VILIAME CAVUBATI

v.

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ADI KOILA NAILATIKAU & THE RETURNING OFFICER FOR LAU FIJIAN PROVINCIAL COMMUNAL CONSTITUENCY

[HIGH COURT, 1999 (Shameem J) 27 July]

Civil Jurisdiction

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Elections- election petition- whether requirement that petition be signed personally by the petitioner is mandatory or directory- Electoral Act 1998 Sections 144, 145, 146 and 147.

The Petitioner who narrowly missed election sought a recount. The High Court dismissed the petition. It HELD: that the requirement that a petition (other than one filed on behalf of the Attorney-General) be signed by the petitioner personally was manadatory and failure to comply with the requirement could not be waived.

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Cases cited:

Cameron v. Fish (1904) 1 CLR 314
Damish McTule [1951] 1 All ER 725
Devan Nair v. Yong Kuan Teik [1967] 2 AC 31
Evans v. Crichton Brown (1981) 147 CLR 169
Griffiths v. Evans [1953] 2 All ER 1364
Jolly v. District Council of Yorketown (1968) 119 CLR 347
Josefa Rusaqoli v. Attorney-General & Anr - 40 FLR 81
McDonald v. Keats & Ors (1981) NSWLR 268
Nile v. Wood (1987) ALR 52
Perrill and the Poll for the Electoral Division of Boothby (1918) 19 ALR 254
R v. Birmingham JJ ex-parte Ferrero [1993] 1 All ER 530
Sandringham Corporation v. Rayment (1928) 40 CLR 510

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Electoral Petition in the High Court.

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K. Bulewa for the Petitioner
Sir Vijay Singh for the 1st Respondent
N. Barnes for the 2nd Respondent
W. Rigamoto as Amicus Curaie

Shameem J:

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On 18th June 1999 an Election Petition was filed in the High Court, as the Court of Disputed Returns, purporting to be the Petition of Viliame Cavubati in respect of the Lau Fijian Provincial Communal Seat, in the 1999 General Elections.

The Petition showed that Viliame Cavubati was a candidate in the Elections, for the Lau Fijian Provincial Communal Seat, the other candidates being Adi Koila

Mara Nailatikau and Isoa Tuinasaqalau. On 18th May 1999 the official results were declared by the Returning Officer to be as follows:

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Viliame Cavubati	2,816
Koila Mara Nailatikau	3,012
Isoa Tuinasaqalau	99

Adi Koila Nailatikau was declared duly elected, and was returned as the representative of the constituency for the House of Representatives.

B The relief sought by the Petition is as follows:

A. An order that the 2nd Respondent count de novo all the votes cast for the election of a member for the Lau Fijian Provincial Communal Constituency in the presence of the Supervisor of Elections and/or the Chief Registrar of the High Court and that the latter report to the court the result of the recount.

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B. Leave be granted to the Petitioner and the Respondents, by themselves or their respective authorised agents, to examine registers, and other documents (including all ballot papers used at or in connection with the election) and to be present at the recount.

D C. A Declaration that the 1st Respondent who was returned as elected was not duly elected; and

D. A Declaration that your Petitioner was duly elected a member of the House of Representatives.

E. Such other or further Order or Direction or Declaration as this court may deem just and fair.

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F. Costs.

The Petition was signed by S. Waqainabete, Barrister and Solicitor for the Petitioner.

F On 13th July 1999 the 2nd Respondent filed a summons supported by the affidavit of Savenaca U. Draunidalo, Commissioner Eastern, asking for an order that the Election Petition be dismissed pursuant to Order 18 Rule 18(a) and (d) of the High Court Rules, and Section 160(2) of the Electoral Act 1998 on the ground that the Petition disclosed no reasonable case of action and was an abuse of the process.

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The matter was called in open court on 14th July 1999. On that date, Sir Vijay Singh, counsel for the 1st Respondent raised a preliminary objection to the Petition. He submitted that section 144 of the Electoral Act had not been complied with, as the Petition had not been signed by the Petitioner. He submitted that because the requirements of section 144(d) were mandatory, there was in effect no petition before the court.

