

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 137/96

IN THE MATTER of the Declaratory
Judgment Act 1988

A N D

IN THE MATTER of the Electoral Act
1963

BETWEEN:

THE CHIEF ELECTORAL
OFFICER and THE
REGISTRAR OF ELECTORS
AND VOTERS appointed
pursuant to the Elec-
toral Act 1963 and the
Electoral Amendment Act
1995

Applicant

A N D:

THE SAMOA ALL PEOPLE'S
PARTY INC.

Respondent

Counsel: H Schuster for applicant
K Robinson for respondent

Hearing: 8 August 1996

Judgment: 12 August 1996

JUDGMENT OF SAPOLU, CJ

This is a motion to lift an interim injunction granted by this Court on 2 August 1996 on application by the respondent to stop the by-election held on the same day for the territorial constituency of Aana Alofi No.3.

In order to have a proper understanding of the issues in these proceedings I will refer first to the background circumstances. After the general election held on 26 April 1996, the candidate Toalepaialii Siueva Pose III Salesa (hereinafter referred to as "Toalepaialii") was declared elected as Member of Parliament for the territorial constituency of Aana Alofi No.3. The candidate Afamasaga Fatu Vaili (hereinafter referred to as "Afamasaga") who polled the second highest number of votes for the same territorial constituency then filed an election petition dated 14 May 1996 alleging a number of instances of electoral corrupt practice against Toalepaialii. In his election petition Afamasaga sought orders to have the election of Toalepaialii declared void and to have Afamasaga declared to be duly elected.

This election petition was set down as the first petition to be heard by this Court in a series of election petitions which were filed in relation to the last general election. The hearing commenced on 30 May and continued on 31 May. There was then a few days break because of the Independence Day Celebrations. At that time it was clear to the Court, from discussions in Chambers with both counsels for Toalepaialii and Afamasaga that there was a real desire on the part of Toalepaialii to settle the petition out of Court. In fact the question of resignation from Parliament on the part of Toalepaialii was also mentioned at that stage as part of the out of Court settlement of Afamasaga's petition.

When the hearing of Afamasaga's petition resumed on 6 June, counsel for Toalepaialii informed the Court that Toalepaialii had already resigned his seat in Parliament. It is now clear that resignation was handed to the Speaker of the Legislative Assembly on 5 June. That resignation did not stop Afamasaga from

continuing with his petition against Toalepaialii. On 7 June at the conclusion of the evidence called in support of Afamasaga's petition, counsel for Toalepaialii made a submission of no prima facie case. The Court found that there was a prima facie case in respect of most of the allegations of corrupt practice against Toalepaialii. Counsel for Toalepaialii then informed the Court that he would not be calling any evidence to rebut the allegations against Toalepaialii in respect of which the Court had found a prima facie case but that he would be calling evidence to establish allegations of corrupt practice against Afamasaga. The hearing then continued and was concluded on 18 June. On 26 June the Court delivered its judgment finding a number of allegations of corrupt practice to have been proved beyond reasonable doubt against Toalepaialii. His election was therefore declared void in terms of section 112 of the Electoral Act 1963 which provides that the election of a candidate who is found guilty of a corrupt practice at the trial of an election petition shall be void. One allegation of corrupt practice was also found to have been proved beyond reasonable doubt against Afamasaga. The Court's report dated 5 July as to corrupt practices was then submitted to the Honourable Speaker as required by section 119 of the Electoral Act 1963.

Turning back to the resignation by Toalepaialii of his parliamentary seat on 5 June, it is now clear from the submissions of Mr Schuster for the applicant, that that resignation was accepted by the Speaker on the same day. On 7 June the Speaker pursuant to the provisions of Article 48 of the Constitution then reported to the Head of States the vacancy to the parliamentary seat for the territorial constituency of Aana Alofi No.3. On 18 June the Speaker notified the Legislative Assembly which was then sitting of the vacancy in the parliamentary

seat for the territorial constituency of Aana Alofi No.3 and also put the question to the Legislative Assembly for an order of the Assembly for the issue of a warrant by the Speaker directing the Chief Electoral officer to issue a writ to fill the vacancy. The Legislative Assembly unanimously resolved to issue the order sought in the question put to the Assembly by the Speaker. On 21 June notice was given by the Speaker in the Western Samoa Gazette of Toalepaialii's resignation and the warrant was issued the same day directing the Chief Electoral Officer to issue writs for a by-election to fill the vacancy in the parliamentary seat for the territorial constituency of Aana Alofi No.3. Those writs were issued on 5 July and published in the Western Samoa Gazette on the basis that the Member of Parliament for Aana Alofi No.3 had resigned his parliamentary seat. It also appears that the by-election for the Aana Alofi No.3 territorial constituency was then set to be held on 2 August.

