IN THE SUPREME COURT OF SAMOA

HELD AT MULINUU

CP-74/11

BETWEEN:	**TUALA IOSEFO PONIFASIO**, Matai of Leauvaa and Businessman.
	Plaintiff
AND:	**APIA BROADCASTING LIMITED TRADING AS TV3**, a duly incorporated company having its registered office at Taufusi, Apia.
	First Defendant
AND:	**ATANOA HERBERT CRICHTON**, General Manager of TV3.
	Second Defendant
AND:	**TUTUILA FARAO**, Reporter for TV3.
	Third Defendant

Counsel: A Su'a for the plaintiff
P Fepulea'i for the defendants

Hearing: 15 – 16 November 2011

Written Submissions: 5 December 2011

Judgment: 13 December 2011

JUDGMENT OF SLICER J.

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1. The Plaintiff Tuala Iosefo Ponifasio ("Ponifasio") was a candidate for the

Constituency of Gagaemauga No. 1 in the 2011 Elections. He stood as a candidate for the Tautua Party. The First Defendant Apia Broadcasting Limited ("TV3") operates a public television station. Its primary owner and chair of its Board is Hans Joachim Keil who, on the evidence given at trial, is a supporter of the Human Rights Protection Party ("HRPP"), the incumbent Government of Samoa and the successful party elected at the 2011 Elections. The Second Defendant Atanoa Herbert Crichton ("Crichton") was and remains the General Manager of TV3, appointed by its Board. The Third Defendant Tutuila Farao ("Farao") was, at the relevant times, the News Editor and a Reporter for TV3.

2. Ponifasio has claimed that during the elections TV3 defamed him in a news broadcast published on 28 February 2011 causing harm to him as a candidate, a person engaged in commerce and a citizen of Samoa. The Defendants admit the publication of the impugned words but deny that they were requested to correct or apologise for its publication. In addition, the Defendants plead:

(1) that the words complained of 'are true in substance and fact';

(2) that the words complained of were in the public interest and a 'fair comment'; and

(3) that as a public broadcaster each was entitled to the defence of qualified privilege.

General Introductions

3. Elections and the right of citizens to recall or replace a government are central to any political process or governance irrespective of the form of 'democracy' adopted by a nation state. A free, honest and fearless media is essential to that process. Samoa has been fortunate in that regard. The media ought be able, without interference by the Executive or Judiciary to express or state its own opinions on matters of public interest. It is often called the 'Fourth Estate'. But its power and public duty are accompanied by the responsibilities of honesty and fairness. The issues in this case do not involve any question of 'a free media' or the right to make comment. It is confined to the law of defamation.

General Background

4. There were two candidates for the Constituency, Ponifasio and the existing member Sala Fata Pinati ("Sala") who was re-elected at the 2011 Elections. Sala was a candidate for the HRPP. Most of the events referred to in this judgment occurred in the village of Leauvaa. The village comprises a number of 'sub-villages'. The village council had agreed to support Sala but as is often the case not all electors voted for the preferred candidate. The tensions between 'party politics' and village preference have been discussed by the Election Court in its decision *Tufuga Gafoaleata Faitua v Vaai Papu Vaelupe* (unreported 10 May 2011).

5. On 25 February members of the Tautua Party including Ponifasio visited Leauvaa

and conducted a public meeting open to all members of the village. The meeting way held, according to protocol, at Malalola the place designated to the title Tuala held by Ponifasio. An earlier meeting, also organised by the Tautua Party, had been held at Samalaeulu, a sub-village of the parent village, Lealatele.

6. Ponifasio spoke at the meeting of 25 February and stated that 'the government of the last two terms had not done enough for the village.' He did not refer to Sala Pinati during his speech.

7. TV3 reported the meeting in a fair and proper manner. On the following day, Sala's campaign committee held its own meeting to discuss the various policies and issues concerning the forthcoming election. Some matai supporters of Ponifasio and members of his campaign committee were not invited or informed of the meeting. TV3 attended and reported on that meeting. Various interviews were conducted during the course of that meeting. It is likely that the Saturday meeting was a meeting of the sub-village, many of whose residents were supporters of Sala. It may have been a combination of both. It is certain that meetings were held on Friday, Saturday and Sunday. It is less certain as to when the words were said and recorded. It appears that a compilation was prepared from differing places and positions. Tuala Kasipale Moli ("Moli") gave evidence at trial that a crew from TV3 were present at the Saturday meeting but believed that he was interviewed on a later day, possibly the following Monday at Sala's home. Farao said that the interview had been conducted and the footage taken on

the Saturday since he and a reporter from the Samoa Observer Newspaper had been invited to the village council meeting at Leauvaa on that day.

