

**GEORGE HENRY MALIRBAAL –V- PATTESON OTI**

**High Court of Solomon Islands  
(Palmer ACJ)**

**Civil Case Number 12 of 2002**

**Hearing: 22<sup>nd</sup> March 2002  
Judgment: 26<sup>th</sup> March 2002**

*P.T. Legal Services for the Petitioner  
J. Apaniai for the Respondent  
G. Deve for the Attorney General*

**Palmer ACJ:** The Petitioner was one of the candidates for the Temotu Nende Constituency. He polled 1,329 votes whilst the Respondent, Patteson Oti polled 2,485 votes and was subsequently declared the winning candidate. The official result was published in the Gazette on or about 28<sup>th</sup> December 2001.

Section 83 of the National Parliament (Electoral Provisions) Act [Cap. 87] ("the Act") allows any petition challenging the validity of the election of any candidate to be lodged within one month of publication of such results in the Gazette. The Petitioner lodged his petition on 28<sup>th</sup> January 2001 at five minutes to 4 o'clock.

Rule 14 of the Election Petition Rules 1976 ("the Rules") requires service of the petition to be personal on the Respondent and to be done within 10 days of date of presentation (Rule 13). The due date for service of the petition in this instance therefore was 8<sup>th</sup> February 2002. Petitioner did not effect service until 19<sup>th</sup> February 2002, some 10 days later. Mr. Tegavota now comes to court asking that the time to effect service be enlarged to 19<sup>th</sup> February 2002. Rule 41 does give this court jurisdiction to consider questions of extension of the time limits prescribed under the Rules.

*"The Court may for good cause enlarge any period of time prescribed by these Rules."*

The basis on which time may be enlarged is good cause. It is for the Petitioner to show to this court that there is good cause for enlargement of the time limit. What is the reason(s) given? Mr. Tegavota gave oral evidence before this court on 28<sup>th</sup> February 2002 and has also filed affidavit on 7<sup>th</sup> March 2002 deposing to the circumstances of delay. Mr. Tegavota deposes (paragraph 2 of his affidavit) that he received instructions from the Petitioner in or about 14<sup>th</sup> January 2002. On 21<sup>st</sup> January 2002 he advised the Petitioner to have \$4,500-00 deposited in his trust account, to cover court fees, security for costs and part payment of his legal charges. On 24<sup>th</sup> January Petitioner advised him of his financial problems and that he may not be able to have the petition filed in time. Mr. Tegavota says he advised Petitioner that he would need to have the petition filed before 28<sup>th</sup> January 2002. He also advised Petitioner that he would be leaving for Munda on the following day, 25<sup>th</sup> January to attend to other official business. On 25<sup>th</sup> January, he signed petition and left for Munda. He says he reminded Petitioner to attend to the filing of the petition when he had the money.

Mr. Tegavota did not return until 5<sup>th</sup> February 2002. By the time he spoke with Petitioner, the 10 days period for service of petition had lapsed. Learned Counsel discovered that the petition had been left in his pigeonhole and had not been collected by the Petitioner. The Petitioner it seems relied on his lawyer to attend to the petition. Unfortunately, there appears to be some reluctance on Counsel's part to pursue the matter actively on the basis that the initial fees required to be paid had yet to be made

and that Counsel may incur further charges which the Petitioner may not be able to pay. His business obviously could not survive without being paid for its services. This is consistent with the letter of learned Counsel dated 26<sup>th</sup> February 2002 copied to the Registrar of High Court informing the Petitioner of his intention to withdraw his professional services for failure to make payments towards part of his fees and other charges. I take judicial notice of that letter (a copy is in the file). Counsel however was advised (quite properly) by the Registrar of High Court to have his withdrawal sanctioned by the court. Counsel's appearance in these applications thus has been by direction of the court.

The issue for determination is whether there is good cause for enlargement of time in the circumstances of this case. Mr. Tegavota has given his explanation for the reason why service was not effected on the Respondent within the time allowed by the Rules. Can this failure be placed at the feet of Mr. Tegavota? It is not in dispute he was not available in Honiara during that period. In his absence, he should have made alternative arrangements to have matters in his office attended to by his secretary or someone else. He should have left instructions to have matters in his carriage attended to. There is no evidence to suggest he did so. Thus when the petition was issued from the Registry Office, it was left in his pigeonhole to attend to service. It remained there until his return from Munda. There is no evidence to suggest he may have left instructions with his client to have the petition collected and served within the ten days period. In those circumstances, the petitioner is entitled to rely on his Counsel to attend to his petition with diligence. Learned Counsel failed in that respect.

