FUKO v VAIKONA

Court of Appeal
Martin CJ, Roper and Morling J. J.
Appeal No 6/1990

3, 12 September 1990

Elections - qualification for election

Constitution - principles of interpretation - no departure from clear and obvious meaning

Constitution - effect of inconsistency with provisions of statute - availability of provision

Constitution - English and Tongan texts - Tongan text to prevail

The respondent filed and election petition against the election of the appellant as a people's representative on the ground that he was disqualified from election by clause 65 of the constitution. The Supreme Court upheld the petition (reported elsewhere in this volume). On appeal it was argued that clause 65 should not be interpreted literally to disqualify any person against whom a court order has been made to pay a specific sum of money which is outstanding in whole or in part: and that, in any event, the court order against the appellant was a nullity since it was made under the Supreme Court Act (Cap 10) section 16(9) [now section 17 (9)] which is inconsistent with clause 50 of the Constitution.

HELD

Affirming the decision of the Supreme Court;

1. Clause 65 of the Constitution was clear and unambiguous and there could be no departure from its clear terms which disqualified a person against whom a court order for the payment of a specific sum of money has been made, if the whole or any part remains outstanding;
2. The Tongan version of clause 50 of the Constitution must prevail;
3. Section 16(9) [now section 17(9)] of the Supreme Court Act is not inconsistent with clause 50 of the Constitution; but even if it is, it is severable from the remainder of the Act and the remainder is therefore unaffected by its invalidity;
4. The court order was made under section 16(7) of the Supreme Court Act and was accordingly not a nullity.

Statutes considered :
Constitution, clauses 50, 65
Supreme Court Act (Cap 10) section 16 (now section 17)
Counsel for the appellant : Mr L. M. Niu
Counsel for the respondent : Mr W. C. Edwards and Mrs F. Vaihu

Judgment

This is an appeal from the decision of Webster J. in which he held that the Appellant's election on the 15 February 1990 as a people's representative for the electoral district of Ha'apai was void.

The Respondent's electoral petition was based on clause 65 of the Constitution which reads, so far as is relevant"

> "Representatives of the people shall be chosen by ballot and any person who is qualified to be an elector may be chosen as a representative, save that 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 any part of which remains outstanding or if ordered to pay by instalments the whole or any part of such instalments remain outstanding on the day on which such person submits his nomination paper to the Returning Officer."

The background facts are not in dispute. In 1986 the Appellant and one Hopate Sanft, both being members of parliament, issued civil proceedings against the Speaker of the House, the Legislative Assembly itself and others. In January 1987 Martin C. J. dismissed the claim with costs against the Appellant and Sanft, "to be taxed if not agreed." They appealed to the Privy Council, but not against the costs order. The appeal was dismissed. In January 1988 Martin C.J. taxed the costs at $1383, no agreement having been reached. The Appellant and Sanft made unsuccessful attempts to have the costs waived or paid by instalments by deduction from their parliamentary salaries and the debt was still outstanding on nomination day for the 1990 elections.

In a very careful judgment Webster J. determined that the Appellant had been in breach of clause 65 of the Constitution and was therefore disqualified and his election void.

There are two grounds of appeal and the first concerns the true interpretation of clause 65. Mr Niu's basic submission was that a literal interpretation of the clause could result in injustice, as indeed he claimed had happened in the present case, and that it was necessary to consider the history of the clause to glean its true intent. The clause as originally enacted in 1875 provided that a candidate for election must be "not heavily in debt so that if judged it would appear that he would not be able to pay his debts." This was amended in 1914 to "who is not in debt for a larger amount than is allowed by law." There is no law in Tonga specifying a limit of indebtedness.

It is not immediately clear what is meant by the 1914 amendment, but the construction most favourable to the Appellant's case, and possibly the only construction open, is that a prospective candidate must not then have debts in excess of his ability to pay. In other words, he must not be insolvent.

It follows that the bar to nomination for election was, until the enactment of the present clause 65, insolvency rather than simple indebtedness.

We see no way in which we can import into clause 65 the notion that the failure to pay a sum of money ordered by the Court, and unpaid, was only a bar to election if the candidate did not have the means to pay. In the present case the Appellant did in fact pay the costs before election, but not before he submitted his nomination paper to the Returning Officer as required by clause 65.

There is no ambiquity in the wording of the clause, no obscurity, and simply no room for holding that the clause does not mean exactly what it says in clear terms. The Appellant fell fairly and squarely within its terms.

Webster J. dealt with this submission in far more detail that we have done and we agree entirely with his conclusion, that there was no merit in it. We therefore reject Mr Niu's first submission.

His second submission was to the effect that on the day the Appellant submitted his nomination paper to the Returning Officer there was no valid order of the Court directing payment of a "specific sum of money" in terms of clause 65.

The basis for Mr Niu's submission was that the Chief Justice's taxation of the costs was unconstitutional and therefore of no effect. He contended that the taxation had been carried out pursuant to s.16 of the Supreme Court Act (Cap 8) subsection (7) of which gives the Chief Justice power to tax " any account rendered or any fees or remuneration etc." Subsection (9) reads "There shall be no appeal from any decision upon taxation." We have very real doubts whether s.16 has any application to the taxation of party and party costs for the whole of the section is concerned with the licensing of lawyers and the payment of their fees and has now been removed into the Law Practitioners Act. However, for the purposes of this exercise we adopt Mr Niu's submission that subsection (9) is of general application.

