

IN THE SUPREME COURT, FIJI ISLANDS
AT SUVA

CIVIL APPEAL NO. CBV0001 OF 2002S
(Court of Appeal Civil Appeal No. ABU0006/02s)

BETWEEN:

PREM SINGH

[Petitioner]

AND:

KRISHNA PRASAD

[First Respondent]

RUPENI NACEWA

[Second Respondent]

WALTER RIGAMOTO

[Third Respondent]

Coram:

Rt. Hon. Sir Thomas Eichelbaum, Presiding Judge
Rt. Hon. Dame Sian Elias
Hon. Justice Bryan Beaumont

Hearing:

25, 26, 27 June, 2002, Suva

Counsel:

Messrs. D. S. Naidu, R. Singh and S. Krishna for the Petitioner
Messrs V.M. Mishra and R. Prakash for the First Respondent
Mr. S. Banuve for the Second and Third Respondents

Date of Judgment:

2003

JUDGMENT OF THE COURT

(ON COSTS)

In ordering the dismissal of this appeal, the Court reserved costs. The parties have now filed written submissions on this question, which we have considered.

It is necessary to recall the forensic history, as follows:

- Prem Singh (the appellant) and Krishna Prasad (the first respondent) were candidates at the Election. The second and third respondents were respectively the Returning Officer and the Supervisor of Elections.
- The Returning Officer declared the appellant elected.
- Upon the petition of the first respondent, the Court of Disputed Returns declared that the first respondent, and not the appellant, was the duly elected member. This Court awarded costs against the second and third respondents (“in their official capacities”) assessed at \$1,500 in the case of the appellant and at \$2,500 in the case of the first respondent.
- The appellant filed a notice of appeal to the Court of Appeal.
- The Court of Appeal (Barker and Davies JJA) dismissed the appeal for want of jurisdiction, allowing the first respondent costs, assessed at \$1,000.
- The appellant then petitioned this Court for special leave to appeal from the Court of Appeal’s judgment. The appellant also sought an interim stay of proceedings, pending the Supreme Court’s decision. Tuivaga CJ granted the interim stay, and ordered that the costs of the stay application be costs in the cause.
- This Court, unanimously granted leave to appeal but by a majority (Eichelbaum and Beaumont JJ; Elias J dissenting), dismissed the appeal, reserving, as mentioned, the question of costs.

It will further be recalled that the Court of Appeal’s decision, and that of the majority in this Court, in dismissing the appeal for want of jurisdiction, was based upon the privative clause enacted by s 73(7) of the Constitution, providing that any determination on this question by the

Court of Disputed returns "is final"; notwithstanding that, in the opinion of each member of this Court, the Court of Disputed Returns had erred in its interpretation of the relevant provisions (s 116) of the *Electoral Act*.

With that background, we turn to consider the several submissions now put to us on the questions of costs.

COSTS OF THE PROCEEDINGS IN THE COURT OF DISPUTED RETURNS

In awarding costs against the Returning Officer and the Supervisor of Elections "in their official capacities", the Court of Disputed Returns relied upon s 156 of the *Electoral Act*, which provides that subject to s 157 (not material here), the costs –

"... must be defrayed by the parties to the petition in such manner and in such proportions as the Court determines, and, in particular, any costs that in the opinion of the Court have been caused by vexatious conduct, unfounded allegations or unfounded objections on the part either of the petitioner or of any respondent, and any needless expenses incurred or caused on the part of the petitioner or a respondent, may be ordered to be defrayed by the parties by whom they were caused or incurred, whether those parties are or are not on the whole successful."

(Section 157 empowered the Court to order costs of the proceedings against a person found to have "committed any illegal practice" – as mentioned, a provision not presently relevant.)

The Court said (referring to s 116 of the *Electoral Act*):

"I attribute no fault to the authorities for the interpretation that they arrived at with this infelicitously drafted section. However with the dashed hopes of the loser and with costs incurred in responding to the petition, and the costs of bringing this petition for the Petitioner, I feel some costs should be borne by the State. An immense amount of work has been done by lawyers on all sides as is obvious from the papers."

It is now submitted for the second and third respondents that, given the unanimous opinion of this Court on the interpretation of s 116 of the *Electoral Act*, the Court of Disputed

Returns' rationale for its criticism of the drafting of s 116 can no longer be accepted; it must follow, their submission goes, that the rationale for the costs order made by the Court of Disputed Returns can also no longer be supported, and, accordingly, that order should now be set aside.

We have difficulty accepting the submission.

Although our construction of s 116 differs from that adopted by the Court of Disputed Returns, we did conclude that, by virtue of the operation of the privative clause, the Court of Appeal was correct in dismissing the appeal to it against the Court of Disputed Returns' judgment for want of jurisdiction. It must follow, logically, that this Court, and the Court of Appeal, had no jurisdiction to interfere with any order for costs made at first instance where (as here) a mere error of law, that is, not one of a jurisdictional kind, is involved.

COSTS OF THE PROCEEDINGS IN THE COURT OF APPEAL

Although special leave to appeal from the Court of Appeal's decision was granted, on the appeal itself we concluded that the Court of Appeal was correct in dismissing the appeal to it for want of jurisdiction. It must follow, we think, that no basis can exist for our interference with that Court's specific orders in respect of the costs in the proceedings before it.

COSTS OF THE PROCEEDINGS IN THIS COURT

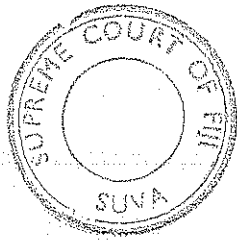
In our opinion, there should be no order for the costs incurred here.

When an analysis of the several issues before us is undertaken, it emerges that each of the contending candidates has enjoyed a measure of success. On the one hand, the appellant persuaded us that special leave to appeal ought to be granted; and that the Court of Disputed Returns erred in its construction of s 116. In this Court, the appellant was also successful on the stay application, as already noted. On the other, the first respondent convinced us that the privative clause operated here.

At the same time, there is no special reason why the position of the second or the third respondent in acting in their respective official capacities, requires any special treatment in terms of their costs.

ORDERS

In all of these circumstances, we make no order for costs.



Thomas Eichelbaum
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Rt. Hon. Sir Thomas Eichelbaum,
Presiding Judge of Supreme Court

Sian Elias
.....
Rt. Hon. Dame Sian Elias
Judge of Supreme Court

Bryan Beaumont
.....
Hon. Justice Bryan Beaumont
Judge of Supreme Court