IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA NO. 1307/2022

BETWEEN **SONNY WILLIAMS**
Appellant

AND **MARGHARET MATENGA**
First Respondent

AND **CHIEF ELECTORAL OFFICER**
Second Respondent

Coram: White P, Fisher JA, Asher JA

Hearing: 3 November 2022

Counsel: Messrs ITF Hikaka and B Marshall for the Appellant
Mr BP Mason for the First Respondent
Mr D Greig for the Second Respondent

Judgment: 23 November 2022

JUDGMENT OF THE COURT

A. The question of law in the case stated is answered Yes.

B. The Titikaveka election petition is remitted to the High Court for inquiry under s 96 of the Electoral Act 2004.

C. The Appellant is to pay the First Respondent costs in a sum to be fixed following the receipt of further submissions if not agreed.

[1] In this election petition appeal by way of case stated the Appellant, Mr Williams, who was the successful candidate for the Titikaveka constituency on Rarotonga at the recent general election held on 1 August 2022, seeks to prevent the High Court from inquiring into the petition filed by the Respondent, Ms Matenga, who was the unsuccessful candidate, in which she

alleges that eight named voters were not qualified to vote because they failed to meet the constituency registration requirements of Article 28 of the Cook Islands Constitution. As Mr Williams' majority was only three votes, the outcome of Ms Matenga's petition could alter the result of the election in this constituency.

[2] For Mr Williams, it was argued before the Chief Justice that the High Court had no jurisdiction to inquire into the voter qualification allegations in the petition because s 96(3) of the Electoral Act provided:

> "Notwithstanding subsection (1), no petition may be filed or inquired into on the grounds that any person's name was or was not on a roll by reason of the presence or absence of that person in or from a particular constituency."

[3] Not surprisingly, the Chief Justice rejected this argument on the ground that in 2004 the Court of Appeal had ruled in *Puna v Woonton* that the limitation on the Court's jurisdiction in s 96(3) was unconstitutional having regard to the provisions of Article 27 of the Constitution when that Article was read together with the provisions of Articles 28, 39 and 65.[1] The Chief Justice accepted that he was bound to follow and apply the decision of the Court of Appeal.[2]

[4] Bearing in mind that Mr Hikaka, counsel for Mr Williams, had already indicated to the Chief Justice that there would be an appeal,[3] the question of law in the case stated under s 102(2) of the Electoral Act for the opinion of this Court reads:

> "Does the Court have jurisdiction, when considering an election petition under s 92 of the Electoral Act 2004, to consider a challenge to an elector whose name is on the roll for a constituency on the basis that they are not qualified to be on the roll having regard to section 7 and Part 3 of the Electoral Act 2004?"

[5] The principal question for this Court is therefore whether it should reconsider and depart from its previous decision in *Puna v Woonton* and rule that s 96(3) was wrongly declared unconstitutional and should be reinstated as a limitation on the High Court's election petition inquiry jurisdiction. There is also a separate but related question relating to the electoral rolls.

[6] In the context of the principal question, the issue of the correct approach to the interpretation of the Constitution is relevant. As a number of relevant authorities in this issue

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1 *Puna v Woonton* [2004] CKCA, Appeal 10/04, 14 November 2004, at [15]-[25].

2 *Matenga v Williams* [2022] CKHC, Civil 942/2022, 26 September 2022, at [52] and [63].

3 At [8].

were discovered in the course of post hearing research, the parties were given the opportunity to provide further brief written submissions. The Court is grateful to Counsel for the further submissions it has received.

[7] The Court is also grateful to Mr Greig, Counsel for the Second Respondent, the Chief Electoral Officer, for his assistance on aspects of the practical implications of the issues in this appeal.

[8] The judgment proceeds under the following headings:

(a) The relevant provisions of the Constitution.

(b) Interpreting and applying the Constitution.

(c) The relevant provisions of the Electoral Act 2004.

(d) The decision in *Puna v Woonton*.

(e) The decision of the Chief Justice.

(f) The submissions for the parties.

(g) Was the decision in *Puna v Woonton* made *per incuriam*?

(h) Should this Court reconsider the decision in *Puna v Woonton* on other grounds?

(i) The roll issue.

(j) Result.

The relevant provisions of the Constitution.

[9] The Constitution of the Cook Islands was originally enacted by the Parliament of New Zealand in the Cook Islands Constitution Act 1964. By s 4 of the New Zealand Act, the Constitution is "the supreme law of the Cook Islands".

[10] The following are the relevant provisions of the Constitution:

> **27. The Parliament of the Cook Islands -**
>
> (1) There shall be a sovereign Parliament for the Cook Islands, to be called the Parliament of the Cook Islands.

(2) Parliament shall consist of [24] members, to be elected by secret ballot under a system of universal suffrage by the electors of the following islands or groups of islands or areas and in the following numbers:-

...

(j) The Island of Rarotonga and the Island of Palmerston, 10 members, being 1 member for each of the 10 constituencies together comprising those islands, having the names and boundaries set out in Part II of the First Schedule to this Constitution;

...

(3) Subject to this Article and Articles 28 [and 28B] hereof, the qualifications and disqualification of electors and candidates, the mode of electing members of Parliament, and the terms and conditions of their membership shall be as prescribed by Act.

