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IN THE SUPREME COURT OF TONGA
NUKU'ALOFA REGISTRY
ELECTORAL REGISTRY

CV 72 of 2021

IN THE MATTER OF: An Election Petition pursuant to Part V of the *Electoral Act*

BETWEEN:

'AKANETE TA'AI LAUTI

Petitioner

-and-

'AISAKE VALU EKE

Respondent

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Counsel: Mr D. Corbett for the Petitioner
Mr S. Tu'utafaiva for the Respondent
Trial: 19, 20 May 2022
Judgment: 20 May 2022

The petition

1. On 18 November 2021, the petitioner, 'Akanete Lauti, and the respondent, 'Aisake 'Eke, were among the candidates vying for election as the representative of the Tongatapu 5 constituency. Dr 'Eke was elected.
2. On 16 December 2021, the petitioner filed an electoral petition challenging the validity of Dr 'Eke's election on the grounds that he had committed bribery in contravention of ss. 21(1)(a) of the *Electoral Act*. The particulars to the petition comprised two claims.
3. By her first claim in the original petition, the petitioner alleged that on 17 November 2021, Elisapeta Totao of Kala'au, a registered voter of Tongatapu 5, was advised by her town officer to prepare a water tank base as 'they' were distributing water tanks to that village. The water tank arrived the same day. Elisapeta was told that the tank was from Dr 'Eke.
4. In her second claim, the petitioner alleged that in the week before the general election, Milika Taufu of Ha'utu, a registered voter of Tongatapu 5, and other members of the Women's Committee of Ha'utu were advised by their town officer that Dr 'Eke would be visiting. They had collected \$500 each for a water

tank. When he arrived, Dr 'Eke advised the chairperson of the Women's Committee that the \$500 each they had collected would be returned to them and that water tanks would be distributed free of charge, that is, gifted to them. The first water tank distribution was conducted during the week before the election. The second distribution was completed on 17 November 2021, the day before the general election. It was further alleged that Dr 'Eke gave \$200 to the 15 members of the Women's Committee present. That second claim will hereinafter be referred to as "the money claim".

5. Dr 'Eke filed a response to the petition on 11 January 2022 whereby he denied the claims of electoral bribery.

The amended petition

6. On 6 April 2022, the petitioner, by her counsel Mr Corbett, filed an application for leave to amend the petition. Reference was made in the application to rule 14 of the *Election Petition Rules* and that the application was based on "changes in circumstances since the petition was filed on 16 December 2021". The changes in circumstances are described as follows:
 - (a) withdrawal of support by one of the witnesses;
 - (b) another witness referred to in the petition was not a registered voter for Tongatapu 5;
 - (c) the volcanic eruption, tsunami and ash on 15 January 2021 led to no internet for a month;
 - (d) Covid lockdowns – February/March 'limited court';
 - (e) Covid community transmission in March and April - red light alert - the public not allowed to move about for two weeks mid-March to 1 April;
 - (f) the petitioner's affidavit filed 28 March referred to new allegations which were not contained in the petition.
7. The application also referred to one various witnesses no longer being prepared to give evidence, and to other witnesses 'being new' but having refused to support the petitioner by giving evidence voluntarily. There was also reference to the Ministry of Meteorology, Energy, Information, Disaster Management, Environment, Climate Change and Communication (commonly known by the

acronym “MEIDECC”) as being a “new witness” due to “the discovery and disclosure of new information in the course of the case both from the respondent and MEIDECC”. The petitioner complained that MEIDECC had not disclosed all information concerning the water tanks as requested by her and therefore, MEIDECC would be “subpoenaed in an application to join it as a third party”. Similar statements were made in respect of other “new witnesses” who had been uncooperative, and that the petitioner wanted them joined as third parties.

8. The petitioner also referred to s. 35 of the *Electoral Act* which provides:

Real justice to be observed

On the trial of any election petition:

(a) the Court shall be guided by the substantial merit and justice of the case without regard to legal forms or technicalities; and

(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.

9. The petitioner otherwise relied upon the “interest of real justice” for leave to amend.
10. The bundle of documents comprising the application included not only a draft order and an affidavit of the petitioner, which was more or less a repeat of the application grounds, but also a document entitled “Amended Petition”. That document included or repeated the same paragraphs in the application to amend by which the petitioner explained how various witnesses were not cooperative and were to be subpoenaed or joined as third parties. And then, the document set out what were entitled various “facts” numbered one through to four. Those so-called facts were actually allegations or claims of bribery against the respondent concerning the distribution of water tanks on 17 November 2021. The first three water tank claims specified particular recipients and the fourth claim was a general complaint about how “*the respondent indirectly via the Chinese Embassy, MEIDECC Ministry and M&J Water Tank Company funded, produced and disseminated water tanks on behalf of the respondent*”.
11. Those allegations were followed by what was effectively a summary of the evidence expected to be given to support those allegations of bribery.

12. The respondent did not oppose the application for leave to amend the original petition. The case was originally managed by Niu J. The court file does not contain any record of Niu J having actually dealt with the application to amend. Nonetheless, the court file does reveal that the respondent proceeded to file a response to the amended petition and affidavits from himself and a number of other witnesses which all addressed the water tank claims in the amended petition. And so, the case proceeded on that basis for trial.

Previous trial dates

13. The first trial date was 11 May this year. However, on 10 May, Niu J recorded in a directions notice that the trial would commence on 19 May on an estimate of two days. Subsequently, the trial of the matter was transferred to me to enable Niu J to take scheduled leave which was supposed to have commenced on 9 May. At paragraph three of the minute, Niu J also reminded counsel:

“... to have their respective parties ready for trial and that their affidavit and subpoenas are issued and filed in time to ensure that the trial proceeds as now set down.”

