

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC. 20449

IN THE MATTER of The Territorial
Constituency of
Satupaitea

A N D

IN THE MATTER of an Election Petition

BETWEEN: ASIALTA SALEIMOVA VAAI of
Siusega and Vaega, Matai

Petitioner

A N D: TAVUI LENE of Pitonuu
and Tafuna, Matai

First Respondent

A N D: FAUATEA SALE of Vaega
and Tafuna, Matai

Second Respondent

A N D: MASE TOLA of Apia, Chief
Returning Officer and
Registrar of Electors
and Voters

Third Respondent

Counsel: Applicant in person

Hearing: 29 May 1996

Decision: 31 May 1996

DECISION OF SIFOLU, CJ

A general election of Members of Parliament was held on Friday, 26 April

1996. On Tuesday, 14 May 1996 the Chief Electoral Officer declared the result of the poll as required by section 80 of the Electoral Act 1963 by giving public notice thereof in terms of the relevant provisions of section 2(1) of the Act. The declaration of the poll result for the territorial constituency of Satupaitea showed each candidate with the total number of votes he or she polled as follows :

Asiata Saleimoa Vaai	374
Fauatea Sale	93
Tavui Lene	405
Tuimaseve Fuea	<u>112</u>
Total number of valid votes	984
Number of informal votes	4

Tavui Lene who polled the highest number of votes was accordingly declared by the Chief Electoral Officer to be elected.

On 20 May 1996 Asiata Saleimoa Vaai, who is the applicant and petitioner in these proceedings, filed an election petition which cite the successful candidate Tavui Lene as first respondent, one of the unsuccessful candidates Fauatea Sale as second respondent and the Chief Electoral Officer and Registrar of Electors and Voters as third respondent. It is clear that the election petition was filed within time as required in terms of section 106 of the Act which provides that an election petition shall be filed within seven days after the day the Chief Electoral Officer has publicly notified the result of the poll.

Now the Court is not concerned with the other respondents in the present proceedings except for the second respondent. The applicant in his application and supporting affidavit alleges that the second respondent is not a resident of Western Samoa but of American Samoa where he operates a business. He further says in his affidavit that immediately after the general election and before the result of the poll was publicly notified, the second respondent left Western Samoa for American Samoa and to the best of his knowledge the second respondent has not again returned to Western Samoa. As a result it has not been possible to effect personal service of the applicant's petition upon the second respondent within the jurisdiction of this Court.

It is also stated by the applicant in his affidavit that his petition has been published in the *Samoa Observer* newspaper and broadcasted over the local Radio ZAP so that notice of his petition must undoubtedly have come to the notice of the second respondent. There is also some suggestion that the second respondent may be evading service of the petition because of the nature of the allegations against him. The applicant is therefore seeking, in the alternative, orders under rules 22 and 23 of the Election Petition Rules 1964. I will deal with those rules later in this decision. But there is another order sought by the applicant under rule 18 for the Court to excuse the one day's delay in having his petition published in one local newspaper. I will defer that part of the application to the substantive hearing when all parties who have been served will be present.

Coming back to the question of service insofar as it concerns the second respondent, rule 19 provides that a petition shall be served not later than seven

days after the date of filing. As already mentioned the petition in this case was filed on 20 May 1996. So in terms of rule 19 the seven days period required for service expired on 27 May. Rule 20 then provides for personal service of a petition on every respondent. Rule 21 which provides for service of a petition on an address for service given by a respondent does not apply here. Rule 22 then provides :

"Where the Court or a Judge, on application made not more than 14 days after the date of the filing of a petition, is satisfied, on affidavit showing what has been done, that every reasonable effort has been made to effect service in manner herein before provided and to cause the matter to come to the knowledge of the respondent, the Court or a Judge may order that what has been done shall be considered sufficient service, subject to such conditions as it or he thinks reasonable".

The present application was filed on 28 May 1996 and therefore in terms of rule 22 it is within time for the purpose of that rule. Rule 23 then provides :

"The Court or a Judge may, if of opinion that there has been evasion of service, order that the affixing in the office of the Registrar of the Court of a notice setting out the fact that the petition has been presented, the name of the petitioner, and the prayer of the petition, shall be considered sufficient service".

For completeness on the question of service of a petition, section 105 of the Electoral Act 1963 insofar as relevant provides :

"(4) The petitioner shall present his petition by filing it in the office of the Supreme Court at Apia, and shall serve a copy of it on each respondent thereto.

"(5) The petition shall be served personally, or in such

"other manner as may be prescribed by rules of Court".

It is clear from the relevant provisions of the Act and the relevant rules that what is contemplated with regard to service of an election petition is personal service unless any of the circumstances provided in rules 21, 22 and 23 apply.

To turn again to rule 22, I am of the respectful view that not every reasonable effort has been made to effect personal service of the petition on the second respondent within the time period of seven days provided in rule 19 in order to justify making the order for sufficient service sought under rule 22. I am further of the view that not every reasonable effort has been made to cause the petition or its contents to come to the knowledge of the second respondent in terms of rule 22.

From the applicant's application and supporting affidavit it is clear that he claims the second respondent to be a resident of American Samoa where he operates a business. He says that the second respondent is not a resident of Western Samoa and except for his family's home at Satupaitea he has no other home in Western Samoa. Given those factual allegations, the applicant knew or ought to have known that any chance of the second respondent returning to Western Samoa so soon after being defeated at the poll by quite a substantial margin must be very slight. Therefore reasonable effort should have been made to effect personal service of the petition on the second respondent in American Samoa or to cause the petition to come to the knowledge of the second respondent in American Samoa. Application should have been made to the Court for leave to serve the petition on the second respondent overseas and this Court with its

ordinary powers as the Supreme Court would have had jurisdiction to make an order for the petition to be served overseas in American Samoa on the second respondent. However no such application was made with the result that the seven days period required to effect personal service of the petition has expired. I am also unable to accept that in the present circumstances the publication of the petition in the local *Samoa Observer* newspaper or its broadcast over the local Radio 2AP, if that was done, constitutes reasonable effort to cause the petition to come to the knowledge of the second respondent in American Samoa for the purpose of rule 22. The application for an order of sufficient service under rule 22 is therefore denied.

Turning to rule 23, I am also of the respectful view that the allegations in the applicant's affidavit do not satisfy this Court that the second respondent has been and is still evading service of the petition so as to justify an order for substituted service under rule 23. It is clear from the applicant's affidavit that the second respondent immediately returned to American Samoa after the poll and before the declaration of the result of the poll was publicly notified. So he returned to American Samoa days before the applicant's petition was filed in Court. And it is very difficult to say that the second respondent's return to and remaining in American Samoa is for the purpose of evading service of the applicant's petition. Given the allegations that the second respondent is a resident of American Samoa with a business there, I think the reasonable inference to draw is that the second respondent was returning home after the poll to American Samoa where he resides and operates a business as the applicant claims in his affidavit. Therefore I am not satisfied and do not accept that the second respondent has been and is still evading service of the petition.

Accordingly the application for an order for substituted service under rule 23 is also denied.

Given the circumstances of this case and the denial of the present application, the petition insofar as it relates to and concerns the second respondent is dismissed. In all other respects the petition is to continue against the respondents who have been served.

There will be no order as to costs.

TFM Sapiro
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CHIEF JUSTICE