Solicitor General.

Court's File

21/04/15

IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY **CV 90 of 2014**

BETWEEN: **VILIAMI UASIKE LATU**

- **First Petitioner**

'AISEA SILIVENUSI

- **Second Petitioner**

AND: **'ETUATE SUNGALU LAVULAVU**

- **Respondent**

BEFORE LORD CHIEF JUSTICE PAULSEN

Heard: **2 April 2015.**
Ruling: **20 April 2015.**
Appearances: **Mr. W. Clive Edwards SC for the Petitioners**
Mr. 'O. Pouono for the Respondent

RULING

The issues to be resolved

[1] This ruling concerns procedural issues affecting the hearing of an election petition commencing on 13 July 2015. The issues are the following:

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1. Whether the respondent has the right to elect trial by jury.
2. Whether the election petition should be heard at Tongatapu or Vava'u.
3. If the respondent is entitled to elect jury trial, whether the jury should be empanelled from Tongatapu or Vava'u.

The background

[2] The petitioners have filed an election petition under the Electoral Act 1989 seeking a declaration that the respondent's election as the People's Representative for the Electoral District of Vava'u 16 in the General Election of 27 November 2014 is void. The petition dated 8 December 2014 (but filed 15 December 2014) alleges that the respondent offered bribes by way of payments of money and valuable gifts in connection with his election. It also alleges that the total amount spent by the respondent in connection with his election campaign exceeded the limit of T$10,000 in section 24(1) of the Electoral Act by a considerable margin. The petitioners say he spent more than $123,000 in relation to his campaign.

[3] In a defense filed on 23 January 2015 the respondent denies any illegal practices or excessive spending and seeks the dismissal of the petition and costs.

[4] In his defense the respondent gave notice that he required the case "to be tried by judge and jury at Vava'u".

[5] There have been a number of directions conferences to manage the petition. Until recently the parties have been proceeding on the assumption that the respondent had the right to trial of the petition by jury. The petition was first set down for hearing over five days from 13 to 17 April 2015 on this basis. Those dates were vacated for reasons that I will now come to.

[6] On 13 March 2015 the respondent applied for security for costs and in his affidavit in support of that application he deposed that he intended to call "about 58 witnesses" at the hearing. Previous indications from his Counsel, in reliance upon which the petition had been set down for hearing, were that the case could be dealt with in five days. If the respondent was to call about 58 witnesses those five days would be hopelessly inadequate.

[7] Then on 26 March 2015 the petitioners, proceeding on the understanding that the respondent could elect trial by jury, filed an application seeking orders that the jury be empanelled from the electoral district of Tongatapu and that the trial of the petition be held at Tongatapu rather than Vava'u.

[8] I dealt with the respondent's application for security for cost on 27 March 2015. I dismissed the application for reasons I set out in a written ruling of the same date.

[9] At the hearing on 27 March 2015 I adjourned the petitioners' application to 2 April 2015 and having reflected upon the respondent's desire for a jury trial made a direction as follows:

> "[3] The case is adjourned for further mention on 2 April 2015 at 9am at which hearing the Court will deal with ...
>
> b Counsel are to make submissions on whether the defendant has the right to elect that the case proceed before a jury under clause 99 of the Constitution (or any other statutory provision);
>
> c The petitioners' application for directions in relation to the empanelling of the jury (which is dependent upon b above); and
>
> d Venue of the trial."

[10] The case came before me again on 2 April 2015 to deal with the matters referred to above. At that hearing Mr. Pouono, for the respondent, advised me that he had no instructions to make any submissions on these issues and he did not do so. Mr. Edwards, for the petitioners, took the position that the respondent had no right to elect trial by jury. As to what was the appropriate venue for the

hearing, Mr. Edwards submitted that the Court had an absolute discretion as to where the trial is to be held and argued that it was in the interests of justice that it be held at Tongatapu and not Vava'u.

Does the respondent have a right to elect trial of the petition by jury?

[11] The means by which elections might be challenged by way of election petition was introduced in Part V of the Electoral Act 1989. Prior to this, section 9 of the Legislative Assembly Act made it an offence to use threatening language or bribery for the purpose of obtaining votes or of influencing electors. The power to unseat any person who engaged in such conduct rested with the Legislative Assembly. Upon the introduction of the Electoral Act 1989, section 9 was repealed by the Legislative Assembly (Amendment) Act 1989. The position now is that by section 25 of the Electoral Act no election and no declaration of poll may be questioned except by election petition. The issue here is whether a party to an election petition has the right to have it tried by jury.

[12] This issue turns upon the correct interpretation of the Act of Constitution of Tonga. The relevant provisions in the Constitution are clauses 11, 99 and 100 which provide as follows:

11 Procedure on indictment

..... And all claims for large amounts shall be decided by a jury and the Legislative Assembly shall determine what shall be the amount of claim that may be decided without a jury.

99 Trial by jury

.....And whenever any issue of fact is raised in any civil action triable in the Supreme Court any party to such action may claim the right of trial by jury; and the law of trial by jury shall never be repealed.

