

IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
ACTION NO. 1079 OF 1983

IN THE MATTER OF THE LOCAL
GOVERNMENT ACT

A N D

IN THE MATTER OF THE ELECTIONS FOR
THE OFFICE OF THE LORD MAYOR OF THE
CITY OF SUVA FOR THE YEAR 1983- 1984

Between:

MAAN SINGH of Princiess Road, PLAINTIFF
Tamavua, Company Director.

- and -

- 1. THE TOWN CLERK for the City of Suva DEFENDANTS
- 2. NAVIN MAHARAJ Mayoral Elect of Suva

Mr. G.P. Lala with Mr. M. Patel
for the plaintiff.

Mr. D.C. Maharaj for the 1st defendant.

Mr. J. Singh for the 2nd defendant.

J U D G M E N T

On the 28th November, 1983, an election for the office of the Lord Mayor of Suva was held at the Chambers of the Suva City Council under the Chairmanship of the Acting Town Clerk, Mr. Kailash Mehrotra.

There were 20 elected Councillors at that meeting including the plaintiff and the first defendant.

The plaintiff and the first defendant were both

nominated for the office and a ballot was held.

It is not in dispute that there were 20 votes cast resulting in the first defendant receiving ten votes, the plaintiff nine votes and one vote was held by the Chairman of the meeting to be informal. The ballot papers were destroyed after the election but there is no dispute as to how the rejected ballot paper was marked.

The plaintiff's case is that the informal vote was in fact a vote for him and that the result of the ballot was a tie which should have been decided by drawing lots as provided by section 21(3) of the Local Government Act.

Each ballot paper had the two names of the plaintiff and the first defendant on it. The instructions given to the Councillors by the Chairman of the meeting regarding voting was for the person voting to place a tick alongside the name of the person for whom he was voting. The vote which was held to be informal had a line through the name of the first defendant and no tick or other marking after the name of the plaintiff.

The legislative provisions for the election of the Lord Mayor of Suva are contained in sections 20, 21 and 22 of the Local Government Act which provide as follows:

"20. Each council shall elect a mayor in accordance with the provisions of sections 21.

21. (1) The mayor shall be elected annually by the council from among the members of the council and shall unless he resigns or ceases to be qualified or becomes disqualified from being a councillor under this Act, or his office otherwise becomes vacant, hold office until his successor is elected at the first meeting of the council after the expiry of twelve months from his election.

(2) The election of the mayor shall be by secret ballot and shall be the first business transacted at the annual meeting held after a general election to the council and thereafter at the first meeting of the council after the expiry of twelve months from the last election of a mayor.

(3) If at any election under subsection (2) there is given to two or more candidates an equal number of votes in excess of those given to any other candidate, or where in the case of there being only two candidates an equal number is given to each, the election between the two candidates with an equal number of votes shall be decided by the drawing of lots.

(4) The town clerk or, if there be no town clerk, the person appointed to be returning officer for the purpose of supervising elections to the council, shall preside at the annual or other meeting referred to in subsection (2).

(5) A council may with the prior approval of the Minister pay to the mayor such quarterly allowance as it consider reasonable.

22. The mayor of the city of Suva shall be known by the style or title of Lord Mayor of Suva."

Mr. K.N. Mehrotra the then acting Town Clerk presided over the meeting called to elect the Lord Mayor. Except for the challenge to his ruling that the vote was informal there is no allegation that he did not conduct the election in accordance with the act and in a proper manner.

In his affidavit Mr. Mehrotra has set out in some detail how he conducted the election.

On the 22nd November, 1983, he gave each Councillor written notice of the Annual Meeting of the Council to elect the Lord Mayor and Deputy Mayor.

Attached to each notice for the information of Councillors was a memorandum stating that the election of Lord Mayor and Deputy Mayor is carried out under the provisions of sections 21 and 23 of the Local Government Act. The text of the two sections was quoted in the memorandum.

Three scrutineers were appointed at the meeting to count the votes.

At the meeting before using ballot papers Mr. Mehrotra explained to the Councillors that in accordance with past practice Councillors were to indicate their preference by placing a tick against the name of the candidate for whom they wished to vote.

