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IN THE COURT OF APPEAL OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

AC 9 of 2022
(CV 77 of 2021)

BETWEEN:

TATAFU MOEAKI

Applicant/Appellant

-and-

MATENI TAPUELUELU

Respondent

Application for a stay of the judgment below

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mrs P. Tupou KC for the Applicant/Appellant
Mr S. Etika for the Respondent
The Attorney General as amicus curiae
Application: 18 May 2022
Hearing: 20 May 2022
Ruling: 20 May 2022

1. On 18 November 2021, Mateni Tapueluelu and Tatafu Moeaki were among the candidates vying for election as the representative of the Tongatapu 4 constituency. Mr Moeaki was successful and was subsequently appointed to Cabinet as the Minister for Finance.
2. In December 2021, Mr Tapueluelu filed an election petition challenging the validity of Mr Moeaki's election on the basis, originally, of five counts of bribery, contrary to s. 21(1) of the *Electoral Act* ("**the Act**"). Two of those claims were subsequently abandoned. The trial was heard before Niu J between 11 and 13 April 2022. On 6 May 2022, his Honour found that Mr Moeaki committed bribery on two of the three remaining counts by giving \$100 to an elector and by making promises through another to give free water tanks to electors, in both cases, to induce them to vote for him.
3. In consequence of those findings, and pursuant to ss 32 and 37 of the Act, the Judge declared Mr Moeaki's election void and issued a certificate to the Speaker of the Legislative Assembly confirming that outcome.

26 MAY 2022
JA

4. On 18 May 2022, Mr Moeaki filed a Notice of Appeal together with the instant application for a stay of Niu J's judgment. The grounds of appeal include that there was no evidence to support certain findings by the judge and that he failed to properly consider other evidence relevant to other findings.
5. The application for a stay of execution of the judgment is made upon the following grounds:
 - (a) the Lord Speaker of the Legislative Assembly has issued a letter advising that Parliament intends to unseat the Appellant and proceed with a by-election;
 - (b) this has occurred before the Appellant had had an opportunity to exercise his Constitutional right of appeal;
 - (c) if his appeal is successful, but a replacement representative has been elected to Parliament beforehand, the Appellant's right to be restored to his seat would no longer be available;
 - (d) in that event, damages would not be sufficient compensation to the reputational and emotional damage suffered by the Appellant and his family;
 - (e) as the official opening of the Legislative Assembly is imminent, it is vital that the judgment is stayed until the Court of Appeal is able to hear the appeal;
 - (f) if the judgment is not stayed, the National Budget, which is ready to be tabled before the Legislative Assembly will be affected as the Appellant is responsible for it;
 - (g) the 1,270 electors who voted for the Appellant in the November 2021 election are entitled to have the Appellant's appeal determined by the Court of Appeal before any by-election is held; and
 - (h) the appeal has 'some prospects of success'.
6. Mr Moeaki provided an affidavit in support in which he deposed to the grounds for the application. The hearing of the application was called on at short notice because, as alluded to in the grounds for the application, the Speaker has indicated that Parliament proposes to resume on 23 May 2022¹ and that on that

¹ The following Monday.

day, Mr Moeaki is to be unseated in accordance with the Act and s. 6 of the *Legislative Assembly Act*.

7. Just prior to the hearing this morning, counsel for Mr Moeaki filed a supplementary affidavit. In it, Mr Moeaki exhibited a further letter from the Lord Speaker, dated 19 May 2022, in which he confirmed that the Legislative Assembly will, in accordance with ss 21(5) and 32(1) of the Act, proceed to unseat Mr Moeaki as the people's representatives for the Tongatapu 4 constituency on the basis of the ruling in election petition CV 77/2021 "*UNLESS the Legislative Assembly receives an order granting a stay of execution of the ruling of the said election petition from the court*".
8. Mr Moeaki also deposed to the following:
 - (a) the effects that the judgment below has had, and continues to have, on him and his family;
 - (b) in his role as Minister of Finance, he prepared the new Budget for 2023, for presentation to Cabinet;
 - (c) after initial deferrals, the final Budget was delivered to the Legislative Assembly on 17 May 2022;
 - (d) the new Budget is extremely vital as it is presented under the unique circumstances faced by the Government and the country following the volcano eruption and the introduction of the Covid-19 virus into the Tongan community;
 - (e) if a stay is not granted, the Prime Minister could become the Acting Minister for Finance or he could appoint a new Minister of Finance;
 - (f) notwithstanding, the Budget and the audited public accounts for the financial year ending 2021 will be presented by persons who will be unfamiliar with both;
 - (g) even though staff of the Ministry could brief such a person, there is a risk of the Government misunderstanding the documents and failing to respond to questions in the House will could result in the Budget being rejected;
 - (h) in these unprecedented times, the stability of the Kingdom and the importance of the Budget and audited public accounts has intensified;

