

**IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY**

CV 06 of 2015

BETWEEN: PALU TAUFAETEAU

- **Applicant**

AND: SUPERVISOR OF ELECTIONS

- **Respondent**

Before Lord Chief Justice Paulsen

Heard: 4 March 2015

Appearances: Mr 'O Pouono for the applicant

R U L I N G

[1] This is an application pursuant to Order. 39 Rule 2(1) of the Supreme Court Rules for leave to file judicial review proceedings. The applicant, Mrs. Palu Taufauteau, seeks review of a decision of the Supervisor of Elections to remove her name from the list of candidates for the Tongatapu No 4 constituency in the 2014 general elections.

[2] Such applications are to be made within three months of the date when grounds for the application first arose (Order 39.Rule 2(2)). That did not happen here. Mrs. Taufateau concedes that the application has been filed outside the three months period. The decision of the Supervisor was made on 24 October 2014 and this application was filed on 12 February 2015. Applications for leave made outside the three months period will not be granted unless the Court considers that there is good reason for extending time.

[3] The issues for me to decide are:

[3.1] Is there good reason for extending time for the making of this application?

[3.2] If so, should leave be granted to Mrs. Taufateau to move for judicial review?

The relevant facts

[4] The applicant is a licensed lawyer. She decided to stand for Parliament in the 2014 General Election. On 23 October 2014 she went to the Electoral Commission's offices and was registered as a candidate in the Tongatapu No 4 constituency. She says that she submitted the documents to be validly registered as a candidate. These included the clearances from the Magistrate's Court and the Supreme Court that are required by section 9(4) of the Electoral Act (inserted by section 11 of the Electoral (Amendment) Act 2010) stating that there were no outstanding orders against her for payment of any sums of money. Her application was processed and she paid a T\$400 fee. She says that she was then 'given a receipt and I was on the list as registered candidate for 2014 national election'. That night

her name was advertised on the television and the radio as a candidate.

- [5] Mrs. Taufaeteau's nomination was accepted despite the fact that on 21 October 2014 Mrs. Dana Stephenson, a local lawyer, had written to the Electoral Commission putting it on notice that Mrs. Taufaeteau had a judgment entered against her in the Supreme Court for T\$2,164 in favour of Mr. Yoshimitsu Kawata and that the judgment sum had not been paid. Mrs. Stephenson asserted that Mrs. Taufaeteau was disqualified from running as a candidate in the forthcoming election under clause 65 of the Constitution.
- [6] I understand that Mrs. Taufaeteau does not dispute the fact of the judgment or suggest that it had been paid. When registering her nomination Mrs. Taufaeteau told the Supervisor of Elections, Mr. Pita Vuki, that she had filed an appeal from the judgment and that he should rely upon the clearance she had obtained from the Supreme Court. I should note at this point that the certificate of the Supreme Court was obscure, stating that there were no records found in the Court of any outstanding debts owed by Mrs. Taufaeteau 'except for an appeal case which is currently pending with the court'. I understand that what was being referred to was the judgment for T\$2,164 in favour of Mr. Kawata.
- [7] Mrs. Taufaeteau says that on 24 October 2014 she was approached in a rude and inappropriate manner by the Chief Magistrate. He had learned of the judgment of Mr. Kawata and challenged Mrs. Taufaeteau's right to be a candidate. That day the Chief Magistrate wrote a letter to the Supervisor of Elections requesting the cancellation of the clearance that had earlier been provided by the Magistrate's Court under section 9(4) of the Act.

- [8] I understand that the Electoral Commission took legal advice from the Attorney General and decided to revoke Mrs. Taufaeteau's candidacy. She was advised of this in a letter given to her on 24 October 2014, signed by the Supervisor of Elections. It stated that a decision had been made to 'remove your name from the registered candidate for electoral constituency Tongatapu 4'.
- [9] Mrs. Taufaeteau took no steps to formally challenge the decision. It appears that had she been refunded the T\$400 registration fee then that would have been the end of the matter. The fee was not refunded.
- [10] On 24 January 2015 Mrs. Taufaeteau read an article on Kele'a about another candidate who had been elected to Parliament despite having a judgment entered against him. Apparently the Supreme Court had issued him with a letter of clearance in a similar form to that provided to Mrs. Taufaeteau. Mrs. Taufaeteau said that upon learning of this she felt discriminated against and this gave her inspiration to file for judicial review.
- [11] In her draft statement of claim Mrs. Taufaeteau pleads that the Supervisor of Elections made his decision in breach of the rules of natural justice and without her first being given an opportunity to respond or be heard. The statement of claim prays for an order quashing the decision made by the Supervisor of Elections terminating her candidacy. I understand that she now accepts that such an order would have no utility and that she in fact seeks a declaration that the decision was unlawful as a vindication of her rights.

Is there good reason for extending time for the making of this application?