Mr. Mehrotra stated in his affidavit that the Councillors unanimously agreed to accept that procedure. He then repeated his instructions that Councillors should tick the name of the candidate they wished to vote for and place the ballot paper in the ballot box. These statements have not been challenged.

Mr. Mehrotra then asked the scrutineers to distribute the ballot papers on which only the two names of the plaintiff and the first defendant appeared. He showed the Councillors the ballot box and again explained to the Councillors that they must indicate their choice by placing a tick against the name of the candidate of their choice and then placing the ballot paper in the box provided.

The Councillors then voted with the result stated earlier in this judgment.

Mr. Mehrotra declared the informal vote invalid and the second defendant duly elected as Mayor.

Under section 13 of the Act the Electoral Commission has made Regulations governing Local Government Elections. They are the Local Government (Election) Regulations.

These Regulations provide for election of Councillors but make no provision for election of a Mayor. They do provide for elections by secret ballot and the manner of voting by means of a tick alongside the name of the candidate for whom the voter wishes to vote.

Regulation 35 provides as follows :

"35. Notwithstanding anything contained in paragraph (3) of Regulation 25 a returning officer may at his discretion if satisfied that the intention of a voter is clear beyond reasonable doubt, accept and count as valid the ballot paper of such voter."

The reference to Regulation 25(3) is incorrect and should read 26(3). This Regulation provides for voting by means of a tick alongside the name of the candidate of the voter's choice.

The Suva City Council has By-Laws governing meetings of the Council, the Suva (Meeting By-Laws).

By-Laws numbered 48 and 49 deal with election of mayor but neither of these by-laws deal with the manner of voting for mayor. By-Law 48 deals only with nominations and By-Law 49 obliges the Town Clerk to notify Government in writing of the result of the election of mayor.

Apart from section 21 of the Local Government Act, there is no other specific provision either in the Act, Regulations or By-Laws which states how a mayoral election is to be conducted after nominations for such office have been received.

Section 21 requires the election to be by secret ballot and also provides that where there are two candidates who receive an equal number of votes the election shall be decided by the drawing of lots. It provides also for the Town Clerk or appointed returning officer to preside at the meeting.

It would appear that subject only to compliance with section 21 and By-Law 48 the legislature intended that the Councillors should themselves determine how an election for mayor should be conducted.

In the instant case the Councillors all agreed

to vote in the manner provided for the voting for Councillors namely by placing a tick against the name of the candidate of their choice. They also agreed on the appointment of three scrutineers who distributed ballot papers and counted the votes.

Counsel have put in written submissions which have been of considerable assistance to me.

Mr. Patel who signed the submission for his firm, Messrs. G.P. Lala and Associates, concedes that the sections of the Act and the Rules I have earlier referred to would appear to provide a complete and separate procedure for the election of a mayor distinct from other provisions relating to Local Government Elections.

He argues, however, that a reasonable and sound approach where the Act is silent on a particular requirement, as for example the manner of voting in the instant case, is to follow the approach adopted by Courts in Parlimanetary and Municipal Election cases.

He has referred to some 13 cases.

I do not propose to discuss all 13 cases although I have considered each of them. They all deal with cases where a voter did not mark his ballot paper correctly. The attitude or principle adopted by the courts in these cases was to hold as valid a ballot paper not marked in the prescribed manner if it could be ascertained from an inspection of the ballot paper with reasonable certainty for whom he had intended to vote.

The latest case in a long line of cases is the case of Ruffle v. Rogers and Another 3 W.L.R. 143, a decision of the English Court of Appeal. It was a case concerned with the incorrect marking of a ballot paper in a Local Government Election. The Appeal Court had to consider

Rule 43 of the Local Elections (Principal Area) Rules 1973.

That rule is similar in effect to Rules 34 and 35 of the Local Government (Election) Regulations. Lord Denning said at page 146 :

"The voter in this case did not obey the directions. Many people make a slip of some kind. But when the intention is clear - as it was in this case - it seems to me entirely wrong that his vote should not be counted".

Rule 43 uses the words "if an intention..... clearly appears" where Regulation 35 uses the words "the intention of a voter is clear beyond reasonable doubt".

