

JOSEVATA NAKAUSABARIA KAMIKAMICA

v

1. **THE RETURNING OFFICER**
2. **THE SUPERVISOR OF ELECTIONS**
3. **RATU MANASA KIKAU SENILOLI**

[HIGH COURT, 1995 (Tuivaga C.J.), 23 November]

Civil Jurisdiction

Elections-successful candidate disqualified-whether runner up to be declared returned or whether new election to be held.

The third Respondent was elected to Parliament but was found to be ineligible for election as a result of Section 42(1)(f) of the Constitution (1990). HELD: In the circumstances a new election would have to be held.

Cases cited:

In Re Parliamentary Election for Bristol South East [1964] 2 QB 257
Hobbs v. Morey [1904] 1 KB 74

Ruling subsequent to hearing of election petition.

S. Matawalu for the Petitioner

I. Mataitoga and *I. Tuberi* for the 1st and Second Respondents

A.R. Matebalavu for the Third Respondent

Tuivaga CJ:

Have now had the benefit of argument by counsel on both sides regarding the circumstances under which the Court may exercise its powers under regulation 10 (1)(v), (vi) and (vii) of the Electoral (Election Petitions) Regulations, 1992 which have a direct bearing on the application of regulation 19(a), (b) and (c). Under regulation 10(1) the Court may among other things in any election petition

- (v) declare that any person who was returned as elected was not duly elected;
- (vi) declare any candidate duly elected who was not returned as elected;
- (vii) declare any election to be absolutely void.

In view of the order made in the substantive hearing of this petition declaring

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Ratu Manasa not to have been duly elected no question now arises in relation to regulations 10(1)(v) and 19(a) of the Electoral (Election Petitions) Regulations, 1992.

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The case for the Petitioner, Josevata Kamikamica, is that as he was the candidate who polled the second largest number of votes he should be declared duly elected. It is said that this is the inevitable consequence following upon the finding of the Court that Ratu Manasa was disqualified as a member of the House of Representatives.

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The case for the Respondents on the other hand is that on the Court's finding Ratu Manasa was disqualified under section 42(1)(f) of the Constitution. It is said that the effect of the finding is to render his election absolutely void as to bring into play regulation 19(c). It follows that a new election for a member in the Tailevu Fijian Provincial Constituency should be ordered to fill the existing vacancy.

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These opposing submissions raise directly the question of the proper order to be made on this election petition given the finding of the Court in the substantive hearing. The law governing the matter has been discussed in various court decisions.

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For present purposes, it is sufficient to refer only to two of these cases. In re Parliamentary Election for Bristol South East [1964] 2 QB 257 the following legal exposition was made during argument at page 262:

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"Where the successful candidate at an election is disqualified by his status at the date of the election, then if the electors who vote for him are unaware of the facts giving rise to his disqualification at the time they record their votes, there must be a new election; but if the electors at the time of recording their votes know that the candidate for whom they vote is disqualified, or know the facts which in law disqualify him, then the votes so given are thrown away and are void, with the result that if, after discharging all such votes for the successful candidate, it appears that the candidate with the next highest number of votes has a majority, he is entitled to be declared elected and returned as member and no new election can take place. As to what constitutes sufficient notice, it is enough to cause the votes of those who vote for a disqualified candidate to be thrown away if they know the facts which constitute the disqualification and are aware that the legal consequences of those facts might be to constitute disqualification, not that they do constitute disqualification."

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That exposition was based in part on the earlier case of Hobbs v. Morey [1904] 1 KB 74 where at page 78 Kennedy J. said:

"The Court on the hearing of the petition cannot, I think, declare

that a candidate who has a minority of votes is elected, unless it has first decided that the votes given to the candidate who is returned at the head of the poll are votes thrown away. I agree, however, that there are cases in which the Court has power so to decide. Alike in municipal and in parliamentary elections, if a person is a candidate who is manifestly disqualified, then in such a case the votes given for him may be treated as having been thrown away, since they were perversely and wilfully given to a candidate whom the electors knew to be disqualified.”

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And at page 79 the Judge said:

“But where the disqualification does not appear on the nomination paper and the election proceeds, and the disqualification is not known to the electors, then, unless on a scrutiny a sufficient number of the votes given for the candidate who has the majority can be struck off to give the petitioner a majority, I think he cannot successfully claim the seat, and the votes given to his opponent cannot be disregarded. That seems to me to be the true view and in accordance with both authority and principle; and as here the disqualification was not apparent and the petition does not allege that the voters knew of the respondent’s disqualification (the only notices being notices to the mayor and to the opposing candidate), and the petitioner had only a minority of vote, I do not think that he can successfully claim the seat. All that we can do, therefore, on this petition is to declare the election of the respondent void.

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It is clear from my finding in the substantive hearing which was based on the evidence adduced that Ratu Manasa’s purported election to the House was unconstitutional as it was in breach of section 42(1)(f) of the Constitution. In the circumstances his election was null and void. The question now is whether the Tailevu Fijian voters numbering 3688 who elected Ratu Manasa can be said to have thrown away their votes. That could only happen if it is established that those voters knew or ought to have known at the time before the election that Ratu Manasa was a disqualified candidate when he offered himself for election. I do not think there is any material before the Court that could lead to the conclusion that the voters were aware or should have been aware of the position. They clearly had no proper basis to have imagined or believed that Ratu Manasa was not competent to be a candidate.

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In his affidavit of 31 October 1995, the Petitioner had at paragraph 8 deposed as follows:-

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“That I did not lodge any objections against the Third Respondent when objections were invited on 8th September 1995 by the First Respondent because I was not then aware of all the relevant facts

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and circumstances which now entitle me to bring these proceedings.”

A If the Petitioner did not have any basis at the time to think that Ratu Manasa may have been disqualified as a candidate under the electoral law, it is hardly conceivable that the voters who elected Ratu Manasa would have been any more knowledgeable on the issue of disqualification than the Petitioner himself.

B I am satisfied that the voters who elected Ratu Manasa could not possibly have known or suspected given the technical nature of his disqualification that his candidacy might have been constitutionally or legally tainted. I do not think it could properly be said that the votes which were polled for Ratu Manasa had been thrown away and were void. In these circumstances a new election for a third member in the Tailevu Fijian Provincial Constituency is inevitable and unavoidable. To hold otherwise would result in a large number of lawful

C voters in Tailevu being prevented from exercising their democratic right to elect to Parliament a candidate of their own choice.

In the result having regard to all the circumstances of this case I have to declare pursuant to the powers of the Court under regulation 10(1)(vii) that Ratu Manasa’s purported election to the House was absolutely void and order that a new election be held in the Tailevu Fijian Provincial Constituency in terms of regulation 19(c) of the Electoral (Election Petitions) Regulations, 1992.

There will be no order for costs.

(Petition allowed.)

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