

FALEALUPO TERRITORIAL CONSTITUENCY re:  
AEAU (PENIAMINA LEAVASEETA) v MAFASOLIA (PAPU VAELUPE)  
AND OTHERS

Supreme Court Apia  
Lowe J  
[June 1991]

INTERPRETATION OF ACT - Electoral Act 1963 as amended in 1990 and 1991 - S16(2), 30(3), 108, 111(2), 111(4), 115, 122(2) - Rule 67 Supreme Court (Civil Procedure Rules) 1980.

Electoral petitions arising out of the election on 5th April 1991 being the first election applying universal suffrage - Petitions unsuccessful - Practice Note from Chief Justice.

CASES CITED:

- Re Election Petition Safata [1970 - 1979] WSLR 239
- Re Election Petition Gagaifomaua No 2 Territorial Constituency [1960 - 1969] WSLR 169

Decision

Two petitions were filed by the Petitioner arising out of the Western Samoan General Election for the Constituency of Falealupo on 5th April 1991. Following the presentation of all his evidence the petitioner made submissions to the Court requesting an order under Section 122(2) of the Electoral Act 1963 requiring the attendance of certain persons who were named in his first petition and whom he alleged were not entitled to vote so that they could be examined as to their qualifications to vote in the Falealupo constituency. The Court took an adjournment indicating that it would consider that matter and at the same would consider whether the evidence adduced in support of the second petition was sufficient as to provide a case for the Respondent to answer.

Following its consideration of the evidence, the Court dismissed the two petitions giving reasons orally and indicating that it would issue a written judgement giving full reasons for its decision in due course.

The final result of the election as declared by the Returning Officer was:

Mafasolia Papu Vaelupe (the First Respondent)	575 votes
Aeau Peniamina Leavaseeta (the Petitioner)	560 votes

Although the two petitions were heard as one in accordance with Section 108 of the Electoral Act 1963, each seeks disqualification of certain voters on certain grounds. Because of this the petitions are best considered separately.

The first petition listed 24 persons whose particulars and identification were taken from the Falealupo Electoral Roll. The Petitioner alleged that these persons voted in that electorate when they were not entitled to and sought inter alia a scrutiny and disqualification of their votes under Section 111(4) of the Act. The grounds are clearly set out in the petition as follows:

- "1. THE General Election for the Legislative Assembly of Western Samoa was held on the 5th day of April 1991.
2. THE First Respondent was declared the successful candidate and Member of Parliament for the Territorial Constituency of FALEALUPO by declaration of the Third Respondent on the 22nd day of April 1991.
3. THE final result of the election is as follows:

Aeau Peniamina	560
Mafasolia Papu Vaelupe	575
4. THE Petitioner was a candidate and was entitled to be declared and reported elected at the said election.
5. THE Petitioner alleges that twenty-three (23) electors voted in the said election who were not entitled to cast votes in the said Territorial Constituency of Falealupo.
6. THE said twenty-three voters (23) were holders of matai titles in other Territorial Constituencies of the said election but cast their votes under their christian names (taulealea names) in the Territorial Constituency of Falealupo.
7. THAT by the said twenty-three (23) electors casting their votes at the said Territorial Constituency of Falealupo they were in clear breach of Section 16(2)(a), (3) and (5) of the Electoral Amendment Act 1991.
8. THAT further by the said twenty-three (23) electors casting their votes under their christian names (taulealea names) they failed to revoke their matai names from the Register of Matais and the Rolls to which these matai names were registered and notified

the Registrar of Electors and Voters accordingly that they were going to vote using their christian names (taulealea names) in the said Territorial Constituency of Falealupo."

Then follows the names, descriptions and particulars of 24 persons. Although paragraphs 5, 6, 7 and 8 refer to 23 electors, in fact 24 electors are listed in the body of the petition.

For purposes of identification I will refer to this petition as the "Matai petition".

