IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Miscellaneous Action No.152 of 2021

IN THE MATTER of section 44 of the Constitution of the Republic of Fiji

A N D

IN THE MATTER of the High Court (Constitutional Redress) Rules 2015

A N D

IN THE MATTER of section 3 of the Electoral (Registration of Voters) (Amendment) (No. 2) Act 2021

A N D

IN THE MATTER of section 2 of the interpretation (Amendment) Act 2021

BETWEEN : **LAVINIA ROSE BERNADETTE ROUNDS GANILAU**

First Plaintiff

SHIROMANI PRISCILLA SINGH

Second Plaintiff

ADI ASILINA DAVILA TOGANIVALU

Third Plaintiff

ELIZABETH CATHERINE READE FONG

Fourth Plaintiff

LEBA SENI NABOU

Fifth Plaintiff

YASMIN NISHA KHAN

Sixth Plaintiff

SALOTE RAIKOLO QALO

Seventh Plaintiff

AND : THE ATTORNEY-GENERAL OF THE REPUBLIC OF THE FIJI ISLAND

First Defendant

THE SUPERVISOR OF ELECTIONS

Second Defendant

THE STATE

Third Defendant

Counsel : Mr. J Apted & Ms. W Chen for the Plaintiff

Ms. C Mangru for the first and third Defendants

Mr. N Prasad for the second Defendant.

Hearing : **11 December 2024**

Judgment : **28 April 2025**

JUDGMENT

[1] In 2021, the then government (but now previous government) amended the legislative requirements for voter registration in general elections (‘**the 2021 amendments**’). Previously, when registering to vote, a voter provided their full name and supplied suitable

identification for that name. The 2021 amendments required a voter to use the name recorded on their birth certificate to register to vote.

[2] A significant number of potential voters, including the seven Plaintiffs, were affected by this change. In particular, married women who used their husband's surname. Such persons were not only using their husband's surnames for social purposes but used their new surname in all aspects of their day to day living. For example, the new surname was recorded on their passports, drivers licence, bank accounts and so forth. In most cases, their children used their husband's surnames or a combination of both parents' surnames. For many, their birth certificate was the only formal documentary reminder of their birth name.

[3] The 2021 amendments required these potential voters to either vote in the names recorded in their birth certificates or amend their birth certificates to record their married names. The Plaintiffs brought this proceeding seeking declarations that the 2021 amendments are unconstitutional and, thus, unlawful. These proceedings were filed in November 2021 in anticipation of the upcoming 2022 elections.

[4] The 2022 elections came and went. A new government was elected. In July 2023, the new government repealed the 2021 amendments. The preliminary question that arises is whether these proceedings are moot and, if so, should this Court nevertheless determine the legality of the 2021 amendments.

Background

[5] Pursuant to s 55(1) of the Constitution of the Republic of Fiji 2013 (**'the Constitution'**), Fiji citizens who are 18 years or over are eligible to register to vote in the general election. The provision provides that registration is to be conducted *'in the manner and form prescribed by a written law governing elections or registration of voters'*. The Electoral (Registration of Voters) Act 2012 (**'the ERV Act'**) regulates the registration of voters. As stated, before the 2021 amendments, a potential voter could use any name so long as they could provide suitable identification for that name. Once registered, the voter's name is placed on the Register of Voters. Only those on the Register are permitted to vote.

[6] In July 2021, the then Supervisor of Elections removed the name of Niko Nawaikula from the Register of Voters as Mr Nawaikula had not used the name recorded on his birth certificate. Mr Nawaikula was then a sitting Member of Parliament. The effect of removing Mr Nawaikula's name from the Register of Voters also had the effect of making his Parliamentary seat vacant. Mr Nawaikula brought proceedings in the High Court seeking declarations that the Supervisor's actions were unlawful. In *Nawaikula v Supervisor of Elections* [2021] FJHC 232 (17 August 2021) the High Court made the declarations sought by Mr Nawaikuula, determining that the ERV Act did not require a potential voter to use the name recorded in their birth certificate. The High Court stated:

