IN THE COURT OF APPEAL OF SAMOA
HELD AT MULINU'U

IN THE MATTER OF	**The Constitution of the Independent State of Samoa 1960, the Declaratory Judgments Act 1998, the Electoral Act 2019**
BETWEEN	**ALIIMALEMANU ALOFA TUUAU, FAGASEALII SAPOA FEAGIAI and HUMAN RIGHTS PROTECTION PARTY (HRPP) INCORPORATED** **Appellants/ First to Third Cross-Respondents**
AND	**TO'OMATA NORAH LEOTA** **First Respondent/ Cross-Appellant**
AND	**FAATUATUA I LE ATUA SAMOA UA TASI (FAST) INCORPORATED** **Second Respondent/ Cross-Appellant**
AND	**LOLOMATUAMA ESETA FAALATA MATAITULI** **Third Respondent/ Cross-Appellant**
AND	**ELECTORAL COMMISSIONER** **Fourth Respondent**
AND	**ATTORNEY-GENERAL OF SAMOA** **Fifth Respondent**

Coram: Honourable Justice Harrison
Honourable Justice Asher
Honourable Justice Young
Honourable Justice Tuala-Warren

Counsel: Dr. R. Harrison KC (via video-link), T. Leavai & A. Matalasi for the Appellants/ First to Third Cross-Respondents
B. Keith (via video-link) for the First, Second & Third Respondents/ Cross-Appellants
B. Heather-Latu & G. Latu for the First & Third Respondents/ Cross-Appellants
M. Lui for the Second Respondent/ Cross-Appellant
D. Fong & V. Leilua for the Fourth & Fifth Respondents

Hearing: 08 November 2022
Judgment: 14 November 2022

JUDGMENT OF THE COURT

Introduction

[1] This appeal and cross appeal involve the interpretation of Article 44 of the Constitution, which provides for a minimum number of women members of Parliament. This minimum number requirement was introduced by the Constitution Amendment Act 2013. The appeal and cross appeal concern the interpretation of that Article.

[2] In its decision the Full Court of the Supreme Court held that a vacancy occurring in a constituency seat formerly held by a woman would always require a woman to replace her, either as a result of a woman winning the subsequent by-election, or, if a man did so, as an additional member and that this was so even if there were already six women in Parliament. That decision turned on the Court's interpretation of the provision that women shall consist of a minimum of 10% of the Members of the Legislative Assembly, and Article 44 (1E), the provision stating what should happen if a man should be elected to fill a vacant seat formerly held by a woman. That is the decision that is the subject of the appeal.

[3] The Supreme Court also held that in determining which candidate got the "highest number of votes" as the phrase is used in Article 44, that the phrase meant the percentage of the total votes in a constituency polled by a woman candidate, that being the plain meaning set out in the definition of the phrase at Article 44(5). That is the decision that is the subject of the cross-appeal.

Background

[4] The General Election of 9 April 2021 led to a change in the Government which had been in power for many decades. We respectfully agree with the Supreme Court's assessment that the election result and events which followed were "likely be recorded in the annals of Samoa's constitutional history as a defining moment in Samoa's development of its identity and nationhood".

[5] On 2 June 2021, in one of those defining decisions, the Court of Appeal in *Electoral Commissioner v Faatuatua i Le Atua Samoa Ua Tasi (F.A.S.T. Party)*[1] had determined that in the context of a Legislative Assembly consisting of one member from each of 51 electoral constituencies, that the minimum of 10% referred to in Article 44 (1A) (a) meant six and not five women members. The Court held that the Constitution is given best effect when it promotes human rights, and that meant in a practical sense that the total be six.

[1] [2021] WSCA 2 at [25].

[6] As a result of the election five women were elected to constituency seats and became members of the Legislative Assembly. Seats were vacated after the election, because members were disqualified by the Supreme Court after being found guilty of bribery and corruption in electoral petitions, or they resigned their seats following the filing of petitions. On 26 November 2021 seven by-elections were held to fill those vacant seats.

[7] There were no women candidates elected in those by-elections. This meant that the Legislative Assembly was short of two women members to make up what had been earlier decided was the minimum number of six.

