

Sanft & Fuko v 'Aho & Kingdom of Tonga

Supreme Court, Nuku'alofa

Martin CJ.

Civil case No 7/1990

14 February 1990

- ¹⁰ *Election – Supervisor of Elections – no power to disqualify candidates*
Injunction – interim injunction – principles applicable
Procedure – interim injunction – principles applicable

The plaintiffs were candidates nominated for election as people's representatives at a parliamentary election. Complaint had been made to the Supervisor of Elections that they were disqualified under clause 65 of the Constitution and he had indicated that he intended to disqualify them unless otherwise ordered by the court. The plaintiffs applied for an interim injunction to order the Supervisor of Elections not to disqualify them or to remove their names from the ballot papers. The parliamentary election was due to be held the day after the hearing of the plaintiffs' application for an interim injunction.

HELD:

- (1) The Supervisor of Elections had no power to disqualify duly nominated candidates;
- (2) It is doubtful whether the Supreme Court has power to disqualify a duly nominated candidate before an election;
- ³⁰ (3) In considering whether to exercise its discretion to grant an interim injunction a court must have regard in particular to whether damages would be a sufficient remedy, and whether greater hardship would be caused by granting or refusing the injunction. Moreover there were questions of fact and points of law that required further consideration, and there was the suggestion that the complaint to the Supervisor may have been a device to gain political advantage. Having regard to those circumstances the discretion of the court should be exercised to grant the injunction sought by the plaintiffs.

- ⁴⁰ Counsel for the plaintiffs : Mr L. M. Niu
Counsel for the defendant : Mr A. J. Martin

Judgment

Hopate Sanft and Teisina Fuko are candidates seeking election as people's representatives in the present parliamentary election. Complaint has been made to the Supervisor of Elections (the first defendant) that they should be disqualified under clause 65 of the Constitution. The Supervisor has indicated that he intends to disqualify them unless the Court otherwise orders.

The plaintiffs now apply for an interim injunction to prevent the Supervisor of Elections from removing their names from the ballot papers. The election is tomorrow. Clause 65 of the Constitution, so far as is relevant to this action, reads:

"... no person may be chosen against whom an order has been made in any Court in the Kingdom for the payment of a specific sum of money, the whole or part of which remains outstanding ... on the day on which such person submits his nomination paper to the returning officer."

Complaint has been made that the plaintiffs have a judgment debt outstanding against them. It relates to an order for costs made in an earlier action which they brought against the Legislative Assembly (Case No. 70/86). It is said, but there is no evidence about it, that the plaintiffs came to some arrangement with the Legislative Assembly about payment.

There are three issues:

1. Does the Supervisor of Elections have power to reject candidates?

His office is created by the Electoral Act 1989. He can only do what he is empowered to do by the Act, or by any regulations made under it. At present the only powers which he has are the general powers conferred by section 3(3). So far as relevant to this action, that reads:

"(he)... shall, subject to the direction of the Prime Minister, have the general control over and supervision of the election... (including)... the handling of complaints concerning... the actions of candidates..."

Those words do not appear to be sufficiently wide to give him the power to reject a nomination, once accepted.

Section 9(2) requires a candidate to be nominated in the prescribed form, bearing the signatures of 50 electors from the relevant district, and signed by the candidate himself. He also signs to confirm that he is not affected by various matters which would disqualify him, in particular that he is "... not in arrears under any judgment given by a Court in the Kingdom for the payment of any sum".

The Supervisor may reject any nomination form which does not comply with the statutory requirements, or which is not lodged in time. But he has no power to reject a nomination paper which is apparently in order; nor to hear and determine objection; still less to take an objection himself on the basis of information received. This would involve him acting in a quasi-judicial capacity. For this specific authority is required, either by the Act or by regulations made under the Act.

No such authority exists at present. No regulations have yet been made relating to the making of objections to nomination, and determination of such objections. This case demonstrates the need for such regulations.

There is such power under the English elections rules. I have considered whether those rules should be applied under the Civil Law Act, but I think that

would be inappropriate. They are made pursuant to an English Act which has been applied in Tonga, but which cannot be applied now that we have our own Electoral Act.

2. Even if the Supervisor has no such power, does the Court have power to disqualify candidates except on the hearing of an election petition?

Elections are governed by the Electoral Act 1989. Section 25 of that Act says :

100 "No election ... shall be questioned except by a petition presented in accordance with this part of this Act."

It is at least arguable that any complaint concerning the conduct of an election can only be raised by way of election petition. I have some doubt whether matters concerning an election can be dealt with in any other manner. But for the purpose of this application I will assume that I have jurisdiction.

3. How should the Court exercise its discretion?

On the hearing of an application of this nature it is usually impossible to make a final determination of the issues raised. In this case the application was made yesterday and was heard within 24 hours.

110 Full preparation, and full consideration of the important issues of law involved, has not been possible.

The grant of an injunction is discretionary. I have to consider two matters in particular:

1. Whether damages would be a sufficient remedy if an injunction is refused.

In this situation damages could not compensate a candidate for the loss of his opportunity to be elected, particularly where (as here) he has been elected before and may be presumed to have at least a chance of being re-elected.

120 2. Whether greater hardship would be caused by granting or by refusing an injunction.

If an injunction is granted, no hardship is caused to anybody. Eligibility can still be challenged by way of an election petition after the election. If it is refused, the plaintiffs would suffer hardship - they would lose the opportunity to be elected; and even if the election were set aside on a later election petition they would go into a further election at an obvious disadvantage. Unless it is obvious that the plaintiffs are disqualified, the balance of hardship is clearly in favour of allowing them to remain as candidates.

130 Although the facts as presented are largely agreed, these raise possible arguments as to the enforceability of the judgment debt. These issues cannot be determined without hearing evidence.

Mr Niu has raised certain points of law : as to the interpretation of clause 65 of the Constitution; and whether the order on taxation of costs was valid. I think it undesirable that I should make any ruling on these points because it would prejudice, on a necessarily superficial consideration, issues which may well be raised later in an election petition when there will be time to give these matters full consideration. It is enough to say that his points are arguable.

140 Finally, the timing of the complaint to the Supervisor suggests that this may be a device by another candidate to obtain an electoral advantage. The Court does

not lend its help in that situation. Complaints must be raised at the proper time and in the proper fashion, and not indirectly.

The plaintiffs are not obviously disqualified. They are entitled to the order sought. The Supervisor of Elections will be prohibited from removing their names from the ballot papers.

¹⁵⁰ The Supervisor has acted entirely correctly in leaving the matter for the Court to decide. There will be no order for costs.