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

CV 73 of 2021

IN THE MATTER OF:        an election petition pursuant to Part V of the Electoral Act

BETWEEN:

**KAPELIELI MILITONI LANUMATA**

Petitioner

-and-

**POHIVA TU'I'ONETOA**

Respondent

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## JUDGMENT

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BEFORE:                LORD CHIEF JUSTICE WHITTEN QC

Appearances:        Mr D. Corbett for the Petitioner

                              Mr W.C. Edwards SC for the Respondent

Trial:                    25 to 27 May 2022

Judgment:            27 May 2022 (ex tempore)

### INTRODUCTION

1. At the general election on 18 November 2021, the Respondent in this proceeding, Dr Tu'i'onetoa, was re-elected as the representative of the Tongatapu 10 constituency. The petitioner, Mr Lanumata, was one of the unsuccessful candidates.
2. On 16 December 2021, Mr Lanumata filed an election petition pursuant to the Part V of the *Electoral Act* ("**the Act**") by which he seeks a declaration that the election of the Respondent is void due to three contraventions of ss 21(1) of the Act, namely, acts of bribery.
3. At the conclusion of the trial, I delivered judgment ex tempore. The following is from the transcript of the reasons for judgment, edited only as to form, not substance.

**PROCEDURAL HISTORY**

4. The original petition specified three claims. The first involved the giving of \$50 by the Respondent's wife, Mrs Henah Tu'i'onetoa, to a man by the name of Ringo Halafihi who was dancing at a barbeque on a Saturday afternoon some weeks before the general election. The second claim involved an allegation that on 17 November 2021, the day before the election, a man by the name of Tipiloma Lauaki, and three other men, were told by the Respondent to pick up water tanks for their personal use from his residence. The third claim alleged that on the day of the election, the district officer told an elector by the name of Lu'isa Latu to vote for the Respondent, which was said to be a breach of ss 23(1)(a) of the Act.
5. In his Response to the original petition, the Respondent denied each of the allegations.
6. The case was allocated to Judge Cooper and His Honour listed the trial initially to commence on 11 April this year. At the time, Judge Cooper was also managing another election petition against the Respondent in the matter of *Kiu v Tu'i'onetoa* (CV 75/2021).
7. On 6 April 2022, the petitioner in this proceeding applied for leave to amend the petition by adding additional claims, namely, another allegation that the district officer told another elector to vote for the Respondent on the day of the election and three additional claims of bribery involving:
  - (a) a promise by the then Minister of Finance, Mr Lavemaau, on behalf of the Respondent, to give \$50,000 to the women's group or committee of Tongatapu 10;
  - (b) that at the opening of the wharf last year, the Respondent directly asked the attendees for their votes; and
  - (c) the Respondent using his position as Prime Minister at the time to influence a roads project being conducted throughout the Kingdom in the lead up to the election so as to favour Tongatapu 10, in particular, the community of Lapaha, thereby inducing them to vote for him.
8. On 11 April 2022, Cooper J granted leave to amend the petition. His Honour also noted in the directions filed that day that due to his other work commitments, this

case was to be referred to Judge Niu. At the time, no issue was raised about that by Counsel for any of the parties.

9. On 14 April 2022, Niu J listed the trial to commence on the 2 May 2022. On that day, Mr Edwards was ill, and the trial was vacated, and the matter re-listed before Niu J for directions at a later date. However, as his Honour was due to take leave, the matter was transferred to me.
10. During a directions hearing on 12 May 2022, I raised with counsel concerns about the fact that the newly added claims involving the \$50,000 and the events at the opening of the wharf had also been the subject of the *Kiu* proceeding. That case had been heard and decided by Judge Cooper on 29 April 2022. His Honour dismissed the claim involving the events at the opening of the wharf but upheld the claim of bribery involving the \$50,000 and thereby certified, pursuant to the Act, that the Respondent's election was void. Counsel were directed to confer on the issue and determine whether this proceeding should continue to include those other claims which had already been determined. Further, and cognizant of the requirement under the Election Petition rules for the trial to be set down within three months of the date of petition (which had not been possible due to the volcanic eruption and tsunami on 15 January 0222 and further disruptions caused by Covid-19), I directed that the trial commence on 23 May 2022.
11. On 18 May 2022, counsel filed a joint memorandum in which they agreed that only three of the claims in the amended petition would proceed to trial and that the others were formally withdrawn. The continuing claims of alleged bribery were:
  - (a) Mrs Tu'i'onetoa gift of \$50.00 to a dancer ("***the fakapale claim***");
  - (b) the giving of a water tank to Maka Fotu ("***the water tank claim***"); and
  - (c) the Respondent's misuse of his then position as Prime Minister to grant favour for Tongatapu 10 in relation to the roads project ("***the roadworks claim***").
12. On 23 May 2022, Mr Corbett applied to adjourn the trial because he and his client did not consider that they were ready to proceed. That application was determined by adjourning the commencement of the trial to 25 May.

13. However, Mr Edwards also filed a memorandum in which he raised s. 28 of the Act which provides that where more than one petition is presented in relation to the same election or result, all those petitions shall be dealt with as one petition. His concern was that Judge Cooper should have heard and determined both petitions at the same time. Mr Edwards' concern was well-founded. However, as noted, no party or their counsel raised with Judge Cooper at the time the requirement of s. 28 when he directed that this matter be referred to Judge Niu. In any event, given counsels' agreement that the only claims going forward in this proceeding were discrete to Mr Lanumata's petition and did not involve any of the claims which had been dealt with in the Kiu proceeding, Mr Edwards agreed that there no prejudice had been occasioned to his client and that therefore no further action was required in relation to his memorandum.
14. And so, the trial proper commenced on 25 May 2022.

#### **LEGAL PRINCIPLES**

15. Before turning to each of the three claims, the evidence adduced in respect of them, the submissions by counsel and my consideration of them, I will first set out a summary of the applicable legal principles as considered in recent decisions on other election petitions including *Piukala v Saulala* (CV 74/2021, 2 May 2022). The principles are largely distilled from the comprehensive survey of the authorities by Paulsen LCJ in *Latu v Lavulavu* [2016] TOSC 5 and may be summarised as follows.
16. Any person who, directly or indirectly, by himself or by any other person on his behalf, gives any money or valuable gift to or for any elector, or to or for any other person on behalf of any elector or to or for any other person, in order to induce any elector to vote or refrain from voting, commits the offence of bribery (s 21(1)(a)).
17. Giving money or a valuable gift includes giving, lending, agreeing to give or lend, offering, promising or promising to procure or try to procure, any money or valuable gift (s 21(2)).
18. The words "in order to induce any elector to vote or refrain from voting" in section 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.<sup>1</sup>

19. Any money or valuable gift given or offered or agreed to be given (in the absence of good consideration) to any person<sup>2</sup> 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 (s 21(3)).
20. The legal onus of proving his challenge is on the 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 the 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 s 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'.<sup>3</sup>
21. It is reasonable to presume that in enacting sections 21(3) and 24 (limits on permitted election expenses), Parliament was aware of, and took into account, any recognized Tongan customs involving the giving of gifts whether by way of assistance to family members, refreshments or as part of recognized rituals or ceremonies. That Parliament nonetheless saw fit to provide that gifts given within three months of an election are deemed to be bribes unless the contrary is proven is a clear reflection of the following cautions cited by Paulsen LCJ in *Latu v Lavulavu* at [42]:<sup>4</sup>

*“What is said in general terms by the Respondent is the cash and other items were handed out in accordance with custom and/or to close family members or supporters. The implication seems to be if ‘gifts’ are handed out for reasons of custom or to family members or supporters they cannot in any circumstances be said to be corruptly given. I do not accept that. The, admittedly obiter, comments*

<sup>1</sup> *Latu v Lavulavu* at [27], citing *Scott v Martin* (1988) 14 NSWLR 663, 670 and *Henslow v Fawcett* (1835) 3 Ad & El 51, 58.

