

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC. 20451

IN THE MATTER of The Electoral Act
1963 and Amendments

A N D

IN THE MATTER of the Territorial
Constituency of Aana
Alofi No.1

BETWEEN: TUAIFAIVA TAMAFILI of
Fasitoouta, a candidate
for election

Petitioner

A N D: TOLEAFOA FAAFISI of
Fasitoouta and SUAFOA
LAUTASI of Faleasiu,
both candidates for
election

Respondents

Counsel: P Meredith for petitioner Tuaifaiva Tamafili
T R S Toailoa for respondent Toleafoa Faafisi
Respondent Suafoa Lautasi made no appearance
T K Enari for intending substituted petitioner Aiono
Leulumoega Sofara

Hearing: 24 June 1996

Judgment: 28 June 1996

JUDGMENT OF SAPOLU, CJ

At the general election held on Friday, 26 April 1996 the result of the poll for the territorial constituency of Aana Alofi No.1 was publicly notified and declared by the Chief Electoral officer as follows :

<u>Candidates</u>	<u>Votes Received</u>
Aiono Fanaafi	100
Aiono Leulumoega Sofara	298
Aiono Sia	234
Fesolai Moemoe	62
Leaupepe Tala Farani	241
Maiava Nafatali	376
Matatumua Maimoaga	125
Suafoa Lautasi	478
Toleaofo Faafisi	851
Tuaifaiva Tamafili	<u>476</u>
Total number of valid votes	3,241
Number of votes rejected as informal	7

The candidates Suafoa Lautasi and Toleaofo Faafisi were accordingly declared to be elected to the two parliamentary seats for the Aana Alofi No.1 territorial constituency.

After the public notification of the result of the poll, Tuaifaiva Tamafili filed an election petition dated 20 May 1996 seeking a declaration that the election of Toleaofo Faafisi and Suafoa Lautasi was void. Then by application dated 12 June 1996 Tuaifaiva Tamafili sought leave from the Court to have his petition withdrawn on the ground that the matter has been resolved. That application was duly advertised in a local newspaper as required under the provisions of the Electoral Act 1963 and the Electoral Petition Rules 1964. The application was then called before this Court on Monday, 24 June 1996. The respondent Suafoa Lautasi did not appear and counsel for the respondent Toleaofo indicated no objection to the application to withdraw. No other person either from the Aana Alofi No.1 territorial constituency or elsewhere appeared to register objection or show cause as to why the application to withdraw should not be granted.

In these circumstances and in view of what will follow in this judgment leave is granted to Tuaeifaiva Tamafili to have his petition withdrawn in respect of Toleafoa Faafisi and that petition is accordingly withdrawn by leave.

Now by application dated 19 June 1996, candidate Aiono Leulumoega Sofara made application to be substituted as new petitioner in terms of section 128 of the Electoral Act 1963. This application calls for the correct interpretation to be placed on the newly enacted section 31 of the Electoral Amendment Act 1995 which amends section 105(1) of the Electoral Act 1963. Section 105(1) of the 1963 Act provided :

"An election petition may be presented to the Supreme Court by one or more
"of the following persons -

- "(a) A person who voted or had a right to vote at the election;
- "(b) A person claiming to have had a right to be elected or returned at
"the election;
- "(c) A person alleging himself to have been a candidate at the election".

Section 31 of the Electoral Amendment Act 1995 amends section 105(1) of the principal Act by omitting the whole of section 105(1) and substituting a new subsection (1) as follows :

"An election petition may be presented to the Supreme Court by one or more
"of the following persons :

- "(a) A person claiming to have had a right to be elected or returned at
"the election;
- "(b) A person alleging himself to have been a candidate at the election;

"Provided however that no petition can be filed by a person who polled
"less than 50% of the total number of votes polled by a person elected or

"returned at the election".

The issue which has arisen is whether the applicant Aiono Leulumoega Sofara is eligible to be substituted as new petitioner in view of the provisions of section 31 of the Electoral Amendment Act 1995 as he polled only 298 votes at the election while the successful candidates Toleafoa Faafisi and Suafoa Lautasi each polled 851 and 478 votes respectively.

As I also understand the application by Aiono Leulumoega Sofara, he is applying to be substituted as new petitioner against Toleafoa Faafisi only and not against Suafoa Lautasi even though he polled less than 50% of the total votes polled by Toleafoa Faafisi at the election. Aiono's counsel submitted that because the applicant polled more than 50% of the total number of votes polled by Suafoa Lautasi the applicant is therefore eligible in terms of the ~~proviso~~ to section 30 of the Electoral Amendment Act 1995 to be substituted as new petitioner against Toleafoa Faafisi.

