

IN THE SUPREME COURT OF SAMOA

HELD AT MULINUU

M 377/21

IN THE MATTER OF

Articles 4, 44, 45, 46, 47, 52, 61 of the Constitution
of the Independent State of Samoa

A N D:

IN THE MATTER OF

Rule 192 of the Supreme Court (Civil Procedure)
Rules 1980, The Declaratory Judgments Act 1988
and the Government Proceedings Act 1964

A N D:

IN THE MATTER OF

The Electoral Act 2019

BETWEEN:

**ALIIMALEMANU MOTI MOMOEMAUSU
ALOFA TUUAU**

First Applicant

A N D:

FAAGASEALII SAPOA FEAGIAI

Second Applicant

A N D:

HON PAPALII OLOIPOLA MASIPAU

Respondent

A N D:

M 379/21

IN THE MATTER OF

Rule 192 of the Supreme Court (Civil Procedure)
Rules 1980, The Declaratory Judgments Act 1988
and the Government Proceedings Act 1964

BETWEEN:

TO'OMATA NORAH LEOTA

First Applicant

A N D:

**FAATUATUA I LE ATUA SAMOA UA TASI
(FAST) INCORPORATED)**

Second Applicant

A N D:

**LOLOMATAUAMA ESETA FAALATA
MATAITULI**

Third Applicant

A N D: ELECTORAL COMMISSIONER
First Respondent

A N D: ATTORNEY GENERAL OF SAMOA
Second Respondent

A N D: ALIIMALEMANU ALOFA TUUAU
Third Respondent

A N D: FAGASEALII SAPOA FEAGIAI
Fourth Respondent

A N D: HUMAN RIGHTS PROTECTION PARTY
(HRPP)
Fifth Respondent

Coram: Chief Justice Satiu Simativa Perese
Justice Vui Clarence Nelson
Justice Lesātele Rapi Vaai

Counsel: A M Leung Wai and L Sio for First and Second Applicants in 377/21, and Third, Fourth and Fifth Respondents in M 379/21
B Heather-Latu for First and Third Applicants in M.379/21
M Lui for Second Applicant in M. 379/21
L Va'a-Tamati for Respondent in 377/21
F S Ainuu for First and Second Respondents for M.379/21

Hearing: 10 March, 21 April 2022

Judgment: 11 May 2022

JUDGMENT OF THE COURT

[1] The Constitution Amendment Act 2013 (“CAA 2013”) introduced a requirement for the Legislative Assembly to consist of a minimum of 10% of women Members. In *Electoral Commissioner & Anor v FAST Party & Anor* [2021] WSCA 2 (“*OEC v FAST*”) the Court of Appeal determined that in the context of a Legislative Assembly consisting of 1 member from each of 51 electoral constituencies, the minimum of 10% meant 6 women Members. The Court held that although 10% of 51 electoral constituencies is 5.1, it was consistent with the promotion of human rights and gender equality, an intent reasonably attributable to Parliament, for the fraction to be rounded up to the next whole number, 6.

[2] The result of the April 2021 General Election led to a change in the Government, which had been in power for many decades. The election result and events which followed will likely be recorded in the annals of Samoa's constitutional history as a defining moment in Samoa's development of its identity and Nationhood.

[3] Five women were elected to constituency seats and became Members of the 17th Legislative Assembly. This number dropped to four when one of the women vacated her seat through resignation.

[4] In November 2021 seven by-elections were held to fill the seats which were vacated after the General Election. The vacancies came about either because Members were disqualified by the Supreme Court after being found guilty of bribery and corruption in electoral petitions, or they resigned the seat to preserve the peace and harmony of their constituency, threatened by an election petition alleging bribery and corruption against them and members of their constituency.

[5] No women candidates emerged as winners of constituency seats in the by-elections. This meant the Legislative Assembly was still short of 2 women Members, to make up the minimum number of 6. Accordingly, additional women Members were required and the Electoral Commissioner ("EC") declared the appointment of two women and their names were included in a Warrant of Election issued by the Head of State ("HOS").