<sup>2</sup> Except those named in section 24(3) which are the giver's 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 or their children, or the brothers and sisters and half-brothers and half-sisters of his spouse or their children.

<sup>3</sup> *Latu v Lavulavu* at [27], citing *Fasi v Pohiva* [1990] Tonga LR 79, 81 per Martin CJ.

<sup>4</sup> From the decision of the Solomon Islands High Court in *Ha'apio v Keniasina* [2011] SBHC 177.

of Ward CJ in *Haomae v. Bartlett* [1988-1989] SILR 35, seem to have been forgotten:

*'In an election, any candidate will be subject to customary pressures to make gifts which he will feel he is obliged to observe. However, the giving of money is always likely to be misconstrued. In this case the sum was not large but, in the context of an old village man who had little other access to cash, its effect could be substantial. No hard and fast rule can be read into the provisions of section 70 but any candidate would be wise to try and avoid any gifts of money during an election campaign and, in all cases where the circumstances of the giving themselves do not do so, he should make it clear that the gift is made in custom and ensure it is appropriate in scale to such gifts.'*"

22. The standard of proof is the civil standard or the balance of probabilities.<sup>5</sup> The standard has been described as a 'flexible test' by which a court will be satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability: *In re H (Minors)* [1996] AC 563 at 586. If the evidence is such that the Court considers that the fact in issue is more probable than not, the burden is discharged. But if the probabilities are equal, it is not.<sup>6</sup> In *Latu v Lavulavu*,<sup>7</sup> it was submitted that 'given the gravity of allegations of bribery, and the very serious consequences that flow from such a finding, the proof required, although on the balance of probabilities, is to a higher level than in the ordinary civil case'.<sup>8</sup> Paulsen LCJ explained that '[t]his does not mean that the standard of proof is any different than in other civil cases. The standard of proof does not fluctuate, rather the quality of the evidence required to meet what is a fixed standard may differ in cogency depending on what is at stake'.<sup>9</sup> Where ss 21(3) has been invoked, the ordinary civil standard of proof, on the balance of probabilities, applies.<sup>10</sup>
23. As it will rarely be acknowledged by a Respondent that he/she gave a payment

<sup>5</sup> *Lavulavu v Latu* [2015] TOCA 13 at [10].

<sup>6</sup> *Miller v Minister of Pensions* [1947] 2 All ER 372, per Denning J.

<sup>7</sup> At [29].

<sup>8</sup> Citing *Fasi v Pohiva*, supra.

<sup>9</sup> Citing *Kalsakau v Principal Electoral Officer* [2013] VUSC 99, Z V *Dental Complaints Assessment Committee* [2009] 1 NZLR 1 at [101] per McGrath J.

<sup>10</sup> *Latu v Lavulavu* at [31], citing *Fusitu'a v Ta'ofi & 'Aho* [1996] Tonga LR 102 at 105.

or valuable gift to buy votes, the existence of such intention will usually only be gathered from acts viewed against all the circumstances of the case. The Court cannot go into any intention of the Respondent nor be dictated by what the Respondent says he/she intended. The determination must be governed by what the Respondent said and did, and by inferences that ought be draw therefrom.<sup>11</sup>

24. The closer that a gift is made to an election, the stronger must be the inference that it is intended to influence the vote of an elector: *Latu v Lavulavu* at [69].<sup>12</sup>
25. 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 will be sufficient for the purposes of section 21(1)(a) if one significant motive was to influence the vote.<sup>13</sup>
26. In an election context, a person may become a candidate's agent by either actual appointment or employment or by recognition and acceptance of their actions by the candidate. In determining whether agency is established all the circumstances should be taken into account. Personal intimacy is evidence of agency. In the case of a candidate's wife, where she concerns herself in her husband's election she is *ipso facto* regarded as his agent and is taken to have acted on his behalf.<sup>14</sup>
27. If an elected candidate is convicted of bribery, whether before or after the relevant election, the Court shall declare the election of that representative to be void, and if/she he has already taken his/her seat in the Legislative Assembly, he/she shall be unseated by the Assembly (ss 21(5) and 32(1)).
28. If any one of a number of allegations of bribery is proved, it will result in the automatic avoidance of the Respondent's election and the Court will not be

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<sup>11</sup> *Latu v Lavulavu* at [32] and [33], citing *Launceston* (1874) 2 O'M & H 129, 133 per Mellor J and *Kingston-upon-Hull* (1911) 6 O'M & H 389, per Bucknill J.

<sup>12</sup> Citing *Kingston-upon-Hull, Central Division, Case* (1911) 6 O'M & H 372 referred to in *Halsbury's* (supra) at paragraph 774 fn5.

<sup>13</sup> *Latu v Lavulavu* at [28], citing *Director of Public Prosecutions v Luff* [1977] AC 962, 983, *Scott v Martin* at 672 and *Wigmore v Matapo* [2005] CKCA 1 at [37]. See also Donne CJ in the High Court of Cook Islands in *Re Mitiaro Election Petition* [1979] 1 NZLR S1 at s12.

<sup>14</sup> *Latu v Lavulavu*, *ibid* at [87], citing *Bay of Islands Election Petition* [1915] 34 NZLR 578, *Petaia v Pa'u* [2007] WSSC 15 January 2007 referred to in *Faitua v Vaelupe* [2011] WSSC 50; *Halsbury's* 3rd Ed, Vol 15 at paragraph 703, *Faitua v Vaelupe* [2011] WSSC 50 and *Hastings Election* (1869) 1 O'M & H 217.

concerned to weigh the relative importance of the conduct or allow any excuse.

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## THE FAKAPALE CLAIM

### *Evidence*

29. **Ringo Halafihi** deposed to the following. On a Saturday a few weeks before the general election, the Respondent held a free barbeque at Lapaha. Whilst Ringo and his mates were dancing at the barbeque, Mrs Henah Tu'i'onetoa, the Respondent's wife, handed \$50 to Ringo and his mates.
30. During cross-examination, Ringo gave the following evidence. He was at a kava session on the day in question. He went and looked at the barbeque where there was a 'disco' or dancing going on. He joined in and was dancing. Mrs Tu'i'onetoa put \$50 on him. There were supporters the Respondent at the barbeque of. There were two other barbeques held on Saturdays after the one at which he received the \$50 for his dancing. He saw the same people at those barbeques. He did not know if the barbeque was for the Respondent's campaign, but he said that the people there voted for the Respondent. At the barbeque, there was only music playing. He did not give any evidence about any announcement by any MC or DJ telling people to vote for the Respondent. He also did not notice any election banner promoting the Respondent at the location of the barbeque.
31. In answer to a question from the Bench, Ringo said that he had been dancing for about 20 minutes before Mrs Tu'i'onetoa gave him the \$50. He said there were other people there dancing 'fairly slowly' while he was dancing 'very happily'. He did not notice any other fakapale or money being given to the other dancers while he was there. When Mrs Tu'i'onetoa gave him the money, she did not say anything to him about the election or voting for the Respondent.
32. In re-examination, Ringo said that he had never before received \$50 for his dancing, and he usually just received kava or smaller amounts such as \$10 or \$5 or even just a cigarette.
33. **Na'a Taufateau** deposed to the following. She attended a free barbeque hosted by 'Isitoke Pasi on 16 October 2021 at the Vakameimotu residence in Lapaha. Na'a arrived at the barbeque with one of her friends between 3 and 4pm. She

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<sup>15</sup> *Latu v Lavulavu*, *ibid*, at [26], citing *Halsbury's*, paragraph 780.

noticed that Mrs Tu'i'onetoa was already there. She saw Mrs Tu'i'onetoa give \$50 each to Ringo and one of her friends and another young girl while they were dancing at the barbeque. Two or three barbeques were held on preceding Saturdays before the elections. She saw a banner for the Respondent displayed at the event and that the MC kept asking people for their support and to vote for the Respondent.