28 Qualification of electors -

(1) No person shall be qualified to be an elector for the election of a Member of Parliament, unless:

(a) The person is a Cook Islander (as defined in an Act prescribing the qualifications of electors), a New Zealand citizen or has the status of a permanent resident of the Cook Islands (as provided for by Article 76A); and

(b) The person has at some time resided continuously in the Cook Islands for a period of not less than 12 months.

(2) A person who meets the qualifications imposed by subclause (1) (or re-qualifies under subclause (3)) is disqualified from being an elector for the election of a member of Parliament if the person is subsequently absent from the Cook Islands for a continuous period of 3 months or more.

(3) A person disqualified under subsection (2) shall re-qualify to be an elector for the election of a Member of Parliament if the person returns to the Cook Islands and at any time thereafter remains in the Cook Islands for a continuous period of not less than 3 months.

(4) The following shall not be regarded or treated as a period of absence from the Cook Islands for the purposes of subclause (2):

(a) Any continuous period not exceeding 4 years spent by a person outside the Cook Islands for the purpose of -

(i) Receiving education, technical training, or technical instruction; or

(ii) Receiving medical treatment;

(b) Any period spent by a person outside the Cook Islands as –

(i) a member of a Cook Islands diplomatic or consular mission; or

(ii) a spouse, partner, or member of the household of a person referred to in subparagraph (i) of this paragraph.

(5) Nothing in this Article limits the provisions of any law prescribing additional qualifications to be (or additional disqualifications from being) an elector for the election of a member of Parliament, insofar as the law is not inconsistent with any provision of this Constitution.

…

39 Power to make laws -

(1) Subject to the provisions of this Constitution, Parliament may make laws (to be known as Acts) for the peace, order, and good government of the Cook Islands.

(2) The powers of Parliament shall extend to the making of laws having extraterritorial operation.

(3) Without limiting the generality of the power conferred by subclause (1) of this Article to make laws for the peace, order, and good government of the Cook Islands, that power shall, subject to the provisions of this Constitution, include the repeal or revocation or amendment or modification or extension, in relation to the Cook Islands, of any law in force in the Cook Islands.

(4) Except to the extent to which it is inconsistent with this Constitution, no Act and no provision of any Act shall be deemed to be invalid solely on the ground that it is inconsistent with any law in force in the Cook Islands.

(5) For the avoidance of doubt, it is hereby declared that the power conferred on the Legislative Assembly of the Cook Islands by Article 39 of this Constitution (as originally enacted) to make laws for the peace, order, and good government of the Cook Islands always conferred on that Assembly power to make laws, notwithstanding anything in Article 46 of this Constitution (as originally enacted), declaring that any specified Act of the Parliament of New Zealand or any regulations, rules, or order under any Act of that Parliament should extend to the Cook Islands as part of the law of the Cook Islands.

[11] We also note:

(a) Article 41 which empowers the Legislative Assembly to repeal or amend the Constitution, but only with a two-thirds majority and a 90 day interval between the final vote and the preceding vote; and

(b) Article 65, referred to by the Court of Appeal in *Puna v Woonton*, which requires every enactment to be construed and applied so as not to abrogate,

abridge, or infringe any of the fundamental rights or freedoms recognised by Article 64.

[12] Several features of these provisions in the Constitution are significant:

(a) Article 27(2) establishes "a system of universal suffrage" which means the right to vote is given to all citizens regardless of wealth, income, gender, social status, race, ethnicity, or political stance. Inherent in a system of universal suffrage is the fundamental principle "one person one vote".

(b) Article 27(2) implements the system of universal suffrage for electors by describing constituencies with reference to the various islands or group of islands or areas making up the Cook Islands as well as stipulating the number of members of Parliament to be elected by each constituency. Obviously under the principle of "one person one vote" an elector may vote only in one constituency.

(c) As Article 27(3) states, the qualification and disqualification of electors "shall be as prescribed by Act", but subject to Articles 27 and 28.

(d) The qualifications for electors prescribed by Article 28 are based on stipulated residential requirements which Article 28(5) recognises will be supplemented by statutory provisions not inconsistent with the provisions of the Constitution.

(e) The provisions of Article 39(1) and (4) make it clear that the power of the Cook Islands Parliament to make laws is subject to the provisions of the Constitution.

Interpreting and applying the Constitution.

[13] There is no dispute that when a Court is interpreting an Article in the Constitution it should adopt a generous interpretation in order to give individuals the full measure of the fundamental rights and freedoms conferred by the Constitution subject only to such limitations as are necessary to ensure there is no prejudice to the public interest.[4] The Court must give primary attention to the words used, but guard against interpreting them in a mechanical or pedantic way.[5] The court must not, under the guise of a generous interpretation, engage in

4 *Minister of Home Affairs v Fisher* [1980] AC 319 (PC), at 328-9, per Lord Wilberforce.

5 *Human Rights Protection Party v Masipa'u* [2021] WSSC 79, at [37].

judicial law making.[6] Further, the social and historical context in which the constitution is to be understood must be considered.[7]

[14] Nor is there any dispute that when a Court is considering whether a statutory provision is consistent with the Constitution it should, if possible, interpret a statute so that it does not conflict with any constitutional limitations.[8] In the event of potential inconsistency, legislation should, where possible, be "read down" to comply with constitutional requirements.[9] A statute should be presumed to be constitutional unless shown to be otherwise, and courts should be circumspect before deciding that a statute is unconstitutional.[10]

[15] At the same time, however, when there is a clear conflict between a statutory provision and the Constitution, the statutory provision will be invalid to the extent that it is inconsistent with the supreme law in the Constitution.[11]

The relevant provisions of the Electoral Act 2004.

