

**In The High Court of Tuvalu
At Funafuti**

HC. Civil case no. 15/11

Civil Jurisdiction

Between:

Leneuoti Maatusi

Petitioner

v

Pelenike Isaia

Respondent

BEFORE THE CHIEF JUSTICE

T Finikaso for the petitioner
D Singh for the respondent

Hearing: 11 January 2012
Judgment: 21 January 2012

Judgment

[1] Following the untimely death, on 19 July 2011, of one of the Members of Parliament for Nui less than a year after the general election, a by election was held on 24 August 2011. The successful candidate, Pelenike Isaia, is the widow of the deceased Member. The only other candidate in the by-election, Leneuoti Maatusi, brings this petition challenging the respondent's election on two grounds:

1. That the respondent engaged in corrupt or illegal practices and her election is therefore invalid pursuant to section 41 (1) of the Electoral Provisions (Parliament) Act, and
2. In the alternative, that the respondent engaged in corrupt or illegal practices such that it may be reasonably supposed to have affected the result of the election and is therefore void pursuant to section 41 (2) of the Electoral Provisions (Parliament) Act.

[2] At the hearing, Mr Finikaso for the petitioner, based his case entirely on the first ground. In summary he alleges that sums of money were paid to electors by the respondent shortly before the election in a manner which clearly showed they were intended as an inducement to the elector to vote for her.

[3] There is no dispute that the payments were made. The respondent's answer is that they were made in recognition of the assistance those people had given during her husband's funeral. It is also undisputed that, during the visit when the payments were made, the respondent asked the recipient to help her in the forthcoming by-election.

[4] The petitioner called four witnesses who testified to receiving money. Affidavits by two others who were unable to attend were admitted and gave similar accounts to those of the four live witnesses. All the written affidavits are in very similar form. Each states the respondent asked the recipient and sometimes the family to help her in the forthcoming by-election as she is one of the candidates. Each then states the respondent gave the money, generally \$20 but in one case, \$10 and another \$50. There is then reference in almost identical terms to the fact that the deponent was not sure what the money was for because it was the very first time that he or she had received money from the respondent. All deponents then state that they thought it was because the respondent had asked them to help her with the by-election.

[5] Those who gave evidence repeated from the witness box the statement made in the affidavit that they had assumed the money was given because they had been asked to help. One witness said that she was asked to vote for the respondent but corrected that. She said that had not been said by the respondent; it was her assumption because of the request to help with the by-election. They all stated that they had not been asked to vote for her.

[6] The respondent swore a lengthy affidavit and gave evidence. She told of how her husband had died whilst on a visit to Samoa, that his body was brought back to Nui about a week later and he was buried on the 24 July 2011. Many people attended the funeral including a number of Government Ministers, relatives of the deceased and of his wife and members of the Nui community. In cross-examination she explained that the funeral gatherings went on for about a month with many of her family remaining until the day of the election.

[7] She also agreed that her family had prepared food for the island and the visiting dignitaries the day after the burial. Counsel suggested that in usual custom, it was the end of the funeral ceremonies but the respondent explained it was held then because many of those people had to leave quickly and had to be thanked for their attendance. The gathering of her relatives continued much longer.

[8] There were two areas of clear dispute between the parties. First, the respondent challenged the repeated assertion by the witnesses called for the petitioner that they had never before received any gifts from the respondent. She insisted that she and her husband had often given small sums to assist them. She was the branch manager of the Fusi and her husband was a teacher and it was, she said, expected on Nui that those who were lucky enough to have paid employment would assist those who were in need.

[9] The second area of dispute related to the respondent's claim that the gifts of cash were related to the funeral. The respondent's case was that they were made to thank the people to whom they were made for their support at her husband's funeral. The petitioner called a witness about the usual funeral customs in Tuvalu. He pointed out, as was stated by many of the witnesses, that it is usual to help a bereaved person by giving him or her gifts of food, material or money. At the end of the funeral ceremonies, the deceased family will prepare food and invite all those who have helped. Sometimes the food is formally distributed on small woven plates. In all cases, any food left over is distributed amongst those who attended. The witness explained that the timing of this event is up to the family. It is not unusual for the ceremonies to continue for a month but he pointed out that it is now common for

the family to conclude these matters rather sooner. I accept that, in this case, although the family had to prepare food very soon after the burial in order to show their thanks to those who had to leave quickly, the status of her husband in the community meant that the ceremonies continued for some time after those people had left.

[10] The witness insisted that custom required all expressions of gratitude to those who had helped at the funeral to be gifts of food. He was adamant that their kindness would never be reciprocated by payment of cash. Asked what would happen if there was not enough food, he explained that a small amount of money could be used by the family of the deceased to purchase food to give away.

[11] The respondent called the wife of the other Member of Parliament for Nui. She disagreed with the petitioner's witness. She said that it is quite usual for the deceased's family to give small sums of money to show appreciation.

[12] The respondent described the funeral. She thought that more than 300 people attended. Altogether the activities associated with the funeral went on for more than a month which took it almost to the date of the election. She told how she decided, when her husband died, that she would contest the election. She had heard much said about her husband and it was that which gave her the determination and strength to stand for the same seat.

[13] She pointed out that many who came to the funeral were people she had not met before. She wanted to show gratitude to everyone for their support and so she went to their homes later to give the money as an expression of that gratitude. Having helped her husband the year before in his election campaign, she was fully aware that, as a candidate herself, she must not give gifts which could be seen as a bribe.

