

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

MISC. 101/2000
101A/2000

BETWEEN REGISTRAR OF
ELECTORS

AND MANILA MATENGA

Objector

AND MATAA AUMATANGI
MATAPI VIGO

Elector

Mr H Puna and Sir G A Henry
Mr M C Mitchell for Tiaki Wuatai
Mr A Manarangi for Electoral Office
Hearing: 8th day of November 2000
Delivered on 16th day of November 2000.

JUDGMENT OF GREIG CJ

This was a further hearing in the ongoing litigation over the Pukapuka by-election which was held on 28th September 2000. The result of that by-election has not been promulgated. What is in issue now is what is to be done about a number of votes by way of declaration which were accepted in the case of certain electors against whose inclusion in the roll there had been an objection. The proceedings before me are two appeals referred to the High Court pursuant to S 20(c) of the Electoral Act 1998. No petition has been commenced under the Electoral Act, there are no other substantive proceedings before me.

The appeals or references were presented to the Court on 26th September 2000. The matters were referred to me first in a telephone conference on Wednesday 27th September. I was informed that in addition to those two references there were 14 other objections which were to be dealt with. It was clearly impossible to deal with the objections before the election on 28th September. I then adjourned the two references which were before me and make a direction that the 14 other objections would be dealt with together as soon as possible after the by-election.

Of the 16 electors who were objected to, 5 did not cast a vote because either their objection was upheld or they consented to the deletion of their enrolment. Two others did not vote. That left 9 electors who were in fact registered on the roll. Each of these was subject to an objection which had been set out in the form of a letter dated 8th September 2000 and which was received by the Registrar on the 13th of September. The objections had not been disposed of, each of those voters exercised their right to vote. As I am told, in order to identify and separate their votes in light of the order that I had made earlier, the votes were accepted by way of declaration.

The background to this by-election is well known and I need not rehearse the history of it. It was carried out in accordance with a special Act of Parliament, the Electoral Amendment No. 2 Act 1999 which called for the enrolment afresh of every elector in the Pukapuka/Nassau by-election Constituency roll. The Chief Registrar of Electors was required to compile and cause to be printed a copy of that roll within 7 days of the closing of the roll. A timetable for the by-election was set out in S3 of the Act. The dates were to be appointed by the Chief Electoral Officer with the approval of Cabinet. The dates so approved and promulgated were as follows:

The last day for the nominations of candidates for the by-election to be lodged with the Returning Officer – Friday 8th September
 Date and time at which the by-election Constituency roll closed – Friday 8th September at 12.00 noon.
 The date, time at which objections by electors pursuant to S19 closed Wednesday 13th September at 4.00pm.

The procedure for objections by electors to registration of an elector are set out in Ss 19 to 23 of the Electoral Act 1998. Those provisions applied to this special by-election.

An elector may at any time object to a name of an elector on the ground that he or she is not qualified to be registered. The objection has to be made in writing to the Registrar for the Constituency affected and is to specify certain matters including the

grounds and reasons for the objection. The Registrar, if it is considered the grounds are insufficient must require the objector to provide within 14 days of receipt of such notice such particulars as the Registrar thinks fit. The Registrar is required to give receipt of the objection to the elector objected to, that elector is then entitled to respond within 14 days with the reasons why his or her name should be retained on the roll. If there is no response within 14 days the Registrar must remove the name from the roll. If there is a response and the Registrar is satisfied of the qualification to be on the roll the Registrar shall retain the name on the roll. In either case whether the name is removed or is to remain the Registrar is to notify the parties, that is to say the objector and the elector accordingly. If the elector or the objector gives written notice within 14 days of that last mentioned notice that there is dissatisfaction with the decision of the Registrar then the Registrar through the Chief Registrar of Electors must refer the objection to the Court.