[16] The following are the relevant provisions of the Electoral Act:

> 7. Qualifications for registration of electors - (1) A person shall be qualified to be registered as an elector of a constituency if that person -
>
> (a) is a Cook Islander or a New Zealander citizen, or has the status of a permanent resident of the Cook Islands;
>
> (b) has at some period actually resided continuously in the Cook Islands for not less than 12 months;
>
> (c) is 18 years of age or over;
>
> (d) has been actually resident in the Cook Islands throughout the period of 3 months immediately residing that person's application for enrolment as an elector;
>
> (e) has not been convicted of any corrupt practice or any offence punishable by death, or imprisonment for a term of 1 year or more unless in each case that person has received a free pardon or has undergone the sentence or punishment to which that person was adjudged;
>
> (f) is not of unsound mind.

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6 Ibid.

7 *Electoral Commissioner v FAST Party* [2021 WSCA 2 at [17]; *Human Rights Protection Party v Masipa'u*, above n 5 at [40].

8 *Arorangi Timberland Ltd v Minister of the Cook Islands National Superannuation Fund* [2016] UKPC 32 at [29]-[30].

9 Ibid at [30].

10 Ibid at [31].

11. *Goodwin v Attorney-General of the Cook Islands* [1994] CKCA, CA 2/1994.

(2) the constituency for which a person shall be entitled to be enrolled and to vote as an elector shall be the last constituency in which that person has actually resided continuously for 3 months or more.

(3) Every person who at the time of first making application for registration or who having become disqualified pursuant to subsection (4) requalifies under subsection (5) to be an elector of a constituency but has not actually resided in any one such constituency for a continuous period of three months shall be entitled to be registered in the constituency in which that person spent the greatest part of his or her time during the period of three months immediately preceding the date of his or her application for registration.

(4) a person who meets the qualifications imposed by subsection (1) or who requalifies under subsection (5), is disqualified from being an elector, or as an elector for a particular constituency if the person is subsequently absent from the Cook Islands or from the particular constituency for a continuous period exceeding 3 months.

…

15. Closing and printing of rolls - (1) For the purposes of a general election -

(a) the main rolls shall be closed 7 days following the date on which the Queen's Representative publishes notice of the general election pursuant to section 30(1)(a);

(b) the supplementary rolls shall open on the day following the closing of the main rolls and shall be closed 14 days thereafter.

…

24. Objection by an elector - (1) Any elector may, subject to subsection (2), at any time object to the name of an elector whose name appears on the same roll, on the ground that he or she is not qualified to be registered as an elector, or is not qualified to be registered on the roll on which his or her name appears.

(2) No objection may be made by an elector in respect of any main roll or supplementary roll, later than 7 days after the closing of that roll for a general election or a by-election.

…

26. Objection by Registrar - (1) The Registrar for any constituency may, subject to subsection (2), at any time object to the name of any elector being on the roll for the constituency of which he or she is in charge on the grounds that the elector is not qualified to be registered as an elector for that constituency.

(2) No objection may be made by the Registrar in respect of any main roll or supplementary roll, later than 7 days after the closing of that roll for a general election or a by-election.

…

92. Election petitions - (1) Where any candidate or five electors are dissatisfied with the result of any election held in the constituency for which that candidate is nominated, or in which those electors are registered, they may, within seven days after the declaration of the results of the poll by the Chief Electoral Officer by petition filed in the Court demand an inquiry into the conduct of the election or any candidate or other person thereat.

…

96. Jurisdiction on inquiry - (1) Subject to this Act, the Court shall have jurisdiction to inquire into and adjudicate on any matter relating to the petition in such manner as the Court thinks fit.

(2) For the purpose of the inquiry, the Court shall have and may exercise all the powers of citing parties, compelling evidence, adjourning from time to time and from place to place, and maintaining order that the Court would have in its civil jurisdiction, and, in addition, may at any time during the inquiry direct a recount or scrutiny of the votes given at the election.

(3) Notwithstanding subsection (1), no petition may be filed or inquired into on the grounds that any person's name was or was not on a roll by reason of the presence or absence of that person in or from a particular constituency.

[17] Several features of these statutory provisions are significant:

(a) As permitted by Article 28(5) of the Constitution, the provisions of s 7 prescribing the qualifications for the registration of electors supplement the provisions of Article 28 by adding the further requirements in subsections (2) and (3) and paragraphs (c) to (f) to subsection (1) and paragraph (c) to subsection (6), thereby expanding the factors listed in Article 28(1) and (4) respectively.

(b) The "one person one vote" principle is reflected in s 13(2) which precludes an elector from being registered on more than one electoral roll.

(c) A regime for objecting to the registration of an elector on a roll is created by ss 24-28. It permits objections by other electors on the same roll and the Registrar of Electors on the ground that the elector is not qualified to be registered as an elector or registered on the roll where his or her name appears.

(d) By ss 24(2) and 26(2), no objection may be made later than 7 days after the closing of the roll for an election. As by s 15 of the Electoral Act, the main rolls close 7 days after the King's Representative publishes notice of the general

election under s 30(1)(a) and the supplementary rolls open for 14 days after the closing of the main rolls and as Article 37(6) of the Constitution requires a general election to be held within 3 months after the dissolution of Parliament, there will be a period of time between the closing of the rolls and the election when no objections will be able to be made.