[8] The Electoral Commissioner on 29 November 2021 applying Article 44 had declared the appointment of two women with the "highest number of votes", and their names were included in a Warrant of Election issued by the Head of State. The Speaker of the House then refused to swear them in.

[9] The Supreme Court decided in the first part of the judgment under appeal that the Speaker of the House had a duty to swear in the two additional members included in the Warrant of Election, and that this should be carried out at the first available opportunity. That part of the judgment is not challenged in this appeal, and the two additional women members have now been sworn in.

[10] The part of the Supreme Court judgment which is challenged by the appellants is the Court's decision that the first respondent, To'omata Norah Leota, was to be sworn in as an additional woman member on the basis of the Court's interpretation of Articles 44(1A) (b) and 44(1E). The Human Rights Protection Party (HRPP) is one of the appellants. Fa'atuatua i Le Atua Samoa Ua Tasi (FAST) Incorporated is one of the respondents.

Pleadings

[11] The proceedings filed in the Supreme Court did not seek a declaration or other order that Ms Leota was entitled to the status of a third additional member resulting in there being a third member of appointed to Parliament under s 44. However, during the hearing the Chief Justice raised the issue of the need to appoint a replacement woman to a seat where a woman member had been replaced in a by-election with a man. It seems as if no counsel supported the approach proposed by the Court, but no counsel objected to him considering the issue. In our assessment counsel were given a fair opportunity to respond and make submissions, as there was no new evidence required or submitted.

[12] In any event at the hearing on appeal before us counsel for the respondents applied to amend the application to incorporate a claim for the appointment of a third additional woman member. Mr Harrison KC for the appellants objected to the application, but did not advance any detailed reasons in support of this objection. Indeed, he made it clear that the appellants wished to have the substantive issue addressed, and that any unfairness that might have existed would be "cured" by means of this Court hearing. This is a commendably pragmatic approach, and given the absence of any discernible prejudice we granted the amendment, and proceeded on the basis that the Supreme Court had and this Court has jurisdiction to make or uphold the orders that are the subject of this appeal. We now proceed to consider the arguments.

[13] In brief Mr Harrison submitted that an overview of Article 44 showed plainly that the intention was to either by election or (if necessary) by the appointment of additional members, ensure there would be a minimum number of women members of Parliament. Equally, however laudable that aim was, there was nothing in Article 44 which demonstrated a general intention of maximising the overall number of women members of Parliament. Article 44 (1E) was one of the clauses designed to achieve the 10% guarantee, which in the present circumstances means no less than six women members, but no more. The Supreme Court was in error in directing the swearing in of a seventh woman member.

[14] Mr Keith for the respondents submitted that the plain meaning of Article 44 (1E) was that if a man was elected at a by-election where the seat was previously held by a woman, an extra woman had to be appointed to stop the number of women in the Legislative House from dropping. This met the legislative intent to advance the number of women in Legislative House, and ensured that the number could not drop. He submits that the appellants seek to read down Article 44(1E).

The Constitution Amendment Act 2013

[15] It is necessary to set out the Constitution Amendment Act 2013, the interpretation of which lies at the heart of the appeal and cross-appeal in full:

> **AN ACT to amend the Constitution of the Independent State of Samoa to provide for a minimum number of women Members of Parliament, and to exclude officers and employees of the Attorney General from the Public Service.**
> *[25th June 2013]*
>
> **1. Short title and commencement-** (1) This Act may be cited as the Constitution Amendment Act 2013 and shall be read with and form part of the Constitution.
> **(2)** Except for section 2, this Act commences on the date of assent by the Head of State.

(3) Section 2 commences on polling day of the next general election as appointed by the Head of State under Article 64 of the Constitution.

2. Members of the Legislative Assembly - In Article 44 of the Constitution:

(a) in clause (1), for "The" substitute "Subject to the provisions of this Article, the"; and

(b) after clause (1), insert:

"(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 five (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.

(1F) If, in the selection of the required number of women under clause (1B), (1D) or (1E), two (2) or more candidates have equal number of votes, the additional Member shall be selected by lot before the Electoral Commissioner with the presence of the candidates or their authorised representatives and at least two (2) police officers.

