IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA NO. 1439/2022

BETWEEN	**VAINETUTAI BOAZA** Appellant
AND	**TE-HANI ROSE ALEXANDRA BROWN** First Respondent
AND	**CHIEF ELECTORAL OFFICER** Second Respondent

CA NO. 1440/2022

BETWEEN	**NOOROA PARATAINGA** Appellant
AND	**VAINETUTAI ROSE TOKI-BROWN** First Respondent
AND	**CHIEF ELECTORAL OFFICER** Second Respondent

Coram:	White P, Fisher JA, Asher JA
Hearing:	2 November 2022
Counsel:	Ms SE Wroe (by Zoom), Mr N George and Ms M Tangimama for the Appellants Messrs ITF Hikaka and B Marshall for the First Respondents Mr D Greig for the Second Respondent
Judgment:	22 November 2022
Costs Judgment:	13 March 2023

JUDGMENT OF THE COURT OF APPEAL AS TO COSTS

A. The Appellants are to pay the First Respondents costs in the sum of $4,500 together with disbursements to be fixed by the Registrar, including half the costs of the return flights and accommodation of counsel.

Introduction

[1] In our judgment of 22 November 2022 we ordered that costs should follow the event and the unsuccessful Appellants should pay the costs of the First Respondents. In the absence of agreement on quantum, we gave timetable directions for the filing of submissions.

[2] By memorandum dated 6 December 2022 the First Respondents sought costs of $14,021.52, being approximately 54% of the actual costs, and full disbursements of $2,454.46.

[3] The First Respondents submitted that these costs constituted a reasonable contribution to the costs incurred on the appeal taking into account that New Zealand counsel were briefed, but a significantly reduced fee was charged, the matter was complex, electoral law being a specialist area of expertise, the First Respondents were successful, costs were increased as a result of the way the Appellants conducted the appeal, raising new arguments for the first time on appeal, and the appeal was weak which required costs to achieve discipline.

[4] By memorandum filed on 15 December 2022 the Appellants submitted that an award of $4,500 would represent a reasonable proportion of the First Respondents' properly incurred costs.

[5] The Appellants referred to the applicable legal principles, including s 101 of the Electoral Act 2004, ss 60(1)(g) and 65 of the Judicature Amendment Act 2011, the High Court decision in *Puna v Piho*,[1] and the approach adopted in recent Court of Appeal decisions which suggested the award should be modest.[2]

[6] The Appellants then submitted that the appeal concerned a fairly straightforward question of statutory interpretation which did not require consideration of a vast number of cases or documents, the new issue was heard by the Court of Appeal in any event and, in an appeal arising from an election petition which

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1 *Puna v Piho & Ors* (Costs) CKHC, MISC 85/06 (Manihiki Petition), unreported, 29 March 2007.

2 *von Hoff v Napa* [2021] CKCA 3 ($2,500) and *Attorney-General for the Ministry of Justice (Survey Dept) v Kokaua* [2017] CKCA 3 ($3,000 per appellant).

deals with matters of fundamental importance to Cook Islanders (namely free and fair elections), modest awards would be appropriate.

[7] By memorandum dated 6 February 2023 the Appellants drew the Court's attention to the 30 January 2023 High Court costs judgment of Chief Justice Keane in respect of the three Atiu election petitions which he had heard and dismissed on 16 November 2022 following our judgment in this case relating to two of those petitions.[3] The Appellants were concerned to ensure that we were aware of the scope of the award of costs in the High Court to ensure that there was no duplication in our award of costs.

[8] By memorandum dated 7 February 2023 the First Respondents assured the Court that all costs in respect of preparation of the case on appeal were, appropriately, included as part of the First Respondents' costs claimed in the Court of Appeal and that there was no duplication between any costs awarded in the High Court and in this Court.

[9] We accept these assurances given to the Court by the First Respondents. As it also happens, the order for costs which we propose to make means that no issue of duplication arises for consideration or determination.

[10] Counsel for the parties have subsequently assisted the Court by providing references to previous costs judgments of this Court in appeals involving election petitions since 2004 which show that awards of between $1,000 and $5,000 have been made.