[6] The issues in **M377/21** arise because the Speaker of the House, the Hon Papalii Oloipola Masipau ("the Hon Speaker"), refuses to swear in the two women who have had their appointments as additional members declared and warranted by the EC and the HOS.

[7] The issues in **M379/21** arise because it is alleged the EC and HOS's declarations were nullities in law and because the EC used the wrong formula to identify the women with the highest number of votes who were eligible for appointment as additional members. This necessitates an examination of Articles 44(1A) – (1E) and 44(5) of the Constitution to determine how they operate as this will inform the issue of which women must be appointed to ensure compliance with the terms of the Constitutional guarantee.

[8] The four women applicants in these matters seek declarations to confirm their respective claims for appointment as additional Members of the Legislative Assembly. The claims can be summarised as follows:

- (1) The two women applicants in **M377/21** claim to have been validly appointed by the Electoral Commissioner and their appointments are the subject of a valid warrant signed by the Head of State, dated 30 November 2021. These women applicants are:

- (i) Aliimalemanu Moti Momoemausu Alofa Tuuau (“Aliimalemanu”) who was a candidate at the 9 April 2021 General Election for the Constituency of Alataua i Sisifo.
- (ii) Faagasealii Sapoa Feagiai (“Faagasealii”) who was a candidate at the November 2021 by-election for the constituency of Aleipata itupa i lalo.

(2) Two women applicants in M379/21 challenge the mathematical formula the Electoral Commissioner used to determine the successful appointees; they submit different formulae should have been used, and had they been used, these two women would have been the successful appointees. These women applicants are:

- (i) To’omata Norah Leota (“To’omata”) who was a candidate at the 9 April 2021 General Election for the Constituency of Anoama’a.
- (ii) Lolomatauama Eseta Fa’alata Mata’ituli (“Lolomatauama”), who was a candidate at the November 2021 by-election for the constituency of Aana Alofi No.2

[9] It is obvious to us from the affidavits we have received from the applicants that they each have a history of *tautua, uta ma le tōfā* to make contributions as Members of the Legislative Assembly tasked with the responsibility of making the laws of Samoa.

BACKGROUND

[10] The EC is required by s.84 of the Electoral Act 2019 (“the Act”) to ascertain the number of votes received at poll in either a general election or a by-election, and declare the result of the poll by giving public notice. The EC appears to have complied with his duty with report *Fa’aaliga manino o le taunuuga o faiga palota laiti na fa’atinoina i le aso 26 o Novema 2021*,¹ dated 29 November 2021, which was published by his office, and tendered to the HOS.

[11] It appears that on the strength of the EC’s report, the HOS issued a Warrant of Election, also pursuant to s. 84 of the Act, dated 30 November 2021:²

WARRANT OF ELECTION

PURSUANT to Section 84(2) of the Electoral Act 2019, **I, TUIMALEALIIFANO VA’ALETOA SUALAUVI II**, Head of State, do hereby declare and issue this Warrant of Election to Candidates mention herein to serve as Members of Parliament of the Independent

¹ Exhibit “A” affidavit of Aliimalemanu dated 13 December 2021

² Exhibit 2 Affidavit of Lolomatauama of 8 April 2022

State of Samoa effective Monday 29th November 2021 and replaces the warrant issued on the same date:

1. MAULOLO Tavita Amosa;
2. TAGALOATELE Pasi Poloa
3. AIONO Tile Gafa
4. LAUMATIAMANU Ringo M. Purcell
5. MAIAVA FUIMAONO Tito Asafo
6. FALEOMAVAEGA Titimaea Tafua
7. ALIIMALEMANU MOTI MOMOEMAUSU Alofa Tuuau (F)
8. FAAGASEALII Sapoia Feagiai (F)

GIVEN under my hand at Vailele this 30th day of November 2021.

[Signed]

Tuimaleali'ifano Va'aletoa Sualauvi II

HEAD OF STATE

[12] Section 84 of the Electoral Act is concerned with candidates and candidates to be elected at a General Election. The section also applies to By-elections as provided in s. 152 of the Electoral Act. We consider s.84 applies to the declaration of additional members, as reported by the EC, whom must of course have been candidates in either General or By-election.