(1G) If a woman candidate becomes an additional Member of a constituency (irrespective of a woman candidate being elected to that constituency), no other woman candidate from the same constituency shall become an additional Member unless there is no other woman candidate from any other constituency to make up the required prescribed number."; and (c) for clause (4), substitute "(4) Members of the Legislative Assembly (including additional Members) shall be known as Members of Parliament."; and (d) after clause (4), insert:

"(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);

"Highest number of votes" means the percentage of the total valid votes in a constituency polled by a woman candidate;

"Prescribed number" means the minimum number of women Members of Parliament specified under clause (1A)."

[16] It is relevant to set out the original Article 44, now amended to be Article 44(1):

> 44. Members of the Legislative Assembly - (1) Subject to the provisions of this Article, the Legislative Assembly shall consist of one member elected for each of 51 electoral constituencies having names, and comprising of villages or sub-villages as are prescribed from time to time by Act.

[17] The structure of the Article is to set out its purpose in the long title, and then to set out in Article (1A) the requirement that the Legislative Assembly consist of a minimum of 10% women members. If that minimum number are not elected, the processes set out in Articles (1B), (1D) and (1E) will apply. Those three Articles cover three different situations.

[18] The first situation is covered by Articles (1B) and (1C), which prescribe what should happen if following a general election all the elected members are men, or less than the prescribed number of women candidates are elected. It provides that the "prescribed" number of women candidates with the "highest number of votes" shall become additional members.

[19] The second situation, covered by Article (1D), arises where the seat of an "additional member", (that is a woman appointed under Article 44), becomes vacant. In that situation the vacancy is not to be filled in the standard way prescribed in Article 48 of the Constitution. Article (1D) provides that it is to be filled by the woman candidate "…who has the next highest number of votes from that election or the last election or general election".

[20] The third situation, covered by Article (1E) arises in relation to the seat of a woman who is not an "additional member" but is a woman who has held the seat by ordinary election. If that seat has become vacant, and a man has been elected to fill that vacant seat, then the woman candidate with "…the highest number of votes from that election or the last election or general election shall become the additional member".

The decision of the Supreme Court

[21] It was the essence of that part of the Supreme Court decision that is appealed, that Article (1E) means what it says. Whenever the seat of an elected woman becomes vacant and at the by-election that follows she is replaced by a man, the next highest polling woman as defined becomes an additional member. It was said that both (1D) and (1E) had "the strong flavour of succession."[2] They aim to preserve the number of women in Parliament, "…so as to maintain the gains against the tide of under-representation".[3] After recording that the Attorney General had argued that additional members under (1E) are appointed only to meet the minimum prescribed number of women members, the Court stated:[4]

> We do not accept the Attorney-General's interpretation. We consider clause (1A) with its two limbs have to be interpreted in a matter 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 in respect of 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.

[22] The Court emphasised the "overarching purpose" of Article (1A) to affirm human rights and gender equality by providing "an avenue to address the under-representation of women in Parliament in Samoa". It did not accept that an important constitutional provision for such rights could be properly displaced other than by express exclusion or limitation of the type contained in Article 44 (1C).

[23] Although as will be seen we do not agree with all the conclusions drawn by the Supreme Court, we observe that the decision is clearly reasoned and expressed in commendably plain transparent language. This has made our task much easier.

Approach to construing provisions of the Constitution

[24] The Supreme Court was right to consider the character and origin of the amendment, and to recognise the rights and freedoms it was intended to advance. However, as the Court recognised in its approach which started with an analysis of the relevant Articles, the natural meaning of the words

[2] *Tuuau v Masipau; Leota v Electoral Commissioner* [2022] WSSC 1 (11 May 2022) at 35.
[3] ibid.
[4] ibid., at 36.

used in the constitutional provision is the starting point. As this Court stated in *Pita v Attorney General:*[5]

> "[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."

[25] The statement by Lord Wilberforce in *Minister of Home Affairs v Fisher*[6] has been relied on in Samoan constitutional cases[7]:

> "Respect must be paid to the language which has been used and to the traditions and usages which have been 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, 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…"

[26] We also note the cautionary statement relating to the interpretation of the Constitution in *Samoa Party v Attorney General*, that *"*[t]he short answer is that the Court has no power to impose its own ideas." [8] We say that as a general reminder, and not to imply that this is what the Court did in this case.