Two of the objections were formally subject of that reference process. Of the remaining 7 objections the procedure required to be carried out by the Registrar was incomplete. In 5 of the cases no notice was given to the elector and no further steps taken except that there was a notice to the objector dated 18th September 2000 that these persons would remain on the roll. At some time after, on or after the 26th of September Mr Puna on behalf of those objectors wrote to the Registrar notifying his dissatisfaction with the decision. In one case a notice was given to the elector. He made a response but there is no record of any further steps being taken. In the last case a notice was given, there was an interview with the elector but no further step was taken. The result is that as at 27th September two appeals or references were properly constituted, the rest were not properly constituted and the appropriate requisite procedure for dealing with the objections had not been carried out or complied with.

The result of the booth count in the election was that 193 votes were cast for Inatio Akaruru for the Cook Islands Party and 183 votes for Tiaki Wuatai for the Democratic Alliance Party. So far 41 votes including special votes and the 9 declaration votes have not been counted. I was informed during the hearing that the steps for the

endorsement of the declarations as qualified or not qualified as required by S59(4) of the Act have not yet been carried out.

It was common ground that the objection procedure cannot continue after the poll has been taken. It was also common ground that the procedures and time limits set out for objections ought to be complied with and that in the 7 cases mentioned, they were not complied with. It is Mr Puna's contention that as a result these electors should not have been allowed to vote and so all 9 declaration votes should be disregarded. It is Mr Mitchell's contention that their votes should be counted. They were electors registered on the roll who exercised their right to vote and so their votes should be counted. It is argued that the petition procedure is the way in which the matters after the roll should be dealt with. The objection procedure is for the defining of the roll. Once the roll is defined and closed there can be no further scope for dealing with the objections and the parties being prima facie on the roll are entitled to vote and their votes must be counted. In the ordinary way and in the ordinary procedure the votes of course would be by secret ballot within the booth and not by way of declaration or by way of special vote. There would then be no way of recalling the votes either by way of allowing or disallowing them and Mr Mitchell contended that to deal with the declaration votes as a separate matter destroys the secrecy of the votes which is one of the fundamental matters in any democratic election.

A compromise proposal has been put forward by which the special votes would be counted and then if it was decided that the further 9 declaration votes might make a difference, they would be counted and the final results of the by-election then promulgated. That compromise arrangement clearly flies in the face of the mandatory procedure by which votes are counted, scrutinised and the final count and declaration of the poll is carried out.

The real problem in this matter is that the Electoral Amendment Act setting up the arrangements for this special by-election provided a timetable which in the circumstances was impossible to achieve or to meet all the requirements and procedures under the principal Act. The finality of the roll is a very important if not

fundamental basis for an election. Both under the principal Act and the Amendment Act, the rolls are to close before the election. Under the principal Act, of course, the rolls are part of a continuing system by which new registrations and other amendments are made from time to time. Pursuant to S27 of the principal Act, for the purpose of an impending election, the rolls both main and supplementary are to be closed and then it is not possible to register after 4.00pm on the day on which the rolls close, see S16(8).

There is no limit on the time at which an objection can be made. The section provides specifically that the elector may "at any time" object to the name of an elector on the roll. But once the roll is closed the objection procedure cannot continue. Rolls are either closed or not. If the objection procedure is not complete before the closure of the rolls then the rolls which are closed by statute will still be subject to amendment. They would not then be closed.

In the ordinary course objections are dealt with from time to time and so the problem is not so pressing as it is in this special by-election. The arrangements under the special legislation for the special by-election should have made time for the printing of the rolls, the notification of electors, receipt of objections, time to reply and per consideration of the reply, advice to the parties and an allowance of 14 days for a response to that, reference to the High Court and a period of hearing and disposal. At least 42 days on a conservative estimate would be required to meet that time lapse. Only after that would it have been appropriate that time be fixed for the closing of the rolls.

Under the procedure and the timetable adopted in the actual by-election there was an insurmountable conflict between requirement for the closure of the rolls and the continuing objection procedure. It was a real conflict between the two procedures and their requirements and their meaning and its effect which it was impossible to meet.

It may be remarked that at any election under present legislation a number of objections if filed before or near the date of election could create a very difficult

problem. Under New Zealand legislation there have been provisions which prevent the receiving or dealing with objections within a specified period before an election. Some similar provision might be advisable here.

