

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

CA. 5 /99

IN THE MATTER of an election of Members of
Parliament of the Cook Islands
(Constituency of Vaipae/Tautu)
held on the 16th day of June
1999

AND

IN THE MATTER of the Electoral Act 1998,
Section 96(4)

BETWEEN **TIRAA ARERE**

Applicant

AND

KETE IOANE

First Respondent

AND

**THE CHIEF ELECTORAL
OFFICER**

Second Respondent

Hearing: 10 August 1999

Coram: The Hon Sir Graham Speight JA (Presiding)
The Hon Sir Ian Barker JA
His Honour Justice AG McHugh JA

Counsel: GB Chapman & Mrs TB Browne for Appellant
MC Mitchell for First Respondent
AM Manarangi for Second Respondent

Judgment: 17 August 1999

JUDGMENT OF THE COURT DELIVERED BY
THE HON SIR GRAHAM SPEIGHT JA.

Solicitors:

Clarkes, PC, Solicitors, Rarotonga, for Appellant;
Stevenson Nelson & Mitchell, Rarotonga, for First Respondent;
AM Manarangi, Solicitor, PO Box 514, Rarotonga, for Second Respondent.

This is an appeal by Mr Arere who, at the General Election on 16th June 1999, was declared the elected representative for the constituency of Vaipae/Tautu. A petition against his election was heard before Hillyer J where the validity of certain votes was challenged. The learned Judge examined individual cases and made appropriate rulings. As a consequence of the recount which then followed, Mr Ioane was declared the elected representative in place of Mr Arere who had apparently lost his election night majority as a result of disqualifications made in respect of certain of his voting supporters. Against this decision, Mr Arere appeals on the grounds that there was no jurisdiction under the Electoral Act 1998 ("the Act") for the grounds relied upon by Mr Ioane to be considered on the hearing of any election petition.

The point involved turns on an interpretation of s 96 of the Act under which within 7 days after the declaration of the result of a poll, a given number of electors may file an election petition in the High Court to enquire into the conduct of the election of any candidate or other person thereat. The section in full reads as follows:

"Election Petitions -

- (1) Where any candidate and five electors, or where ten electors, are dissatisfied with the result of any election held in the constituency for which that candidate is nominated, or in which those electors are registered, they may, within seven days after the declaration of the results of the poll by the Chief Electoral Officer by petition filed in the Court as hereinafter mentioned, demand an inquiry into the conduct of the election or any candidate or other person thereat.
- (2) Every such petition shall be accompanied by a filing fee of \$1,000.

- (3) The petition shall be in Form 15, and shall be filed in the Court, and shall be heard and determined before a Judge of the Court.
- (4) The petition shall allege the specific grounds on which the complaint is founded, and no grounds other than those stated shall be investigated except by leave of the Court and upon reasonable notice being given, which leave may be given on such terms and conditions as the Court deems just.

Provided that evidence may be given to prove that the election of any rejected candidate would be invalid in the same manner as if the petition had complained of his or her election."

Before dealing with the issues raised in the present appeal, it is necessary to fill in some background as to how the issue arose at the hearing of the Vaipae petition.

After the Cook Islands General Election had been held, a number of petitions were filed in various electorates challenging the declared results. A wide variety of grounds were relied upon: but in this appeal, the Court has to consider the basis upon which the qualification of voters may be challenged. Petitions on this ground were filed not only in Vaipae but in the Oneroa electorate and some others. These objections were upon the grounds that certain persons whose names appeared on the role and who had voted were, for various alleged reasons, not qualified to be so registered.

The same questions as to the status of an enrolled person arose in the Vaipae case as had shortly before been determined by Hillyer J in the Oneroa electorate. It is helpful to recite the issues which arose at Oneroa, the arguments there advanced and the conclusion reached by the learned Judge.