> *43. This Court holds that where a surname is adopted by any person with no intention to defraud or deceit any person or organization, then that person has the legal right to use that surname irrespective of whether that surname is registered with the BDM*[1] *Registry.*
>
> *44. What is stated at preceding paragraph is of course is subject to any legislative provisions that require surname to be registered, or for provisions for name appearing on a persons' birth certificate. Also institutions and organizations (including Government and State entities) may also require persons to provide name on their birth certificates.*

[7] The government of the day acted on paragraph 44 of the High Court's decision, introducing legislation requiring a person to use the name recorded in their birth certificate not only to register to vote but in all circumstances where it was required under written law for a person to use their name or provide identification. Amendments were introduced to three separate pieces of legislation: the Electoral (Registration of Voters) Act 2012, the Interpretation Act 1967 and the Births, Deaths and Marriages Registration Act 1975. The amendments came into force on 6 October 2021. The changes were as follows:

i. A potential voter was required to use the name recorded in their birth certificate in order to register to vote.[2]

[1] Births, Deaths & Marriages.
[2] Section 4 of the ERV Act.

ii. The Interpretation Act was amended to require persons to use the name recorded on their birth certificate where, under any written law, their name was required to be provided or they were required to provide any form of identification.[3]

iii. If the voter wished to change the name on their birth certificate, they no longer were required to do so by Deed Poll. A simpler process was introduced into the Births, Deaths and Marriages Registration Act requiring lodgement of a form only at no cost.

Present proceedings

[8] The concern, particularly for the seven plaintiffs, was the impact on persons who were married and had taken their husband's surname. They brought these proceedings in November 2021 seeking declaratory orders that the amendments in the Electoral (Registration of Voters) (Amendment) Act 2021 and in the Interpretation (Amendment) Act 2021 were in breach of their rights under the Constitution and, thus, ultra vires. The orders sought by the plaintiffs are as follows:

1. *A declaration that Section 3 of the Electoral (Registration of Voters) (Amendment) (No.2) Act 2021 (Act 40 of 2021) and the amendments made thereby to section 4 of the Electoral (Registration of Voters) Act 2012 are in breach of the Plaintiffs' rights under section 23 of the Constitution of the Republic of Fiji including their rights to –*

    a. *free, fair and regular elections under the Constitution.*
    b. *to be registered as a voter, and*
    c. *to vote by secret ballot in any election under the Constitution.*

2. *Further or alternatively, a declaration that section 3 of the Electoral (Registration of Voters) (Amendment) (No. 2) Act 2021 (Act 40 of 2021) and the amendments made thereby to section 4 of the Electoral (Registration of Voters) Act 2012 are in breach of the Plaintiffs' rights under section 24(1)(c)*

[3] Definition of 'birth certificate' under s 2 of the Interpretation Act.

of the Constitution of the Republic of Fiji to personal privacy, in particular respect for their family life.

3. *Further or alternatively, a declaration that section 3 of the Electoral (Registration of Voters) (Amendment) (No. 2) Act 2021 (Act 40 of 2021) and the amendments made thereby to section 4 of the Electoral (Registration of Voters) Act 2012 are in breach of the Plaintiffs' rights under section 26 of the Constitution of the Republic of Fiji including their rights to –*

    a. *equality before the law, and equal protection, treatment and benefit of the law*
    b. *full and equal enjoyment of all rights and freedoms recognised in Chapter 2 of the Constitution and under written law, and*
    c. *not to be unfairly discriminated against directly or indirectly on the grounds of their actual or supposed personal characteristics or circumstances, including their sex, gender, and /or marital status.*

4. *Further, a declaration that section 3 of the Electoral (Registration of Voters) (Amendment) (No. 2) Act 2021 (Act 40 of 2021) and the amendments made thereby to section 4 of the Electoral (Registration of Voters) Act 2012 by reason of inconsistency with the Constitution of the Republic of Fiji are under section 2 of the Constitution invalid and of no force or effect.*