[13] Approximately a week and a half after the issue of the Warrant of Election, the Hon. Speaker released an undated public statement in the following terms:

**PRESS RELEASE FROM THE OFFICE OF THE SPEAKER OF THE
LEGISLATIVE ASSEMBLY OF SAMOA**

The Speaker is considering delaying the Swearing in of the two (2) women appointed under Article 44 (1A) due to the following:-

- 1) The Warrant of appointment of the two (2) women is being challenged in court as to the validity, as to whether it was issued at the correct time.
- 2) The Warrant also seems to have been issued prematurely and may be invalid as a petition has been filed by a woman candidate from the by-election, and so her results are still not finalised, and so the election results are still not finalised, as has been directed by the Court of Appeal (E.C v Tuuau) C.A 05/21.

- 3) There is a challenge to the formula used for the calculation of the 10% by another woman candidate and so a further issue about the calculation of the additional woman is also before the Courts, and directly impacts upon who can be declared to be the additional women Members of Parliament.
- 4) The Speaker must only have sworn the duly elected candidates who are also qualified to be members. However the additional women seats do not qualify unless the electoral petitions are determined, and any by-elections (if any) arise from those petitions.

Ma le fa'aaloalo tele

Hon. Papalii Lio Oloipola Taeu Masipau
SPEAKER OF THE LEGISLATIVE ASSEMBLY

[14] We record that both Article 61 of the Constitution and Standing Order 14(1) impose a mandatory duty on the Hon Speaker to administer to each Member the Oath of Allegiance, before the Legislative Assembly: *HRPP v Masipau* [2021] WSSC 79. We are bound to observe that in circumstances where the Hon Speaker has not sought a declaratory order from the Supreme Court about the eligibility of the member who wishes to present for swearing in, it is inappropriate for the Hon Speaker to of his own volition simply refuse to undertake his constitutional duty to swear in the Member. The Court does not condone parties, no matter how high a standing, appearing to take the law into their own hands. This is just a recipe for disaster. No one is above the law.

THE PLEADINGS AND PARTIES

[15] The applicants in **M377/21** filed a motion for the issue of a writ of mandamus and other orders, and for judicial review on 13 December 2021. The writ of mandamus is sought to compel the Respondent to perform his Constitutional and statutory duties. Declaratory orders were sought to describe the respondent's refusal to swear in Aliimalemanu and Faagasealii as either not constitutionally mandated and/or discriminatory. The applicants point to the following grounds in support of their claim:

- (a) They were officially declared by the Head of State as the Additional Women Members of Parliament on 29th November 2021, to make up the minimum 10% women in the Legislative Assembly as they satisfied the criteria set out in Article 44(1A) of the Constitution;
- (b) The activation of Article 44(1A) is in accordance with the Court of Appeal decision *Electoral Commissioner and Tuuau v FAST & Ioane* [2021] WSCA 2 (2nd June 2021), which held that the invocation of the minimum of 10% women in Parliament is to be

considered “at the conclusion of the determination of the Election 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”.

- (c) The *Standing Order* 14(1) imposes a mandatory duty on the Respondent to administer before the Legislative Assembly to each member, the Oath of Allegiance as required by Article 61 of the *Constitution*, at the first appropriate opportunity after the Member’s election;
- (d) The decision by the Speaker on the 10th December 2021 to delay the swearing in of the Applicants as Members of Parliament is not supported by law and/or is unlawful;
- (e) The Court has jurisdiction to issue the Writ of Mandamus and to make the Orders sought;
- (f) Article 44 of the Constitution is clear in that the Legislative Assembly shall consist of a minimum of 10% women and the Applicants make up such number and therefore have a right to be sworn in and to sit as Members of Parliament;
- (g) The Applicants are being deprived from participating and representing their electoral constituencies when Parliament convenes on 14th December 2021;
- (h) Parliament will be convening without the minimum of 10% women as required by the Constitution;
- (i) The Respondent is discriminating against the Applicants on the basis of their sex contrary to Article 15 of the Constitution since he is allowing the swearing in of male Members of Parliament whose election will also be called into question by way election petitions.

[16] The respondent filed an amended notice of opposition dated 9 March 2022,³ and he pleaded:

- (1) That the Applicants are yet to be qualified to be sworn in as members of the Legislative Assembly.