In the Oneroa election, a Mr Samuels had been the unsuccessful candidate. He and the requisite number of supporters brought an election petition pursuant to the provisions of s 96 challenging the declaration by the Electoral Officer that Mr Pokeno had been elected: the petition sought a recount or other remedy. Counsel for Mr Pokeno moved that the petition be struck out on the basis that the grounds cited in Mr Samuels' petition of non-qualification of some of the voters did not fall within the ambit of s 96 namely, did not relate to "the conduct of the election or any candidate or person thereat".

To anticipate an argument subsequently put in support of the petition in Vaipae – also based on non-qualification of voters – it was submitted by the successful candidate that the qualification of electors is dealt with in a distinct and separate part of the Act namely, Part III; "Registration of Electors".

That part defines grounds of qualification for enrolment, provides grounds for objecting thereto, specifies certain powers of the Registrar of Electors, including powers to close and print the rolls and to review the same in case of successful challenges to the roll as compiled. It was submitted on behalf of Mr Pokeno that this Part III (it was submitted) was a self-contained and definitive part of the Act: no subsequent challenge could be made to the qualification of a person so listed unless there had been a contest and determination in accordance with the Registrar powers in that part of the Act. It was further submitted that determination of qualification was to be made solely prior to election by complaint to and determination by the Registrar on the grounds set out in that section of the Act. Consequently, so it was submitted, the purported qualifications

having been accepted or at least never challenged, the person so listed as an elector was entitled to vote without further challenge being made thereafter. And as a consequence, the matters upon which the Court could enquire at a petition, namely "conduct" of a person at the election, could relate solely to such matters as behaviour, management and handling of the election and not to antecedent qualification.

Counsel for Mr Samuels and counsel for the Chief Electoral Officer submitted that such suggestions went against the design and structure of the Act; in particular, they drew attention to the provisions of s 100 which provides:

"... a Court may at any time direct enquiry ... and disallow the vote of persons who have "voted not being entitled to vote"

In our view this was a strong argument against the submissions made on behalf of Mr Pokeno: indeed it drove his counsel to contend that however improperly procured, presence on the role conferred entitlement even to persons who, properly viewed, were not qualified to be there.

Counsel for the Chief Electoral Officer also advanced further submissions which appear to be strong. In particular, he relied upon s 15(f) of the Acts Interpretation Act 1924 which is as follows:

"(f) The division of any act into parts, titles, divisions or sub-divisions and the headings of any such parts, titles, divisions or sub-divisions shall be deemed for the purposes of reference to the part of the Act, but the said headings shall not affect the interpretation of the Act."

It will be noted that such divisions and headings are deemed to be part of the Act "for the purpose of reference" but shall not affect the overall interpretation. Such a global interpretation of all parts of the Statute, it is submitted, must be necessary by virtue of s 5(j) of the Acts Interpretation Act which calls for "a fair large and liberal construction ... such as will best ensure the attainment of the Act according to its true intent, meaning and spirit".

When one considers the Electoral Act as a whole, its provisions are aimed at ensuring the achievement of proper democratic processes by ascertaining who should properly be entitled to vote and who should be excluded. It would defeat the whole purpose and pattern to accept there is no remedy to prevent the casting of a vote by a person whom the Act, through its detailed provisions, has endeavoured to exclude.

These matters were advanced to and doubtless considered by Hillyer J in the Oneroa petition. One can perhaps speculate that the self-demonstrating absurdity of the proposition became immediately apparent to the learned Judge as may be seen from the succinct ruling then given by him in the briefest of summations; "that a person who casts a vote is conducting himself at the electorate", and the motion to strike out the petition was peremptorily dismissed. The Judge then proceeded to consider and rule on the challenged qualifications.

We move, therefore, to the Vaipae election petition between the above intitled parties, Messrs Arere and Ioane. Although these are different parties, there is an identical point although it followed a somewhat different course in reaching judicial consideration.