Petitioner’s “Response to the Respondent’s Response” to the application to amend

14. Meanwhile, on 13 May 2022, the petitioner filed a document entitled “*Petitioner’s Response to the Respondent’s Response concerning application to amend the election petition*”. The document was signed by the petitioner despite Mr Corbett having in fact prepared it. His explanation for why he, as counsel on the record, did not sign it was unclear. The document contained the following statements:
- (a) “The petitioner has reconsidered its position and states that allegation two of the original petition will remain”;
 - (b) even though a witness by the name of Milika Taufu was not a registered voter for Tongatapu 5 but was for Tongatapu 6, she was said to be a witness in relation to the money claim and the distribution of the water tanks ‘by the respondent’ to the Ha’utu Women’s Committee;
 - (c) “The petitioner will rely on both the original petition and the amended petition”.

15. The balance of the document was devoted to complaints about the Respondent not having provided copies of his discovered documents as requested by the petitioner and her counsel.

Petitioner's opening

16. When the trial commenced on 19 May 2022, Mr Corbett presented a written opening statement. At paragraph 3, he stated that the evidence of the petitioner would show that the respondent both indirectly and directly gave valuable gifts of *money* and water tanks within three months prior to the general election. Upon noting the reference to the money claim, Mr Corbett was asked what he intended given that the amended petition did not contain any reference to the money claim. In response, Mr Corbett relied on the *Petitioner's Response to the Respondent's Response concerning application to amend the election petition* referred to above. I will return to consider the ramifications of that document and Mr Corbett's purported addition of the money claim to the issues for determination at trial further below. Suffice to say, however, that at that point in the trial, Mr Tu'utafaiva objected to the purported inclusion of the money claim and confirmed that he and his client had prepared for trial on the basis only on the four water tank claims in the amended petition. So much was plain by the fact that they had filed not only a response to that amended petition but also affidavits as well as submissions (prepared by Dr 'Eke's New Zealand Counsel, Ms Amelia Schaaf) on 17 May 2022, all of which addressed only the four water tank claims in the amended petition.
17. After hearing from counsel, I ruled that the petitioner was not entitled to add the money claim to the issues for determination at the trial. The reasons for that decision were given at the time and were revisited and further developed at the conclusion of the trial for reasons which will become apparent in due course.

Petitioner's evidence

Paula Ma'u

18. Paula Ma'u appeared pursuant to subpoena. He is the Chief Executive Officer of MEIDECC. He gave evidence in relation to a national project for the distribution of water tanks in 2021. That project was managed by the climate change department within MEIDECC. The project had been approved by

Cabinet. He recalled that on 17 November 2021, a number of tanks were distributed to the Tongatapu 5 constituency, including the village of Ha'utu. That work, including the decisions as to which households were to receive water tanks, was all undertaken by what Mr Ma'u described as the "water tank team" which included climate change officials, representatives of the Tonga Water Board and from the Ministry of Lands and others. It was headed by the Director of Climate Change, Lu'isa Malolo, and other staff from that department. Mr Ma'u said that 16 tanks were delivered to Ha'utu out of a total of 30 and that the balance were distributed in Tongatapu 4 and 8 that same day.

19. Mr Ma'u explained that the project was based on a list compiled from the last census conducted in 2016 where about 6,000 people and households without water catchment facilities and equipment were identified. The process involved surveying each village and confirming with the relevant town officer the persons on the list and then assessing their eligibility for a tank according to specified criteria. There were also issues in relation to funding which influenced how many tanks could be distributed during each round of the project.
20. When asked about Dr 'Eke's involvement in the distribution of tanks during the project, Mr Ma'u said that he had received a request from Dr 'Eke through the Chinese Embassy which was the donor for the tanks project at the time. That request included a list of names. He said that his team then checked those names on the list to ensure that they were on the official list from the 2016 census. Mr Ma'u then elaborated on the process in distributing tanks to particular individuals on the list. That, he said, depended on whether those persons met specified criteria including whether they or their households had existing water catchment facilities, whether they had built a stand for the tank and had installed roof guttering for rainwater collection to a tank. He also mentioned that the elderly and the poor were given priority. Beyond that, Mr Ma'u said that he did not know of any other involvement by Dr 'Eke in the distribution of the tanks. He also emphasised that he told his team to ensure that any request, including from Dr 'Eke and the Chinese Embassy, met the criteria. He said that even if Dr 'Eke had not made his request, the project team would have continued to distribute tanks in accordance with their official list of names and in accordance with the criteria for distribution. He also instructed the

team to advise those people on the list who missed out on a tank at that time that they may receive a tank during the next round.

21. Mr Ma'u said that MEIDECC received many requests for tanks from various people, groups and other agencies during the project. He confirmed that all of those requests were assessed against the criteria.
22. Mr Ma'u was not cross-examined.

Uaisele Lomu

23. The next witness called by Mr Corbett was Uaisele Lomu. He was expected to appear pursuant to witness summons. However, when he was called, Uaisele did not appear. Mr Corbett then explained that the witness summons for Uaisele was only served the day before the start of the trial. Order 44 rule 3 of the Supreme Court Rules provides that service of any witness summons less than four days prior to the day on which the witness is required to attend Court is invalid.

Mele Ika Taufu

24. The next witness called was Mele Ika Taufu. She was also the subject of a witness summons. She also did not appear. For the same reason as for Uaisele Lomu, the late service of the witness summons on Mele was invalid.

'Akanete Ta'ai Lauti

25. Ms Lauti's affidavit did not contain any direct evidence relevant to any of the four allegations concerning the water tanks. Rather, she recited references to the witnesses she hoped would give evidence in support of her petition. She also identified difficulties she had experienced in securing the cooperation of a number of those witnesses. She also complained that a number of email requests from Mr Corbett to Ms Schaaf and Mr Tu'utafaiva for copies of Dr 'Eke's discovered documents had not been fulfilled. Pursuant to rule 16(3) of the *Electoral Petition Rules*, copies of those documents were required to be served with the list of documents. However, on 17 May 2022, a number of those documents were produced including by way of exhibits to Dr 'Eke's affidavit.
26. Beyond that, it is fair to say that the petitioner's evidence given during further examination in chief by Mr Corbett did not elucidate the issues for consideration

in the proceeding. Rather, the petitioner continued to raise complaints about what she considered to be inconsistencies in information about the actual basis upon which the water tanks were distributed at Ha'utu from various people, by which she seemed to be suggesting some sort of conspiracy against her.