5. *Further or alternatively, a declaration that section 2 of the Interpretation (Amendment) Act 2021 (Act 42 of 2021) and the amendments made thereby to section 2 of the Interpretation Act 1967 are in breach of the Plaintiffs' rights under section 23 of the Constitution of the Republic of Fiji including their rights to –*

    a. *free, fair and regular elections under the Constitution*
    b. *to be registered as a voter, and*
    c. *vote by secret ballot in any election under the Constitution.*

6. *Further or alternatively, a declaration that section 2 of the Interpretation (Amendment) Act 2021 (Act 42 of 2021) and the amendments made thereby to section 2 of the Interpretation Act 1967 are in breach of the Plaintiffs' rights under section 24(1)(c) of the Constitution of the Republic of Fiji to personal privacy, in particular respect of their family life.*

7. *Further or alternatively, a declaration that section 2 of the Interpretation (Amendment) Act 2021 (Act 42 of 2021) and the amendments made thereby to section 2 of the Interpretation Act 1967 are in breach of the Plaintiffs; rights under section 26 of the Constitution of the Republic of Fiji including their rights –*

   a. *to equality before the law, and equal protection, treatment and benefit of the law*
   b. *to full and equal enjoyment of all rights and freedoms recognised in Chapter 2 of the Constitution and under written law, and*
   c. *not to be unfairly discriminated against directly or indirectly on the grounds of their actual or supposed personal characteristics or circumstances, including their sex, gender, and/or marital status.*

8. *Further, a declaration that section 2 of the Interpretation (Amendment) Act 2021 (Act 42 of 2021) and the amendments made thereby to section 2 of the Interpretation Act 1967 by reason of inconsistency with the Constitution of the Republic of Fiji are under section 2 of the Constitution invalid and of no force or effect.*

9. *An order that the Second Defendant take all necessary steps to enable the Sixth Plaintiff and all other persons who have amended their names on the National Register of Voters from their adopted married names to their birth certificate names as a consequence of the Electoral (Registration of Voters) (Amendment) (No. 2) Act 2021 to revert from their birth certificate names to the names under which they previously appeared on the National Register of Voters.*

[9] Affidavits for each of the seven plaintiffs were filed in support. Each plaintiff told their own personal story as to how the 2021 amendments affected them. All are married women. They have taken their husband's surname and their children have similarly taken their husband's surname or a combination of their husband's surname and their own. They have identifications such as passport, driver's license, qualifications, and so forth all in their married names as they have used this name for many years and in some cases several decades. Notwithstanding, they value their birth name and the cultural, social and familial identification that comes with it. They are fervently opposed to having to make any choice to vote in their birth name or to change their birth certificate to their married name. They believe that this will expunge the official record of their birth identity.

[10] The plaintiffs believe, based on information provided by the previous Attorney-General when the 2021 amendments were passed, that more than 100,000 women were affected by the 2021 amendments and, therefore, feel that they are bringing this proceeding on behalf of all these women. They describe the 2021 amendments as an unnecessary burden and inconvenience. More to the point, they consider that the 2021 amendments are an affront to their constitutional right to equality and their right to a fair election.

[11] The defendants filed an affidavit in response from Anaseini Diroko Senimoli dated 14 January 2022. The affidavit is some 33 pages in length and responds to each of the plaintiff's affidavits. Ms. Senimoli stated that between 3 October 2021 and 31 December 2021, the Supervisor of Elections received a total of 177 name change requests, 132 from female voters and 45 from male voters. She stated that the elections office facilitated these name changes to minimize inconvenience to the voters.

[12] On 4 February 2022, the plaintiffs filed affidavits in reply from Ms. Ganilau (the First Plaintiff) and Ms. Nabou (the Fifth Plaintiff).

[13] It is apparent from the Plaintiff's Originating Motion, the content of the affidavits in support and the extensive written submissions for the plaintiffs that the purpose of this litigation was to obtain declaratory orders from the High Court regarding the legality of the 2021 amendments before the then upcoming elections.[4] A hearing was conducted on 24 February 2022, well before the general election in December 2022.

[4] This is also apparent from the Plaintiffs Supplementary Submissions dated 4 September 2024, at paras 5 and 10.