8. The Court accepts Farao's evidence on this point.

9. There is evidence that reporters attended a further meeting at the village on Sunday although there is competing evidence that TV3 attended on the Monday. It is not necessary for the Court to resolve the difference. The Court is satisfied that a reporter and cameraman attended the meetings on at least two occasions; certainly one on 25 February and a second on 26 February. Farao's worksheet (Exhibit D4) shows that he was not rostered for duty on 27 February and it is unlikely that a different camera crew were sent to the village on that day.

10. A compilation of Sala's meetings was made and shown on the national news on the evening of Monday 28 February 2011. The news report was repeated on the normal 6:30 a.m. broadcast of Tuesday 1 March 2011. It is that compilation which is the subject of these defamation proceedings.

11. Ponifasio provided further evidence which he suggested amounted to additional unfairness making the conduct of TV3 and its officers more reprehensible. On the morning of Monday 28 February, he took part together with the other members of the Tautua Party in a televised panel interview undertaken and broadcast by TV3. He was met by Crichton and the two exchanged a few words before the

commencement of the interview. Ponifasio complains:

(1) that Crichton or other officers of TV3 knew of the Sala compilation;

(2) that portions of that compilation were unfair and raised serious questions as to his integrity;

(3) journalistic ethics and general fairness required Crichton or his staff to inform him of the accusations which were to be published; and

(4) journalistic ethics and general fairness ought to have been applied in reporting and publishing his response at the same time as the 'impugned' compilation or at least raised for comment or response during the course of the panel discussions.

12. That complaint will be later considered together with his general complaint that no apology or opportunity for reply was ever made by TV3.

The News Broadcast

13. The report of the 25 February Tautua Party meeting was fair and neutral. The report of the Sala compilation is said to be defamatory.

14. Crichton introduced the report. That was not his ordinary role as General Manager but he claimed he did so because of the absence of the normal presenters through illness. Doubtless his status enhanced the import of the report. His introduction included a reference of the Sala meeting 'confirming the strong support of the village for the incumbent Member of Parliament.'

15. The Plaintiff pleads that one of the persons interviewed 'Tuala Moli' stated:

> "Fea le mea ga fai ile Virgin Cove? Uma tupe a fafo o ai tauvalea. E avatu ni taitai faapea e taitai se atunuu? Leotetele galuega."

The agreed English translation is:

> "Where is the thing at Virgin Cove? All the monies from overseas were eaten, a disgrace. Do we take leaders like this to lead the country? Actions speak louder."

16. Those words are said to refer to Ponifasio and the pleadings claim that 'their natural and ordinary meaning meant and were understood to mean that the Plaintiff:

> "(a) is a thief, a dishonest and fraudulent person who could not be trusted;
> (b) is not worthy to be a leader or a representative in Parliament;
> (c) is a disgrace;
> (d) is irresponsible;
> (e) is incompetent."

17. The Defendants admit that the words were said and published and, through their Statement of Defence paragraph 8, admit that:

> 'the words…were intended and understood to refer to the Plaintiff.'

18. The defences raised by their pleadings are:

(1) the words did not injury the Plaintiff or cause him loss or damage;

(2) the words were ‘true in substance and fact’;

(3) the publication was in the public interest and amounted to ‘fair comment’ (paragraph 21); and

(4) the publication was in the public interest and protected through qualified privileged (paragraph 25).

Context of the Impugned Publication

19. In order to consider whether the words pleaded were defamatory, or the defences made out, it is first necessary to consider the whole of the broadcast and its import on the above issues. The impugned words ought be seen in context. The broadcast was introduced by Crichton and the reporter, Tutuila Farao, who conducted the interviews and linked the segments. Apart from Crichton there were six participants and the Court will state a summation of the exchanges and responses of each.

20. Two of the participants were identified as Speaker 1 and Speaker 2. The remaining four, in order of appearance, were Farao, Moli, Vaifale Iose (“Iose”) and Tevaga Mata’afa (“Mata’afa”).

