

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

MISC. NO. 7/2019

IN THE MATTER of section 92 of the Electoral Act
2004

AND
IN THE MATTER of a by-election in the constituency
of Tengtangi-Areora-Ngatiarua

BETWEEN **NANDI GLASSIE**, Candidate

Petitioner

AND **TE HANI ROSE ALEXANDRA
BROWN**, Candidate

Respondent

Date of Petition: 27 March 2019

Counsel: Mesdames H Ellingham & T Browne for Petitioner
Mr T Elikana for Respondent
Ms K Bell for Crown

Date of Minute: 1 April 2019

Date of Judgment: 4 April 2019

ORAL JUDGMENT OF HUGH WILLIAMS, CJ

[12:37:35]

[1] Following the general election in the Cook Islands held on 14 June 2018, the Respondent in these proceedings, Te Hani Rose Alexandra Brown, was the successful candidate for the constituency of Tengtangi-Areora-Ngatiarua, one of the two electorates on the island of Atiu.

[2] However, she resigned from her tenure of that seat thus provoking a by-election. In the general election she had stood under the banner of the Democratic Party but for the by-election stood as an independent.

[3] She was successful as a result of the by-election held on 18 March 2019 against Mr Glassie, the Petitioner in these proceedings, who was her other protagonist in the general election.

[4] On 27 March 2019 Mr Glassie filed a petition for an inquiry into the result of the by-election alleging that, in the way set out in the petition, Ms Brown and her parents and supporters had infringed the Electoral Act 2004 section 88(1), namely the bar on bribery as defined in the Act.

[5] By minute dated 1 April 2019 a conference of the parties was directed. It was expected to deal largely with housekeeping matters concerning security for costs, swapping of briefs of evidence, fixtures, and matters of that sort. The conference was due to begin on 3 April 2019 at 3pm.

[6] However, in a letter dated 3 April 2019 directed to the Queen's Representative and apparently received at about 2.05 pm, Ms Brown said that she wished to resign her seat effective immediately saying that "it is my wish born out of respect for the will of my people that the representative for my constituency of Areora-Ngatirua-Tengatangi be elected by them as electors of the constituency and not be determined by the Court", and "I wish to give my people the opportunity to decide on their representative again".

[7] When this letter was brought to the attention of counsel, the conference was adjourned for approximately 24 hours to give the parties the opportunity to consider the effectiveness of Ms Brown's letter and to assist the Court on what steps, if any, should then be taken concerning the future of the petition.

[8] Pursuant to the Electoral Act 2004 s.9(1)(d), the seat of a Member of Parliament becomes vacant if "he or she resigns his or her seat by writing under his or her hand addressed and delivered to the Speaker or the Queen's Representative if there is no Speaker or the Speaker is absent from Rarotonga or if the resigning member is the Speaker".

[9] In fact, at the present time, the Speaker is absent from Rarotonga for legitimate reasons, hence, no doubt, the addressing of the Respondent's letter to His Excellency, the Queen's Representative.

[10] What should then happen pursuant to Electoral Act s.9(4) is that "when it appears to the Speaker that the seat of any member has become vacant according to subsection (1) the Speaker shall declare in writing that the seat has become vacant and the cause thereof and shall forthwith notify the Chief Electoral Officer and cause that declaration to be published in the Cook Islands *Gazette*".

[11] In view of the fact that Parliament is not to begin sitting until Monday 8 April 2019, with the Speaker off the island and there being no Deputy Speaker as yet elected by Parliament and remaining in office, as far as is known there has not as yet been any step taken by any functionary to declare in writing that the seat is vacant nor to notify the Chief Electoral Officer which would, in the usual course of events, result in the declaration of vacancy being advertised in the Cook Islands *Gazette*¹.

[12] The question therefore is what, if any, effectiveness the letter of 3 April has on the currency of the petition?

