IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0006 OF 2002S
(High Court Civil Action No. HBC269 of 2001L)

BETWEEN:

PREM SINGH

Appellant/3rd Respondent

AND:

KRISHNA PRASAD

Respondent/Petitioner

AND:

RUPENI NACEWA

Original 1st Respondent

AND:

WALTER RIGAMOTO

Original 2nd Respondent

Coram: Barker JA, Presiding Judge
Davies JA

Hearing: 21 February 2002, Suva

Counsel: Messrs. D. S. Naidu, S. Krishna and R. Singh for the Appellant
Mr. R. Prakash for the Respondent
Mr. J. Udit for the 1st and 2nd Respondent.

Date of Judgment: 1 March 2002

JUDGMENT OF THE COURT

Introduction

This case is being heard by a Court of two judges because the President of the Court is of the opinion that it is impracticable to summon a Court of three Judges (see s.6(1) and (2) of the Court of Appeal Act (Cap.12)).

On 8 February 2002, Gates J., sitting as the Court of Disputed Returns established under s.73(1) of the 1997 Constitution, delivered a final ruling on an electoral petition brought by the present Third Respondent, Krishna Prasad, under s.73(1)(a) and 73(3)(a)(ii) of the Constitution. The Third Respondent had been a candidate for the seat of Nadi Open in the general election held in August/September 2001.

The present Appellant, Prem Singh, was declared the elected member for the Nadi Open seat by the Returning Officer after the election, winning by 82 votes. After 3 days of hearing evidence and submissions, the Judge, in a reserved decision, ruled that 1278 votes, rejected by the Returning Officer as invalid, should have been counted. On receipt of this ruling, the Returning Officer conducted a recount including the 1278 disputed votes. He reported that the amended count showed the Third Respondent successful in the election by 108 votes. The Judge thereupon gave a final ruling in terms of s.73(1)(a) of the Constitution that the Third Respondent was duly elected.

Purported Appeal

On 12 February 2002, the Third Respondent applied to Gates J. for various orders in the nature of leave to appeal against his decision of 8 February 2002 and for a consequential stay. There was also an alternative application for the Judge to state a case for the Court of Appeal. On 15 February 2002, Gates J. delivered a judgment in which he doubted whether a right of appeal existed against the final decision of the Court of

Disputed Returns because of s.73(7) of the Constitution which states: **"A determination by the High Court in proceedings under paragraph (1)(a) is final."** The Judge stated that if there was any right of appeal, it could only be under s.121(2) of the Constitution for which no leave to appeal is necessary. Nevertheless, purporting to act under "limited inherent jurisdiction," he granted a stay of 7 days to permit appeal papers to be filed with the Court of Appeal. He did not say what would happen if the Court of Appeal were unable to consider the matter within the 7 days which he had nominated. He declined to state a case for the Court of Appeal.

On 19 February 2002, the Appellant filed in this Court a notice of appeal against Gates J.'s decision declaring the Third Respondent to have been the duly elected member for Nadi Central. The stated grounds, in summary, were: (a) The Judge wrongly misinterpreted s.116(3)(d) and (b)(ii) of the Electoral Act 1998 ('the Act') in a manner contrary to the preferential system of voting laid down in s.54 of the Constitution and (b) The Judge acted *ultra vires* in his construction of the same piece of legislation in allowing validation of below-the-line single ticks on Part II ballot papers opposite the names of the individual candidates.

On 19 February 2002, the Appellant filed in this Court an application for stay pending the determination of any appeal from the judgment of Gates J. sitting as the Court of Disputed Returns. At the conclusion of the hearing before it, the Court extended the stay until the date of delivery of its decision. This ruling was purely to preserve the

position pending the Court's consideration of the question whether any right of appeal existed.

Right to Appeal

Before considering the application for stay, the Court must decide whether there is a right of appeal from the Court of Disputed Returns. If there is no right of appeal, then there can be no stay and the purported appeal will have to be dismissed.

Section 73(7) of the Constitution (quoted above) is clear and unambiguous when it states that there is no right of appeal from a decision of the High Court under s.73(1)(a) as Gates J.'s decision clearly was. That statement in the Constitution is reinforced by s.153(2) of the Act which indicates the obvious when it says: "The right of appeal against any decision of the Court is governed by section 73(7) of the Constitution."

Counsel for the Appellant submitted that there was a right of appeal to this Court notwithstanding the unambiguous indications to the contrary in s.73(7) of the Constitution and s.183(2) of the Act on the following grounds:

(a) S.121(2) of the Constitution gives a right of appeal to this Court from a final judgment of the High Court in any matter arising under the Constitution or involving its interpretaion.

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(b) The function exercised by the High Court sitting as a Court of Disputed Returns is an original jurisdiction of the High Court conferred on it by the Constitution. The said function is consistent with its jurisdiction in deciding other civil cases. Hence there is a right of appeal under s.121(2) of the Constitution.

(c) The Judge in his interpretation of s.116 of the Act has "acted as a legislator" by allowing votes to be counted which the Act does not permit to be counted.