21. The Plaintiff challenged the accuracy of some of the matters spoken by the person

interviewed and relied on those inaccuracies to give colour or meaning to the impugned words. The substance of the questions and responses will be set out in the order of their making.

Farao referred to the meeting held on 25 February and averred that Ponifasio 'was not received well by the village of Leauvaa'. The Court does not accept, on the evidence, that the opinion was accurate.

Speaker 1 referred to the absence of titled chiefs from the Saturday meeting. This was incorrect since some were not invited and the meeting itself a party political meeting or at least a mixture of a village and political meeting.

Speaker 2 complained of the presence of Tautua Party members coming to the Friday meeting being 'brought in as strangers'. That was ill-founded and offended the Constitution and the Electoral Act.

Farao referred to those statements and commented that they clearly showed 'the strong disagreement of the village' adding that one of the subjects was the interviews 'to show to Samoa that strangers have come to the land of Leauvaa without permission'.

Moli spoke at length on the matter in an offensive manner. He claimed that some high chiefs had acted badly and that the Friday meeting was contrary to custom and likened the visitors' entry to 'the thief and a robber'. The meaning to be drawn from that comment was they entered like criminals at night. The Electoral Act Part III provides for the registration of electors and the Act section 18B provides for the compulsory registration of electors and voters. Candidates and electors have a right as citizens of Samoa to attend meetings held for election purposes especially since the Act Part II A permits the registration of political parties. Moli was wrong but his words showed spite and malice which give colour and context to his later words which are said to be defamatory.

Farao commented that the meeting was to clarify that 'this is not the will of Leauvaa through Tuala and Vaifale.'

Moli again was interviewed adding that 'the village was unanimous that our incumbent Member is our very own Member.'

Farao linked together the interviews by stating 'and the last subject' and the compilation showed a fourth person, Vaifale Iose, who complained about Ponifasio's criticism made on the February meeting that the Government had not provided sufficient service to

the village. In doing so he wrongly claimed that Ponifasio had criticised Sala personally. Ponifasio had criticised Government generally and had made no personal attack on the incumbent.

Mata'afa was then shown thanking Sala for his good works concluding 'well done and thank you.'

22. The above précis has been made to show the context of the impugned words. The compilation concluded with the following exchanges:

> "Tutuila Farao – 'Some of the reasons why the village believes they should not accept Tuala Iosefo Ponifasio as suitable for the position were also revealed at this meeting.'
>
> Tuala Kasipale Moli – 'The fine should be $20,000, and remove his role as a lawyer. What are these tourism businesses? What happened to the Virgin Cove? All monies from overseas were eaten. A disgrace. Do we need leaders like this to lead the country? Works speak louder.'
>
> Tutuila Farao – 'The village of Leauvaa is now unanimous for their one and only candidate Afioga Sala Fata Lisati Pinati Ah Leong, who has been the incumbent member for the past 2 parliamentary sittings.'
>
> Tuala Kasipale Moli – 'The majority of the village want to protect the decision made at our meeting. But a persons right is still left to the persons free will.'
>
> Tutuila Farao – 'The country's general elections is this Friday. Tutuila Farao, TV3 News.'"

23. Moli in his evidence claimed that his remarks were made on the Sunday meeting. He admitted that he used the words. He had not been at the Friday meeting. There is some confusion about the dates on which Moli was interviewed and further confusion about the Sunday meeting. It may be that the confusion was caused because the Samoa Observer Newspaper attended and reported on the Sunday meeting. Moli thought he had been further interviewed on the Monday. It is not necessary to resolve the difference.

24. The Court notes that Moli had been a strong supporter of Sala and had assisted him in the campaign. The Court also notes that the polling day for the election was held on Friday 4 March, four days after the broadcasting of the compilation. Whilst some of the sub-villages may have been unanimous in their opposition to Ponifasio, the Constituency was not. Ponifasio received 663 votes as against 1,664 in favour of Sala. Whether the broadcast affected the voting will never be known.

Defamation and Imputation

25. The Defamation Act 1992/1993 ("the Act") sections 4, 5 provide that 'in any action for defamation (whether libel or slander) it shall not be necessary to allege or prove special damage.'