34. During her cross-examination, Na'a gave the following further evidence. She knows Luse Toke who was said to be the organiser for the barbeque. Luse at the barbeque and was announcing support for the Respondent. Na'a understood that the barbeque was for the Respondent's campaign. However, she clarified that the barbeque she attended on 16 October 2021 was the last of the three Saturday barbeques she mentioned earlier in her evidence. She also said that Luse was only involved in the second barbeque which would have been the 9th of October. Therefore, she agreed that Luse did not make any announcements during the third barbeque at which Mrs Tu'i'onetoa gave the money to Ringo because Luse was not at that barbeque.
35. Na'a did not know who put the banner up on the top story of the house and she was not clear about the date on which she saw the banner. She also confirmed that Mrs Tu'i'onetoa did not mention anything about the election or her husband when giving the money.
36. **Melesina Singa Pohiva** deposed to the following. On 16 October 2021, she also attended the free barbeque at the Vakameimotu residence in Lapaha. She is the caretaker for that residence which belongs to her cousin, Mr 'Unaloto Pasi, who now resides in New Zealand. She said that the barbeque was hosted by her cousin, Ms Isatokia Pasi, who also resides in New Zealand. The aim of the barbeque was to support the Respondent and to promote his candidacy for the Tongatapu 10 constituency. A banner promoting the Respondent was displayed during the event and his name was announced frequently by the MC during the event reminding people there to give their support and vote for him. Around 3pm, Mrs Tu'i'onetoa arrived. Melesina saw Mrs Tu'i'onetoa give \$50 each to Ringo and two others while they were dancing. She also referred to the free barbeque being conducted on three consecutive Saturdays before the election.

37. During her cross-examination, Melesina gave the following evidence. Luse Toke was “like the MC” at the barbeque. The barbeque at which Mrs Tu’i’onetoa gave the money to the dancers was the first barbeque of the three that were held, that is, the barbeque on 16 October 2021 was the first. She denied a suggestion that the barbeque was held to promote the opening of a new restaurant by Istatokia and Luse.
38. **The Respondent** deposed to the following. He did not hold a free barbeque on the date alleged, which was then simply described in the Amended Petition as a Saturday afternoon, weeks before the general election. After checking with his wife when the allegation was brought to his attention, she told the Respondent that Luse Toki held a barbeque on the alleged date and invited Mrs Tu’i’onetoa to attend. Mrs Tu’i’onetoa did give \$50 to a man who was dancing at the time, as a fakapale, not a bribe to a voter. The money was not given by Mrs Tu’i’onetoa on behalf of the Respondent, and she did not tell him about the occasion as it was not related to him or his election campaign. He did not tell his wife to attend the barbeque on his behalf or to give any money to anyone and he had no knowledge of the event.
39. In his supplementary affidavit, the Respondent added that he disputed the affidavit evidence of Melesina and Na’a referred to above, in particular, in relation to the display of the Respondent’s banner at the event. At the time of the barbeque, on 16 October 2022, the Respondent was at Niuatoputapu. He was not aware of what transpired at the barbeque. He categorically denied approving any arrangements for any barbeque or the use of his banner as part of his campaign. He considered the accusation against him to be fabricated. He understood from the affidavits of the organisers of the barbeque that it was conducted as a promotion to advertise a proposed new restaurant establishment at the property of Isatokia Pasi. He had no connection with the people conducting the barbeque whatsoever and he did not know that his banner was used at the event.
40. During cross-examination on this claim, Mr Corbett asked the Respondent about his knowledge of one of the other barbeques held on 23rd October 2021. I ruled that that was not relevant. No further evidence was adduced in relation to this claim during the Respondent’s cross-examination.

41. **Henah Tu'i'onetoa** deposed to the following. Her friend, Luse Toki, telephoned her about 11 a.m. on the Saturday in question and invited her to the barbeque. By that time, Mrs Tu'i'onetoa was already at Nuku'alofa doing her shopping, running other errands and was engaged in other activities. She told Luse that she had other things to which she was already committed. However, upon her return from Nuku'alofa between 2 and 3 pm, she stopped at the barbeque because it was held beside the road at Lapaha on her way home. The barbeque was already finished but the DJ and dancing was still going and Luse was there dancing with other people. One of the dancers was an 'old man' who, the way he was moving, was 'obviously very intoxicated with liquor'. Mrs Tu'i'onetoa fakapaled Luse, another lady, and the old man spontaneously by placing money on their heads and bodies in accordance with the Tongan custom on such 'happy' occasions. As soon as the old man received his \$50, he hurried off to the other side of the road with his drinking mates.
42. Mrs Tu'i'onetoa confirmed that her husband, the Respondent, was at the outer island of Niuatoputapu as part of his duties as then Prime Minister. He travelled there for the national prayer and fasting program. He did not know about the barbeque and had nothing to do with it. Copies of the Respondent's travel documents for the relevant period were exhibited.
43. During cross-examination, Mrs Tu'i'onetoa gave the following further evidence. She clearly recalled that the barbeque in question was held on 16 October 2021. In addition to the \$50 she gave Ringo, she also fakapaled the other dancers with other amounts including \$20, \$10 and \$5. She gave \$50 to Ringo because he was quite entertaining, and he was the only male among the other woman dancers. She denied the suggestion that the barbeque was a campaign promotion for her husband or that anyone there (whilst she was there) said anything to that effect. She attended the barbeque to support the proposed new restaurant business and she said that if the business ran well, she would advertise it in her village. She also denied seeing any of her husband's election banners at the residence that day.
44. It was never put to Mrs Tu'i'onetoa that she gave the money on behalf of the Respondent.

45. **Luse Toke** deposed to the following. Her barbeque was held at Isatokia's residence. The aim was to let people know that they were about to start a restaurant and takeaway business at the residence. The barbeque began and there was DJ playing music and people dancing. They invited whoever came by on the road to freely enjoy the barbeque. Towards the end, when there was no food left, Henah Tu'i'onetoa arrived. Luse had called her in the morning, but Henah said she was going to be busy that day. When Henah arrived, Luse was still dancing together with Ringo and a few other ladies. Henah put money (which she described as a fakapale), on Luse, another lady and Ringo. She described it as normal custom in Tonga for such an occasion and there was nothing strange about it. Not long after that, Henah said goodbye and left. The rest continued on dancing with the music for a while but not long thereafter, people started to leave.
46. During her cross-examination, Luse gave the following further evidence. She confirmed (even though it was not in her affidavit) that the barbeque was held on the 16 October 2021. She denied that it was held to promote the Respondent's campaign. She also denied that there was any banner promoting the Respondent up at the premises on the day. Luse disputed Melesina's evidence about the banner and the reason for the barbeque and noted that Melesina was responsible for domestic duties in the house and looking after Isatokia's parents and that Melesina would not know what the barbeque was about. Luse agreed that she was the MC at the barbeque, but she denied making any announcements promoting the Respondent's election or telling people to vote for him. She explained that when she was feeling happy, she would just grab the microphone and tell people passing by to come and join them.
47. In relation to the money given by way of fakapale by Mrs Tu'i'onetoa, Luse said that she received \$50. She did not know how much was given to Ringo or the other dancers because she was too busy having a good time.
48. She denied that Henah came to the barbeque to endorse the Respondent's election. When asked about the current situation with the proposed restaurant business, Luse explained that the business had stopped during the period that Covid has been affecting the country and that they were now 'taking things slowly'. She had been taking courses and looking after some elderly people. She said that 'once things are back to normal' they would resume the business.