The second petition which I will call the General petition sought the disqualification of the votes of a further 22 people who were listed in a Schedule at the back of the petition. The grounds were set out in paragraph 4 of the petition as follows:

"4. THE Petitioner alleges that:

- (a) the persons whose names and descriptions appeared in the schedule annexed hereto were wrongfully placed or retained on the roll for the Territorial Constituency of Falealupo;
- (b) all the persons referred to in the schedule hereto voted at the said election and the Petitioner believes these persons voted for the First Respondent;
- (c) all the said persons were unqualified to be registered as electors of the said territorial constituency because they did not fit into any or other of the criteria for qualifications of electors as provided for in the Electoral Act 1963 and its Amendments;
- (d) more specifically all the persons referred to in the annexed schedule should have been disqualified from voting because they were not:
  - (1) duly registered matai title holders of the Falealupo Constituency 16(2)(a) as amended by section 5 Electoral Amendment Act 1990; or
  - (2) they had no family connections whatsoever with any matai title holders within the prescribed limits (Section 16(2)(b) and (c) of Electoral Amendment Act 1990); or

- (3) they had never rendered service to any village of the said Territorial constituency, nor were they bona fide residents of the said Territorial constituency at any time (Section 16(2)(d) and (e) as amended by Section 5 Electoral Amendment Act 1991 and Section 2 Electoral Amendment Act 1991);
- (4) further, in as much as the names of these persons unlawfully appeared on the main roll or any supplementary roll (or did not appear on any roll at all) their votes should be disqualified (Section 60 of the Electoral Act as amended by Section 25 Electoral Amendment Act 1990)."

The qualifications of the electors are set out in Sections 16(2)(a)-(e) of the Electoral Act 1963 as amended in 1990 and 1991 by the Electoral Amendment Act 1990 and the Electoral Amendment Act 1991 as follows:

- "(2) The constituency in which an elector shall be registered shall be determined according to the following provisions:
  - (a) If the elector is the holder of a Matai title he shall be registered in the constituency in respect of which the title exists or, if he is a plural title holder, he shall be registered in the constituency in respect of which one of those titles exists, as he may at any time choose.
  - (b) If the elector is not the holder of a Matai title but his spouse or one of his grandparents, parents, or a brother or sister is (or if that person is dead, was at the time of his or her death) the holder of a Matai title then, subject to paragraph (c) of this subsection, the elector shall be registered -
    - (i) if there is only one title to which this paragraph applies, in the constituency in respect of which that title exists or existed; or
    - (ii) if there is more than one title to which this paragraph applies, in such constituency in respect of which one of those title exists or as the case may be existed as the elector may at any time choose; or

(iii) at the choice of the elector and whether or not there is more than one title to which this paragraph applies, if the elector satisfies the Registrar that he is rendering bona fide service to a village, in the constituency in which that village is situated;

(c) Paragraph (b) of this subsection shall not apply in respect of any Matai title acquired by a brother or sister of an elector from or through the spouse of such brother or sister;

(d) If the elector is not a person to whom either paragraph (a) or (b) of this subsection applies then the elector shall be registered in either -

(i) the constituency in which it is confirmed to the satisfaction of the Registrar that he is rendering service to a village; or

(ii) the constituency in which that person is a bona fide resident at the time he applies for registration as that elector may choose;

(e) For the purposes of this subsection "service" in relation to a village means service to a Church in that village or to the Village Council, or to any community project or work related activity in that village."

Dealing firstly with the second petition or General petition, this alleged as I have said, that 22 voters were wrongly on the Roll. Specific reference was only made to 16 of these voters in the evidence presented to the Court and the other six voters were only referred to in the Schedule in general terms. As I will explain later, evidence was given primarily by affidavit.

Three witnesses were called by the Petitioner in respect of this petition and each also gave evidence in support of the Matai petition. It appears from the evidence that on Monday the 8th of April 1991, three days after the General Election, a Committee of which the witnesses were part, met to consider the result. Consequently Rolls were checked and investigations were made in an endeavour to see if the result could be overturned. This eventually led to the filing of the two petitions.