[27] Mr Harrison submitted that the approach to interpreting that Part 14 of the Electoral Act dealing with election petitions was relevant, but we see that as an ordinary statute the provisions of which must take second place to those of the Constitution. References in the Electoral Act as to the speedy resolution of petitions do not help in interpreting the application of the fundamental rights and procedures set out in the Constitution. This is not an appeal from a petition, and nor do appointment of additional women members fall under the Electoral Act. The interpretation of Article 44(1A), which sets out a fundamental protection for minimum seats in Parliament for women, should not be influenced by the scheme for the expedited finality of election petitions referred to in the Electoral Act.

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[5] *In re the Constitution, Pita v Attorney-General* [1995] WSCA 6; 07 1995 (18 December 1995).
[6] [1980] AC319.
[7] *In re the Constitution, Attorney-General v Olomalu* [1982] WSCA 1 at p 14, *Electoral Commissioner v Faatuatua i Le Atua Samoa Ua Tasi (F.A.S.T. Party)* [2021] WSCA 2 at [24]
[8] [2010] WSCA 4 at 45.

The words of Article 44(1A)

[28] The words of the long title to the Constitution Amendment Act 2013 which amended Article 44 describe its purpose as being an Act to amend the Constitution "to provide for a minimum number of women members of Parliament". We agree with Mr Harrison KC that these words are significant to the interpretation of the articles that follow. The intention is to provide for a "minimum" number of women members. The centring on the minimum number is re-enforced by the first substantive statement in the new Article, Article 44(1A)(a) that the members shall "Consist of a minimum of 10%...which for the avoidance of doubt is presently five". There is nothing to indicate an intention to provide for an unconstrained number of women members that could increase incrementally without limit after every election. There is nothing in the long title or in this initial Article to indicate that the goal is to ensure that the number of women in Parliament, whatever its level above the minimum, should never drop.

[29] Under the Article which follows, the minimum number is achieved by two ways, by election or the process created by it for the appointment of additional members. As we have set out, three situations are covered by the Article, the first being after an election where the minimum of women members has not been achieved by the election, or second and third when in different circumstances vacancies arise and the number of women members drops below that minimum. In all three situations, the minimum must be achieved or restored by the appointment of additional women members. The three different situations all flow into each other, contain similar phrases and concepts, and can be seen in drafting terms as a continuum.

[30] It is the third situation, covered by Article 44 (1E) that arises here, and it is this sub–article which is the subject of primary focus.

[31] The sequence set out in (1E) (subject to Article 48 which requires the reporting and filling of a vacancy) is as follows:

(i) There is a seat under clause (1) held by a woman.
(ii) The seat becomes vacant.
(iii) A man is elected to fill that vacant seat
(iv) In which case the woman candidate (if any) with the highest number of votes from that election or the last election or general election is identified.
(v) She shall become the additional Member.

[32] The reference to clause 1 in (i) above is to Article 44(1), which provides for the election of one member elected for each of the fifty-one electoral constituencies.

[33] Mr Keith for the first to third respondents submits there is no limitation on the number of women who can be appointed under this clause. The number of women members can increase over the 10% minimum stated in Article (1A). It can go up from the six members prescribed in *Electoral Commissioner v Faatuatua i Le Atua Samoa Ua Tasi (F.A.S.T. Party).*[9] Certainly (i) to (iv) above do not in any way turn on retaining a minimum number of women members. They could be leading to a provision which requires the appointment of an unlimited number of women.

[34] However (i) to (iv) above can be seen as preconditions setting the platform for the occurrence of the event referred to in (v). That event is the appointment of "the additional member". It is not "an additional member" which would be a neutral and open phrase which would support the appellants' submission. The use of the word "the" indicates that the phrase is less than open. It is necessary to turn to any other reference in the Article to "additional member" to see if that helps in defining the phrase.

[35] The phrase "…shall become the additional member" relates back to the reference to "the additional member" in Article (1A). "Additional members" are the women appointed to make up the "minimum of 10%" of women members that is required by that Article. There is only one type of "additional member[s]" referred to in Article (1A). It is the woman or women who must be appointed to make up the required minimum number of women members.