Mr K. Bulewa for the Petitioner asked for the matter to be adjourned to allow him to respond to the objection. The court adjourned to 22nd July to hear submissions. A

On that day, Sir Vijay made both oral and written submissions. He argued that Section 144 of the Electoral Act 1998, was almost identical to Section 355 of the Commonwealth Electoral Act 1918, and that the Australian courts had held that the requirements of the section were mandatory and that further proceedings could not be taken on a Petition that did not comply. He relied in particular on the decisions of the High Court of Australia in Nile -v- Wood (1987) ALR 52, Cameron -v- Fish (1904) 1 CLR 314 and Evans -v- Crichton Brown (1981) 147 CLR 169. B

His submissions were supported by Mr N. Barnes for the 2nd Respondent and by Mr W. Rigamoto, Supervisor of Elections, who appeared as amicus curaie. C

Mr Bulewa, in response submitted that the High Court Rules allowed litigants to conduct proceedings in person, or by barrister and solicitor, that the Constitution of Fiji did not require the Petitioner to sign the Petition in person, that the requirements of the Electoral Act were only technical, and that the provisions of section 144 should be given a broad interpretation by the court. He urged the court to consider the constitutional implications of the proceedings, and that the decision of the court of disputed returns was final. He further submitted that solicitors were widely accepted as agents for their clients, and as having ostensible authority to sign documents for them. He referred to the cases of Griffiths -v- Evans [1953] 2 All ER 1364, and Damish McTule [1951] 1 All ER 725, in support of his submissions. D E

Section 73(1) of the Constitution of Fiji provides as follows:

> "The High Court is the court of disputed returns and has original jurisdiction to hear and determine:
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> (a) a question whether a person has been validly elected as a member of the House of Representatives and F
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> (b) an application for a declaration that the place of a member of the House of Representatives or the Senate has become vacant'.

Section 73(2) provides: G

> "The validity of an election or return may be disputed by petition addressed to the court of disputed returns and not otherwise".

Section 144 of the Electoral Act 1998 provides:

> "Every petition must -

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(a) set out the facts relied on to invalidate the election or return

(b) set out those facts with sufficient particularity to identify the specific matter or matters on which the petitioner relies as justifying the grant of relief;

(c) contain a prayer asking for the relief the petitioner claims to be entitled to;

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(d) subject to Section 146(2) be signed by the petitioner; and

(e) be filed in the registry of the court within the period specified in Section 73(3)(b)".

Section 146(1) gives the Attorney-General power to file a petition. Section 146(2) of the Act provides;

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"Section 144(d) does not apply in relation to a petition referred to in subsection (1) but such a petition must be signed by the Solicitor-General for and on behalf of the Attorney-General".

Section 147 of the Act provides as follows:

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"(1) Subject to this Act proceedings must not be had on a petition unless the requirements of Sections 144 and 145 are complied with.

(2)The court may at any time after the filing of a petition and on such terms (if any) as it thinks fit, relieve the petitioner wholly or in part from compliance with Section 144(b).

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(3)The court must not grant relief under sub-section (2) unless it is satisfied that -

(a) in spite of the failure of a petition to comply with Section 144(b), the petition sufficiently identifies the specific matters on which the petitioner relies; and

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(b) the grant of relief would not unreasonably prejudice the interests of another party to the petition."

It is clear, that by virtue of Section 147(2) the Electoral Act has given the court specific statutory powers to relieve the petitioner from strict compliance with paragraph (b) of Section 144. There is no such power given to the court in respect of the other paragraphs of Section 144.

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The question is, what was the intention of the legislature? It appears clear from the provisions of Section 73(2) of the constitution, and of Section 147(1) of the Electoral Act, that the intention of the legislature was to create a special code for challenges to election results, and for declarations that seats have become vacant.