- (i) two Cabinet ministers are presently in New Zealand for medical treatment and three others are at risk of being unseated, leaving the Government with a Cabinet of seven ministers; and
 - (j) if a stay is not granted, there will be little point in pursuing his appeal regardless of its merit because he will not be able to be re-seated.
9. Counsel for the parties provided helpful written submissions at short notice. The Court is also grateful to the Attorney General for appearing as amicus curiae and for providing helpful oral submissions.
10. Order 9 rule 1 of the *Court of Appeal Rules*, provides that unless otherwise ordered by the Court or the Supreme Court, an appeal shall not operate as a stay of execution or of a proceeding in the court below.
11. Mrs Tupou referred to the applicable principles for a stay application discussed in the recent decision in the *Attorney General v Angilau* [2021] TOCA 24, namely:
- “Two principles have to be balanced against each other as to whether a stay of execution pending appeal should be granted: first, that a successful litigant should not be deprived of the fruits of his litigation (The Annot Lyle (1886) 11PD 114, 116 (CA)); and secondly, that an appellant should not be deprived of the fruits of a successful appeal. Whether to grant or refuse a stay is within the Court’s discretion. (Halsbury’s Laws (4th Ed) Vol 37 para 699).”*²
12. Similar principles have been applied in other cases such as:
- (a) the jurisdiction of the Court to make an order preserving the status quo pending the hearing of an appeal ‘rests upon the inherent power to preserve from futility the exercise of the Court’s jurisdiction to allow an appeal’;³
 - (b) the court will, as a rule, only grant a stay if there are **special or exceptional circumstances**;⁴
 - (c) special circumstances justifying a stay will exist where it is necessary to **prevent the appeal, if successful, from being rendered nugatory**;⁵

² [13] citing *AJ & E Ltd v FC Nichols (Wholesales) Ltd* [2006] TOCA 1.

³ *Beljajev v Director of Public Prosecutions* (1991) 173 CLR 28 at [6], referring to *Chamberlain v. The Queen* (No. 1) (1983) 153 CLR 514 at 518.

⁴ *Thompson v Tonga Development Bank* [2004] Tonga LR 11, citing Halsbury’s, Vol 17, at [455].

⁵ *Beljajev v DPP*, supra, at [7], referring to *Federal Commissioner of Taxation v. Myer Emporium Ltd. (No. 1)* (1986) 160 CLR 220 at 222-223.

- (d) the so-called 'stringent test'⁶ which requires evidence of *irreparable harm* being suffered by the appellant if the stay is not granted such as damages and costs being paid in accordance with the terms of the judgment appealed from with no reasonable probability of recovering them if the appeal succeeds, or *where there is a real risk that it would not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed*;⁷ and
- (e) the 'more relaxed test' where 'if [an applicant] can say that, without a stay of execution, he will be ruined and that he has an appeal which has *some prospect of success*, that is a legitimate ground for granting a stay of execution'.⁸

[emphasis added]

13. Mrs Tupou further submitted that:

- (a) if a stay is not granted, Mr Moeaki's appeal will be rendered nugatory;
- (b) he will suffer loss which could not be adequately compensated by an order of damages; and
- (c) the appeal has some prospects of success.

