IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION AC 31 of 2015

NUKU'ALOFA REGISTRY [CV 45 of 2015]

BETWEEN: MATENI TAPUELUELU

- Appellant

AND : ATTORNEY GENERAL

- Respondent

Coram : Moore J
Handley J
Blanchard J
Tupou J

Counsel : Mr. R. Harrison SC for the Appellant
Mr. 'A. Kefu SC for the Respondent

Date of Hearing : 30 March 2016

Date of Judgment : 8 April 2016

JUDGMENT OF THE COURT

[1] Mr. Tapueluelu appeals against a declaration made by Lord Chief Justice Paulsen that his election on 27 November 2014 as the People's Representative of the Tongatapu 4 Electoral Constituency was in breach of clause 65 of the Constitution and was unlawful and invalid, with the same consequence for his holding of that office.

[2] Clause 65 of the Constitution of Tonga is as follows:

> ***Qualification of representatives***
> *Representatives of the people shall be chosen by ballot and any person who is qualified to be an elector may nominate as a candidate and be chosen as a representative for the electoral constituency in which he is registered, 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 remains outstanding on the day on which such person submits his nomination paper to the Returning Officer:*
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> *Provided that a person resident outside of Tonga who is qualified to be an elector will qualify as a candidate only if he is present in Tonga for a period of 3 months within the 6 months before the relevant election.*

The facts

[3] The facts are not in dispute. At the date of Mr. Tapueluelu's nomination, and also when he was chosen as a representative for the constituency, there was a judgment of the Magistrate's Court entered against him. On 17 June 2011 he had been held liable to pay William Clive Edwards $10,000 in damages and $4,500 in costs in a civil action for defamation. Mr. Tapueluelu had lodged an appeal against the Magistrate's decision but his appeal had been struck out by the Supreme Court on the ground of inordinate and inexcusable delay in the prosecution of the appeal. An application for leave to set aside the Supreme Court's decision and for a stay of execution of the Magistrate's Court's judgment had been dismissed by the Supreme Court. But then on 30 August 2012 a single Judge of this Court had given leave to appeal to this Court and ordered that the Magistrate's Court's judgment be stayed pending the decision of this Court.

[4] That stay remained in force when Mr. Tapueluelu was nominated, registered as a candidate, elected and took his oath of office as a People's Representative.

[5] At a later time, in June 2015, his appeal against the Magistrate's Court's judgment was dismissed by this Court but that is of no relevance to the issue of constitutional breach now before this Court. Clause 65 requires an assessment on the day on which the candidate's nomination papers are submitted. Nor is it relevant that with his nomination Mr. Tapueluelu had submitted letters of clearance from both the lower courts as required by s.9(4) of the Electoral Act 1989. If they were in error they cannot save a candidacy invalidated by clause 65.

The Electoral Act restrictions

[6] This proceeding has been brought by the Attorney General as an ordinary civil action seeking declarations of unlawfulness and invalidity. It is not brought under any provision of the Electoral Act, but in that statute there are some provisions restricting the right to challenge an election as having been unlawful. Those of present relevance are:

> *"25.* ***Method of questioning election.***
> (1) *No election and no declaration of poll shall be questioned except by a petition complaining of an unlawful election or unlawful declaration (in this Act referred to as an election petition) presented in accordance with this Part of this Act.*
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> ....
>
> *26.* ***Election petitions.***

(1) An election petition may be presented to the Supreme Court by one or more of the following persons –

(a) A person who voted or had a right to vote at the election;
(b) A person claiming to have had a right to be elected or returned at the election;
(c) A person alleging himself to have been a candidate at the election.

....

27. ***Time for presentation of election petition.***

(1) Subject to the provisions of this section, an election petition shall be presented within 28 days after the day on which the result of the poll has been declared.

....

The issues

[7] The issues considered in the Supreme Court were:

(a) Whether a Tongan Court's order for payment of a specific sum of money remains "outstanding" if execution of the order has been stayed by that court or a higher court;

(b) Whether it is possible to challenge the validity of the outcome of an election by a means other than a petition brought under, and within the time limit fixed by, the Electoral Act, in a case raising an issue under cl 65 of the constitution;

(c) Whether such a challenge can be brought by the Attorney General; and

(d) Whether the Supreme Court in the exercise of its discretion should, in any event, refuse to grant any relief.