(e) An objector or elector dissatisfied with a Registrar's registration decision may appeal to the High Court under s 28.

The decision in *Puna v Woonton*.

[18] In the 2004 general election Mr Puna, the then Prime Minister and Minister of Tourism, was re-elected as a Member of Parliament for the Manihiki constituency by a majority of four votes out of a total of 280 votes cast.[11] Mr Woonton, the unsuccessful candidate, filed an election petition under s 92(1) of the Electoral Act alleging both voting irregularities and election offences.[12] The voting irregularities complaint related to five persons who were not qualified to be electors of the island of Manihiki, but who voted.[13]

[19] In the High Court the Judge accepted the argument that the voting irregularity complaint was barred by s 96(3) of the Electoral Act and rejected the argument that the provision was unconstitutional.[14]

[20] The issue of the constitutionality of s 96(3) was then the subject of an unorthodox appeal to the Court of Appeal, but was effectively treated as raising a question of law for the opinion of the Court by way of case stated.[15] In answering the question, the Court of Appeal held that s 96(3) was unconstitutional because it prevented the High Court from inquiring into the voter irregularity complaint in the face of the universal suffrage and constituency requirements of Article 27. The election petition was therefore remitted to the High Court for further hearing.[16]

[21] The essence of the Court of Appeal's reasoning was:

11 *Puna v Woonton*, above n 1, at [1].
12 At [2].
13 At [9].
14 At [7].
15 At [8]-[13].
16 At [32].

[15] We are in no doubt that the High Court Judge was wrong on this point and that s 96(3) of the Act cannot stand in the face of the provisions of the Constitution, particularly those contained in Art. 27 which can be read together with Arts. 28, 39 and 65.

…

[19] Mr Akel, for the petitioner, submitted, correctly in our judgment, that in referring to "the electors of the following islands" the Constitution must be taken as meaning, in the context of this case, the electors of the island of Manihiki who are to elect the "one member" referred to in Art. 27(2)(d). That is the view that was espoused in the decision of this Court in CA3/2001 in the case of *Akaruru v Wuatai and the Chief Electoral Officer* (judgment 14 November 2001) where the Court said in the course of its judgment at page 8:

> ... importantly the Constitution, in art 27 stipulates a Parliament of 25 members, elected by electors of identified islands, groups of islands, or areas. The number of members to be elected for each constituency is designated. The clear reference is that each electorate or constituency will have its own electors.

[20] It is apparent therefore that Art. 27 precludes the electors of one island from electing a member of another island. The phrase "electors of the following islands" cannot be interpreted as permitting electors other than those of the island of Manihiki electing one member for that island. Manifestly any other interpretation would lead to an absurd result.

[21] One then has to consider who are the electors of the island of Manihiki and the answer is to be found in s7 of the Electoral Act, subs(2) of which provides:

(2) The constituency for which a person shall be entitled to be enrolled and to vote as an elector shall be the last constituency in which the person has actually resided continuously for three months or more.

[22] Subsections (3), (4) and (5) of s7 make it clear that an elector must always attach to "a particular constituency".

…

[24] We confidently reject the interpretation argued for by Mr Elikana. It may be that counsel for the first respondent was correct when he submitted that s 96(3) (apparently passed in haste before the 2004 election) was intended to place a restraint on the number of election petitions that can issue following the official declaration of the result of a poll. But since the Constitution is, as provided by s 4 of the Cook Islands Constitution Act 1964, the "supreme law" any enactment that offends it is *ultra vires*.

The decision of the Chief Justice.

[22] As already mentioned,[17] the Chief Justice accepted he was bound to follow and apply the decision of the Court of Appeal in *Puna v Woonton*. In his judgment giving his reasons for doing so, he helpfully set out the background to the election petition, the relevant Constitutional and statutory provisions and the submissions for the parties before turning to his discussion of the issue relating to the constitutionally of s 96(3) and the decision in *Puna v Woonton*.

[23] Recognising the Chief Justice's experience with election petitions, we note the following paragraphs from his discussion of the constitutionality issue:

> [35] It is helpful to commence discussion of the matters at issue in this petition by first enumerating the variety of ways in which Courts become involved in electoral proceedings under the Act.
>
> [36] There appear to be four:
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> - By an objector, or an elector objected against, appealing the Registrar's decision under s 28. Judges have the wide range of powers in s 28(2) and, under s 28(3), "the decision is final and conclusive and without further appeal" but, under s 102(2) may be appealed to the Court of Appeal by way of case stated on a question of law. The s 28 route is largely self-contained and, prior to an appeal, extra-judicial.
> - Disputes as to whether candidates are, or are not, registered as electors of a constituency decided after inquiry into the facts by the Court under s 34 which is again "final and conclusive and without appeal" subject to s 102(2).
> - Applications by candidates or Returning Officers under ss 79 and 80 for a recount of the votes in any particular constituency, brought within three working days after the public declaration under s 78. The recount may be conducted by any of the persons listed in s 79(5) with, again, the determination being "final and conclusive and without appeal", subject to s 102(2).
> - Petitions lodged within seven days after the s 78 declaration demanding an "inquiry into the conduct of the election or any candidate or other person thereat" under s 92(1) with the possible results of the inquiry being listed in s 98.
>
> [37] The intended finality of each of the avenues by which Courts become involved is emphasised by s 102(1) providing that every determination under ss 28, 34, 79 or "in respect of or in connection with an election petition", is conclusive and without appeal, subject only, by s 102(2), to appeals to the Court of Appeal by way of case stated on questions of law only.