14. Mrs Tupou also referred to:

- (a) the decision in *Lasike v Kingdom of Tonga* [2017] TOSC 3, to which I will refer in detail further below; and
- (b) clause 23 of the Constitution which provides that:

Disabilities of convict

No person having been convicted of a criminal offence and sentenced to imprisonment for more than two years, shall hold any office under the Government whether of emolument or honour nor shall he be qualified to vote for nor to be elected a representative of the Legislative Assembly unless he has received from the King a pardon together with a declaration that he is freed from the disabilities to which he would otherwise be subject under the provisions of this clause:

⁶ Referred to by Ward CJ in '*Uta'atu v Free Wesleyan Church of Tonga*, No. 26/90, 12 August 1994, citing *Atkins v Great Western Railway* (1886) 2 TLR 400.

⁷ *McBride v Sandland (No 2)* (1918) 25 CLR 369.

⁸ '*Uta'atu v Free Wesleyan Church of Tonga*, supra, citing *Linotype-Hell Finance Ltd v Baker* [1992] 4 All ER 887, 888 (CA).

Provided that the operation of this clause shall be suspended in any case until the expiration of 42 days after the date of the conviction; and in cases where notice of appeal or leave to appeal is given within 42 days after the date of conviction, until the determination of the appeal; and if the conviction is quashed on appeal or the sentence reduced to no more than 2 years imprisonment then this clause shall not have effect.

15. Mrs Tupou explained that one of the Appellant's main concerns is that it is not yet known whether his appeal will be heard in the next sitting of the Court of Appeal which is currently scheduled to commence in the first week of October this year. In the meantime, if Mr Moeaki is unseated, as the Lord Speaker has indicated Parliament intends to do, and a by-election is conducted resulting in a replacement representative for Tongatapu 4, then if his appeal is ultimately successful, he would not be able to be re-seated. However, if the appeal could be heard sooner rather than later, then it 'makes more sense' to grant a stay to preserve the status quo until then.
16. During her oral submissions, Mrs Tupou pointed to the fact that in comparing the public interest versus the individual interests of Mr Moeaki in determining whether to grant a stay, if a stay is not granted and his appeal is ultimately successful, the Government will have to remunerate both the replacement representative and Mr Moeaki for the time he will have been unseated. There are other obvious financial elements to any other claim that Mr Moeaki might have in the event that he is unseated and replaced but is then successful on his appeal.
17. In relation to time, Mrs Tupou suggested that, in the ordinary course, it could take about 13 weeks from the date of unseating for any by-election to be completed. She also noted that in the case of Etuate Lavulavu, in 2016, that same process took between five and six months to be completed.
18. Mr 'Etika opposed the application on the following grounds:
 - (a) the application has no merit;
 - (b) there is no certainty about any date or time for any by-election;
 - (c) the unseating of Mr Moeaki and a subsequent by-election as foreshadowed by the Speaker would be a legitimate exercise of his duty according to law; and
 - (d) the appeal does not have reasonable prospects of success.

19. When he first appeared this morning, Mr 'Etika had not been provided with the Notice of Appeal. A copy was provided and the hearing of the application was stood down to permit him to consider it. When the hearing resumed, Mr 'Etika maintained that the stated grounds of appeal did not have much in the way of prospects of success, even those alleging no evidence to support certain of the judge's findings because he recalled making detailed submissions at trial on the evidence that was available to support those findings.
20. In his oral submissions, Mr 'Etika tacitly suggested that this Court had no jurisdiction (or power) to entertain the current application because the consequences of Niu J's decision are "now in the hands of Parliament". He eventually accepted, however, that, at present, the Speaker has only indicated Parliament's intention to proceed with the unseating process, unless this Court orders a stay, and that as the matter presently stands, Mr Moeaki had not yet been unseated nor have any other steps been taken under the relevant legislation in consequence of the judgment below. Nonetheless, Mr 'Etika maintained his submission that the Court had no power to order a stay but otherwise "left it to the discretion of the Court".
21. The Attorney General, Mrs Folaumoetu'i, referred to the decision in *Vaikona v Fuko (No. 3)* [1990] Tonga LR 114. There, Webster J refused an application for a stay pending appeal of a judgment declaring the election of Mr Fuko void. The Attorney General here adopted the position taken by the Solicitor General appearing for the Attorney-General as *amicus curiae* in that case, namely, that:

"... the Court's decision depended very much on the possibility of success of the Respondent's appeal and that the principles applied in Paasi v Sanft and Siale⁹ applied in this case also. Whether the Respondent had been properly elected had not yet been decided and until that had been decided in his favour he could not be a properly elected representative for Ha'apai".