The Supreme Court's judgment

[8] Having reviewed some Tongan authorities on the interpretation of clause 65, none of which was seen as precisely in point, the Lord Chief Justice considered the legal effect of a stay as between creditor and debtor. He concluded that in that circumstance:

> *The effect of a stay of execution is to prevent the judgment creditor from compelling payment by use of the processes of the Court, but it does not release the judgment debtor from his present obligation to pay the judgment debt nor does it deprive the judgment creditor of any other rights he may have available to him to obtain payment (such as exercising a right of set off).* (At [31])

[9] The Lord Chief Justice said that the fact that the Magistrate's Court's judgment was subject to a stay of execution did not release Mr. Tapueluelu from the obligation to pay the judgment debt. It remained "both unpaid and payable" on the day of his nomination as a candidate. He did not accept an argument that the purpose of the proviso to clause 65 was to ensure that only solvent (and perhaps fiscally responsible) candidates stand for election. It was, he said, the simple fact of indebtedness pursuant to a court order and not insolvency that is the bar to nomination. He was unpersuaded that either the form of the Electoral Act and in particular, the introduction of the s.9(4) clearance procedure by

amending legislation in 2010, or the long-standing system of appeals and discretionary stays of execution pending their determination required a different approach to the proviso. Nor did the Lord Chief Justice believe that it was unsatisfactory that the person ordered to pay a money judgment was debarred from standing for election "no matter how unjustified or substantial" the judgment was or even if it was stayed and ultimately overturned on appeal. He pointed out that the judgment debtor could pay or compromise the debt if wishing to stand for election. Clause 65 was not concerned with whether a judgment was justified or substantial or under appeal or beyond challenge. It did not matter either whether it was ultimately successfully appealed. Mr. Tapueluelu fell within the disqualification and was ineligible for election in the 2014 General Election.

[10] On the second issue, the Lord Chief Justice did not accept that ss.25-27 of the Electoral Act provided the exclusive means of challenging the election outcome. The sections were, he said, inconsistent with the Constitution in the sense that they interfered with its ambit in a respect that the Constitution did not intend. There was no intention that clause 65 would be subject to

regulation at the will of the Legislature. It was "proscriptive and absolute in its terms". Sections 25-27 limited the right to bring a challenge to those few persons referred to in s.26(1) and would exclude, for instance, challenge by the Attorney General. The section also limited the time within which a challenge could be made to an election in reliance on cl 65 to just 28 days, even in circumstances where a successful candidate's disqualification was not and could not have been known.

[11] The Lord Chief Justice also rejected the further argument that the Attorney General had no standing to bring a challenge even if the Electoral Act did not bar it.

[12] As to the discretion to decline declaratory relief, the Lord Chief Justice said that although a year had passed since the election it had been conceded that the Attorney General was not aware that Mr. Tapueluelu had an outstanding judgment when he was nominated and had pursued the proceedings urgently when made aware of it. There was no suggestion of prejudice from delay. He accepted that Mr. Tapueluelu had acted in good faith, believing that the stay dealt with any issue concerning clause 65. But he

was not prepared to create an exception to the application of the clause based on the existence of good faith. It would introduce uncertainty and encourage non-compliance with the Constitution. A declaration of invalidity would leave the constituency unrepresented in Parliament but the Judge had no doubt that any lacuna in the legislation could be quickly filled allowing for a bye-election to be called.

Clause 65

[13] Clause 65 of the Constitution disqualifies as a candidate anyone otherwise qualified to be an elector if on the date of nomination that person has been ordered by a Tongan Court to pay a specific sum of money any part of which "remains outstanding". The question for us to decide is how literally the word "outstanding" should be read in the context of this constitutional provision. The Lord Chief Justice was guided by the approach taken in cases in which it was necessary to decide what steps could be taken by a judgment creditor in the face of an order staying execution of the judgment. These cases, from which the Lord Chief Justice cited *Clifton Securities Ltd v Huntley* [1948] 2 All ER 283 and *Pollack v Commissioner of Taxation* (1991) 32 FCR 40, appear to establish that in such a context the debt remains payable, and that all that

the stay does is to prevent the creditor from putting into operation the machinery of the law, as Denning LJ remarked in *Clifton Securities* at p.284. If a self-help remedy such as a set-off is lawfully exercisable the stay does not prevent that.

