CA 04/21

IN THE COURT OF APPEAL OF SAMOA
HELD AT MULINUU

IN THE MATTER:	Articles 44 and 47 of the Constitution of the Independent State of Samoa
A N D: **IN THE MATTER:**	Declaratory Judgments Act 1988
A N D: **IN THE MATTER:**	The Electoral Act 2019
BETWEEN:	**ELECTORAL COMMISSIONER** *First Appellant/First Respondent*
A N D:	**ALIIMALEMANU MOTI MOMOEMAUSU ALOFA TUUAU,** *Second Appellant/Second Respondent*
A N D:	**FAATUATUA I LE ATUA SAMOA UA TASI (F.A.S.T. PARTY)** *First Respondent/First Applicant*
A N D:	**SEUULA IOANE,** *Second Respondent/Second Applicant*

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

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

Hearing: 23 June 2021
Judgment: 25 June 2021

JUDGMENT OF THE COURT

(Respondents' application under Rule 24 of the Court of Appeal Rules)

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[1] This interlocutory application is brought by the Respondents who complain that the judgment of this Court dated 2 June 2021 is being held out in public as saying something that it has not.

[2] Mr Keith, Counsel for the Respondent/Applicants, says the need for clarification arises because:

5.1 The decision of the Court of 2 June 2021 dealt with the question of how and when Article 44(1A) of the Constitution is to be applied;

5.2 Prior to the hearing and determination of the appeal, the Court declined a stay. Further, and though the Attorney-General sought to raise the question of whether article 44(1A) would operate to delay the meeting of the Assembly past the 45 day requirement in article 52 of the Constitution, that step was not further pursued; and

5.3 **The Court did not find, and was not asked to find, that the operation of article 44(1A) operated to set aside the 45 day requirement. Nor did it find, or was asked to find, that the judgment operated to stay or reverse:**

5.3.1 The proclamation of the Head of State for the first session of Parliament to occur on 24 May 2021; or

5.3.2 The judgments and orders of the Supreme Court in *Fa'atuatuai i le Atua Samoa ua Tasi & ors v Attorney- General & ors*, above, which had directed compliance with that proclamation; but

5.4 **The claim has nonetheless been made, including in remarks by the former Prime Minister; the former Deputy Prime Minister; and**

> **latterly in submissions for the Attorney-General in *Attorney- General v Latu & ors* in the Supreme Court, that the Court's judgment made that finding.**
>
> (emphasis added)

[3] Respectfully, in his oral submissions, Mr Keith succinctly put his concerns that the judgment is being raised in public for saying what it did not say. He said the judgment has not said what is being attributed to it.

[4] The Electoral Commissioner abides the decision of this Court as to (1) the Court's jurisdiction to consider the application; and (2) if the Court considered that it had the jurisdiction, that it would participate in a hearing concerning the merits of the orders sought. We consider that this is an appropriate position to be taken by the Electoral Commissioner.

[5] The Electoral Commissioner properly concedes that the Court of Appeal's judgment did not give a ruling on the question of the interaction between Article 52 and 44(1)(A) of the Constitution. That is plainly so because such a ruling would have been on a topic that was not part of the appeal; the Electoral Commissioner's position is in essence the same as that of FAST.

Discussion

[6] The only evidence available to the Court in this application is from the leader of the FAST party, which has won a majority of the seats in Parliament and therefore command the confidence of the Legislative Assembly, the Honourable Fiame Naomi Mata'afa ("the Hon. Fiame Naomi Mata'afa").