22. Webster J referred to the remarks of Martin J in *Paasi* to the effect that the people should be represented in the Assembly only by a representative "properly elected and clearly properly elected". Webster J opined that:

"... If this simple balancing of interests in the consideration of justice is not enough, the result is fully supported by the public interests ... the people of Ha'apai should only be represented in the Legislative Assembly by a person

⁹ Case No. 5/87.

who has clearly been properly elected. Otherwise, there might be the chance of the proceedings of the Assembly being invalidated. As this court has already decided that the election was void, the respondent cannot be said to have been properly elected, although he has appealed.”

23. However, and importantly for the purposes for this application, Webster J then stated:

“Nor can it be said that if this is proved wrong and the appeal is successful that it would be nugatory if a stay is refused. Mr Fuko may have lost the right to sit in the Assembly for two or three months but if the appeal were to be allowed, he would still be entitled to sit for another two and a half years until the next election.”

24. The Attorney General further submitted, by reference to the UK White Book, that all the circumstances of the case must be considered, including the risks of injustice to one or both of the parties if a stay is granted or refused. She also sought to distinguish the *Lasike* decision, for reasons referred to in the discussion on that decision below.
25. However, unlike the result in *Vaikona*, the Attorney General, in this case, supported the grant of a stay.
26. In *Patrick Stevedore’s Corporation (No. 2) Pty Ltd v Maritime Union of Australia (No. 3)* (1998) 72 ALJR 869 at 870, the High Court of Australia stated:

“The principles to be applied in such an application are well established. The jurisdiction to grant a stay is part of the inherent jurisdiction of the court and finds its most frequent use in order to preserve the subject matter of litigation. To speak only of preserving the subject matter of litigation may in some cases obscure the fact that the jurisdiction can be imposed if to grant a stay is necessary to prevent the exercise of rights of appeal being rendered futile or the exercise in circumstances where restoration of the status quo cannot be achieved. The jurisdiction to grant a stay is however an extraordinary jurisdiction and exceptional circumstances must be shown before its exercise is warranted. It is equally clear that it is very important to bear steadily in mind the grant of a stay deprives the respondent to the application of the benefit of the orders they have obtained and in considering whether to grant a stay it is important to consider the prospect of success on appeal, the effects the grant or refusal of stay will have and where lies the balance of convenience.”

27. In the apparently urgent circumstances of this application, there was little opportunity for either party to further elucidate on their competing views as to Mr Moeaki’s prospects of success on appeal. Having regard to Mrs Tupou’s seniority and experience, I consider it reasonable to assume that the grounds of appeal

alleging there was no evidence to support certain findings by the trial judge would not lightly have been advanced and are therefore likely to have some prospects of success. That is because, in the ordinary case, such propositions are only capable of a binary outcome: either there was evidence or there wasn't. If there was none, and the relevant finding was material to the result, then there is a considerable likelihood that the appellate court will set aside the result.

28. Despite Mr 'Etika's diametrically opposite view, in the absence of a demonstration of the cogency of that view, by reference even to the evidence referred to in the judgment, I am satisfied that the nature of the majority of the complaints in the Notice of Appeal represent some prospects of success. Conversely, it could not be said merely by looking at the grounds of appeal that they are hopeless by way of some legal defect or otherwise, and that was not suggested by Mr 'Etika.
29. Exceptional circumstances in this case are inherent in the very subject matter of the application which emanates from a decision on an election petition. By virtue of the relevant statutory provisions, election petitions are not ordinary cases. More particularly, a declaration at the trial of an election petition that a respondent's election is void carries with it very significant consequences starting with the unseating of the representative from Parliament, followed by a by-election for the relevant constituency and the election of a replacement representative for that constituency. Meanwhile, the appellant's appeal may be pending hearing or determination by the Court of Appeal.
30. The last excerpt above from the decision in *Vaikona* clearly reflects that Webster J proceeded on the basis that if Mr Fuko's appeal was successful, notwithstanding his earlier unseating and a subsequent by-election, he could legally be re-seated.
31. However, in *Lasike*, *ibid*, Paulsen LCJ considered authorities and principles which point the other way.
32. In 2012, Lord Lasike was convicted of possession of ammunition without a licence and was fined. He appealed against his conviction. In about July 2012, the then Attorney General, Mr Adsett, reported the result of the case and consequences of Lord Lasike's conviction to the then Prime Minister, Lord Tu'ivakano and Deputy Prime Minister, Mr Samiu Vaipulu. It was decided that the Government