In Levers v. Morris and Another [1971] 3 All E.R. 1300 another case in which ballot papers had been incorrectly marked in a Local Government Election in which Rule 43 also had to be considered, it was held that a ballot paper on which lines had been drawn through the names of two of the three candidates should have been counted as a vote for the third candidate since it was an election at which only one candidate could be elected it showed a clear intention that the vote was for the third candidate. It was also held that a cross through the name instead of alongside it was clearly a vote for the named candidate.

Mr. Sweetman who prepared the written submission on behalf of the 1st defendant after pointing out the absence of procedural regulations governing the precise manner of voting in mayoral elections except for requirement of a secret ballot argues that a mayoral election is clearly distinguishable from a Parliamentary Election or a Local Body Government Election. He contends that the reason for a Councillor striking out the name of one of the candidates after such clear instructions as were given by the Returning Officer can only be a matter of conjecture. He submitted

that there was clear intention in the instant case that he did not wish to vote for the 2nd defendant but no clear indication that he did wish to vote for the plaintiff.

Mr. Sweetman referred to Regulation 11 of the Suva (Meetings) By-Laws which provides that the rulings of the Chairman is final unless any member forthwith moves a motion of dissent. He pointed out there was no such motion in the instant case.

I do not consider Regulation 11 has any application in the instant case. It is intended to cover the conduct of a meeting and the Chairman's control of it. It can have no application in my view to the Returning Officer acting as such and not as Chairman even though he performs both functions.

Mr. Jasvir Singh in his submission raises two issues. The first is whether the procedure adopted by the plaintiff by way of Originating Summons was the correct procedure to be followed in this instance. He argues that the plaintiff should have commenced this action by way of petition and refers to Regulation 10 of the Local Government (Election) Regulations which is as follows :

"10. Unless otherwise specifically provided in these Regulations, the provisions of the law for the time being in force relating to offences in connection with the conduct of elections to the House of Representatives and in connection with election petitions shall apply mutatis mutandis to elections to a council under the provisions of these Regulations."

By referring to section 78 of the Electoral Act which provides that a petition may be presented to the Supreme Court within 21 days after the Returning Officer has declared a candidate elected, Mr. Singh argues that in the instant case the failure to follow the proper procedure is fatal to the plaintiff's application. No petition was presented within 21 days. Regulation 10 clearly is intended to have application to elections to a council of a councillor and

not of a councillor to the office of mayor. In England under the Local Government Act 1972 the election of a mayor is an election under that Act. There is no such provision in the Fiji Local Government Act.

In the absence of any provisions in the Local Government Act on the issue of a challenge to the election of a mayor I am of the view that the correct procedure is by way of Originating Summons.

There is no provision that a challenge to a mayor's election may or must be by way of petition and in my view Order 5 rule 4 Rules of the Supreme Court permits action being brought by way of Originating Summons where there is no provision as to how an action is to be commenced.

On the second issue whether the ballot paper which was rejected was in fact a vote for the plaintiff Mr. Singh sought to distinguish the line of cases relied on by Mr. Patel.

His main argument is that if the clear intention test is applied to the invalid vote it could not be said with any certainty at all that the vote was for the plaintiff. Mr. Singh said there were four possibilities :

- (a) It was a vote for neither.
- (b) It was a vote for the plaintiff.
- (c) It was a vote for the second defendant.
- (d) It was a vote against the defendant but not necessarily a vote for the plaintiff.

Mr. Singh, as did Mr. Sweetman, stressed the nature of the mayoral election involving only 20 Councillors all of them literate who were directed by the Returning Officer not once but three times just before voting that they must signify their choice by placing a tick after the name of the candidate of their choice. Both Mr. Singh and Mr. Sweetman suggested that the informal ballot paper was in the circumstances

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deliberately made invalid by a councillor not wishing to cast his vote for either candidate. Mr. Singh referred to Stout C.J's comments in Hawkes Bay Election Petition (No.1) (1915) 34 N.Z.L.R. 507 at p. 509 where the learned Chief Justice said :

"We can find no reason why a voter should, if he intended to vote for a candidate, strike out part of the name. The voters can read. If they could not read they could ask the assistance of the Returning Officer. There is no suggestion that these voters were illiterate. The instructions on the ballot paper are clear. 'The voter', it says, 'is to strike out the name of any candidate for whom he does not intend to vote by drawing a line through the name with a pen or pencil.' What explanation, then, is to be given why the plain directions were not complied with?"

