Tonga

Attorney General v Helu

[2005] TOSC 4

Supreme Court
Webster CJ
7–8, 10 March 2005

Constitutional law – Elections – Parliamentary election – Candidate – Qualifications for election – Disqualification – Prospective candidate subject of court judgment – Judgment of payment of money still unsatisfied on day when nomination paper submitted to returning officer – Constitution providing that person unable to stand for election if subject of court order for payment of specific sum of money and whole or part of such sum outstanding on nomination day – Attorney General seeking declaration that candidate disqualified – Relevant considerations – Constitution of Tonga 1875, cl 65.

The Attorney General brought proceedings seeking, inter alia, a declaration that the candidature of the defendant for election as a representative of the people in the 2005 general election was invalid on the ground that, on nomination day, there was a court order against the defendant for the payment of a specific sum of money by her, the whole or part of which sum remained outstanding at that time. Clause 65 of the Constitution, dealing with the qualification requirements for representatives of the people, provided, inter alia, 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 ... on the day on which such person submits his nomination paper to the returning officer'.

HELD: Declarations granted.
There could be no drawing back from obedience to the Constitution: the representatives of the people, who were involved in the making of the laws, had to comply, and be clearly seen to comply, with the fundamental law. In 2001 a default judgment had been made against, inter alia, the defendant, rendering her jointly and severally liable for the amount in question. That judgment had not been fully satisfied as at nomination day: money still remained outstanding under the court order against the defendant. It had been clear for the last 15 years that the courts insisted on the observance of the clear terms of cl 65 of the Constitution. The plaintiff would therefore be granted the declarations sought; the defendant was disqualified as a candidate in the forthcoming general election and her name would be removed from the roll of candidates therefor (see pp 285–287, 289, below). *Vaikona v Fuko (No 2)* [1990] Tonga LR 68, *Fuko v Vaikona* [1990] Tonga LR 148, *A-G v Tupouniua and 'Ilavalu* [1999] Tonga LR 21, *Namoa v A-G* (6 March 2002, CA, unreported) and *A-G v Fuko* [2002] TOCA 9 (23 July 2002, CA 09 & 10/2002) followed. *Roper v Bumford* (1810) 3 Taunt 7, *Page v Meek* (1862) 32 LJQB 4 and *Commercial Bank of Australia v Wilson & Co's Estate, Official Assignee* [1893] AC 181 distinguished.
Per curiam. There is an obligation on counsel to provide copies of cases to which they refer and which are not readily available, rather than for the court to have to seek them out (see p 289, below).
[*Editors' note*: Clause 65 of the Constitution is set out at p 284, below.]

Cases referred to in judgment
A-G v Fuko [2002] TOCA 9 (23 July 2002, CA 09 & 10/2002), Tonga CA
A-G v Tupouniua and 'Ilavalu [1999] Tonga LR 21
Commercial Bank of Australia v Wilson & Co's Estate, Official Assignee [1893] AC 181, Aus PC
Fuko v Vaikona [1990] Tonga LR 148
Namoa v A-G (6 March 2002, CA, unreported)
Page v Meek (1862) 32 LJQB 4
Roper v Bumford (1810) 3 Taunt 76
Vaikona v Fuko (No 2) [1990] Tonga LR 68

Legislation referred to in judgment
Constitution of Tonga 1875, s 24, cll 65, 90
Electoral Amendment Act 1992, s 11

Other source referred to in judgment
9 *Halsbury's Laws* (4th edn), para 494

Application
The plaintiff, the Attorney General, sought declarations in the High Court that the defendant, 'Iunaise Vusenga Helu, be disqualified as a candidate as a representative of the people in the 2005 general election and that the defendant's name be removed from the roll of candidates for that election. The facts are set out in the judgment.

Mr Pouono for the plaintiff.

10 March 2005. The following judgment was delivered.

WEBSTER CJ.

PRELIMINARY

This is a claim by the plaintiff, the Attorney General, that the candidature of the defendant, Ms 'Iunaise Vusenga Helu, for election as a representative of the people for the Vava'u District at the forthcoming general elections on 17 March 2005 is invalid.

