LEFAGA & FALEASEELA TERRITORIAL CONSTITUENCY re:
TAULA (IEROME) v LE MAMEA (ROPATI) AND OTHERS

Supreme Court Apia
Ryan CJ
24, 27 June 1991

INTERPRETATION OF ACT - Electoral Act 1963 as amended in 1990 and 1991 - S16, 25A(1), 25B(5), 99, 111(4), 112, 113, 116.

COSTS - unsuccessful litigant to pay costs as fixed by the Court.

Electoral petition arising out of the election on 5th April 1991 being the first election applying universal suffrage (unsuccessful).

R S To'ailoa for Petitioner
A S Va'ai for First Respondent
C Peteru for Second Respondent

Cur adv vult

There is a matter that I want to deal with that was raised in Chambers. Mr To'ailoa after submissions had concluded and after I had finished preparing my decision submitted that a scrutiny be ordered under S.111(4) of the Electoral Act i.e. of the 10 voters who were looked at to see if they voted and how they voted. He submitted that if it was then found that the 10 or a fairly substantial number of them voted for the First Respondent then that would indicate that there had been an orchestrated campaign by the First Respondent to wrongly enrol voters that he knew were not qualified and that that would amount to an illegal practice.

Section 111(4) certainly gives the Court a right at any time during the trial to order a scrutiny of votes. However in my view there would be imponderables and dangers inherent in such a course in this particular trial. Who is to say e.g. what influenced the voters in the 3 weeks or so between enrolment and the election.

I am not prepared to make an order under Section 111(4) requiring the 10 votes to be scrutinised.

The hearing of this Petition commenced on 24 June. At that point the Petition was amended by reducing the number of electors whose presence on the roll was challenged to 91. It became clear at an

early stage that if all 91 applications for entry on the roll were to be examined then a great deal of time would be required. Counsel then agreed with the Court's suggestion that 10 voters, to be chosen by the Petitioner, should be scrutinized and accordingly the Petition proceeded on that basis. When I say scrutinized I mean considered by the Court.

In summary the grounds for the Petition are that the said electors should not have been on the roll and that they only appear on the roll because of illegal practice on the part of the First Respondent. There is no suggestion here of corrupt practice. What is relied upon to establish illegal practice is that the First Respondent breached S.99 of the Act.

At the conclusion of the evidence relating to the 10 electors and the evidence generally as contained in the affidavits of the Petitioner and the oral evidence of those deponents Counsel for the First Respondent has applied to have the Petition struck out. I take that to mean he submits that there is no prima face case to answer.

It is well established in Western Samoa that the appropriate standard of proof in these matters is proof beyond reasonable doubt. The Courts have held that for a prima facie case to be established there must be a minimum of evidence which must be tendered before the issue can be submitted to a jury - in other words there must be evidence which a properly instructed jury, if this was a criminal trial, would find adequate to bring in a conviction on.

This petition must be looked at in the context of this particular election. The 1991 election was a momentous one for Western Samoa in that it was the first election in which universal suffrage applied. A plebiscite had been held late in 1990 which had voted in favour of universal suffrage. On the 27 November 1990 an amendment to the Electoral Act was passed to give effect to that finding and that amendment set out among other things how voters were to qualify and register.

The Act was further amended in 1991 a very short time before the election took place on 5 April, and it is fair to say that the 1991 amendment was principally aimed at the qualifying of electors because it amended in S.2, S.15 of the 1963 Electoral Act which had been amended by S.5 of the 1990 amendment. It can be seen from the foregoing that the time frame for the implementation of the new electoral law was very tight given the date of the election and I think it is fair to say, given the evidence that I have heard in Court, that the Registrar of Electors, had for this particular and unique election an unenviable task.

Mr Va'ai for the First Respondent in his submissions pointed to the provisions of S.112, 113 and 116 as providing the statutory basis on which elections can be avoided. S.112 deals with corrupt practice and has no application here.

S.113 deals with, for the purpose of this Petition illegal practices and S.116 deals with irregularities which are not to result in an invalid election i.e. if the court is satisfied that the election was so conducted as to be in substantial compliance with the law and that the irregularities did not affect the result of the election.

Mr Va'ai accepted that the Registrar in her evidence had conceded that mistakes had occurred. He said that the law required the registrar to be satisfied as to the right of an elector to be on the roll and that therefore this raised a presumption which required rebuttal by the Petitioner. He said the evidence may have disclosed mistakes but little else.