27. Meanwhile, Mr Corbett did not:

- (a) ask Mr Ma'u anything about the email he received from Dr 'Eke which had a list of names on it which Dr 'Eke explained came from the town officer of Ha'utu;
- (b) cause any witness summons or subpoena to be issued for production of any of the documents from MEIDECC about which his client complained; and
- (c) apply for an adjournment or seek any other order in relation to that issue.

28. In answer to Mr Corbett's invitation for the petitioner to give any other evidence, Ms Lauti explained that she visited Elisepa Pilivi at Ha'utu at 5:05pm on 16 May this year with Mr Corbett "to collect evidence". She described Elisepa as the head of the women's group. Relevantly, the petitioner recounted that Elisepa told her that the distribution of the water tanks on the day in question was "not particularly restricted to women only within the group ... there were also other members in the community who received tanks". She then named a number of those other recipients. The petitioner explained that when she was asked Elisepa to testify, she said she couldn't because she'd already been approached by the respondent to testify.

Sifa Malolo

29. The next witness was Sifa Malolo. No affidavit or outline of evidence had been filed for Mr Malolo and he was not the subject of a subpoena. Mr Corbett asked Mr Malolo about his knowledge in relation to the water tanks distributed last year, and specifically about Elisapeta Ngauamo, the person named in paragraph seven of the amended petition. She was Sifa's niece. He said that she told him that the town officer contacted her to create a stand for a tank and that a tank would be brought the next day. He was also asked about a form that Elisapeta was asked to sign but that line of questioning went nowhere. Sifa was not cross-examined.

30. Mr Corbett then closed the petitioner's case.

No case submission

31. Mr Tu'utafaiva applied for the petition to be dismissed on the basis that there was no case to answer. In other words, as he explained, the evidence adduced on behalf of the petitioner had not established that the respondent had given, either directly or indirectly, by himself or by someone else on his behalf, any of the tanks in question. Mr Tu'utafaiva submitted that the only evidence of any relevance to those issues which had been identified was Mr Ma'u who confirmed the receipt of the request from Dr 'Eke through the Chinese Embassy for tanks for the people listed from Ha'utu. Otherwise, there was no other evidence, Mr Tu'utafaiva submitted, of Dr 'Eke being involved with anything to do with the decisions or the distribution of the water tanks in question. Mr Tu'utafaiva emphasised that Mr Ma'u's evidence was that there had been many other requests for the tanks at the time and all of them were processed in the same manner by the water tank team and in accordance with the relevant criteria.
32. In response to the application to dismiss the petition, Mr Corbett referred to what he described as the respondent's admission in his affidavit about making the request and that because that request had been made within three months of the election, ss 21(3) of the Act deemed the request to have been a bribe, and that therefore the onus of proof that it was not bribery was on Dr 'Eke.
33. When I then asked Mr Corbett what evidence I had before me that Dr 'Eke had given (in the extended meaning of that term provided in s 21) any of the tanks, he was unable to answer. He then revealed that he had intended to rely on the respondent's affidavit in support of his case and that he hoped that when he cross-examined Dr 'Eke and his witnesses, some further evidence from them might support the petitioner's case.
34. It was clear that the petitioner had failed to discharge the prima facie onus of establishing any form of giving by Dr 'Eke. Nonetheless, in order to afford the petitioner the fullest opportunity to present her case at trial, I reluctantly declined Mr Tu'utafaiva's application and permitted the trial to continue.

Respondent's evidence

35. When the case resumed after lunch that day, Mr Tu'utafaiva called Dr 'Eke.

Dr 'Eke

36. Dr 'Eke confirmed the contents of his affidavit. It will suffice for the purposes of these reasons to summarise the contents of his affidavit. I pass over the preliminary matters stated in relation to Dr 'Eke's background, qualifications and experience and proceed to the matters at hand:

"[7] Because of the position I've held in society and my involvement in various body in government I am approached a lot of the time by the community, schools or related groups and church groups to assist them with their request for humanitarian and development projects."

37. He then gave examples of that assistance to others and a number of documents were exhibited to his affidavits evidencing that assistance to various groups. Dr 'Eke continued:

[10] On the night of 13 October 2021, I visited the hall of the Ha'utu Wesleyan Church to participate in a kava party. It was probably around 9pm as I was working in Nuku'alofa and finished late. I was surprised to see women at the hall who wanted to talk to me. They conveyed their wish by their secretary Henlietta Aliko for me to ask about water tanks that they had sought from MEIDECC and aid agencies as other villages had received their water tanks and they have yet to receive water tanks.

[11] I understood that they had sought assistance from the Mordi Tonga Trust but anyone who wanted to have a water tank had to pay \$500 to the Mordi Trust. I understood that they had not been successful in obtaining water tanks. I was informed that this was a pressing need for the community as there had been a cyclone previously, there was a lack of rain and rainwater was really needed for drinking. As I understood that, this was an urgent need. I said I would try and convey their request and for them to pray for the effort. In addition to the need, I felt it was important for people to have access to water for sanitation purposes should the Covid-19 pandemic arrive in Tonga.

[12] After the speech by Henlietta Aliko, the town officer Siosiu Malolo and Amini Fonua gave a speech I understood that the town officer had given a list of those who needed water tanks in the village to MEIDECC. He had also raised the need for water tanks to their member of parliament in her annual visit but had not received any. The town officer told me that the people in the village of Fahefa had already received some water tanks. He also said that they were asking him [that is, the town officer] for help. He also said that they were asking for my help as I knew about government process and donors.

[13] On 15 October 2021, I received the list and I forwarded the list on 18 October 2021 to MEIDECC. I did not receive a response from MEIDECC then. The women from Ha'utu had also wanted me to contact the aid bodies to convey their wish for water tanks. [A copy of that email was exhibited.]