[14] Gummow J said in *Pollack* at p.56 that enforcement was concerned with the means of compulsion, whether of the debtor or of third parties "such as those to whom orders for a garnishee are directed". In that context Gummow J's statement must be correct. We query the comment to the contrary of the majority of the Court of Appeal of England and Wales in *Berliner Industriebank Aktiengesellschaft v Jost* [1971] 2 All ER 1513, 1519. Possibly the majority may have been influenced by a particular form of stay order then in use in that jurisdiction.

[15] However, the focus in such cases is only on the position as between the debtor and the creditor. Clause 65 has a wider focus on the public interest in the process of choosing of People's Representatives. A different approach is needed to the word "outstanding" where it appears in the context of a constitutional provision concerning suitability to be elected. It should not be

construed literally and technically, but, rather, with the evident purpose of the provision in mind.

[16] What is intended by clause 65, we believe, is that a person qualified as an elector should not be able to become a candidate at an election if at the time of nomination he or she is in default in complying with a court order "for the payment of specific sum of money". In fact, even the expression we have just quoted illustrates that the words of the clause must be read purposively and not literally. We say this because in a civil action it would be rare indeed to find a court literally ordering someone to pay a sum of money.

[17] A civil court ordinarily gives judgment for a sum owing by the defendant to the plaintiff (eg. "T is awarded damages in the sum of $100 against Y" or "T will have judgment for $100 against Y"). But such a judgment does no more than create a judgment debt. It is not framed as an order to pay. If the judgment debtor does not pay, he is not in breach of the judgment or order so as to be in contempt, though of course he is liable to the processes of

execution if the judgment creditor invokes them, subject to any stay obtained by the debtor.

[18] It is therefore necessary, in order that clause 65 should operate as it must have been intended, to treat the words "for the payment of a specific sum of money" as if they included judgments for a specific sum of money.

[19] The same purposive interpretation should be given to "outstanding" in clause 65. Once a stay has been granted the judgment debtor is not in default (even if the judgment was in the form of an order to pay) because the judge granting the stay, which is likely to be granted only pending the determination of an appeal, has concluded that the debtor should not be compelled by court process to pay until it is decided. It is true that in some situations the creditor may still be able use self-help to get paid but for most practical purposes the effect of a stay is that in the meantime the debtor need not make any payment. In effect, that is what the court has decided in issuing the stay.

[20] Approached in this non-technical way, and bearing in mind what we see as the purpose of the provision – to prevent someone in default of a court order for payment of money from being nominated etc. – the judgment debt is not "outstanding" in terms of clause 65 once a stay has been ordered. The debtor cannot be seen to be in default in the sense that he is simply ignoring the judgment or refusing to give effect to it. He has gone back to the court and it has agreed to stay the operation of the judgment so far as court processes are concerned.

[21] Two further considerations reinforce our view. Firstly, if the correct approach was the technical one found in the case law to which we have referred, a debtor who had tendered the judgment amount to the judgment creditor and had his tender refused (perhaps because of an argument about costs) would be caught by clause 65 because the debt would technically still be payable and therefore outstanding. It can hardly be the intention of clause 65 to prevent someone in that position from being elected as a People's Representative.

[22] And secondly, we are influenced by the stark contrast between the position of someone convicted of a crime and the position of a mere debtor if the technical interpretation that attracted the Supreme Court is given to clause 65. Clause 23 of the Constitution reads as follows:

> **Disabilities of convict**
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> No person having been convicted of a criminal offence and sentenced to imprisonment for more than two years, shall hold any office under the Government whether of emolument or honour nor shall he be qualified to vote for nor to be elected a representative of the Legislative Assembly unless he has received from the King a pardon together with a declaration that he is freed from the disabilities to which he would otherwise be subject under the provisions of this clause.
>
> Provided that the operation of this clause shall be suspended in any case until the expiration of 42 days after the date of sentencing; and in cases where notice of appeal or leave to appeal is given within 42 days after the date of sentencing, until the determination of the appeal; and if the conviction is quashed on appeal or the sentence reduced to no more than 2 years imprisonment then this clause shall not have effect.

