ARVIND KUMAR SINGH and 2 Ors v NACANIELI LOMANI and 3 Ors (HBC0311 of 2005)

HIGH COURT — CIVIL JURISDICTION

FINNIGAN J

5, 12, 19 December 2005, 13 February 2006

Local government — administration — elections — lodgment of nomination papers — substantial compliance — Constitution of the Republic of Fiji Art 73 — Electoral Act No 18 1998 ss 50, 50(9) — Local Government Act (Cap 125) (Rev 1985) s 13(1) — Rules for the Election of Members of a Council rr 5, 6, 7 — Local Government (Elections) Regulations reg 10.

Pursuant to the Ba Town Council elections, the nomination papers of the three Petitioners were taken to the Returning Officer by Jai Ram Khelawan and another Chandar Deo during the lodgment period. The Returning Officer did not object as to the contents of the paper or to the procedure of their lodgment. However, the following day, the Returning Officer rejected the nomination papers on the ground that they were invalid because an objection was made by Iqbal Nabi who was himself a candidate claiming the candidates themselves did not deliver the papers personally or by one of their proposers contrary to r 5 of the Rules for the Elections of Members of a Council. This objection was made one hour before the close of the lodgment period. It was also the normal practice that candidates must be present at the Returning Office for the whole nomination period.

The Petitioners filed before the High Court an application but was dismissed on procedural grounds. The Petitioners did not appeal from that ruling. Instead, they filed an "Amended Election Petition" in the High Court as the Court of disputed returns. The Petitioners argued that by not taking the objection at the time of the lodgment of the nomination papers and/or within one hour, the Returning Officer acted unlawfully and had seriously misled them into believing that their nomination papers were accepted for the next phase of the process.

The issues in this case were: (a) whether the Petitioners complied with the law about lodgment of their papers; (b) if not, whether the returning officer was bound to point out their error to correct it; and (c) if not in strict compliance with the law, was the lodgment none the less valid as substantial compliance.

Held — (1) The court held on the first issue that rr 5, 6 and 7 of the Local Government Act (Cap 125) (Rev 1985) require that every nomination paper must be delivered to the returning officer by the candidate or one of his proposers between the hours and at the place appointed for the nomination of the candidates. While the Petitioners complied as to the time and place, what was not complied with was they or their proposers were not present during the whole of the nomination period so that they may be allowed to scrutinise each other's papers.

(2) As to the second issue, the Petitioners argued that the Returning Officer had the duty to make enquiries, lodge objection and disallow the filing of nomination papers and cited *Prasad v Minister for Immigration and Ethnic Affairs*. However, the court held that the submission had some logic to the present case but it was not what the law required. The rules did not impose that duty on the Returning Officer to make enquiries and had it done so it would have taken away much or all of the power given to the candidates themselves.

(3) The court, on the third issue, rejected the Petitioners' argument that s 50(9) of the Electoral Act No 18 of 1998 applied by analogy to municipal council elections. Both counsel acknowledged that this provision applies to parliamentary elections. The court ruled that s 50 does not apply to the present case as there is a separate scheme that excludes what is in s 50 for municipal elections. There was insufficient reason to overturn what was otherwise valid and lawfully conducted election based on the errors of the Petitioners which they have not satisfactorily excused.

Petition dismissed.

Cases referred to

Morarji v Singh [1996] FJHC 75; *Singh v Lomani* (unreported, HBC291/2005L), applied.

Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155; 65 ALR 549, cited.

Prem Singh v Krishna Prasad (unreported, Civ App No 1/2002), considered.

Singh & Chaudhary Lawyers, City Agents Mishra Prakash & Associates for the Petitioners

A. K. Lawyers City Agents Young and Associates for the second and third Respondents

Finnigan J.

Introduction

The Petitioners in October 2005 filed an application which I dismissed on procedural grounds (HBC291/2005L). That was an earlier false start in these proceedings. An appeal from that ruling in the High Court was permissible but none was taken.

After a second false start the Petitioners have filed, by way of "Amended Election Petition" a petition in the High Court as the Court of Disputed Returns. It is however still numbered as a civil action in the High Court, which I think undesirable.

