

## Afeaki v Prime Minister and Salakielu

10 Supreme Court  
Roberts CJ  
Civil 337/1975

21 May 1976

*Elections - not to be held invalid unless not substantially in accordance with law*

*Elections - Electoral Appeal Committee appointed under Legislative Assembly Act does not have jurisdiction to deal with claims as to invalidity of elections*

20 Supreme Court - jurisdiction to determine claims as to invalidity of elections to Legislative Assembly

'Afeaki, who was an unsuccessful candidate in elections to the Legislative Assembly, brought proceedings in the Supreme Court claiming that because of a number of irregularities that had occurred in the elections, the elections should be declared void. The Government argued, first, that the Supreme Court did not have jurisdiction to deal with such a claim which should be determined by an Electoral Appeals Committee set up under s5(g) Legislative Assembly Act, and, secondly, that there were insufficient irregularities to justify invalidating the elections.

### HELD:

Dismissing the petition:

- (1) The Supreme Court had jurisdiction to determine the proceedings, because the Electoral Appeals Committee had only power to deal with appeals in respect of the registration or non-registration of voters;
- 40 (2) An election should not be declared null and void unless it was shown that it was not substantially in accordance with the law;
- (3) The irregularities which were proved were not sufficient to cause the elections to be not substantially in accordance with the law.

Statutes considered  
Legislative Assembly  
Ballot Act 1872 UK

50 Cases considered  
Morgan v Simpson [1974] 3 All ER 722

**Judgment:**

In this case plaintiff, a licensed lawyer, sues in his capacity as citizen and Voter of Tonga and as a defeated candidate in the last Election of Members to the Legislative Assembly - he having been a candidate for the position of people's representative from the Ha'apai district. In his Statement of Claim plaintiff alleges that he would have been successful in his bid for election had it not been for numerous irregularities which he alleges occurred in the said election.

Plaintiff brings this suit against the First Defendant as Prime Minister of Tonga and Minister in charge of the election of the People's Representatives to the Legislative Assembly.

The Second Defendant is sued in his official capacity of Chief Returning Officer for the government of Tonga in the General Election of the 16th May, 1975 for the election of the People's Representatives to the Legislative Assembly.

Plaintiff alleges that the Second Defendant failed to keep a proper register of qualified electors for each and everyone of the three Electoral Districts of Tonga as required by Section 5 (c) of the Legislative Assembly Act. Plaintiff also alleges in his Statement of Claim that many ballot papers were deposited in the ballot by persons other than the voters themselves; also that 2nd Defendant, acted ultra vires in promulgating certain rules governing the manner, right and effect of voting; and also that plaintiff's opponent in the election was guilty of "actions tantamount to bribery of prospective voters" in providing certain specified services.

Plaintiff further claimed that the failure of the defendants (sic) to keep a proper or any register of electors was contrary to the Constitution and the Law of Tonga and therefore that the election was null and void. Plaintiff also asks the Court for an Order directing the First Defendant to Convoke a new election of People's Representatives to the Legislative Assembly.

Following submission by the Crown Solicitor for Defendants the Plaintiff withdrew his allegation of "offences tantamount to bribery" and this was accepted by the Court.

Defending counsel also asked that the case be struck out in toto on the grounds that Section 5 (g) of the Legislative Assembly Act provides for the appointment by His Majesty in Council of an Electoral Appeal Committee to deal with such a case as this and asked for an interim ruling on this submission which ruling I have given as follows:- The first paragraph of the said sub-section deals with the appointment and constitution of such an Electoral Appeal Committee and concludes with the purpose, namely to hear "appeals against the decision of a returning officer in respect of registration". The second paragraph of the sub-section states who may appeal by providing that "any duly qualified elector whose application for registration as an elector has been refused, or whose name has been wrongfully removed from the register, may appeal in writing to the Electoral Appeal Committee". Here we find an express mention of the type of person who may appeal and that person is a qualified elector who has been denied the right of registration;

the Plaintiff is not in this category and it would be against the rules of interpretation to extend or add to the provision of the sub-section so as to include him. It would be reading something into the statutory provision which is not there and which can be put there only by amending legislation. I have ruled, therefore, that Section, 5 (g) of the Legislative Assembly Act does not apply to plaintiff's claim.

110 With regard to paragraph 6 (f) of the plaintiff's statement of claim, plaintiff alleges that the 2nd defendant made rules and promulgated these without legal authority. I hold that these were merely directions which supported and clarified the existing rules and that consequently the 2nd defendant, as Returning Officer was acting within his authority.

Accordingly an interim ruling was given that the defendants had to answer only those allegations of plaintiff relating to the irregularities in the registration of voters and also in relation to the improper handling of the ballot papers.

120 Plaintiff has stated that his purpose in bringing this action is not to vilify the defendants but to expose the alleged irregularities so that measures will be taken to ensure that elections in the future will be more efficiently organised and conducted.

The Court has heard eighteen witnesses and has found the following irregularities in regard to the said election:-

- 130 1. Nine persons having been convicted of a criminal offence punishable by imprisonment for more than two years were registered as voters on the Register, of Gazette No.4 of 1975 and allowed to vote contrary to Clause 23 of the Constitution.
2. Eight persons were registered twice on the said Register and two of these completed two ballot papers each having been registered in more than one district contrary to Section 5 (b) (vii) of the Legislative Assembly Act (Cap 4).
- 140 3. Seven persons under the age prescribed in Section 5 (c) (i) of Cap 4 were registered on the said Register and allowed to vote.
4. Five persons were on the said register and allowed to vote who had not made application on Form I as provided in Section 5 (c) (i).

The evidence has shown that owing to the somewhat crowded conditions many ballot papers were collected by assistant Returning Officers for depositing in the ballot box. This is contrary to Section 5 (m) of Cap 4 which provides that 'upon completion of the ballot paper an elector shall sign it and deposit it in the ballot box'.

150 In view of the thousands of voters the aforementioned irregularities may seem trivial, nevertheless these irregularities were illegalities in that they were contrary to the provisions of the Legislative Assembly Act (Cap 4) as stated. The question I must answer

is the following - was the election conducted so badly that it should be declared invalid by this Court?

160 I hold that if an election is conducted substantially according to the Law it should not be declared null and void unless any irregularities which have occurred are shown to have affected the result. I am supported in this view by the case of Morgan V. Simpson [1974] 3 ALL E.R. p. 722 to which counsel for the defendants has referred. Lord Denning's statement of the law therein is as follows:- 'If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the result of the election'.

Lord Denning also stated that 'if the election were conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.

170 The same principle of law is expressed in the English Ballot Act of 1872,

I find that the irregularities and illegalities established by plaintiff to have occurred were comparatively few in relation to the number of voters and exceptional to the general practice and that, accordingly, the election was conducted substantially in accordance with the law. Plaintiff has not established that he would have been elected if the statutory provisions had been fully complied with.

180 Plaintiff has stated that his main purpose in bringing this action was to expose irregularities in the management of the election. In this he has succeeded and it must be hoped that this action will lead to a stricter observance of election law in the future. In this plaintiff is entitled to feel that he has performed a worthwhile Civic act. Nevertheless, in his Statement of Claim plaintiff has asked the Court to order that the election of the 16th May was invalid and to order a new election. For the reasons stated the Court can make no such order and the election must stand. Accordingly I find for the defendants but make no order as to costs.