Up to this point there was no problem. The present dispute arose when the present respondent the Samoa All People's Party (hereinafter referred to as "SAPP") became aware after registering its candidate for the Aana Alofi No.3 by-election that the roll which was to be used in the by-election was not the same roll that was used for Aana Alofi No.3 in the general election held on 26 April but a new roll which contained new electors whose names were only registered after the general election. SAPP accordingly filed a motion on 1 August seeking an interim injunction to stop the by-election. That motion was set down for hearing on 2 August so that the motion could be served on the present applicant, the Chief Electoral Officer. An interim injunction was granted so that the by-election held the same day, 2 August, was discontinued. The Chief Electoral Officer is now seeking to lift that interim injunction.

At the heart of the present dispute is section 113A of the Electoral Act 1963 which was introduced by section 2 of the Electoral Amendment Act (No.2) 1991. Section 113A provides as follows :

"Where as a result the avoidance of an election pursuant to a decision of the Supreme Court in respect of an election petition it is necessary for a by-election to be held, and notwithstanding any other provision of this Act, the main roll and the supplementary roll which were used at the election which has been avoided shall be used at the by-election without any amendment or addition".

The crucial question then is whether section 113A applies to the present by-election or not.

In his well prepared and persuasive submissions, counsel for the applicant, the Chief Electoral Officer, argued that section 113A does not apply to the present by-election. Essentially he submitted that the by-election was the result of the resignation tendered by the former Member of Parliament for Aana Alofi No.3 to the Speaker. In terms of the provisions of Article 46(2)(b) of the Constitution, that resignation created a vacancy in the parliamentary seat for Aana Alofi No.3 and set in motion the relevant provisions of the Constitution and the Electoral Act 1963 for filling the vacancy through a by-election. He further submitted that the by-election which was scheduled to be held on 2 August could not have been necessitated by the judgment of this Court delivered on 26 June voiding the election of the Member of Parliament for Aana Alofi No.3 as that judgment was delivered several days after the Member of Parliament for Aana Alofi No.3 had resigned his parliamentary seat on 5 June thereby creating a vacancy for that seat in terms of Article 46(2)(b) of the Constitution. These submissions represent the gist of the arguments by counsel for the Chief Electoral Officer

but I will also refer to some of the other details of the argument by counsel in the course of this judgment.

Without intending any discourtesy or disrespect to the well prepared submissions by counsel for the Chief Electoral Officer, I have, after some careful consideration, been unable to accept them. I will now explain why. The essence of this case is whether section 113A of the Act applies to the by-election. If section 113A applies then the rolls which were used in the general election held on 26 April would be the same rolls to be used for the by-election. If section 113A does not apply then new electors could be entered in the rolls for the by-election. And whether or not section 113A applies to the present by-election must depend on whether the avoidance of the election of Toalepaialii pursuant to a judgment of this Court in respect of the election petition by Afamasaga made it necessary for a by-election to be held. In other words, is it because of the judgment of this Court which avoided the election for Aana Alofi No.3 which has necessitated the holding of the present by-election. This is primarily a question of fact to be determined by having regard to all the relevant circumstances.

As already pointed out, before the Court was informed by counsel for Toalepaialii on 6 June that Toalepaialii had resigned his parliamentary seat, which is now confirmed to have taken place on 5 June, the desire of Toalepaialii for an out of Court settlement of the election petition was already clear to the Court and the question of Toalepaialii resigning his parliamentary seat as part of that settlement had already been mentioned. On 5 June Toalepaialii resigned his seat. On 6 June the hearing resumed and on 7 June at the conclusion of the

evidence for Afamasaga and after the Court had ruled there was a prima facie case in respect of a number of allegations of corrupt practice against Toalepaialii, counsel for Toalepaialii informed the Court that he was not calling any evidence to rebut the allegations of corrupt practice in respect of which the Court had found a prima facie case but would call only evidence in support of the counter-allegations of corrupt practice against Afamasaga.

Given these circumstances, the clear and irresistible inference is that when Toalepaialii resigned his parliamentary seat he knew or had reasonably foreseen that some of the allegations in the election petition against him would be established and that the Court would so find and declare his election void. I see no other realistic explanation for Toalepaialii's action in resigning his parliamentary seat on 5 June so soon after he was elected in a matter of weeks on 26 April. He foresaw and anticipated what the judgment of the Court was going to be. In that regard, I must say Toalepaialii was dead right. But with respect to Toalepaialii, any expectation he might have had that Afamasaga would thereby withdraw or discontinue his petition thus avoiding any findings of corrupt practice so that Toalepaialii could run again as a candidate in the by-election which would follow did not eventuate.

