IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY   CV 80 of 2014

BETWEEN: SIONE KEUATE TUPOUNIUA   -   _Applicant_

AND: 1. SUPERVISOR OF ELECTIONS - _(PITA VUKI)_

              2. CHAIRMAN OF THE ELECTORAL COMMISSION -

              (MR BARRIE SWEETMAN)

              3. THE ELECTORAL COMMISSION

                                                  Respondents

BEFORE HON. JUSTICE CATO

Mr Kahungunu Barron – Afeaki SC for the Applicant

Mr Kefu - Acting Attorney General for the Respondents.

J U D G M E N T

[1]   The applicant sought review of the refusal by the respondents to
      receive and register his nomination as a candidate for the
      forthcoming Parliamentary elections to be held on the 27th November,
      2014. His attempted application to register was declined on Friday
      24th October, 2014 by the first respondent (in his capacity as a

Returning officer), and was later confirmed by the second respondent.

[2] The reason his application was declined was the time for the acceptance of applications for nomination had closed when the applicant attended the Commission's Offices with the intention of presenting his nomination; the relevant time, being 3pm on the date fixed for nominations which was the 24th October, 2014. In this regard, section 9 (1) provides;

> " On the day or days and at the place fixed, the returning officers shall attend between the hours of 10am and 3pm, and receive the nomination of any qualified candidate or candidates for the seat or seats to be filled."

[3] Section 9(3) requires a deposit of $400.00, to be provided, and section 4 provides that a candidate shall, before completing his nomination, deliver to the returning officer a written clearance from the Supreme Court and Magistrate's Court that there is no record of an outstanding order as specified in clause 65 of the Constitution relating to the candidate.

[4] In this regard, clause 65 of the Constitution provides;

> "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 shall be chosen against whom an order has been made in any court in the Kingdom for the payment of a specified sum of money the whole or an part of which remains outstanding or if ordered to pay by instalments the whole of any part of such instalments remain outstanding on the day on which such person submits his nomination paper to the Returning Officer."

[5] The problem the applicant faced in having his nomination accepted by 3pm on the 24th October, 2014, was that he was late in settling a judgment debt he had with a bank in Tonga as a consequence of the clearance of a telegraphic transfer sent from New Zealand to extinguish the debt, on or about that date. Appreciating the urgency of requiring a clearance from the Supreme Court in order to meet the 3pm closing time, he paid out the debt in cash and obtained a bank

clearance at about 2.15pm on the 24th October, 2014. I accept further on the evidence that I heard he arrived at the Supreme Court where at 2.40 pm he made application at the counter for a debt clearance in a handwritten document which was time and dated stamped.

[6]   The applicant give evidence concerning the events of the 24th October, 2014, as did a witness who also had driven with him to the Court and had previously attended the bank. Other deponents gave evidence including the Registrar of the Supreme Court, as well as others from the Registry concerned with obtaining the clearance. I also heard evidence from the first respondent and other deponents from the Electoral Commission concerning the declination of the nomination. Although there is some conflict as to times, I accept, as did Mr Kefu, that the applicant had arrived at the Court and made application some time before 2.40 when he was asked to make a written application by a registry officer. I accept that he had with him the bank's clearance, as well and that this was presented to registry officers. I was the only Judge available at the Court that day and was engaged in court on the afternoon of the 24th December, 2014. Authority for a clearance from a Judge must be obtained before the Registrar is able to give a clearance. Although a registry officer said she went into court shortly before 3pm, having retrieved the Court file relating to the debt, no approach was made by her at that time to have me authorise a clearance because I was engaged in a sentencing. She returned to the Registry. The Registrar appreciating the urgency of obtaining authorization from me prepared a minute for me to consider whilst I was in court. The file and request for authorization was handed to me and I briefly adjourned the matter I was engaged in and authorized the clearance. I accept the evidence from Registry officers that this occurred after 3pm.