26. Defamation includes:

(1) A statement which may tend to lower the plaintiff in the estimation of right - thinking members of society generally (*Sim v Stretch* [1936] 2 All ER 1237);

(2) A false statement about a person to his or her discredit (*Youssoupoff v Metro-Goldwyn-Meyer* (1934) 50 TLR 581);

(3) A publication without justification which is calculated to injure the reputation of another by exposing him or her to hatred, contempt or ridicule (*Parmiter v Coupland* (1840) 151 ER 340).

27. Imputations of fraud or dishonesty are defamatory (*Lloyd v David Syme & Co. Ltd* [1986] AC 350). Receiving money for an improper service or accepting a secret commission are defamatory (*Television New Zealand Ltd v Keith* [1994] NZLR 84). Even a statement of suspicion of the commission is a crime imputes dishonourable conduct (*Truth (NZ) Ltd v Holloway* [1961] NZLR 22).

28. The law of defamation has been considered by the Samoan Courts in cases such as *Faleulu Mauli v University of the South Pacific & Ors* [2008] WSCA 8; *Mauli v University of the South Pacific* [2007] WSSC 23; *Tauiliili v Malifa* [1980-1993] WSLR 440 and its appeal *Malifa v Tauiliili* [1980-1993] WSLR 561, and *Enosa v Samoa Observer Company Ltd* [2009] WSSC 95 and *Alesana v Samoa Observer Company Ltd* [1998] WSSC 1.

29. Those cases will be considered and applied.

30. The Court will analyse the impugned words in its segments.

(1) ***"The fine should be $20,000 and remove his role as a lawyer."*** It is not clear why a fine of $20,000 should be imposed. It may relate to the claimed wrongful entry of Tautua Party members into the village or to disciplinary proceedings which were concluded on 26 November 2010 and resulted in the suspension of the Plaintiff as a practitioner for a period of two years. The comment 'remove his role as a lawyer' presumably related to a claimed belief that the penalty was inadequate. The statement alone may have been protected by the defences provided for by the Defamation Act 1992/1993 sections 8 and 9. The pleadings do not allege the statement as defamatory. Moli claims that he had learnt of the matter through radio news.

(2) ***"What are these tourism businesses? What happened to the Virgin Cove?"*** Ponifasio had previously been involved in the operations of the Virgin Cove Resort between 1998 and 2000 and parted on good terms. As at February 2011 was engaged as a consultant to a number of clients, some of whom were involved in tourism. A right-minded person would understand the statement to be that:

(a) Ponifasio had been involved in a financial irregularity or

dishonesty whilst at the Resort; or

(b) Was incompetent in the running of that operation causing harm; and

(c) On another basis his conduct with other tourism businesses was suspect and he was untrustworthy in business.

31. There was no evidence of impropriety or incompetence in relation to the above. Moli stated at trial that he had heard rumours or words 'flying in the wind.' He said he had no direct knowledge of impropriety and admitted that the words were said in anger. The Court finds the words published were defamatory.

(3) ***"All monies from overseas were eaten."*** The meaning is clear. The Plaintiff had unlawfully misappropriated funds or investments made by off-island sources. They were clearly defamatory.

(4) ***"A disgrace."*** The clear meaning of those words was that the Plaintiff had disgraced himself in professional and commercial dealings, was not a person of reputation and was untrustworthy.

(5) ***"Do we need leaders like this to lead the country? Works speak louder."*** This can be seen as a conclusion drawn from (1) – (4) above. The sting is that the Plaintiff's words spoken during the election meeting could not be

trusted because of his conduct or ‘works’.

32. Alone the words in (5) could be protected by the Act sections 8 and 9. In the context as seen from the whole of the compilation and in particular matters (2), (3) and (4) they were defamatory.

33. Farao made their import worse by adding ‘the village is now unanimous against the Plaintiff.’

34. The Court finds that the Defendants defamed the Plaintiff through their publication of the impugned portion of the unfounded statements as pleaded.

Publication and Apologies

35. Ponifasio learnt of the defamation when he watched the evening news of TV3 on the evening of Monday 27 February. He had not been advised of the compilation by Crichton or any other TV3 employee when he attended the panel interview on the morning of that day. TV3 had opportunity to tell him of the intended publication of Moli’s statements and offer him a right to reply. It did neither. Its failure amounted to a breach of the Code of Ethics of the Journalists Association of Samoa (“JAWS Code”) Article V Clause 1 which states:

> “1. The news media should not communicate unofficial charges affecting reputation or moral character without giving the accused a right of reply.”

