

- [2] There were initially 3 candidates for the constituency for the general election which was held on 18 November 2021, namely, the holder of the seat, Mr. Poasi Tei from the village of Hofoa, who was the Minister of Meteorology, Energy, Information, Disaster Management, Environment, Climate Change and Communications (MEIDECC), Mrs. Fane Fituafe and Mr. Saia Penitani, both from the village of Houma. But Mr. Saia Penitani withdrew and the seat was contested by only Mr. Tei and Mrs. Fituafe.
- [3] After the election, Mr. Tei was declared the winner and he continued to hold the seat, and Mrs. Fituafe has now brought this election petition against him.

The petition

- [4] The petitioner claims that the election of the respondent was unlawful because:
- (a) the respondent committed bribery indirectly by another person by giving valuable gifts of 20 plastic water tanks to electors in the village of Houma without good consideration to influence them to vote for him in the first week of November 2021, contrary to S.21 (1) (a) of the Electoral Act;
 - (b) the respondent committed bribery indirectly by another person by giving valuable gifts of another 20 plastic water tanks to electors in the village of Houma without good consideration to influence them to vote for him, in the second week of November 2021; contrary to S.21 (1) (a) of the Electoral Act;
 - (c) the respondent committed bribery indirectly by another person by giving valuable gifts of cartons of chicken and groceries to the village police in the village of Houma without good consideration to influence them to vote for him contrary to S.21 (1) (a) of the Electoral Act;

(d) the respondent committed overspending on his election campaign by expending more than \$20,000 contrary to S.24 (4) of the Electoral Act.

and asks for an order declaring that the election of the respondent is void.

The defence

[5] The respondent denies that he had any involvement in each of the matters alleged in the 4 claims of the petitioner.

The evidence

[6] The petitioner and 7 witnesses gave evidence for the petitioner, and only the respondent gave evidence in his defence.

The petitioner's evidence

[7] **Fane Fituafe**, 40 years of age of Houma, the petitioner, said in her affidavit of evidence, paragraphs 10, to 17, as follows:

"10. I have petitioned the Supreme Court and alleged that the respondent has committed bribery on three occasions, namely:

10.1 that he caused to distribute 20 plastic water tanks on his behalf to the people and/or voters of Tongatapu 6 constituency at Houma village through the town officer, Naitoko Vuna and his campaign agent and supporter, Saia Penitani on or about the first week of November 2021;

10.2 that he caused to distribute a further 20 plastic water tanks on his behalf to the people and/or voters of Tongatapu 6 constituency through the town officer, Naitoko Vuna and his campaign agent and supporter, Saia Penitani on Friday 12 November 2021;

10.3 that on or about the last week of October 2021 he caused to distribute on his behalf through his agent and supporter at the village of Houma, chicken quarter cartons and groceries throughout the community police posts to its members and/or voters of Tongatapu 6 constituency;

- 10.4 that the market values of the plastic water tanks distributed as referred to in para. 9.2 and 9.3 above are in excess of permitted election expenses.
11. The timing of the above mentioned distribution were purposely made to induce voters to vote for the respondent.
 12. that the plastic water tanks distribution within Tonga is part of the National Water Tanks Project Tonga Government coordinated and implemented by the MEIDECC (Department of Climate Change) under the portfolio of the respondent Minister as shown on the letter from the CEO for MEIDECC attached hereto **Marked "A"**.
 13. that the groceries and chicken meat were not purchased from the Tongatapu 6 Constituency Council's fund but were purchased by the respondent and/or his agent supporter, Saia Penitani for distribution at the 10 Community police posts at Houma on 05 November 2021.
 14. That I knew when I registered to stand for the seat of Tongatapu 6 in 2021 that bribery is an offence that may void the successful candidate if proved so I was adamant not to spend in excess of the permitted expenses or give any money or valuable gifts to voters within 3 months from the election or make any promises to procure any money or valuable gifts to voters for it is an offence under the Electoral Act.
 15. I kept my expenses during my election campaign to as minimal as possible and strictly in accordance with that which is permitted by law to be made.
 16. I did not hear or sight first-hand the allegations made herein but have been informed about it by my supporters during my campaign who are my witnesses in the trial of this petition.
 17. I hold no ill will or issue with the respondent before and even after the election up to now, however, this petition is made as of right provided by the law so as a citizen of Tonga I have the right to pursue this petition as of right under the Electoral Act."

In cross-examination

- [8] She said that she was in the Houma Village Council and that Saia Penitani was the secretary for many years and that the Chairman was Noble Vaea.

- [9] She said that there was also a Tongatapu 6 Council, separate from the village council and its chairman was one, Fusi Vaitai. She said that that council made the distribution of the allocation which is received from Parliament.
- [10] She said that she was distantly related to her witnesses Timote 'Eteaki, Mesui Leao, Manu Lautaimi and Samuela Talatala, who were her supporters.
- [11] **In re-examination**, she said that, as a member of the village council, she did not know of any decision of the council that any money of the council be used to buy any food for the village police posts of the village.
- [12] **Loisi Koloamatangi**, 48 years of age of Houma, said in paragraphs 1 to 24 of her affidavit as follows (as translated):

1. *I am a Tongan and I am married and am registered as an elector of Houma in Tongatapu 6.*
2. *I remember well 12 November 2021 there was the opening of the 2 new water tanks and pump of Houma, a Friday, and I went there to help the wife of the town officer in serving the refreshments to the guests.*
3. *Noble Vaea was there, and so was Poasi Tei, the parliament representative for Tongatapu 6, and the owner of the Water Tank Company on Hihifo Road at Hofoa and other guests and also the members of the Tongatapu council and the members of the Houma Village Water Committee.*
4. *I noticed there were several dark green plastic 5000 litre water tanks at the area where the opening was held.*
5. *Saia Penitani was the MC and he spoke and said:*
"Folks, look over at those tanks on the side there, they just came to rest here but they are intended for another area, but the representative will gladly agree that they be all distributed here at Houma."
6. *When the opening finished, we quued up and the town officer, Naitoko Vuna, took down our names to be given a free tank each which had been donated by the representative.*

7. *And whilst I was still tidying up the serving things, the delivery of the tanks were already being carried out by the town officer and Saia.*
8. *And when I got home, I noticed that a tank was being uploaded at my neighbour's place, Mele Lisiate, that was one of the tanks from the opening that was held.*
9. *There were several distributions of water tanks in Houma in 2021, the first one we got no tank, the second one we got no tank again and after the third one we still got no tank.*
10. *I then went and asked the town officer for a tank for us.*
11. *He said that the water tanks were only an aid to the registered electors of Houma. So we decided to transfer our registration as electors from Vava'u to Houma.*
12. *After we effected our registration as electors of Houma, we went directly to the representative at his home at Hofoa.*
13. *We told him, in first week of October,*
"We live in Houma and we have registered as electors in Houma and there are three electors in our home and that we are really in need of a water tank and we have not received a tank in the 3 distributions that have been made there."
14. *He asked if we lived at Houma and we said yes, and he said to give him our phone number and that he would ring us later. We gave him Feleti Koloamatangi's phone number and we returned to Houma.*
15. *About a week later, another water tank distribution to Houma was carried out. We were not given any tank.*
16. *About two weeks later we went to the representative again at his home at Hofoa. On this occasion, he was not home and his wife spoke to us.*
17. *We told her what we came for and she rang the representative and told him. It was conveyed to us that he had our phone number and that he would text us.*
18. *Our tank was delivered to us on the day of the water tank opening which was the 12 November 2021.*
19. *That day, we were driving to go to the beach and we noticed several water tanks placed at the frontage of the Mormon*

Church at Houma and that the Town Officer and Saia Penitani were standing there.