[14] On 22 October 2021, I went to the Chinese Embassy and made the request as I understood that they were providing the funds for water tanks as Chinese government aid to support the government's request for funding of the national water tanks project launched in 2020.

[15] I took the list of 20 people including eight on the list of 15 people conveyed by the town officer These are the people who made previous requests but did not receive any and others who did not receive any water tanks but really needed one. These are people who approached me for assistance in sending their need for water tanks to the appropriate authorities. I did not approach them nor did I authorise to get them water tanks.

[16] The Chinese Embassy informed me during the visit that their involvement in the project is funding support but the consideration and distribution to the communities under the project is the responsibility of the Tongan government. The work was administered by MEIDECC and they have their own criteria for determining the eligible recipients.

[Dr 'Eke exhibited a copy of the list to the embassy to his affidavit which also include people from villages within Tongatapu 5 and 6.]

[17] At a later stage, around the first week of November, I was contacted by a MEIDECC employee, Makaleta Moala, saying that they received the list and that there is a policy to considering all applications for water tanks and the list would go through the same screening process. I was not further involved in the decision making about the water tank distribution.

....

[25] In relation to the Chinese embassy, I visited it and had previous requests to them on behalf of the community groups. I do not have any influence in what they do. Similarly, I do not have any involvement with any water tank company who supplied the water tanks on behalf of the government. Lastly, I only sent the request to MEIDECC and I was not part of the previous government."

38. During cross-examination, Mr Corbett began to ask Dr 'Eke about the money claim. Mr Tu'utafaiva objected on the basis of my previous ruling that that claim did not form part of the issues for consideration or determination at trial. Mr Corbett then said that he wanted to pursue the issue as a matter of credit. He was permitted to do so on that basis.
39. Dr 'Eke admitted that he gave \$200 to the women's group the night of the kava party. When he was asked why he gave the money, he said that he was

'shocked' that they were all waiting for him after he had arrived late and that it was a contribution to the community for them being there waiting for him, and that it was for charitable purposes which he believed was allowed under the electoral rules. He denied that the money formed part of his campaign spending.

40. I pause there to note that the explanation given by Dr 'Eke in cross-examination was virtually identical to his written response to the money claim when it was first included in the original petition.
41. He was also asked about the documents that the petitioner had been complaining had not been provided to her by Dr 'Eke or his counsel. It transpired that after a comparison between Dr 'Eke's list of discovered documents and those Dr 'Eke had actually exhibited to his affidavit for trial, that all but one had been included. That one email was produced by Dr 'Eke from his documents whilst in the witness box and provided to Mr Corbett. That was the email to MEIDECC with the list on it. That also turned out to be little more than Dr 'Eke forwarding to MEIDECC the email he received from the town officer with the names of the 15 villagers who were seeking water tanks.
42. Mr Corbett put to Dr 'Eke that his "involvement in the water tank project close to the election was to buy votes". Dr 'Eke denied the suggestion and reiterated that he had only passed on the request from the town officer for the tanks and that he had no discretion or involvement in the decision-making process as to who received tanks on the 17th of November. He also added that he was conscious that there was a risk that if any of the persons who asked him to pass on their request did not in fact get tanks, they "might have been angry with him".

Siosiu Fonua

43. Siosiu Fonua is the town officer for Ha'utu. In his affidavit, Siosiu explained how he passed on the list of names to Dr 'Eke just as Dr 'Eke had testified. His evidence was undamaged in cross-examination. He was asked from the Bench over what period of time he, as the town officer, had been approaching various groups and government agencies, and the like, trying to secure water tanks for his village. He said it had been about a year and a half. He was asked why he had not asked the petitioner for similar assistance. He said she had not visited

the village. Siosuia was not challenged on that evidence. Mr Corbett asked Siosuia why he had not asked one of the other candidates, Malia Takai, for similar assistance. Siosuia responded that he had not had any opportunities to speak to Malia. When asked why he approached Dr 'Eke on this matter, Siosuia said it was because Dr 'Eke visited their town during his campaign on 13 October and that Dr 'Eke had spoken to him and the women's group and agreed to try and assist by passing through their request.

44. Siosuia confirmed that on the day in question, MEIDECC personnel were responsible for the distributions. They came beforehand and conducted a survey of the village by reference to their list and the criteria by which the applicants for tanks were assessed. Only those who met the criteria received tanks that day. Some on the list that he had given did not receive tanks, including himself. From the list he emailed Dr 'Eke, only 11 out of 15 received tanks. He understood that the four who missed out on that round did not meet the criteria. During the process of distribution, he followed the MEIDECC team around as they distributed each tank. He described each of the recipients as being happy and that they, including Henlietta Aliko, the secretary of the women's group, "thanked the government". There was no mention of Dr 'Eke to or by any of them.

Henlietta Aliko

45. Henlietta Aliko deposed to the following. As noted, she was the secretary of the Ha'utu women's group which comprised approximately 35 members. The purpose of the group was to work together for the development of the village. The group was not registered, but it was started by the village committee. They did not have their own funds, but they did cash collections when they needed funds for the work of the group. On the evening of 13 October 2021, over 10 members of the women's group were present at the Ha'utu hall with others including the wife of the Wesleyan Church Minister. They did not know that Dr 'Eke would visit the hall that evening. At the hall, they heard the members preparing kava to wait for Dr 'Eke. She told the women that they should remain at the hall to wait for Dr 'Eke so that they could seek his help in relation to water tanks. She welcomed Dr 'Eke when he arrived. They requested his help to find a way to get water tanks to the families of the village. It was a pressing need

and they had tried to get tanks for many years, but with no result. They sought help from the government and the Mordi Tonga Trust which wanted people to pay a contribution of \$500 and not all the members could pay that sum. When they asked Dr 'Eke for help, they did not do so in return for them voting for him. They simply felt that he was the "correct person" from whom to seek help. He told them that he would try and for them to pray for him in the task. Dr 'Eke did not return after that visit and there were no further meetings with him before the election. She confirmed the distribution of the tanks on the 17 November.

