CA 04/21
CA 05/21

IN THE SUPREME COURT OF SAMOA
HELD AT MULINUU

IN THE MATTER: Articles 44 and 47 of the Constitution of the Independent State of Samoa

A N D:
IN THE MATTER: Declaratory Judgments Act 1988

A N D:
IN THE MATTER: The Electoral Act 2019

BETWEEN: **ELECTORAL COMMISSIONER** appointed under the Electoral Commission Act 2019

First Appellant

A N D: **ALIIMALEMANU MOTI MOMOEMAUSU ALOFA TUUAU**,

Second Appellant

A N D: **FAATUATUA I LE ATUA SAMOA UA TASI (F.A.S.T. PARTY)**

First Respondent

A N D: **SEUULA IOANE**, candidate for the Constituency of Alataua i Sisifo

Second Respondent

Coram: Chief Justice Satiu Simativa Perese
Justice Tologata Tafaoimalo Leilani Tuala-Warren
Justice Fepuleai Ameperosa Roma

Counsel: P. Rishworth QC (via video-link) & S. Ainuu for the First Appellant
P. Lithgow (via video-link) & M. Leung-Wai for the Second Appellant
B. Keith (via video-link), P. Chang & M. Lui for the First and Second Respondents

Hearing: 31 May 2021
Judgment: 2 June 2021

JUDGMENT OF THE COURT

Introduction

[1] The participation of women in the Parliament of Samoa has been an exception rather than the norm.

[2] The Court can take notice that for some months in the lead up to the April 2021 General Election, there was a widespread and commendable use of television advertisements encouraging and promoting awareness among the community of women putting themselves forward for election to Parliament. These advertisements invited women to put themselves forward for election to one of fifty one constituency seats.

[3] There were women candidates who ran at the 2021 general election, and five succeeded in securing constituency seats. This was the highest number of successful women candidates.

[4] In 2013, Parliament enacted ground-breaking Constitutional amendments concerning women's membership of Parliament. It is to those amendments which this Court must turn its attention. The issue is simple. Does the Constitution provide for a minimum of 10% membership, therefore six women members, or does it provide for 9.8% membership, and therefore five women members? We note that there are political ramifications to the outcome of our decision. But, those considerations are irrelevant to our task. We simply and humbly tender our opinion based on our interpretation of the law, which must be obeyed.

[5] In the Supreme Court, their Honours were split on the issue of whether the Constitution permitted the addition of the further woman member. Their Honours Justices Tuatagaloa and Vaai considered that they were constrained by the express language of the Constitutional provision, which said that there were to be 5 women members of Parliament. Writing for himself, His Honour Justice Nelson, considered that Constitutional provision only made sense if there were 6 women members. All the Supreme Court Justices considered that there was uncertainty about how the appointment of

the additional members was to be carried out, and out of their respect for the separation of powers, considered that the process of appointment was a matter for clarification from Parliament.

[6] We note at the outset of our judgment that this Court has had the privilege of, respectfully, high-quality submissions from very learned Counsel from New Zealand and Australia; we respectfully consider that their participation, as well as those of senior members of the Samoan bar have made our task easier. We do not intend to summarise each of the submissions made, save to say that they have been carefully considered.

[7] We begin with a discussion about whether there is an ambiguity that calls on the Court to have an input.

Is there an ambiguity in the Constitution?

[8] Article 44(1A) is the relevant provision in the Samoan Constitution. However, it appears to us that the legislators have attempted to do too many things in that provision, resulting in mixed messages, confusion and an ambiguity of ideas.

[9] The mixed messages, confusion and ambiguity arises from these words:

> **44. Members of the Legislative Assembly** – **(1)** ... the Legislative Assembly shall consist of one member elected for each of 51 electoral constituencies.....
>
> **(1A)**...women Members of the Legislative Assembly shall:
> (a) Consist of a minimum of 10% of the Members of the Legislative Assembly specified under clause (1) which for the avoidance of doubt is presently 5; …

[10] Article 44 (1A)(a) produces two results.

[11] First, clearly, 10% of 51 members, must be 5.1. So there should be at least 5.1 women. One would reasonably attribute to Parliament the intention that the .1 would be rounded up, and when this is done there would be 6 women members.

[12] However, the second result arises from the words *which for the avoidance of doubt is presently 5.* This reduces the percentage of women in Parliament to 9.8%. That is 5 women members out of 51 is 9.8%.

[13] The suggestion that 10% of 51 can be satisfied with an outcome that produces 9.8% is patently ambiguous and a clash of ideas.