[36] We see that limitation in (1E) as qualified on its plain words in combination with (1A) as we have set out. The use of the word "the" before "additional member" makes this unambiguous. It is consistent with what could be expected, given the purpose expressed in the long title to the Amendment of providing for a "minimum number of women members of Parliament". It does not say in the long title that the purpose is to maximise the number of women in Parliament, which would have been consistent with the interpretation urged on us by the first - third respondents. It refers to a minimum number, and in the body of the Article bases that on 10 percent, consistent with the Article only being used to maintain that minimum number.

[37] That means in practical terms, (given the present requirement of six women members to make up the 10 per cent), if there is vacancy of a seat held by a woman who is not an additional member, and there is the subsequent election of a man to that seat, there are two different scenarios. On the

[9] [2021] WSCA 2 at [24].

first scenario if there are only five or less women members at that point of the election of the replacement man, (less than the required 10 percent), the requirement in Article (1A)(a) is not met as the 10 percent requires six women members. Article 44 (1A)(b) then will apply and there will be no by-election and the additional seat will be filled by the available woman candidate with the next highest number of votes. On the second scenario, if on the election of the man to take the previous woman member's vacated seat there are still six or more women members of Parliament, then there is no "additional member" required. There is no vacancy arising under (1A). There is no need for an additional member. The necessary prerequisite for the application of Article 44 (1) has not arisen.

[38] This interpretation is supported by the overall context of the Article. As we have observed, the long title is precise in its expression of the purpose of providing for a minimum number of women. As Mr Harrison submitted, it is not something more general and aspirational, such as for example promoting or increasing the number of women in Parliament. The structure of the amended Article is consistent with this, starting with setting out the 10 per cent minimum. It follows that there is no reason for the 10 per cent regime to apply if there are already 10 per cent of women members. This is the premise of Article 44 (1B) which addresses a shortfall of the minimum of 10 per cent after a general election.

[39] This is also the premise of the preceding Article 44 (1D) which addresses a vacancy in the seat of "an additional member". "Additional member" means the additional member envisaged by Article (1A). Plainly the vacancy of an additional member means that the number of women members will in this event drop below the 10 per cent and an additional member is to be appointed under Article (1A)(b). "Additional member" is referable back to the meaning of that phrase in Article (1A).

[40] The same meaning of "additional member" is evident in Article (1E). If the vacancy of the woman member and election of a man has not brought the number of women below the 10 per cent minimum there is no woman additional member required under Article (1A). But if it does result in the number falling below the 10 per cent, then there is a need for an additional member as envisaged in article 44(1), and the additional seat will be filled by the available woman candidate with the next highest number of votes.

[41] Further support for this interpretation is seen in the definition of "additional member" in Article 44(5). An "additional member" is "a woman who is a Member of Parliament by virtue of clause (1B), (1D), or (1E) for the purpose of clause (1A)". This is not consistent with Mr Keith's submission that there is no necessary connection between the minimum of 10 per cent set by Article 44(1A) and the terms of Article 44 (1E). The reference in Article 44(5) back to (1A) confirms that

"the" additional member in (1E) is a woman member required to fulfil the ten percent. We respectfully disagree with the Supreme Court's statement that "…there is no express limitation on (1D) and (1E)". The definition expressly requires the appointment of a woman who is a member of Parliament for the purposes of clause (1A).

[42] For these reasons we cannot accept the first – third respondents' submission supporting the Supreme Court judgment that there are two distinct mechanisms to ensure and enhance the participation of women in the electoral process. It was submitted that these were first under Articles 44 (1A) – (1D) being the maintenance of additional women members, and second under (1E) with its distinct and narrower focus of ensuring that a woman member is always replaced by another woman member. To the contrary we see (1E) as one of a consistent set of provisions aimed at maintaining the 10 per cent minimum in all likely circumstances. There is nothing to indicate a legislative intention to create in (1E) what would be effectively a stand-alone provision not connected to a minimum number.

