

**IN THE SUPREME COURT OF TONGA  
CIVIL JURISDICTION  
NUKU'ALOFA REGISTRY**

**CV 90 of 2014**

S.G.  
30/10/15  
Scan, email &  
File.  
04/11/15

**BETWEEN: VILIAMI UASIKE LATU**

- **First Petitioner**

**'AISEA SILIVENUSI**

- **Second Petitioner**

**AND: 'ETUATE SUNGALU LAVULAVU**

**Respondent**

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Date of Hearing: 15 October 2015**

**Date of Ruling: 16 October 2015**

**Counsel: Mr. W. C. Edwards SC for the petitioners**

**Mr. 'O. Pouono for the respondent**

**R U L I N G**

[1] There is before the Court an application by Mr. Lavulavu for leave to amend his pleading by adding a counterclaim against the first petitioner, Viliami Latu. The application is opposed by the petitioners.

**IN THE SUPREME COURT OF TONGA**

**CIVIL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**CV 90 of 2014**

---

[2] I had this case called before me on 9 October 2015 to arrange a trial date. At that hearing, without any opposition from Counsel, the case was set down for trial commencing 25 November 2015 at Vava'u. Because of the previous indications from Mr. Lavulavu and his Counsel that Mr. Lavulavu will be calling nearly 60 witnesses, and that the trial can be expected to take 3 weeks, the Court has rescheduled it's caseload so as to be able to hear the petition and has made arrangements for the Court to travel to Vava'u and stay there for an extended period as a special sitting of the Court.

[3] It was only after the case had been set down and on 14 October 2015 that Mr. Lavulavu filed the application to add a counterclaim.

**The application**

[4] Along with Mr. Lavulavu's application is filed an affidavit and his proposed statement of counterclaim. The draft statement of counterclaim alleges that at the 2014 General Election Mr. Latu stood as a candidate for the Electoral District Vava'u 16 (the Electoral District to which Mr.

**IN THE SUPREME COURT OF TONGA**

**CIVIL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**CV 90 of 2014**

---

Lavulavu was successfully elected as a People's Representative) and that he committed offences of bribery (and other corrupt and illegal practices) contrary to section 21 Electoral Act. It is also alleged that Mr. Latu spent in excess of the permitted sum on his election campaign in breach of section 24 Electoral Act. Mr. Lavulavu seeks declarations that Mr. Latu is 'guilty' of offences under section 21 Electoral Act and that he spent more than the permitted sum contrary to section 24 Electoral Act. He also seeks an order "declaring that the Petitioner shall not be nominated as a Candidate on any election held with [sic] 5 years from the date of the order from this Court".

[5] In his affidavit Mr. Lavulavu deposes that following the 2014 General Election he lodged a complaint against Mr. Latu to the Supervisor of Elections and that the complaint has not been dealt with or finalized and he does not know why this is the case. He says that he is afraid that the complaint will never be determined by the Office of the Supervisor of Elections and that for that reason he wants his complaint to be determined in the trial of the petitioners' election petition and that "The parties should have come with clean hands to

**IN THE SUPREME COURT OF TONGA**

**CIVIL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**CV 90 of 2014**

---

the Court especially questioning the outcome of the election petition”.

**Discussion**

[6] I doubt whether it is possible to file a counterclaim to an election petition. There is nothing in the Electoral Act or Rules of the Court to allow it. The pursuit of a counterclaim appears to me to be incompatible with the *sui generis* nature of an election petition. Neither Counsel raised the matter and I do not need to determine it because this application must be dismissed in any event.

[7] The foundation upon which Mr. Lavulavu has based his application is the allegation that the Supervisor of Elections has failed to deal with his complaint and that the Court is therefore the proper forum to hear the complaint. I do not accept that argument. The evidence shows that upon receipt of the complaint the Supervisor of Elections immediately complied with his obligation under section 21(6)(a) Electoral Act to call upon Mr. Latu to answer the complaint. Mr. Latu answered the complaint promptly on 24

**IN THE SUPREME COURT OF TONGA**

**CIVIL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**CV 90 of 2014**

---

December 2014. The Supervisor of Elections is then required to investigate the complaint and, if satisfied that the grounds for complaint are good, notify the Attorney General who shall, if he considers there are good grounds, prosecute the alleged offender (section 21(6)(b) and (c)). It is not clear to me that the Supervisor has not performed his duties as Mr. Lavulavu appears to allege. I understand Mr. Lavulavu was unaware that Mr. Latu had answered his complaint and I agree with Mr. Edwards that it would have been better had the Supervisor of Elections made Mr. Lavulavu aware of how he has dealt with the matter. That said, there is no evidence that Mr. Lavulavu has made any enquires to find out. There are however more substantial grounds for dismissing this application to which I will now turn.