36. The news item was repeated on the 6:30 a.m. news on 28 February.

37. When Ponifasio saw the compilation he was distressed. He sought the advice of others within his family. On Tuesday 1 March, his sister rang TV3 asking for a copy of the news item. Crichton confirmed the phone call, subsequent meeting and arranged for the provision of a DVD which was collected later that morning.

38. Many people including members of his own election committee contacted Ponifasio asking for details and explanations for the allegations. On Wednesday 2 March, Ponifasio attempted to contact Crichton and Farao to speak about the news item and to request a retraction. He was unsuccessful in contacting either.

39. On Wednesday 2 March, Farao went to the Plaintiff's house but refused to discuss the matter. Ponifasio was distressed and preferred the matter to be answered by two matai present in his house. Farao agreed to interview two matai in relation to the matter. He said he had little time because of other work but conducted a brief interview of the matai, but chose to confine the interview to the call for peace in the village made by Sala Fili Lauano. The interview was rushed and incomplete. No footage of that interview was broadcast by TV3 which confined the news item to a brief mention of the call for peace.

40. The Court does not accept the evidence of Farao that he did not become aware of Ponifasio's grievance until after the election. It does not accept his claim that he

was not aware of the grievance until he attended a reconciliation ceremony held at the village in mid May 2011. None of the Defendants have apologised to the Plaintiff or offered to publish a retraction. Each Defendant has breached the JAWS Code Part 5 Clause 3. Each maintained a claim of truth up to and including the trial. That matter is relevant to the Act section 14.

41. The Plaintiff was unsuccessful in the election. How much the publication affected electors will never be known.

Defences

42. The Defendants plead:

- justification in that the words spoken by Moli were true in substance and fact;
- the matters were those of public interest because of the elections and amounted to fair comment; and
- the matters were those of public interest and the Defendants were entitled to the defence of qualified privilege.

Truth

43. Following the election the village undertook a reconciliation ceremony in mid May. Sala Lauano who attended the meeting described it in the following terms:

> "16. That in mid May 2011, our constituency had a meeting to reconcile

> matters between the Plaintiff and Sala Fata Lisati and also between matais of our village. All matais of the village attended this meeting including Tuala Kasipale Moli. It was at this meeting that Tuala Kasipale Moli emotionally relayed his apology to the village and to the Plaintiff. He was in tears when he relayed his apology and it was eventually accepted by the Plaintiff."

44. There was no evidence adduced at trial supporting the defence that the statements were true in substance and fact. Moli gave evidence for the Plaintiff that his statements were unfounded, unsubstantiated and untrue. He said that they were made in anger. In relation to the Virgin Cove allegation his affidavit paragraph 4 stated:

> "THAT I did make various statements about Tuala Iosefo Ponifasio during the said meeting, some of these statements questioned Tuala Iosefo Ponifasio's involvement with the Virgin Cove tourism venture and that he stole all monies from overseas for the project. That I also stated that Tuala Iosefo Ponifasio was a disgrace and we do not need people like this to be our leaders."

45. In cross-examination Moli told the Court that he had heard 'whispers in the wind' concerning fraud by the Plaintiff at the Resort. There was no evidence of dishonesty or incompetence involving the Plaintiff or the Resort itself on this matter.

46. Even the defence of honest opinion will not protect a defendant in commenting on things which never happened or which he or she got wrong. As Lord Ackner stated in *Jeyartham v Goh Chok Kong* 1989 1 WLR 1109 at 1113:

"The commentator must get his basic facts right"

(cited with approval in *Mitchell v Sprott* [2002] 1 NZLR 766; see also *Merivale v Carson* (1887) 20 QBD 275; *Bamberger v Mirror Newspapers Ltd* 1969 43 ALJR 242).

47. Here the Defendants made no attempt to establish the truth of the allegations or amend the pleadings before, during or at the completion of the trial. That persistence is relevant to any award for exemplary damages.

48. The defence of truth in substance and fact is dismissed.

Public Interest

49. The issue of public interest is common to the second and third defences pleaded and it is convenient to deal firstly with that question.

50. At common law the defendant had the onus of proving that the matter on which he or she was commenting was a matter of public interest. The decision on this question was one for the Judge.

51. Public interest is something more than mere curiosity but it certainly is related to the conduct of government and politicians (*Purcell v Sowler* (1887) 2 CPD 215; *London Artists Limited v Littler* [1969] 2 QB 375).