S.111(4) enables the Court to direct a recount or scrutiny of the votes and to disallow the votes of persons wrongly placed on the roll, but has a proviso i.e. that the vote of any person who was entitled to be registered shall not be disallowed on the ground that his name has been wrongly placed on the roll. Mr Va'ai says that the effect of this subsection and proviso is that even if there are defects, if the elector is entitled to be qualified, the proviso saves the vote.

I do not think that S.111(4) has any application here. The Court is not recounting or scrutinizing votes as such. The problem which the Court faces is qualification of the voters, not what they did on election day. Mr Va'ai went on to submit that there was no evidence of involvement of the First Respondent in any illegal practice. That the only evidence of any activity on the part of the First Respondent was taking persons to be registered - something the Petitioner admitted to doing and which the Petitioner said every candidate was doing.

Mr Peteru adopted Mr Va'ai's submissions insofar as the Registrar was concerned, to the effect that the Registrar had carried out her functions basically in accordance with the Act.

Mr To'ailoa said the Petitioner had no objection to the First Respondent taking persons to enrol but objected to his procuring electors who were not entitled to vote. He embarked on an exhaustive review of the documentation in relation to the 10 electors, Exhibits 3 -12. Without going as far as Mr To'ailoa did I think it is fair to say that the documentation leaves a lot to be desired. I have reached the conclusion that there were clear breaches of S.25 B(5) of the Act in at least five of the exhibits. That section requires the registrar or an assistant to witness the forms and of course the necessity for that

requirement flows from S.25 A(1) which requires enrolment in person and to the satisfying of the registrar as to the application. It is an error of substance to depart from S.25 B(5) and if that error is projected to the remaining 81 electors it can be seen that some 45 of the voters have been enrolled contrary to the provisions of S.25 and there votes must as a result be dubious to say the least.

Three of the five forms I have mentioned were witnessed by one Patosina who was apparently assisting the First Respondent during his campaign. Mr To'ailoa went on to deal with the entitlement to qualification as set out in S.16 of the Act. I must say that I am in full agreement with him that before a person can be eligible for registration under S.16(2)(d) for service then the categories under S.16(2)(a) and (b) must be naegated. As to "Service" that is of course defined under S.16(d)(e) and I agree also with his submission that a one off rendering of any service does not come within the terms of the definition: That there is a necessity for service to be rendered on a continuing basis.

Particulars, as opposed to categories of service, are not defined in the Act and the wisdom for this is obvious because it would be quite impossible to produce an exhaustive list of every action which might be considered as a type of service.

It is apparent that even if the 91 voters were held to have been improperly enrolled and had voted for the First Respondent then the removal of their names from the roll would not affect the outcome given that the First Respondent's margin was 148. However the Court would still be in a position to apply S.113 if it reached the conclusion that the First Respondent had been involved in an illegal practice to such an extent that it could reasonably have been supposed to have affected the result of the election.

Recourse must be had to S.99 of the Act. Mr To'ailoa says that even if there is no direct proof against the First Respondent then he is caught because of the illegal practices of his agent and I presume he refers to Patosina. Section 99 of the Act reads as follows:

> "99. Procurement of voting by unqualified electors or voters.
>
> Every person is guilty of an illegal practice who induces or procures to vote at any election any person whom he knows at the time to be disqualified or prohibited whether under this Act or otherwise, from voting at that election."

The Section requires inducement to vote or procuring to vote at any election of a person he knows to be disqualified.

In my view it would be stretching the evidence beyond recognition to say that a properly instructed jury could find that the First Respondent had breached S.99 either personally or vicariously.

There were obvious deficiencies in the enrolment of electors but to sheet home responsibility for that to the First Respondent is simply not possible on the evidence produced.

I have accordingly reached the conclusion that this Petition cannot succeed in that the Petitioner has not established a prima facie case and it will accordingly be dismissed.

I will hear counsel on the question of costs.

As to the question of costs I must say that I was most impressed by the genuineness of the Petitioner.

I am not prepared to hold that the Petitioner has caused unnecessary expense by way of vexatious conduct. However this trial has proceeded for in excess of 3 days and clearly required a great deal of preparation by all concerned.

It is the usual rule in legal proceedings that the unsuccessful litigant should meet the costs of the successful litigant. The part played by counsel for the Second and Third Respondents was not really as substantial as the part played by counsel for the First Respondent and in those circumstances the costs payable by the Petitioner to the First Respondent will be fixed at $1,000.00 and the costs payable to the Second and Third respondents in total will be fixed at $500.00