49. **Petelo Toki** deposed to the following. He is Luse's husband. On 16 October 2021, he and some others were having a drinking party at a damaged service station at Lapaha, across the road from where Luse was holding a barbeque. He noticed that women were dancing and Luse spoke through the loudspeaker inviting people to join the barbeque. Towards the end of the barbeque, he noticed Henah Tu'i'onetoa arrive and saw her give money to a number of dancers including Ringo who was one of Petelo's drinking party. As soon as Ringo received his money, he quickly went over to the other side of the road to the drinking party.
50. During his cross-examination, Petelo gave the following further evidence. He did not recall Luse making any announcements on the PA system telling people to vote for the Respondent. However, he did recall Luse saying words to the effect: "*You all come and get free barbeque. Who you vote for is up to you*". Petelo also did not notice any banner belonging to the Respondent at the premises that day. However, on the other days barbeques were held, he did see the Respondent's campaign banner hanging up. He said that if the banner had been there on the day of the barbeque with which this claim is concerned, he would have noticed it.
51. Mr Corbett then produced a still photograph from a video showing the Respondent's election banner up at the premises. Petelo confirmed that the banner was not there on the day of the barbeque. Mr Corbett explained that the video showing the banner was taken by Melesina. He did not mention this when she gave evidence. Nonetheless, it was clear that the photograph taken from the video was dated stamped 23 October 2021, not 16 October. That photograph was tendered and marked exhibit P2.
52. Petelo did not know the purpose of the barbeque. He simply said that he was told that morning that it was going to be held and it was otherwise the "ladies arrangement".

### *Submissions*

53. In his written submissions in relation to this claim, **Mr Corbett** recounted the evidence, and placed emphasis on the evidence of some of the witnesses that the barbeque on 16 October 2021 was for the purpose of promoting the Respondent's election campaign, including announcements made to that effect during the barbeque and that the Respondent's election banner was seen by

some of the witnesses up on the premises. Mr Corbett therefore concluded that the evidence supported the fact that the Respondent had, through his wife, indirectly given a gift of \$50 to Ringo and other dancers at the barbeque which was for the Respondent's campaign. He added that the gift of money given directly or indirectly on behalf of the Respondent was to induce Ringo as an identifiable elector to vote for the Respondent or refrain from voting for him at the general election.

54. In his oral submissions, Mr Corbett agreed that the act of giving money to dancers, commonly known as 'fakapale', was a widely recognised and observed custom in Tonga. He tacitly accepted that even if all his other submissions were to be accepted, such that it was then for the Respondent to prove that the \$50 given by his wife to Ringo was given for an innocent purpose, that fakapale would constitute an innocent purpose. However, he sought to distinguish that custom from what occurred here by reference to the amount of money given by Henah on the day. But Mr Corbett also accepted that there was no evidence before me, and he was not aware of any written or unwritten rules in relation to the custom, which limited the amount of money that could be given by a particular person in appreciation of a particular dancer.
55. **Mr Edwards** submitted that the money given by Mrs Tu'i'onetoa should simply be regarded as a fakapale and treated as a traditional and customary way of acknowledging the performance of the dancer. He pointed to the evidence that the barbeque was not held for the purpose of promoting the Respondent's election and that the Respondent's banner was not there on the day. Moreover, the Respondent's evidence was that he knew nothing of the barbeque or his wife's attendance at it until after the petition had been served and that he did not authorise any barbeque to be conducted for his campaign, nor did he authorise anyone to use any of his election banners at that barbeque.

### *Consideration*

56. In my view, the evidence adduced on behalf of the petitioner failed to demonstrate a prima facie case that the money given at the barbeque by Mrs Tu'i'onetoa was a gift of money by or on behalf of, directly or indirectly, the Respondent. His evidence that he knew nothing about the barbeque and did not authorise it as part of his election campaign, nor did he authorise the use of his banner (if in fact

they were the features of the barbeque that day) was never challenged and certainly not contradicted. There was no evidence in terms of the factual events surrounding the giving of the money that Henah gave it to the dancers on behalf of the Respondent.

57. The evidence about the barbeque being for campaign purposes and that the Respondent's banner was up at the premises that day was unclear and conflicting. The only objective or physical evidence adduced was the photograph (exhibit P2) which showed the banner up at what was said to be the premises. But, as I have noted, that photograph was dated 23 October 2021. That was consistent with Petelo's evidence that he saw it days after the barbeque in question. There were also inconsistencies between the evidence of Na'a and Melesina about which Saturday of the three barbeques held on the consecutive Saturdays the subject giving of money occurred. One said it was the last of the three Saturdays and the other said it was the first.
58. The evidence about announcements at the barbeques (including the one on 23 October) whether by the MC or DJ, or whether it was Luse Toki on one of the barbeques, or some other person seeking to promote the election of the Respondent, was also unclear.
59. However, even if I were to accept the petitioner's case at its highest, namely, that:
  - (a) the barbeque on 16 October 2021 was for the purpose of promoting the Respondent's re-election;
  - (b) the Respondent knew about it or in any way approved it for that purpose;
  - (c) the Respondent authorised the use of his banner to be displayed at the barbeque; and
  - (d) that Henah gave the money to the dancers on behalf of the Respondent,
 so that ss 21(3) might be engaged and thereby reverse the onus of proof on to the Respondent to demonstrate that the money was for an innocent purpose, I am satisfied that the money was given for an innocent purpose.
60. As noted, the act of giving money to dancers as a display of appreciation for the entertainment they provide, whether at a formal or informal occasion, whether it be arranged or impromptu, is commonly known as 'fakapale' and is probably one of the most widely recognised and observed customs in the Kingdom. There was

no issue about that fact in this case. The only distinguishing feature that Mr Corbett sought to emphasize was the amount of money that Mrs Tu'i'onetoa gave Ringo and the others. However, as noted above, he also accepted that there is no known rule about how much constitutes genuine fakapale and how much might otherwise be regarded as a bribe in the circumstances of this case.

61. For those reasons, I am satisfied on the balance of probabilities that:
- (a) the \$50 given to Ringo as named in the amended petition was not given either directly or indirectly by or on behalf of the Respondent; and
  - (b) further or alternatively, if it was given by or on behalf of the Respondent, I am satisfied that he has discharged the burden of proof that it was given for an innocent purpose.

### **THE ROADWORKS CLAIM**

62. At paragraph eight of the amended petition, the Petitioner alleges that:
- (a) weeks before, and on the day of the general election, the Respondent used his power as head of government to provide road construction works throughout the village of Lapaha in Tongatapu 10; and
  - (b) the timing of the project 'shall be deemed to have given [sic] for the purpose of influencing the vote unless the contrary be proved'.
63. In his Response, the Respondent simply denied the allegation as being capable of constituting bribery pursuant to the Act.

### *Evidence*

64. **Meli Manu** is employed as a broadcaster at Broadcom 87.5FM radio station. He gave evidence that he attended, and was part of the crew, that recorded a speech given on 28 October 2021 by the then Minister for Finance, Mr Tevita Lavemaau, at the launch of the Respondent's campaign at Lapaha. A transcript of Mr Lavemaau's speech was admitted into evidence without objection. Relevantly, Mr Lavemaau stated:

*"At the moment I believe the tar sealing of the roads have started in this constituency. That is the plan for all villages of Tongatapu 10 to be completed by next week. This evening, tar sealing of the road in 'Eua are [sic] currently taking place and it is also the plan for that to be completed by next week so that the machinery can be brought here to complete the works in these villages. Remember, it is difficult to transport the machinery around and next*

*week we will start in Tongatapu 3, 4, 1, 5 and also those places. The goal is, by the 18th all roads in these constituencies are done. Those other representatives from the other constituencies, they didn't agree with the roads project. You all heard them when the budget was being discussed. Now we are fed up of [sic] them begging for their roads to be fixed. We are giving them a little punishment until their electors elect the right person. Like these men here – Sangster from 7, Seventeen from 9 as well as Tatafu from 4 and Viliami Sisifa from 8. Please clap for them. There is a great blessing upon the Cabinet and team of today.”*