17 Above at [3].

[38] Turning to the detailed provisions founding the Court's jurisdiction in litigation under the Act, and restricting that consideration to Part 3, especially s 28, and Part 7, dealing with offences at elections – the only avenues relevant to this matter – it has never been in doubt that the right to "demand an inquiry into the conduct of the election or any candidate or other person thereat" is broad enough to cover enquiries into all the offences listed in Part 7 – mainly bribery under s 88 and treating under s 89 – but the question is whether the wording of s 92(1) is broad enough to enable candidates, or any five electors in a constituency, whether nominated or registered, to petition the Court concerning what they contend are wrongful inclusions or exclusions from that constituency's roll.

[39] It is not unduly straining the language of s 92(1) to read the right to seek an inquiry into the "conduct of the election or any candidate or other person thereat" as including within that wording petitions querying, in the complainant's constituency, allowing persons to vote or debarring persons from voting in that constituency when they are, or are not, entitled so to do. That would indicate that, in addition to a s 28 appeal, allowance or disallowance of voter eligibility can fall within s 92(1) and thus be the subject of petitions such as the present.

…

[50] As ss 14–28 certainly provide a comprehensive and detailed scheme for the inclusion or exclusion of names on the rolls for any constituency, and for the resolution of objections to the inclusion of electors on a constituency's roll, the question arises as to why, when Parliament, in those sections, has provided a means of ensuring the correctness of the rolls in any election in the various constituencies, it has, in s 92, provided another means of reviewing voter eligibility and assessing the correctness of the rolls, judging much the same issues by much the same criteria.

[51] The answer may be that, detailed though the registration provisions are, there remain the lacunae which Mr Mason outlined and it is more important for all the rolls for all constituencies to fulfil the requirements of the registration provisions – especially s 14 – than to confine Registrars, candidates and electors to a procedure which, absent appeal under s 28, ends at the Registrar's decision under s 27. A further reason may be that the duty of keeping the rolls current is a continuing one, so decisions under Part 3 should be ongoing while, for effectively almost the whole of the four year Parliamentary term, the s 92 route is unavailable.

[52] Finding that candidates or electors in a constituency have a right to petition for inquiries into the conduct of elections, and candidates "or other persons" under s 92(1) may be thought to have some unsatisfactory aspects, not least that eligibility is tested after an election when there is a statutory scheme for testing beforehand and the objections will only be to named persons who are thought not supportive of the unsuccessful candidate, but it is the conclusion of the Court of Appeal in *Puna* and *Wigmore* and it is not open for this Court to reconsider the correctness of those decisions.

The submissions for the parties.

[24] In the course of the hearing of the appeal, Mr Hikaka, Counsel for the Appellant, Mr Williams, acknowledged that of the eight voters named in the election petition as not being entitled to vote it was now accepted that the petition could proceed to be heard by the High Court in respect of two of them, but that the remaining six were on the Appellant's contention barred either solely by s 96(3) or by both s 96(3) and the roll argument.

[25] To maintain that s 96(3) still applied, Mr Hikaka submitted that the decision of the Court of Appeal in *Puna v Woonton* that the provision was unconstitutional was erroneous and *per incuriam* because the Court:

(a) Made its decision by reference to provisions of the Constitution that were not in force.

(b) Did not consider the mechanism for challenging whether a voter was on the roll for the correct constituency under ss 24-28 of the Electoral Act.

(c) Failed to consider the unconstitutional disenfranchisement of electors that resulted from its decision.

(d) Erred in its consideration of *Akaruru v Wuatai*.[18]

[26] Mr Hikaka also submitted that the legislative history and wording of s 92 supported the Appellant's position and that comments of the Court of Appeal in *Wigmore v Matapo*[19] concerning the extent of the jurisdiction under s 96 were erroneous obiter dicta and *per incuriam* because they were made on the basis of the decision in *Puna v Woonton*.

[27] For the First Respondent, Ms Matenga, Mr Mason submitted that:

(a) The decision in *Puna v Woonton* was correct.

(b) This Court should not depart from its earlier decision which has stood unchallenged for 18 years.

(c) The legislative history does not support the Appellant's position.

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18 *Akaruru v Wuatai*, [2002] CKCA 2.

19 *Wigmore v Matapo* [2005] CKCA 12.

(d) The process the Appellant says must be followed is cumbersome and inappropriate.

(e) The preservation of the integrity of the electoral system outweighs any concerns about the disenfranchisement of voters.

Was the decision in *Puna v Woonton* made *per incuriam*?

[28] A decision made *per incuriam* is a well-established exception to the rules of precedent.[20] A *per incuriam* decision will not be a precedent which a later Court will need to follow either because it would otherwise be binding on the later Court or because it was a decision of the same Court which the later Court would normally follow.[21]

[29] For a decision to be made *per incuriam*, it must be "wrong by reason of a fatal and fundamental omission".[22] Examples of decisions made *per incuriam* occur when a relevant statutory provision or a particularly important precedent is overlooked in a case where, if it had been taken into account, the outcome would have been different.[23] If the outcome would not have been different, the failure to consider the statutory provision or precedent will not amount to a fatal or fundamental omission.