Whilst I do not condone the failures of Counsel in this case, I do note there may have been some confusion as to the state of the petition whether it had been filed or not. On his return however, he ought to have been able to ascertain what the true position regarding his client's petition was. Learned Counsel returned on 5<sup>th</sup> February 2002. He still had three days to attend to his client's petition. That was not done. By the time contact was made with his client, it was obvious nothing had been done and that the time limit had expired.

It is not in dispute court has discretion to extend the time limits prescribed under the Rules. The exercise of that discretion however is confined to there being shown good cause. This means there must be in existence material before this court upon which its discretion can be exercised (*Civil Service Co-operative Society v. General Steam Navigation Company* [1903] 2 K.B. 756).

Further, the cause given must be adequate, proper or valid. Not every cause will activate the court's discretion. If the reason given is inadequate, improper or unreasonable, this court cannot activate its discretion. At the same time, the mere fact good cause is given does not imply the time limit will be enlarged. Court has discretion in those circumstances whether to grant extension of time or not.

Is the failure of learned Counsel to attend to his client's case because he may be busy elsewhere, good cause or put another way, should the Petitioner be made to suffer the consequences for failures attributed wholly to his lawyer? In my respectful view, whilst the failures of learned Counsel couldn't be condoned, the interest of justice demand that the client must not be made to suffer for that. It would have been different if it could have been demonstrated that delay had been attributed wholly to the problems in fee arrangements with learned Counsel. I am satisfied on the evidence before me that the Petitioner was entitled to rely on his counsel's carriage of the matter in the period between 28<sup>th</sup> January 2002 and time of service. Good cause has been shown.

Should the court exercise its discretion? In *Francis Joseph Saemala v. Batholomew Ulufa'alu* CC 251 of 1997, 2<sup>nd</sup> February 1998, his Lordship Awich J. found there was good cause when personal service could not be effected on the Respondent as he was out of the jurisdiction attending to State matters in Japan as Prime Minister. The Respondent only returned to the country after the ten-day period had

lapsed. In exercising his discretion to enlarge time, his Lordship took into account, inter alia, (1) the public interest in having the petition determined, (2) that failure to comply was not contumelious (3) that it was more due to ignorance of the rules on the part of the Petitioner and (4) that the Respondent had not suffered prejudice from the delay or failure to comply.

I also bear in mind the words of Lord Atkin in *Evans v. Bartlam* [1973] AC 473 quoted with approval in *Leslie Allison v. Monique Medlin* CAC No. 7 of 1996 by McPherson and Casey JJA and referred to also by his Awich J that, "unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure." I do take note of the public interest factor in having this petition determined as opposed to having it being dismissed simply due to a failure on the part of Petitioner's counsel. I do not think any reasonable member of the Public would consider a dismissal of the petition in such circumstances fair and just. Secondly, I do not think it can be said the failure here was contumelious or that delay was inordinate. Thirdly, despite the delay, the Respondent has not been prejudiced. In the circumstances, I am satisfied the court's discretion can be exercised in favour of an extension of the time limit to effect personal service on the Respondent to 19<sup>th</sup> February 2002.

The second matter raised in the Respondent's Summons filed on 11<sup>th</sup> March 2002 relates to the time allowed for service of the notice of the nature of the security in accordance with Rule 13 of the Rules. It is my respectful view the Rules anticipate that payment of the security for costs should be made within the same time period allowed for petitions to be filed (that is one month after publication of the results in the Gazette). I say this because Rule 13 requires service of the notice of the nature of the security to be made within the same time period as service of the petition. Notice cannot be given unless security had first been given.

During the hearing I raised the question whether failure to pay within the time period was fatal. The Rules however make clear that is not so. All it means is that the petition may not be determined until such security is given and may result in a possible action by the Respondent for its dismissal.

On the question of costs, the Respondent is to have his costs in any event. As to who is to be responsible for the payment of costs, it is my respectful view this is to be met by the Petitioner and his Counsel in equal shares, but I am prepared to hear Counsel, Mr. Tegavota if there is objection.

#### **Orders of the Court:**

- 1. Grant enlargement of time for service of the petition and the notice of the nature of security.**
- 2. Refuse paragraph 1 of the orders sought in the Summons of the Respondent filed 11<sup>th</sup> March 2002.**
- 3. Grant paragraph 2 of the orders sought in the Summons of the Respondent, that is, the Respondent is to have his costs of and connected with this application.**
- 4. Costs of the Respondent in connection with this application to be borne in equal shares by the Petitioner and his Counsel.**

**The Court.**