65. Mr Manu confirmed that the Respondent was at the launch at the time Mr Lavemaau gave that part of his speech. Mr Manu was not cross-examined.
66. **Hekisou Fifita** also appeared pursuant to witness summons issued on behalf of the Petitioner and gave the following evidence. Hekisou is the CEO of the Dexing Construction company. He has been involved in the national road works project since 2019. He explained the project as follows. After the passing of the former PM, 'Akilisi Pohiva, the Respondent's government submitted a program for development works in the country. Roads were one of the programs. At the time, Hekisou was a director and project manager for the road works project. He was involved for almost two years from January 2020 to February 2022. There was a committee for the road works project which had submitted a plan to the Cabinet of the day. The members of the committee included the Respondent as the chairperson, Minister of Finance, Minister of Infrastructure, Minister of Police and the CEOs of the Ministries of Infrastructure and Finance, with Hekisou being the project manager.
67. He confirmed a number of photographs<sup>16</sup> which showed road works in Lapaha including some driveways (or thresholds) from the main roads into private properties having been sealed. He explained that the driveways were performed as part of another construction development project but under the umbrella of the roads project. The driveways were intended to help families with access as well as the elderly and those with disabilities. The driveway works were included as part of the works on all the major roadways in all 17 constituencies. It was up to families as to whether they wanted their driveways done, and in some instances, properties already had concrete driveways. By 18 November 2021, driveways

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<sup>16</sup> Exhibit P1

had been completed in Tongatapu 8, 10 and 3 and they were all done at the same time.

68. The program for the road works was planned to be completed earlier in 2021. However, by the time of the election, the program had not been completed and is still incomplete. There were a number of delays to the project overall. The works in Tongatapu 10 had not been completed and had, in fact, only been started.
69. During his cross-examination, Hekisou gave the following further evidence. Lapaha was one of the communities with which government entered into a partnership agreement that involved the communities paying 50% as a contribution towards the tar sealing component of the road works for their areas with the government to pay for the balance of the works. There was consultation with the communities on a number of occasions. He was asked specifically about the Lapaha council. The chair of that council was the estate holder, Lord Kalaniuvalu. The council conveyed the urgent need for the works to be done before any change of government because the community had deposited their contribution as part of the partnership agreement with the then government.
70. Hekisou said that he knew the petitioner and that Mr Lanumata did not attend the Lapaha council meetings in relation to the road works when Hekisou attended.
71. Hekisou confirmed that at no time did the Respondent ever direct the project team to urgently finish the project before the election. As project manager, he constantly updated the roads committee about the project and its progress and reported on the various issues encountered from time to time. In answer to a question from the Bench, Hekisou confirmed that the program or schedule for the works was amended from time to time due to various challenges such as delays in the supply of materials, equipment breakdowns, the government having to allow the ordering of new equipment to continue the works, procurement processes having to be undertaken for that equipment and equipment arriving late due to the impacts of Covid-19. He said "they did their best". He reiterated that at no time did the Respondent as chair of the committee ever give any direction about the order or sequence of the works.
72. Hekisou also said that he did not recall any reference in any of the committee meetings to any decision, as Mr Lavemaau had described it in his speech, to

'punish' any particular constituents because they had not elected representatives who, as I understood it, were on side with the government of the day and the Respondent's team.

73. Hekisou said that communities who deposited their contributions got priority. The order of works was also determined on a needs basis, that is, according to how bad the condition of roads were in certain villages or areas. There were five or six communities who had deposited their contributions but had still not had the road works in their areas completed. The project was ongoing, and he said it depended on the new government's direction or plan as to whether the balance of the works will be completed.
74. **Fifita Sili** confirmed photographs in the petitioner's book of documents which appeared on Fifita's Facebook page showing road works done to the front of his house and in the block where he lives. He also referred to providing food for workers who were doing the tar sealing of the road. He said he was happy to provide the food and that's why he took the photos and posted them. He was not cross-examined.
75. **Uluaki Tovo** deposed that resurfacing and road maintenance works took place in Lapaha in the weeks before the election and on the election day. He also deposed that the works went beyond surfacing just the public roads and included driveways to some of the private homes, including his. He said that he never asked anyone to resurface his driveway, and no one told him that they were going to so, but he 'did not bother stopping them'.
76. **Punou Vaeatangitau**, a farmer from Lapaha, gave the following evidence. He attended the Respondent's campaign launch at Lapaha on 28 October 2021 where Mr Lavemaau announced that the roadworks in the constituency would be finished before the general election. He also said that works were being undertaken during the weeks before the election and even on the day of it.
77. During his cross-examination, Punou added that the community at Lapaha had paid its contribution for the tar sealing and they had asked the government or the company to finish the work before the election. He attended a meeting with the Ministry in relation to the urgent completion of the works. He said the works had been completed and "they were satisfied with them".

78. **The Respondent** deposed to the following in relation to this claim. He had not given any directions to the Ministry of Infrastructure or the roadworks project manager at the time to have the road works done at Lapaha. He was aware of some pressure from the people at Lapaha to have their roads paved and sealed. To that end, the estate holder and the Lapaha community council, of which the Petitioner was a member, held a meeting with the project manager requesting the roads to be done. There was an urgency to having the roads completed before the election because Lapaha had paid their 50% for the cost of the bitumen. The Petitioner was well aware of this because he is an active councillor and they were concerned that if there was a change of government before the road works were completed, there might be further delays and possible default in completing the works. The urgency of the works was expressed by the people themselves, including the petitioner. Given that situation, the Respondent said he did not push the work or used his “alleged powers” as the Prime Minister to have the government project completed. Government had already approved it and the village had already paid their 50% for the bitumen. Therefore, as he understood it, the roads were expected to be completed before the election. However, even after the election, the road works continued and also stopped when they ran out of bitumen.
79. The Respondent noted that the roads in Tongatapu 10 are open to all members of the public whether they are residents of Tongatapu 10 or elsewhere. They are not for the sole use of the people of Lapaha or Tongatapu 10.
80. During his cross-examination, the Respondent denied that he ever directed that the road works in Tongatapu 10 were to be performed just before the election to induce the electors there to vote for him. He was asked by Mr Corbett why there was “a rush” to complete the roads. The Respondent explained that there had been various delays, just as Hekisou had explained, including lack of spare parts for equipment and that, otherwise, the timing of the works was up to the project manager.
81. **Tevita Lavemaau** deposed to the following. By Cabinet decision No. 234, dated 13 March 2020, he was appointed a member of the roads sub-committee. The decision provided that:

*“... the Cabinet sub-committee for the PPISCPTCIP (Tonga roads project) comprising of the Honourable PM, Honourable Minister for Finance and Honourable Minister for Infrastructure be formalised and approved.”*

82. Since 2019, and after the election, the government was endeavouring to complete the roads program to which it had committed, including the works in Tongatapu 10. Delays to the program occurred due to a number of factors beyond the government's control project. As a result, the programmed works for Tongatapu 10 'ended up being done late'. The government had to complete the roads in 'Eua by June 2021 because of the general conference of the Wesleyan Church to be held there but even they were not all completed on time.
83. At the time of his speech on 28 October 2021, the machinery for the road works was still in 'Eua. The equipment was only returned to Tongatapu in November 2021. He described his speech as an explanation, "as it was well known", that whether there was an impending election or not, government still had to function and carry out its responsibilities.
84. During his cross-examination, Mr Lavemaau explained that the reference in his speech to the other constituencies being punished was intended as "a joke". He confirmed that, as he mentioned in his speech, there were road works being conducted in other constituencies at the same time as the works in Tongatapu 10. He said there was never any alteration to the works schedule, so far as he knew as part of the roads committee, to leave out any constituency because the representatives of those constituencies had not supported the project in Parliament.
85. In answer to a question from Mr Corbett as to whether Tongatapu 10 had been "prioritised", Mr Lavemaau explained that the project involved a "new arrangement" by which the communities were asked to contribute to the cost of the tar sealing. Eventually, he said that the works in Tongatapu 10 were prioritised in the sense that the Respondent confirmed that the community had agreed to raise their funds for the cost of the tar. He described the partnering arrangement with Tongatapu 10 as the "first experiment" of such arrangements between government and the community. Therefore, because of the communities in Tongatapu 10 had deposited their contributions, the works in their areas were conducted.