Counsel for the Chief Electoral Officer submitted all that is irrelevant because the Speaker was under no obligation to enquire as to the motive for Toalepaialii's resignation. That may be so. However, I am of the clear view that the reasons which prompted and caused Toalepaialii's resignation to be made are still relevant to the separate question whether section 113A of the Act applies to the by-election and the question of the roll or rolls to be used in

the by-election. And it was clear that because Toalepaialii anticipated an unfavourable judgment which would avoid his election that he decided to resign.

Section 113A does not expressly spell out whether the avoidance of an election pursuant to a judgment of the Court in respect of an election petition which has made it necessary for a by-election to be held is restricted to an avoidance which has already occurred or whether it includes such avoidance of an election which is reasonably foreseen, expected or anticipated but has not yet occurred. To give force and life to the provisions of section 113A, I am of the view that the provisions of section 113A apply not only to the avoidance of an election which has actually occurred but also to the avoidance of an election which is reasonably foreseen, expected or anticipated and such foreseeability, expectation or anticipation turns out to be well-founded. This interpretation would give force and life and promote rather than defeat the intention and purpose of section 113A.

In *Pepper v Hart* [1993] 1 All ER 42 Lord Griffiths stated at p.50 :

"The days have long passed when the Courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The Courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation...."

That approach echoes the approach to statutory interpretation stated by Lord Denning MR in *Nothman v Barnet London Borough Council* [1978] 1 All ER 1243 :

"In all cases now in the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose'

"underlying the provision. It is no longer necessary for the Judges to wring their hands and say : 'There is nothing we can do about it'. Whenever the strict interpretation of a statute gives rise to an absurd and unjust result, the Judges can... use their good sense to remedy it.... so as to do what Parliament would have done, had they had the "situation in mind".

It also appears that there is no dispute that as a result of the judgment of this Court avoiding the election for Aana Alofi No.3, Toalepaialii and Afamasaga are not qualified to run as candidates in the by-election. This shows that there is a real link between the judgment of this Court avoiding the election and the by-election which has followed. If the real and only cause of the by-election is Toalepaialii's resignation of his parliamentary seat, then how can one explain the fact that both Toalepaialii and Afamasaga are not running as candidates in the by-election. In my respectful view, it would be unrealistic to say that the avoidance of the election pursuant to this Court's judgment can apply to who may be candidates at the by-election but not to which roll can be used in the by-election. Either the Court's judgment applies to the by-election in all its relevant aspects or it does not apply at all.

My concern about the interpretation which arises from the submissions made by counsel for the Chief Electoral Officer, is that, if it is accepted it could drain section 113A of much of its force and life. It would mean that if in the course of election petition proceedings against a successful candidate at an election, that candidate resigns his parliamentary seat when it is obvious that his election will be voided because of corrupt practices, then section 113A does not apply to the roll to be used in the by-election which will follow. With respect, this interpretation would tend to restrict and defeat the intention and purpose of Parliament in enacting section 113A. It would also facilitate

circumvention of the will of Parliament as enacted in section 113A. But it is the duty of the Court to give effect to and promote the purpose of a statutory provision enacted by Parliament.

In this connexion, I must add that there is no conflict between the resolution of the Legislative Assembly ordering a by-election for Aana Alofi No.3 and this Court seeking to promote and give effect to the legislative purpose of Parliament enacted in section 113A of the Electoral Act 1963 which is a statute of Parliament. Furthermore, there is nothing to show that the Legislative Assembly in passing its resolution ordering the by-election for Aana Alofi No.3 also ordered that section 113A is not to apply to the roll to be used for that by-election. The Assembly's resolution was simply silent on whether section 113A applied to the by-election or not.

I must also point out that the legality of Toalepaialii's resignation and the actions taken by the Speaker and the Legislative Assembly on that resignation are not in issue in these proceedings. The real and only issue is whether in the circumstances of this case section 113A applies to the by-election so that the rolls used for the territorial constituency of Aana Alofi No.3 in the general election should be the same rolls to be used in the by-election. In my view section 113A applies.

I have also considered section 118 which relates to the certificate of the Court as to the trial of an election petition and section 121 which relates to what the Legislative Assembly may do with that certificate. However, that consideration has not led me to a different view from that I have already taken.

For those reasons the present motion is denied.

As this case is in a real sense a test case, I make no order as to costs.

TFM Sapaku.....
CHIEF JUSTICE