20. *I told my husband to turn around and go back there because it seemed to me that there would be a tank distribution. So we turned around and drove up close to the Town Officer and I said to him and Saia: "Gentlemen, greeting, how is our work, are we included?"*
21. *And the Town Officer held up his hand with the fist clenched and the thumb up, and I understood that we were.*
22. *We then went home and cleared the roadway to the place we had prepared as the stand for our tank so that the truck would easily back up and put the tank on it.*
23. *We then left to the beach. In the evening, we returned from the beach and found the tank already delivered and placed on its stand at our home. It was a 5,000 litre tank.*
24. *I knew very well that Saia and the Town Officer were strong supporters and agents of Poasi and of his campaign team at Houma."*

[13] **In cross-examination**, she admitted that she was wrong in saying in paragraph 6 of her affidavit that she was one of the people queuing up to the town officer. She said she did not join the que.

[14] She said that they only came from Vava'u and lived in Houma in 2017 and that their home did not have any water tank. She said she knew that the water tanks were aid from Government.

[15] She said that she had paper at home which confirmed that she was a registered elector of Houma.

I directed her to make 3 copies of it and give the Court and each counsel a copy the following day.

[16] She said that there were many water tanks, there, some on the grass and some on 2 or 3 trucks there. She said that she did not write down what Saia said in his speech but it was just as she has said in her affidavit. She said that what Saia meant was that the representative would gift the tanks to the people of Houma.

- [17] She said that she did not see any officer from MEIDECC there but there was someone there who directed who to be given a tank.
- [18] She said that they had cemented their stand as Poasi had instructed them to do. She said that when Poasi asked them for their phone number, he also instructed them to go and prepare the stand for the tank.
- [19] She said that she knew that Saia and the Town Officer were strong supporters of Poasi because they went around in the campaign of Poasi. When asked how she knew Saia was an agent of Poasi, she said that it was because they were his supporters.
- [20] **On re-examination**, she said that she knew they were supporters of Poasi because they went on Poasi's campaign and floats and also because of the giving of the food to the village police posts of Houma.
- [21] She said that Fane had invited Saia and the Town Officer to go on her campaign but they did not go.
- [22] **I asked**, and she said that she lived with her husband and their son, who was 25 years old and unmarried.
- [23] She said that there were maybe 20 tanks at the opening, and that their tank was a 5,000 litre tank.
- [24] **Makeleta Tu'umoto'oa**, 61 years of age of Houma, said in her affidavit, as translated:

- "1. *I am a Tongan, married and am a registered elector of Tongatapu 6 of which Houma is part.*
2. *I remember well 12 November 2021 when the opening of the new pump and two water tanks of Houma was carried out, which was a Friday and I went there because I was given a written invitation because I and two nuns cared for our kindergarten at Houma and we were surprised when Saia Penitani stopped by with it on the Thursday before the Friday of the opening.*

3. *Noble Vaea of Houma attended, and also Poasi Tei, the Parliament representative for Tongatapu 6, and the man who owned the company which manufactured the plastic water tanks on the Hihifo Road at Hofoa and other people of the village and the officials of the Tongatapu 6 Council and of the Water Committee of Houma.*
4. *I noticed there were several dark green 5000 litre plastic water tanks at the area of the opening.*
5. *The programme started and I heard the speech by Saia Penitani, a person of Houma but who was the MC and he said:*

"Folks, look over at those tanks over there, they just turned down here to rest but they are intended for another place, but the representative will gladly agree that they be all distributed here in Houma."

[25] **When cross-examined** by Mr. Tu'utafaiva, she said in respect of being a registered voter, that she had a national ID card and a covid 19 immunisation card, and that she had always lived at Houma.

[26] As to paragraph 2, she said that Houma had a problem with its water supply and its water stand and tank were damaged. She said these 2 new tanks gave Houma 3 water tanks.

[27] She said that Tu'akoi 'Ahio gave the welcome speech. He was the vice-chairman of the Houma council.

[28] As to her paragraph 5, she said that Saia Penitani introduced the owner of the water tank manufacturer and who constructed the stand. She said that she only remembered the part of the speech by Saia which she had given. It was put to her that Saia did not say what she had stated and she said that he did. She said that she did not write it down.

[29] She was shown and she read the transcript of Saia's speech and she said that she did hear Saia say what she has said and that her memory was not wrong because they did clap as a result of what he said.

- [30] She said that Noble Vaea spoke and said that the weight of the tanks were 30 tonnes and that the stand was 20 tonnes.
- [31] She said that the 2 men also went with her and that Saia did bring their invitation.
- [32] **When re-examined**, she said that what she has said was correct, and that what she had been shown was more or less the same but what she had said was the correct version.
- [33] **I asked**, and she said that Saia spoke several times because he was the MC.
- [34] **Tevita Funaki**, 70 years of age of Houma, said the following in his affidavit, as translated:

- "1. *I am a Tongan national and I am registered as a parliament elector of Houma which is in Tongatapu 6.*
2. *I remember the month of November 2021, close to the opening of the pump and two new tanks of Houma.*
3. *I was in my house at home and I heard some activity and the thump of the water tank being unloaded and taken to my neighbour.*
4. *I noticed Saia Penitani there coming towards me and asked me if there was anything wrong and I said to him, how is it that I did not have any of these blessings and he said for me to go and prepare a tank stand and then he said: "This is just a gift of Poasi, but you go and make your tank stand".*
5. *I was also given an invitation to the opening of the new water tanks but I did not go to it.*
6. *As I understood it, it was intended that I vote for Poasi because I was the one who had campaigned for Poasi in Houma when he first entered the Parliament of Tonga.*
7. *I knew very well Saia was the agent of Poasi in Houma, and he strongly campaigned for and promoted Poasi in Houma last year."*

- [35] **When cross-examined**, he said that he grew up and lived in Houma and that he had no problem with his water supply and that he lived close to the old well, but that Gita blew down the stand and the new stand and tanks were needed.
- [36] He said that his neighbour was Tevita Lepa and that he, Tevita, never had a water tank given to him up to now. He said that he did tell NEMO that he wanted a water tank but he never got one. He said that a survey had been carried out after the hurricane Gita in 2018.
- [37] In respect of his paragraph 4, he said that the blessings he referred to was the water tank distribution. He said that there were distributions in 2021 but he missed out and never got any tank. He said that what Saia said to him was exactly what he had stated. He said that he did prepare the stand for the tank.
- [38] He said that he heard that the price for one tank was \$10,000 and it was \$5,000 for another type of tank. He said that because that was the price, then a tank was a big gift for him. He said that he was sure that Saia said "a little gift from Poasi". He said that he swore to God that it was true.
- [39] He said that at this election, he supported Fane instead.
- [40] As to paragraph 6, he said that what he understood was that he would be given the water tank so that he would vote for Poasi.
- [41] As to paragraph 7, he said he knew that Saia was the agent or representative of Poasi in Houma because he was the one who distributed the tanks and he was the one who distributed the invitations. He said he did not know that Saia was the secretary for the Houma Council.
- [42] He said that there was nothing wrong with being a strong supporter of a candidates and that when he was a supporter he did nothing wrong. But, he said, that he did nothing like Saia was doing by giving water tanks for votes for Poasi.