This is an election year. When the court is constituted as the Court of Disputed Returns it usually plays a pivotal role. It is the Court of Final Decision in disputes arising about government elections. The parties and the court are acting within narrow boundaries that are confined ultimately by the Constitution. There being no appeals, the determinations of this court can be altered only by legislation and/or Constitutional amendment. I have insisted therefore that the petitioners try to make their petition comply with the legislative provisions for petitions to the Court of Disputed Returns.

In the course of dismissing on procedural grounds the Petitioners' first application made in the High Court I referred briefly to their substantive grievance (at pp 2 (bottom), 6 (top), 5, 8 and 9 of the decision). The present petition was administratively allocated to me and counsel for the Petitioners asked me to place the matter before Connors J. It was agreed between counsel and the court. On reflection however I am certain that my references to the substantive grievance exclude the possibility of judicial bias, as they were intended to do.

None the less, in preparing this judgment I encountered the majority judgment of the Supreme Court in *Prem Singh v Krishna Prasad* (unreported, Civ App No 1/2002). There the court said:

> Before we leave the appeal, we would, as mentioned by the Court of Appeal, draw to the attention of those concerned, the policy adopted in New Zealand of providing that a Full Court of three judges must exercise the jurisdiction of the Court of Disputed Returns. Whilst, as we have said, the determination of the Court of Disputed Returns is not unexaminable, there are, as we have held, severe limits imposed by s 73(7) of the Constitution upon the scope of that examination. In those special circumstances, and given the need to expedite matters, it may be thought that a Full Court is an appropriate bench to constitute the Court of Disputed Returns in all cases.

That dictum adds significance to counsel's request. It is desirable that more than one mind should consider the issues raised in the petition. Almost every other litigant at any level of the judicial system except in the Supreme Court can ask for a second opinion.

However, no rules have been made for the Court of Disputed Returns and the rules of the High Court apply. There is no provision for the court to sit as a bench of more than one judge. I am the judge allocated and I see no reason to disqualify myself. I have to agree however with counsel about the absence of rules and with the Supreme Court about the absence of legislation for a Full Bench. In my view both need urgent action as valuable functional parts of Fiji's democracy.

The facts

The facts have never been in dispute. The essential facts can be stated briefly and I extract the following statements from the petition itself. The Ba Town Council elections were to be held on 22 October 2005. The appointed time for lodgment of nominations was 28 September 2005 between 9 am and 12.30 pm. On that day the three Petitioners completed nomination papers for themselves as candidates and these papers were witnessed by their respective proposers. These completed nomination papers were taken to the returning officer by the official branch secretary of the Ba Branch of the FLB (Jai Ram Khelawan) and another person (Chandar Deo). These two persons lodged the papers with the returning officer between 10 am and 11 am on 28 September 2005.

No objection was taken by him to the contents of the papers or to the procedure of their lodgment. However, the following day the returning officer wrote a letter in which he purported to declare the nomination papers to be invalid and to reject them. The following facts are not stated in the petition but they are not disputed and are relied on by counsel for the respondents. The reason for the rejection of the nominations was an objection made in writing by *Iqbal Nabi* who was himself a candidate and was present at the office of the returning officer during the time for receiving nominations. This objector's complaint was that the candidates had not delivered their papers personally or by one of their proposers. They had not complied with r 5 of the Rules for the Elections of Members of a Council, about which more later. This complaint was lodged by 11.30 am which was one hour before the close of the lodgment period.

It is said to be the normal practice that candidates are present at the returning office for the whole nomination period but on 28 September 2005 none of the three Petitioners attended.

The Petitioner's complaint

The Petitioners say in their petition that they are very aggrieved with the action of the returning officer. They say that by not taking the objection at the time of the lodgment of the nomination papers and/or within one hour thereafter the returning officer acted unlawfully. They claim "the nomination papers, if lodged as alleged in contravention of the Local Government Act or the Regulations there under, ought to have been rejected or not accepted at the time of lodgment and/or registration": para 13. They go on to say that "the Returning Officer by his conduct has seriously misled the petitioners into believing that their nomination papers were accepted for the next phase of the process, (and) … the later rejection of the said nominations is contrary to the earlier conduct (of the Returning Officer)": para 15.

The issues

In submissions counsel for the Petitioners has stated five issues. These are not accepted by counsel for the respondents who has stated another five issues. There is a small area of overlap.

The essential issues seem clear enough from what I have already said. They are all addressed in the submissions.

(1) Did the Petitioners comply with the law about lodgment of their papers?