The wider legislative purpose

[43] Neither counsel relied heavily on background materials in discussing the legislative purpose. The Hansard debates relating to the amendment, while in general terms expressing the wish to support women in Samoa, do not go further. We accept that a relevant background document is the Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW).[10] Samoa is subject to specific and directly relevant obligations under CEDAW, to which Samoa became a state party by ratification in 1992.

[44] We also accept the respondents' submission that the 2013 amendment was proposed and adopted with the object of overcoming among other things longstanding under-representation of women in Parliament. It followed criticism that Samoa was not meeting its obligation to promote and enhance the political participation and representation of women under Article 7 of CEDAW, where Samoa undertook to participate in the formulation of government policy and its implementation, and to hold public office and perform all public functions at all levels of Government. Article 7 of CEDAW provides:

> "…take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

[10] UNTS 1249, 13 (1979; in force for Samoa 1992)

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of Government policy and the implementation thereof and to hold public office and perform all public functions at all levels of Government; …"

[45] There had been reference to an objective of 30 percent representation by women in Parliament, and we accept the submission that 10 percent may have been seen by many as only a starting point. The amendment can also be seen as consistent with Article 15(1) of the Constitution stating that all persons are equal before the law and entitled to equal protection, and Article 15(3)(b) which provides that nothing in Article 15 shall prevent the making of any provision for the "protection of advancement of women".

[46] However, we do not accept that this background assists the first – third respondents. The amendment has advanced the position of women in Samoa, by forcing a percentage minimum number of women members, considerably greater than the actual percentage in 2013. But plainly it did not have the intention of requiring in certain circumstances a number of women in Parliament that exceeded the 10 percent minimum. If it had wished that it could have said so in the Long Title, or at least made unambiguous provision for it. The Legislative Assembly had all sorts of options it could have adopted, including a higher percentage minimum. It chose the option we see in the Amendment. There is nothing to indicate it was also creating a second option for increasing the representation of women not connected to the 10 percent minimum. If that was what it intended it could have said so.

[47] Another factor is that the Supreme Court judgment permits the increase of the number of members of Parliament beyond the limit of 51. That is implicit in the general provision of additional members to achieve the 10 per cent, but it can be expected that Parliament would have been conservative in passing provisions that permit the 51 limit to be exceeded. It we accepted the respondents' arguments, the Legislature has through Article 44(1E) left the door even more open to increases above the five, (now six), that follows from the 10 percent. It seems unlikely that Parliament would have done that.

[48] Finally, we refer to the Supreme Court's reliance on the "strong flavour of succession" inherent in Article 44. It is difficult to see how that premise can be used to justify its interpretation of (1E). On the Supreme Court's construction, which does not admit of any exceptions, this provision would require the replacement, for example, of one woman member who had secured election by fraud with another woman member. That cannot have been the legislative intention behind (1E) and we do not accept Mr Keith's submission that Parliament was concerned only with the result,

regardless of the means, of preserving a seat won by one woman for another woman, This anomaly counts against the Supreme Court's conclusion.

Conclusion in relation to Article 44(1E)

[49] If anything our examination of the wider background confirms that Parliament did not intend to set up a separate regime of an unlimited increase of members of Parliament. It was not its intention to ensure that when a seat held by a woman was vacated, a woman would always replace her and be an additional member of Parliament if the seat had been won at by-election by a man. It did not intend to depart from the purpose outlined in the Amendment's Long Title and Article 44(1A) to provide for a minimum of 10 percent of women members.

[50] We have decided to allow the appeal and we will make the orders sought by the appellant.

THE CROSS-APPEAL

Introduction

[51] The cross-appeal involves the interpretation of Article 44(5) already considered in relation to the appeal. For the purposes of this cross-appeal, the relevant part of (5) reads as follows:

> **"44(5)** In this Article, unless the context otherwise requires:
> …
> "Highest number of votes" means the percentage of the total valid votes in a constituency polled by a woman candidate;
> …"

[52] The Electoral Commissioner had used in the by-election 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. It was on this basis that he got a percentage of votes gained by women candidates in their respective constituencies.

[53] In the Supreme Court the cross-appellants submitted this was wrong. It was argued by them that there was an ambiguity in the meaning of the definition. Relying on the definition, the Supreme Court did not agree that there was any ambiguity. It held:

> "[50] 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."