[14] At the hearing, the defendants raised a preliminary objection regarding the plaintiff's affidavits. Pursuant to the 2021 amendments, the deponents were required to swear the affidavits in the name recorded in their birth certificate. They executed the affidavits in their married names. The defendants argued that the affidavits ought to be struck out.

[15] The plaintiffs argued the 2021 amendments were unconstitutional as they infringed on their rights to free, fair and regular elections (s 23 of the Constitution), their right to personal privacy (s 24(1)(c)), and their right to equality, full and equal enjoyment of rights and not to be unfairly discriminated against (s 26). The plaintiffs also argued that the 2021 amendments were inconsistent with the Constitution. In short, the plaintiffs argued that female voters were disproportionately discriminated against by the 2021 amendments and this was not only a breach of the supreme law of the land but also to international covenants which had been ratified by the government of Fiji. Moreover, the plaintiffs argued that there was no justifiable reason for Parliament to change the law.

[16] The defendants pointed to s 6(5) of the Constitution which allows Parliament to restrict rights enshrined in the Constitution. Nevertheless, the defendants argued that the 2021 amendments did not restrict the plaintiffs' rights. According to the defendants, the plaintiffs were entitled to vote, they simply had to choose which name to use to register to vote. The defendants also pointed out that where a voter decided to vote in their married names, amendments had been made to the Births, Deaths and Marriages Registration Act to facilitate the quick and affordable change of name. The defendants argued that the 2021 amendments had a valid and worthy purpose, being to bring about greater integrity in the voter registration process, minimizing fraud and multiple voting by dishonest voters.

[17] At the conclusion of the hearing, the learned Judge reserved his decision. The decision was not delivered before the 2022 election. As stated, a new government was elected by the voters in December 2022 and, in July 2023, Parliament repealed the 2021 amendments to the Interpretation Act and the Electoral (Registration of Voters) Act. The Hansard reports for the Parliamentary debates on 14 July 2023, when the bill was before Parliament, demonstrate the parliamentary process in action - and the view of the new government in respect to the repeal of the 2021 amendments. The Honourable S.D Turaga stated:

...before I proceed, may I just thank the woman who are sitting in the gallery; strong-minded women who fought for their rights. Whilst they were waiting for a decision, this Government found the courage to change this law.

...

The Act of 2021 was seen to disadvantage people, namely women who chose to use their spouse's surname when providing their name under any written law...

....

Mr Speaker, Sir, again on consultation, it had extensive, it was held at the Office of the Prime Minister, Minister of Finance and the Office of the Solicitor General. The stakeholders that were consulted were:

- *Fiji Women's Crisis Centre (some of the members are sitting in the gallery);*
- *Fiji Women's Rights Movement;*
- *Fiji Council of Churches;*
- *i-Taukei Land Trust Board;*
- *Fijian Elections Office;*
- *Fiji National Provident Fund;*
- *Fiji Revenue and Customs Service;*
- *Land Transport Authority;*
- *Ministry of Home Affairs and Immigration.*

There were also public consultations in Suva, Labasa, Lautoka, Nadi and outer islands including Lomaiviti – Gau, Nairai and Batiki."

[18] The 2021 amendments that are the subject to the present litigation were repealed on 14 July 2023. The new Parliament had brought about the outcome that the plaintiffs had sought to achieve by the filing of these proceedings in late 2021.

[19] These proceedings remained on foot awaiting a decision from the Judge. Sadly, the learned Judge passed away. As such, I became charged with the matter. A fresh hearing was

conducted in December 2024. Before the hearing, the parties were directed to file written submissions on whether the substantive dispute was still live in light of the repeal of the 2021 amendments. The parties were also permitted an opportunity to file an affidavit in respect to developments since the previous hearing in February 2022.

Preliminary issue as to whether proceedings are moot

[20] The defendant's position is that the substantive dispute is moot in light of the repeal of the 2021 amendments. The plaintiffs disagree. While the plaintiffs accept that prayer 9 of its Originating Motion should be withdrawn (in light of the said repeal) they do not accept that the substantive issue is moot, arguing that the issues were very much live when the proceeding was filed. The plaintiffs argue that even if the claim is moot there are compelling reasons for the Court to decide the dispute, namely, that it is in the public interest to do so and will help clarify the constitutional rights of women in Fiji. A determination will also vindicate the plaintiffs if they are successful - confirming, they say, that their rights were infringed for the almost two-year period that the 2021 amendments were in force.