[7]   I also accept that before the applicant had arrived at court on the 24th he had spoken to the Registrar and informed him of problems he was having associated with the bank clearance and that both he and the Registrar were aware of the importance of obtaining the clearance to meet the 3pm closure time. I accept also the Electoral Commission staff (and indeed the first respondent) had been made aware by the

Registrar prior to 3pm on the 24th October, 2014, that the applicant had cleared his debt and that the Registrar had seen evidence of the bank's clearance. He must have been aware then that the applicant intended to apply for registration. He was informed also by the Registrar that he was having difficulty providing a formal clearance because authority had to come from a judge first. The applicant left the Supreme Court and went to the Electoral Commission's premises shortly before 3pm without the court's clearance of the debt in order to present his nomination. I also accept the evidence from Commission officers that not only did he not have a clearance from the Supreme Court but nor did he have one from the Magistrate's Court as section 9(4) requires. I accept he arrived shortly after 3pm and was advised that the time for registration had closed. The formal clearance by the Supreme Court was forthcoming about 3.30 pm.

[8] The decision by the first respondent was approved by the second respondent after it seems consultation with the Attorney – General's Office. The applicant then left the Electoral Commission's offices returning the following Monday to receive a formal letter relating to the declination dated the 27th October, 2014. That letter recorded the reason as being that, at the closure of the time for nomination being 3pm, the Commission had received no nomination from him.

[9] I am satisfied on the evidence that I heard as I have said that the Commission were well aware that the applicant intended to nominate prior to 3pm on the 24th October, 2014. At one point in argument, Mr Kefu suggested that, if he had gone directly to the Commission with his fee, and the bank letter of clearance, it is unlikely his nomination would not have been accepted.

[10] Arguments were well presented for both sides by Mr Barron- Afeaki SC for the applicant and Mr Kefu for the respondents. Mr Afeaki contended that his client had met the constitutional requirements under clause 65 and should have been able to nominate even though there had been no clearance of the debt by the Supreme Court. He contended the requirements under section 9(4) for a clearance of

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debt were surplusage and, indeed, repugnant to the provisions of clause 65. He cited several authorities where issues relating to severance of repugnant provisions in subordinate legislation had featured and submitted that I should rule that the refusal to accept the nomination was unreasonable where the applicant qualified under the Constitution to be a candidate and had no debts. Fuko v Vaikona [1990] Tonga LR 148; Afeaki v Fuko [1993] TLR 15, Taione v Kingdom of Tonga [2004] Tonga LR 67

[11]   Mr Kefu contended the provisions relating to clearances under section 9(4) were not repugnant to the Constitution and cited to me several authorities where candidates had been incorrectly accepted for nomination when they did in fact have judgment debts. He submitted that the section in question was facilitative of the Constitution, and not repugnant to, and I accept that it is facilitative. I was informed that amendment was made to the Act in 2010 to avoid debt impaired candidates being registered for nomination, as some had been. AG v Tupouniua [199] Tonga LR 21; AG v Helu [2005] TOSC 45 He pressed additionally the reason for the declination given in the Chairman's letter of the 27th October, 2014, that the time for nomination had expired. He argued that the provisions in section 9 were mandatory and required strict observance. When asked whether there were, in the circumstances of this case, any reason why a late application for nomination would cause prejudice, he responded there were no reasons why this would be so. Further, at the end of hearing, he confirmed that the only additional cost caused by late registration would be reprinting the ballot sheet which would not, he acknowledged, be unduly expensive. He submitted that to hold that the section was directory would to blur the certainty of application criteria contained within section 9 and might have a floodgate effect. On this point, Mr Afeaki countered by submitting that requirements were directory and that, in any event, the circumstances of this case were exceptional.

[12]   On the issue of mandatory and directory requirements as a factor in relation to invalidity of the exercise of statutory powers, I refer to

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Professor HWR Wade's 'Administrative law", 5th ed, Clarendon Press, Oxford, 1982 at page 221;

> "Sometimes the legislation makes it plain what the effect of non – observance is to be. But more often it does not, and then the court must determine the question. This the court does by weighing the inconvenience of holding the condition ineffective against the inconvenience of insisting upon it rigidly. It is a question of construction, to be settled by looking at the whole scheme and purpose of the Act and by weighing the importance of the condition, the prejudice to private rights and claims of public interest."