[43] **Solomone Palu**, 66 years of age, Church Minister of Houma, said in his affidavit, as translated, as follows:

1. *I am a Tongan national and I am a registered elector for Parliament from Tongatapu 6 of which Houma is part.*
2. *I remember 12 November 2021 well when the new pump and two water tanks of Houma were opened, a Friday and I was there.*
3. *Noble Vaea was there and so was Poasi Tei the Parliament representative from Tongatapu 6 and the owner of the company which made the water tanks on Hihifo Road at Hofoa and various people of Houma and the officials of the Tongatapu 6 Council and of the Water Committee of Houma.*
4. *I noticed there were several dark green 5000 litre plastic water tanks there at the area of the opening.*
5. *I heard there during the opening the speech of the representative, Poasi Tei, saying to the people who were there: "Any of you who want a water tank come over there and take a tank for you, if any tanks are left, they will be given out freely to any person so they are all gone today".*
6. *After the opening, the town officer, Naitoko Vuna, wrote down the names of the people who queued up for the free water tanks as conveyed by the Representative at the opening.*
7. *When I got to the town officer he informed us that there were no more tanks left.*
8. *He told us that we had to wait to get our tanks in the following week when there would be further delivery and for us to wait till then but no delivery came in the following week."*

[44] **When cross-examined**, he said that the tank stand and the 2 new tanks for the village were made by the company which made the tanks.

[45] He said that Saia Penitani was the MC.

[46] He said that the words which Poasi Tei spoke which he had stated in his paragraph 5 were what Poasi said in his speech.

- [47] He said that the order of the speeches was the welcome by Tu'akoi 'Ahio, then the MC spoke, then the owner of the company, then Poasi Tei spoke.
- [48] He was shown the transcript of the speech of Poasi Tei, page 3, last paragraph, and he said that he did not deny what he had said. He said that he had not written it down but that he remembered it.
- [49] As to his paragraph 6, where he stated "as conveyed", and he said that that was what Poasi Tei had said in his speech when he made the gift of the tanks. He agreed that when the town officer spoke to him there were only him and the town officer.
- [50] As to paragraph 8, he said that the town officer told them that they had to wait.
- [51] He said that he was a supporter for Fane Fituafe in the election.
- [52] **I asked him questions** and he said there were 20 empty water tanks there, all 5000 litre each in size, and there were 2 tanks on each truck and there were 3 trucks. The other 14 tanks were on the ground.
- [53] He said he did not know where those tanks were intended to be delivered.
- [54] He said that he estimated the value of each tank to be \$10,000 because his neighbour had bought a 3000 litre tank for \$5,000.
- [55] **When again asked by Mr. Tu'utafaiva**, he said that the 20 tanks were on the side of the area where the opening was held and were not part of the opening.
- [56] He said that he agreed that the words which Poasi used were "tufa tavale" (give out freely and indiscriminately) were said in jest and that they understood it that way and they clapped.
- [57] **Timote 'Eteaki**, 75 years of age of Houma said in his affidavit, as translated, as follows:

1. *I am a Tongan national and I have been authorised by the petitioner to give this sworn statement.*
2. *I am a member of the village police of Houma and I work at the post (base) at the end of the village towards Nuku'alofa.*
3. *I remember well the evening of 5 November 2021 whilst I was at the base with others of our members when Saia Penitani arrived there, the agent (representative) of Poasi Tei at Houma.*
4. *He unloaded from his vehicle two cartons of chicken and a carton of noodles and said to us: "Village police members, this little gift I have come with is a gift from the Representative" and he got in his vehicle and left.*
5. *I was one of the supporters of Fane and I joined in travelling to places in the Tongatapu 6 and campaigned for Fane Fituafe.*
6. *It was only once that Saia Penitani came, no one had come before and this was the first time anyone had come with an aid from Poasi to this base as far as I know.*
7. *This year (2021) neither Poasi nor his agent had come and given us an aid like this.*
8. *I was disappointed with Saia because he is my son but I did not change my mind from voting for Fane.*
9. *The others in our base were happy with the gift so that they would eat it and make their hot drinks.*
10. *But to me the gift was one thing and the voting was another and as I understood it, the reason for Saia's visit with the thing was to try and induce me to vote for Poasi."*

[58] **When cross-examined**, he said that what he said in his paragraphs 3 and 7 were correct.

[59] He said that the head of the village police at their base was Lamonai 'Ahau.

[60] He said that Saia was the agent of Poasi in campaigning in Houma. He was the one distributing these things for Poasi. He said he did not know that Saia was the secretary of the Houma council.

- [61] As to his paragraph 4, he said he understood the word "Representative" which Saia spoke meant Poasi, the one he represented in Houma. He said that the words he spoke were: "This is a gift from Poasi for your nourishing (strengthening)". He said that Poasi was the only one Saia represented.
- [62] He said he did not know of any money which had been approved by the Houma council for them, the village police.
- [63] He said he was sorry that Saia went and supported a person from another village but that he did nothing about it.
- [64] As to paragraph 9, he said that the village police were working then.
- [65] As to paragraph 10, he said that Saia was trying to influence them to vote for Poasi.
- [66] **I asked** and he said that the cartons of chicken were given to them on 5 November 2021 and nothing had been brought to them before then.
- [67] **Mesui Leao**, age 43 years of Houma, said in his affidavit, as translated, as follows:

1. *I am a Tongan national and I have been authorised by the petitioner to make this affidavit.*
2. *I estimate that it was 5 November 2021 whilst I was in the first village police base (the one towards Vaotu'u) that Saia Penitani arrived, the representative of Poasi Tei at Houma.*
3. *I am in the village police base no. 1, and I was there when Saia Penitani came with 2 cartons of chicken, and cocoa, milk, 2 packs of SAO (crackers) and coffee and sugar and told us: "That is a gift from Poasi Tei, thank you for carrying out your work".*
4. *I know and am well acquainted with Saia Penitani because he is from Houma and he was the leader of the campaign of Poasi in Houma."*

- [68] When cross-examined by Mr. Tu'utafaiva, he said that Fane came and asked him whether he knew about the campaign of Poasi and that he told her that he knew nothing except when Saia Penitani brought the cartons of chicken and cocoa, SAO and sugar and saying "that is a gift from Poasi Tei, thank you for carrying out your work", and that she came to him after the election.
- [69] He said that Saia Penitani did say those words as he had sworn, although he had not written them down, and only recalled them, and was not wrong about them.
- [70] As to his paragraph 2, he said that Saia was the representative of Poasi in Houma during the campaign for the election. He said that Saia was a representative because he persuaded him. He said that Saia came to the frontage of his home and said, in respect of Fane Fituafe, "where is that woman from? Where was she educated? Where did she come from? She has no basis to represent Houma."
- [71] He said that by then, he had not decided who to vote for, and the words of Saia persuaded him to vote for Fane instead, and that that was why he said that Saia was representing Poasi.
- [72] He said that there were 3 candidates: Poasi, Fane and Saia Penitani, and Saia withdrew leaving only Poasi and Fane. He said he did not know if Saia Penitani had been registered as a candidate before he withdrew.
- [73] As to his paragraph 4, he said that Saia led the campaign of Poasi in Houma.
- [74] **I asked**, and he said the 2 cartons of chicken were of frozen chicken. He said there was an old man at the base at the time, Sio Veatupu, and that the old man, Timote 'Ete'aki was at a different base from theirs.
- [75] **Manu Lautaimi**, 55 years of age of Houma, said in his affidavit, as translated, as follows:

1. *I am a Tongan national and am a registered elector for Parliament in the constituency Tongatapu 6 which includes Houma.*
2. *I remember well 12 November 2021 when the opening of the new pump and 2 water tanks of Houma was held, a Friday, and I went there.*
3. *Noble Vaea was there and also Poasi Tei the Parliament representative of Tongatapu 6 and the owner of the company which made the water tanks on Hihifo Road at Hofoa and various people of the village and the officials of the Tongatapu 6 Council and of the Houma Water Committee.*
4. *I noticed there were several dark green 5000 litre water tanks at the area of the opening that was held.*
5. *I heard there the speech of the MC, Saia Penitani, he said to the people who were there: "That is a gift of the Representative remember the election", meaning the several big plastic water tanks there.*
6. *I also heard the speech of the Representative, Poasi Tei, and he said to the people there: "If I shall have another chance I will help you all".*
7. *At that time, I was at the end of the tent where the guests were."*

[76] **When cross-examined**, he said that his job was to look after the pump and supply of water for Houma.

