

Between Isaac Tosike INOKE **Petitioner**
Represented by M. Pitakaka

And Namson TRAN **1st Defendant**
Represented by J. Sullivan Q.C. and with him Mr. Kingmele

And The Attorney-General (representing the Returning Officer For West Honiara Constituency) **2nd Defendant**
Represented by the Solicitor General

Before Goldsbrough J

Decision on application to strike out and preliminary issues

Date of hearing 6 and 7 June 2011

Date of decision 4 July 2011

1. Following the General Election held in Solomon Islands on 4 August 2010 Isaac Tosika Inoke (the petitioner) filed an Election Petition seeking to overturn the election of Namson Tran, the 1st defendant. The Petitioner also chose to join the Returning Officer as the 2nd defendant and hence the Attorney General is a party representing that officer.

2. This is the hearing of two applications filed by the 1st defendant, the one seeking a determination on preliminary matters and the other seeking strike out. By consent the two applications were heard together. This decision focuses on the application to strike out for

most of the questions raised as preliminary matters are subsumed into the essence of the application to strike out.

3. The Petition has already been case managed with orders for scrutiny of ballot papers made and carried out in addition to requests for further and better particulars made and answered.

4. All parties are in agreement in this application that the principle to be applied is that only where there is no evidence to support an allegation or where there are no prospects of success should the petition or any part of it be struck out.

5. The Petition alleges irregularities in terms of voter registration, allegations of bribery by the 1st defendant in person and by his agents and allegations of failure to comply with requirements at polling stations on polling days.

6. I will deal with voter registration first. A returning officer is limited in what he or his officers may do when provided with a voter registration list. They cannot look behind to consider any complaint that names should not be on it. That is the function of others, and for the Returning Officer to be found at fault for adhering to the list provided to him on an election petition does not seem an attractive proposition.

7. On the petition filed and the particulars provided the Petitioner cannot succeed in an action against the returning officer on the registration of voters. There is nothing alleged that the Returning Officer did which is other than his true function. Complaints about the construction of the registration list provided to the Returning Officer are valid but not brought within this petition as against the officers responsible for that work. That part of the petition must fail and is struck out on this application.

8. I will turn to voting irregularities, such as failing to call out names audibly and sending people to buy betel nut during polling. There is nothing pleaded in respect of these allegations to suggest that the conduct if proved affected the result of the election, i.e. who the winner is. That is important having regard to these allegations not levelled against the 1st defendant or his agents. Neither Section 9 of the National Parliament Electoral Provisions Act (the Act) nor Section 66 (2) thereof speaks of affecting the result. There is nothing pleaded in this case to suggest that any polling irregularity was of a sufficient frequency to affect the result. That part of this petition again has no prospect of success absent that element and is struck out.

9. I will now deal with the alleged action of agents of the 1st defendant. The point made in the application here is the lack of evidence from the Petitioner as to agency. The only evidence to be tendered to establish that certain people are agents of the 1st defendant is that the very same people stood up and told assembled crowds at Election rallies held in support of the 1st defendant that they were his agents. There appears to be no evidence to be produced by the Petitioner as to the actual position of the alleged agents.

10. Yet if the Petitioner could establish agency and can establish the facts alleged, at least in some instances, he may succeed as against the 1st defendant. It would therefore be contrary to principle to strike out that part of the petition which makes out acts by agents amounting to corrupt or illegal practices. That would indicate that some of paragraph 3 of the petition should remain to be tried. Only that part of paragraph 3 which lacks certain elements to show a corrupt or illegal practice should be struck out.

11. The one matter in this category is the provision of uniforms for the soccer team of Tabaa youths and the provision of a water supply for community member, where the Petitioner does not allege in any pleading that recipients were registered voters within the relevant Constituency.

12. Contrary to the submissions of the 1st defendant as to the proper construction of "candidate elected" I take the view that the actions at any time of any person who eventually comes within that definition is caught by the provisions of section 66 (1) of the Act. It is wrong, in my view, to suggest that it is only after a valid nomination that the actions of a candidate may be questioned. I agree that it is only after a valid nomination which necessarily follows the announcement of an election that any individual becomes a candidate within the definition contained in section 2 of the Act. Section 66 (2), though, speaks of the 'candidate elected' and no person is that until after the election result is declared. It would be nonsense, and is not even submitted by the Petitioner, to suggest that section 66(1) applies only during that time when a person is a 'candidate elected', for that short period would not be a time when bribery or any other corrupt or illegal practice would be useful or even necessary.

13. I also reject the submission made by the 1st defendant that *Fono v Fiulaua* was incorrectly decided. The point being made in that part of the judgment said to be in error is not the point that the 1st defendant is attempting to establish. It is not the consequences of section 66(2) and section 70 that are in issue but support for the contention that but one act of bribery or corrupt or illegal practice is sufficient to enliven either section, committed by the candidate elected or his agent, to upset an election. In that case it was argued that there had to be so much bribery that it affected the result of the election and section 70 was used as an illustration to demonstrate that such an argument was not a valid argument. It was not held in *Fono v Fiulaua* that the consequence of a finding of circumstances under section 66 (2) is disqualification.

14. Thus the allegation that the candidate himself bribed voters should also be tried, and not struck out as the 1st defendant seeks.

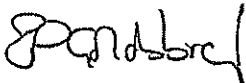
15. It does not seem necessary in the circumstances to answer the preliminary questions raised per se. If any questions remain after this decision they can more properly be answered in a judgment after evidence.

16. One of the difficulties faced by the Petitioner is that matters covered in submissions are not matters that have been pleaded in these proceedings. Submissions made in the course of an application should relate to matters pleaded or evidence received. Matters which are

neither pleaded nor in evidence but referred to only in submissions will not assist the Petitioner. Paragraph 18 of the submissions filed on behalf of the petitioner is an example.

17. This application has been partially successful and partially otherwise. As regards the 2nd defendant it has been wholly successful. The costs of the second defendant on this application will be paid by the Petitioner. As regards the 1st defendant costs will be reserved. They can be dealt with as a separate matter when the Petition is finally determined.

18. On the application to strike out the following paragraphs of the petition are struck out:
Paragraph 3 (v) : Paragraph 4 in its entirety.


Goldsbrough J