[14] We, respectfully, consider that there is a principled way to resolve the two ideas which are presently before the Court. In reaching the views that we have, we are guided and bound by well-established principles of interpretation from earlier rulings of this Court.

[15] We agree, the proper approach to the interpretation of the Constitution is as held in a 1982 decision of this Court in *Attorney General on behalf of the Registrar of the Land and Titles Court v Saipai'a Olomalu*.[1] That case related to the constitutionality of sections 16 and 19 of the Electoral Act 1962 (WS) and the Bill of Rights provisions in the Constitution. The Court (comprising of Their Honours Sir Robin Cooke, Mills and Keith JJ) noted that –

> "[T]he Constitution be interpreted in the spirit counselled by Lord Wilberforce in Fisher's case. He speaks of a Constitutional instrument such as this as sui generis; in relation to human rights of a "generous interpretation avoiding what has been called the austerity of tabulated legalism; of respect for traditions and usage which have given meaning to the language; and of an approach with an open mind. This involves, we think, still giving primary attention to the words used, but being on guard against any tendency to interpret them in a mechanical or pedantic way."

[16] The Learned Justices referred to the approach of Lord Wilberforce in *Minister of Home Affairs v Fisher*,[2] a case that concerned the interpretation of section 11 of the Constitution of Bermuda and whether the reference to "a child" included an "illegitimate child" for the purpose of being given "Bermudan status". His Lordship speaking for the Privy Council said;

> A Constitution is a legal instrument giving rise, amongst other things to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation, a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms…

[17] The principle in *Fisher* adopted in *Saipa'ia Olomalu* was further endorsed by the Court of Appeal in *Pita v Attorney General* where the Court said:

[1] [1982] WSCA 1.
[2] [1980] AC 319.

> "[T]he Court will consider the words of the provisions principally in issue, the Constitutional and legal context in which they appear, and the wider social and historical context in which they are to be understood."[3]

Discussion

Interpretation

[18] The first and perhaps overarching point about Art 44 (1A) is that it establishes a specific mandate for women to become representatives in Parliament. The words of the Article are plain enough – there are to be women members of the Legislative Assembly; a clear and unequivocal Constitutional guarantee of women's participation in the electoral process and Samoa's democracy. We do not believe that the importance of this declaration can be overstated.

[19] How this guarantee is given effect is set out in the balance of Article 44, including 44(1A) itself.

1) If all members elected to electoral constituencies are male, then the prescribed number of women candidates, with the highest number of votes shall become additional members (Art. 44(1B)(a));
2) If less than the prescribed number of women are elected to an electoral constituency, then the remaining prescribed number of women candidates with the highest number of votes shall become additional members (Art 44(1B)(b));
3) If the prescribed number of women are elected in electoral constituencies, then there is no additional woman member (Art. 44(1C));
4) If a seat of an additional member becomes vacant, it shall be filled by the woman candidate who has the next highest number of votes at the last election (Art. 44(1D));
5) If a seat won by a woman in an electoral constituency becomes vacant, and on a by-election is won by a male, then the woman candidate with the highest number of votes at the last general election shall be an additional member (Art 44(1E));
6) If two or more women candidates have an equal number of votes, the additional member shall be selected by lot before the Electoral Commissioner (Art. 44(1F));
7) If a woman candidate becomes an additional member of a constituency, no other woman member from the same constituency shall become an additional member unless there is no other woman candidate from any other constituency (Art 44(1G));

[3] [1995] WSCA 6; 07 1995 (18 December 1995). See also *Jackson v CCK Trading Limited* (2009) WSSC 122 and *Henry v Attorney General* [1983] CKCA 1; [1985] LRC (Const) 1149 at 41-51 and *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 550-534.

8) Members of the Legislative Assembly (including additional members) are known as Members of Parliament (Art. 44 (4)); and
9) The term *prescribed number* means the minimum number of women Members of Parliament specified under Art 44(1A); (Art. 44(5)).

[20] What is plain from these points is Parliament providing for the embedding of an enduring change to the Constitution; Art. 44(1B) sets out when the minimum number of women members provision is intended to operate: Arts. 44(1D), (1E) and (1G) deal with situations which might arise well-after a general election. That Parliament provided for vacancies and the need to consider geographical representation, in certain respects, supports the commitment to and protection of women representation, at-all-times, and not just following a general election.

[21] The number of additional members is directly influenced by the prescribed number of women members as defined in Art 44(1A).

[22] So, what is the prescribed number of women members in Art 44(1A) – is it a minimum of 10% or presently five?