[77] He said that as to paragraph 3, Noble Vaea spoke in thanks and about the past problems and about the stand, that the stand was 30 tonnes and the tanks were 25 tonnes and that the tanks were made by one company and that the stand was made by another company.

[78] He said that as to paragraph 4, the several empty tanks were there too and that some were on trucks and some were on the ground. He said that he was not sure how many there were but that there were 4 trucks with tanks on them.

[79] As to his paragraph 5, he said that Saia was the MC and that he spoke several times, that is, he spoke after each speech was given. He said that

Saia said the words when he spoke his first speech. He said he spoke after Tu'akoi 'Ahio spoke and he spoke several times. He said that his first speech included the words he had said.

[80] He said he had not written down the words Saia said, but that Saia encouraged the people because of the luck of the tanks being there, that the tanks would be their's that day, as well as having the new tank stand and the two new tanks on it to solve the water problem of the village, and that he then said to the people to remember the election.

[81] He said that Poasi spoke last, after Vaea. He said that the speeches were: Tu'akoi 'Ahio, Saia, the company representative, Vaea and then Poasi.

[82] He said that all he could remember of Saia's speech was: "That is a gift of the Representative, remember the election".

[83] Mr. Tu'utafaiva read to him part of the transcript of Saia's speech produced as exhibit 1 in which he said:

"If you look over at the trucks there with the tanks on them, they were to be distributed to the villages in need, they were told turn and come here and leave all the tanks here in Houma for the people of Vaea. Let us clap to that."

He said that he remembered that but that he also remembered his words "That is a gift of the Representative."

[84] As to his paragraph 6, he said that he remembered those words of Poasi well because his (the witness's) wife was with him at the time and that they talked that they would vote for Poasi.

[85] Mr. Tu'utafaiva then read to him the first sentence of the last paragraph of the last page of Poasi Tei's speech, Page 19 of the documents of the respondent, as follows:

"To the honourable people of Kaukauloka, may this help here will help you with the improvement of your cohabitation, and our

cooperation will not stop, our joint effort for the pressing needs of daily living and the development and improvement of our constituency, and that our children will grow up in an environment in which they will feel free and safe, peaceful and happy.”

He said, in response to Tu’utafaiva, that he agreed with it but his wife later told him that they should vote for Fane instead.

[86] **Mr. ‘Etika asked him**, and he said that Saia spoke several times and that he had spoken before Tu’akoi ‘Ahio spoke.

Agreed exhibits

[87] At the end of the evidence of the petitioner’s witnesses, both counsel agreed, and the following were produced as exhibits:

Exhibit 1: the full speech of Saia Penitani after Tu’akoi ‘Ahio’s speech.

Exhibit 2: the full speech of Poasi Tei.

Exhibit 3: the flash drive recorded by “Ha’apai Veu Live Screen” of the opening held.

Exhibit 4: Loisi Koloamatangi’s registration as elector.

The respondent’s evidence

[88] **Poasi Tei**, 54 years of age of Hofoa, the respondent, said in his affidavit as follows:

"1. *I am the respondent in this election petition, and this affidavit is sworn in:*

a) *Support of my response to the election petition; and in*

b) *Response to the allegations made by the petitioner and her witnesses against me in their respective affidavits.*

2. *At the relevant times, for the purposes of this election petition, I was the elected representative of the Tongatapu Six electoral constituency to parliament, and also the Minister for the Ministry of Meteorology, Energy, Information, Disaster*

Management, Environment, Climate Change and Communications (MEIDECC).

3. *I was re-elected to parliament at the parliamentary election held on 18 November 2021, and appointed by the Prime Minister to be the Deputy Prime Minister. I am the minister for MEIDECC and also the Ministry of Public Enterprises.*

Response to the election petition

4. *I strongly deny the claim by the petitioner that I was not lawfully elected for the seat of Tongatapu Six electoral constituency at the election held on 18 November 2021. This denial is based on the facts that:*

- a) *I did not know, and most certainly did not consent, to Saia Penitani and/or the town officer of Houma village Naitoko Vuna allegedly giving away plastic water tanks, as gifts on my behalf, to electors of Houma on or about the first and second weeks of November 2021, to induce those electors to vote for me at the said election;*
- (b) *I did not know, and most certainly did not consent, to Saia Penitani allegedly distributing cartons of chicken leg quarters, noodles and other groceries to community police posts at Houma, on 5 November 2021, to influence those who received those alleged gifts to vote for me at the election; and*
- c) *I did not spend more than \$20,000.00 on my campaign for the election.*

Plastic water tanks

5. *The plastic water tanks distribution is a project of the Government of the Kingdom of Tonga to help the people of the Kingdom. It is aimed at distributing the water tanks to those households in Tonga that did not have water tanks to collect and store drinking rain water for their families. I attach and mark "A" a copy of the letter dated 05 January 2021, which should be 05 January 2022, from the Chief Executive Officer of MEIDECC explaining the National Water Tank Project.*
6. *I was, and am not, personally involved in the distribution process of the water tanks to the villages in Tonga. Furthermore, I do not know the time-line and programme for*

the tanks distribution to the villages until they are reported to me after the distribution is made.

- 7. The Tongatapu Six electoral constituency has a council known as the Kosilio Tongatapu 6 Incorporated. Membership of that council include District Officers all the town officers of the villages of the constituency, and leaders of those villages that do not have town officers and representatives from village councils or respective villages. There are 15 villages in the constituency. One of the main tasks of the council is to meet with their parliamentary representative from time to time when necessary to discuss the needs of the people and villages of the constituency. There are aid funds from the Government and Parliament to the constituency and the Council decides on how to use or spend that fund.*
- 8. As to the water tanks, I understand that the constituency council of Tongatapu Six had a meeting with MEIDECC staff where the criteria and process of the water tank project distribution were explained. The intention is for the town officers and village leaders to identify families in their respective villages that needed water tanks as per the criteria set out and then report it to MEIDECC staff for processing and distribution of the water tanks.*
- 9. There were water tanks distributed to the villages in Tonga within the three months before the election on 18 November 2021. Those water tanks were funded by China. There were two agreements entered into. The first agreement came into effect in August 2021 for 480 water tanks to be distributed by the last day of September 2021. The second agreement for 500 water tanks came into effect in October 2021 and to be distributed by 20 November 2021. I attach marked "B" and "C" copies of those two agreements respectively.*
- 10. As the water tanks from the above stated agreements were to be distributed within the three months before the election on 18 November 2021 and because of the upcoming election, the Minister of Labour Commerce at the time sought advice to the AG's office with regards to spending before the election. Having received their advice the decision was made to continue with the Government's distribution of the water tanks to the villages.*

11. *In respect of the plastic water tanks that were in Houma village on the day the village was celebrating their new village water tanks, I only knew about them when I arrived to take part in the celebration and representing the Government. The speech I made at the celebration was electronically recorded and it has been transcribed. A copy of that transcript is annexed and marked "D". The relevant part of the speech by Saia Penitani has been transcribed and a copy is annexed marked "E".*

The allegations by the petitioner and her witnesses

12. *Firstly, I deny the allegations that Saia Penitani was my campaign agent in Houma. Secondly, I did not have any campaign team in Houma.*
13. *Thirdly, I did not purchase any chicken meat and/or groceries to be distributed to the community police posts in Houma on 5 November 2021. Fourthly, I did not know, and certainly did not consent to Saia Penitani purchasing any chicken meat and/or groceries to be distributed to the community police posts in Houma on 5 November 2021 or at any other time or date on my behalf."*

[89] I directed and he numbered all the pages of his affidavit and of the documents attached thereto from 1 to 20 and he did.

