

FROST

v.

ARCHIBALD

[SUPREME COURT, 1963 (MacDuff C.J.), 7th, 17th June]

Civil Jurisdiction

Election petition—returning officer—public declaration—meaning of “publicly”—Electoral Regulations 1962, Regulations 62, 63–69 (inc.) 71, 72.

Regulation 71 of the Electoral Regulations 1962 requires that the returning officer shall publicly state the result of the voting and declare the candidate to whom the majority of the votes have been given to be elected. All that is envisaged by this part of the regulation is that the returning officer should officially make the results known and declare the successful candidate elected publicly by so stating those matters as an official result in the presence of the candidates themselves, their agents and scrutineers and his staff and orderlies and such other persons as he may have permitted to be present during the counting.

Case referred to:

Wairarapa Election Petition (1897) 15 N.Z.L.R. 471.

Election Petition under the Fiji Constitution Order in Council 1963 and the Electoral Regulations 1962.

Bhai for the petitioner.

Justin Lewis (Attorney-General) for the Returning Officer.

Marquardt-Gray for Mr. F. G. Archibald.

Munro for the Supervisor of Elections.

H. B. Gibson in person.

MACDUFF C.J. [17th June, 1963]—

This is a petition complaining of the undue return or undue election of Frederick George Archibald as a member of the Legislative Council at the 1963 elections for the European seat for the Northern Constituency. It is presented in accordance with Regulation 82 (a) of the Electoral Regulations, 1962, by Trevor Francis Borgia Frost, a person who voted and who had the right to vote in the election for the European member for the Northern Constituency.

Objection has been taken for the respondent, Mr. Archibald, that the petition is out of time in that it has not been presented “within twenty-one days after the returning officer has declared any candidate to be elected” as required by Regulation 82. It is the contention of counsel for Mr. Archibald that the returning officer for the Northern Constituency, Mr. W. W. A. Miller, declared Mr. Archibald to be elected at 11 o'clock in the evening of 27th April, 1963, with the result that the time for presenting this petition expired on the 18th May, 1963. The petition was not, in fact, presented to the Supreme Court Registry until the 20th May, 1963.

The declaration by a returning officer of the election of a candidate is provided for in Regulation 71 which reads:

" 71. As soon as may be after the returning officer has arrived at the number of votes given to each candidate by means of the process prescribed in regulations 63 to 69 inclusive of these Regulations he shall publicly state the result of the voting, and declare the candidate to whom the majority of votes have been given (or in case of equality of votes, in whose favour the lot has been drawn) to be elected a member of the Legislative Council according to the tenor of the writ of election addressed to him."

Mr. W. W. A. Miller gave evidence concerning the night of 27th April, 1963, which unfortunately was not particularly clear. He completed his count of the ballot papers for the election of the European Member for the Northern Constituency about 11 p.m. on 27th April, 1963, and then announced the result in the room in which the count had been taking place. He then caused the figures of the votes for the two candidates to be written on a black-board at one end of the room. At that time there were present in the room about 20 to 30 persons whom the returning officer considered to be entitled to be there in accordance with the provisions of Regulation 62 which provides:

" 62. On the day and at the time appointed the returning officer, his assistants and clerks and the candidates or their agents and no other person, except with the sanction of the returning officer, may be present at the opening of the ballot boxes and during the count of the votes."

In addition he had a policeman stationed at the door of the room used for counting for the purpose of excluding any unauthorised person from entry and he had further policemen stationed outside the building for the purpose of keeping back from the immediate vicinity of the building a number of members of the public who were congregated there. Mr. Miller admitted that some of the people outside may have heard the announcement he made. He also admitted that some of the people outside may have been able to see the figures of the poll for the two candidates which he had caused to be written on a black-board.

In answer to the learned Acting Attorney-General and to learned counsel for the Supervisor of Elections, Mr. Miller gave somewhat contradictory evidence. First he said:

" I indicated that Mr. Archibald had won the election by 17 votes.

I had not in mind making a public declaration at that time."

Later Mr. Miller said:

" I knew I had to make public declaration under Regulation 71. When I announced result of voting I do not remember exactly what I did say but I followed requirements of Regulation 71. I remember referring to fact that Mr. Archibald had been elected by margin of 17 votes. Within qualification I have made in respect of my memory of the exact words I declared him to be elected member of Legislative Council. I regarded my announcement at the time as being the declaration required by Regulation 71. It was my final announcement."