(d) The Judge thereby contravened section 54 of the Constitution which mandates the preferential system of voting known as the alternative vote.

S.121(2) of Constitution

S.121 of the Constitution provides as follows:

"(1) The Court of Appeal has jurisdiction, subject to this Constitution and to such requirements as the Parliament prescribes, to hear and determine appeals from all judgments of the High Court, and has such other jurisdiction as is conferred by law.

(2) Appeals lie to the Court of Appeal as of right from a final judgment of the High Court in any matter arising under this Constitution or involving its interpretation.

> *(3) The Parliament may provide that appeals lie to he Court of Appeal, as of right or with leave, from other judgments of the High Court in accordance with such requirements as the Parliament prescribes."*

It is important to note in s.121(1) that the jurisdiction of the Court of Appeal is "subject to this Constitution and to such requirements as the Parliament prescribes." Where the Consitution has specifically stated that there is to be no right of appeal from the Court of Disputed Returns, that provision (s.73(7)) overrides a general provision such as s.121(2). In other words, s.121(1) governs the interpretation of s.121(2). As will be seen later in this judgment, a provision denying an appeal from an electoral Court is fairly universal. In this Court's view, therefore, s.121(2) of the Constitution cannot give a right of appeal to the Court of Appeal from a decision of the High Court sitting as the Court of Disputed Returns.

A provision forbidding any appeal from a decision of a Court required to adjudicate on disputed parliamentary elections is by no means novel. Cases where such a provision has never even been queried emanate from many Commonwealth jurisdictions. The reason for such a provision was stated as long ago as 1876 by the Privy Council in a Canadian appeal, *Theberge v. Laudry* (1876), 2 App. Cas 102, 106 in these words:

> *"A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known."*

A similar perspective was taken by the Privy Council in a Malaysian appeal; in *Nair v. Teik*, [1967] 2 A.C. 31, at pp.39-40, their Lordships noted previous decisions from such disparate countries as Ceylon and British Honduras (as Sri Lanka and Belize then were).

In similar vein is the comment of the Election Court (consisting of 3 High Court Judges) in the New Zealand case of *Re Wellington Central Election Petition*, [1973] 2 NZLR 470, 477-8: "The assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment." Because of the finality of the decision of the Election Court, the New Zealand legislation mandates a Court of 3 Judges.

For these reasons, s.73(7) of the Constitution precludes an appeal being taken from a judgment of the Court of Disputed Returns to the Court of Appeal.

In any event, section 121(2) of the Constitution does not have unlimited application. It can only arise when a judgment sought to be appealed involves, a matter arising under the Constitution or its interpretation. In *Kulavere v. The State* (judgment 13 August 1999 - Criminal Appeal AAU0033 of 1998), this Court was asked to assume jurisdiction under s.121(2) of the Constitution to hear an appeal from a High Court judgment refusing costs to a person acquitted in a criminal charge. No right of appeal was afforded by the relevant statute but counsel for the appellant claimed that the case involved s.29(1) of the Constitution providing for the right of fair trial: the Court (Tikaram P, Eichelbaum and Handley JJA) said at p.3-4 of the unreported judgment:

"The purpose of the subsection is plain. It is to ensure a right of appeal in matters where the High Court has made a decision which (to put it in popular rather than legal language) involves the Constitution. However, paying more precise attention to the language of the legislation, it will be seen that the right of appeal is in respect of a judgment in a matter arising under the Constitution or involving its interpretation. The matters before the High Court were applications for costs and compensation. The considerations to be taken into account on such applications are set out in sections 158 and 160 of the Criminal Procedure Code. In deciding such applications it is unnecessary to turn to any provision in the Constitution, or consider its interpretation.

We accept that the arguments Mr Cameron has urged in support of the appeal involve the interpretation of the Constitution. If there was jurisdiction to entertain the appeal we would need to decide whether in terms of s.29(1) of the Constitution the applications were made in the course of the trial, or whether the trial had concluded. If the applications were part of the trial the Court would have to decide further whether failure to give reasons infringed the appellant's rights under chapter 4 of the Constitution (Bill of Rights) and if so the appropriate remedy. None of these issues however arose in the applications before the High Court.

Language similar to that of s.121(2) is found in section 76 of the Constitution of the Commonwealth of Australia and we are obliged to Dr. Cameron for providing references to case law on that legislation, Hopper v. Egg & Egg Pulp Marketing Board (Vic) (1939) 61 CLR 665; Attorney General (NSW) v. Commonwealth Savings Bank of Australia (1986) 160 CLR 315; James v. State of South Australia (1927) 40 CLR 1: and R v. Commonwealth Court of Conciliation and Arbitration, ex parte Barrett (1945) 70 CLR 141. Interpretation of the Australian sections however raises a different issue, whether the matter before the High Court arises under the Constitution or involves its interpretation. In our case, we repeat, the issue is not whether the hearing of the appeal would include matters arising under the Constitution or involving its interpretation; undoubtedly it would. But the Court's power to deal with the appeal depends on the different question whether the judgment of the High Court was one "in any matter arising under [the] Constitution or involving its interpretation" and for the reasons given we are of the opinion it was not.