The Court of Appeal's jurisdiction and discretion as to costs

[11] The jurisdiction of the Court of Appeal to award costs on appeals is conferred by ss 60(1)(g) and 65 of the Judicature Amendment Act 2011. In exercising its statutory jurisdiction under these provisions, the Court has a discretion to make such order "as the Court of Appeal thinks fit" or "as may seem just" in the circumstances of the particular case.

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3 *Allsworth v Tangatapoto* [2023] CKHC, CIVIL MISC 937/2022, 30 January 2023.

[12] The specific election petition costs provision in s 101 of the Electoral Act 2004 relates to costs in the High Court rather than to costs in the Court of Appeal on appeals in election petitions on questions of law by way of case stated. The costs jurisdiction of the Court of Appeal in such cases arises under ss 60(1)(g) and 65 of the Judicature Amendment Act.

[13] At the same time the Court of Appeal when exercising its discretion under ss 60(1)(g) and 65 to make an order for costs in an election petition appeal may take into account by analogy the factors mentioned in s 101 of the Electoral Act in respect of "vexatious conduct, unfounded allegations, or unfounded objections". In other words, in respect of an election petition appeal by way of case stated on a question of law, submissions without foundation or merit should similarly be penalised.

[14] We also agree with Ms Wroe for the Appellants that in exercising its discretion in an election petition appeal the Court of Appeal may be assisted by the approach of the High Court in cases such as *Puna v Piho* where Nicholson J pointed out:[4]

> "The right to challenge an election provided by Part 8 of the [Electoral] Act plays a major part in ensuring democratic election in accordance with the Act and maintenance of confidence in the validity of election results. The right to challenge or defend an election result should not be restricted in practice to the rich and/or powerful by potential cost consequences."

[15] A similar approach was adopted by Williams J in *Beer v Tuariki* where he recognised that:[5]

> "election petitions are a legitimate and useful tool to ensure the democratic electoral process operates as it should and the integrity of elections is thereby safeguarded. It follows that unsuccessful parties should not be dissuaded from challenging, initially at least, the outcome of an election by filing election petitions, if genuine grounds appear to exist. But the litigation should be attended by strict attention to the likely result…."

[16] While there appear to be differences between other aspects of these and other High Court decisions insofar as they relate to the interpretation and application of s 101 of the Electoral Act, with other High Court Judges, including the Chief Justice, preferring the approach of Williams J in *Beer v Tuariki* to that of Nicholson J in *Puna*

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4 *Puna v Piho*, above n 1, at [48].

5 *Beer v Tuariki* [2011] CKCH 58, Misc. 114/2010 (Pukapuka), at [33][b].

v Piho,[6] it is unnecessary for us to refer or to resolve these differences, especially as they are not before us in this case and we have heard no argument in respect of them. It is sufficient for our purposes to note that the High Court Judges in both *Puna v Piho* and *Beer v Tuariki* recognised the significance of election petitions in the context of safeguarding the integrity of the electoral process and the need to ensure that unsuccessful parties are not deterred from challenging election results by the potential level of costs.

[17] In our view a similar approach should be adopted by the Court of Appeal when exercising its discretion to make orders as to costs in election petition appeals on questions of law by way of case stated. The need to ensure democratic elections and to maintain confidence in the validity of election results in accordance with the Cook Islands Constitution and the Electoral Act remains of importance in this Court. Appeals raising reasonable arguments should not be discouraged or restricted by costs awards.

[18] This approach has led the Court of Appeal to make relatively modest awards of costs in all such appeals since 2004. We are grateful to counsel for their helpful research which indicates the following:

- *Puna v Woonton* ($2,000 inclusive of all travel, accommodation and other incidental expenses).[7]
- *Wigmore v Matapo* ($3,000 plus disbursements as fixed by the Registrar).[8]
- *Tapaitau v Rasmussen* ($1,000).[9]
- *Robati v Rua* ($4,000).[10]
- *Tangatapoto v Vavia* ($3,000).[11]
- *George v Toki-Brown* ($3,000).[12]

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6 *Allsworth v Tangatapoto*, above n 3, at [33]-[49].
7 *Puna v Woonton* [2004] CKCA 8, at [33].
8 *Wigmore v Matapo* [2005] CKCA 1, at [110].
9 *Tapaitau v Rasmussen* [2005] CKCA 5, at [21] (joint judgment with *Robati v Rua*).
10 *Robati v Rua* [2005] CKCA 5, at [21] (joint judgment with *Tapaitau v Rasmussen*).
11 *Tangatapoto v Vavia* [2014] CKCA 15/14, at [23].
12 *George v Toki-Brown* [2014] CKCA 14/14, at [30].