…
[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 the number by the total valid votes in each constituency to arrive at a percentage."

[54] The cross-appellants argued for a different interpretation. It was said that the definition was ambiguous. They also argued that applying the formula led to results which were capricious, unreasonable and unfair, and not in accord with the broader legislative context. It was submitted in particular that the two governing provisions, which it was said were Article 44 (1B) and 44(1)(5), provided different interpretations and led, in practice, to conflicting outcomes as to the appropriate candidate(s). It was also argued that because Article 4 is a Constitutional provision and, particularly, because the additional women Member provisions were and are directed to advance women's right to equality under both the Constitution and CEDAW, that the definition could be constrained in its application.

[55] The cross-respondents adopted the reasoning of the Supreme Court, and submitted that the definition Article 44(1)(5) meant what it said, and applied to all of Article 44(1).

The definition

[56] Article 44(1)(5) has a compressed but plain meaning, which was not seriously challenged before us. The phrase "the highest number of votes" means that the woman candidate who has received the highest percentage of valid votes in a constituency. As we understand it the cross-appellants argue that at least for Article 44(1E) it means the woman candidate who has received the highest number of votes in the relevant election and not the highest percentage in a constituency. Different candidates will be declared the additional members, depending on the interpretation.

[57] We cannot accept that the definition means one thing for some of the sub-articles, and a different meaning for others. The whole purpose of statutory definitions is to achieve certainty and consistency. The position and heading of this definition in Article 44(1)(5) indicates the same purpose. It sets out how the "highest number of votes" is to be calculated in Article 44(1). Nor can we accept that we can entirely put-aside the definition as Mr Keith invited us to do, on the basis that the phrase "unless the context otherwise requires" means that, if we consider that the definition produces what might be seen, at least by some, as sub-optimal outcomes, we can reach what may be submitted to be the appropriate result. The legislature cannot have intended that a court should vary its construction of the statute according to the facts under consideration by applying a sliding scale of subjective interpretation.

[58] Further, consistent with our approach to interpreting Article 44 (1) set out above, we see the articles that follow Article 44(1)(5) as flowing and a continuum, being the imposition of a similar solution (the appointment of a women member) in the three situations set out in Articles 44 (1B), (1D) and (1E) we have discussed earlier. We cannot accept Mr Keith's submission that the two governing provisions which are Article 44 (1B) and (5) provide "different interpretations and lead to conflicting outcomes". We see Article (5) as applying to all the sub-articles and as leading to consistent outcomes.

[59] It is easy to see why Parliament decided to provide a definition of the phrase "the highest number of votes". The description of the process of deciding the unelected woman candidate who would become the additional member could not be set out in a couple of words, but it had to be used in the three situations referred to in the amended Article where an additional member was to be appointed. A clear and consistent method need to be prescribed, and the logical drafting technique was to provide a definition that would apply to those situations. Parliament provided that definition in Article 44(1)(5). The language used in the definition is compressed, but its meaning is clear. That meaning as discerned by the Electoral Commissioner and endorsed by the Supreme Court in the decision appealed, has not been the focus of the cross-appellant's submissions. The focus has been rather to submit that the legislative background and context within the amended article require the definition to not be applied to the phrase "highest number of votes".

The context

[60] Mr Keith placed weight on the phrase at the start of Article 44 (5) "unless the context otherwise applies." In *Police v Thompson*[11] McCarthy J in the New Zealand Court of Appeal commented about the phrase "unless the context otherwise requires":

> "…it would take a conflict of unmistakeable character, in my view, to justify a Court departing from a specific meaning which a statute expressly requires to be applied…"

[61] The leading New Zealand case about context qualifications is the Supreme Court decision in ***AFFCO New Zealand Ltd v New Zealand Meat Works and Related Trades Union.*** It was stated: [12]

[11] [1966] NZLR 813 at 823.

[12] [2017] NZSC 135, [2018] 1 NZLR 212 at [58] – [65]. See also *Kini v Aiafa* [2006] WSSC 25; Burrows and Carter, "Statute Law in New Zealand" (sixth ed. 2021) at p.571.