46. In cross-examination, Henlietta explained that she considered that Dr 'Eke was "easy to approach" because she is a member of a weaving group that included Dr 'Eke's mother-in-law. She also said that she had asked Losaline, the then MP, and others in relation to tanks.
47. On the pivotal issue of whether the request for Dr 'Eke's assistance had anything to do with being induced to vote for him in the election, Henlietta volunteered that not only was she was not a supporter of Dr 'Eke, she had in fact voted for the petitioner.

Tevita Kaufana

48. At that point, Mr Tu'utafaiva indicated that his client was no longer relying on the affidavits filed by the remaining two witnesses, Tevita Kaufana and Elisapeta Ngauamo. However, he also acknowledged that he had not informed Mr Corbett until then. Meanwhile, Mr Corbett had opened his case in the expectation that he would be entitled to cross-examine those witnesses and he had given prior notice of the intention to do so. It so happened that Tevita Kaufana was waiting outside court. As a matter of fairness to Mr Corbett, I directed that Tevita be called.
49. Notwithstanding that Mr Tu'utafaiva no longer relied on Tevita's affidavit, Mr Corbett cross-examined him on it and so it was received in evidence. Tevita confirmed his affidavit, and that he did not receive a tank on the day in question. Mr Corbett asked Tevita about the allegations attributed to him in the amended petition in relation to the tanks. He was asked whether he ever told the petitioner that there was a vehicle driving along Vuna Road with water tanks on it and that one of the passengers, an unidentified Ha'utu male, said to Tevita

that the tanks were to be distributed in the name of Dr 'Eke. That, in fact, was not a faithful recitation of what was alleged in the petition. In any event, Tevita said that he knew nothing about that and that he gave an affidavit in support of Dr 'Eke's case in this proceeding because "it was the truth". That affidavit denied any of the allegations that are attributed to him. He did confirm that he was selling watermelons on the side of Vuna Road on the day in question but he was quick to explain he had no time to worry about stopping some vehicle with water tanks and he wasn't interested in it.

50. Tevita was then asked about his discussions with the petitioner herself. He recalled that she came and asked him to be a witness. He told her that he did not want to be involved in any political matters or anything that was not true or correct. When asked about the evidence the petitioner had asked Tevita to give, he said that the petitioner said to him: "*Did you not see the respondent giving money and tanks?*". Tevita confirmed he knew nothing of that and he did not want to waste time "looking for things like that".

Elisapeta Ngauamo

51. The final witness to be called was Elisapeta Ngauamo. I had directed at the close of the first day of the trial that notwithstanding the 'Eke camp no longer wanting to rely on Elisapeta's affidavit, as a matter of fairness to Mr Corbett and the petitioner, Elisapeta would be required to attend court the next morning.
52. When she was called, Elisapeta did not appear. Mr Tu'utafaiva explained that 'Elisapeta had recently given birth and that her baby was sick. He repeated that he was not relying on her affidavit. Mr Corbett accepted Mr Tu'utafaiva's explanation and let that matter rest.
53. That was the end of the evidence.

Submissions

Respondent

54. Mr Tu'utafaiva referred to the written submission which had been filed on 17 May 2022 by Ms Schaaf on behalf of Dr 'Eke. It is unnecessary to go into the details of those submissions because Mr Tu'utafaiva's real point was that the petitioner's case had not improved with the cross-examination of any of Dr 'Eke

or his witnesses and there was still no evidence on the real issue, namely, whether the petitioner had established that Dr 'Eke had given, directly or indirectly, by himself by another on his behalf, the water tanks in question. Mr Tu'utafaiva again reiterated that the only evidence was that Dr 'Eke passed on the request of the town officer and the women's group to MEIDECC and the Chinese Embassy. That, he submitted, could not be construed as giving the tanks in any form and therefore could not be considered to give evidence of bribery. Moreover, there was no evidence whatsoever that any of the tanks had been given to any of the recipients on behalf of Dr 'Eke whether to induce them to vote for him or otherwise.

Petitioner – withdrawal of allotment the water tank claims

55. Mr Corbett provided written closing submissions and spoke to them. They were in two parts. In the first, Mr Corbett conceded that, in relation to the four water tank claims, the sole subject of the amended petition, there was no evidence to establish giving by or behalf of Dr 'Eke. On that basis, Mr Corbett, on behalf of his client, withdrew those claims in the proceeding.

56. But that was not the end of the matter.

Purported resurrection of the money claim

57. The balance (in fact, the majority) of Mr Corbett's closing submissions were dedicated to the money claim which I had previously ruled was excluded from consideration at trial. At paragraph 7 of his written submissions, Mr Corbett stated that "[d]uring cross-examination of the respondent to test his credibility questions were put". He then set out a summary of the evidence about the money that Dr 'Eke admitted he had given to the women's group. The balance of the submissions did not reflect the permitted purpose for cross-examination about that issue which was claimed to be as to credit. Instead, Mr Corbett advanced what was simply a repeat of the money claim from the original petition as a purported additional allegation of bribery.

58. After lengthy exchanges with him about the fact that he had made those submissions in defiance of the ruling I gave at the outset of the trial, Mr Corbett eventually explained that he had been instructed to include the money claim in his closing submissions for the purposes of an appeal against my ruling

excluding the money claim.

59. Mr Corbett was then referred to the recent decision in *Piukala v Saulala* (CV 74 of 2021, 2 May 2022) in which a similar issue arose involving the petitioner there seeking to add an additional claim of bribery at the commencement of the trial. Mr Corbett was not familiar with the decision and so the matter was stood down to enable him and his client to consider it and their position further.
60. When the matter resumed, Mr Corbett continued to advance the money claim and referred to a few passages from the *Piukala* decision. He tacitly conceded that the reasoning in that decision did not assist him in relation to his repeated attempt to have the money claim heard and determined in this case. He then repeated his reliance upon s. 35 of the Act to which I have already referred.
61. Mr Corbett admitted that the course he and his client had undertaken was procedurally unfair and prejudiced Dr 'Eke and his counsel in the preparation and presentation of their case at trial. He then suggested that the trial be adjourned for that additional claim to be dealt with. Again, I referred him to the same consideration which was discussed in *Piukala v Saulala* decision to which I will turn shortly.