86. Mr Lavemaau denied the suggestion that the works were 'rushed' in the lead up to the election. He said that they were conducted according to the works program, which had an original completion date of June 2021, but was delayed due to the various issues he had described. More than two years since the start of the project, the works were still on going.
87. In re-examination, Mr Lavemaau said he was not entirely sure about whether Lapaha had paid their contribution for the tar sealing but he believed there was a system set up so that the Ministry of Infrastructure checked with the Ministry of Finance to determine whether funds had been deposited from the various communities before work commenced.

### *Submissions*

88. In his written submissions in relation to this claim, Mr Corbett referred to some of the principles discussed in *Latu v Lavulavu*, *Sika v Fasi* and *Piukala v Saulala* noted above and stated:

*“The evidence of Tevita Lavemaau the former Minister of Finance confirms the road project headed by the former PM, the Respondent. The project commenced in 2019 and is still running now. There were road works conducted on the eve of the election and on election day. Lavemaau confirms that he monitored and controlled the road project. He confirms that the road project for TT10 was prioritised and put forward for road pavement before and leading up to and on election day. The case for the Petitioner has proven that the Respondent used his position of power as chairman of the road project committee to prioritise road projects at TT10 to bring road works forward to induce the identifiable electors to vote for him or refrain from voting within three months of the election”.*

89. Mr Edwards submitted:

*“The cost of the tar sealing of the community roads was shared equally by the Lapaha community and government was shared 50%. In the evidence of Hekisou Fifita he referred to the meeting with the estate holder and his council. They were pressing or demanding the completion of the tar sealing before the election in case there was a change of government. The Lapaha community had already paid their share and the roads project manager arranged for this project to be started including the tar sealing of the driveway to some of the homes at Lapaha. Hekisou Fifita said it was part of the road improvement program he had worked on and he had implemented it for the purpose of the development and improvement of the roads in the area. There is no evidence that the Respondent had used his powers as alleged by the Petitioner to have the roads completed and tar sealed. This was a joint venture between government and the community. The latter was demanding that this work be done before the election. It is submitted that the vague*

*allegations against the Respondent that he used his power as head of government to provide road construction pavements throughout the Lapaha community roads must fail and be dismissed.”*

***Consideration***

90. I agree with Mr Edwards' submissions. I am not satisfied that this allegation of bribery concerning the road works has been made out by the petitioner for the following reasons.
91. Firstly, on a proper consideration of the evidence, it has not been established that the Respondent's involvement as Chair of the roads committee or as the Prime Minister of the day involved any influence by him, or on his behalf, to alter the sequence of works of the project so as to favour the constituents of TT10.
92. Secondly, the only reference to any works being prioritised was by Mr Lavemaau. He had already demonstrated imprudence in the language used in his speech when he referred to some constituencies being 'punished'. However, he went on to clarify his evidence at trial that his reference to the Tongatapu 10 works prioritised meant that the communities there, including Lapaha, had deposited their contributions as part of the partnership agreement with government. As confirmed by Hekisou Fifita, when communities had deposited their contributions, works were undertaken in their areas and that was not peculiar to Tongatapu 10.
93. Thirdly, I am not satisfied that the Respondent's involvement in this project could constitute a valuable gift to anyone including the constituents of Tongatapu 10. As discussed with Mr Corbett during oral submissions, the national road works project comprises government assets. The roads are not owned by any elector or electors. The maintenance of the road is the responsibility of the government of the day and all public roads (in whatever condition) remain part of the government's asset base.
94. Fourthly, I am not satisfied that the Petitioner has identified that any gift, if it were given, was to any identified elector or electors. As discussed recently in *Piukala v Saulala* (CV 74 of 2021, 2 May 2022, at [252]), all road users in Tongatapu are able to use the roads the subject of the road works project. They are not confined only to the electors within Tongatapu 10.
95. Fifthly, the project has been on foot since 2019 and has experienced a number of delays. In circumstances where the works were in delay, including in

Tongatapu 10, it is not reasonable to characterise what occurred in the weeks leading up to the election and on the day of the election as ‘rushing’ or ‘prioritising’ the works done in Tongatapu 10 to favour the Respondent. That is particularly so given that road works in other constituencies were being performed at the same time.

96. Sixthly, despite Mr Corbett’s apparent attempt to advance the driveway works as a purported and unpleaded additional aspect to the bribery claim, I am satisfied on a sensible view of the evidence, including the unchallenged testimony of Hekisou Fifita, that the driveways were simply part of the roads project for the major roadways in all the constituencies, which are still ongoing, including in Tongatapu 10.

97. For those reasons, those road works claim fails.

#### **THE WATER TANK CLAIM**

98. That brings us finally to the water tank claim.

99. It is important to record the way in which the Petitioner framed this allegation. It is to be derived from the following paragraphs in the amended petition:

*“[2] Tipiloma He Lotu Lauaki is 52 years of age and a registered voter of Tongatapu 10 electoral district. On Wednesday 17th November 2021 the day before the general election Tipiloma and three other men were told by the Respondent Pohiva Tu’i’onetoa’s to pick up free water tanks for their personal use from his residential home. The timing of this offer was done to encourage the men to vote in his favour.*

...

*[5] Semi Hafoka, 57 years of age of Hoi and registered voter for Tongatapu 10 electoral district. On Wednesday 17th November 2021 the day before the general election that he and Tipiloma Lauaki, Siosiua Maka Fotu, Etueni Yaka went on Tipiloma’s pickup truck and picked up a water tank from the Respondent Pohiva Tu’i’onetoa’s place for Siosiua Maka’s meaning Maka Fotu personal use.”*

#### ***Evidence***

100. There was very little contest in the affidavit evidence in relation to the facts on this claim.

101. **Tipiloma Lauaki** deposed to the following. On 17 November last year, he drove a delivery truck with three other men and picked up a free water tank. One of the

men was Maka Fotu who was told by the Respondent to pick up the water tank from the Respondent's house for his personal use.

102. During his oral evidence at trial, Tipiloma explained that the information about the Respondent telling Maka to go and pick up the water tank came from Maka. Tipiloma did not meet the Respondent on 17 November, when they attended the Respondent's premises. They only saw his wife, Henah. He also clarified that on that day, the men only picked up one tank.
103. **Semi Hafoka** deposed that on the same day in question, he went with Tipiloma, Siosua Maka (referred to as Maka Fotu) and Etuani Vaka in Tipiloma's truck and picked up a tank from the Respondent's place for Maka Fotu's personal use. During his evidence, Semi explained that when he and the others arrived at the Respondent's premises, they were 'received' by Henah. Maka got out of the vehicle and walked to the verandah of the house. Henah came out and asked where they were going. Maka said they were there to get a water tank. Henah told them to go around the back where there was only one tank left. They picked up the tank and took it to Maka's house.
104. In his cross-examination, Semi said that they placed the tank beside Maka's house and that there was no stand or concrete base there at the time. The significance of that will become apparent shortly.
105. **Etueni Vaka** gave similar affidavit evidence. He deposed that when the men arrived at the Respondent's house, they were met by Henah Tu'i'onetoa who directed them to the back of the house to pick up the last remaining water tank, which was then taken to Maka's house. He, unlike Semi Hafoka, Etueni confirmed in cross-examination that when they arrived at Maka's house, there was a concrete stand already built for the tank.
106. **The Respondent** deposed to the following. He did not give a water tank to Maka Fotu on 17 November 2021 at his residential home. He does not know Tipiloma He Lotu Lauaki, Semi Hafoka or Mr Etueni Vaka. In his affidavit, Etueni Vaka did not refer to seeing the Respondent or to the Respondent promising any of them free water tanks. Etueni's affidavit only refers to one water tank. The Respondent denied the pleaded allegations and any statement in the relevant affidavits that he told the men to pick up water tanks from his residence as false.