Further, Professor Wade comments at page 222 that;

> "Time limits may be held to be mandatory where the rights of other persons depend on them or are of importance."

He then continued further;

> 'But time limits governing electoral procedure may sometimes be exceeded with impunity, as where a list of voters was revised after the time appointed by the Act."

[13] The distinction between directory and mandatory conditions has received some criticism as Aronson and Dyer point out in their "Judicial Review of Administrative Action", 2nd ed, LBC Information Services, 2000, at page 270 referring to the observations of the High Court of Australia in Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, at 390-391. The majority in Blue Sky as the commentators, however, point out looked well beyond the Act's language, to the consequences of invalidity which seems to be an approach not dissimilar to the approach advanced by Professor Wade and one which I adopt here.

[14] It is, as Mr Afeaki SC submitted, a very serious consequence to deny an otherwise appropriately qualified applicant the opportunity to seek election to Parliament. The right to vote and the opportunity to seek election for Parliament are cornerstones of parliamentary democracy. Whilst I agree with Mr Kefu that there should be reasonable certainty in the application of statutory requirements, I do not agree that those conditions must be inexorably applied so that a failure to comply

results immediately in exclusion from registration. I agree that there is no statutory discretion appearing in the legislation and this factor understandably influenced the first respondent's rejection of the applicant's attempt to nominate, but the absence of a statutory discretion does not mean that a court must inevitably rule that a failure to comply timely with a statutory timetable and procedure must be fatal to an application for registration. As the passage from Professor Wade suggests and the approach also of the High Court in <u>Blue Sky</u> illustrates, a court must consider the consequences of invalidity before ruling that this must be so. That would also include any prejudicial aspects of late registration for others who might be affected but that was not the case here.
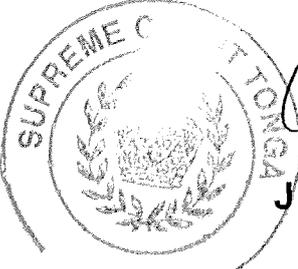
[15] In this case, it is plain that prior to the closure time of 3pm the Commission were aware that the applicant intended to nominate, and was awaiting the clearance from the Supreme Court. His judgment debt had to the first respondent's knowledge, as I have said, also been satisfied. He was appropriately qualified to stand for Parliament and wished to do so. I consider that rejecting his candidature in these circumstances was wrong, and probably was influenced, as the first respondent's affidavit would suggest, by the fact that there was no statutory discretion to extend or depart from the statutory requirements contained in section 9. I do not agree with Mr Kefu's submission that to allow this application would open the floodgates. I agree that, although the applicant was foolish and has only himself to blame for leaving it so late to comply with the statutory requirements for clearance, the consequences of denying his candidacy in these, I consider exceptional circumstances, would be wrong and unreasonable. Had the Commission granted his application and extended the time for him to nominate and obtain clearances which could have been achieved on the 24th October 2014, albeit after 3pm, I do not consider any complaint of invalidity could have been successfully entertained. I should also add that, because there had been no clearance from the Magistrates' Court, I asked that such a clearance be obtained quickly. One was forthcoming confirming that he had no other debts, in that Court, either.

[16] Consequently, I have decided to grant the relief sought. I do not, bearing in mind that the election is imminent, see any need to refer the matter back to the Commission for reconsideration.

[17] Accordingly, I grant the orders sought to this extent;

    a. The applicant is deemed to have fulfilled all the nomination requirements under section 9 of the Electoral Act and is not disqualified under the Constitution from being a candidate for election.

    b. The respondents register the applicant forthwith as a candidate for the Tongatapu Number 1 parliamentary constituency for the General Election to be held on the 27th November, 2014.

    c. At this stage I make no order as to costs. The parties are to make further written submissions as to whether costs should be awarded to the applicant in these circumstances, and if so on what basis. The applicant is to file his memorandum within 14 days hereof, and the respondents are to reply within 7days.

DATED: 10 NOVEMBER 2014

J U D G E