In McDonald -v- Keats and Others (1981) NSWLR 268, the Supreme Court of New South Wales, in relation to the Parliamentary Electorates and Elections Act 1912 said of a provision identical to our Section 73(2) of the constitution; A

> "..... it is my view that the provisions of Pt V - conduct of Elections - and Pt VI - Court of disputed returns - are so extensive and detailed that it is difficult, if not impossible, to avoid the conclusion that they were intended to lay down a "code' not only as to the circumstances in which elections to the Parliament are to be conducted, but also as to the circumstances in which, and the manner in which questions arising in the court of, or relating to any stage of, the whole electoral process may be entertained and adjudicated upon." (Per Powell J at p 274). B

That view was echoed by Scott J in Josefa Rusaqoli -v- Attorney General and Chairman of the Electoral Communion 40 FLR 81, a case in which the Plaintiff had attempted to impugn a decision of the returning officer in the 1994 General Elections, by statement of claim. In that case Scott J said of the now repealed Electoral (Election Petitions) Regulations 1992 that; C

> "In my opinion the clear intention of the Decree was to provide an exclusive mechanism to be laid down by Regulation, through which election matters could be questioned. Were this not the case then the restrictions and requisites of the Regulations could simply be circumvented. D
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> Furthermore, it is a general principle of our system of law that where a specific method for questioning a particular activity is provided by law, then that specific method should be adopted and not without exceptional cause any other (see eg. R -v- Birmingham J J Ex.p Ferrero [1993] 1 All ER 530." E

In Evans -v- Crichton Browne & Others (1981) 147 1 CLR, the High Court of Australia considered the meaning of Section 185 of the Commonwealth Electoral Act 1918 which is similar to our Section 144. It also considered Section 187 of the Commonwealth Electoral Act which provides; F

> "No proceedings shall be laid on the petition unless the requirements of the preceding sections are complied with."

The High Court of Australia held that since the petitions filed did not sufficiently satisfy the requirements of Section 185 of the Act, and since the time limit for filing petitions had expired, no proceedings could be entertained on the petitions. G

In Perrill and the Poll for the Electoral Division of Boothby (1918) 19 ALR 254, the petitioner had failed to include the facts relied on disputing election results, in her petition. It was held by the High Court of Australia that because the

requirements of Section 185 of the Commonwealth Electoral Act had not been complied with, the petition could not be allowed to proceed.

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The use of the word "must" in Section 144 of the Electoral Act suggests that the requirements are mandatory, rather than directory. Section 144 expresses conditions precedent to a hearing for an election petition. It has been held that the courts "cannot ignore a condition precedent imposed by the legislature" and that such provisions are mandatory (Jolly -v- District Council of Yorketown (1968) 119 CLR 347 at 350 Sandringham Corporation -v- Rayment (1928) 40CLR 510 at 533 per Higgins J). It has also been held that rules relating to election petitions are mandatory on the basis of a public interest that the matter be speedily determined (Devan Nair -v- Yong Kuan Teik [1967] 2 AC 31 at 44-45).

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I find therefore, that the requirements of Section 144 of the Electoral Act are mandatory with the exception of Section 144(b), which is not applicable in this matter.

I cannot agree with Mr Bulewa's submission that a barrister and solicitor may sign the petition as the petitioner's agent. There are many examples of statute where a barrister and solicitor has specifically been given this right. Section 310(1) of the Criminal Procedure Code is one such example. However the legislature has seen fit in the case of Election Petitions specifically to require the Petitioner's signature.

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Furthermore, statute has not provided the court of disputed returns with a discretion to waive the requirement of personal signature, as it has with the requirements of Section 144 (b).

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I find therefore that the requirements of Section 144(d) which requires the Petitioner to sign the Petition, to be mandatory. It follows therefore that no proceedings can be had on the Petition filed in this court. Nor can the Petition now be amended since the time limit under Section 73(3)(b) of the Constitution has expired. It is also not necessary to consider the summons filed by the 2nd Respondent asking for the Petition to be dismissed on other grounds.

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I dismiss the Petition accordingly. Costs for the 1st and 2nd Respondents are to be paid by the Petitioner to be taxed if not agreed.

(Petition dismissed.)

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