[23] The proviso suspends any disqualification pending the outcome of an appeal and disapplies it if the appeal is sufficiently successful that the conviction is quashed or the sentence reduced to 2 years or less. Would it really be intended that someone who obtains a

stay and wins their appeal against a civil judgment, should be in a worse position? Admittedly, on the construction of "outstanding" that we prefer, an ultimately unsuccessful appellant like Mr. Tapueluelu would also avoid disqualification if granted a stay pending his appeal, but that is a less undesirable result than the penalisation of the successful appellant, who should not be in a worse position than his criminal counterpart.

[24] The Lord Chief Justice was influenced in his conclusion by some Tongan case law on clause 65 but none of the earlier decisions in this Court considered the position if a stay was in place on the day of nomination. It is to be observed also that in *Attorney General v Fuko* [2002] TOCA 9 at [5] this Court said that the word "outstanding" is capable of more than one meaning according to the context. In *Fuko* the judgment creditors and the debtors had reached agreement for payment of the debts by instalments, all of which were up to date. The Court held that the unpaid balances were not "outstanding". In its more general remarks the Court was simply not addressing the position after the granting of a stay, although we observe that at [3] it said that the exclusion of a

candidate for election "strongly suggests some serious default is involved". We agree.

[25] We have, for the foregoing reasons, concluded that Mr. Tapueluelu was not disqualified by clause 65 as execution of the judgment against him was stayed. His appeal therefore succeeds.

The Electoral Act provisions

[26] It follows that he does not need to show that the Lord Chief Justice also erred in holding that ss 25-27 of the Electoral Act were not an exclusive means of challenging an election outcome. As we have heard full argument on the point, however, and have reached the view that the sections did prevent the Attorney General from bringing the present proceedings, we should briefly say why that is our view.

[27] While the Constitution contains some provisions relating to elections it does not flesh them out with a detailed scheme for how an election should be conducted and disputes about its outcome resolved. That is left to the Legislature and the scheme

is found in the Electoral Act. The peace, order and good government of Tonga obviously requires as much stability as possible in the membership of the Legislature. Elections, whilst essential in a democratic society, have the potential to create some degree of instability until the composition of the Legislature is settled, especially if the result of an election is generally, or in particular constituencies, a close one. It is highly desirable, therefore, that challenges to an election outcome are made and determined with all due speed. It is accordingly to be expected that any sensible electoral scheme will so provide and, in particular, that there will be a strict time limit within which any challenge must be made.

[28] Section 25 – 27 limit who can bring a challenge and when it can be brought, as well as prescribing the procedure of any challenge. Challenges can be brought only by the individuals listed in s.26(1), who all had a direct interest in the outcome. (Contrary to what the Lord Chief Justice said, they are not just a "few persons" but include all who had a right to vote in that constituency). The challenge must be made within 28 days after declaration of the

result (with a limited extension for cases of bribery after the event) and the challenge must be by election petition.

[29] Those restrictions are a reasonable and proportionate limitation upon the disqualification provisions found in the Constitution. They do not "infringe the Constitution", to adopt the expression of this Court in *Touliki Trading v Fakafanua and Kingdom of Tonga (No.2)* [1996] Tonga LR 145, 152. They merely ensure that the bringing of belated challenges does not create instability in Tongan society and that only persons with a direct interest can bring challenges. They therefore further legitimate constitutional goals. Similar provisions are found in other democratic societies.

[30] The Attorney General seeks to stand outside this legislative scheme but we do not consider he is able to do so in the face of the clear words of s.25(1) that "No election ... shall be questioned except by a petition .... presented in accordance with this Part of this Act." The Legislature could have included the Attorney General in the list in s.26(1) but has not done so. We do not regard that absence as any indication that he alone is able to bring a challenge by another means and outside the time limit.

[31] We have been referring to the situation after an election has taken place. Nothing we have said is intended to cast any doubt on the ability of the Attorney General to challenge a candidacy prior to an election, as happened in *Attorney General v Tupouniua* [1999] Tonga LR 21. Sections 25 – 27 operate only after the election.

Result

[32] The appeal is allowed, with costs to the appellant in this Court and the Supreme Court to be taxed if not agreed.

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Moore J

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Handley J

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Blanchard J

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Tupou J