³ The Amended Notice omitted reliance on two pending by-election petitions that had not yet been decided. These petitions were withdrawn, and the ground of opposition fell away.

- (2) That there is currently a challenge filed before this Honourable Court brought by To'omata Norah Leota and Faatuatua i le Atua Samoa ua Tasi (FAST) Incorporated against the Electoral Commissioner and the Attorney General, and the Applicants in this matter, for the determination of the women candidates required under Article 44(1A) of the Constitution which is yet to be determined by this Honourable Court.
- (3) That there is no certainty that the Applicants qualify to be sworn in as members, given that there remains uncertainty as to the reading of Article 44(1A) of the Constitution which is yet to be determined by this Honourable Court.
- (4) That the treatment of women by not swearing them in immediately is not discriminatory as the additional members are the exception and not the norm.
- (5) It would be in the interests of justice that the orders sought should not be granted.

[17] In proceeding **M379/21**, the first and second applicants filed a joint motion for the making of declaratory orders, dated 13 December 2021:

- (a) Declaring unlawful the EC's Article 44(1A) declaration, dated 29 November 2021, because it was prematurely issued;
- (b) Declaring the Warrant of Appointment dated 29 November 2021 issued by the HOS is unlawful and unconstitutional;
- (c) Declaring the computation or formula used by the EC to calculate the two women candidates eligible to be appointed as additional members, is not the correct computation or formula, and does not identify the woman candidates who are eligible to be appointed as such additional members;
- (d) Declaring the correct computation or formula to be applied in calculating the women candidates.

[18] There are five respondent parties in M379/21. The first two respondents – the Electoral Commissioner and the Attorney General (joined under the Government Proceedings Act 1974), first and second respondents respectively, were represented by the Attorney General's office.

- (a) The Attorney General filed a Motion of Response dated December 2021, which advised the Court that the first and second defendants appeared to assist the Court and would abide by the decision of the Court. We were helpfully assisted by the submissions of by Mr Ainuu. We shall refer further to one submission in particular later in this judgement at paragraphs 36 - 39.

(b) The third, fourth and fifth respondents filed a Notice of Opposition and Motion of Response, which is dated 22 December 2021. The opposition was plainly put:

- (i) They asked for the first and second applicants' notice of motion to be dismissed;
- (ii) The Court to affirm the validity of the Head of State's writ dated 29 November 2021;
- (iii) The EC used the correct formula to calculate the percentage of women candidates who polled the highest number of votes.

[19] Two parties applied to be joined to M 379/21. The application to join **LOLOMATAUAMA ESETA FAALATA MATAITULI** was not opposed, and the Court granted leave for her joinder as third applicant. Although she filed her own motion, her claim largely mirrors the motion filed by the first and second applicants. All three applicants in M 379/21 were represented by Ms Heather Latu and Ms Lui.

Joinder of the Hon Speaker as sixth respondent

[20] The situation however is different in relation to the eleventh-hour application by the Hon Speaker of the House to be joined as a sixth respondent. The application is opposed by the third, fourth and fifth respondents, and the Court heard from Mr Leung Wai for the respondents and Ms Tamati for the Hon. Speaker. We reserved our decision on the joinder whilst allowing Ms Tamati, counsel for the Hon. Speaker, the opportunity to participate in the hearing and to make submissions as she considered appropriate.

[21] In his application for joinder, the Hon Speaker sought, among other grounds, to rely on Article 47 of the Constitution. Article 47 provides for questions that may arise as to the right of any person to be or remain a Member of Parliament, shall be referred to and determined by the Supreme Court. There may be a debate about whether "shall" in this Article means "may", but there is no doubt that the Constitution intended for these types of issues to be referred to the Supreme Court for its apolitical determination.

[22] The Hon Speaker has known about the issues raised in the M 379/21 proceeding for some months; indeed, he expressly relied on its putative relevance as justification for not swearing in Aliimalemanu and Faagasealii; this as set out in his Notice of Opposition, dated 2 February 2022.