Each of the three witnesses that gave evidence in support of this petition, gave brief details of certain of the electors and swore that they were not eligible to vote in the Falealupo Electorate. It became apparent that their evidence was based on their limited

understanding of the Act and that they had no understanding of the broad range of qualifications that exist under the present legislation.

The petition is specific in that it alleges that the electors do not qualify under Section 16(2)(a) or (b) and 16(2)(c) or 16(2)(d) and (e) of the Act. I would therefore have expected that evidence would be directed to proving that each of these electors was not qualified to vote under each of those Sections. However the evidence that was presented was in general terms only. In the case of connection with Matai title holders under Section 16(2)(b) or 16(2)(c), while there may have been statements by the witnesses that the people were not qualified under that Section or had no family connections within the Falealupo electorate, there was no specific evidence of family so as to enable the Court to conclude that these people would definitely be excluded on this ground. Likewise the question of service was only covered in general terms and even the question of residence which can easily be covered specifically, was again only covered in general terms.

In the case of residence, no material dates or times of residence were adduced and there was no corroborative evidence from other persons who were not connected with the petitioners campaign as to residence by the various voters which would exclude them from the residential qualification.

There is also the fact that the three witnesses who presented evidence were as I have said all part of the Petitioner's campaign committee and also gave evidence on the Matai petition. In each case that evidence was proved to have contained material errors and as a consequence the credibility of these witnesses became suspect. The Court is not suggesting that they deliberately misled the Court but new evidence (seemed) to have been given on the basis of what they hoped the situation might be rather than properly investigated and established facts.

The standard of proof required in election petitions is well settled. I quote from the decision of Nicholson CJ in re-election petition re: Safata [1970 - 1979] WSLR 239 at Page 241:

"On the question of standard of proof of allegations in election proceedings I have had the opportunity of reading the decision of Spring C.J. on election petition re: Gagaifomauga No. 2 Territorial Constituency [1960 - 1969] WSLR 169 where he reviewed a number of authorities, which suggest two alternative standards of proof, viz., -

- (a) proof beyond all doubt, and
- (b) proof beyond reasonable doubt.

He went on in his judgement to apply the criminal standard of proof beyond reasonable doubt. I respectfully agree that this is the correct standard of proof to apply in election cases. The judicial overturning of an election result may only occur when the allegations made have been proved beyond reasonable doubt."

The Petitioner seeks to have disqualified the votes of some 46 electors who appear on the Electoral Roll. Their democratic right to vote is challenged. If they have been enrolled then the presumption must be that they have been correctly enrolled. The onus of proof is therefore on the Petitioner to establish that they are wrongly on the Roll to a standard beyond reasonable doubt.

Applying the standard of proof to the allegations made in the general petition, the evidence led by the Petitioner falls far short of such standard. The three witnesses as has been said are all members of a committee supporting the Petitioner and their evidence is of a general nature only and contains no specific information or detail which would enable the Court to make a conclusive finding in respect of the eligibility of these electors to vote. The witnesses did not endeavour to establish the basis on which these electors were enrolled and even if the basis of their qualifications had been established, the evidence as presented is not of sufficient detail to enable the Court to find on their eligibility. The evidence is limited to the three members of the committee and there is not as would be expected any corroborative evidence by persons who have particular knowledge of these voters family or by persons who know them and reside close by them and are able to give particular dates as regards residential qualifications.

The general nature of the evidence and lack of understanding of the requirements of proof is perhaps exemplified in the affidavit of Tanuvasa Lutia. In paragraph 4 of that affidavit where he is referring to one of the named voters he states:

"4. That Feaveai Vailloafou is not a Falealupo person but from the village of Vailloa Palauli. He is residing in Falealupo."

Such evidence was not enlarged on or commented on when the witness presented his affidavit. All it does is establish that the voter may have residential qualifications in Falealupo but presents no grounds whatsoever to the Court for disqualifying this voter.

As indicated, the evidence presented falls far short of a standard of proof beyond reasonable doubt and I therefore rule that there is no case for the first respondent to answer in respect of the 22 persons named in the general petition.