[90] He said that the agreement in P.7 to P.9, clause 1 (b), stated that the agreement would end on the last day of September 2021, and the agreement in P.12 to P.13, clause 1 (b), stated that that agreement would end on 20 November 2021.

[91] He said that several water tanks were distributed to Houma under both agreements.

[92] He said that P.17 was the document already exhibited no. 2 and that P.20 was the document already exhibited no.1.

[93] **When cross-examined**, he said that he did not agree that Saia Penitani and Naitoko Vuna act for him in his campaigning or to give anything to anyone on his behalf. He said that if he had known he would have stopped them. He said that he only knew of it after the petition was served on him.

[94] He then corrected that and said that there was something posted in Facebook before he was served. He said he could not recall if it was before or after the election that he knew about the goods which were delivered to the village police posts by Saia Penitani. He said he gathered that the goods were foodstuff as stated in Facebook.

[95] He said that he went to the opening as representative of Government and that Saia Penitani as MC stated what is stated in P.20:

"If you look over at those trucks with tanks on them, they were to be distributed to the villages, they were told you turn and leave all those tanks in Houma for the people of Vaea. Let us clap to that."

[96] He said he did not know if what Saia had said was right or wrong.

[97] **Mr. 'Etika asked** that further transcript from the flash drive already exhibited be produced as P.21 and P.22, and Mr. Tu'utafaiva did not object and I ordered it.

[98] Mr. 'Etika referred the respondent to P.22 at no. 43.06 which was part of the speech of Angus Naupoto, representative of M & J Water Tank Company:

"... it is alright because the Minister is here, like those big tanks over there as the MC said they were intended for another place, but I believe that may be after our programme today, the Minister will gladly agree that they be distributed here in Houma instead in order that the people have them whilst the other villages may be considered later because they are not here now."

and he said that Angus was joking, like Saia was joking in his speech.

[99] He said he spoke after those speeches but he did not know about the tanks and he did not correct what Saia and Angus had said.

[100] He said that he understood that tanks were being distributed at that time and that these tanks were from the second agreement.

[101] He referred to P.5 of his documents, the letter of his CEO, second paragraph where it stated an intended goal of 6000 water tanks for the Kingdom, 5000 litre each, and that 3530 had been made and delivered, leaving 2,470 tanks for which they were looking for funds. He said that the 500 tanks which China funded had already been deducted leaving the figure of 2,470.

[102] He said that he did not know that water tanks were going to be at Houma the morning of the opening. He said that the distribution of water tanks were handled by a part of his Ministry and that he only found out the previous week (to the trial) that two of his officers were there.

[103] He said he had been Minister of MEIDECC for 4 years.

[104] He said that he did not know of this distribution until he got to Houma. He said that the previous distribution prior to the opening was on 29 September 2021.

[105] He said he did not authorise either Saia Penitani or Tu'akoi 'Ahiō to say any of what they said, but he accepted that the water tanks were distributed that day in Houma.

[106] He said that he knew that the tanks would be distributed in Houma but he did not stop it or asked about it because he was too busy.

[107] He was referred to his own words in his speech (P.19).

“Kaukauloka, please look over at these tanks ...”

and he said that he meant the tanks which were on the ground and on the trucks.

[108] He said that he agreed with what Saia and Angus said in their speeches.

[109] He said that there were 10 tanks on the ground and were intended for Houma itself and that there were 9 on the trucks and were intended for

the village of Fualu. He said that he only found that out the previous week (to the trial).

[110] He said that he did not have a list of the people who received those 19 tanks. He said that he was told that the 10 tanks were distributed at Houma and that the 9 were distributed in Fualu.

[111] He said that the distribution made on 12 November 2021 was in accordance with the criteria required in the CEO's letter, P.5.

[112] As to his paragraph 11 of his affidavit, he said that he was at the opening as a representative of Government, and not as a member of the Tongatapu 6 council.

[113] He was referred to the several parts of his speech at the opening.

[114] He said that Loisi Koloamatangi got her tank on 6 November 2021. He said that he could not recall if there had been any inspection carried out before approving her tank and he said he did not recall if it was done, but that there should be a record of it. He said he did ask his staff about it because of this case.

[115] He said that Saia Penitani was only a supporter of his, not an agent or representative.

[116] He said that he did not know where Saia Penitani got the money from to buy the goods he delivered to the village police posts.

[117] He said that it was not true that the money used to buy the goods were from him. He said he had no knowledge of what Saia did and that he had not approved it.

[118] He said Saia was a supporter and that he joined him in his float as did his other supporters.

[119] He said that he did not know what Saia was doing for living last year, but that this year, he appointed Saia as a board member of Tonga Power Ltd,

Tonga Water Board and Tonga Waste Authority, as he could as Minister of Public Enterprises with consent of Cabinet. He said he trusted him as he had been in the Ministry of Health before but he did not know what he was doing in that Ministry.

[120] He said that he appointed him because he had to see that the services of those enterprises were run as a business and that their decisions be good for the people.

[121] **I asked him** and he said that he himself was not a member of those 3 boards.

[122] **Mr. 'Etika asked** and he said that he trusted Saia because he helped with his campaign and also because other Cabinet members knew of him. He said that he appointed him because he would help with the decisions of Government.

[123] He said he was not rewarding him for what he did for his campaign but because he trusted that he, Saia, would carry out the required work.

[124] **Mr. Tu'utafaiva then produced documents** of the respondent which were then numbered P.21 to P.33, and Mr. 'Etika continued with his cross-examination.

[125] The respondent said that P.27 to 29 was the certificate of distribution of water tanks carried out on 16 October 2021 at Houma and that those tanks were from Chinese aid and not Government aid as stated wrongly in the certificate. He said that the same was to be said of the certificate P.30, the distribution of 12 November 2021 at Houma.

[126] He agreed that he had no record that the recipients of the tanks had satisfied the criteria to be given a tank.

[127] He said that the price of each tank was \$1,850 and that the value of the 10 tanks was \$18,500, and the price of 38 tanks was \$70,300.

- [128] He agreed that the person, Mele 'Amato, shown in P.30 was the neighbour of Loisi Koloamatangi who received her tank on 12 November 2021.
- [129] He also agreed that the person, Feleti Koloamatangi, that is no.17 on P.28 was the one listed for the tank of Loisi Koloamatangi.
- [130] He said that P.23 – 26 were the email of Saia Penitani's CV dated 4 January 2022 and that he had asked Saia for it when he was considering to appoint him because he trusted him because he supported him in his campaign. He said he had known him for 5 years in the Houma council where Saia was secretary.
- [131] He said that the Houma council had asked MEIDECC for help for 2 stands and 2 tanks, and the help was funded from the emergency fund of Government on their request. He however agreed that the request was made to him and that he approved it as Tu'akoi 'Ahio stated in his speech at 27:00 and at 34:48 of his speech shown in P.31 – 33.
- [132] **I asked questions** and he said that he knew of the donations Saia Penitani made to the village police posts because he saw it in Facebook before the election. He said that what he did when he found out was to tell Saia not to do it again. He said that he did not do anything else. He said he did not ask Saia where he got the money to buy the goods he donated.
- [133] He said that the water tanks at the opening were taken by M & J Company themselves on their own decision. He said he did not inquire as to why they did that.
- [134] He said that it was true that Saia was going to be a candidate, according to what he told him, and that Saia did not tell him why he decided to withdraw and not be a candidate.
- [135] He said that Saia was a director in 3 boards and that in one board he gets a sum of \$10,000 plus meeting fees of \$80 per meeting. He said that his appointment was for 1 year but was renewable for up to 3 years.