[30] In the present case, for the following reasons, we do not consider that any of the reasons advanced by Mr Hikaka for claiming that the decision in *Puna v Woonton* was made *per incuriam* establish that the decision was wrong by reason of a fatal and fundamental omission. We refer to each reason in turn:

(a) It was made by reference to provisions that were not in force.

[31] Mr Hikaka submitted by reference to the decision in *Puna v Woonton* at [17] that the Court considered the Constitution prior to Amendment No.26 in 2003 because Article 27(2) cited by the Court mentions 25 members of Parliament rather than 24 and Article 27(3) contains cross-references to Articles 28A, 28C and 28D which had been repealed. The short answer to this submission is that none of these amendments to the Constitution affected the substance of Articles 27 and 28 which were the provisions relied on by the Court in deciding that s 96(3) of

20 *Singh v New Zealand Police* [2021] NZCA 91, at [13].

21 *Originality or Obedience? The Doctrine of Precedent in the 21st Century* (2019) 28 NZULR 654, at 658; *Boaza v Brown* [2022] CKCA, CA 1439 and 1440/2022, 22 November 2022, at [23]-[24].

22 *Singh v New Zealand Police*, above n 20, at [17].

23 Ibid, at [16].

the Electoral Act was inconsistent and therefore unconstitutional. Even accepting that the Court overlooked the 2003 amendments, it is clear that they would not have affected the outcome if they had been taken into account. There was no fatal or fundamental omission resulting in a wrong decision in this respect.

[32] Nor do we accept the submission that the 2003 Amendment took considerations of constituencies out of the Constitution and placed them in the purview of the Act. On our reading of Article 27, constituency considerations remained in Article 27 which in this respect has remained unchanged for 57 years. The system of universal suffrage referred to in Article 27(2) is implemented for electors through the constituencies referred to in that provision. The fact that, as envisaged by Articles 27(3) and Article 28(5), the Act contains provisions supplementing the Constitutional constituency provisions does not detract from the Constitutional requirement that an elector's right to vote related to one of the constituencies named in Article 27(2). The fact that the Act contains a separate registration objection procedure does not alter this conclusion.

[33] Consequently, we also do not accept that the Court in *Puna v Woonton* was erroneous in upholding an elector's constitutional right to vote or that in doing so it created a situation where the constitutional right to vote was removed because of the disenfranchisement that occurs in using the s 92 procedure without the s 96(3) limitation. In our view it is the s 96(3) limitation which unconstitutionally prevents the correction of the rolls in the period between the 7 day cut off after the rolls are closed and the election is held by way of an election petition alleging voting irregularities.

(b) It did not consider the mechanism for challenging whether a voter was on the roll for the correct constituency under ss 24-28 of the Electoral Act.

[34] Mr Hikaka submitted that the statutory process for registration objections under s 24 of the Act was not drawn to the Court's attention in *Puna v Woonton* and was overlooked when the Court referred in its decision at [23] to declaratory judgment and prerogative writ remedies outside of s 96(3) being "inconsistent with the electoral process as envisaged in the Constitution and the Electoral Act". Mr Hikaka submitted that if the Court had been aware of s 24 it would have seen that the electoral process provided an avenue for addressing concerns outside the s 92 election petition process.

[35] The difficulty with these submissions is that the s 24 registration objection process is not available when the 7 day cutoff period commences after the rolls are closed. Unless a voter irregularity election petition is available under s 92, there will be no remedy available for electors seeking to exercise their right to vote after the cutoff date in the face of s 96(3). For this reason, we do not consider that the s 24 registration objection process was relevant or would have led the Court in *Puna v Woonton* to have reached a different conclusion.

(c) It failed to consider the unconstitutional disenfranchisement of electors that resulted from its decision.

[36] The submission that the decision in *Puna v Woonton* led to the unconstitutional disenfranchisement of electors was repeated by Mr Hikaka on several occasions. The problem with the submission is that it overlooked the fact that in the event the voter irregularity complaint were accepted by the High Court on inquiry it would justify the disenfranchisement of voters who voted in the wrong constituency contrary to Article 27. At the same time, if s 96(3) prevented the High Court from inquiring into a voter irregularity complaint in the period after the 7 day cut off commenced, adversely affected electors who ought to have been able to vote would be disenfranchised. Indeed, as Mr Mason pointed out, the purpose of s 96(3) was to make legal what was otherwise illegal by allowing breaches of the Constitution to go unchallenged.

[37] The decision of the Court of Appeal in *Puna v Woonton* was expressly based on the inconsistency between the inquiry limitation in s 96(3) and Article 27 of the Constitution which by adopting a system of universal suffrage conferred a right to vote based on the principle of one person one vote. It is obvious from the references at [17] and [20] of the Court's decision to Article 27 itself and its specific wording (the phrase "electors of the following islands") that, contrary to Mr Hikaka's submission, the Court had taken into account the constitutional right to vote.

(d) It erred in its consideration of Akaruru v Wuatai.

