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IN THE COURT OF APPEAL  
CIVIL JURISDICTION  
NUKU'ALOFA REGISTRY

AC 22 of 2022  
(CV 55/2022)

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BETWEEN

[1] FATAI HELU

[2] PAULA PIVENI PIUKALA

Appellants

AND

[1] THE ELECTORAL COMMISSION

[2] LORD NUKU

Respondents

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**JUDGMENT OF THE COURT**

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Court:       Randerson J  
              White J  
              Morrison J

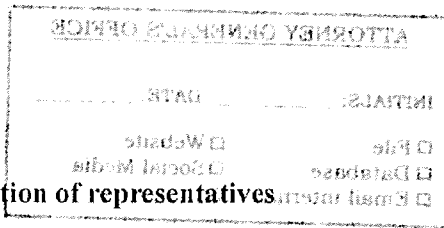
Counsel:     Mr S Fonua for the Appellants  
              Mr T 'Aho for the Respondents

Hearing:     30 March 2023

Judgment:   6 April 2023

**Introduction**

[1] In the election for the Legislative Assembly held on 16 November 2021, the second respondent, Lord Nuku, was elected as one of nine Nobles' Representatives. The respondents are associated with a political party known as PTOA or the Democratic Party. After the election they sought to challenge Lord Nuku's election on the ground that there was an outstanding judgment debt against him which they contended would disqualify him from election by virtue of clause 65 of the Constitution. This provides:



## 65. 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 remain outstanding on the day on which such person submits his nomination paper to the Returning Officer:

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.

[2] The response of the Supervisor of Elections to the issue raised by the appellants was that clause 65 only applies to the election of “Representatives of the people” and not to Nobles’ Representatives. On 17 August 2022, the appellants filed an application for leave to apply for judicial review of the decision of the Supervisor of Elections.<sup>1</sup>

[3] By a ruling issued on 29 August 2022, the Lord Chief Justice dismissed the application on a number of grounds we summarise as follows:

- (a) The proposed proceedings were a collateral attack on the validity of Lord Nuku’s election thereby contravening s 25 of the Electoral Act which forbids an election to be questioned except by a petition under that Act;
- (b) The application raised a merely hypothetical question;
- (c) There was undue delay in bringing the application and there was no good reason to extend time;<sup>2</sup>
- (d) The appellants had no sufficient interest in bringing the application;

<sup>1</sup> Order 39 Rule 2(1) of the Supreme Court Rules requires the grant of leave of the Supreme Court to any application for judicial review.

<sup>2</sup> Order 39, rule 2(2) of the Supreme Court Rules requires an application for leave to apply for judicial review to be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers there is good reason for extending that period.

- (e) On the merits, there was no arguable case to support the appellants' contentions. That was because, on its true construction, clause 65 is concerned only with the qualification of Representatives of the people and does not apply to Nobles' Representatives.

### **Submissions**

[4] In his written submissions, Mr Fonua for the appellants focussed almost wholly on the issue of whether the appellants had established an arguable case warranting the grant of leave. Counsel has since informed the Court through the Registry that the appellants no longer seek a declaration that the election of Lord Nuku is invalid. Rather, they seek only a declaration as to the effect of clause 65 of the Constitution.

[5] We express no view as to whether the absence of a direct challenge to Lord Nuku's election avoids the otherwise peremptory terms of s 25 of the Electoral Act as an independent ground to dismiss the application. We observe that the appellants' approach on appeal tends to emphasise the hypothetical nature of the proceedings but we propose to focus solely on the issue of arguable case. In doing so, we should not be taken as disagreeing with the discretionary grounds upon which the Lord Chief Justice declined the application for leave.

[6] Mr Fonua essentially repeated the submissions he had made in the Court below which may be summarised in these terms:

- (a) Clause 65 was ambiguous because it is divided into two limbs;
- (b) The first limb deals with the ballot, nomination and registration of the Peoples' Representatives while the second limb deals with disqualification for outstanding judgment debts;
- (c) The Court below erred by construing the second limb as applying only to the Peoples' Representatives;
- (d) The words "save no person may be chosen ..." in the second limb meant that the prohibition for those with an outstanding judgment debt applied to both Peoples' Representatives and Nobles' Representatives;

- (e) This interpretation was consistent with the scheme of the Constitution including, in particular, clause 4 which provides:

**4. Same law for all classes**

There shall be but one law in Tonga for Chiefs and commoners for non-Tongans and Tongans. No laws shall be enacted for one class and not for another class but the law shall be the same for all the people of this land.