Mr Arere had won the final count and was declared to have been duly elected. Mr Ioane filed a petition pursuant to s 96. Questions of the non-qualification of some who had voted were investigated by Hillyer J and he disqualified certain voters. As a consequence, on recount, Mr Arere's election was revoked and Mr Ioane was declared elected. In so proceeding, of course, Hillyer J had obviously followed the course upon which he had ruled in the Oneroa petition i.e. that "conduct" of the voter could include questions of qualification. In so proceeding, the learned Judge doubtless bore in mind in the Vaipae case, as he would have done at Oneroa, the provisions of s 100 of the Electoral Act as follows:

"Powers of Court on Inquiry -

For the purpose of the inquiry, the Court shall have and may exercise all the powers of citing parties, compelling evidence, adjourning from time to time and from place to place, and maintaining order that the Court would have in its ordinary jurisdiction, and, in addition, may at any time during the inquiry direct a recount or scrutiny of the votes given at the election, and shall disallow the vote of every person who -

- (a) has voted, not being entitled to vote, or
- (b) has voted for more than one candidate."

Counsel for Mr Pokene, at Oneroa, had attempted to grapple with the difficulties which that section placed in the way of his argument by again submitting that the appearance of one's name on the roll ipso facto created "entitlement to vote" regardless of whether it had been procured improperly by a person who was clearly unqualified. No specific ruling had been made by Hillyer J either in Oneroa or Vaipae. We think that the provisions just recited advances the submissions that the right to vote, as a matter of mechanics, is only accorded to a person who is upon the roll,

but a person can only be entitled to be upon the roll and consequently entitled to vote, if he is a properly qualified person.

Consequent upon that ruling, the learned Judge ruled against Mr Arere as he had done in the case of Mr Pokeno. An appeal was lodged pursuant to s 105 of the Act against that determination on the grounds that a point of law is involved. Leave to appeal was granted by Hillyer J on 3 August.

In this Court, Mr Chapman, on behalf of the appellant, has advanced the same arguments as were canvassed by counsel for Mr Pokeno in the Oneroa case, albeit with considerable more delicacy. Again, he is bound to rely upon the submissions:

- (a) that a question of qualification of a voter is the subject of separate and discrete procedures dealing with objections to the elector's qualifications as set out in ss 19-25 being part of Part III, and
- (b) a conclusion under those sections is final and excluded from any further investigation in proceedings under s 96. We think it unnecessary to repeat the concurrence which we have already expressed with the reasoning which obviously activated Hillyer J in his decision in the Oneroa case, followed again at Vaipae; consequently, the appeal is dismissed.

In addition to the matters already canvassed, we think it worth noting and we accept a further submission made on behalf of counsel for the Chief Electoral Officer before us, ss 46 & 51 of the Act confer the right to vote upon "an elector". An "elector" is defined in s 2 as "a person who is qualified and registered as an elector for that constituency". Such

definition makes it abundantly clear that mere registration is not sufficient to cast a valid vote.

In the Oneroa case the Court was not faced with an election petition properly so-called, but with an application in its general jurisdiction to strike out the opponent's petition on the ground of the Court's alleged lack of jurisdiction under s 96. That application having failed, the Court proceeded to deal with objections in the ordinary way. We are unaware, nor are we concerned with, the results of the consequential enquiry.

In the Vaipae case now before us, the disqualification question arose during the hearing of the election petition proper. In the course of that hearing the learned Judge, quite naturally, followed the ruling he had made in the Oneroa case. He investigated the qualifications of persons who had voted, and as a consequence, revoked the previous declaration in favour of Mr Arere and declared Mr Ioane to be elected.

Mr Arere applied for leave to appeal against that determination pursuant to s 105(2) and leave was granted on 3 August (Article 60 of the Constitution) but the Judge was not prepared to order a stay.

That being so, the order by Hillyer J on 16th July 1999 that Mr Ioane be declared elected will stand and doubtless the Chief Electoral Officer will act accordingly if he has not already done so: (see s 102(2))

Costs to each respondent in the sum of \$2,500 together with disbursements to be certified by the Registrar taking account of the fact both Mr Manarangi and Mr Mitchell will also be in receipt of disbursement orders in their favour on other current appeals.