would take no steps until the appeal was heard. Subsequently, the Attorney General had a change of mind, which he reported to the Prime Minister and his Deputy. He was adamant that a by-election should be held to replace Lord Lasike as a Nobles Representative and that he should be removed as Speaker. The Prime Minister and his Deputy insisted that nothing be done because 'it would create considerable problems for the Government' if Lord Lasike's appeal was allowed. The Attorney General said that whether they liked it or not, he would advise His Majesty to revoke Lord Lasike's appointments and to call a by-election, which is what he did.

33. On 17 July 2012, Lord Lasike was advised by the Palace Office, on behalf of His Majesty, that his appointment as Speaker was revoked. On 18 July 2012, the Attorney General advised the Acting Chief Secretary and Acting Chief Secretary to Cabinet and others that Lord Laike had ceased to hold his hereditary titles and estates and his seat in the Legislative Assembly from the date of his conviction, that he should not be paid for any period after 9 July 2012, and that his appointment as Speaker had been revoked by His Majesty and so he should not receive payment in respect of that position from that date. The Deputy Speaker assumed the role of Speaker until His Majesty appointed Lord Fakafanua. A by-election was held in August 2012 and Lord Nuku was elected to replace Lord Lasike as the Nobles Representative for 'Eua.
34. On 12 October 2012, the Court of Appeal quashed Lord Lasike's conviction and he was restored to his hereditary titles and estates but not his seat in the Legislative Assembly or position as Speaker. He sought declarations that his removal from the Legislative Assembly and as Speaker was unlawful and contrary to the Constitution and that he remained a member of the Legislative Assembly from when he was unseated until the end of his term on 24 November 2014. He also sought orders for compensation for lost remuneration and emoluments.
35. At trial, the Kingdom argued that:
 - (a) upon his conviction, Lord Lasike ceased to be a member of the Legislative Assembly as a matter of law, and this his appointment as Speaker was lawfully revoked by His Majesty the King;

- (b) the decision of the Court of Appeal only operated prospectively so that the quashing of his conviction did not invalidate earlier acts taken in reliance upon it; and
- (c) Lord Lasike was a simply 'victim of the law' and entitled to no relief.
36. Paulsen LCJ referred to a number of decisions including, in particular, the *Commissioner for Railways (New South Wales) v Cavanough* [1935] HCA 45. There, the High Court of Australia described a conviction overturned on appeal as "utterly defeated and annulled" and "annulled, obliterated and held for nothing". Paulsen LCJ did not accept Mr Sisifa's submission that the decision of the Court of Appeal only operated prospectively. To the contrary, his Honour considered that the decision operated retrospectively and must be taken to have annulled the conviction entered in the Supreme Court from the date that it was made.
37. However, his Honour noted that that did not mean that Lord Lasike's conviction was a nullity for all purposes, because, as stated in *Cavanough*:¹⁰

"... acts done in reliance upon a judicial order are protected in law. ... Acts done on the exigency of a judicial order afterwards reversed are protected: they are acts done in the execution of justice which are compulsive. ... Proceedings, although based upon a judgment, brought to completion before it is reversed, are not avoided. For, collateral acts executory are barred, but not collateral acts executed. But upon the reversal of judgment against any person convicted of an offence, the judgment, execution and all former proceedings become thereby absolutely null and void. If living, he will be entitled to be restored to all things which he may have lost by such erroneous judgment and proceedings and shall stand in every respect as if he had never been charged with the offence in respect of which judgment was pronounced against him. ..."