The point is underlined by the holding in Attorney General for NSW v. Commonwealth Savings Bank of Australia at 327 that a cause involves the interpretation of the Constitution if the interpretation

> ***of one or more of its provisions is essential or relevant to the question of statutory interpretation arising. This cannot be said in respect of any issue in the applications before the High Court here. Or to adopt the language of Starke J. in Ex parte Walsh & Johnson: In re Yates (1925) 37 CLR 36, 130 no matter arising under the Constitution or involving its interpretation "was involved or entangled in the controversy" before the High Court.***
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> ***While we agree with Dr. Cameron that a fair large and liberal interpretative approach is appropriate, the clear language of s.121(2) precludes the result for which he has argued, that the issues before the High Court came within that section."***

The present case is similar. Gates J. was required to interpret the provisions of the Electoral Act 1998. He did so in some detail, criticising the drafting of s.116, the crucial section. The Judge did not purport to interpret any part of the Constitution. The fact that the subject- matter of the case, namely an election, is a topic discussed at length in the Constitution is irrelevant. The case is no different from Kulavere's,where the subject-matter of the case i.e. the right to a fair trial, also featured in the Constitution. Neither case "involved or entangled" the Constitution in the words of Starke, J. cited earlier. Nor was any provision of the Constitution essential or relevant to the question of statutory interpretation arising.

Accordingly, the Court does not consider that there is any right of appeal to this Court either under s.121(2) of the Constitution or under any provision of the Court of Appeal Act (Cap.12). S.73(7) of the Constitution means what it says. In accordance with the position in many other countries, there is no right of appeal from the final decision of the Court of Disputed Returns.

Error of Law

Nor can a right to appeal from or to review a decision of the Court of Disputed Returns be manufactured by claiming that the Judge was acting as a 'legislator' in his interpretations of s.116 of the Act. If this were so, then the same criticism could be levelled at many judicial exercises in statutory interpretation. The Judge is not acting as legislator: he/she is merely the interpreter of the work of the legislature.

What Gates J. held, in essence, was that, even where a voter has failed to observe the voting instructions contained in the Act, his/her vote should still be counted if the voter's intentions are clear from the ballot paper. He based his decision on overseas authorities and made the ruling despite the absence of an express provision to that effect which had been present in the previous Electoral Act.

The Court is not in a position to rule whether the Judge's interpretation of the Act was right or wrong. But if he did make an error of law, he nevertheless did so whilst exercising his undoubted jurisdiction as the Court of Disputed Returns. As already held, no right of appeal or review is possible because of s.73(7) of the Constitution supported by s.153(2) of the Act.

Possible Solution for the Future

Counsel for the Returning Officer and the Supervisor of Elections quite

properly, abided the decision of the Court. However, Mr Udit pointed out his clients' concerns. Up until Gates J.'s decision, the Supervisor of Elections had taken the view that s.116 of the Act was to be interpreted in the manner contended by the appellant and not as found by Gates J. Not unnaturally, the Supervisor would have liked a definitive ruling from this Court, particularly when a by-election in another part of Fiji is imminent.

The Supervisor or a political party may, in these circumstances, be attracted to the course followed by the New Zealand Court of Appeal in *Wybrow v. Chief Electoral* Officer [1980] 1 NZLR 147. The representative of a major political party there sought declarations that would have the effect, in the future, of overruling the decision of 3 High Court Judges sitting as an Election Court in *re Hunua Election Petition* [1979] 1 NZ LR 251.

The *Hunua* judgment had rejected as informal certain votes not cast in conformity with the relevant legislation. The Court of Appeal overruled the effect of this decision for the future in holding that a Returning Officer may not reject a ballot paper as informal unless the paper fails clearly to indicate the candidate for whom the voter wishes to vote.

The details of that case of course turn on the particular legislation with which it was concerned. However, the following principles of general application were established:

(a) The plaintiff representing a major political party had sufficient standing to bring declaratory judgment proceedings, although there was no general election in contemplation at the time of the Court hearing.

(b) The case was properly transferred by the High Court to the Court of Appeal. There was a conflict of High Court decisions which justified the Court of Appeal interpreting the relevant legislation and making appropriate directions which would govern the conduct of future elections.

Decision

For the reasons stated, there is no jurisdiction in this Court to consider the appeal purportedly filed by the appellant. Accordingly, the Court orders:

(a) The application for stay is refused.

(b) The temporary stay granted on 21 February 2002 is lifted.

(c) The appeal is dismissed for want of jurisdiction.

(d) The appellant is to pay $1,000 costs to the Third Respondent plus disbursement as fixed by the Registrar.

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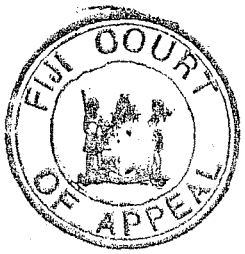
Hon. Justice Sir Ian Barker
Justice of Appeal



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Hon. Justice Daryl Davies
Justice of Appeal

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