IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC 14033

IN THE MATTER of the Constitution of the Independent State of Western Samoa:

A N D

IN THE MATTER of the Electoral Amendment Act 1990, the Electoral Act 1963, the Judicature Ordinance 1961 and the Declaratory Judgments Act 1988:

BETWEEN: LE TAGALOA PITA of Alafua and Sili, Member of Parliament, FAAMATUAINU TALA MAILEI of Lufilufi, AIONO FANAAFI of Fasitoo-uta and Alafua, TUAIMALO FAAUTU of Matautu-uta, MANUO SIUI of Lufilufi, MOEFAAUO LEASO PAUESI of Lufilufi, AUFAI UELESE AMOSA of Saleaula and Afega, all Samoan Matais:

Applicants

A N D: THE ATTORNEY GENERAL on behalf of the REGISTRAR OF ELECTORS and VOTERS:

Respondent

Counsel: T. Malifa for applicants
M.B. Edwards for respondent

Hearing: 29 September 1994

Decision: 11 October 1994

DECISION OF LUSSICK, J
ON RESPONDENT'S APPLICATION TO STRIKE OUT

This is an application by the respondent to strike out the affidavits of the applicants filed in support of their originating motion. The grounds relied upon by the respondent in his Notice of Motion are that "they are scandalous and irrelevant". The application is supported by the affidavit of Michael Bernard Edwards, Principal State Solicitor. Mr Edwards deposes that the material contained in the applicant's affidavits "is irrelevant and argumentative such that they are embarrassing to the Court". Notwithstanding the wording of the Notice of Motion, Mr Edwards makes no claim that they are scandalous.

In Mr Edwards' written submissions he relies on the cases of Rossage v Rossage (1960) 1 All E.R. 600, Walker v Poole, 21 Ch. D. 835, Hill v Hart-Davis, 26 Ch. D. 470 and Sims and Cain, Practice and Procedure, 12th Ed., para 710 where the authors cite the case of Sievwright v Holloway (1936) G.L.R. 591. In Rossage the matter objected to was not only inadmissible, but was also scandalous. In Walker, the Court regarded the prolix affidavit under review to be "a discreditable attempt to make costs". The affidavits in these cases were ordered to be taken off the file In Hill, the Court found that the affidavit was unnecessarily and oppressively long, but, while deciding that the Court had an inherent power to remove it from the file, allowed it to remain because of the delay and expense of filing a fresh one. Sims and Cain, para 710 cites Sievwright as authority for the proposition

that the Court has an inherent power to order removal from the file of an affidavit which contains scandalous or impertinent material.

There can be no question that the Court has inherent jurisdiction to strike out affidavits containing inadmissible material. Nevertheless, the above-mentioned cases all relate to affidavits that contained material that was not only inadmissible but was also scandalous, oppressive, or otherwise objectionable, whereas the affidavits the subject of the present application can be distinguished in that, so far as I have been able to find, there is nothing scandalous or oppressive in them, nor is there anything that embarrasses the Court. Thus the basis for the exercise of the Court's discretion applied in the cases cited is not the same basis to be applied here.

The originating motion of the applicants is for a declaration that section 5 of the Electoral Amendment Act 1990 is void pursuant to article 2 of the Constitution and that, consequently, the General Election of April 1991 is void. The declaratory order sought, if granted, would abolish universal suffrage.

It is realistic to envisage that an issue of this nature will be taken further, whatever the decision of this Court. Our Court of Appeal sits just once per year, with the next sittings expected in March 1995. If I were to rule on the admissibility of the

material in the applicants' affidavits at this stage, it is conceivable that that decision would be the subject of a separate appeal which would be heard in March 1995 at the earliest, with the originating motion to be heard sometime after that. Any subsequent appeal would not be heard before March 1996. There has already been an inordinate delay in these proceedings. The present application was filed on 19 November 1991 but, for some reason unknown to the Court, apparently nothing was done to bring it on for hearing until April 1994, when counsel for the applicants requested a fixture. Obviously the matter should be brought to finality without any further undue delay.

As a matter of convenience, it is desirable for the question of admissibility of the affidavits to be a factor in the consideration of the main issue of whether section 5 of the Electoral Amendment Act 1991 is void. In deciding that issue the Court is bound by the usual rules as to admissibility of evidence. Needless to say, matters considered by the Court to be hearsay, argument, opinion, or otherwise irrelevant must be excluded under those rules. But in my view the proper time to deal with the affidavits is in the trial of the originating motion.

I cannot see how the respondent would be prejudiced if all matters were to be dealt with together. The respondent is not facing affidavits of an onerous nature such as those in the cases

he cited. The affidavits here are by each of the applicants and, generally speaking, seek to establish their right to be heard and the arguments relied upon. Whether any particular matters are relevant and whether it is proper to present them by way of affidavit need not be decided now. The respondent cannot be taken to have made any admissions as to the contents of the affidavits merely because they remain on file. His submissions already filed make his position very clear. The respondent claims that he "should not be placed in the position alluded to in Rossage of having to run the risk of not answering the affidavits and relying on their exclusion at the hearing, or having to go to the time and expense of answering them". I cannot see the respondent being put at risk. He has already made comprehensive submissions on the question of admissibility. Furthermore, the affidavits in Rossage were of a very different nature from those now being considered. Even looking to the worst result for his case, that is, that all affidavits were to be ruled admissible in every respect, there would still be the question of the weight to be attached to such evidence. Moreover, the arguments set out in the affidavits are the arguments that the respondent must face in any event.

In the case of Re J (an infant), (Chancery Division - Cross J) (1960) 1 All E.R. 603, the Court, in referring to Rossage, said this :

> "I find nothing in his judgment which suggests to me that "Hodson L.J. went back on the view which is implicit in the "interlocutory observation which I have quoted, namely, "that there may be cases where the proper course for a judge "to follow is to refuse to strike out hearsay evidence impro- "perly included in an affidavit".

And in another passage :

> "Whether the material to which objection is taken on the "ground that it is not admissible in evidence is contained "in a statement exhibited to an affidavit, or in the affi- "davit itself, the Court has, in my judgment, a complete "discretion whether or not to strike it out, and a judge "cannot be said to be exercising his discretion improperly "merely because he decides not to strike out the matter in "question".

It follows that, even if this Court were to decide that the affidavits contained inadmissible material, the Court would not, as a matter of course, be bound to strike it out.

Having said that, I find that it is not imperative to consider the question of the admissibility of the affidavits at this stage. That course is not necessary to enable the applicants' originating motion to be properly heard. As I have said, there is no prejudice to the respondent if all matters are considered together, and, as a matter of convenience, that will be the procedure.

I make the following orders :

1. Respondent's application to strike out dismissed;

2. Costs reserved.

JUDGE