[136] **Mr. 'Etika asked again**, and he said that the words of Saia and Angus were spoken in jest but the tanks were in fact distributed as they said. He said that he did not think to correct what they said.

[137] He said that the tanks on the trucks were for Fualu but that M & J decided to take them to Houma instead.

[138] He said that the \$30,000 to be received by Saia per year was not a reward for his service to him but his salary as a director for which he was qualified.

[139] **Mr. Tu'utafaiva asked again**, and he said that there were 6 directors who were the directors for each of the 3 boards, that is, the same 6 persons.

Consideration

[140] In deciding this case, I have to consider all the evidence and the law relating to each of the 4 claims of the petitioner and the submissions of both counsel in respect of each claim. I will deal with the claims in this order:

- (a) the water tanks in the first week of November 2021 (the first water tanks);
- (b) the water tanks in the second week of November 2021 (the second water tanks);
- (c) the food given to the village police posts on 5 November 2021; and
- (d) the excess spending in the campaign.

[141] I have to bear in mind that all these 3 alleged gifts were given within 3 months before the election, which was held on 18 November 2021, and that the burden of proof that they were not for the purpose of influencing the vote, rests upon the respondent as provided by S.21 (3) of the Electoral Act (the Act):

"(3) For the purposes of this section, any money or valuable gift given or offered or agreed to be given (in the absence of good consideration) to my person (except a person named a section 24 (3) within 3 months of any election by or on behalf of a candidate, shall be deemed to have been given or offered or agreed to be given for the purpose of influencing the vote, unless the contrary be proved."

[142] That means that if the gifts are proved to have been made by the respondent, it is then upon the respondent to prove that the gifts were not given for the purpose of influencing the vote.

Standard of proof

[143] The standard of proof which the petitioner must achieve with her evidence to establish her claims, and the standard of proof which the respondent must achieve with his evidence to prove that the gifts he gave (if established by the petitioner) were not to influence the vote, are the same, namely, the balance of probability. That standard simply means: Is it more likely than not that what is alleged is true? It is the civil standard of proof.

[144] However, it is required, that the evidence must be convincing, cogent, to ensure that, on the balance, it is more likely than not, in view of the seriousness of the consequence of the claim made.

(a) The first water tanks

Background

[145] In considering these 2 claims, I must appreciate the value of a water tank to a family in Tonga. That is because Tonga has no river. It depends on well water and rain water, but well water is hard water containing calcium which affects its taste and leaves the calcium in pots and kettle when boiled, and clogs up piping, especially toilets and showers.

[146] To store rain water, in sufficient quantity for the family when there is no rain, concrete water tanks had to be constructed. They were costly and could not be afforded by every family, in fact only a few could.

[147] Then plastic and fibre glass and plastic water tanks were introduced which were less costly than the concrete tanks but were still beyond the means of the majority of the people.

[148] Government then decided to give free plastic water tanks to the people who could not afford them. It applied its own funds as well as funds donated by other governments such as China, for the manufacture of large 5000 litre tanks here in Tonga, to distribute to those families.

[149] It set certain criteria which had to be met in respect of a family to entitle that family for one of those tanks.

[150] The Ministry of MEIDECC was allocated the task of procuring the funds, the manufacturing of the tanks and the distribution of the tanks.

[151] A target of 6,000 tanks was set and by the time of this trial, some 3530 tanks have been distributed throughout the Kingdom.

[152] Government contracted with M & J Water Tank Company for the manufacture of the tanks but that distribution of the free tanks to the people was carried out at the direction of the Ministry itself to ensure compliance with the criteria set by Government.

The evidence

[153] The evidence for the petitioner in respect of the first water tanks (first week of November 2021) were given by Loisi Koloamatangi and Tevita Funaki.

[154] Loisi said that the town officer, Naitoko Vuna, and Saia Penitani were strong supporters of Poasi Tei and his campaign team in Houma. Tevita Funaki said that he knew very well that Saia Penitani was the representative of Poasi Tei in Houma and that he campaigned strongly and

promoted Poasi Tei in Houma last year (2021). Timote 'Eteaki also stated that Saia Penitani was the representative of Poasi Tei in Houma in November 2021. Mesui Moala said that Saia Penitani was the leader of the campaign of Poasi Tei in Houma.

[155] Loisi said that initially when she went and asked the town officer, Naitoko Vuna for a tank, because she had not received one in all 3 distributions which been carried out in Houma, the town officer told her that she was not eligible for one because she was not a registered elector of Houma.

[156] Now, there was not and there is not any criterion in the criteria for a free water tank, that the recipient had to be an elector of the village in which the recipient lives and the people did not know that the town officer had only made that up to deny eligible people of their entitlement to a free water tank.

[157] Nevertheless, Loisi and her husband and their adult son, all had their registrations as electors in Vava'u transferred and they were all registered as electors of Houma. Then Loisi went directly to Poasi Tei at his home at Hofoa and told him that they had all been registered as electors of Houma. Poasi instructed them to give him their phone number and to go and have their tank stand ready and which they did.

[158] In consequence of that Loisi and her family were then delivered their water tank on 6 November 2021. She said that on that day, she saw several water tanks at the frontage of the Mormon Church and that the town officer and Saia Penitani were there and that she asked if she and her husband were included amongst those for which the tanks were intended and the Town Officer responded that they were and they were delivered their tank that day.

[159] Poasi Tei, the respondent, did not deny the evidence of Loisi that the Town Officer and Saia Penitani were strong supporters of his and of his campaign team at Houma, nor her evidence of their contact with him about their registration as electors or his instruction to them to go and

have their tank stand ready. He did not deny or point out instead to Loisi at the time that the town officer was wrong to have required them to be registered electors of Houma before they could be granted a tank. To me, he showed no surprise that there was such a requirement. And in his evidence, he said nothing about it at all.

[160] It is therefore, the fact that the respondent impliedly accepted, and endorsed, the requirement which the Town Officer required, which meant that he required, as head of the Ministry responsible distribution of free water tanks, that no tank be given to any person unless that person was a registered elector. He thereby tied the entitlement to a tank to the general election to be held on 18 November 2021.

[161] And because the Town Officer and Saia Penitani, who were strong supporters of Poasi Tei, were the persons who were delivering and distributing the tanks, there was an unfair advantage of Poasi Tei over any opposing candidate. The town officer and Saia Penitani would pick and choose who to be given a tank, depending on how favourable a recipient may be towards Poasi Tei. That is the case with Tevita Funaki, when the tank of his neighbour was delivered. He said to Saia Penitani: "How is it that I miss out in these blessings?" Saia Penitani replied: "This is only a little help by Poasi, but you go and prepare your stand for your tank."

[162] That reply meant that Saia Penitani could decide to give a tank to Tevita Funaki, by telling him to prepare his tank stand, without consulting Poasi Tei or Poasi Tei's office or his Ministry. It of course also meant that Poasi had directly instructed that Tevita Funaki's neighbour be given a tank and not through the Ministry which decides the distribution in accordance with the criteria already set and which was produced in evidence through the letter of Paula Ma'u of 5 January 2021 (P.5).

[163] Mr. Tu'utafaiva has submitted that I disregard the evidence of Loisi and of Tevita, although S.35 of the Act allows the Court to admit evidence which

may not be admissible. He says that the evidence of Loisi and of Tevita, to which I have referred, were hearsay.