[23] The civil procedure rules concerning joinder of parties are well established. Supreme Court (Civil Procedure) 1980, rule 32 provides:

32. Order joining parties - The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as appear to the Court to be just, order that the name of any party improperly joined, whether a plaintiff or a defendant be struck out, and that the name of any person who ought to have been joined or whose presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added, whether as plaintiff or defendant provided however that no person shall be added as a plaintiff without his own consent.

[24] Respectfully, we consider the Court can effectively and completely adjudicate on and settle all of the questions involved in this action without the Hon Speaker's involvement. What parties may consider to be the meaning of these provisions are matters properly for submission. The heavy lifting has been carried out by the three applicants, and the five respondents. However, Ms Tamati's submitted, which we assume to be her instructions, the Speaker did not propose to offer a view on the issues in M 379/21 and he would not take an active part in the hearing. On this basis, we see no substantive justification for the Hon Speaker being joined. He did not offer up anything to the Court which might assist with the determination of these issues. The Hon Speaker, as a Constitutional officer, is bound to uphold the rule of law and is accordingly bound to follow the declaratory decisions of this Court dealing with Constitutional rights, whether or not he is a named party to litigation.

[25] Finally, we note for completeness, that in line with her submission to the Court, Ms Tamati did not make any submissions in reply when the Court gave her an opportunity to respond to the submissions of the named parties.

[26] We deliver our decision on joinder of the Hon. Speaker, as follows.

- (a) We dismiss the application to join the Hon. Speaker as a party.
- (b) The other parties have 14 days from the date of the delivery of this judgment to file submissions if any as to costs. The Hon Speaker is to file any response within a further 14 days. Compliance with the timetable is of the essence.

DISCUSSION

[27] The present Legislative Assembly of the 17th Parliament of the Independent State of Samoa consists of 1 member elected for each of 51 electoral constituencies. There are presently four women Members who were elected to constituency seats from the last General Election in April 2021:

Fiame Naomi Mata'afa	-	Elected unopposed
Mulipola Anarosa Ale Molio'o	-	Palauli 1
Matamua Seumanu Vasati Sili Pulufana	-	Faaseleleaga 1
Faimalotoa Kika Stowers-Ah Kau	-	Gagaifomauga 1

[28] A further woman, Leota Ae'au Tima Leavai ("Leota"), won the Falealupo constituency seat at the General Election. However, she resigned and thereby vacated the seat. At the subsequent by-election the seat was won by a male – Fuiono Tenina Crichton, who was elected unopposed.

[29] Following the 2021 General Election, and before Leota Leavai's resignation, there was a need for one additional woman Member pursuant to Article 44(1B)(b) ("1B") to reach the minimum number of 6 women Members in the Legislative Assembly. Leota's resignation is an event which is of critical importance to understanding the additional woman Member provisions. After Leota's resignation, there remained the need to attain the minimum of 6 female representatives but also for a replacement for Leota because of the terms of Article 44(1E) ("1E").

APPOINTMENT AS AN ADDITIONAL MEMBER

[30] In our respectful view there are four ways in which the Constitution provides for a woman to become a Member of the Legislative Assembly of the Independent State of Samoa.

- (a) As a successfully elected candidate in any one of the 51 constituency seats, pursuant to Article 44(1);
- (b) Where the prescribed minimum number of women Members is not elected to constituency seats, then the women candidates with the highest number of votes become additional members - Article 44(1B)(b);
- (b) Where the seat of an additional woman member becomes vacant, it is filled by a woman candidate who has the next highest number of votes at the last election or general election - Article 44(1D);
- (c) Finally, where a woman member who has won a constituency seat vacates the seat, then if a man is elected to fill the seat, an additional woman with the highest number of votes from that election or the last election or general election is appointed an additional Member – Article 44(1E).

[31] The term "additional member" is defined in Article 44(5) of the Constitution, and it means a woman who is a Member of Parliament by virtue of clause (1B), (1D), or (1E) for the purposes of clause (1A):

(5) In this Article, unless the context otherwise requires:
“Additional Member” means a woman who is a Member of Parliament by virtue of clause (1B), (1D), or (1E) for the purposes of clause (1A);

The definition makes plain that a woman’s Membership of the Legislative Assembly, on the basis of being an additional member, must be for the purposes of clause (1A).