Consideration

62. Notwithstanding the withdrawal of the water tank claims, for reasons which will become apparent in due course, I now set out the legal principles relevant to a claim of this kind as recently discussed in *Piukala v Saulala*, *ibid*, and *Sika v Fasi* [2022] TOSC 17.¹ For the purposes of this case, it is sufficient to refer to but a few of those principles derived largely from a comprehensive survey by Chief Justice Paulsen in the decision of *Latu v Lavulavu* [2016] TOSC 5:
 - (a) Any person who directly or indirectly by himself or by any other person on his behalf gives any money or valuable gifts to or for any elector or to or for any other person on behalf of any elector to or for any other person in order to induce any elector to vote or refrain from voting commits the offence of bribery pursuant to ss 21(1)(a).
 - (b) Pursuant to subsection 2, giving money or a valuable gift includes giving,

¹ CV 78 of 2021 (15 April 2022).

lending, agreeing to give or lend, offering, promising or promising to procure or trying to procure any money or valuable gift.

- (c) The words “in order to induce any elector to vote or refrain from voting” in ss 21(1)(a) are directed to actions taken to influence an elector or electors in the exercise of their voting rights. It is not necessary to prove that such actions did in fact produce any effect on the election.
 - (d) Any money or valuable gift, given or offered agreed to be given in the absence of good consideration to any person within three months of any election by or on behalf of the 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 (ss 21(3)).
 - (e) The legal onus of proving his challenge is on a petitioner. To discharge that onus, the petitioner bears the evidentiary burden of proving that a gift was made and that it was made for the purpose of influencing the vote. Any gift made beyond three months prior to the election is presumed innocent until a petitioner proves otherwise. However, once a petitioner establishes that a gift was made within three months prior to the election, the rebuttable presumption created by the deeming provision in ss 21(3) has the effect of satisfying the petitioner’s burden of proving the second element that the gift was made for the purpose of influencing the vote. The burden of proof then shifts to the respondent to establish the contrary, that is, that the gift was innocent.
 - (f) A candidate for election may make a payment or valuable gift for mixed motives. He may, for instance, make a gift for charitable purposes. There is nothing wrong with that. But he may also make a gift to buy votes. That is bribery. There is no requirement that a wrong motive must be the dominant one. It is sufficient for the purposes of s 21 if one significant motive was to influence the vote.
63. As mentioned, in *Piukala v Saulala*, a late application to amend by the addition of an extra claim of bribery was considered. Mr Piukala also relied on s 35 of the Act as a basis for permitting that late amendment. Order 14 of the *Electoral Petition Rules* provides, relevantly:

- (a) an election petition may be amended without leave of the court after it is filed and before it is served but only with leave from the court after it is served;
 - (b) Order 8 rule 7(4) and (5) of the Supreme Court Rules are not to apply to amendments to any documents filed in election petition proceedings; and
 - (c) where leave is granted to make an amendment, the respondent is to be given such time to respond to the amendments as the court may allow.
64. The approach to be taken to the exercise of discretion and determination of an application to amend is informed by the following statements of principle which are repeated from the *Piukala* decision.
65. In *Cropper v Smith* (1884) 26 Ch D 700 at 710-711, Bowen LJ opined:
- "[T]he object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party ... as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."*
66. The relation of rules of practice to the work of justice has been described as that of 'handmaid rather than mistress' and the court ought not be so far bound and tied by rules as to be compelled to do what will cause injustice in the particular case: *Re Coles and Ravenshar* [1907] 1 KB 1, 4 per Collins MR.
67. Similarly, and as a general proposition, amendments should be allowed, even mid-trial, if they are in the interests of justice and would enable proper determination of the issues in the case: *Taumoepeau v Pohiva* [1994] Tonga LR 12.
68. "In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties ... What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.":

Sali v SPC Limited [1993] HCA 47; (1993) 67 ALJR 841 at 843-844; 116 ALR 625 at 629 per Brennan, Deane and McHugh JJ.

69. However, in *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 154, the High Court said of the above statement in *Sali* that:

"... nothing in that case suggests that those principles might be employed, except perhaps in extreme circumstances, to shut a party out from litigating an issue which is fairly arguable. Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim."

And further, at 155:

"Justice is the paramount consideration in determining an application such as the one in question. Save in so far as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties."

70. The plurality in *JL Holdings* provided the following guiding principles (citations omitted), in summary:
- (a) No rigid pronouncements can be made of the way in which a discretion to permit an amendment of pleadings should be exercised.
 - (b) The basic principle controlling the exercise of a power granted by statute, or under the authority of statute, is that the power must be exercised for the purpose for which it was afforded by the legislature. In the case of Rules of Court, it may be assumed that the power was granted out of the recognition of the traditional role of the judges to do justice according to law.
71. Case management is now regarded as a necessary and orthodox part of the judicial function to provide more effective management of litigation and to avoid accumulating delays which may occasion serious injustices and to respond to ever increasing caseloads without the benefit of commensurate increases in judicial numbers and resources.
72. Considerations which may tend to favour the extension of an indulgence to a party applying for it include:
- (a) it is the only way in which the true issues and the real merits, factual and

legal, can be litigated and artificiality avoided;

- (b) the oversight which occurred is adequately explained as, for example, that it arose out of sudden and unexpected events;
- (c) the proposed amendment is of considerable importance to the rights of a party, particularly where it provides a complete answer to a claim;
- (d) any fault is that of the party's legal representatives;
- (e) the oversight was wholly accidental or was simply the product of unavoidable human error or, possibly, the outcome of the application to the case of fresh legal minds who perceived an important new point;
- (f) cost orders or the imposition of other conditions could adequately rebalance the competing claims to justice;
- (g) the hearing date is sufficiently in the future to permit a party to meet the amendment, taking into account any consequences for the gathering of fresh evidence, the conduct of discovery or like pre-trial procedures and the loss of assigned hearing dates;
- (h) departures from a court ordered timetable, whilst relevant, are not decisive. Such orders are the servants of justice. They are designed to enhance its achievement in a way that an inflexible application of rigid rules could prevent.