- *Tatuava v Glassie* ($3,000).[13]

- *Rasmussen v John* ($3,000).[14]

- *Tangatapoto v Vavia* (No. 2) ($5,000 plus disbursements to be fixed by the Registrar including travel and accommodation for one counsel).[15]

[19] In all of these cases the Court fixed costs without reference to the parties or submissions being received from them. In the 2014 cases security for costs was ordered at the outset of the appeals.

[20] Relatively modest awards of costs have also been made by the Court of Appeal in other civil appeals involving issues of public interest: *von Hoff v Napa* ($2,500),[16] *Attorney-General for the Ministry of Justice (Survey Dept) v Kokaua* ($3,000 per appellant)[17] and *Allsworth v Puna and Brown* ($1,500).[18]

The award in this case

[21] We have not been persuaded by the First Respondents that we should depart from the Court's usual approach to make a relatively modest award of costs in this election petition appeal by way of case stated. In particular we do not accept that the First Respondents are entitled to an award of 54% of their actual costs. In our view an award of $14,021.52 would be likely to deter appellants and discourage appeals in such cases. Nor do we consider that the Appellants' arguments were so weak that they could be described as meritless and should therefore be penalised.

[22] We agree with the Appellants that the questions of law in this appeal by way of case stated while of importance were in the end not unduly complex. Nor was the length of the hearing significantly increased as a result of the new issues raised on appeal.

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13 *Tatuava v Glassie* [2014] CKCA 12/14, at [26].
14 *Rasmussen v John* [2014] CKCA 9/14, at [65].
15 *Tangatapoto v Vavia* (No.2) [2015] CKCA 1/15, at [50].
16 *von Hoff v Napa*, above n 2.
17 *Attorney-General for the Ministry of Justice (Survey Dept) v Kokaua*, above n 2.
18 *Allsworth v Puna and Brown* [2021] CKCA 3, at [61].

[23] We also note that in the parallel appeal in *Williams v Matenga*,[19] the quantum of costs was agreed by the parties following a submission by the successful Appellant in that case for an award of $4,000 inclusive of VAT and disbursements which it was said was modest and recognised the public interest factor in the appeal. While there were differences between the two appeals, we agree with the approach of the Appellant in *Williams v Matenga* to the appropriate level of awards in cases of this nature.

[24] For these reasons we order the Appellants in the present case to pay costs in the sum of $4,500 to the First Respondents, together with disbursements to be fixed by the Registrar, including half the costs of the return flights and accommodation of counsel as sought. In a case like this one where bringing counsel from New Zealand was justified, the full cost of return flights and accommodation would normally be allowed. Fortunately in this case those disbursements were shared with another appeal involving the same counsel.

[25] In view of our approach to this award it is unnecessary for us to deal specifically with the issue of VAT which we note arose in the High Court costs judgment.[20]

[26] Nor do we need to address the issue of security for costs as no security was given in this appeal.

[27] For completeness, we do not consider it is necessary or desirable to order that the costs should be paid by the Cook Islands United Party. The fact that Senior Counsel for the First Respondents has said in her memorandum that the costs "will be paid by the Cook Islands United Party" is sufficient to ensure that costs will be paid. We note that the Chief Justice reached a similar conclusion in his High Court costs judgment.[21]

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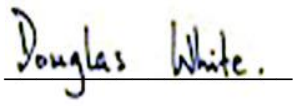
19 *Williams v Matenga* [2022] CKCA.
20 *Allsworth v Tangatapoto*, above n 3, at [68]-[69].
21 *Allsworth v Tangatapoto*, aove n 3, at [74]-[75].

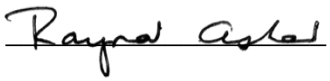
Result

[28] The Appellants are to pay the First Respondents costs in the sum of $4,500 together with disbursements to be fixed by the Registrar, including half the costs of the return flights and accommodation of counsel.



Douglas White, P

Robert Fisher, JA



Raynor Asher, JA