107. During his cross-examination, the Respondent gave the following further evidence. The tank in question was behind his home which is on a one-acre block. There were a number of tanks in that location from time to time to be distributed to his constituents. The constituency office for Tongatapu 10 is also located at his home. There are two officers employed there who were responsible for distributing water tanks at that time. The Chairperson of the women's committee for Tongatapu 10, Mrs Melenaite Kaufusi, had asked the Respondent for tanks on behalf of the women from the villages.
108. The Respondent referred to there being rules or a process by which the tanks were distributed. However, the only rule he specified was that an applicant for a tank had to have built a concrete stand upon which to place the tank. That requirement was established because, at first, they were just giving out tanks, but they found that at some properties the tanks were left lying around and not installed properly on a stand or connected to guttering. He described the process as follows. If someone wanted a tank, they would speak to him or go to his constituency office. He directed his officers in relation to the distribution of tanks after they reported to him. The officers from the constituency office would inspect the applicant's property, take a photograph of the location of the concrete stand and the person would be told they could come and pick up a tank. The 'same rules', as he put it, were applied to each request.
109. The Respondent said he was not home when the men came to collect the tank 17 November and that he only knew about the tank being given to Maka Fotu after receiving the petition. He added that Maka would not have been able to receive a tank unless his name was 'on a list somewhere'. He confirmed that he never spoke with Maka Fotu, However, the Respondent then added that the tank the subject of this allegation was for Maka's wife.
110. In answer to questions from the Bench, the Respondent stated following. There were a number of tanks at his residence during 2021. They had been provided in two lots as donations by the Chinese Embassy. They were part of a project for the provision and distribution of about 500 tanks from the donor throughout the Kingdom to those households and people who needed them. However, as then Prime Minister, he 'directed' that 50 of the tanks be taken to his premises for Tongatapu 10. He also allocated some tanks to certain other (unspecified)

constituencies but that otherwise MEIDECC was primarily responsible for the distribution of the balance of the tanks throughout other constituencies. He initially described MEIDECC's role in the tank project as being involved in negotiations with the Chinese Embassy and other donors (which included New Zealand at the time) as well as the manufacturer. He was only involved in 'high level talks' he was not aware of, for instance, any criteria applied by MEIDECC in its work in assessing who was to be given a tank in the various constituencies. He confirmed that the only rule he applied for tanks distributed in TT10 was the cement base requirement and that he was in charge of the distribution of the 50 tanks in his constituency.

111. In relation to the particular tank picked up by Maka Fotu, the Respondent explained that he attended a meeting some two to three weeks before the election at his constituency office with the women's committee, where the chairperson of requested for water tanks for their members. He understood that the women had prepared their concrete stands and that they had been inspected. Therefore, tanks for those women had been approved and Maka's wife was told to come and collect one. He said that all happened 'well before' 17 November 2021.
112. By the time the women's group requested tanks, there were only a few left. The Respondent said and that during 2021, the other tanks had been distributed throughout Tongatapu 10 and that within the three-month period before the election, about 20 of the 50 tanks had been distributed. The Respondent described the timing of the distribution of those 20 tanks, including the last one on the day before the election, as 'just a coincidence'.
113. **Henah Tu'i'onetoa** was also cross-examined about this claim. She said that she had no knowledge of Tipiloma and the other men coming to her house. She said that people often came to pick up tanks at that time and that she did not know their names. However, she knew Maka Fotu. She said she would have known if he came to pick up a tank. She repeated that she wasn't sure about the events on 17 November 2021 or whether Maka and the others came to her house. She confirmed that there were tanks at the back of the house and that when someone came to collect a tank, she directed them to go around the back of her house to pick it up. Henah otherwise said she had no other involvement in or knowledge of this matter.

114. **Maka Fotu** deposed to the following. The Respondent did not at any time prior to the election on 18 November 2021 talk to or tell him to get a free water tank for his personal use in order to encourage him in any way to vote for him at the election. On Wednesday, 17 November 2021, he went with Tipiloma Lauaki, Etuini Vaka and Semi Hafoka on Tipiloma's truck to the Respondent's residence where the office of the Tongatapu 10 constituency is situated to pick up a water tank for his wife which had been arranged several weeks before by the chairperson of the women's group of Tongatapu 10, Mrs Melenaite Kaufusi. The ladies had been instructed that they should make a cement stand for the water tank which would be inspected by the office staff from the constituency office. If the officers were satisfied, then they could come and collect their water tanks. If there were no cement stand, there would be no water tank for the women. He then went on to explain how the cement stand at his house had been completed more than a week before inspection took place and the collection of the tank was deferred until eventually 17 November. Photograph of the cement stand were exhibited to his affidavit, and he was never challenged on that.
115. During his cross-examination, Maka said that when they arrived at the Respondent's premises, they were received by Henah. He told Henah that they were there to pick up a water tank for his wife. Henah asked Maka who the tank was for, and he gave her his wife's name. Henah asked Maka if his wife was in the women's group that needed tanks. Maka said yes. He added that Henah had a list of names with her. She checked the list and confirmed that his wife's name was on it.
116. Mr Corbett also cross-examined Maka in relation to whether he had earlier indicated his support for the Petitioner including that he was prepared to give evidence for the Petitioner until 23 January 2022. It was put to him that he received a telephone call from Tipiloma about providing an affidavit for the petitioner. The upshot of those exchanges was that Maka denied ever agreeing to give evidence for the Petitioner and that when he was approached by Tipiloma to do so, he refused. He also said that his wife had told him not to do so.
117. Maka also was questioned about whether the water tank was "in his name". He denied that and said that at all times, as far as he understood, the tank was in his

wife's name, and it was her who told him to go with the others on the day in question to pick it up from the Respondent's premises.

118. In answer to a question from the Bench, Maka confirmed that both he and his wife, who are the only occupants of their home, have received the benefit of the water tank. They had been waiting for one for over a year. As far as he was aware, the only request made on their behalf was through the women's group.

***Submissions***

119. In relation to the submissions by counsel in relation to this claim, it is necessary to start with those made initially by Mr Edwards.
120. In his written submissions, Mr Edwards focused on the first of the two paragraphs of the amended petition recited above and submitted that:

*"The emphasis on this allegation is that on Wednesday 17 November 2021 Tipiloma He Lotu Lauaki and three other men were told by the Respondent to pick up three water tanks for their personal use from the Respondent's home. The allegation is false. When Tipiloma was questioned, he accepted that he did not see or speak to the Respondent on the 17th or before or after that date about a water tank. It is significant that he confirmed that they had gone in his truck to uplift one water tank for Maka Fotu.*

*In the evidence of Maka Fotu he confirmed that he was rung by Tipiloma to give false evidence. He was asked to say that he was offered a water tank by the Respondent. He refused as he believed that it was wrong to do so. The petitioner was not far removed from being involved in trying to get Maka Fotu to give false evidence in his support.*

*The water tank was arranged by the wife of Maka Fotu through the women's group. A concrete slab was built as a base and stand for the water tank. This was one of the conditions imposed by the women's committee before the tank was released. After the stand was completed Maka Fotu went with Tipiloma and the other two men to pick up the water tank. They did not meet or talk to the Respondent on the 17th of November when they picked up the water tank.*

*The allegation of bribery with regards to the water tank has not been made out and must fail".*

121. Mr Corbett prefaced his written submissions with the following articulation of the claim:

*"On 17 November 2021, the Respondent directly and indirectly gave a valuable gift of a water tank to Siosiuua Maka Fotu and his wife."*

122. Mr Corbett then referred to excerpts from the evidence which he submitted made good that statement of the allegation in respect of this claim. He concluded his

submissions in this regard by stating that since the gift was made within three months of the election, ss 21(3) reversed the burden to the Respondent of proving, on the balance of probabilities, that his intention was not to induce any voter to vote for him or refrain from voting at the election. Mr Corbett submitted that the Respondent had failed to prove that the water tank given to Maka Fotu and his wife was for an innocent purpose.”

