

IN THE HIGH COURT OF THE COOK ISLANDS  
HELD AT RAROTONGA  
(CIVIL DIVISION)

Misc No: 80/2006

IN THE MATTER

of Section 92 of the Electoral Act 2004

AND

IN THE MATTER

of an election of Members of Parliament of the  
Cook Islands held on Tuesday the 26<sup>th</sup> day of  
September 2006

BETWEEN

GEORGE COWAN of Rarotonga,  
Candidate

Petitioner

AND

MAPU TAIA of Mauke, Politician

First Respondent

AND

NOOAPII TEAREA Deputy Chief Electoral  
Officer

Second Respondent

Counsel:

Mr N George for Petitioner  
Mr C Little for First Respondent  
No appearance necessary for Second  
Respondent

Date of Judgment:

10 April 2006

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**COSTS JUDGMENT OF DAVID WILLIAMS CJ**

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## 1. INTRODUCTION

- 1.1. On 2 November 2006 I delivered an oral judgment dismissing the petition. The revised written Judgment was delivered on 23 November 2006. Costs were reserved. Paragraph [5.7] of the revised written Judgment provided as follows:

"The First Respondent is entitled to its reasonable costs of and incidental to the defence of the Petition. If costs cannot be agreed within 21 days of receipt of written judgment, the First Respondent must lodge submissions in support of its claim for costs. The Petitioner will lodge submissions in reply within 21 days thereafter. Then the Court will decide on the papers."

- 1.2. The parties were unable to agree costs. The Court received written submissions dated 4 December 2006 from Mr Little, solicitor for the First Respondent. On 22 December 2006 Mr George, Counsel for the Petitioner, filed submissions in response.

- 1.3. I became aware that, in relation to the Manihiki petition, Justice Nicholson was preparing a comprehensive analysis of the applicable principles as to costs in respect of electoral petitions. I decided to defer my judgment in this case to await delivery of the Manihiki judgment. The Manihiki judgment was delivered on 29 March 2007. I respectfully adopt the comprehensive analysis of the relevant law set out in paragraphs 37-54 of that Judgment and in particular the helpful summary as to the relevant discretionary principles set out in paragraph [55]. Paragraph [55] states as follows:

"[55] Having regard to the provisions of the Act, I find that the discretion to determine the defrayal of election petition costs is to be exercised judicially by considering and applying the following criteria:

- a) The amount of security for costs fixed by the Court; and
- b) The amount and composition of all costs of all parties to the petition of and incidental to the presentation of the petition and the proceedings consequent thereon; and
- c) The success of each party; and
- d) Any costs, which in the opinion of the Court have been caused by vexatious conduct, unfounded allegations, or unfounded objections on the part of either the petitioner or of the respondent, and any needless expenses incurred or caused on the part of the petitioner or respondent; and

- e) The conduct of each party and the events after security for costs was fixed."

1.4. In paragraph [51] Nicholson J said as to the amount fixed for security:

[51] In light of this provision and process, I consider that the amount fixed as security should be taken as a benchmark by the Court in later deciding who should defray the election petition costs actually incurred. Each party should bear this benchmark figure in mind in deciding the expense that he or she will incur in the part they take and realise that if they incur more expense, by for example, considerable investigation and interviewing, or instructing very senior, foreign domiciled, or multiple counsel, they run the high risk of not being reimbursed for the extra expense, even if they succeed."

## 2. SUBMISSIONS AS TO COSTS BY FIRST RESPONDENT

- 2.1. It was first contended that the general rule to be applied is that costs should follow the event. Since the First Respondent was successful in defending the petition he was entitled to costs. The Court upholds this submission. Indeed that is what this Court decided in paragraph 5.7 of its 23 November 2006 judgment and there was no endeavour on the part of the Respondent to challenge the First Respondent's entitlement to costs. The real issue is the appropriate quantum of costs.
- 2.2. As to that, the basic submission for the First Respondent was that indemnity costs should be awarded in the sum of \$7,458.77 being the actual amount of legal fees and disbursements incurred by the Petitioner. There was an alternative submission that, if the Court decided that indemnity costs were inappropriate, then "the usual two-thirds rule should apply and professional costs should be awarded in the sum of \$4,972.51 being two-thirds of the actual professional costs incurred". Under this alternative submission that sum would be added to the disbursements of \$1,426.25 being disbursements of \$1,026.25 plus \$400.00 for the return airfares of Mr Kite Ioane, a Minister of the Crown, from Aitutaki to Rarotonga. Mr Ioane had been summoned to give evidence at the hearing of the petition and accordingly incurred this expense for airfares from Aitutaki to Rarotonga return.
- 2.3. The basis for the primary claim for indemnity costs was that unfounded and frivolous allegations had been pursued and when allegation 4 had been

withdrawn costs had already been incurred in preparing to defend it. The submissions were put as follows:

6. Section 101 of the Act refers to "all costs of and incidental to the presentation of an election petition, and to the proceedings consequent thereon shall be defrayed by the parties in such manner and in such proportion ..." Again it is submitted the legislature has sent a clear intention that the actual costs of the petition are to be paid by way of reasonable contribution to "all costs of and incidental to the presentation of an election petition". In particular any costs caused by, inter alia, unfounded allegations may be ordered to be defrayed by the parties.
7. It is submitted the policy behind the Act is to prevent and discourage frivolous petitions by imposing costs orders upon an indemnity basis in circumstances where petitions have been filed frivolously upon tenuous grounds without sufficient evidence to substantiate the relevant allegations contained therein. It is submitted to do otherwise would be to encourage the filing of frivolous and groundless petitions and importantly would discourage candidates from coming forward and being nominated as they could be subjected to large legal costs in defending a petition which costs they may not be able to recover.
8. It is submitted the policy and intent of the legislation is to not file a petition unless you have good or reasonable grounds for doing so.
9. In the circumstances of the current matter it is clear if the Court is of the view that the petition has been filed without any grounds to support the allegations contained therein the policy of the statute should be complied with and a clear message sent by the Court that the filing of petitions on groundless allegations will not be tolerated. It is submitted this is one of those occasions, Counsel noting the comments of His Honour upon delivery of the oral judgment on 2 November 2006 that the circumstances of this matter was "miles away from the Wigmore case".
10. Counsel for the Petitioner at the hearing of evidence in Rarotonga withdrew allegation 4 of the Petition. He withdrew the allegation at that point he stated to the Court in Rarotonga to reduce costs should costs be awarded to the First Respondent. It is submitted that this does not help Counsel for the Petitioner as by that stage it is too late to defray any costs incurred as all preparation that was needed to be done to defend the allegation had already been undertaken and the relevant witnesses called to Court and cross examined. Accordingly the costs had already been incurred in relation to allegation 4 at that stage.
11. It is further submitted that the petition has been in the nature of a "fishing expedition" with no grounds for the allegations made. If the Court refers to the Petitioner's response for further particulars dated 18 October 2006 the Court will note at paragraph 2 of same that the Petitioner was still interviewing witnesses in Rarotonga and did not even, appear to have interviewed witnesses in Mauke.
12. It is submitted evidence should be obtained before allegations are made. In response to the particulars sought where an exact

statement, and actions were requested to evidence inducement of voters to vote for the First Respondent, there was none provided in response by the Petitioner to the request for particulars, it being apparent that either there were no such statements or actions or the relevant evidence had not been obtained. It is submitted this petition is clearly within the ambit of Section 101 of the Act as being a petition filed on the basis of unfounded allegations.

13. As regards the cross petition, it is noted His Honour Chief Justice Williams made directions that all costs incurred in relation to the cross petition were not to be included in any calculations as to costs incurred in the petition. The calculations which follow as to the actual costs only in respect of the defence of the petition filed and all costs in relation to the costs petition have been specifically excluded from the calculation."

### **3. SUBMISSIONS AS TO COSTS BY THE PETITIONER**

- 3.1. Counsel for the Petitioner expressly agreed with paragraphs 1 to 9 of the Respondent's submissions but disagreed with paragraph 10 and the suggestion that the Petition had been in the nature of a fishing expedition.
- 3.2. As to paragraph 11 It was said that "electoral petitions are not easy matters to pursue especially when the Government is involved and you are from a defeated party. All doors are locked and the only access to information is through the Court. Within strict time lines the Petitioner has little choice but the file within 7 days on what information is available."
- 3.3. As to the Applicant's contention that the First Respondent had had to interview twenty-five witnesses to prepare for the petition, and that the total costs incurred in defending the petition had been \$7,458.77 plus disbursements of \$1,026.25 and \$400.00 airfares for Mr loane from Aitutaki to Rarotonga, the response was as follows:

"Mr Kite loane is a Minister of the Crown, his expenses are met by the Crown, his office is in Rarotonga, there was no official reason given by him about being in Aitutaki, had the Minister remained where he should be at his ministerial office, no costs would be incurred. We asked that this costs application be rejected"

- 3.4. Coming to the essence of the matter the Petitioner agreed with the alternative contention that the two-thirds rule should apply and that accordingly only \$4,972.61 should be paid with the balance of the security for costs returned to the Petitioner. It needs to be noted that the amount of the security for costs ordered to be paid in this case was \$8,000.00.