Mr. Singh also referred to the further remarks on p. 509 where the learned Chief Justice said :

"If electors able to read will disobey the plain instructions of the Act must it not be assumed that they did not want to vote?"

I do not consider the cases dealing with Parliamentary Elections or Local Government Elections are of much assistance in the instant case.

The legislature has left the conduct of mayoral elections for the Councillors to decide on the procedure to be followed. Except that the ballot must be secret the Councillors are left to regulate their own procedure.

In the instant case it was agreed, following past practice, how votes were to be cast. Councillors had to indicate the candidate of their choice by placing a tick after his name. On three occasions the Returning Officer reminded them of their obligation to signify their choice in that manner. A more simple method of voting could not in my view have been chosen. It followed the method adopted under the Local Government (Elections) Regulations. One of

the reminders was just prior to casting the votes. All the Councillors were literate and having succeeded in being elected to Council must be deemed to have sufficient intelligence to understand the instructions and to appreciate what he must do to cast his vote.

Nineteen of the Councillors cast their votes in the manner instructed. One did not.

Both Mr. Sweetman and Mr. Singh have speculated that one councillor did not want to vote for either man and could not be seen to refuse to accept a ballot paper.

Like Stout C.J. I can find no reason why one councillor should not have followed the simple clear agreed procedure.

What is abundantly clear is that the councillor concerned did not place any mark whatsoever against alongside under or over the name of the plaintiff indicating positively that his choice was the plaintiff.

The ballot paper declared invalid by the Returning Officer was not a vote for the plaintiff and the Returning Officer was correct in rejecting it from the count.

If however the legal position is that the Returning Officer has a discretion to accept as valid, if satisfied beyond reasonable doubt, a ballot paper not properly marked but clearly showing the voter's intention as provided for Voters for Local Elections in Regulation 35, then I would still hold on the facts that the ballot paper was properly rejected in the instant case.

The paper showed an intention not to vote for the second defendant because of the line through his name. It cannot be assumed in the case of mayoral elections that the intention not to vote for the second defendant indicated beyond any reasonable doubt that the councillor had voted for

the plaintiff. If the beyond reasonable doubt principle is adopted the Returning Officer by rejecting the vote as being invalid was clearly not satisfied it was a vote for either of the two parties.

It has not been suggested that the Returning Officer acted capriciously or unreasonably and I do not consider this Court can or should substitute its opinion for that of the Returning Officer if, as is not the case, it disagreed with him.

Had the voter in the instant case also added a tick to the name of the plaintiff or had otherwise positively indicated his preference the principle could have had application.

In my view the manner in or method by which Councillors vote by secret ballot for the mayor is dictated by the wishes or agreement of the Councillors at the meeting called for the election.

That method must be followed. If voting is to be by a tick that method must be followed but if in addition for example a line is scored through the other name or otherwise marked, but not in a manner which would identify the voter, the ballot paper should be accepted as a vote for the candidate whose name is ticked.

If however the councillors agree that a tick and only a tick should be used and any other mark on the ballot paper invalidates it that agreement must be followed.

It is open to the Council under section 122 of the Act to make By-Laws specifying in detail how a mayoral election should be conducted.

The procedure adopted by the Suva City Council is very simple and one not beyond the intelligence of a 10 year old

primary school child to understand. The legislature clearly appreciated that simplicity and did not consider it necessary to give detailed instructions as to how to vote on a mayoral election.

It is this very simplicity of voting which raises doubts in the instant case as to whether one councillor deliberately refrained from casting a valid vote. It is not an unreasonable doubt.

In my view the Returning Officer was correct in not counting the ballot paper which he rejected, as a vote for the plaintiff.

The plaintiff's application is dismissed with costs to the defendants.

R.G. Kermode
(R.G. KERMODE)
J U D G E

S U V A,

26 APRIL, 1984.