- [8] The proposed counterclaim asks the Court to make declarations that Mr. Latu has committed serious criminal offences under the Electoral Act. The Court will not grant a remedy in civil proceedings which usurps the jurisdiction of the criminal courts. Joseph '*Constitutional and Administrative Law in New Zealand*' 4th Ed at 1180.

**IN THE SUPREME COURT OF TONGA**

**CIVIL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**CV 90 of 2014**

---

*Imperial Tobacco Ltd v Attorney-General* [1981] AC 718. *Institute of Patent Agents v Lockwood* [1894] AC 347 and *R v Sloan* [1990] 1 NZLR 474. Even though an election petition is not a civil proceeding Mr. Lavulavu's proposed counterclaim seeks civil remedies and the principle is apposite. Whilst it has been held that the Court may grant a declaration pronouncing on the lawfulness of an activity under regulatory offences this is not the case "under an offence where the full force of the criminal law might be brought to bear". (See Joseph at 1180) The offences under section 21 and 24 Electoral Act are not regulatory in nature and carry significant penalties upon conviction including, in the case of section 21, the possibility of a substantial period of imprisonment.

- [9] The principle that the functions of the criminal courts should not be usurped applies equally to a case where a party seeks to pre-empt criminal proceedings, by obtaining a declaration as to the criminality or otherwise of future conduct, and to cases such as the present, where criminal proceedings have not been instituted but may be contemplated because the

acts in question have already been committed. See *Sloan* at page 481.

[10] The Courts will also refuse to grant a declaration where to do so will serve no useful purpose. In *Financial Services Authority v Rourke* [2002] CP Rep 14 Neuberger J stated:<sup>1</sup>

It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration.

[11] In the *Imperial Tobacco* Viscount Dilhorne at page 875 referred to the lack of utility of declarations as to criminality as follows:

Such a declaration is no bar to a criminal prosecution, no matter the authority of the court which grants it. Such a declaration in a case such as the present one, made after the commencement of the prosecution, and in effect a finding of guilt or innocence of

---

<sup>1</sup> As referred to in *Office of Fair Trading v Foxtons Ltd* [2009] 3 ALL ER 697 at [57].

**IN THE SUPREME COURT OF TONGA**

**CIVIL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**CV 90 of 2014**

---

the offence charged cannot found a plea of autrefois acquit or autrefois convict, though it may well prejudice the criminal proceedings, the result of which will depend on the facts proved and may not depend solely on admissions made by the accused. If a civil court of great authority declares on admissions made by the accused that no crime has been committed, one can foresee the use that might be made of that at the criminal trial.

[12] Applying these principles to this case, the declarations sought by Mr. Lavulavu, if made, would not resolve any justiciable issue which exists between him and Mr. Latu. The declarations would not remedy any prejudice suffered by Mr. Lavulavu nor vindicate his rights either. The fact that this Court came to a view that Mr. Latu had breached the Electoral Act would not result in criminal convictions being entered against him or prevent Mr. Latu from defending criminal charges if they are brought against him. Far from providing assistance to a criminal court, declarations would simply serve to obfuscate and prejudice a criminal trial.

[13] Mr. Pouono referred in his submissions to Mr. Lavulavu desire to obtain a declaration that Mr. Latu could not be nominated as a candidate to stand in any election for 5 years. This is sought in paragraph 3 of the prayer for relief

**IN THE SUPREME COURT OF TONGA**

**CIVIL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**CV 90 of 2014**

---

in the draft statement of counterclaim. This relief appears to be taken from section 40 Electoral Act. It cannot apply to Mr. Latu because he was not a successful candidate in the 2014 Election and is not therefore a person who can be 'unseated' or 'whose election is declared void'.

[14] I can discern no useful purpose that would be served by the pursuit of the counterclaim nor has Counsel shown me that there is any.

[15] This is not a case where the petitioners (or either of them) are claiming Mr. Lavulavu's seat in the Legislative Assembly for themselves so that recriminatory evidence may be called. (See section 92 Electoral Act 2004 (Cook Islands) and *Halsbury's Laws of England* Fourth Ed Reprint Vol. 15 'Elections' at paragraph 827). Mr. Pouono submitted that Mr. Lavulavu should be able to raise these matters to show that Mr. Latu is motivated by bad faith but to the extent that they are relevant to that issue they do not need to be pursued as a counterclaim.