Decision

[21] I am grateful to counsel for their thorough written submissions and helpful oral arguments.

[22] The courts are not in the business of providing advisory opinions. There must exist a live issue for determination by the court. As the Court of Appeal noted in *Yabaki v President of the Republic of the Fiji Islands* [2003] FLR 14 at 21:

> *The Appellants had the undoubted right to appeal to this court under s 121(2) of the Constitution because the final judgment of the High Court involved interpretation of the Constitution. But contrary to counsel's submission,* ***the mere fact of their having an unassailable right to file an appeal does not oblige the court to consider an appeal on the merits when the subject matter of the litigation has become moot****. In that event, a moot case may be considered on appeal only in the very limited circumstances described below.*

Section 121(2) of the Constitution, does not give an unrestricted power to any concerned citizen to seek an advisory opinion on a constitutional matter. ***The only right to an advisory opinion is that conferred on the President by s 123 of the Constitution to seek the opinion of the Supreme Court on constitutional matters in stated situations.*** *Even the recent line of authority on standing for declarations in public interest cases shows that* ***there is normally to be sought from the court a ruling on the legality of something live: either the court is asked to declare illegal something which is to happen or to declare illegal something which has happened in circumstances, usually where a return to the status quo is feasible, even although inconvenient...***[5]

[23] In *Yabaki*, the appellants had sought declarations that certain action by the President was contrary to the Constitution and, thus, null and void. However, subsequent to the disputed action by the President, Fiji had had a general election and a new government was elected. As such, the action that was the subject of that proceeding had been overtaken and become redundant. The Court of Appeal dismissed the appeal as there was no live issue for it to determine. The Court of Appeal stated at 26:

> *Because the elections had been held, it is too late to 'turn the clock' back. The elections were duly held despite any constitutional irregularities which may have preceded them. The nation has returned to democratic rule.*

[24] Heath JA provided the following discussion on the law on mootness in *Biju Investments PTE Limited v Transfield Building Solutions (Fiji) Ltd* [2024] FJCA 133 (26 July 2024):[6]

> *32.* ***The starting point for determining whether an appeal is moot is to ascertain whether there is an existing lis between the parties that requires judicial determination.*** *The rationale for that approach was explained by Viscount Simon LC, (giving the principal speech, with whom the other Law Lords agreed) in Sun Life Assurance Co of Canada v Jervis.*[7] *His Lordship took the view that it was not the role of the House of Lords to decide "an academic question, the answer to which*

[5] My emphasis.
[6] Footnotes included.
[7] ***Sun Life Assurance Co of Canady v Jervis*** [1944] AC 111 (HL) at 113–114.

cannot affect the respondent in any way". Lord Simon considered that, if the House had been prepared to entertain the appeal, "it would not be deciding an existing lis between the parties who [were] before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties". Applying those principles, I conclude that the statutory demand appeal is moot.

33. ***Nevertheless, it is now widely accepted that an appellate court may exercise a residuary discretion, on limited public interest grounds, to hear an otherwise moot appeal.*** *A relatively recent example is the judgment of the Supreme Court of New Zealand, in R v Gordon-Smith.*[8] *After referring to observations made by Lord Slynn in R v Secretary of State for the Home Department, ex p Salem,*[9] *McGrath J, for the Supreme Court, said:*[10]

> *[16] ... mootness is not a matter that deprives a court of jurisdiction to hear an appeal. Here, as already indicated, Ms Gordon-Smith, like the Crown, was a party to the Court of Appeal's determination of the case stated appeal and has a right to apply for leave to bring an appeal to this Court. That disposes of any issue concerning jurisdiction. The question of whether this Court should hear an appeal which otherwise qualifies under statutory criteria for a grant of leave but is moot, is rather one of judicial policy. In general, appellate courts do not decide appeals where the decision will have no practical effect on the rights of parties before the court, in relation to what has been at issue between them in lower courts. This is so even where the issue has become abstract only after leave to appeal has been given. But in circumstances warranting an exception to that policy, provided the court has jurisdiction, it may exercise its discretion and hear an appeal on a moot question.*
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> *[17] The approach in Salem was said to be applicable where there is an issue involving a public authority as to a question of public law. It has been applied in New Zealand by the Court of Appeal, however, in a manner that has not been confined to public law. That Court agreed in Attorney-General v David to hear an appeal on a question of employment law of general and public importance, which warranted an early determination from the Court, although there were no longer live issues between the immediate parties.*
>
> ...