[38] Mr Hikaka submitted that the Court of Appeal in *Puna v Woonton* had erred at [19] because it misunderstood the earlier decision of the Court in *Akaruru v Wuatai* which he said had "expressly rejected an argument that the Constitution was concerned with identifying the electors for a particular constituency" which it recognised was a matter left for legislation.

[39] We do not accept this submission. In an appeal confined to the issue of the eligibility of two electors in the Pukapuka and Nassau constituency, the Court in *Akarua v Wuatai* had rejected a submission based on the definition of the expression "To reside" in the Constitution that it was necessary for a person to have a place of abode within a particular constituency for three months before applying for enrolment in that constituency.[24] It was in the context of that particular submission that the Court then said that "The Constitution does not itself contain any reference to a constituency which would attract that part of the definition."[25] The Court then went on to consider whether a residential qualification was truly "contrary" to the then principal Electoral Act. It was in that context that the Court said:[26]

> "……. Importantly the Constitution, in Article 27 stipulates a Parliament of 25 members, elected by electors of identified islands, groups of islands, or areas. The number of members to be elected for each "constituency" is designated. The clear reference [sic inference?] is that each electorate or constituency will have its own electors."

[40] This is the passage from *Akarua v Wuatai* correctly cited in *Puna v Woonton* at [19]. In our view it was a relevant passage which provided support for the decision in *Puna v Woonton*. The Court did not err in taking the passage into account.

[41] Our conclusion that the decision in *Puna v Woonton* was not made *per incuriam* has several consequences:

(a) s 96(3) of the Electoral Act remains unconstitutional.

(b) In the face of the clear conflict with the relevant provisions of the Constitution, it is not possible to "read down" s 96(3) in order to save it.

(c) It is unnecessary to consider Mr Hikaka's submissions, including those related to various scenarios, which were based on the constitutionality of s 96(3).

(d) The comments of the Court in *Wigmore v Matapo* based on the decision in *Puna v Woonton* were not *per incuriam* either.

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24 *Akarua v Wuatai* [2001] CKCA, CA 3/2001, 14 November 2001, at p 6.

25 Ibid, at pp 6-7.

26 Ibid, at p 8.

[42] We therefore turn to address the question whether we should reconsider the decision in *Puna v Woonton* on any other grounds.

Should this Court reconsider the decision in *Puna v Woonton* on other grounds?

[43] We have considered the approach which the Court of Appeal should follow to its own previous decisions when they are final determinations under s 102(5) of the Electoral Act in our recent decision in *Boaza v Brown*.[27] For the reasons given in that decision, we propose to follow a similar approach here.

[44] In particular, we agree with Cooke P in *Dahya v Dahya* that a cogent reason is required to justify a departure from an earlier decision involving statutory interpretation.[28] In the context of the present case, where we have accepted that the earlier decision in *Puna v Woonton* was not made *per incuriam* and therefore s 96(3) remains unconstitutional, we consider the following factors are relevant and militate against departure:

(a) The fact that the 2004 decision in *Puna v Woonton* has stood unchallenged[29] for 18 years which is a lengthy period.

(b) The importance of the interpretation of the relevant provisions of the Constitution and the Electoral Act in *Puna v Woonton* and its application to election petitions alleging voting irregularities filed in the seven subsequent elections apparently without difficulty or dissatisfaction. In this respect it is noteworthy that the Chief Justice did not identify any practical problems in his decision.

(c) The absence in the context of Parliamentary elections and Constitutional provisions of any suggestion that Parliament itself has considered it necessary or desirable to seek to amend the Constitution under Article 41(1) to reinstate the limitation on the High Court's election petition inquiry jurisdiction contained in s 96(3).[30]

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27 *Boaza v Brown*, above n 21, at [23]-[25].

28 *Dahya v Dahya* [1991] 2 NZLR 150 (CA), at 155-156. See also *Couch v Attorney-General (No.2)* [2010] NZSC 27, [2010] 3 NZLR 149, at [211] and *Singh v New Zealand Police* [2021] NZCA 91, at [14]-[15].

29 cf *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] UKSC 36 where the precedent in question had been consistently criticised for 50 years.

30 cf The 1994-95 amendment to Article 28B of the Constitution to reverse the effect of the decision in *Goodwin v Attorney-General of the Cook Islands* [1994] CKCA, CA 2/1994.

[45] In our view these factors mean we should adopt a particularly cautious approach to the Appellant's other grounds for challenging the decision in *Puna v Woonton*. We would need to be satisfied that the decision was otherwise plainly wrong. It would not be sufficient to find "a finely balanced point of statutory construction" on which we preferred a different view.

[46] In this context Mr Hikaka's submissions related to the legislative history of ss 92 and 96 and the decision of the Court of Appeal in *Wigmore v Matapo*. He submitted that the legislative history supported the Appellant's position and that comments in *Wigmore v Matapo* about the interpretation of s 92(1) were in any event erroneous obiter dicta. In particular, he submitted that s 92(1) rather than 96(1) gave the High Court jurisdiction in respect of election petitions and that the word "conduct" in s 92(1) did not include a challenge to whether a voter was on the roll for the purposes of s 92.