[164] S.35 provides as follows:

"35. Real justice to be observed

On the trial of any election petition –

- (a) *The Court shall be guided by the merits and justice of the case without legal forms and technicalities;*
- (b) *The Court may admit such evidence as in its opinion may assist it to deal effectively with the case, notwithstanding that the evidence may not otherwise be admissible in the Supreme Court."*

[165] He submits that the "real justice" of the case lies in favour of the Court not admitting the hearsay evidence of the witnesses of the petitioner, which are what Loisi and Tevita have said that Saia Penitani and Naitoko Vuna had said to them, because:

- (a) it would not have been prudent for the respondent to subpoena Saia Penitani and Naitoko Vuna to give evidence because the alleged hearsay are denied by the respondent and he could not cross-examine them if he called them as his witnesses;
- (b) the petitioner has the burden of proving that the words were spoken and yet she did not call either Saia or Naitoko to give evidence that they said them;
- (c) the petitioner was asked in cross-examination and she said that she had not spoken to either of them to give evidence for her; and that
- (d) she was aware that the evidence of her witnesses were hearsay.

[166] He says that the petitioner has made a conscious decision to come to Court with hearsay evidence, and he submits that it would not be a real justice for the respondent if the Court admitted those hearsay evidence

because the respondent denies them and he has not been given the right to cross-examine those persons as to the truth of what is alleged they said to the witnesses.

[167] I am afraid that I do not agree. I consider that this is exactly why the Legislature has expressly enacted that the Court deals effectively with an election petition **notwithstanding** legal forms or technicalities or inadmissibility of evidence in accordance with the laws of evidence in the Supreme Court. The persons who said the relevant words were clearly the supporters of the candidate of whose election is at issue, and it is safer to rely on what those supporters are said to have said at the time of the campaign than what they now say they said at that time. The reason is because they would not want the candidate they had supported to be unseated and barred from re-election.

[168] The petitioner was quite justified in deciding not to subpoena them or even to speak to them to give evidence for her because she would not be sure what they would say in Court if they gave evidence for her.

[169] The respondent on the other hand was obliged, as the candidate who was supported, to ask the specified supporters whether or not they said the things alleged by the petitioner and her witnesses. If they tell him that they did not say what is alleged, then he should call them as his witnesses. If they admit to him that they said the alleged words, then he does not need to call them. But he certainly cannot then ask the Court to disregard the hearsay evidence of the petitioner's witnesses as being unfair because, he says, he could not cross-examine those supporters in Court as to what they are "alleged" to have said. That cannot be the real justice of the case.

[170] The real justice of this issue is whether or not Saia Penitani and Naitoko Vuna said the words which Loisi and Tevita said they did. That is so that the central issue is able to be decided. That central issue, as Mr Tu'utafaiva said, is whether the respondent had actual or inferred

knowledge and assent to the water tanks and chicken meat and groceries being given by Saia and Naitoko.

[171] Because Tevita Funaki has stated in evidence in his affidavit and has confirmed it in Court that Saia Penitani said to him that the water tank which was just delivered to the neighbour was a little gift to that neighbour from Poasi Tei, and because there has been no contrary evidence that Saia did not say that to Tevita, and that Tevita has maintained that evidence despite cross-examination that Saia said no such words, I accept that Saia said those words. It is more likely than not that he said those words.

[172] I also accept that it was a criterion used by Saia Penitani and Naitoko Vuna that the recipient of the tank was a registered elector of Houma, and so I have to accept, in absence of evidence that the neighbour of Tevita was not a registered elector of Houma, that the neighbour to whom the tank was given was a registered elector of Houma.

[173] As to whether or not Poasi Tei, the respondent, had actual notice of and had directed the gift of the tank to be given to the neighbour, I have to accept the statement by Paula Ma'u in his letter of 5 January 2021 (P. 5 & 6):

“Once the recipient list fully complies with the criteria, the National Water Tank Project team will inform the supplier with the schedule and number of tanks to be delivered. On the day of delivery, the Town Officer, and/or member of community council, and/or a representative of NGOs will join the National Water Tank Project team in delivering and instalment of water tanks.”

[174] To me that meant that when a delivery was approved to be made at Houma, the Town Officer, Naitoko Vuna, would have been informed and shown the list of persons to be given the tanks. And because Saia Penitani was present when the tank of the neighbour of Tevita Funaki was delivered, it meant that the Town Officer had informed Saia Penitani of it

and Saia therefore attended and told Tevita that the tank of the neighbour was a little gift from Poasi.

[175] The question is: Did Poasi Tei authorise Saia Penitani to say what he said (that the tank was a gift from him)?

[176] To answer that question, I must also consider his answers to my questions when I asked him as I have stated in paragraph [132] above.

“...he said that he knew of the donations Saia Penitani made to the village police posts because he saw it in Facebook before the election. He said that what he did when he found out was to tell Saia not to do it again. He said that he did not do anything else. He said he did not ask Saia where he got the money to buy the goods he donated.”

[177] The delivery of the food to the village posts were done by Saia on 5 November 2021 and the delivery of the tanks which included the tank of Tevita Funaki’s neighbour was on the 6 November 2021.

[178] To me, the answers which he gave me about the gift of the food to the village police posts confirmed that he approved of it, if he had not known beforehand that the food were to be delivered to the village police posts on 5 November 2021.

[179] I consider that had he not known of it before hand and had not agreed that such food be given, he would have straight away, upon finding out and confirming from Saia himself that he had given the food on his behalf, gone to each of the village police posts and inform them that he had had nothing to do with the making of the gifts, and if possible take away any of that food if still there. But he did not do that. He deliberately let the members of the village police continue to believe that he had in fact sent them himself, via Saia Penitani.

[180] And more importantly, he ought to have publicly dismissed Saia Penitani as a supporter of his and disassociate himself from any act which Saia had purported to have done on his behalf. Again he did not do that.

[181] In consequence of that failure on his part, he allowed Saia to continue to make representations on his behalf, such as he did to Tevita Funaki on 6 November 2021.

[182] And because of that failure by him to do the right thing, I am more inclined to believe that he has not called either Saia Penitani or Naitoko Vuna to deny what they are alleged to have said and done because they would come and confirm that the words that they had spoken to Loisi and Tevita were true, that he, the respondent had told them to say them.

[183] The name of the neighbour was Tevita Leka and he was listed in the delivery list of 16 October 2021. Also listed in that list was the name of Feleti Koloamatangi, the name of the person to whom Loisi's tank was properly delivered. I believe and I accept that that list was dated 16 October 2021 but the deliveries, at least of Loisi's tank and of Tevita Leka's tank, were not done until 6 November 2021, seeing that some 38 tanks had to be delivered.

[184] Although this first claim of the petitioner claims that 20 tanks were given and only 1 has been proved as to the circumstances of its delivery, the act is still an offence under S.21 irrespective of the number of tanks proved to have been delivered to an elector to induce him to vote for the respondent.

The second water tanks

[185] Mr Tu'utafaiva submits that the witnesses who have given evidence were quite mistaken as to what they recollected were said by Saia Penitani in his speech as MC at the opening because the agreed transcript of Saia's speech did not contain any of the words alleged by the witnesses.

[186] However, the actual words that Saia said, and as confirmed by Angus Naupoto in his speech were to the same effect, namely that the tanks were there to be distributed to the people of Houma. Saia said (in P.20):

“If you look over there at those trucks with the tanks on them, they were intended to be delivered to other villages, they were told to turn here and leave all the tanks here at Houma for the people of Vaea. Let us clap to that.”

And Angus said

“... although we come and work as representative of Government to establish their work goal, but we also participate as work partner in this village.