Turning now to the Matai petition, this alleged that 24 named electors who voted in Falealupo constituency were not entitled to vote as they held Matai titles in other constituencies. As I have said previously, the method of operation of the Petitioner's committee to which all his witnesses belonged was to meet after the election and working from their Electoral records, Rolls and previous Matai Rolls and of course their own knowledge, try to establish the names of any Matais who they believed supported the Respondent and were not entitled to vote. Their findings were subsequently checked against information obtained from the Register of Matais from the Land and Titles Court and which was produced to the Court.

The problem was that they had been dealing with names from the Electoral Roll. They had, as Counsel for the Respondent was quick to point out, to identify the persons whose Roll numbers and identification numbers they indicated in the petition with the people they knew or had established held Matai titles.

As was acknowledged in evidence, Samoans can have a number of names. Some have several titles but only use one. It is not uncommon for a Matai holding a title in one village and living in another not to use that title in his village of residence. The legislature appears to have tackled this problem of names and identity by the issue of identification cards to electors and insisting on their presentation when ballot papers are issued.

The scrutineers for the Petitioner were both witnesses and one admitted that he did not see the identification cards of the voters. The other gave no evidence on this point. The problem of identifying the persons named in the petition with the persons named as Matais soon became apparent in the cross examination of the first two witnesses. Both witnesses were forced to concede that voters they had identified as holding Matai titles were in fact not the same persons as the persons holding those titles. In essence they had to agree that some of the voters they claimed to have titles did not hold those titles.

Consequently at the end of the second witnesses evidence the Petitioner withdrew his allegations against six of the 24 persons named. Shortly after the Petitioner acknowledged that another voter was wrongly named in the petition and sought leave to amend the details of this person. The petition recited:

"14 Ulufanua Esekia No. 1154 on the Falealupo Electoral Roll with identification No. E67321. He voted using the aforesaid names, but a holder of the Matai title Taomia, No. 541 in the Electoral Roll of the territorial constituency of Vaisigano No. 1 during the Matai suffrage. He voted using his Matai title in past elections."



The amendment sought to substitute for the above-named person a completely different person with completely different Roll number and identification number, viz:

"Alomau Ulufanua Roll No.79 Identification No E67320"

Leave to amend was declined and the Petitioner then withdrew his allegation against the above person Ulufanua Esekia.

The Petitioner called six witnesses and all presented evidence against most of the persons named in the petition. The withdrawal of the allegations against the seven voters meant that each of the witnesses' evidence was proven to include error. Where evidence is presented against a number of persons as has happened in this case it is most important that the witnesses are very particular as to the accuracy and content of such evidence. Where the evidence is established or admitted to be wrong in some respects, this casts doubt on the credibility of the witnesses and the value of their remaining evidence.

In evidence the Petitioner also acknowledged that a further four of the remaining 17 persons names were registered as holders of the Matai titles in the Falealupo constituency. He and his witnesses claimed that as they were registered under their untitled or Taulealea names, they were not entitled to vote in that electorate.

It was conceded that these four electors were all registered as Matais as at the date of the election, namely the 5th day of April 1991. Section 111(4) of the Electoral Act contains the following proviso:

"Provided that the vote of any person[s] who on polling day was entitled to be registered as an elector or voter of the constituency or individual voter[s] in question, shall not be disallowed on the ground that his name has been wrongly placed or retained on the Roll."

These four voters were entitled to be registered as electors in the Falealupo constituency on polling day. The provisions of Section 111(4) protects their votes as it specifically provides that the Court shall not disallow such votes. The proviso clearly evidences the intent of the legislat[ure] to allow the votes of all persons who are qualified to vote. According to this provision the votes of the four voters who it is acknowledged hold title in the Falealupo constituency should not be disallowed.