Such a limitation does not mean that objectors would be without remedy. There would still be a right to bring a petition to correct any invalid voting after the election. Any complaint about the roll and the qualification of electors after its closure can be dealt with by a petition.

My conclusion is that it was impracticable and not in accordance with the law to deal with the objection procedure and the objections after the poll was taken. The objection procedure was ineffective in this case. It was not appropriate or able to change the roll after the poll was taken. It would have been impossible in fact to deal with the two objections between the 26th or 27th of September and the date of the poll especially having regard to the distance separating objectors, electors, their advisors and the judge. I was in error in endeavouring to adjourn and leave over the reference procedure until after the election. As far as the other objections are concerned they were not validly constituted before the date of the election and so in effect my endeavour to adjourn those cases was of no avail.

The objection that has been made in all cases is to the registration and in each case what is sought is a removal of the names from the roll. It is claimed that each of the electors objected to do not qualify by their residence to be on this special constituency roll. The objection procedure when carried out means that the elector is or is not on the roll and then can proceed to exercise their votes in the ordinary way in secrecy and without challenge of the way in which they may have voted.

It was suggested to me that the matter might be dealt with as minor irregularities. The answer immediately on the facts is that in the circumstances even 9 votes cannot be said to amount to a trivial matter. It might affect the result of election when on the first count there are only 10 votes difference between the candidates. S101 of the Electoral Act gives a discretion to the Court to ignore irregularities if it appears that

the election was conducted in accordance with the principles laid down in the Act and that the irregularity or failure did not affect the result of the poll. This section applies only to election petition. It is not a general provision and clearly it could not be said that the matters in issue did not affect the result of the poll. I was also referred to S112 which gives a discretion to the Chief Electoral Officer to extend time to validate things irregularly done. That again is a matter of irregularity in form. It could not authorise the Chief Electoral Officer or the Court to validate this objection procedure or to alter what I found to be the law which prevents the objections being considered after the taking of the poll.

What is the result of all this? When the rolls closed and when the vote, the poll was taken these 9 electors were on the roll. On the face of it they were entitled to vote. The objection procedure had not been completed and in some cases it was not validly constituted so that no further action can properly be taken. It is not now possible to deal with the objections and to hear and decide them.

Each of the electors did exercise their vote. They voted by declaration, they should have not voted by declaration because the qualification for that kind of voting is that the elector is not able to find his or her name on the roll. Clearly his or her name was on the roll. However that declaration procedure was done by special arrangement and that should not be held or used against those voters. They did not choose to vote by declaration, they chose to vote and were directed or requested to do so in this particular way. The Registrar must proceed under S59 to examine the declarations and for the purposes of verification and to endorse them appropriately as qualified or not qualified as the case may be.

The next step is the final count in accordance with S72 and the declaration in accordance with S73 of the Act. That count should proceed with the scrutineers present if they so wish. All parcels of votes including specials and the declaration votes should be included in the counting. There should be no separate procedure as is suggested in the compromise but the votes of course should be dealt with in the


ordinary way under S72. Following that final count and the declaration the parties may then consider whether or not a petition is appropriate.

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The alternative proposal is that the votes should not be counted. That means that they would be treated as if either they had not been cast, which is not the case, or as if the electors were not qualified and that the objection had been allowed. That again, is not the case because the objections were, it seems in all cases, dismissed by the Registrar. But each objection has not been formally disposed of. On the other hand the counting of the votes recognises the actual state of the roll and the right of electors who were on the roll to exercise a vote. That is a preferable and on its face a lawful way of dealing with the matter. It recognises the right of the elector to exercise his vote subject to challenge on a petition. To disregard these declaration votes would be to deny that right and disfranchise an elector who has claimed to be qualified and who has been accepted as such by the Registrar. To refuse their right pre-supposes the validity of the objection procedure when it has not been properly challenged.

I formally declare that the 2 appeals cannot proceed further and that the final count of the by-election should proceed with the inclusion of all special votes and vote by way of declaration in the way provided for by the Act.

I reserve the question of costs. If counsel require I will receive submissions on that.


CHIEF JUSTICE