52. Here the publication involved governance, an election and fitness of a candidate.

53. The Defendants have shown clearly the subject matter of the publication was one of public interest.

Fair Comment

54. The Act section 10 provides:

> "10. Fair Comment – In an action for defamation in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

55. The historic distinction between libel (published or printed distribution and slander (action and/or the spoken word) has been subsumed into the general term of defamation). Fair comment is akin to the expression of 'opinion'. The law governing 'fair comment' and opinion is identical. Those principles are:

(1) An opinion or its mixture (the Act section 10) must be based on true facts (*Kemsley v Foot* [1952] AC 345);

(2) The facts on which the commentator relies must be true (*Mitchell v Sprott* (supra); *Jeyartham* (supra));

(3) The opinion must be recognised as opinion not as a guise for slur (*Templeton v Jones* [1984] 1 NZLR 488; *Mitchell v Sprott* (supra));

(4) The opinion must be genuine. The test is the honesty of the opinion not its reasonableness (*Mitchell v Sprott* (supra)). A defence may be provided even if the opinion was made in malice. The question is one of fact. In some jurisdictions the onus of proof shifts to the defendant to prove honesty (see: *The Law of Torts in New Zealand*, Todd (4 Ed.) par. 17.8.04). But an opinion so extravagant as to amount to invective would be unlikely to be found genuine (*Cornwall v Myskaw* [1987] 2 All ER 504);

(5) The common law did not provide a clear answer to the question of whether a news medium sued for defamation could plead fair comment in respect of material submitted to it by a contributor (*Telnikoff v Matusevitch* [1992] 2 AC 343; *Hawke v Tamworth Newspaper Co. Ltd* [1983] 1 NSWLR 669). Even assuming the persons interviewed were 'contributors' the defence would not protect the Defendants since the choice of the segment used and the 'linking' and interventions of the Third Defendant were the responsibility of the First Defendant.

56. The Defence ought fail. The words published were said in anger and went far beyond a comment that the Plaintiff was not an appropriate or satisfactory

candidate for the election. It went further and tainted both his political and professional reputation.

57. The evidence does not support a finding favourable to the Defendants on any of the criteria 1 – 5 stated above. The context surrounding the impugned and published defamatory words does not permit the use of the defence of fair comment.

Qualified Privilege

58. The Defendants plead the general public interest in the election and the qualifications or integrity of the candidates. That matter has been earlier determined in their favour.

59. The Act Part IV and its Schedules Parts I and II relevantly provides for Qualified Privilege.

60. Section 18 protects matters defined in the Schedules. The Defendants are not protected by Sections 18(1) or 20. They are not protected by the Schedule Part I since the item did not relate to a report of the proceedings of the Legislative Assembly or its Committees or of judicial proceedings. They are not protected by the Schedule Part II, paragraphs 1 – 11 since the publication was not of official proceedings of governance. Nor are they protected by Clauses 13 or 14 which deal with meetings of corporations, associations and officers of governance.

61. The only clause relevant to these proceedings is Part II Clause 12 which provides:

> "12. A fair and accurate report of the proceedings of any public meeting held in Samoa, that is to say, a meeting bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission to the meeting is general or restricted."

62. The meetings held on Friday, Saturday and possibly Sunday were 'meetings bona fide and lawfully held for a lawful purpose.' The discussions of Friday and Saturday were held in furtherance of discussion of matters of public concern, even though the Saturday meeting was restricted.

63. It is not certain whether the Third Defendant attended each of the meetings. The item or compilation did not purport to be an account of a reporter who was a direct observer or one who reported fully on what had transpired. It comprised interviews, outside of the Saturday and/or Sunday meetings, of persons who claimed to have attended. The tenor of the whole of the published material was partisan and adverse to the Plaintiff. The summation or commentary made by the Third Defendant was the same. It may be that persons made defamatory statements during the course of the Saturday meeting and that the Plaintiff would be entitled to bring an action against each individual for slander. The plea of qualified privilege ought fail for a number of reasons which include:

(1) The news item comprised the comments and grievances of persons outside

of the Saturday and/or Sunday meetings;

(2) The news item did not purport to report on the meetings as such but was confined to specific matters identified or chosen by the Third Defendant;

(3) The selection was confined to complaints about a claimed unlawful presence of persons attending the Friday meeting, the absence of high chiefs, clarification to the country of the will of Leauvaa and the unanimous support for Sala and the character of the Plaintiff;