(2) If not was the returning officer bound to point out their error so they could correct it?

(3) If not in strict compliance with the law, was the lodgment none the less valid as substantial compliance?

The law on election petitions

Both counsel have addressed this heading in their submissions. I adopt here the findings of law set out in my earlier Ruling *Singh v Lomani* (unreported, HBC291/2005L), Ruling 18 October 2005.

The starting point is the Constitution at Art 73. Relevantly it provides as follows:

> 73(1) the High Court is the Court of Disputed Returns and has original jurisdiction to hear and determine;
>
> (a) A question whether a person has been validly elected as a member of the House of Representatives …
>
> (7) A determination by the High Court in proceedings under Para 1 (a) is final.

Next, parliament has created the Local Government Act (Cap 125) (Rev 1985) and the Electoral Act No 18 of 1998, which is for elections to the House of Representatives. Under Cap 125 there are the Local Government (Elections) Regulations, and under them the Rules for the Election of Members of a Council. These provide at rr 5, 6 and 7 for the conduct of the candidates and the returning officer at nomination time. They provide at r 5:

> Every nomination paper signed in the required manner and accompanied by the deposit prescribed under R 3 shall be delivered to the Returning Officer by the candidate or by one of his proposers between the hours and at the place appointed for the nomination of candidates.

Rules 6 and 7 provide that the candidates, their respective proposers and one person each appointed by them may be present during the nomination period. Each of the candidates and one of their respective proposers is entitled to scrutinise the nominations of other candidates for the same municipality or ward.

> 6. — On the day appointed for the nomination of a candidate for any municipality or ward, every candidate and one of his proposers and one other person selected by the candidate, and no persons other than the aforesaid, shall, except for the purpose of assisting the returning officer, be entitled to attend the proceedings during the time appointed for nomination.
>
> 7. — The returning officer shall permit the candidates and one proposer selected by each candidate, to examine the nomination papers of candidates which have been received for the municipality or ward concerned.

The reason for that provision (in r 7) is set out in r 8(2) which I should set out in full;

> (2) No objection to a nomination paper on the ground that the description of the candidate therein is insufficient or that the nomination paper is not in

> accordance with the provisions of the rules shall be allowed or deemed to be valid unless such objection is made by the Returning Officer or by some other person within one hour at the time of delivery of the nomination paper.

So, the position so far is this. All candidates are allowed (could one say encouraged?) to be present during the whole of the nomination period and they are allowed to scrutinise each other's papers. This can only be to give each candidate a fair opportunity to object to another candidate's nomination if there is something wrong with it. Certain types of objection that can be made are limited by r 8(2).

It is not only the candidates who may raise objections. The returning officer may do so. But neither is obliged to. A candidate may choose to forgo an objection and contest the merits on the hustings. The returning officer may for one reason or another remain unaware of grounds in any particular nomination paper for objections to it, or he may be uncertain and prefer to leave it to the candidates to object so that he can decide. It all seems practical workable commonsense. The rules are straightforward and need only to be complied with.

The Petitioners did not comply with them. They now mount an ingenuous argument seeking to add a gloss to something which has the merit of simplicity, clarity and certainty. On the topic of objections that may be made by the returning officer they say in submissions:

> It is envisaged that the Returning Officer can himself notionally lodge objection and disallow the filing of nomination papers. (P 6 No. 3)

To me this indicates a desire to be creative. The rules do not need that. The submissions supporting that contention are interesting and logical but provide no basis on which I should alter or extend what is already clearly the law.

The Petitioners mount an argument that the returning officer has a "duty to make enquiries". They cite *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155; 65 ALR 549, particularly at FCR 169–70; ALR 563. There, the Australian Federal Court is said to have held that the failure to attempt to obtain information which it is obvious is readily available and which is centrally relevant to the decision to be made will amount to a procedure so unreasonable that no reasonable person would have so exercised that power. This duty to make enquiries is said to be a limited duty. The submission states that the returning officer "could easily have resolved this issue at the counter by requiring the person lodging the form to identify himself and his/her relationship with the candidate". Then only when satisfied with the explanation should the returning officer proceed to accept the nomination, or he could ask the person to find the candidate or one of the proposers. This interesting submission has some logic to it but it is not what the law requires. The rules did not impose that duty on the returning officer and had it done so it would have taken away much or all of the power given to the candidates themselves. That system could have been provided, but it was not.