- [12] When an applicant for leave to move for judicial review fails to apply within three months they must show 'good reason' why time should be extended. The Court's discretion to extend time is a wide one. In this context, good reason must mean that there exists some fact, condition, or situation that makes it proper or appropriate for the Court to extend time. This might be, for instance, because the applicant's circumstances are such that she could not with reasonable diligence file an application within three months. In other circumstances the issue arising in the case might be of such general importance that leave should be granted notwithstanding an unacceptable delay.
- [13] There was nothing to prevent Mrs. Taufaeteau filing an application for leave within three months. She is a lawyer and must be taken to know of the time limit that applies to such applications. She clearly decided not to challenge the decision, at least initially. Her affidavit details attempts she made to get a refund of the registration fee but says nothing about any intention that she had to challenge the decision or steps she took to do so. It was only the Kele'a article that gave her inspiration to seek judicial review by which time the three months had, or was about to, expire. It took over two further weeks for the application to be filed.
- [14] I do not accept, as Mr. Pouono urged, that I should take into account that a number of public holidays fell within the three months period. The public holidays were not causative of the failure of Mrs. Taufaeteau to file the application for leave within time.

[15] I do not consider that this case raises an important issue of law such that I should grant leave notwithstanding Mrs. Taufaeteau's delay. The law in this area has been thoroughly considered in a number of cases including *Attorney General v Tupouniua* [1999] Tonga LR 21 and most recently in *Pohiva v Mafi and Others* (CV 75 of 2015, 17 October 2014, Scott LCJ) and by the Court of Appeal in *Supervisor of Elections and Others v Tupouniua* (AC 32/2014).

[16] Mr. Pouono stressed on me the importance of the Court's role to acknowledge legal rights and renounce unlawful action. It was submitted that if a wrong is done there should be a remedy for it. I am not persuaded by that submission as if Mrs. Taufaeteau is deprived of a remedy for a wrong done to her that is only because she failed to act promptly to assert her rights.

[17] I therefore find no good reason to extend time to move for judicial review in this case.

Is this an appropriate case to grant leave to Mrs. Taufaeteau to move for judicial review?

[18] Given my findings above, I do not need to consider this second issue but will make some brief comments about it.

[19] The requirement that a party must obtain leave to apply for judicial review is designed to eliminate those cases that are hopeless, frivolous or vexatious, and to remove, where possible, any uncertainty that may exist over the performance of public duties while proceedings for judicial review are pending. Leave will only be granted if there is an arguable case which merits full investigation by the Court.

- [20] Based on the limited information I have before me, and not having heard from the Supervisor of Elections, I accept that there is an arguable case that once Mrs. Taufateau's nomination was accepted the Supervisor of Elections had no power to reject it. *Sanft & Fuko v 'Aho & Kingdom of Tonga* [1990] Tonga LR 35.
- [21] That notwithstanding, I do not consider that leave to move for judicial review should be granted. Mrs. Taufateau had an outstanding judgment against her of the Supreme Court. She was not entitled to stand for election as a people's representative in breach of clause 65 of the Constitution. The fact that she had appealed the judgment did not alter the situation. The fact of the judgment operated as a complete bar to her nomination. Of particular relevance are the comments of Lord Chief Justice Scott in *Pohiva v Mafi and Others* at [16] to [18]. As a practicing lawyer Mrs. Taufateau should have been aware of this.
- [22] Legal proceedings could have been brought to nullify Mrs. Taufateau's nomination to avoid distortion, disruption, cost and inconvenience to the electoral process. *Attorney General v Tupouniua* at [28]. I can infer that such proceedings would have been taken to remove Mrs. Taufateau as a candidate had the Supervisor of Elections not believed that he had the power to remove her as a candidate without legal proceedings.
- [23] It is inconceivable, in my view, that in the circumstances of this case the Court would ever exercise its discretion to grant Mrs. Taufateau any remedy in judicial review proceedings. Whether one puts this on the basis that Mrs. Taufateau does not come to the Court with clean hands and is undeserving or that her removal as a candidate was inevitable (regardless of any shortcomings in the approach of the Supervisor of Elections) in the end makes little difference. Mrs.

Taufaeteau's registration as a candidate was in breach of the Constitution and as the Court of Appeal observed in *Attorney General v Tupouniua* at [30] 'The Court has noted a number of times now the importance of strictly observing the Constitution and of removing ineligible candidates from the roll prior to the election'.

[24] Furthermore, the Court will not grant remedies that serve no useful purpose. The elections were held months ago now and Parliament is sitting. It is clear from her affidavit that what Mrs. Taufaeteau feels most aggrieved about is the manner in which she was treated by the Chief Magistrate and by the Supervisor of Elections. All she stands to gain from proceedings is the possibility of the Court's endorsement that she is right to feel this way. In my view that is not a compelling basis to grant leave to take judicial review proceedings.

The result

[25] The application for leave to apply for judicial review is refused.

NUKU'ALOFA 17 March 2015



A handwritten signature in black ink, appearing to read "O G Paulsen".

**O G Paulsen
Lord Chief Justice**