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

AC 11 of 2022
(CV 76 of 2021)

BETWEEN:

POASI MATAELE TEI

Applicant/Appellant

-and-

FANE FANGUFANGU FITUAFE

Respondent

Application for a stay of the judgment below

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr S. Tu'utafaiva for the Applicant/Appellant
Mr S. Etika for the Respondent
The Attorney General as amicus curiae (by memorandum)
Application: 23 May 2022
Hearing: 26 May 2022
Ruling: 26 May 2022

1. On 13 May 2022, in Supreme Court proceedings CV 76 of 2021, Niu J declared the election of the Applicant (Respondent below) as representative of Tongatapu 6 constituency at the last general election to be void on the basis that His Honour found the Applicant had engaged in three counts of bribery contrary to s. 21 of the *Electoral Act*. The bribes involved 'giving' water tanks to certain persons in Houma and various items of food to the village police there, all within three months of the election.
2. On 23 May 2022, the Applicant, by his counsel, filed a notice of appeal and the present application for a stay of the judgment below pending the hearing of the determination of the appeal.
3. The grounds for the stay application were echoed by Mr Tu'utafaiva in his oral submissions drawing from the recent decision in *Moeaki v Tapueluelu* (AC 9 of 2022, 20 May 2022). In that decision, the relevant principles for an application of this kind were discussed as well as an exegesis of the application of those principles to the peculiar consequences of a declaration following trial of an election petition that the election of a candidate is void.

4. The principles discussed in *Moeaki* include, relevantly to this case, the balancing of two competing interests. The successful petitioner below is entitled to the fruits of the judgment; whereas, the appellant (unsuccessful candidate below) is entitled to the fruits of his appeal, if successful. The real question is: where does the balance of convenience lie?
5. In assessing that, the Court needs to consider the competing consequences to the respective parties and any other relevant interests whether it grants or refuses a stay. Generally, a court will only order a stay where there are special or exceptional circumstances and where to not order a stay could render the appeal nugatory.
6. Relevantly, the latter proposition transposes into this question: if the applicant is unseated by the Assembly and replaced at a by-election but his appeal is thereafter successful, whether he will be able to be restored to his former position and re-seated.
7. In *Lord Lasike v Kingdom of Tonga* [2017] TOSC 3, Paulsen LCJ examined the authorities relevant to that question including the Australian High Court decision in *Commissioner of Railways (NSW) v Cavanough* [1935] HCA 45. Relevantly, his Honour distilled two principles. The first, as mentioned, is that in the circumstances of this case, if the Applicant is successful on his appeal and the judgment below is quashed, he is entitled, so far as possible, to be restored to his former position. However, the second principle is that, in the meantime, if a stay is not granted, and the Applicant is unseated and a by-election is conducted which results in the election of a new representative for Tongatapu 6, those acts pursuant to the judgment will be lawful and binding. The practical result would be that the Applicant could not be re-seated.
8. That is an important exceptional circumstance in an application such as this and is a feature of the nature of election petitions and the statutory consequences which follow from a declaration of an election being void.
9. Mr Tu'utafaiva identified that many of the quite detailed grounds of appeal involve allegations of no evidence to support several of the judge's findings below and which were material to the result. Mr Tu'utafaiva also identified that the primary judge acted on hearsay evidence attributed to two of the recipients of water tanks

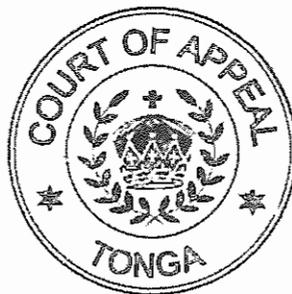
in circumstances where it was reasonable to expect the petitioner to have called those persons to give direct evidence. He added that, notwithstanding the latitude of s. 35 of the Act which permits the Court to receive hearsay evidence, given the seriousness of the consequences and that Mr Tu'utafaiva did not have an opportunity to cross-examine those persons during the trial, the judge ought not have acted on that evidence.

10. Mr 'Etika accepted that there are some prospects of success on Mr Tei's appeal.
11. In *Moeaki*, I also referred to the public interest. If a stay is granted but the appeal is ultimately unsuccessful, then there is a risk that any decisions made by the Assembly and/or Cabinet during the intervening period may be rendered uncertain. However, it is not presently possible for this Court to assess the magnitude of that risk so as to attribute any particular weight to it, although it may be informed, to some extent, by the likely duration between now and when the appeal is determined.
12. In the absence of a stay, ss 32 of the *Electoral Act* and 36 of the *Legislative Assembly Act* require a representative such as Mr Tei to be unseated from the Assembly followed by a by-election for a replacement representative. However, they do not prescribe the time within or by which those processes are to be undertaken. They are matters for the Speaker in conjunction with the Electoral Commission.
13. As of late last week, when the *Moeaki* decision was being considered, the Lord Speaker had advised that Parliament intended to resume on 23 May and would proceed to unseat Mr Moeaki unless the Court issued a stay in the meantime. On 23 May, the Speaker announced that the re-opening of Parliament would be deferred until further notice.
14. As such, the Court is left to balance the relative uncertainty, if a stay is granted, of any risk of decisions of Parliament being rendered uncertain for a presently unknown period against the relative certainty, if a stay is not granted, that the applicant will not be able to be re-seated (or restored) if he succeeds on appeal. In that event, any award of compensation for lost remuneration or emoluments is, in my view, unlikely to be an adequate remedy. Unlike in *Lasike*, the finding of electoral bribery connotes an element of dishonesty. The extent of any stigma

which might attach to the reputation of a person so found to have engaged in that conduct is difficult to gauge both in terms of the depth and duration of any adverse opinions about him amongst the electors of Tongatapu 6, even if the judgment below is quashed.

15. As mentioned in the previous rulings, in order to minimise the uncertainty for all concerned, a special session of the Court will be convened by the end of July 2022 to hear all the appeals from the 2021 election petitions.
16. In that regard, I respectfully repeat the previous recommendations that consideration be given to amending the *Electoral Act* to insert a proviso akin to that found in clause 23 of the Constitution and a special shorter period for the filing of appeals against decisions on election petitions.
17. For those reasons, I am satisfied that the appellant has demonstrated a case for a stay.
18. Accordingly, I order that the judgment of Niu J in Supreme Court proceeding CV 76 of 2021, dated 13 May 2022, and any enforcement or execution thereof, is stayed pending the hearing and determination of the appeal in this proceeding.
19. The costs of the application are costs in the appeal.

NUKU'ALOFA
26 May 2022



M. H. Whitten QC LCJ
PRESIDENT