It is unnecessary to remark that when a regulation requires a specific act to be performed the sole question is whether in fact that act has been performed, not the intention behind such actions as may have been taken. It is, then, in the light of that evidence that the question of fact as to whether Mr. Archibald was declared to be elected in accordance with the Electoral Regulations on the 27th April, 1963, falls to be decided.

The returning officer is required to "state publicly the result of the voting, and declare the candidate to whom the majority of votes have been given to be elected. . . ." and this is required to be done "as soon as may be after the returning officer has arrived at the number of votes given to each candidate by means of the process prescribed in Regulations 63 to 69 inclusive". It is apparent that Mr. Miller had carried out the process prescribed for the counting of votes. In fact, in view of the close result, he had carried out what may be called a recount.

The phrase "as soon as may be after" in my view is intended to mean as soon as conveniently possible. In the present instance the announcement of results by the Fiji Broadcasting Commission was made as and when the final voting results were made available by the respective returning officers. Of necessity, then, the public declaration by the returning officer of the results of voting and the candidate elected should be made before publication over the air. It is obvious also that the intention of Regulation 71 is that the returning officer should make his public declaration as soon as he can after he has completed and is satisfied with his count of votes. This was the intention of the Regulation as understood by Mr. Miller and which he intended to carry out. I prefer, therefore, to accept the much fuller version of what he said and did given by Mr. Miller in answer to close questioning by learned counsel for the Supervisor of Elections. I find as a fact accordingly, that Mr. Miller, as returning officer, did officially state the result of the voting and that he did officially declare Mr. Archibald to be elected a member of Legislative Council.

Did he so state and declare publicly? The learned Acting Attorney-General has referred me to the case of the *Wairarapa Election Petition* (1897) 15 N.Z.L.R. 471. Under section 120 of the Electoral Act, 1893, (N.Z.) the returning officer was required (a) to give public notice of the number of votes received by each candidate, and (b) to declare the candidate with the majority of votes to be duly elected. There was, in that case, no evidence of any public notice or declaration having been given by the returning officer prior to his return of the endorsed writ to the Clerk of Writs, the equivalent in this Colony of the return under Regulation 72 by a returning officer of his endorsed writ to the Supervisor of Elections. Prendergast, C.J., at page 480 of the report, said:

"He therefore, either before the endorsement on the writ or by that endorsement, did make the required declaration that Mr. Buchanan was elected. There is no evidence that the Returning Officer did not make before the endorsement an express declaration that Mr. Buchanan had the majority. I think he must have done so: if he did not he made such a declaration by the endorsement."

In effect, therefore, what was held in that case was no more than that if no actual declaration had been made before the returning officer's endorsement of the election writ that itself became his declaration. It is following this authority that it is submitted that the returning officer made his public declaration of the result of voting and the election of Mr. Archibald either on the 29th April, 1963, when he signed the endorsement of the result on the election writ, or the 30th April, 1963, when someone, presumably the Supervisor of Elections, filled in the date on the return. This is no authority however as to the public nature or otherwise of a declaration that has been made.

Learned counsel for the Supervisor of Elections also contended for the 29th April, 1963, as being the date of public declaration by the returning officer. His contention was that the declaration by Mr. Miller was not public since the members of the public, as such, were not admitted to the place where the declaration was made, nor was that place a public place. I am unable to accept either of those contentions as affecting the public nature of Mr. Miller's announcement. I cannot see that the regulation calls for the returning officer to appear before the waiting multitude and make his declaration in public in that manner, nor to appear in some place which can be held, in law, to be a public place. All that is envisaged by the regulation is that the returning officer should officially make the results known, and declare the successful candidate elected, at the earliest opportunity, and that he make that declaration publicly by so stating those matters as an official result in the presence of the candidates themselves, their agents and scrutineers and his staff and orderlies, and, of course, such other persons as he may have permitted to be present during the counting. It is understood, for example, that the Indian candidates and their agents were also present when Mr. Miller officially declared the result of the election for the European seat.

This, in my view, the returning officer, Mr. Miller, did. It follows therefore the Mr. Archibald was publicly declared to be elected on 27th April, 1963, and the petition has been presented out of time. It is accordingly unnecessary for me to consider the actual merits of the petition.

For that reason this petition is dismissed. I will hear counsel on the question of costs.

Petition dismissed.

Solicitor for the petitioner: *M. V. Bhai.*

Solicitor-General for the Returning Officer.

Solicitors for F. G. Archibald: *Marquardt-Gray and McNally.*

Solicitors for the Supervisor of Elections: *Munro, Warren, Leys and Kermode.*