100 Form of verdict

.....In civil cases the jury shall give judgment for payment or compensation as the case may be and according to the merits of the case.

[13] I note also that section 13(1) of the Supreme Court Act provides:

Non-jury actions

(1) Civil actions shall be commenced by writ of summons and may by the consent of the parties thereto be tried....without a jury.

[14] Order.15 Rule 3(2) of the Supreme Court Rules 2007 provides:

> **O.25 Rule 3 Form of trial**
>
> An action shall be tried by a Judge sitting with a jury if any party so requests.

[15] By Order.3 Rule 2 of the Supreme Court Rules 2007 the word "action" is defined as:

> "action" means any civil proceeding commenced by writ.

[16] The principles to be followed in the interpretation of the Constitution have been considered in a number of cases including *Finau v Alofaki* [1989] Tonga L.R. 66; *Tu'itavake v Porter, Government of Australia and Attorney General* [1989] Tonga L.R. 14; *Vaikona v Fuko (No 2)* (SC) [1990] Tonga L.R. 68; *Fuko v Vaikona* [1990] Tonga L.R. 148 and *Tupou v Saulala* [2004] TOSC 38. The relevant principles are that the Constitution should be applied in a flexible and generous way being guided by the sense of the purpose of the text being interpreted. *Fuko v Vaikona.* Importantly too, the words used must

be considered in the context in which they are used so as far as possible "to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter". *Tupou v Saulala* applying *Canada Sugar Refining Company v R* [1898] AC 735, 741.

[17] In *Tupou v Saulala* the issue was whether the defendants to defamation actions were entitled to have them tried by jury. The plaintiffs argued that they were not and that the intention of clause 99 was that trial by jury was an optional exercise in the Court's discretion. The Supreme Court rejected that argument, finding that clause 99 provides a mandatory right to a party in a civil proceeding triable in the Supreme Court to have the action tried by a jury. I take no issue with the result in *Tupou* but derive little assistance from it. It did not concern an electoral petition and the statement of the learned Judge that the Constitution provides a mandatory right to trial by jury in a civil case triable in the Supreme Court is too broad. Some civil cases are not able to be tried by jury in the Supreme Court. Family proceedings generally and Land Court cases (section 146 Land Act) are examples.

[18] The terms 'civil action' (clause 99 and section 13(1)) and 'civil cases' (clause 100) are often used to refer to an adversarial action for the enforcement of an individual right or the redress of an individual wrong excluding any criminal offence. *Bradlaugh v Clarke*, 52 L.J. Q.B. 505.

[19] However, the law is not neatly divided between civil and criminal cases. There are causes which may not fall into either category. Electoral petitions are an example. Electoral petitions are *sui generis* being neither civil nor criminal in nature. Electoral petitions are a suit commenced to challenge the validity of an election or dispute the election of a candidate. The importance of the issues raised in electoral petitions is self-evident involving matters of broad public interest. In nature they are not concerned with the enforcement of individual rights but with the maintenance of free and fair elections which are the cornerstone of democratic society.

[20] The special nature of electoral petitions is reflected in the unique procedures that apply to them. The Electoral Act contemplates that electoral petitions will be dealt with under special rules (made by the Chief Justice) and not as ordinary actions. Other distinctive aspects include:

[20.1] The manner in which civil actions are commenced in the Supreme Court has been by way of writ (Section 13 Supreme Court Act, Order IV Supreme Court Rules Cap 8 1958, Orders 5 and 6 of the Supreme Court Rules 1991 and Order 6 Rule 1 of the Supreme Court Rules 2007). Election petitions are commenced by petition and a special form of petition was to be prescribed (section 26(3)).

[20.2] There are strict time limits to file an election petition which do not apply to civil actions. The petition must be presented within 28 days of the result of the contested poll (section 27).

[20.3] Whilst section 31 of the Act deals specifically with the trial of a petition there is no mention of a right to elect trial by jury as there is with civil actions under the Supreme Courts Act and 2007 Rules.

[20.4] The powers given to the Court upon hearing a petition under section 31(4) (to inquire into any matter relating to the petition in such manner as the Court sees fit and at any time to direct a recount or scrutiny of the votes given at the election) are incongruous with a right to elect trial by jury.

[21] Historically under English Law election disputes were settled by the King and Council and later by Parliament itself and then by the Courts sitting without juries.[1] In other jurisdictions today electoral petitions are determined by specialist tribunals or by the Courts sitting without juries.

[1] O. Hood Phillips "Constitutional and Administrative Law" Seventh Ed, pages 199-200.

[22] As a matter of fact, and consistent with international practices, election petitions in Tonga have been heard without juries. Since the Electoral Act was passed there have been number of electoral petitions that have been heard and none, as far as I am aware, have been heard with a jury. *Sione Tu'ifua Vaikona v Teisina Fuko* (No 2) [1990] Tonga L.R. 68; *Fasi v Pohiva* [1990] Tonga L.R. 79; *Fusitu'a v Ta'ofi and Aho* [1996] Tonga L.R. 102.