[13] Both counsel for the Petitioner and counsel for the Crown have helpfully referred to a recent interim judgment of the Court of Appeal in *Browne v. Hagai*² where a rather similar situation arose. In that case, a petition had been heard and dismissed in the High Court, had been taken on appeal and, during the interval between the hearing of the appeal and delivery of the Court's decision, the Respondent, Mr Hagai, lodged a notice of resignation from his election as the Member for the seat of Rakahanga with which the proceedings were concerned.

[14] One of the issues then to be determined by the Court of Appeal in the interim decision was whether the appeal had become moot following Mr Hagai's resignation. It held that: "the Court has no hesitation in agreeing with the parties that the appeal is not moot and notes in passing that it finds the Appellant's arguments particularly compelling"³.

[15] The Court of Appeal then referred to recent Indian authority to the following effect: "in the Court's view the case is best summarised by the recent decision of the Supreme Court of India⁴ where that Court held⁵ that "a returned candidate cannot get rid of an election petition filed against him by resigning from the seat in the Legislature whatever the reason for his resignation may be". The Court of Appeal went on to hold that "the Court agrees with the Appellant that a resignation by a candidate when faced with ongoing proceedings alleging corrupt practices in the petition where the seat is prayed should not be allowed to purge the stain of any corrupt practices"⁶. The

¹ Ms Bell, for the Crown, subsequently confirmed that no such steps had, or would, be taken until disposal of the Petition or further order of the Court.

² CA 9/18, 9 November 2018.

³ At [25].

⁴ *Gudadhe v Election Commission of India et al 2018* SC Special Leave Petition No, 9968 of 2018.

⁵ At [13].

⁶ At [27].

Court therefore finds that the appeal is not moot”. The Court of Appeal then went on to consider whether it had the power to, and should, issue a stay to halt the by-election process that would normally have ensued.

[16] The conclusion of the Court of Appeal on that point was that “ the Court finds these Indian Supreme Court authorities and especially the *Samithi*⁷ case well-reasoned and directly applicable on the similar facts of this case. It follows from the above cases that there was no finality in the vacancy caused by the resignation of a member of the House where an election petition was in the course of being determined. Accordingly, the Chief Electoral Officer is entitled to suspend taking further action until the decision in the electoral petition becomes known”.

[17] In the present case, where the election petition remains pending, the Court similarly finds that, notwithstanding the purported resignation of the Respondent, there is no vacancy to be filled until the election petition has been determined. Accordingly, while the election petition remains pending, the Speaker may not make a declaration that a seat has become vacant because there is no vacancy to be filled.

[18] Mr Elikana, for the Respondent, submits that the decision in *Browne v. Hagai* is distinguishable because of the position to which the hearing of the petition in that case had advanced prior to Mr Hagai’s purported resignation. He makes the point that, in this case, the hearing of the petition and the adjudication on it is still at a very early stage with no more than the petition having been filed no Notice of Intention to Oppose having yet been filed, no timetable orders have been made and the matter is still some distance from hearing.

[19] The view to be taken, with respect to counsel, is that the claimed distinction is ineffectual in this case. The position is that the Respondent has purported to file a resignation in accordance with the provisions of s.9 of the Electoral Act but the consequential declaration and the like have not yet been undertaken.

[20] Therefore, the decision of the Court of Appeal in *Browne v. Hagai* binds this Court and is to be followed and the Court finds that, in terms of the decision⁸, a resignation by a candidate when faced with ongoing proceedings alleging corrupt practices should not be found to terminate the process.

⁷ At [51] citing *Election Commission of India v Telengana Samithi* (2011) 1 SCC 370.

⁸ At [27].

[21] In view of that, whilst it may come as some surprise to the Respondent given the terms of her letter, the purported resignation has not yet been processed in accordance with the Electoral Act and it does not follow from her filing the letter in accordance with the early provisions of s.9 that the petition is moot.

[22] The Court therefore proceeds to consider the housekeeping issues such as timetabling and the like.

A handwritten signature in black ink, appearing to read 'H Williams', written in a cursive style. The signature is positioned above a horizontal line.

Hugh Williams, CJ