[14] It took some time for her to recover from her sadness over the loss of her husband and, when she did, she needed to take steps to conduct her election campaign. She also wanted to convey her gratitude to her family and relatives. She accepted in Court that it was unfortunate that she was giving these gifts to thank people at the same time as introducing herself as a candidate. She said, as the witnesses confirmed, that she never asked them to vote for her and gave the money solely because she wanted to thank them.

[15] In election petitions where corruption is alleged, the burden is on the petitioner to prove it. The standard of proof for such a serious allegation of what is criminal conduct is proof beyond reasonable doubt. The making of these payments at the same time as asking for help with the election clearly, I accept, led the recipients to link the two in their minds. Anyone standing for election must consider how his or her actions are likely to be interpreted by others. In normal circumstances, such juxtaposition of the payment and the request would point very strongly to an intention, in effect, to buy votes. As the respondent said, she was fully aware from the time of her husband's election that any bribe was criminal and would invalidate the election. With that knowledge, she should have realised the danger of using a campaign visit to give a cash payment to acknowledge earlier kindness at the same time as introducing herself as a candidate and requesting help in the election. I also accept that the witnesses did, as they stated, assume the payment related to the

election. The respondent said that, on one occasion, she specifically mentioned that the money was nothing to do with the election. That shows she clearly realised the danger and yet continued to make similar payments to other people. Any reasonable person realising that would have been careful to make separate visits for the two purposes.

[16] I found the evidence generally of the recipients of the cash payments unconvincing. As I have pointed out, the fact of the payment and of the request to assist with the election are not disputed. It was explained by the petitioner in his evidence that he first heard about these payments at a meeting of his supporters. The affidavits sworn by them demonstrate that they were all asked a number of specific and similar questions when making the affidavit which clearly, from the way the answers are recorded had suggested the answers. In particular, I was not satisfied with the evidence that, in each case, this was the first gift ever received by them from the respondent.

[17] I accept the evidence of the petitioner's witness that the usual manner of thanking those who have helped with a funeral is by gifts in kind and is the practice throughout the islands of Tuvalu. I do not accept, however, that these days, cash is never considered an appropriate or acceptable token of gratitude. I accept the witness's knowledge of custom but I accept that the wife of a member of Parliament will be more in touch with modern variations.

[18] As Mr Finikaso, for the petitioner, agrees, charitable gifts are a part of life in Tuvalu. The higher a person's status, the higher the expectation of his charity. Following the funeral, a failure to acknowledge the assistance or support of anyone would be considered a serious omission or even a deliberate slight. These gifts were given only a very short time before the election and the Court must bear that proximity in mind when assessing the true intention of the respondent. The learned editor of Halsbury's Laws warns:

"The distribution of charitable gifts to voters had always been allowed. On the other hand what are called charitable gifts may be merely a specious and subtle form of bribery. ... The imminence of an election is an important factor to be taken into consideration in deciding whether a particular act of charity amounts to bribery." *Laws of England, 4th Ed, vol15,774*

[19] On the other hand, it was a short time after the death of the respondent's husband and at a time she was still occupied with the consequential family gatherings. I also should consider the scale of the giving - the greater the gift the more likely it is to be seen as intended to influence the voter. In the present case, the scale of gifts in all but one case was very modest.

[20] The overall evidence of the respondent must be set against the effect of the sudden and unexpected loss of her husband. That loss necessitated her involvement in the funeral for much of the time which would normally be spent in electioneering. I entirely accept her evidence of her grief and of the time it took her to recover sufficiently to turn her attention to the pending election. At the time of these payments the election was less than two weeks away. The gatherings with the family were still going on but, if she was to fulfil her wish to take over her husband's

seat in Parliament, it was necessary also to visit the electors' homes and introduce herself as one of the candidates.

[21] I note also that the evidence relates to a total of six occasions over two consecutive days when she paid money. There is no evidence beyond that to suggest, as did counsel for the petitioner in his opening, that she was going house to house paying money to the voters. Her case is that these people had attended at the funeral. There is no evidence of any other payments.

[22] There can be little doubt this was a very ill considered action by the respondent. In normal circumstances it would be sufficient to satisfy the court of a corrupt motive by the candidate. In the present case the circumstances were unusual. Not surprisingly, the witnesses linked the fact of the payment to the request to help in the election and such a link would in many cases be likely to prove beyond reasonable doubt that it was intended to induce the elector to cast a vote in the candidate's favour.

[23] The intention of the respondent is an inference of fact which must be drawn from the evidence of the whole situation at the time and the Court must look at the actual facts of each case to decide the true intention of the respondent. The petitioner must prove that the passing of this money was corrupt in that it was intended to influence the way in which the elector voted. In such a case it does not absolve the candidate to show that intention was only one of a number of different, and clearly innocent, motives. The test is whether at least part of the candidate's intention was to influence the vote. If it was, the transaction was corrupt however proper the other intentions

[24] The events affecting the emotions and activities of the respondent at that time meant these were not normal circumstances. They exerted pressure of a kind which would certainly have affected the respondent's conduct and are sufficient to raise a doubt in my mind as to the intention of the respondent in these six instances. I am not satisfied, therefore, that the petitioner has proved a corrupt intention and his claim fails.

~~*~~ [25] I determine that the respondent was truly elected. I direct, in accordance with section 58 of the Electoral Provisions (Parliament) Act, that such determination be certified to the Minister.

Dated 21st day of January 2012



Gordon Ward
Hon. Gordon Ward
CHIEF JUSTICE