[23] In the Constitution the meaning of the terms 'civil action' and 'civil case' are informed by their context. Importantly clause 100 identifies that the role of the jury in a civil case is to "give judgment for payment or compensation as the case may be". The words payment or compensation cover a range of possible remedies but in ordinary usage refer to the enforcement of financial obligations and the making of amends for financial loss. These meanings are broadly consistent with clause 11 which states that the claims to be heard by a jury shall be "all claims for large amounts", albeit that what qualifies as a large amount has never been stated. *Tupou v Saulala.*

[24] The remedies that are available to the Court upon hearing of an electoral petition are set out in sections 32, 33 and 34 of the Electoral Act. These include directing a recount or scrutiny of votes (section 31) declaring the election of a candidate to be void and unseating him from the Legislative Assembly (sections 32 and 33) or striking off from the number of votes received by a candidate one vote for every

person who voted and is proved "to have been ... bribed or threatened" (section 34). None of the remedies involve ordering payment or compensation, regardless of how flexibly one seeks to define those words. It cannot have been intended that electoral petitions would be heard by a jury if a jury cannot grant any of the remedies prescribed by law.

[25] Based on all of the above I have formed the very clear view that an election petition is not a claim for a large amount or a 'civil action' or a 'civil case' as those terms are used in clauses 11, 99 and 100 of the Constitution and that the respondent has no right to elect trial by jury in reliance upon those provisions.

[26] Nor do I consider that the respondent has a right to elect trial by jury (arising independently of the Constitution) under section 13 Supreme Court Act and for much the same reasons. An electoral petition is not a 'civil action' within the meaning of section 13 and certainly not one commenced by writ of summons.

[27] In the absence of the rules contemplated by section 29 of the Electoral Act, the Supreme Court has inherent power to adopt such procedures as it considers are required to facilitate its jurisdiction (see section 5 Supreme Court Act as amended by section 2 of the Supreme Court (Amendment) Act 2012). As Alderson B stated in *Cocker v Tempest* (1841) 7 M & W 502

> "The power of each Court over its own processes is unlimited; it is a power incidental to all Courts inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice"

[28] Assuming the Court's inherent powers extend to ordering trial by jury I would not do so in this case. Such an approach would be contrary to Tongan and international practices. The issues in this case are complex, factually and legally, the trial is to be lengthy and there are on present assessments to be more than 60 witnesses. Such a case is better heard by a judge alone than a judge sitting with a jury.

[29] Furthermore, jury trials add significant costs and delays in the administration of justice that this country can ill-afford. As was noted in the December 2008 Review of the Tongan Criminal Jury System at page 16, paragraph 43:

> "The overriding issue is that, in common with other 'small' jurisdictions, the resources required to run a jury system that can fulfill the basic rationales outlined above have largely been unavailable in Tonga. In order to ensure that juries are properly representative of the community and can perform their task competently and conscientiously without undue danger of outside influence and bias, those jurisdictions that currently still operate jury systems to any significant extent devote substantial resources to courtroom and support facilities, jury selection and the provision of information and training to jurors. Up until now in Tonga this has simply not been possible ....."

[30] Whilst the review was concerned with criminal jury trials the extract quoted is in my view apposite.

[31] The review highlighted also the risk, in a country with such a small population, for there to be perverse judgments from juries based on familial, social as well as political affiliations. The recent experience of Judges in this Court would suggest that jury trials in non-criminal cases are an anachronism and that there is a need to review the law in this area. This is of course a matter for the Legislative Assembly and not for the Courts.

Venue

[32] The reasons advanced by the respondents for seeking a trial at Tongatapu rather than Vava'u relate to the risk of witness intimidation, that in the climate of present public opinion it would not be possible to empanel an impartial jury and that the trial could more readily be held in Tongatapu as the Court is not constrained to conduct hearings only during periods that it is on circuit. None of these grounds persuade me that I should order that the petition be heard at Tongatapu. There is before me no evidence of any witness intimidation. The case is already set down for hearing. There will be no need to empanel a jury. There is also authority that it is desirable

that election petitions be conducted in a local court. *Fusitu'a v Ta'ofi and Aho* [1996] Tonga L.R. 102.

[33] Given that the respondent has deposed (and his Counsel has confirmed to me) that he will be calling about 58 witness, most of whom will come from Vava'u, I consider that it would pose an unfair logistical and economic burden upon the respondent to require him to defend the petition at Tongatapu.

[34] Accordingly the trial of the petition will be held at Vava'u but with this qualification. Should there be evidence of any witness intimidation or the number of witnesses the respondent will call be found to be substantially fewer than the 58 he presently estimates, then the petitioners may apply to review this direction.

Jury empanelling

[35] As I have held that the petition will be heard by a Judge sitting without a jury there is no need to consider this matter.

Ruling

[36] I order as follows:

[36.1] The trial of the petition will be heard by a Judge of the Supreme Court sitting without a jury.

[36.2] The petition will be heard at Vava'u.

[36.3] Costs are reserved.

[37] I also order that the case will be called again before me for mention on Friday 21 May 2015 at 9am to make further directions for the hearing.

NUKU'ALOFA: 20 April 2015. **LORD CHIEF JUSTICE**

N. 'Inafo
17/4/2015.