Mr Niu then submitted that the restriction on appeal contained in subsection (9) was contrary to clause 50 of the Constitution which reads in part:

> "And if any case shall have been heard in the Supreme Court it shall be lawful for either party thereto to appeal to the Privy Council which shall rehear the case and the judgment of the Privy Council shall in all cases be final ..."

In the Tongan version of that passage, which must prevail, the word "case" translates as "thing", which according to Mr Niu extends greatly the scope of the appeal given by the clause, If Mr Niu is right every direction given by a Judge, whether pre-trial or even during a trial, would be subject to appeal for example, the grant or refusal of an adjournment, or discovery, would be appealable, and even perhaps his decision on the admissibility of evidence in the course of a trial.

Webster J. concluded that clause 50 did not give a right of appeal against a taxation and we agree with that view.

Even assuming that clause 50 does give such a right what effect does s.16 (9) of the Supreme Court Act have on the Chief Justice's taxation? According to Mr Niu it makes the whole taxation process invalid (and indeed if he is right there has not been a valid taxation in Tonga for 40 years). He relied on the case of *Minister of Lands v Pangia,* which we heard in 1932, was unreported, with no copy now available. It appears that the decision held that the Land Commission Act 1917, which set up a Commission to "inquire into and finally settle and determine all titles to lands in the kingdom and all dispute and claims concerning lands" was unconstitutional. Scott J. held that all decisions made by the Commission were ultra vires. It seems that one of the reasons for the decision was that the Land Commission Act provided in s. 20 that the Courts and the Privy Council had no power to inquire into the Commission's findings so depriving those who appeared before it of the right of appeal given by the Constitution. Clause 90 of the Constitution provides that "cases concerning land shall be determined by a Land Court subject to an appeal

to the Privy Council." Mr Niu submitted that just as the whole of the land Commission Act and its decisions had been struck down, so too should Martin C J's taxation.

It appears however that there was more to the Land Commission's demise than the fact that no right of appeal from its decisions was available. The Pangia decision of 1932 was referred to with approval of Ragnar Hyne J. in *Kalaniuvalu (Noble) v Minister of Lands* 2 Tongan Law Reports 40. He said at p. 43 "The Commission was not the Land Court contemplated by the Constitution." A perusal of the Act indicates that the Commission was all powerful, answerable to no one with power to make its own rules and with no requirment that a member of the judiciary should be a member of the Commission.

We do not see the Pangia decision as relevant to the present inquiry. Assuming s.16(9) of the Supreme Court Act is of general effect, as Mr Niu claimed, it is our opinion that although it cannot stand against the provisions of clause 50 of the Constitution it is clearly a case where the subsection is severable and the following passage from Wynes "Legislative, Executive and Judicial Powers in Australia "(5th Edition) at p.47 is in point;

"When an Act of the Commonwealth (or a State) Parliament is found to contain provisions that are ultra vires, it does not follow that the whole of the Act is invalid, for it may still be capable of a limited operation. The Act, while in respect of its general subjects matter within constitutional power may purport to apply to persons or things beyond power and may be entirely valid as to some classes of case and bad as to others, or it may contain provisions or sets of provisions some of which are within and some without power in which case it may be possible to sever the bad from the good. In both cases the basic consideration is the intention of Parliament but the particular considerations upon which a severance of "reading down" depends may not be precisely the same.

The intention of Parliament is to be gathered from the terms of the statute itself. In the United States it has been said that the rule for severance is that the Act is not void unless "all the provisions are connected in subject matter, depending on each other operating with the same purpose or otherwise so connected together in meaning that it cannot be presumed that the legislature would have passed the one wihout the other.. The point is ...whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is struck out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained".

But if the provisions are "so mutually connected with and dependent on each other as conditions, consideratons, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them".. This statement of the rule, in so far as it refers to what the legislature might be presumed to have done, was early rejected by the High court as leading to uncertainty. In Whybrow's Case (1910) 11 C.L.R.1 at p.27 Griffith CJ. said, "What a man would have done in a state of facts which

never existed is a matter of mere speculation, which a man cannot certainly answer for himself, much less for another, I venture to think that a safer test is whether the statute with the invalid portions omitted would be substantially a different law as to the subject matter dealt with by what remains from what it would be with the omitted portions forming part of it."

In the instant case the severance of subclause (9) makes no difference whatever to the law proclaimed by what remains of the section. For the sake of completeness and to put the matter beyond doubt we refer to clause 35 of the Interpretation Act (Cap. 1) which reads:

210 "Every Act shall be read and construed subject to the constitution and so as not to exceed the legislative power of the Kingdom to the intention that where an Act would, but for this section, have been construed as being in excess of that power that Act shall nevertheless be valid to the extent to which that act is not in excess of that power."

Martin C. J's taxation was therefore lawful.

The appeal is dismissed with costs to the Respondent to be taxed if not agreed.