(4) There were significant errors in the compilation which, while not defamatory, were inaccuracies adverse to the Plaintiff and partisan to the incumbent Member of the Legislative Assembly;

(5) The published item was neither a fair or accurate report of the proceedings;

(6) No opportunity was given to the Plaintiff to reply to the defamatory material or to correct other inaccuracies, either before publication or republication;

(7) Whether by design or not the publication was to the favour of the owner of the First-named Defendant, a supporter of the party of the incumbent

member;

(8) The Report, as a whole and taken in context, did not comply with the standards required by the 'JAWS Code', in particular Articles III Clause 3, and IV Clauses 2, 3, 4 and 5;

(9) There was ample opportunity to put the matter to the Plaintiff on the Monday panel meeting.

64. Qualified privilege at common law has been defined by the House of Lords as:

> "…an occasion, where a person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it."

(*Adam v Ward* [1917] AC 309). The question might be difficult but remains one for the trial Judge (*Stuart v Bell* [1891] 2 QB 341; *Lange v Atkinson* [2000] 3 NZLR 385). The Defendants have failed to establish that their publication came within a defence provided for by either statute or the common law.

65. The Defence of qualified privilege ought fail.

Criminal Defamation

66. This matter does not concern this Court. Nevertheless it brings to the attention of

all of the parties the provisions of the Electoral Act 1963 section 90 which provides:

> "90. Publishing defamatory matter at election time – Every person shall be liable on conviction to a fine not exceeding 8 penalty units or to imprisonment for a term not exceeding six (6) months who at any time after public notice has been given by the Commissioner under section 45 or section 47 and before the close of the poll publishes or exposes, or causes to be published or exposed, to public view any document or writing or printed matter containing any untrue statement defamatory of any candidate and calculated to influence the vote of any elector or voter."

67. The date relevant to the operation of Section 45 was the date of the Warrant issued by the Head of State namely, 2 February, published in the Samoa Observer Newspaper on 4 February 2011.

68. It also brings to the attention of all the parties the provisions of the Crimes Ordinance 1961 section 84 which states:

> "84. Defamatory libel – (1) Everyone who publishes a defamatory libel is liable to imprisonment for a term not exceeding 6 months.
>
> (2) To publish a defamatory libel means to do any act which confers upon the person defamed a right of action for damages for libel.
>
> (3) In a prosecution under this section the burden of proof shall be determined by the same rules in an action for damages for libel.

(4) In a prosecution under this section it shall be no defence that the libel is true unless the publication thereof was for the public benefit."

and the Defamation Act 1992/1993 Part III.

Repetition

69. The news item was broadcast on the 6:30 a.m. news on the following day. Each repetition is fresh publication and credits a fresh cause of action (*Dingle v Associated Newspapers Ltd* [1964] AC 371. Here it will be considered in the assessment of damages.

Damages

70. Injury to reputation may be compensated if the three elements of defamatory meaning, identification of the Plaintiff and publication are established. Here the publication was made to a large numbers of the Samoan population and repeated on the following day.

71. Those damages may include exemplary and aggravated damages. The first is a form of punishment and at the second on the form and nature of a defendant's conduct up to and including trial (*Uren v John Fairfax and Sons Pty Ltd* (1965 – 1996) 117 CLR 118.

Mitigation by Apology or Retraction

72. No offer of apology or right of reply was offered to the Plaintiff. The report of the meeting with the matai has already been stated but it related solely to the need for peace and harmony. No evidence of apology, retraction or right of reply was provided to the Court.

73. The Act sections 14, 15 provide:

> "14. Public apology in mitigation of damages – In an action for defamation the defendant may prove in mitigation of damages that he or she made or offered a public apology to the plaintiff for the defamation before the commencement of the action, or, if the action was commenced before there was a reasonable opportunity of making or offering such an apology, as soon afterwards as he or she had a reasonable opportunity of doing so.
>
> 15. Other evidence in mitigation of damages – In an action for defamation the defendant may prove in mitigation of damages that the plaintiff has already recovered damages, or has brought an action for damages, or has received or agreed to receive compensation, in respect of any other publication by the same or any other person of the same or substantially the same defamatory matter."