The Petitioners' submission about reasonableness therefore need not be addressed, except in one respect. The Petitioners ask the court, on the basis of reasonableness, "either (to) dispense with the personal lodgement of r 5, or deem that the nominations are in substantial compliance with the Elections Rules, or alternatively, impugn the rejections of the nomination forms as an unreasonable decision and in breach of the duty as spells above". What they are asking is that by interpretation I should add something new to the Rules.

This is exactly what they are seeking. They say;

> It is argued that Section 50 (9) of the Electoral Act is Authority for the proposition that there needs a shift from the strict, narrow and inflexible requirement in the filing of the nomination papers as previously to a more relaxed and "permissive" test of substantial compliance. (P 6 No. 2)

For this they argue a reasonable social basis, the encouragement of candidates to participate in elections. Regrettably (for that submission) the function of the Court of Disputed Returns is fundamentally to decide disputes according to the electoral law and not to promote social policy.

Substantial compliance

A few words on this topic. Both counsel are thanked for their submissions. Substantial compliance is indeed provided for in s 50 (9) of the Electoral Act No 18 of 1998. Substantial compliance, that is, with s 50.

> (9) A nomination must not be rejected because of any formal defect or error in the nomination if the returning officer to whom the nomination is delivered is satisfied that this section has been substantially complied with.

Both counsel acknowledged that this provision applies to parliamentary elections. The Petitioners seek by submission to have it applied "by analogy (as) also the correct test to be applied to municipal council elections".

I do not think s 50 of the Electoral Act applies here. For Municipal Elections there is a separate scheme that excludes what is in s 50, namely Pt I of the Rules for the Election of Members of a Council.

The starting point is the Local Government Act (Cap 125) (Rev 1985). It provides as follows at s 13 (1):

> The Electoral Commission may make regulations providing for the conduct of Elections to Municipalities and all matters incidental thereto including prescribing electoral offences and for election petitions.

This means that the Commission has power to make regulations for the conduct of local body elections, and may (interalia) prescribe electoral offences and has power to make regulations for electoral petitions. By that authority there have been made the Local Government (Elections) Regulations. They provide for the conduct of local body elections. What they provide for offences and for petitions is in reg 10. I refer now to reg 10 which is as follows;

> Unless otherwise specifically provided in these regulations, the provisions of the law for the time being in force relating to offences in connection with the conduct of the elections in the House of Representatives and in connection with election petitions shall apply mutatis mutandis to elections to a council under the provisions of these Regulations.

I would prefer not to go past the plain meanings of the clear chosen words of that provision. It does provide (first) that specific provision is made in these regulations for elections to councils, and (second) that unless there is already some specific provision in these regulations then the provisions of the law relating to certain offences will apply. Then it provides (third) that the offences to which it refers are (a) in connection with the conduct of elections in the House of Representatives and (b) in connection with election petitions. However, it is ambiguous and can be given more sense by reading it as "the provisions of the law for the time being in force … in connection of election petitions". This is the interpretation adopted by Byrne J in *Morarji v Singh* [1996] FJHC 75, judgment 10 October 1997, and I adopt it.

In 1997, there were the Petitions Regulations 1992 but they have since been repealed. All that is left are the provisions for petitions that are made in the Electoral Act 18/1998. That is Pt 7 of the Act. This is the part of the Act that provides the working rules for the Court of Disputed Returns, in ss 141–160. There are clear provisions in Pt 7 requiring the court to depart from strict compliance and allow substantial compliance, for example, ss 150(1) and (2), and 151(2).

However I do not think the court should be prepared to allow what amounts to a precedent for non compliance with r 5. Justice for the Petitioners is the guideline I am required to apply, but the Petitioners here are claiming relief from the consequences of their own error, an error which they have not satisfactorily excused. Their error is insufficient reason to overturn what was otherwise a valid anti lawfully conducted election.

Conclusion

I have gone into some detail because this must be the final decision. If some error of fact or of law is apparent in what I have said then of course liberty is reserved for any party to bring the matter back before the court of disputed returns. The petition is dismissed.

I assess costs on the basis that all the Respondents who made submissions were represented as one by counsel. Submissions for both parties were of a high order and carefully detailed (as they were last time). I assess costs higher than last time at $1500.

Petition dismissed.