The ground of that claim is that the defendant's candidature could lead to a

breach of cl 65 of the Constitution, as it is alleged that on 11 January 2005 [nomination day], the day on which she submitted her nomination paper to the returning officer, there was an order in the Supreme Court (in Case No CV 870/2000) on 23 July 2001 for the payment of a specific sum of money by the defendant and another, the whole or part of which remained outstanding at nomination day.

Clause 65 of the Constitution provides:

> *'Qualification of representatives*
>
> 65. 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 ...'

EVIDENCE AND SUBMISSIONS

The plaintiff led evidence from the Chief Registrar of the Supreme Court, Mrs Manakovi Pahulu, and Mr Hiva Tatila, Assistant Manager (Legal) of the Tonga Development Bank. The defendant gave evidence herself and led evidence from her cousin, Mr 'Atonio Tu'ipulotu, Mr Sifa Tupouto'a (Registrar of Lands at the Ministry of Lands and Survey) and another cousin, Mr Samiuela Talia'uli Helu. Both parties also produced exhibits. On completion of the evidence submissions were made for the parties in support of their cases,

In view of the very limited time available before the elections on 17 March, I am grateful to the parties for their cooperation in abridging time so that the hearing of this case was able to proceed at short notice, which should permit time for an appeal to the Court of Appeal by written submissions by fax if that is desired. In these circumstances this decision is necessarily brief.

BASIC FINDINGS IN FACT

On the evidence before me I found the following facts relevant to this case to be established or admitted. There was much other evidence which I did not consider relevant to the issues before me and on which I make no detailed findings in fact.

It was accepted that nomination day for the general elections was on 11 January 2005 and that on that date the defendant submitted valid nomination papers to the returning officer in Tongatapu, along with a deposit of $200. Her nomination paper included a declaration in Tongan that (in the words of the English text of s 11 of the Electoral Amendment Act 1992) there was no order which had been made in any court in the kingdom against her for the payment of a specific sum of money, the whole or any part of which remained outstanding on the day on which her nomination paper was submitted to the returning officer and that those particulars were true and correct. The declaration also referred to an order for payment by instalments, although that is not relevant in this case.

For the purposes of this case, the background begins with a loan agreement for $28,642 dated 24 November 1997 between on the one hand the defendant, her cousin, Mr Samiuela Talia'uli Helu, and her uncle, Mr Sioeli Vailena Helu, and on the other hand the Tonga Development Bank. The loan agreement was a consolidation of and superseded the existing loan accounts of these members of the Helu family. Under cl 7 of the loan agreement the borrowers' liability was joint and several. However, it was clear that the defendant had made regular payments towards that loan by deductions from her salary of $750 per month up to the end of 1999, when these payments apparently ceased, presumably coinciding with the ending of her position as a police magistrate.

While the defendant emphasised in her evidence and submissions the amount of money she has paid in all to this 'family' loan, it is important that part of the obligations in the loan agreement of 24 November 1997 was for monthly repayments of $750 to be made from January 1998 to June 2002. That was clearly planned to be undertaken by the defendant by monthly deductions from her salary and it appears that this whole deteriorating situation began when she ceased making these monthly payments at the end of 1999.

The start of matters in relation to this case was when the Tonga Development Bank then brought an action in the Supreme Court (Case No CV [or C] 870/00) against the defendant, her cousin and her uncle for repayment of the outstanding balance of that loan. The defendant did not dispute that she did not enter any defence in that action and a default judgment was made against her and her uncle on 23 July 2001 for $17,273.04 plus interest. That was a final judgment against Ms Helu as the first defendant in that action; and as already mentioned it has to be noted that it was a default judgment, as she did not file any defence, although her cousin Talia'uli contested the case, albeit unsuccessfully. That judgment thus rendered her jointly and severally liable for the whole of that amount. The defendant admitted that that was an order of the Supreme Court against her for the payment of a specific sum of money.

There was no evidence of any arrangement or attempt at arrangement made by the defendant with the Tonga Development Bank for payment or satisfaction of that judgment from that time right up to 17 February this year, nor even of any payments made by her towards that, nor even of any contact by her to the bank from the date of the default judgment up to nomination day. There was evidence that some payments towards the balance had been made by her cousin Talia'uli and another cousin Mr 'Atonio Tu'ipulotu, and that the bank had taken over some of the securities in the loan and had received a small amount of income from that. There were also claims by the defendant that the bank had released her uncle Vailena from the loan, but no conclusive evidence as to that. Nor was there adequate evidence to establish the defendant's claim that the bank had been negligent in looking after the securities under the loan. However, it was quite clear that as at 11 January 2005 money still remained outstanding under the court order against the defendant.