[32] It is convenient to set out Articles 44(1A) – 44(1E) in full:

- (1A) Subject to this Article, 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; and
 - (b) be elected pursuant to clause (1) or become additional Members pursuant to clause (1B), (1D) or (1E).
- (1B) If, following any general election:
 - (a) all members elected under clause (1) are men, the prescribed number of women candidates (if any) with the highest number of votes shall become additional Members; or
 - (b) less than the prescribed number of women candidates are elected under clause (1), the remaining prescribed number of women candidates (if any) with the highest number of votes shall become additional Members for the purposes of clause (1A).
- (1C) Clause (1B) does not apply if the prescribed number of women are all elected under clause (1).
- (1D) If the seat of an additional Member becomes vacant, it shall, despite Article 48, be filled by the woman candidate (if any) who has the next highest number of votes at the last election or general election.
- (1E) Subject to Article 48, if a seat under clause (1) held by a woman becomes vacant, to which a man is elected to fill that vacant seat, the woman candidate (if any) with the highest number of votes from that election or the last election or general election shall become the additional Member.

[33] Clause (1A) establishes a minimum number of 6 women Members in the current Legislative Assembly, but it does not logically follow that this means the Constitutional guarantee is spent once 6 members of the Legislative Assembly are women. We accept the terms of (1C) provide that when the prescribed number of women are satisfied if they are elected to constituency seats then (1B) does not apply. ((1B) enables up to the prescribed number of women becoming additional Members.)

[34] However, we do not accept that once the prescribed number of women Members has been satisfied that this means (1D) and (1E) are also spent or are otiose. These provisions are relevant to very different circumstances:

- (a) Under (1D), if an additional member vacates her seat, on account of the woman's death, resignation, ceasing to be a citizen, or becoming otherwise disqualified, the vacancy is filled by the woman candidate who has the highest number of votes at the last election or general election.
- (b) Similarly, (1E) seems to operate independently of the prescribed number of women Members. If a constituency seat held by a woman is vacated, to which a man is elected, then the woman with the highest number of votes from that election or the last election or general election shall become the additional member.

[35] Both these provisions have a strong flavour of succession. They both aim to preserve the number of women in Parliament, so as to maintain the gains against the tide of under-representation.

[36] The Attorney General argued that additional members under (1E) are appointed only so as to meet the minimum prescribed number of women members. This argument was supported by Mr Leung Wai on behalf of the other respondents.

[37] Clause (1D) is concerned with the process of substitution - one additional member for an additional member who vacates her seat. In a scenario where there are six women Members following the general election, four are constituency members and two are additional members appointed under clause (1B)(b). However, if during that Parliamentary term, a by-election is held and it is won by a woman, then presumably there would be seven women members. If we apply the Attorney General's argument - that, additional members are only appointed if there is a shortfall in the prescribed number required to reach the minimum number of women members, then it would follow that if one of the two seats of the additional women Members was vacated - such vacancy would not be replaced under clause (1D), because there were still 6 women Members of the Legislative Assembly.

[38] We do not accept the Attorney General's interpretation. We consider clause (1A) with its two limbs have to be interpreted in a manner which achieves Parliament's aim of promoting human rights and gender equality. In our view, Parliament had the opportunity to limit the application of (1D) and (1E) when it approved the clause (1C) limitation with respect to clause (1B). But it did not. That signals to the Court that Parliament intended for additional women Members would always be replaced, and vacancies occurring in constituency seats formerly held by a woman would always have a woman replacement, even if a man happened to win the seat at a subsequent by-election.

[39] For completeness, we do not interpret the phrase "for the purpose of clause (1A)" in Article 44(5) suggesting that (1B), (1D), and (1E) operate in the limited way submitted by the Attorney General.

On the contrary, the phrase simply mirrors (1A)(b) which particularises the three ways that additional members can be appointed as women Members of the Legislative Assembly.