3.5. The Court has carefully examined the legal bill presented as an annex to the submissions of the Respondent and considered as well the claim for disbursements. The Court finds that both the professional fees and the disbursements are reasonable and therefore the total amount of costs and disbursements is fixed at \$8,885.00.

#### 4. DISCUSSION

4.1. The claim for costs and disbursements having been found to be reasonable the sole question is whether a full indemnity costs should be awarded or some lesser sum. If a full indemnity is awarded the result would be that the whole of the security of \$8,000.00 would be paid to the Respondent and the Respondent would have to pay a further \$885.00.

4.2. At this point it is necessary to refer to the judgment of Nicholson J with particular reference to principle (d) and (e) in the formulation of Justice Nicholson cited above ie, were any of the costs caused by vexatious conduct, unfounded allegations and what was the relevant conduct of each party.

4.3. As noted in paragraph 1.2 of the Judgment of 23 November the Petition for enquiry lodged by Mr Cowan originally involved four allegations of bribery as well as allegations of electoral irregularities said to have been caused by the Electoral Office. However, by the time the hearing started in Mauke all but two grounds alleging bribery had been withdrawn.

4.4. Those two grounds in essence were that during the election campaign the First Respondent had made gifts to a large number of electors by way of payment by him of their lodging at the Mauke Hostel on Rarotonga when the Mauke Tere (Dance) Party went to Rarotonga to participate in the dancing festival at the Cook Islands Constitutional celebrations in August of 2006. The amount of payment for the lodgings was \$980.00. The second allegation of bribery related to the payment by the First Respondent's daughter on behalf of the Tere party of their sea freight charges from Rarotonga back to Mauke to the total value of \$506.30.

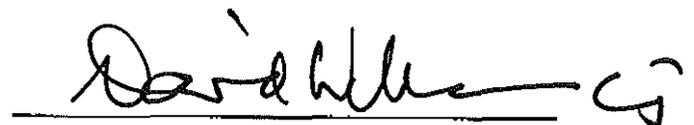
4.5. As to the first allegation, the Court found that there was no offer to the electors and that, in any event, the allegation failed for lack of sufficient proof of inducement. Mr Taia was found to be an entirely truthful witness and it was

considered that there were no political connotations to the statements he had made as to payment for the lodging at the Tere Party meeting on Mauke prior to its departure for Rarotonga. As to the question of the freight charges it was found that Mr Taia's daughter was not his agent and, even if she was held to be the agent, there was no intent to induce electors. The Court held that the key findings of fact were that there was no political motivation on the part of the daughter and there was no significant political purpose motivating Mr Taia at the time of his speech on Mauke.

- 4.6. This Court finds that although the allegations were not upheld and while they were not strong they could not be regarded as frivolous allegations. I consider that those two allegations were reasonably arguable. I do not consider that any of the costs were caused by vexatious conduct or unfounded allegations on the part of the Petitioner. I also take into account that the Petitioner, once he knew that certain of his allegations were untenable, withdraw them so that at the hearing there were only two allegations remaining.
- 4.7. Standing back from this matter and looking at the case by way of a broad overview and bearing in mind the discretionary principles articulated by Nicholson J the Court does not consider that a full indemnity is appropriate even though, unlike the Manahiki case, this case "went the distance". In the end there were only two allegations and both related to the one event, namely the trip of the Tere Party to Rarotonga. In all the circumstances the sum of \$6,000.00 for professional fees should be awarded along with the disbursements of \$1,026.25 plus \$400.00 for the return airfares of Mr loane giving a total of \$7,426.25.

#### DECISION

- 4.8. The sum of \$7,426.25 shall be paid by the Registrar to the solicitor for the First Respondent and the balance of \$573.75 shall be returned to the Petitioner.



David Williams CJ

Signed at Rarotonga at 2 pm  
on 10 April 2007