I turn back now to the relevant statutory provisions to determine whether that submission is sustainable. The first thing which is noticeable is that section 31 of the Electoral Amendment Act 1995 reduces and restricts the categories of those persons who may be eligible to present an election petition to a person claiming to have had a right to be elected or returned at the election and a person alleging to have been candidate at the election. No longer is a mere elector or voter who was not a candidate at the election eligible to present an election petition as was the case under the original section 105(1) of the principal Act. In addition to that, section 31 of the Electoral Amendment

Act 1995 goes further in its proviso and restricts the category of candidates who are eligible to present an election petition by providing that no petition can be presented or filed by a person who polled less than 50% of the total number of votes polled by a person elected or returned at the election. So the clear intention of the legislature in enacting section 31 of the Electoral Amendment Act 1995 was to reduce and restrict the categories of those persons who may be eligible to present an election petition to those persons specified in the new provision.

Turning specifically now to the proviso to section 31 of the Electoral Amendment Act 1995, it is clear that in the case of a territorial constituency with only one parliamentary seat, there will be no difficulty in the application of the section 31 proviso for only one person or candidate may be elected or returned at an election. At least 50% of the total votes polled by the successful candidate will be the prerequisite an unsuccessful candidate has to obtain in order to be eligible to present an election petition. That is all straightforward.

However, the case of a territorial constituency with more than one parliamentary seat as it is with Aana Alofi No.1 raises some difficulties in the interpretation and application of the proviso to section 31 as it has happened in this case. To resolve the present difficulty I think one must start by first asking the question, who is "a person elected or returned at the election" in respect of the election for Aana Alofi No.1. The answer must be that both Toleafoa Faafisi and Suafoa Lautasi come within the description of "a person elected or returned at the election". And this is where the difficulty arises

with the proviso to section 31. In respect of Toleafoa Faafisi, the applicant Aiono Leulumoega Sofara will be "a person who polled less than 50% of the total number of votes polled by a person elected or returned at the election" and therefore he is not a person eligible to present an election petition. However in respect of Suafoa Lautasi, the applicant will not be such a person as described in the proviso as he polled more than 50% of the total votes polled by Suafoa Lautasi. On that basis the applicant Aiono Leulumoega Sofara is therefore saying he is eligible to present a petition against Toleafoa Faafisi. This is clearly an unsatisfactory and confusing situation. It means a person at one and the same time can and cannot present an election petition depending on who you pick to be the one the words "a person elected or returned at the election" as used in the section 30 proviso refer to. Counsel for the applicant picks Suafoa Lautasi so that the applicant can be substituted as petitioner against Toleafoa Faafisi, whereas counsel for Toleafoa Faafisi would naturally pick Toleafoa Faafisi in order to keep out the applicant.

I am of the clear view that in the case of a territorial constituency with two parliamentary seats, each one of the two candidates declared by the Chief Electoral Officer to be elected is "a person elected or returned at the election" in terms of the section 31 proviso. Therefore to avoid confusion and absurdity and to give the proviso to section 31 of the Electoral Amendment Act 1995 a sensible interpretation, I am of the view that the proviso must mean that a person who polled less than 50% of the total number votes polled by a person elected or returned at the election may not file a petition in relation to the election or declaration of result of that person. In that way consistency will also be maintained in the application of the section 31 proviso to a territorial

constituency with one parliamentary seat as well as to a territorial constituency with two parliamentary seats. It also appears rather illogical and inconsistent if in a territorial constituency with one parliamentary seat an unsuccessful candidate who polled less than 50% of the total number of votes polled by a successful candidate cannot on that basis petition against the successful candidate, whereas in a territorial constituency with two parliamentary seats an unsuccessful candidate who polled less than 50% of the total number of votes polled by a candidate with the highest number of vote can petition against that candidate on the basis that he polled more than 50% of the votes polled by the successful candidate with the second highest number of votes. The inconsistency will further appear when one considers that in a constituency with one parliamentary seat a candidate who comes third or fourth in the poll may not petition against the only successful candidate if he polled less than 50% of that candidate's votes even if he also at the same time polled more than 50% of the votes polled by the candidate who came second. There is no compelling reason appearing in section 31 of the Electoral Amendment Act 1995 to justify a different application of the proviso to a constituency with two parliamentary seats with a similar factual situation. I am also of the view that the interpretation I have adopted is not incompatible with the intention of the legislature manifested throughout section 31 of the Electoral Amendment Act 1995 which is to reduce or restrict the categories of persons who may present or file an election petition.

I am therefore unable to accede to the submission by counsel for the present applicant that because the present applicant polled more than 50% of the total number of votes polled by Suafoa Lautasi who polled the second highest

number of votes, he is therefore eligible to present an election petition against Toleafoa Faafisi who polled the highest number of votes which was much more than 50% of the total number of votes polled by the applicant.

Accordingly the application to be substituted as a petition is denied.

As no party sought costs in these proceedings there will be no order as to costs.

T. F. M. Sapulu
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CHIEF JUSTICE