[40] Clause (1A) has a number of purposes. First, as its overarching purpose, the clause intends to affirm human rights and gender equality by providing an avenue to address the under-representation of women in the Parliament of Samoa. It does this through two co-dependent mechanisms: namely, (1) the establishment of a minimum number of women members, and (2) the provision for women to become additional members through three independent and alternative pathways per (1B), (1D) and (1E). Parliament intended that the pathway through (1B) did not apply if the prescribed number of women are all elected under clause 44(1). However, there is no express limitation on (1D) and (1E). The Attorney General's argument asks the Court to read in a limitation where one does not exist. We do not accept that important Constitutional provision for human rights can be properly displaced other than by express exclusion or limitation – such as that contained in (1C).

CONSEQUENCES FOR WOMEN MEMEBERSHIP OF 17TH LEGISLATIVE ASSEMBLY

The facts in this case

[41] In this case, no further women won constituency seats at the November 2021 by-election. As discussed earlier, the Electoral Commissioner and Head of State warranted the appointment of two women as additional Members pursuant to Art. 44(1A)(a) and (1B)(b). They have been appointed Members, though they are yet to be sworn in. No doubt if there were matters which arose before the swearing in which disqualified the Members, as set out in Article 45, then the Hon Speaker would be entitled to take action to vacate the Member's seat under Part 16, Division 2 of the Electoral Act. The Hon Speaker in his defence in M377/21 has not raised any such concern. For all intents and purposes Aliiemalemanu and Faagasealii are presently members of the Legislative Assembly. They should be sworn in forthwith.

[42] Furthermore, as referred to in paragraph [29] above, Leota's resignation of the seat of Falealupo after the General Election led to Mr Fuiono Tenina Crichton's unopposed election. That turn of events brought into play clause (1E).

[43] Leota's vacated seat is not capable of being filled by (1B)(b) because of the operation of (1E). To demonstrate the point, had the November by-elections resulted in the election of two further women Members, bringing the total number of women Members of Parliament to 6, then there would be no need for an additional woman under (1B)(b) because of the limitation contained in (1C). However, in this example there would still be the need to appoint a further woman under (1E) to replace Leota. In

accordance with (1E) a woman candidate with the highest votes at the election or the last election *shall* become the additional member to replace Ms Leavai.

[44] The woman with the next highest number of votes, after Aliimalemanu and Faagasealii (who have already been warranted as additional women Members) is To'omata Norah Leota ("To'omata"), and we direct that she should be sworn in forthwith.

[45] We do not consider there is an issue of double dipping. Leota's resignation can only be satisfied by an additional woman becoming an additional Member under (1E), which under our interpretation operates independently of (1B)(b).

THE FORMULA

[46] The Applicants in M379/21 argued that the EC's calculation of the highest number of votes was incorrect. In carefully prepared arguments Ms Heather-Latu sought to argue that the approach taken by the EC led to outcomes which were capricious, unreasonable, and unfair. Ms Heather-Latu argued that there was an ambiguity in the meaning of the definition because the phrase "highest number of votes" was not the same as an assessment based on the percentages achieved by women candidates.

[47] The EC used the same formula he had used in the 2016 General Election, whereby he divided the total number of votes won by a woman candidate in a constituency by the total number of valid votes in a constituency – to get a percentage of votes gained by women candidates in their respective constituencies. This approach was supported by Mr Leung Wai for the other respondents.

[48] Respectfully, we do not intend to traverse Ms Heather-Latu's thoughtful submissions because we disagree with its fundamental premise.

[49] One begins the process of interpreting a statute by looking at the plain meaning of the words. The need for a fair large and liberal interpretation of the words used, in order to determine the purpose of the legislation arises only where the meaning of Parliament cannot be sufficiently ascertained from the word used. Generally, this will occur when the words are ambiguous, or they lead to results which would not have been reasonably intended. In those types of cases, the Court's role is to interpret what Parliament is reasonably understood to have intended.

[50] We do not agree with the central plank of Ms Latu's formula argument because there is no ambiguity in our view. Whilst we accept that the phrase the highest number of votes speaks to a numerical accumulation of votes and not necessarily a percentile, it is clear that Parliament intended the phrase "highest number of votes" to have a defined meaning. That is obvious from the fact of the

definition. It appears to be the case that in the context of Article 44, the phrase highest number of votes has a statutory definition and is a legal term of art.