123. Upon realising that the statement of the allegation in Mr Corbett’s submissions did not align with the focus in Mr Edwards’ written submission, I invited Mr Edwards to reconsider his submissions by reference to both paragraphs in the amended petition, in particular, the second of the two paragraphs which referred to the men in question picking up the water tank from the Respondent’s place for Maka’s personal use. I suggested to Mr Edwards that on one interpretation of those allegations, it was tolerably clear that the petitioner had alleged that the Respondent had indirectly, at least, given a water tank to Maka Fotu and/or his wife.
124. Mr Edwards initially submitted that the Petitioner should be confined to his pleading and again focused on the first of the two paragraphs. He submitted that there was no evidence to support the allegation that the Respondent had told either Maka Fotu or any of the other men to pick up free water tanks from his premises.
125. About that, there was no dispute. In other words, if that was the extent of the allegation by the Petitioner, it would have clearly failed. However, I endeavoured to explain to Mr Edwards that, having regard to s. 35 of the *Electoral Act*, which requires the court to “be guided by the substantial merits and justice of the case without regard to legal forms or technicalities”, the content of the first paragraph was not the truth or totality of the allegation by the Petitioner.
126. Mr Edwards then submitted that he would have run his client’s case differently if the allegation was clearly stated that the Respondent had indirectly given a tank to the Fotus. When asked how his case would have been conducted differently, Mr Edwards was unable to give any specific response. He candidly conceded that it did not occur to him when his client gave evidence expanding upon the circumstances by which the water tanks came to be in the Respondent’s possession, and the process by which he oversaw their distribution in the lead up

to the election, that it might have established a prima facie case of bribery under s 21.

127. In order to consider this issue further, Mr Edwards asked for the matter to be stood down to take instructions. When the trial resumed, Mr Edwards submitted that he did not agree with the interpretation posited of the allegations as pleaded by the Petitioner. However, he also accepted that if the court were of the view that the claim as pleaded constituted an allegation that the Respondent had indirectly given a tank to the Fetus, that that would constitute a bribe for the purposes of ss 21(3) and that, as a result, the Respondent bore the onus of proof to establish that the giving of the tank was for an innocent purpose.
128. In that regard, Mr Edwards submitted that the giving of the tank was in response to a request and not a "straight out giving". The request, he said, was processed in the "normal way" and was approved subject to the cement stand having to be built. It was not a giving to influence the vote and the request had been normally processed in the electoral office. He accepted that the Respondent was in charge of the office, and indeed the distribution of the tanks, and that therefore he had indirectly approved the giving of the tank in question. Mr Edwards added that the process of distributing the 50 tanks the Respondent had appropriated for Tongatapu 10 occurred over a period of time. He reiterated that those who received tanks "had to meet conditions". Beyond that, Mr Edwards said he could not take the matter any further.

### *Consideration*

129. After carefully reviewing the text or the way in which this claim was framed in the amended petition, I am satisfied that it is sufficiently clear that the allegation against the Respondent was that he had given, either directly or indirectly, a tank to Maka Fotu. In that context, and as noted, the allegations in the first paragraph were not made out on the evidence. But that was not the real gravamen of the complaint. Rather, and put simply, it was that the Respondent had given a tank to the Fetus. There was no uncertainty reflected in the evidence adduced, either by way of affidavit or during the course of the viva voce evidence at trial, about that being the true nature of the allegation. I am also satisfied that that interpretation of the pleaded allegation is consistent with s. 35.

130. By her evidence, compared to that of the other witnesses relevant to this claim, it was clear that Mrs Tu'i'onetoa was desirous of distancing herself from this allegation.
131. Based on the other evidence, in particular, the Respondent's own viva voce evidence during the trial, I am satisfied, on the balance of probabilities, of the following.
132. The Respondent was responsible for the Tongatapu 10 constituency office, the constituency officers employed there and the process for distribution of the tanks in question including the rule requiring a cement base before any tank was given.
133. The lawfulness or authority for the Respondent's direction for an appropriation or allocation of 50 tanks from the Chinese Embassy donation of some 500 tanks, for distribution in Tongatapu 10, was not explained either by the Respondent or by any other independent evidence, whether by reference to any decision of Cabinet or pursuant to some other established process for the distribution of the donated tanks at the time.
134. In that regard, the evidence of MEIDECC's involvement, as the relevant Ministry concerned with water tanks as part of the response to environmental challenges and climate resilience, in the broader tank distribution project and being responsible for deciding who was to receive tanks, on what basis or by what criteria, made complete sense. The involvement of MEIDECC was an important feature in ensuring appropriate distancing, independence or insulation, if you like, for any candidate, particularly a sitting representative and even more particularly the then Prime Minister, from any possible allegation of bribery through the distribution of tanks in that candidate's constituency. But that is not what the Respondent did here.
135. The Respondent clearly used his position to have the 50 tanks brought to his constituency for the purpose of him directly or indirectly giving the tanks out to his constituents.
136. The distributions all happened during 2021 with almost half of the tanks being given in the last three months, that is, the critical period pursuant to ss 21(3), prior to the election.

137. In those circumstances, the inescapable conclusion is that, on the evidence, the Respondent indirectly gave a valuable gift in the form of a water tank to Maka Fotu and his wife.
138. The evidence about the involvement of the women's group really did not take the matter any further. They met with the Respondent a few weeks before the election and, as a result, their request for tanks was approved including the tank for the Fotus. Similarly, the requirement for a cement base to be installed before any tank was given also did not advance the real issue any further.
139. In the absence of any evidence of any legitimate basis for the appropriation of the tanks by the Respondent for use in his own election, I can only infer that he did so to favour his own electorate. The characterisation of almost half the tanks being distributed in the three months prior to the election, with the very last tank being given to the Fotus on the day before the election, as being merely a coincidence, cannot be accepted. The evidence overall is overwhelming that the Respondent used the tanks as gifts at a time when an election was looming.
140. I found it troubling that, during the course of his evidence, the Respondent appeared oblivious to the fact that what he was explaining amounted prima facie to bribery for the purposes of the Electoral Act. In that regard, the Act does not distinguish between naivety (at the lower end of the spectrum), wilful disregard (around the middle), or conscious corruption (at the upper end) when it comes to offences of electoral bribery. As recently discussed in *Sika v Fasi* [2022] TOSC 17 at [67] to [71], there is a mental element required for bribery as opposed to, for example, contraventions of s. 24 and exceeding the maximum permitted on election spending. But here, as I have said, the only inference open on a rational view of all the evidence is that the Respondent used the tanks as gifts during the election period and that he knew he was doing so. As such, ss 21(3) is invoked, as submitted by Mr Corbett, and the gift of the tank is deemed to be a bribe unless the Respondent proves to the contrary, meaning that it was given for an innocent purpose.
141. In that regard, Mr Edwards' rear guard submission that the innocent purpose here was that the Respondent was just acceding to a request for water tanks, was not the subject of any specific evidence. Nor can it be accepted. The submission simply begs the question: why did the Respondent accede to or approve, directly

or indirectly, the tanks to be given to the women's group just before the election? That question was not answered either in evidence or in submissions.

142. Accordingly, the Respondent has failed to discharge his burden of proving that the tank here was given for an innocent purpose.

143. For those reasons, I find the water tank claim proven.

**Result**

144. On that finding, I am required pursuant to ss 32 and 37 of the *Electoral Act* to certify that, by this further proceeding, the Respondent's election as the representative of Tongatapu 10 is void.

145. In the circumstances of the outcomes of the case, I consider it appropriate to make an issues-based costs order. As such, the Respondent is to pay one third of the Petitioner's costs of the proceeding, to be taxed in default of agreement.

NUKU'ALOFA  
27 May 2022



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

M. H. Whitten QC  
LORD CHIEF JUSTICE