**IN THE SUPREME COURT OF TONGA**

**CIVIL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**CV 90 of 2014**

---

[16] At paragraph 12 of his affidavit Mr. Lavulavu states "That parties should have come with clean hands to the Court especially questioning the outcome of the election petition". Maxims of equity have no role to play here. To suggest otherwise fails to recognise that election petitions are generally not concerned with the vindication of individual rights but in securing free and fair elections in a democratic society. *Latu and anor v Lavulavu* (Unreported, 20 April 2015 CV 90/2014 Supreme Court) approved in *Lavulavu v Latu and anor* (Unreported AC 11/15, 16 September 2015 Court of Appeal) at [15].

[17] In the notice of application reference was made to *Paasi v Sanft and Siale* [Supreme Court CV5/87]. I am not aware of any reported decision from this case but I have viewed the Court file. It was an action in which the plaintiff sought to challenge an election for breaches of the Legislative Assembly Act and Representation of the People Act 1983 (UK). The first defendant filed a defence and counterclaim alleging that the plaintiff had also been guilty of bribery and corrupt practices and seeking declaratory relief, including that the plaintiff was estopped from obtaining any remedies.

The case went to trial before a jury, which found that the plaintiff and defendants were guilty of corrupt practices. The result of the trial was that the election of the defendants was declared void. I do not get any assistance from this case. It predates the Electoral Act and so has little if any relevance to a proceeding based solely on the provisions of that Act. Secondly, I can see no evidence that the judge considered whether it was appropriate to allow a counterclaim to be pursued. Thirdly, when one considers the result of the case it is not clear what (if any) purpose was served by the counterclaim.

[18] For those reasons I would dismiss Mr. Lavulavu's application but in case I am wrong about any of the matters referred to above I also go on to consider other reasons why this application should be dismissed.

**Prejudice to the petitioners and the public interest**

[19] At paragraph [11] of his affidavit Mr. Lavulavu says that justice and fairness between the parties should be the determining factor that the Court should have regard to in deciding whether to allow an amendment of the pleadings.

**IN THE SUPREME COURT OF TONGA**

**CIVIL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**CV 90 of 2014**

---

As a statement of general principle I agree with that. As to what justice and fairness requires, it is worthwhile to consider the commentary in the White Book at 20/1/1 in relation to amendments which states:

...as a general rule either party is allowed to make any amendment, provided there has been no undue delay on his part, and provided also that the amendment will not injure or prejudicially affect any vested rights of his opponent. But if the application is made *mala fide*, or if the proposed amendment is sought to be made after undue delay, or will in any other way unfairly prejudice or cause detriment to the other party, or is irrelevant or useless or would raise merely a technical point, leave to amend will be refused.

[20] I have, for reasons already given, formed the clear view that the proposed counterclaim is both irrelevant and useless. Furthermore, Mr. Lavulavu is guilty of undue delay. This election petition was filed on 8 December 2014. Mr. Lavulavu filed his defence on 21 January 2015. Since that time there has been no suggestion that Mr. Lavulavu has any intention of amending his pleadings despite the fact that the petition has been set down for hearing on more than one

**IN THE SUPREME COURT OF TONGA**

**CIVIL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**CV 90 of 2014**

---

occasion. When the case was set down on the last occasion, no objection was taken to that nor any suggestion made that he wished to pursue a counterclaim.

[21] The draft counterclaim makes wide ranging and numerous allegations against Mr. Latu. Mr. Latu has had no opportunity to consider or respond to these allegations, there has been no discovery in relation to them and to prove the allegations at trial Mr. Lavulavu would need to call a substantial amount of, no doubt contested, evidence. To allow him to pursue a counterclaim at this late stage would mean that the trial dates would have to again be vacated and the trial delayed for some months. There should be no further delays. The petitioners are entitled to have the petition heard on the dates that have been allocated.

[22] In addition to the potential for prejudice to the petitioners, there are important public interest considerations. Election petitions should be dealt with promptly. In many jurisdictions there are strict time limits within which petitions, and any appeals from them, must be heard. This petition has not been heard before now because of

**IN THE SUPREME COURT OF TONGA**

**CIVIL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**CV 90 of 2014**

---

unsuccessful procedural steps taken by Mr. Lavulavu including his appeal to the Court of Appeal. Almost a year has passed since the General Election which is already far too long for determining a matter such as this.

[23] As I have noted the Court has now allocated its time and resources to the trial of this petition based on the representations of Mr. Lavulavu as to the number of witnesses he will call, the likely length of the trial and his preference for a trial in Vava'u. To grant Mr. Lavulavu's application would not only be contrary to the public interest but be a substantial waste of the Court's resources.

**Result**

[24] Mr. Lavulavu's application to add a counterclaim is dismissed. The respondents are entitled to costs to be fixed by the Registrar.



A handwritten signature in black ink, appearing to read "O.G. Paulsen".

O.G. Paulsen

**NUKU'ALOFA: 16 October 2015.**

**LORD CHIEF JUSTICE**