There was evidence that Talia'uli had approached the bank to take the

defendant's name off the loan, and had told the defendant that he had done so, although she personally took no steps towards that, nor to check whether that had been done. Talia'uli gave differing reasons for that, perhaps the true one being that his wife and son did not want to pay the debt of someone else, ie the defendant. In any event by January 2005 the bank had advised him that it would not take the defendant's name off the loan.

There was also evidence that on 17 February 2005, the same day that the Supervisor of Elections wrote to the defendant raising this matter with her, she went to the Tonga Development Bank and made an arrangement to take over the debt completely by paying $3,500 on that day and arranging to pay $500 monthly until the debt was fully paid. That, in itself, indicated an acceptance by the defendant of her outstanding liability under the court order and that the debt was still due in part. The defendant said that the arrangement she made then had nothing to do with the letter from the Supervisor of Elections of 17 February, but I regret I was unable to accept that evidence.

The defendant submitted that she had issues with the bank as to the total she has paid towards the loan over the years, as to unfair treatment relating to how it had dealt with her and her co-debtors under the loan, as to alleged negligence, and as to how it had dealt with its securities under the loan. But given that at as at 11 January the loan balance still stood at $18,595.42 and that the defendant must be taken to have accepted in relation to the bank that she was still due money to the bank under the court order when on 17 February she made a further payment of $3,500 towards the sum due, with an arrangement for regular future payments, I did not consider that these issues referred to in the first sentence of this paragraph were relevant to the real issue in this case – ie whether all or partial payment of a specific sum of money under a court order against the defendant remained outstanding at nomination day. In any event these issues were only hinted at in evidence, rather than being established.

It was quite clear from the evidence to a high standard of probability that, at nomination day on 11 January 2005, under the order of the court against the defendant there remained money outstanding, which the defendant honestly accepted in evidence.

THE LAW

As the Court of Appeal noted in *A-G v Fuko* [2002] TOCA 9 (23 July 2002, CA 09 & 10/2002), there have been a series of cases, particularly *Vaikona v Fuko (No 2)* [1990] Tonga LR 68, *Fuko v Vaikona* [1990] Tonga LR 148, *A-G v Tupouniua and 'Ilavalu* [1999] Tonga LR 21 and *Namoa v A-G* (6 March 2002, CA, unreported), in which the Supreme Court and the Court of Appeal have insisted on the observance of the clear terms of cl 65 of the Constitution.

The history of cl 65 was set out by Burchett J in *Namoa v A-G*:

> 'In *Fuko v Vaikona* [1990] Tonga LR 148 at 149, this Court (Martin CJ, Roper and Morling JJ) pointed out that Clause 65 reflects, but in a changed form, s 24 of the Constitution of 1875, which barred from the Legislative Assembly a candidate "heavily in debt so that if judged it would appear that he would not be able to pay his debts", and the original form of Clause 65, as adopted in 1914, which required a representative to be "not in debt for a larger amount than is allowed by law". The latter wording, their Honours suggested, was rather obscure, but might refer to insolvency law. It might also, I suggest, have contemplated the enactment by the Parliament of a law to give it precise effect. That is, in a sense, what the present Clause 65 does—by fastening, as the definitive test, upon a Court order "for the payment of a specific sum of money" which has not been wholly satisfied "on the day on which ... [the] nomination paper" is submitted to the returning officer.'

In *Namoa v A-G* the Court of Appeal emphasised that, in the affairs of the kingdom, there can be no drawing back from obedience to the Constitution, and that the representatives of the people, who are involved in the making of the laws, must themselves comply, and be clearly seen to comply, with the fundamental law of Tonga (ie the Constitution).

The Court of Appeal in *Fuko v Vaikona* [1990] Tonga LR 148 at 150 said, in relation to the test in cl 65:

> '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 ambiguity 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.'