38. In applying *Cavanough*, Paulsen LCJ held that the acts taken by the Kingdom to remove and replace Lord Lasike as a Nobles Representative and Speaker were not unlawful simply because his conviction was subsequently quashed. That, he says, made 'perfect sense' and that it was 'necessary that court orders be treated as valid and may be acted upon unless and until they are set aside'. His Honour continued:¹¹

"... It is not therefore the case, ... that if the Court of Appeal ruling was applied retrospectively, it would be necessary to untangle the revocation of

¹⁰ At 224, 225.

¹¹ [35]

the plaintiff as Speaker, his removal as a Nobles Representative and the election of a new noble's representative for 'Eua.

39. His Honour also considered that it was not the case that Lord Lasike must be regarded for all purposes as a victim of the law and entitled to no redress for what he lost as the consequence of his wrongful conviction. As far as it is possible, he was to be restored to all things which by reason of the judgment he had lost. However, upon his successful appeal, Lord Lasike could not be restored to his positions in the Legislative Assembly, and he was only entitled to the remuneration and emoluments attached to those positions of which he was deprived.
40. Paulsen LCJ also rejected Lord Lasike's alternative argument that he could not be removed from his positions in the Legislative Assembly because he did not resign nor was he impeached, by application of clause 23 of the Constitution (as it then was) which was described as a 'self-operating provision' which had the effect that Lord Lasike ceased to hold office from the moment of his conviction.
41. Accordingly, Lord Lasike's claims for declaratory relief were refused but he was awarded compensation for the remuneration and emoluments to which he was entitled during the relevant period.
42. Both Mrs Tupou and the Attorney General agreed that the statements of principle enunciated by Paulsen LCJ in *Lasike*, by reference to the High Court decision in *Cavanough*, should continue to be regarded as good law in Tonga and should be applied to this application. I agree.
43. That is an important factor in determining where the balance of convenience lies. To do so, the Court must also consider the effects on the parties, and any other interests affected, by a grant or refusal of the stay. As noted, a stay does not negate or displace the judgment to which it applies but only precludes any further action being taken to enforce or give effect to it, pending the hearing and determination of the appeal against that judgment.
44. If, in the meantime, a stay is granted, the only effect on Mr Tapueluelu will be that, if the appeal is unsuccessful, his opportunity to participate in a by-election will have been deferred for a time. If, on the other hand, Mr Moeaki's appeal is successful, then he will continue in Parliament and there will be no other adverse

consequence to him.

45. However, there is another interest at stake. If a stay is granted, so that Mr Moeaki remains an active member of Parliament (and Minister of Cabinet) until his appeal is determined, and his appeal is then unsuccessful, there is a risk (as alluded to in *Vaikona*) that the validity of decisions by Parliament in the interim, while Mr Moeaki was a seated member, *may* be rendered uncertain. That is not in the public interest. However, as presently informed, it is not possible to assess the extent or magnitude of that risk or potential with any precision, other than to observe that the longer the period between the reopening of Parliament and the determination of Mr Moeaki's appeal, the greater the risk.
46. If, on the other hand, the stay is refused, then the judgment *will* be enforced by Mr Moeaki being unseated in accordance with the Act and a by-election being conducted in accordance with s. 6 of the *Legislative Assembly Act*. Regardless of the fate of Mr Moeaki's appeal, those steps will have been validly taken according to law and any new representative will have been lawfully elected to the vacant seat. But if Mr Moeaki's appeal is successful meaning that his election was valid, and in accordance with the principles discussed in *Lasike*, he *will* not be able to be re-seated and will be left to a claim in damages. That would not be in Mr Moeaki's individual interests.
47. It has been held that in determining whether to grant a stay, the Court should regard the public interest as dominant to the personal interests of the applicant: *Woods and Geary v The Legal Ombudsman* [2002] VSCA 133 at [10].
48. However, in my view, there are likely to be further consequences for Mr Moeaki, if a stay is not granted, and his appeal is upheld, which may be even more dire than in *Lasike*. There, Lord Lasike was unseated for a relatively minor criminal offence. Here, Mr Moeaki has been found to have committed electoral bribery. Even though the offence of bribery under the Act can be the subject of criminal proceedings at the discretion of the Attorney General, the election petition, which was concerned solely with the validity of Mr Moeaki's election, was determined in accordance with the civil standard of proof.
49. In addition to the legal inability for him to be re-seated, and any loss of salary or emoluments, the very nature of the finding of the court below connotes an

element of dishonesty, which has had and may continue to have a damaging effect of his reputation. Arguably, any ill effects on his reputation ought end upon the Court of Appeal upholding his appeal, if that be the case, but there is always the possibility that some members of the community may still look back on the events of his original unseating for bribery and maintain adverse views of him because of it. Those effects are likely to be compounded if, in the meantime, he is also unseated and replaced at a by-election.