- (f) The interpretation of clause 65 adopted in the Court below penalised Peoples' Representatives and absolved Nobles' Representatives.

[7] Addressing the scheme of the Constitution, Mr Fonua submitted that, prior to 1875, commoners were enslaved and had no rights. When the Constitution was promulgated in that year, King George Tupou I not only granted freedom to the commoners under the Constitution (clause 1) but also promoted commoners to be on the same level as the Chiefs by putting Peoples' Representatives in the Legislative Assembly (clause 59).

[8] Counsel described the 1975 Constitution as a social and cultural revolution in the Kingdom. The intention of the King at that time was said to have been expressed in clause 4 of the Constitution.

[9] Mr 'Aho for the respondents was content to rely principally on the reasoning in the court below.

**The approach in the lower court**

[10] The Lord Chief Justice described the modern common law approach to statutory interpretation as involving consideration of the text, context and purpose of the relevant enactment.<sup>3</sup> The natural and ordinary meaning of the words of the Act must be read in their context and in light of the purpose of the Act.<sup>4</sup> Considering the text of clause 65, the Lord Chief Justice made the following points:

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<sup>3</sup> *Attorney-General v Ikamanu* [2021] TOCA 3.

<sup>4</sup> *R v Schaumkel* [2012] TOCA 10.

- (a) The opening words of clause 65 refer to “Representatives of the people” but there was no reference elsewhere in the clause to Nobles or Representatives of the Nobles;
- (b) The phrase “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 ...” is referable to the opening phrase “Representatives of the people” This is confirmed by clause 60 of the Constitution which provides that the Legislative Assembly shall determine the boundaries of electoral districts for the election of Representatives of the Nobles and shall establish an independent Commission to determine the boundaries of the electoral constituencies for the election of Representatives of the people;
- (c) Clause 65 does not contain any reference to “electoral districts” which relates to Nobles’ Representatives. Rather, the reference to electoral constituency, is consistent with an interpretation of clause 65 as applying only to Peoples’ Representatives;
- (d) It followed that the words “that no person may be chosen ...” must refer to and be informed by the preceding text as relating solely to Peoples’ Representatives;
- (e) The disqualification for those candidates who have an outstanding judgment debt is to be assessed “on the day in which such person submits his nomination paper to the Returning Officer ...”;
- (f) An analysis of Part III of the Electoral Act and the Electoral Regulations showed that the procedure for voting in respect of each constituency applied only to the election of the Peoples’ Representatives and did not apply to the election of Nobles. In contrast, the election of Nobles’ Representatives is otherwise governed by the Electoral (Elections of Representatives for Nobles) Regulations 2017. Thus, the second limb of clause 65 relied upon by Mr Fonua must be taken as dealing only with the disqualification of Representatives of the people.

[11] Looking at the wider context of the Constitution, the Lord Chief Justice said:

56. As for context, clause 65 appears within Part II of the Constitution which established the law in relation to the form of Government. Specifically, the provision is within the section of the Part concerned with the composition, powers and procedures of the Legislative Assembly. It follows on from clauses 63, qualifications of nobles, and 64, qualifications of electors. The first provides that every noble shall be competent to vote in an election for representatives of the nobles and to sit in the Assembly if chosen according to law. The second disqualifies nobles from being entitled to vote in an election for representatives of the people. Clause 65 prescribes (and proscribes) the qualifications for the third category of persons involved in the electoral process, namely, representatives of the people.

[12] As the Lord Chief Justice briefly noted, the conclusion he reached on the interpretation of clause 65 is further supported by clause 64 which disqualifies Nobles from voting in the election of Peoples' Representatives. This emphasises the distinction between the two categories of representatives drawn by the Constitution and the different electoral qualifications and processes applying to each. Since Nobles are not permitted to vote in the election of Peoples' Representatives, clause 65 can have no application to Nobles.

[13] Addressing the effect of clause 4 of the Constitution the Lord Chief Justice observed that most previous decisions involved conflicts or inconsistencies with clause 4 with the provisions of other statutes rather than conflicts within the Constitution itself.<sup>5</sup> His Lordship observed that there was no obvious reason for restricting clause 65 to Peoples' Representative but considered that the language of the provision was clear and unambiguous, indicating what must be taken to have been the intention of the Monarch when the Constitution was granted and subsequent Parliaments with power to promulgate amendments to the Constitution.