Also, in relation to the terms of cl 65, in *A-G v Fuko* the Court of Appeal noted that the context strongly suggests that some serious default is involved; and that the sense in which the word 'outstanding' was used was that payment stands unpaid, though payable, connoting default on the part of the debtor. The Court of Appeal found that in each of the appeals in those cases, the candidate had reached an agreement with the judgment creditor for payment by instalments of the amount referred to in the relevant order of the Supreme Court. Each candidate had fully complied, at the date of the submission of his nomination paper to the returning officer, with the terms of his instalment agreement. The Court of Appeal found that, in that situation, the Chief Justice had been right to hold that the candidate was not disqualified by cl 65 from being chosen as a representative of the people.

In respect of the result which the Attorney General seeks in the instant case, the Court of Appeal made it clear in *Namoa v A-G* that such action may be appropriate:

> 'As Ward CJ pointed out in *A-G v Tupouniua and 'Ilavalu* [1999] Tonga LR 21 at 25, it should not be thought that the Supreme Court's wide powers (and the powers of this court upon appeal) only become available after a breach of Clause 65 is completed by an invalid election. Clause 65, where it is applicable, disqualifies from election, and the court must be able to

declare the position and issue an appropriate injunction. His Honour also pointed out that the candidature of a person ineligible to be chosen would have consequences going far beyond the possible invalid election of that particular person. He said (at 26): "Quite apart from the substantial cost to the general revenue of an inevitable by-election, every properly nominated candidate is entitled to assume that all other candidates are also eligible to be chosen. If the defendants are allowed to stand, votes may be cast for them that would otherwise have been cast for the valid candidates. It is no remedy to decide the matter by an election petition because, if the candidate who is in breach of clause 65 is chosen, he would, if he then pays his judgment debts, be entitled to stand in the by-election that was necessitated solely by his unconstitutional election in the general election. That cannot be fair to the candidates who have taken care to ensure they are properly qualified at the right time for the general election. Even less fair is the situation that would arise if they stand unsuccessfully because there can then be no election petition. Thus the other candidates will have no way of testing what would have been the result had the votes received by the defendants been cast for the qualified candidates." '

In *A-G v Tupouniua*, Ward CJ was clear that cl 90 of the Constitution gives the Supreme Court jurisdiction in all cases in law and equity arising under the Constitution and laws of the kingdom, with the exception only of matters within the exclusive jurisdiction of the Land Court.

In *A-G v Namoa* Ward CJ held that, as there is no requirement to advise the court when and if judgment debts have been paid, the court record is not conclusive, and that it may be necessary to ask one or both parties whether the judgment has been satisfied (as occurred in this case). Ward CJ also held that the standard of proof in such cases is a high standard of probability that the sum of money ordered to be paid by the court has not been paid.

In *Namoa* one of the other candidates, Mr Tapuelelu, had been unaware of the court orders against him, but his disqualification was still upheld by the Court of Appeal; as was that of another candidate, Mr Piukala, who had envisaged that his son would pay the sum under the court order, but that had not happened.

CASES CITED BY DEFENDANT

Ms Helu, the defendant, who is a fully qualified lawyer, referred to three English cases, but did not provide copies of any: *Commercial Bank of Australia v Wilson & Co's Estate, Official Assignee* [1893] AC 181 (PC), *Page v Meek* (1862) 32 LJQB 4 and *Roper v Bumford* (1810) 3 Taunt 76.

I have found that these are all referred to at 9 *Halsbury's Laws* (4th edn), para 494, as authority for the proposition that payment by a debtor to a third person at the request of a creditor is equivalent to payment to the creditor.

I have been able to look at *Commercial Bank of Australia* but the others are not available here. *Commercial Bank of Australia* deals with guarantors and sureties and it seems to me that, if anything, it is against the defendant. The headnote states:

'Where a bankrupt and others had become guarantors to the appellants of a principal debtor's liability for the sum of £6250, and three of the guarantors thereafter entered into agreement with the appellants that their liability should be limited in this way, that there should be substituted for it a deposit of £3000 in the bank, to be carried to a suspense account, with power to the appellants to appropriate that sum whenever they thought fit in discharge pro tanto of the principal debt:—

Held, that such deposit did not until appropriation operate as payment, and that the appellants were entitled to prove for the full amount of their debt against the estate of a bankrupt co-surety, who was not a party to the above agreement.'