50. There is also the fact that, at a personal level, Mr Moeaki will not be able to fulfil his desire to represent his constituency until the next election. He gave up lucrative employment to run in the last election, where almost half of the electors voted for him. There may no doubt be other types of loss or harm, objective and subjective, tangible and intangible, for which an award of damages could never adequately compensate.
51. For the purpose of weighing the balance of convenience, those considerations significantly increase the weight to be attached to this exceptional circumstance.
52. Any risk of the fruits of a successful appeal being rendered nugatory, if a stay is not granted, will depend on whether in the time between any unseating of Mr Moeaki and the determination of his appeal, a by-election has been conducted and a new representative for Tongatapu 4 elected. In other words, and from a practical perspective, the issue depends to a great extent on timing.
53. Section 32(1) of the Act provides that where the election of a candidate is declared void, he shall be unseated by the Assembly. Section 6 of the *Legislative Assembly Act* provides, relevantly, that if a representative is unseated in accordance with the provisions of the *Electoral Act*, his seat in the Legislative Assembly shall thereupon become vacant and the Speaker of the Legislative Assembly shall issue a Writ for the election of a successor. The Electoral Commission, in consultation with the Speaker, shall then fix the time and place of such election and the person elected thereat shall hold office for the balance of the term of his predecessor. Neither provision prescribes when either the unseating or any by-election is to take place but clearly leaves those questions to the discretion of the Speaker and the Electoral Commission.
54. As presently advised, apart from the fact that Parliament proposes to proceed

with the unseating process on 23 May (next Monday), unless this Court orders a stay of execution of the judgment, there is no other definite information before the Court as to when any by-election might be held. As Mrs Tupou pointed out, if, as a consequence of other appeals filed from other recent election petition decisions, other by-elections may also have to be conducted for other constituencies, at or about the same time, the overall process could take longer than three months.

55. In my view, this Court can play a part in ameliorating the risks, for all concerned, to which I have referred, by convening a special, earlier session to hear and determine all appeals from the 2021 election petitions. The last of those petitions is expected to be concluded by 27 May 2022. Applying the present appeal periods prescribed by the *Court of Appeal Act* of 42 days to the last of those cases, and in the expectation that the parties and counsel to the appeals will be able to file submissions promptly thereafter, it is envisaged that a special session could be held in the last week of July 2022, that is, approximately two months hence.
56. During that period, it may be possible for Parliament, the Lord Speaker and the Prime Minister in Cabinet to manage the work of the House and the order of business to be considered so as to minimise the risk of any decisions being rendered uncertain in the event that, in Mr Moeaki's case at least, his appeal is unsuccessful.
57. Finally, in my view, a stay in this case would produce a result more consistent with the allied provisions in clause 23 of the Constitution. The proviso thereto was inserted by amendment in 2013 following the consequences to Lord Lasike of his conviction. I consider harmony between the two statutory regimes to be a relevant consideration on this application.
58. In that regard, and in an endeavour to minimise future uncertainty and avoid any further 'victims of the law' in the context of election petitions, I respectfully recommend that consideration be given to amending the *Electoral Act* by the addition of:
 - (a) a proviso akin to that found in clause 23; and
 - (b) a special, shorter period for filing appeals from decisions on election petitions.
59. For those reasons, I consider that the course that carries the lower risk of injustice

is to grant the application for a stay of the judgment below.

60. Accordingly, I order that the judgment of the Supreme Court in proceeding CV 77 of 2021, dated 6 May 2022, and any enforcement or execution thereof, be stayed pending the hearing and determination of the appeal in this proceeding.
61. The costs of the application shall be considered part of the costs of the appeal.

NUKU'ALOFA
20 May 2022



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC
LORD CHIEF JUSTICE