73. Considerations which tend to argue against the grant of an indulgence include many which are the counterparts of the foregoing such as:

- (a) the failure of a party to offer anything by way of explanation for a late application has been held relevant;
- (b) the blamelessness of the resisting party and the extent to which the applicant is at fault in its breach of clear directions;
- (c) the strain which litigation may place upon those involved and the natural desire of most litigants to be freed, as quickly as possible, from the anxiety, distraction and disruption which litigation causes;
- (d) just as justice cannot be measured solely in monetary terms, costs orders are not necessarily an adequate balm to the other party; the proximity of the hearing is a most important consideration;
- (e) an opposing party is entitled to have taken into account the consequences of an indulgence, especially where it would cause disarray at the last minute to its preparation of the trial;
- (f) the length of time that the proceedings have been pending before the

application is made;

- (g) if a consequence of the indulgence is truly a necessity to postpone a trial date, this will be a most important consideration. Its importance increases with the congestion of court lists and the difficulty, particularly in the case of a lengthy trial, of securing early replacement dates;
 - (h) the extent to which a new issue would give rise to a substantial and new case in reply is also relevant;
 - (i) the nature of the litigation and whether it has been assigned to a special list designed to cater for the peculiarities and special needs of commercial cases, long trials and the like;
 - (j) the risks of "litigation abuse" by which some litigants seek, at all costs, to avoid firm hearing times. Courts are entitled to react unfavourably to repeated default on the part of a litigant whose conduct has the effect of frustrating a proper timetable fixed for the trial;
 - (k) justice will not necessarily require that a party should have multiple opportunities to plead and present its case;
 - (l) a court must accord justice to the particular litigant, but it must also maintain its responsible use of scarce public resources and consider, in a general way, the impact which its orders have on other litigants and on the public generally.
74. Whilst taking all of the considerations relevant to the circumstances of the case into account, the judge must always be careful to retain that flexibility which is the hallmark of justice. "A judge who ignores the modern imperatives of the efficient conduct of litigation may unconsciously work an injustice on one of the parties, or litigants generally, and on the public. But a judge who applies case management rules too rigidly may ignore the fallible world in which legal disputes arise and in which they must be resolved."
75. Even though case management principles 'should not supplant the objective of doing justice between the parties according to law', 'waste of public resources and undue delay, with the concomitant strain and uncertainty imposed on litigants', are to be taken into account. 'Also to be considered is the potential for loss of public confidence in the legal system which arises where a court is seen to accede to applications made without adequate explanation or justification, whether they be for adjournment, for amendments giving rise to adjournment, or

for vacation of fixed trial dates resulting in the resetting of interlocutory processes': *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 at [30].

76. As noted, the explanation for a late application to amend is important in the exercise of the discretion. Here, as mentioned above, Mr Corbett's explanation for the petitioner's attempt to have the claim from the original petition included in the case for trial was, in my view, entirely unsatisfactory.
77. Mr Corbett acknowledged that the procedure by which that attempt was undertaken was unacceptable and not in accordance with appropriate procedures in any civil litigation including electoral petitions. It so happened that Mr Tu'utafaiva stated that he had not read the petitioner's "response to the Respondent's response" document in detail and only became aware of the attempt on the night before the trial. Nonetheless, as he had already indicated, he and his client had prepared for trial solely on the basis of the claims in the amended petition. In my view, they were perfectly entitled to do so.
78. There had been no leave given by Niu J in relation to the application to amend nor was there any application to further amend the amended petition to bring back in the money claim. When I say 'bring back in', it was in fact not in identical terms to that originally pleaded. The first claim involving the water tanks in the original petition was said by Mr Corbett to have been included in the amended petition. However, again, when one compares the details of the first claim in the original petition with the first claim in the amended petition, there are numerous and significant differences. More importantly, there is no mention at all of the money claim in the amended petition.
79. Mr Corbett's suggested panacea for the problem of an adjournment of the trial, was also addressed in *Piukala v Saulala* as follows:

"[20] In the ordinary case, and consistent with the above principles, any significant amendment to a pleaded case during trial will very often necessitate an adjournment of the trial to ensure fairness to the parties affected by the amendment. Section 31(2) provides that the court may in its discretion adjourn the trial from time to time but the trial shall so far as it is practicable and consistent with the interests of justice in respect of the trial be continued from day to day on every day until its conclusion.

[21] However, as that provision of the Act and its rules plainly suggest, election petition cases are not ordinary cases.

[22] Section 31(4) of the Act confers on the court's discretion to enquire into and adjudicate on any matter relating to the petition in such manner as it thinks fit. To that end, s 35 provides that on the trial of an election petition, the Court is to be guided by the substantive merit and justice of the case without regard to legal form or technicality and may receive ordinarily inadmissible evidence if that evidence may assist to deal effectively with the case.

[23] In my opinion, the latitude of those statutory directives ought not be interpreted as permitting negation or diminution of any of the fundamental characteristics of the just trial or any action which include, at a minimum, natural justice and procedural fairness. The latter includes that, prior to trial, the parties know the case they have to meet.

[24] Section 27(1) requires an election petition presented within 28 days after the result of the poll has been declared. Section 26(3) requires that a petition state the matters prescribed the rules. Rule 10(1) requires the petition to state the full details of the grounds and the facts on which the petitioner disputes the election.

[25] As of the date this matter was set down for trial, the ambit of the issues in dispute (the four claims referred to above), that is, the case for trial, had been defined by the Petition and the Response. It was in respect of those issues that the parties were required to prepare (and in the case of the Respondent, at least, had prepared) and present their cases for trial.