[7] In an affidavit dated 10 June 2021, the Hon. Fiame Naomi Mata'afa, deposed that at every stage of the process of transition to her administration, the "ex-Prime Minister" and office-holders acting at his direction and/or with his acquiescence and/or advice provided by him and/or by the Attorney-General have repeatedly obstructed the efficient and lawful transition on a variety of pretexts. The Hon. Fiame Naomi Mata'afa gives evidence about a meeting which she held with the "former Prime Minister"

> *4. SINCE the release of the Court of Appeal's final decision in this matter, the former Prime Minister has said to me and publicly that:*
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> *a. He would agree to Parliament meeting if the second appellant in this case, whose appointment has been set aside by this Court and by the Supreme Court, nonetheless sits as a Member;*

b. *He considers that appointment of the second appellant remains valid, such that HRPP continues to have 26 seats in the Assembly;*
c. *Unless I were to agree to the second appellant sitting as a Member, he believes that the Constitution does not permit the Parliament to convene until all current election petitions; and any consequent by-elections; and any subsequent appointment of any additional member(s) is completed; and*
d. *He will remain in office as a "custodian" Prime Minister until that time.*

5. I am also aware that the Head of State, in addition to having been advised not to attend the first session of the new Parliament, has taken no step to proceed with responsible government under the Constitution. The Head of State has also continued to refer in public remarks to an "impasse". The former Prime Minister has advised me that the Head of State will not take any such step, consistent with the former Prime Minister's views set out above. I infer from the absence of any action or statement from the Head of State and from article 26(1) of the Constitution that the former Prime Minister and/or those acting on his behalf have continued to advise the Head of State that he may delay or prevent the sitting of Parliament. Such advice is contrary to the orders of the Supreme Court of 23 May.

6. THESE views have been well advertised and distributed and have caused confusion and consternation by the public who are profoundly sick of the ongoing political stalemate and simply wish for a speedy return to democratic government.

7. WHILST I and a number of my colleagues have attempted to correct these misinterpretations, they have by being repeated by HRPP members who are also solicitors, and so the actual outcome as regards the election results of 26 seats for FAST and 25 for HRPP, has been deliberately obfuscated by HRPP by the misuse of the Appeal decision, as an excuse to further prolong and prevent my government from actually taking over government.

[8] The Hon. Fiame Naomi Mata'afa also exhibits several newsprint reports. However, whilst they appear to be generally consistent with the text of the affidavit, we consider that the Hon. Fiame Naomi Mata'afa 's own recollections of her meetings to be more compelling. That though is not to undermine the reporting of the journalists who aim to provide accurate news coverage – but as they will appreciate, they have not given affidavits in this matter.

[9] The Hon. Fiame Naomi Mata'afa's affidavit deserved a response, if one could be provided. We however note Mr Ainuu's submission that he considered the Hon. Fiame Naomi Mata'afa's

affidavit to be irrelevant. We consider the making of that submission to be an exercise of poor judgment. The uncontested evidence before the Court, which is highly relevant to the issues this Court must decide, is that at a meeting between Fiame and Tuilaepa:

a. Tuilaepa asserted that HRPP continued to have 26 MP's, despite the Court of Appeal's decision of 2 June 2021;
b. Further, Tuilaepa asserted that the Constitution does not permit the Parliament to convene until all current election petitions; and any consequent by-elections; and any subsequent appointment of any additional member(s) is completed.

[10] This evidence supports the Applicant's case that the terms of the 2 June 2021 decision are not being obeyed, as we will discuss below. Whilst we accept that there may be a measure of "negotiation tactics" in the assertions, nevertheless, they are what they are, and they are unchallenged therefore unacceptable misrepresentations of the law.

[11] The issue we must consider is whether orders should be made to spell out what the Court did not decide. It is not simply a matter of the Court issuing new orders; we need to consider whether the Court has the power to do that.

Functus officio

[12] There is an important principle which generally bars a court from reopening a final decision it has delivered. Save in exceptional circumstances such as procedural impropriety, where the process in arriving at a judgment is fundamentally flawed, or where there is fraud, the general principle is that there needs to be an end or a finality to litigation. This principle is commonly given the Latin term of *functus officio*.

[13] There are however other exceptions. One, which was referred to in the matter of *AG v Leapai* [2017] WSSC 105, where the Court considered the issue of whether a judgment which had been obtained by way of formal proof (this happens when the defendant fails to appear at the hearing of the case) can be set aside afterwards. The Learned Chief Justice Sapolu (as he was), discussed at some length the principles applicable to the law concerning setting aside judgments, and in this context His Honour considered that *the Supreme Court has inherent jurisdiction to set aside its own judgments or orders where the interests of justice require.* We, respectfully, consider His Honour correctly stated the law.