But I cannot see that these cases are of direct relevance in the present case, which is essentially concerned with the situation arising *following* a court order, rather than events taking place before the matters concerned reached court, as in these three cases.

I should also point out that the obligation is on counsel to provide copies of cases to which they refer and which are not readily available, rather than for the court to have to seek them out.

CONCLUSIONS

On the evidence I was therefore satisfied to a high standard of probability that, in terms of cl 65 of the Constitution, there was a court order against the defendant for payment of a specific sum of money, part of which remained outstanding on the day on which she submitted nomination papers to the returning officer. Payment remained outstanding because part of the money was still payable, but not paid. On that date the applicant had not reached an agreement with the Tonga Development Bank as judgment creditor for payment by instalments of the amount referred to in the order of the Supreme Court, so there was no instalment agreement with which she could comply. There was no such arrangement made at that time to pay by instalments or defer payment, as in the case of Mr Fuko in 2002.

I therefore make the declarations sought by the plaintiff.

I must add that there has to be sympathy for the defendant, who has obviously already put much effort into her election campaign; and also throughout the history of this loan she has taken a large part in servicing it for the benefit of others in the family as well as herself. But it is equally clear that she is a fully qualified lawyer of considerable experience with 14 years service on the Bench in three jurisdictions and that, for whatever reasons, she (a) entered into the loan agreement, (b) allowed a default judgment to go against her without any subsequent challenge and then (c) personally took no steps to repay the amount ordered against her and others. While she may have believed that her name was being taken off the loan by the bank, she personally took no steps towards that, nor to check whether that had been done.

At the same time the law has been substantially clear for the last 15 years since the cases involving Mr Teisina Fuko in 1990 and I cannot believe that the cases cited above in the 1999 and 2002 elections did not receive wide publicity.

I award the plaintiff costs against the defendant as agreed or taxed.

I add that, if the defendant wishes to appeal this decision to the Court of Appeal by written submissions by fax prior to the general elections on March 17, in order to allow proper time for consideration by the Court of Appeal before that date, any appeal should be filed at the Registry at the latest by 3.30 pm on Friday 11 March, with a contemporaneous copy to the plaintiff's counsel.

South Africa

Dendy v University of Witwatersrand, Johannesburg and Others

Case No 03/2015

Witwatersrand Local Division

Boruchowitz J

26 August, 15 September 2003, 5 April 2005

(1) Constitutional law – Fundamental rights – Right to dignity – Alleged infringement – Remedies – Constitutional and delictual remedies – Damages – Common law – Novel claim – Actio injuriarum – Dignitas – Whether to be extended – Constitution requiring courts to promote spirit and objects of Bill of Rights in developing common law – Plaintiff refused academic appointment by university selection committee – Plaintiff not furnished with reasons for decision – Plaintiff alleging that conduct of selection committee insulted and humiliated him – Whether conduct complained of reasonably capable of amounting to wrongful violation of plaintiff's constitutional rights – Whether damages an appropriate remedy – Whether judicial review more appropriate – Constitution of the Republic of South Africa 1996, ss 10, 38.

(2) Tort – Defamation – Freedom of expression – Alleged defamatory words – Defendant sending letter to plaintiff's superior at university implying that he neglected his administrative duties – Plaintiff claiming damages – Defendants raising exception to particulars – Whether words capable of alleged defamatory meaning – Whether prima facie defamatory – Whether right to freedom of expression providing defence – Appropriate test – Public purpose – Whether public purpose served by denigrating plaintiff.

The plaintiff, a former associate professor of law, brought proceedings against the defendants, a university and two professors, claiming damages of a compensatory nature for injury to his dignity and reputation by reason of various procedural irregularities in the consideration of his application for promotion to one of the Chairs of Law at the university for which he had been shortlisted, alleging that their treatment of him constituted a breach of certain of his fundamental constitutional rights, including the right to dignity protected by s 10 of the Constitution (which provided that 'everyone has inherent dignity and the right to have their dignity respected'). Although the plaintiff had duly complied with all the stipulated requirements the selection committee decided not to appoint the plaintiff but to appoint three other rival candidates and did not furnish him with any reason for their decision. The plaintiff alleged that in deciding to appoint rival candidates in preference to him the university had acted in breach of his rights and/or legitimate