> …where there is a defined meaning of a statutory term that is subject to a context qualification, strong contextual reasons will be required to justify departure from the defined meaning. The starting point for the Court's consideration of context will be the immediate context provided by the language of the provision under consideration. We accept that surrounding provisions may also provide relevant context, and that it is legitimate to rest the competing interpretations against the statute's purpose, against any other policy considerations reflected and against the legislative history, where they are capable of providing assistance. While… the context must relate to the statute rather than something extraneous, we do not see the concept as otherwise constrained.

[62] We see no sufficient context in Articles 44(1B) – (1E) to justify a departure from the definition in Article 44(5) of "highest number of votes". There is nothing persuasive in the context to indicate a different meaning for the phrase in those clauses where it arises, to that set out in that definition. As our analysis of the connecting and consistent approach adopted by Parliament right through Article 44 (1A) indicates, we are unable to see any conflicting context which is persuasive of not applying the plain definition. There is no conflict of "unmistakeable character" to justify a departure from the specific meaning which Article 44(5) expressly requires. It is highly unlikely that Parliament would have provided a definition for a phrase used a number of times in a concise amendment to one constitutional Article, with the intention that it not be applied when the phrase arises in that Article. That would have been a pointless exercise.

The wider legislative purpose

[63] The cross appellants placed reliance on the legislative background in support of their preferred interpretation of Article 44(5). The context was as discussed above that the 2013 amendment was proposed and adopted with the object of overcoming among other things longstanding under-representation of women in Parliament. Instead it was submitted that the percentage interpretation set out in the definition has the practical effect of favouring women candidates in those electorates with the fewest candidates rather than "those who have stood in more highly contested electorates and run the most competitive campaigns". We have already discussed that legislative background.

[64] Based on this the cross-appellants submitted the better approach was to adopt the wording in Article 44(1B) itself and appoint those women who receive the highest number of votes. Alternatively although more complex, compromising the two terms in (1B) and (5) by ranking the unsuccessful women candidates by percentage of the vote attained by the elected candidate. There is nothing to indicate that Parliament addressed such alternatives. More importantly, for the reasons we

have set out above, if there was such an intention, Parliament would have not bothered with the definition which centres on the percentage of the woman candidate. We have no doubt that there are all sorts of arguments and cross-arguments about the fairest way of calculating the highest number of votes. We are not persuaded that any policy is obviously better than another. In any event that is why Parliament created a definition. It is there to avoid just these sorts of debates.

[65] We also note that the advancement of women and the CEDAW obligations relied on by the Cross-Appellants do not address a preference for one method of selection criteria for the achievement of a minimum numbers of women in Parliament by legislative prescription. That is unsurprising, as more women in Parliament rather than the selection method, is the focus.

[66] What was plainly envisaged by Parliament as the Supreme Court stated is a selection method based on dividing the total number of votes won by a woman candidate in a constituency, to get a percentage of votes gained by women candidates in their respective constituencies. It is a cascading process. In (1E) to determine the additional member, the assessment of the highest number of votes as defined is taken first from the election in which the man was elected to the seat previously held by a woman. If no woman candidate emerges from the process, then it is taken from the previous election closest in time to that election. If still no woman candidate has emerged, it is taken from the results of the last general election. In (1D) to choose the additional member, an assessment of the candidate with the highest number of votes is taken from the results of the last election closest in time to the general election, or if there was no such election from the last general election. In (1B) to choose the additional member, it is the woman with the highest number of votes as defined in the general election who becomes the additional member.

[67] We endorse the Supreme Court reasoning and will dismiss the Cross-Appeal.

Result

[68] The Appeal is allowed.

[69] Paragraphs 59(b) and 59(d) of the Supreme Court decision are quashed

[70] We declare that no additional member should have been sworn in, and the swearing in of To'omata Norah Leota was invalid.

[71] We declare that To'omata Norah Leota is not a member of the Legislative Assembly.

[72] The Cross-Appeal is dismissed.

Costs

[73] Like the Supreme Court, given the novelty and importance of the issues raised in this litigation, we determine that there will be no order as to costs.

Honourable Justice Harrison

Honourable Justice Asher

Honourable Justice Young

Honourable Justice Tuala-Warren