And so that was accepted, it is just as well the Honourable Minister is here, like those tanks over there and as the MC said, they were intended to go to another place, but I believe may be as soon as our programme is finished, today, the Minister will gladly agree to distribute them right away for the people to have and then see about the other villages, for they are not here.”

[187] The respondent, who was the Minister referred to, was there and he heard those speeches and did not disassociate himself as having had nothing to do with the presence of the tanks there, and with what his staunch supporter, Saia Penitani, had said, namely, that the delivery trucks were told to turn and bring all the tanks to Houma for the people of Houma.

[188] Instead he got up and spoke, and towards the end of his speech, he said (P.19)

“Please look over there Kaukauloka (Noble Vaea’s pet name) at these tanks and as stated in the speeches just now, I feel that it seems that your village is abundantly blessed today; let us be thankful for everything; and for the way that Almighty God has bestowed these various opportunities upon us and may he be

glorified for the aid which have been brought to your village. As you know Kaukauloka we are now proceeding to the coming Parliament election next week, and I take this opportunity to convey my well wishes and much love to you and your family at the pending election of the nobles representatives ...

To the people of Kaukauloka, may these aid help to improve your living, and our cooperation will not cease; namely cooperating to attain the pressing needs and to build and develop our district ...

If this was not an election year we would have heard the songs and hymns of Christmas now ... despite the political things of these days, including our approaching to the election, let it not affect the spirit of Christmas ..."

[189] That speech endorsed the gift of the water tanks which Saia Penitani had already made and which Angus Naupoto said was awaiting his, the Minister's approval, and he reminded the people of the forthcoming election. It also reminded the people of the imminent election in the following week. The purpose of the giving of the water tank could not be more obvious, just as the witnesses said in their evidence.

[190] The respondent said in evidence that he was too busy that day to inquire as to why the tanks were ordered to be there and who ordered it.

[191] I am satisfied on the balance of probability that the 10 tanks which are said to have been delivered that day were delivered by the town officer and by Saia Penitani at the direction and with the approval of the respondent for the purpose of influencing or inducing the recipients, who were registered electors of Houma, as the Town officer had required, to vote for the respondent. The names of those 10 recipients are listed in P.30.

(c) The food to the village police

[192] As I have already stated above, I am satisfied on the balance of probability that the respondent had known beforehand that Saia Penitani was going to give the gifts of the food to the village police for the reasons I have stated. Besides, it is unlikely that Saia Penitani would have had the

money to pay for all the 20 or so cartons of frozen chicken, to give to each of the 10 posts of the village police in Houma, and the respondent has told me that he did not ask Saia where he had got the money to make the purchase of the goods.

[193] I do not believe that he only found out about it after it was posted in Facebook because he did not take any step to disassociate himself from those gifts in anyway whatsoever. He was content to let the people continue to believe that he had given them, so that they would be influenced to vote for him.

(d) The excess spending

[194] I have considered this claim and have found that it has not been proved by the petitioner. The ground of this claim of the petitioner is that the respondent donated 20 water tanks in the first claim and 20 water tanks in the second claim, making a total of 40 tanks, each tank being valued at \$10,000 per tank.

[195] All those tanks were not the property of the respondent. There is no evidence that he expended any money in making them or in buying them or paying for them. What the law requires is that the candidate spent that is, his own money or his own goods, in excess of \$20,000 in his election campaign to be in breach of the law. S.24 of the Act provides as follows:

"24. Permitted election expenses

- (1) No candidate may spend, on any election campaign, more than the sum of \$20,000.*
- (2) Without prejudice to the generality of subsection (1), the following payments are deemed to be spending on an election campaign – unless contrary to section 21 –*
 - (a) any donation made within 6 months of an election, either by a candidate or on his behalf;*

- (b) *the cost of any entertaining (including food, drink or provision) paid by or on behalf of a candidate within 6 months of an election;*
 - (c) *travelling or transportation expenses paid by or on behalf of a candidate, to enable people to travel to a polling station.*
- (3) *For the purposes of this section any sum expended by a candidate for his personal expenses, or those relating to his spouse, parents, grandparents, grandchildren, the brothers and sisters and half brothers and half sisters of his parents, spouse's parents, brothers and sisters and half brothers and half sisters of his spouse or their children, or in relation to a church or for a charitable purpose; shall be disregarded.*
- (4) *Within 14 days of an election, every candidate shall deliver to the Supervisor a signed statement of his election expenses in Form 7 of the Schedule, itemized and complete in all respects.*
- (5) *It is an offence for any candidate to spend on an election campaign more than the sum of \$10,000 or to fail to deliver the statement referred to in subsection (4) or to deliver a false statement, and any person found guilty shall be liable to a fine not exceeding \$10,000.*
- (6) *If a person convicted under subsection (5) was elected at the election, and if the Court considers that the circumstance of the offence are sufficiently serious, the Court may declare the candidate's election to be void and if he has already taken his seat in the Legislative Assembly he shall be unseated by the Assembly.*

[196] On the evidence, the tanks were the property of the Government and they remained so until they were delivered to recipients who satisfied the set criteria.

[197] That of course does not prevent the respondent from donating any of the tanks to any elector to influence that elector to induce that elector to vote

for him, and thereby commit the offence of bribery under S.21, as I have found in respect of the first water tanks and second water tanks.

[198] And it also does not mean that a friend or relative of the candidate cannot donate money to the candidate and he uses it in his campaign because that money thereby becomes his money. The friend or relative can also pay directly for the publication of posters, pamphlets, television and radio times and they can properly be held to be expenses of the candidate in his campaign because they were lawfully done for him as his.

[199] But where in the present case, the respondent purported to give or to procure the giving of water tanks which belonged to Government without the consent of Government and in breach of the rules applicable to the giving of those tanks, they cannot properly be said to be his expenses because he had not expended any money of his own or of his friend or relative to acquire them as his.

[200] I therefore conclude that this fourth and final claim of the petitioner is not proved and I dismiss it.

[201] I note that Mr. 'Etika did not even address it in his submissions at all.

Result

[202] Accordingly, I have come to the conclusion that I am satisfied on the balance of probability that the respondent has committed the following 3 offences under section 21 (1) (a) of the Electoral Act:

- (a) that the respondent committed bribery indirectly by another person by having Saia Penitani give a 5000 litre water tank to Tevita Leka, an elector of Houma on or about 6 November 2021 to induce him to vote for him;
- (b) that the respondent committed bribery indirectly by another person by having Saia Penitani and Naitoko Vuna give a 5000 litre tank each to Mele Lautaimi, Mele Kalatiola, Sinele Fakava, Piola Veatupu, Palema Fakava, Faiva Malie, Mele 'Amato, Loisi Vake and Sunia

Amoula, electors of Houma, on or about 12 November 2021 to induce them to vote for him, and

- (c) that the respondent committed bribery indirectly by another person by having Saia Penitani give 2 cartons of frozen chicken, crackers, cocoa, coffee, milk and sugar to the members of the village police post at the end of Houma towards Nuku'alofa, and of similar goods to the members of the post at the end of Houma towards Vaotu'u on 5 November 2021 to induce them to vote for him.

[203] In accordance with the provisions of S.32 (1) of the Electoral Act, because the respondent has been elected at the election of the 18 November 2018 and it has been proved to the satisfaction of this Court at the trial of the election petition filed in respect of that election, that the respondent is guilty of 3 offences against S.21 of the Act, this Court hereby declares that the election of the respondent, Poasi Mataele Tei, is void.

[204] The respondent shall pay the costs of the petitioner in these proceedings, such costs to be taxed if not agreed.

NUKU'ALOFA: 13 May 2022.



Niu J
J U D G E