[47] For the following reasons we do not accept these submissions. First, we agree with the Chief Justice (at [39] of his decision) that the word "conduct" should be interpreted broadly in the context of s 92(1) which entitles a candidate or five electors who are dissatisfied with the result of an election in any constituency by petition filed in the High Court to "demand an inquiry into the conduct of the election or any candidate or other person thereat". Bearing in mind that the purpose of the provision is to ensure the system of universal suffrage required by Article 27(2) of the Constitution is implemented through properly conducted elections, the phrase "the conduct of the election or any candidate or other person thereat" should be given a fair, large and liberal interpretation which enables a petition to be filed relating to any aspect of the conduct of the election or any candidate or any person which might undermine the Constitutional purpose.

[48] Second, there is no good reason why relevant "conduct" should be restricted to the "electoral offences", "corrupt practices" or other "widespread or damaging conduct" that threatens the safety of the result as submitted by Mr Hikaka, but not encompass "voting irregularities" such as those at issue in *Puna v Woonton* and alleged in the present case. Any conduct of this nature has the potential to undermine the Constitutional purpose of the election petition provisions in Part 8 of the Act and should not be excluded by an unduly narrow interpretation of s 92(1).

[49] Third, there is no provision in Part 8 supporting such a narrow interpretation. On the contrary, the original enactment of the limitation in s 96(3) clearly indicates that without it voting irregularities relating to constituency registration issues would have been relevant

"conduct". Similarly, s 97, which expressly excludes certain irregularities not affecting the result of the poll, recognises that other irregularities may be the subject of petition and inquiry. Furthermore, other specific provisions relating to petitions involving allegations of corrupt practices or election offences such as ss 98 and 100 do not mean that voting irregularities may not be the subject of an election petition and High Court inquiry.

[50] Fourth, the legislative history of the provisions and references to comparative provisions in other jurisdictions do not alter our approach to the interpretation of s 92(1).

[51] Finally, the comments in the decision in *Wigmore v Matapo* were not erroneous obiter dicta. That case involved an election petition alleging voting irregularities in respect of three electors whose entitlement to be on the Titikaveka roll for the 2004 general election had also been challenged by way of objection under s 24(1) of the Electoral Act.[31] Challenges to the validity of the petition and the way the High Court Judge approached the objection were rejected.[32] The third argument related to the validity of the s 24 objections.[33] It was in that context that the Court addressed the scope of s 96(1) as it related to the jurisdiction of the High Court "to inquire into and adjudicate on any matter relating to the petition in such manner as the Court thinks fit". As Counsel in that case accepted and the Court correctly stated:[34]

> "If a challenge to the validity of a particular vote is properly mounted under a petition brought pursuant to the Act, then the Court is under an obligation to inquire into and adjudicate on that challenge."

[52] In our view it is clear that in this context the Court recognised that the petition would be brought "pursuant to the Act", i.e. under s 92(1), and that the scope of the Court's jurisdiction was then prescribed by s 96(1). We are therefore not satisfied that the obiter dicta were erroneous or that the decision was plainly wrong.

[53] No other grounds for departing from the Court's decisions in *Puna v Woonton* or *Wigmore v Matapo* have been established.

[54] Furthermore, if we had approached the issue afresh without the guidance of the decision in *Puna v Woonton*, we would, for all the reasons we have given, have reached the same conclusion that s 96(3) was unconstitutional and therefore *ultra vires.*

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31 *Wigmore v Matipo* [2005] CKCA, CA 14/2004, 19 August 2005, at [1]-[2] and [80].

32 Ibid, at [85]-[89].

33 Ibid, at [90].

34 Ibid, at [91].

The roll issue.

[55] Mr Hikaka also advanced a separate argument based on the fact that the Court's inquiry jurisdiction under s 96(1) of the Electoral Act is "Subject to this Act". He submitted that these words meant that the provisions in Part 3 of the Act relating to the Registration of Electors and dealing with objections to registration on the election rolls took precedence over and pre-empted the Court's election petition inquiry powers under Part 8 of the Act.

[56] Essentially for the following reasons which we have already found conclusive in respect of the Appellant's other arguments, we do not accept this separate argument:

(a) It is inconsistent with our view that the decision in *Puna v Woonton* was not *per incuriam*. Once it is accepted that s 96(3) was unconstitutional and the provisions in Part 3 of the Electoral Act do not prevent voter registration irregularities from being raised and considered in election petitions under Part 8, there is no basis for precluding them by way of this alternative route.

(b) It is inconsistent with our interpretation of "the conduct" in s 92(1). If, as we have held, "the conduct" includes voter registration irregularities, it would be inappropriate to prevent the Court from inquiring into them by a narrow interpretation of s 96(1).

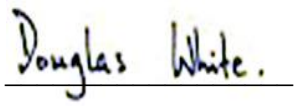
(c) It is inconsistent with the decision in *Wigmore v Matapo* which rejected the argument that voter registration irregularities could not be the subject of an election petition under Part 8. We have not been persuaded to depart from that decision. It was not plainly wrong. Nor do we consider it involved "a finely balanced point of statutory construction" on which we prefer a different view.

Result.

[57] Accordingly, we answer the question of law in the case stated Yes.

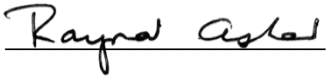
[58] The Titikaveka election petition is remitted to the High Court for inquiry under s 96 of the Electoral Act 2004.

[59] Costs should follow the event. If the quantum is not agreed, the First Respondent is to file short submissions not exceeding four pages **within 14 days** of the issue of this judgment and the Appellant is to respond **within a further seven days**.



Douglas White, P

Robert Fisher, JA



Raynor Asher, JA