[23] The Court finds persuasive the submissions made by the Appellants that:

> "the appropriate way to resolve such a conflict is to seek the deemed legislative intention having regard to the values underpinning the provision. In this context, that requires giving weight to the important and rights-affirming purpose that lies behind the 10% requirement and not reading that down in light of the weak and ambiguous signal sent by the "presently 5" provision" [4]

Further:

> "The 10% requirement is and always has been the dominant provision and to read up the 'presently 5' phase (designed to deal with the situation in 2013) so as to mean 'always 5' turns the section on its head…The better reading of Art 44(1A) is that it required and still requires a 10% minimum of women. The Respondent's suggested meaning comes at a cost of dipping below 10%, now and for the future, which it is the whole concern of Art 44(1A) to avoid"[5]

[4] Paragragh 17(b) Submissions for the First Appellant
[5] Paragraph 17(d) Submissions for the First Appellant

[24] From the submissions of the Second Appellant,

> "the mandated Constitutional representation of women proscribes the 'minimum' representation"[6] -

Further:

> "If there is less than 10% then the "minimum" requirement has not been fulfilled. The ordinary and plain meaning is that if the minimum requirement, in this case 10% women members of the Legislative Assembly, is not reached then the Constitutional requirement has not been satisfied" [7].

[25] We consider that the interpretation of Art 44(1A) does not require us to look further than its wording. We find that the most compelling interpretation of Art 44(1A) is that primacy should be given to the number of women representatives reaching a minimum of 10%, or as Mr Rishworth put it – interpreting the Constitution to give it its best effect. In the context of this case, we consider that the Constitution is given its best effect when it promotes human rights and that means in a practical sense that the total of the prescribed number of women is 6.

[26] It cannot possibly be a prescribed number of 5 women representatives because the threshold of a minimum of 10% would not have been reached. We have a saying in Samoa *e le togi le moa ae u'u le afa*, one should not appear to do something but then hold back in a material respect. We do not attribute that sleight of hand to the Honourable Members of Parliament, whom, only a few words earlier in the same sentence, declared their vision of a minimum of 10% of women.

[27] We consider that Mr Lithgow correctly submits that the phrase *for the avoidance of doubt it is 5* is otiose; it does not add to the meaning of Article 44(1A), as we understand. We would go further and say that to give primacy to the phrase would send two messages, both of which are not attractive. First, that despite the aspirational nature of the guarantee, a ceiling would be allowed to be established. Second, it leaves open the possibility that without further Parliamentary intervention, that ceiling would continue to exist.

[6] Paragraph 13 Submissions for the Second Appellant
[7] Paragraph 19 Submissions for the Second Appellant

When are additional members appointed?

[28] Having reached the position that we consider that an additional woman member is constitutionally mandated, we now turn to the second issue and that is when the additional member/s is/are to be appointed.

[29] Our interpretation of Article 44(1A) means that the appointment of the additional member/s can only be fulfilled once there is certainty about the outcome of a general election.

[30] Article 44(1B) provides that an additional member may be appointed following a general election. No other express direction is made in the Constitution. It is by necessary implication that we arrive at the decision that the electoral process must necessarily have reached a point of certainty before the additional member is appointed. We do not attribute to Parliament the intention that the additional member can be appointed at any time the Electoral Commissioner deems appropriate, there is no basis for such a discretion where Parliament has clearly set out the conditions by which an additional member is to be added. It is clear that the addition of the additional members is a deliberative process, undertaken at a time when there is a high level of certainty as to the outcome of the constituency vote – which then determines the number of additional members.

[31] We consider that the point of certainty is reached at the conclusion of the determination of the Electoral Petitions and any by-elections that might result. It is only at this time is it possible for the elements of Articles 44(1B),(1C), (1E) and (1F) to be considered. Article 44(1B) requires the results of the Petitions because you cannot know how many additional members are to be appointed. Once appointed, the additional members cannot be unappointed. Yet, if say there were 6 appointed, on a snap shot in time basis, before petitions and by-elections, and then a further 6 were successful at the by-elections, this result would be inconsistent with the Art. 44(1B)(b), that additional members are appointed to enable compliance with the specified number in Article 44(1A), which in the circumstances of this case is 6 women in total, not 12. Furthermore Art. (1C) provides that Clause 1B does not apply if the prescribed number of women are all elected under clause 1 – which applies to electoral constituencies. This would suggest that the legitimacy of the added members (added pursuant to Clause (1B)) is open to question. That can not have been Parliament's intent.

[32] Article 44(1C), (1E) and (1F) also require a high degree of certainty before they apply or can be applied.