This then places the position over the Matai petition, as follows:

"Original Claim		24
Allegations Withdrawn	7	
Persons found qualified to vote in Falealupo	<u>4</u>	<u>11</u>
Balance		<u>13</u>

The Petitioner has issued witness summonses against the Matai voters. Proof of service has been filed in respect of five of these summons and the Petitioner has made a submission to the Court asking leave for him to file a further affidavit as to service of a further 13 summonses and for the Court to require the persons who have not answered the summons to attend as witnesses pursuant to Section 122(2) of the Electoral Act. The Petitioner is quite entitled to produce an affidavit of service of these summonses but the fact is that the votes of the 13 persons are only now in question. The margin between the First Respondent and the Petitioner in the final return from the election was 15 votes so that even if the Court did require the attendance of the 13 Matais whose qualifications are in dispute the hearing of evidence and examination of these persons could make no difference to the final result.

Accordingly the Court sees no point in giving further consideration to this submission or in bringing these people before the Court.

There are several matters arising out of this hearing on which I would comment: in the first case I have some sympathy for the Petitioner insofar as this is the first petition brought under the 1990 Electoral Amendment Act which introduced general suffrage to Western Samoa. From the evidence presented it is obvious that the full implications and effect of the Act, and the number of different qualifications of the voters and the difficulty that this places on a Petitioner who wishes to dispute the right of qualification of electors, may not yet be fully understood. However while the Court may sympathise with the task that the Petitioner has to prove his case, it must not take this into account. It must rule impartially between the parties.

Secondly the Petitioner has also had some difficulty in that he had a dispute with his Counsel and dispensed with his services at the end of the second day of hearing. The Court eventually allowed three days of adjournments but then directed that the hearing proceed and the Petitioner carried on without Counsel. The Court's direction was in accordance with Section 111(2) of the Electoral Act 1963 which provides that the trial shall so far as is practicable, consistently with the interests of Justice, be

continued from day to day on every lawful day until its conclusion. Section 30(3) of the Act is also taken into account by the Court and this provides:

"in allocating a time for hearing an electoral petition, the Court shall give priority to that petition over all matters before the Court which are not electoral petitions."

The third point is when the closing date for petitions was reached, Chief Justice Ryan issued a practice note requiring evidence to be presented by affidavit. There was no doubt that the intent of that requirement was that the parties cases be fully presented in affidavit form prior to the hearing. To give effect to the practice note this Court ruled that the Petitioner's case was to be limited to the affidavit evidence produced. It relaxed this ruling to allow production of documentary evidence to support the affidavits filed.

In submissions to the Court the Petitioner has questioned the procedure laid down by the Chief Judge. There is no doubt that under Rule 67 of the Supreme Court Rules, the Chief Judge can give such directions as he thinks proper. Directions were given. They were accepted by counsel. The Petitioner did not at the commencement of the proceedings seek an adjournment but elected to proceed. It was only during the course of the hearing that he sought to have the procedure changed. The procedure had been set and accepted and while the Petitioner refers to Section 115 of the Act, I believe that to alter the procedure as directed for one party could lead to an injustice to the other.

Fourthly, during the course of the proceedings the Petitioner sought the assistance and indulgence of the Court to make orders for the production of various documents held by the Second and Third Respondents. The Court declined on the grounds that these documents did not form part of the Petitioner's case. It was quite competent for the Petitioner to seek production of those documents by normal procedures prior to the hearing. The Petitioner's case was to have been complete at the commencement of the hearing and the Court could not see that it should use its special powers to assist the Petitioner overcome possible deficiencies in his case.

As it happens documentary evidence prepared by the Registrar of the Land and Titles Court was introduced as an exhibit during the case and I do not believe that there were any further records which could have been produced from that Registry which would have assisted the Petitioner. As far as the production of records from the Registrar of Electors and Returning Officer was concerned the content of such documents had not been taken into

account by any of the witnesses for the Petitioner and as I have already indicated because of the deficiencies in the evidence presented, I do not believe that such documents would have added anything to the Petitioner's case.

The question of costs was reserved. The Respondents are entitled to costs. Taking into account the length of the hearing and the fact that Counsel for the Second and Third Defendants was excused for most of the hearing, it is ordered that the Petitioner pay costs of \$1,750.00 to the First Respondent and \$150.00 to the Second and Third Respondents.