[14] The Court below went on to refer to the recent decision of this Court in *Tu'alau v Tu'alau*<sup>6</sup> where the Court was considering whether s 87 of the Land Act was *ultra vires* for inconsistency with clause 113 of the Constitution. This Court rejected the primary argument raised by the appellants but also addressed an alternative argument raised by present counsel based on clause 4 of the Constitution. The Court pointed out that in reality, the Constitution

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<sup>5</sup> The Chief Justice distinguished what he described as a "rare example" of a case involving apparent conflict between provisions of the Constitution: *Tu'ipulotu v Kavanouku* (1938) 2 Tonga LR 143 (PC).

<sup>6</sup> *Tu'alau v Tu'alau* [2021] TOCA 2.

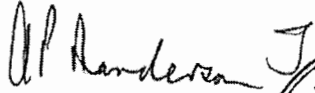
itself differentiates between nobles and commoners even in the important matters such as the provisions dealing with the complex land holding system in Tonga. This Court rejected the argument based on clause 4 of the Constitution in these terms:

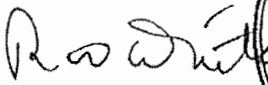
- [17] Mr Fonua raised an alternative ground to support his ultra vires submission. He submitted that s 87 was void under clause 82 of the Constitution because it infringed clause 4 of the Constitution which provides for one law for chiefs and commoners. Referring to clause 111 of the Constitution which prescribes the law of succession to hereditary estates and titles, Mr Fonua submitted that the Lords were treated differently from commoners because in the case of the former, there was no equivalent to the time prescribed by s 87.
- [18] There are considerable difficulties in applying the "one law for all" provision in clause 4 of the Constitution. In fact, there are a number of inconsistent provisions under the Land Act applicable to nobles and commoners. To take just one example, there does not appear to be any equivalent for commoners to s 37 of the Land Act under which holders of hereditary estates may lose their rights in certain circumstances.
- [19] The reality is that the Constitution itself differentiates between nobles and commoners. This necessarily arises from the complex land holding system in Tonga which provides differently for estate holders and Tongan subjects and recognises the distinct roles each of the key participants play in the system according to their respective functions and status. For example, all the land in Tonga is the property of the King who may grant hereditary estates to the nobles and titular chiefs or mataboules; the law of succession for hereditary estates is set out in the Constitution; and in the absence of legitimate heirs to an estate, it reverts to the King who may then confer the estate on someone else. In contrast, commoners have the right to apply for allotments under clause 113 with certain limitations and conditions on the grant of allotments to Tongan male subjects; rights of succession are not set out in the Constitution but in the Land Act; and s 83 of the Land Act provides for different rights of reversion when there is no person entitled to succeed to an allotment, depending on whether the land is Crown land or a hereditary estate.
- [20] In the end, in order to rely on clause 82, the appellant must demonstrate that s 87 of the Land Act is inconsistent with the Constitution. In circumstances where the Constitution itself necessarily differentiates between nobles and commoners, we are not persuaded that the attenuated argument advanced by Mr Fonua establishes an inconsistency of the kind contemplated by clause 82. This argument also fails.

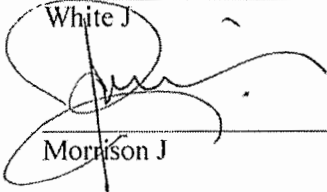
## Conclusion

[15] We agree with the Lord Chief Justice for the reasons he gave. His analysis of the text of clause 65 in the context of related provisions of the Constitution and other primary and secondary electoral legislation demonstrates that the disqualification ban in clause 65 relates only to the election of Peoples' Representatives. Whether the ban should also apply to Nobles' Representatives is a matter for the Legislative Assembly. We do not view clause 4 of the Constitution as overriding s 65 of the Constitution nor as bearing on its interpretation given the clear differentiation drawn between the electoral processes relating to Peoples' Representatives and Nobles' Representatives elsewhere in the Constitution. We see no reason to differ from the conclusion reached by the Lord Chief Justice that the appellants have not demonstrated an arguable case such as to warrant the grant of leave to bring judicial review proceedings.

[16] The appeal is dismissed. The respondents are entitled to costs against the appellants to be agreed or fixed by the Registrar.

  
Randerson J

  
White J

  
Morrison J