[8] ***R v Gordon-Smith*** [2009] 1 NZLR 721 (SC).
[9] ***R v Secretary of State for the Home Department****, ex p Salem* [1999] 2 All ER 42 (HL).
[10] ***R v Gordon-Smith*** [2009] 1 NZLR 721 (SC), at paras [16] and [17].

> *34. In my view, this is a case in which it is appropriate for this Court to hear the appeal from the statutory demand proceeding. I reach that conclusion based on the observations made in the Supreme Court in Gordon-Smith*[11] *and those of the Court of Appeal of New Zealand in Attorney-General v David.*[12] *Relevantly, in circumscribing the extent of the discretion to hear a moot appeal, Richardson P, in David, said:*[13]
>
> > *[10] ...*
> >
> > ***The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example. . . when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated . . .***[14]

[25] The first question for the Court to consider is whether the issue in this proceeding is moot. If the issue is moot, does the matter fall within one of the recognised exceptions - is there a good reason in the public interest for still deciding the matter, such as the issue is likely to come up again for determination in the future?

[26] I am satisfied that there is no existing lis between the parties. The legislation that is front and centre in this proceeding has been repealed. The amendments for which declarations are sought (being to the Electoral (Registration of Voters) Act and to the Interpretation Act) have been repealed. There is no longer any requirement on potential voters to use the name recorded in their birth certificate or for persons to use the name in their birth certificate for identification purposes. Married women are no longer required to make the choice imposed on them in the 2021 amendments.

[27] Is there, nevertheless, a legitimate basis for the Court to decide the legality of the 2021 amendments? The plaintiffs argue that there is public interest in doing so. I do not agree. Firstly, there is no indication that the issue will arise again in its present form. There is no evidence before this Court that any political party has indicated that the requirement to use

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[11] Ibid, at paras [16] and [17], set out at para 0 above.
[12] ***Attorney-General v David*** [2002] 1 NZLR 501 (CA).
[13] Ibid, at para [10].
[14] My emphasis.

the name in the birth certificate will be introduced if they are elected. Even if that were so, there is no evidence that the new legislation would be in the same form as enacted in 2021. It is important to note that the issue advanced in this proceeding in respect to the 2021 amendments is not a discreet or narrow question. The 2021 amendments affected three separate pieces of legislation. The plaintiffs argued that multiple rights under the Constitution were infringed. It is unlikely that the exact same issue will require consideration again in the future. In short, any determination by this Court will have no practical effect on the parties (or others).

[28] A determination now on the legality of the 2021 amendments will make no difference to the current legislation or the next election. A determination by the court must have some practical utility. It would not here. Simply providing vindication to the plaintiffs is not a valid basis to provide an advisory opinion.

[29] I appreciate that this is not a satisfactory outcome for the plaintiffs who took all necessary and timely steps prior to the 2022 elections to obtain declarations from the court that the 2021 amendments were unlawful. However, I cannot turn back the clock. I can only consider the matter as the law now stands. The 2021 amendments are no longer the law in this country. Any decision on the matter now would be an advisory opinion and there is not, in my view, a legitimate basis to do so.

Orders

[30] My orders are as follows:

i. The Notice of Originating Motion is dismissed.

ii. There will be no order as to costs. Each party will bear their own costs.

HIGH COURT OF FIJI SUVA

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D. K. L. Tuiqereqere

JUDGE

Solicitors:

Munro Leys for the Plaintiffs
Office of Attorney-General's Chambers for the First & Third Defendants
Mitchell Keil for the Second Defendant