[26] On their proper interpretation of s 31 and/or 35 do not automatically permit any additional discrete claims to be injected into a proceeding late in the piece and without any clear notice to an opposite party in advance that those claims are intended to form part of the overall issues for determination. That is particularly so given that success on any one claim will invalidate [the respondent's] election.

[27] Further, and perhaps most importantly rule 17(2)(c) requires the trial of an election petition to commence not more than three months from the date the petition is filed unless extended by special leave of the Court. Since 15 January 2022, the Kingdom had suffered unprecedented major disruptions as a result of a volcanic eruption consequent tsunami and widespread damage including internet outage for the following months. In addition, since the beginning of February 2022, after almost two years of isolation from the Covid-19 pandemic, the Kingdom is now grappling with the incursion and rapid spread of the virus within the community. While the resulting delays are not in any way attributable to [the petitioner here] or the conduct of his case, they have meant that the prescribed three-month period had already elapsed by the time this trial was able to commence.

[28] Provisions such as ss 27(1) and rule 17(2)(c) serve a critically important purpose. They are plainly intended to ensure that the outcome of an election can be known with certainty within defined and relatively short timeframes. Thus, the longer the period between an election and the determination of election petitions challenging the result of the election, the greater the risk of uncertainty in the relevant electorate and within Parliament. ...

[29] In my view, those considerations weigh heavily in the exercise of discretion on an application to amend during the trial of a case of this kind. Had the application to [further] amend [the amended petition] been allowed, the resulting delays occasioned by a necessary adjournment of the trial part-heard and then revised pleadings, possible further discovery and the filing of additional affidavit material, combined with the Court's current trial listings for many other cases, would likely have resulted in the determination of this petition being further delayed by another five or six months. Such an outcome, regardless of the fate of the petition (or any appeals from the decision on it) would be contrary to the evident intent and temporal imperative and the Act and the Rules, and the necessity for certainty within Parliament as soon as practicable following a general election."

80. In the instant case, the real vice was the manner of which the petitioner went about trying to include or revive the money claim in the claims for trial. In the *Piukala* case, Mr Piukala was not a lawyer. Therefore, any misunderstandings about directions given or the proper method by which amendments to the petition were to be advanced were far more understandable. Here, the petitioner was legally represented. Mr Corbett informed me that he has been a lawyer for over 25 years and that he knew the correct procedure for any further amendment to the amended petition. His explanation for not having conducted the case in accordance with those known procedures was unsatisfactory.
81. Ultimately, the issue turned on the question of fairness to Dr 'Eke and his legal team, and I ruled originally on the basis that to allow the money claim in the manner in which it was purported to be included was unfair.
82. But even if I am wrong about that, and even if, as Mr Corbett contended, s 35 of the Act ought be interpreted:
- (a) to absolve the petitioner and his counsel here from the manner in which the money claim was purported to be included;
 - (b) as forgiving any form of erroneous preparation of court documents with incomplete, inaccurate and arguably misleading information given in those documents; and
 - (c) to extend to a failure to observe known procedures for applying for leave to amend documents in the proper manner,

in this case, the only 'evidence' concerning the \$200 given by Dr 'Eke was from his own response to the original petition, upon which Mr Corbett sought to rely, and Dr 'Eke's admission in cross-examination to giving the money.

83. However, Dr 'Eke also explained the purpose of giving the money to the women's group: he felt sorry for them waiting around to speak to him about the water tanks and it was also a charitable gift to assist their community work. Mr Corbett did not challenge Dr 'Eke's evidence in that regard, nor did he seek to contradict it with any other evidence.
84. Further, in his written submissions, Mr Corbett made no reference to that evidence. In his oral submissions (and again after the matter was stood down for him to take instructions) Mr Corbett submitted that:
- (a) the money had been given by Dr 'Eke during his visit to Ha'utu which occurred during his campaign;
 - (b) the women's group had not requested any charitable donation;
 - (c) no documents were produced to evidence the fact that the women's group at Ha'utu was a charitable organisation - It will be recalled that Henlietta deposed that the women's group was not registered, that it did not have its own funds and that the members performed their work through contributions;
 - (d) the evidence of Henlietta included that out of the money given by Dr 'Eke, she received \$20 with which she purchased some bread - Dr 'Eke was not asked about that, nor could he reasonably be expected to know what the group did with his donation;
 - (e) the tanks were from MEIDECC and the Chinese Embassy; and
 - (f) the women's group was funded by government and the Ministry of Internal Affairs.
85. When asked to explain the relevance of those last two propositions, Mr Corbett conceded that they were irrelevant.
86. In reply, Mr Tu'utafaiva opposed the renewed application for what he described as "the revival of the money claim". He reiterated that his client came to court to answer the amended petition and otherwise referred to the ruling made against

it at the outset of the trial.

87. On the available evidence before me, the money was given for a charitable purpose. By operation of ss 21(3) of the Act, because the money was given within three months of the election, it would be deemed to be a bribe unless Dr 'Eke could prove to the contrary. Dr 'Eke proved to the contrary without any challenge or contradictory evidence that his gift was for a charitable purpose. I see no basis for not accepting his evidence. In that regard, in his oral submissions, Mr Corbett accepted that Dr 'Eke was an honest witness.
88. Therefore, on that alternative analysis, even if the money claim ought to have been included in this case, I find that Dr 'Eke has demonstrated that the money was given for an innocent purpose.
89. Accordingly, and on that basis, that claim too is dismissed.

Result

90. Overall, the result is that:
- (a) the four water tank claims, the subject of the amended petition, were withdrawn by the petitioner before judgment;
 - (b) the additional money claim was excluded from the trial; and
 - (c) even if the money claim ought to have been included, then on the evidence, it failed and is dismissed.
91. The petitioner is to pay the respondent's costs of the proceeding to be taxed in default of agreement.

NUKU'ALOFA
20 May 2022



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

M. H. Whitten QC
LORD CHIEF JUSTICE