[51] We accept the EC's interpretation of the statutory definition of the phrase highest number of votes. The EC counted the women candidates valid votes and divided that number by the total valid votes in each constituency to arrive at a percentage.

PARTICULAR ISSUES RAISED BY THE APPLICANTS IN M379/21

Warrant of election

[52] The Head of State issued a document described as a Warrant of Election on 29 November 2021. However, it was issued in reliance on a section of the Electoral Act concerning unrelated matters. We are satisfied the 29 November 2021 document was issued in error, perhaps a typographical error. Moreover, as seen above in paragraph [11], the Head of State addressed the status of the 29 November 2021 warrant in the body of the 30 November 2021 warrant.

[53] In the absence of any other challenge, we consider the Warrant of Election expressly sets out the names of the persons who are members of the Legislative Assembly, and the basis for their membership.

Whether the EC was premature in the release of his outcome of the election report on 29 November 2021?

[54] The EC issued his s.84 declaration before the expiry of the time for filing electoral petitions arising out of the outcomes of the by-elections he reported on to the HOS on 29 November 2021. As matters would transpire, two electoral petitions were filed after the publication of the EC's report.

[55] We consider that the EC should have waited for the time allowable for the filing of electoral petitions to run out. Our reading of the Court of Appeal's decision in *OEC v FAST* is that the Court was concerned to ensure that the state of the constituency contests, including electoral petitions, were settled before additional women Members were appointed. Applying common sense this would mean that this degree of certainty would be achieved after the determination of by-elections and any electoral petitions arising out of those. Potentially, further by-elections might have been needed; they could be contested and won by women candidates. If that were to happen, and subject to what we say about the operation of (1E), the need for the appointment of additional members under (1B)(b) would be barred by (1C), as discussed earlier. To clarify the position, it would have meant that Aliimalemanu as the candidate with the highest total would have become an additional member under clause (1E).

[56] The petitions were eventually withdrawn, but had they not, we would have been required to determine the legality of the EC's report made on 29 November 2021.

[57] For the sake of clarity, the withdrawal of the electoral petitions means the EC's report of 29 November 2021 is in all respects an accurate declaration of the final outcome of the various by-elections and naming of the successful candidates. Mrs Heather-Latu's challenge that the report was untimely and invalid might have been more attractive had the electoral petitions been pursued, and led to further by-elections contested by women candidates.

[58] Whilst we agree with Mrs Heather-Latu the timing of the EC's report is imperfect, however, perhaps, more by luck than design, the report is factually correct with respect to the final outcome of the by-elections. The timing issue, therefore, does not appear to prejudice any party or their eligibility to be appointed as additional members, if they qualify.

DECISION

[59] We issue the following declarations:

- (a) The Hon Speaker has a duty to swear in Aliimalemanu Alofa Tuuau, Faagasealii Sapoa Feagiai as additional Members of the Legislative Assembly, pursuant to Articles 44(1A)(a), 44(1A)(b) and 44(1B)(b) of the Constitution;
- (b) The Hon Speaker has a duty to swear in To'omata Norah Leota as an additional Member of the Legislative Assembly under Article 44(1A)(b) and 44(1E) of the Constitution;
- (c) Although To'omata Norah Leota is to be sworn in as an additional Member, the Motion she has filed with Lolomatauama in M.379/21 is dismissed.
- (d) In accordance with earlier authority of this Court, we declare that the swearing-in is constitutionally required to be carried out at the earliest opportunity, there being no constitutional or other legal basis by which the swearing in should be further delayed or deferred.

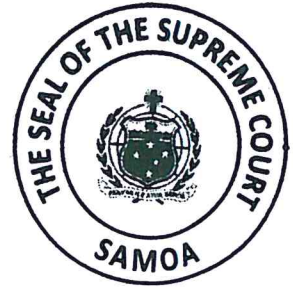
[60] Considering the novelty and importance of the issues raised in this litigation, there will be no order as to costs; unless sought by any party as a result of the Motion for Joinder filed by the Hon Speaker of Parliament.

S. Perese

Honourable Chief Justice Perese



Honourable Justice Nelson



Mai

Honourable Justice Vaai