[14] We also note that the Court of Appeal in addition to the jurisdiction conferred by statute also has inherent powers which are incidental or ancillary to its substantive jurisdiction. These inherent powers enable a court to regulate its own procedures to ensure fairness in trial, investigate procedures, and to prevent abuse of its processes.

Turning to the Court of Appeal's statutory power in the context of this matter. The relevant section is s.17 Judicature Act 2020:

> The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which the Court considers ought to have been made, and to make such further or other order as the case may be.

[15] We consider that the dominant purpose of this section is to set out the powers that a Court of Appeal has when making its determinations.

[16] There may be an argument that the last phrase (addendum) of the sentence seems to suggest that the Court of Appeal may make further orders post the delivery of a judgment. However, none was advanced at the hearing. But that is not the end of the matter.

What is the real issue?

[17] We, respectfully, consider that the Court of Appeal's Judgment is clear, and there is no real argument between Counsel about the scope of the Court of Appeal's judgment. However, the Honourable Fiame Naomi Mata'afa – who leads the majority of members, raises a concern that the judgment has been attributed meanings that do not reasonably arise from its terms and the judgment is therefore being used as substantive justification for the retention of power and failure to transition power to her party.

[18] Samoa is in uncharted legal and constitutional waters. But what is certain is that the Constitution applies and therefore the rule of law applies.

[19] We consider that it would be scandalous if in the context of the present Constitutional crisis this Court, the Final Appellate Court in Samoa, did not do all it reasonably could to articulate the law. If this means issuing clarifications as to the meaning of a judgment, then it should do that. We consider that this Court's inherent powers enable the Court to act effectively in relation to its appellate role on declaratory matters. The very nature of this proceeding is one which seeks a declaration about the meaning of the law. If, because of intended or unintended interpretations, the

meaning of the law is made uncertain, then the Court has no option but to revisit its earlier decision to do its job.

[20] We therefore make the following clarifications to the 2 June 2021 decision.

a. the Court of Appeal's decision **did not rule** on the interaction between Articles 44(1)(A) and 52. That being so, it necessarily follows that the Court did not declare that the convening of Parliament, a state which is mandatory under Article 52, is dependent or relies on the activation of Article 44(1)(A).
b. For the avoidance of doubt, any argument or interpretation to the effect that the Court did rule on the interaction of Article 44(1)(A) and 52, and what those rulings meant, are wrong.
c. In the 2 June 2021 decision the Court set aside the appointment of the Second Appellant/Second Respondent; any suggestion that both parties continued post the 2 June 2021 decision to hold 26 seats each, is wrong. They did not. FAST had 26 seats and HRPP had 25. A further seat **may** be added following any by elections. There is no certainty that Article 44(1)(A) will be required to be called on to supplement the guaranteed number of women members of six, because a sixth woman member may win an electoral constituency seat in a by election.

[21] We consider that there is insufficient evidence before the Court to enable us to determine whether any of the persons who have provided interpretations contrary to the terms of paragraph 20 of this decision, were made maliciously, carelessly or otherwise.

The Second Appellant/ Second Respondent

[22] We formally record the position that the claim as against the Second Appellant/Second Respondent was struck out at the hearing. It turned out that there was no real reason for her involvement in the application, and we accordingly consider that costs should follow the event and we award costs of $1,000 against the Respondents/ Applicants in favour of the Second Appellant/ Second Respondent. Given that there was a broad suggestion of contempt like behaviour she was put to the expense of instructing Counsel, both locally and overseas, and they filed submissions and appeared at the hearing itself.

Conclusion

[23] This Court makes the clarifications which are set out in paragraph 20 above.

[24] Costs as between the Respondents/Applicants and the First Appellant/First Respondent are ordered to lie where they fall.

S. Perese

Chief Justice Perese

Justice Tuala-Warren

Justice Roma