[33] We do not attribute to Parliament a method which is haphazard to regulate the addition of a woman member. In our view the overall scheme of the constitutional guarantee achieves its purpose

when there is a credible level of certainty, and in our view that occurs post electoral petitions and by-elections, if any.

[34] We add for completeness the vagaries of uncertainty might also arise under the terms of the Electoral Act 2019 ("the Act") in two respects. First, the Act provides that the election of a candidate proven at the trial of an electoral petition to have been guilty of a corrupt practice at the election is void: s.116. The voiding of an election leads to a vacancy of the seat, which is then the subject of a by-election. It follows therefore that the results of the election are set aside, so it would be anomalous for a woman to be added when her claim to a certain level of electoral support has been voided. Second, the Supreme Court has the power to void an election for corruption under s.117 of the Electoral Act 2019:

> 117 Void of election for corruption:
>
> (1) If it is reported by the Supreme Court at the trial of an election petition that the prevalence of corrupt or illegal practices committed for the purpose of obtaining the election of the candidate is reasonably inferred to have resulted in the election of the candidate, the election shall be ruled as void.
> (2) Except under this section, an election is not void by reason of the general prevalence of corrupt of illegal practices.

[35] Again, this may mean that any votes that the additional member might call on in support of her position as the highest polling woman candidate are voided by the Supreme Court on account of general corruption in an electorate. It may in fact be another woman who was properly entitled to be declared an additional member.

[36] We are of course mindful that the Supreme Court has before it 28 electoral petitions and 28 counter-petitions. These petitions are directed at over half (28 of 51 seats) of the electoral constituencies in Samoa. This is an extraordinary number, even by Samoa's standards. This living example supports the interpretation that the invocation of Art. 44(1A) can only be considered after petitions and by-elections – in theory, at least, over half of the constituencies may need to go back to the polls in by-elections.

[37] We do not consider the intent of Parliament of having a minimum of 10% of its members being women is frustrated by waiting for the outcome of Electoral petitions, and by-elections, if any. On the contrary, it ensures a high degree of credibility in the application of the additional member provision, and that in our respectful view also ensures that the dignity and gravitas of women's participation is promoted.

Conclusion

[38] The Supreme Court made the following declarations and we conclude on each as follows;

1) *Article 44(1A) should be activated by the Electoral Commissioner*.

We dismiss the cross appeal and uphold this declaration;

2) *Article 44(1A) should be activated after the final count of the ballot papers and before reporting to the Head of State*.

We allow the cross-appeal on this point. We hold that the determination under Article 44(1A) must be made on the basis of the General Election results as finally determined after the results of any electoral petitions under the Electoral Act 2019 and by-elections pursuant to the terms of that Act;

3) *The activation by the Electoral Commissioner of Article 44(1A) on 20 April 2021 was unconstitutional and that the Warrant of Election issued by the Head of State appointing the Second Respondent as Member of Parliament is void.*

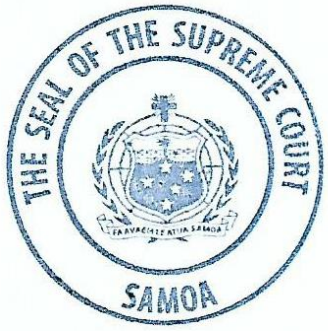
We agree with the conclusion that the Supreme Court reached in relation to the third declaration, but we reach that result for different reasons. We consider that it is not necessary to refer the matter back to Parliament for clarification. We hold that a plain interpretation of Article 44(1A) provides that the appointment can only be triggered after the final results are known, and this point is reached when the results of the electoral petitions and by-elections, if any, are known. We consider that this is a principled way by which Art 44(1A) can be triggered, rather than an ad hoc snap shot moment in time approach, which appears to have been adopted by the Commissioner.

[39] Finally, we allow the appeal on the basis that the majority decision in the Supreme Court is wrong in law as to the number of additional members being 5. We consider that Article 44(1A) is ambiguous as to the ideas that it promotes, and that primacy should be given to whichever of the competing ideas best promotes the establishment of human rights practice in Samoa. In this case, that means we consider the prevailing measure is a minimum of 10% of women representation, which is 6 women.

[40] We commend the Second Appellant's tenacity in bringing this appeal which champions women's representation in Parliament. Although we have found that 10% means 6 women in Parliament, it remains to be seen whether she will be appointed an additional member to satisfy the

10% requirement. It is only after petitions and by-elections can it be confirmed whether there is a need for recourse to Art. 44(1A) and if there is, whether the Second Appellant remains eligible to be made an additional member.

[41] We consider each party should bear their own costs.



Chief Justice Perese

Justice Tuala-Warren

Justice Roma