74. Surprisingly the Defendants did not seek, at trial, to withdraw its Defence paragraphs 15 – 17, relating to truth and justification. That failure is relevant to the issues of aggravated and/or exemplary damages.

75. The Plaintiff was defamed both as an aspiring politician and a businessman

involved in providing services in security and investigation. The defamatory material was broadcast to the whole of Samoa and repeated the following day. Crichton gave evidence that the television station covered 85% of the population. The Court finds as a fact that on Wednesday 2 March, the Plaintiff approached the Third-named Defendant and asked him 'Why have you done this to me?' and received no satisfactory reply. The Plaintiff also asked what could be done and Farao replied he had no time to record on interview. The journey between the Plaintiff's home and the TV Studio is said to take only 5 minutes. The Court finds as a fact that the Second Defendant was made aware of the Plaintiff's complaint by Malia and that he did little to provide redress. In their written submissions dated 5 December, after trial each maintained their position that there was no credible evidence that any complain was made. Their written submissions include:

> "3.5 It is submitted that there is no credible evidence given by the Plaintiff that he or his agent had informed either the First, Second or Third Defendants that the contents and imputations of the news item were false, misleading and defamatory to him. It is further submitted that there was no credible evidence given by the Plaintiff that he sought a retraction, apology and an immediate correction of the publication of the words complained of.
>
> 3.6 The Plaintiff relies on his sister as his agent that put this message across to the First, Second and Third Defendants. The Second and Third Defendants testified and at no time during their examination in chief and cross-examination were they able to mention any complaint that part of the news item was false,

misleading and defamatory and nor were they requested to retract, apologise or do an immediate correction of the words complained of.

3.7 The Second Defendant was cross-examined extensively on this meeting with the Plaintiff's sister and he was adamant that she came to him to ask for a DVD copy. That was the extent of the conversation in relation to this matter. They did talk about other things unrelated to this."

76. The Court does not understand the import of paragraph 3.6. They were able to give and adduce evidence and were not prevented by the Court to mention 'any complaint'. Nor were they prevented from retracting or apologising for the publication. They knew of the complaint made in the Statement of Claim dated 19 May 2011, and repeated their claim of truth, in substance and in fact, in their Defence dated 24 June. The Court did not prevent the Defendants from making or offering an apology. Crichton had the opportunity to state his regret or offer an apology in his affidavit, admitted at trial. There are a number of reasons why the Court finds that the Second and Third Defendants were aware of the complaint and chose not to.

(1) The words used themselves ought to have alerted Crichton and Farao of a risk in their publication;

(2) There was no obvious reason for Farao to film at Ponifasio's residence on 2 March unless he was aware of the existence of the complaint. In the

written submissions at paragraph 3.10, the Defendants claim that:

> "3.10 The Third Defendant considered what he was filing on 2 March 2011, at the Plaintiff's residence at Alafua, as a follow up story to the news item that he ran on Monday night 28 February 2011."

That claim is rejected. Farao said he went but had little time to conduct an interview. No footage was shown. The Court finds it difficult to believe that he went there voluntarily as a 'follow up story' not that there was hostility over the publication by Ponifasio and his supporters. Farao chose to present only the plea for peace and harmony to deal with the possibility of violence caused by Moli's statements.

(3) The request to Crichton for the DVD itself ought to have suggested the existence of anger;

(4) It is unlikely that Crichton and Farao were unaware that Ponifasio had attempted, unsuccessfully, to speak with each on the Tuesday. It is likely that Farao was sent to Ponifasio to placate the Plaintiff. He chose not to ask the matai any questions concerning the words used by others or Moli in the news compilation;

(5) It is wrong to say that it was for Ponifasio to ask that Moli be re-interviewed;

(6) Farao was aware of the apology by Moli made at the May meeting of reconciliation. There was no evidence that TV3 published the making of the apology or the contents of that apology;

(7) Iosefa said that the broadcast had caused much unrest within the village. He was a taxi driver and said that following the broadcast many of his customers spoke badly of the Plaintiff because of what they had heard;

(8) Many persons spoke with Ponifasio about the news item published on 28 February and 1 March. It was common knowledge that there was discontent within and between the political factions. It is unlikely that Farao at least was unaware of that common knowledge.

77. The above reasons or inferences support the accuracy of the direct evidence given by the Plaintiff and his witnesses. Their version is accepted by the Court.

78. The Court notes that in their written submissions the Defendants use the word 'could' (paragraph 5.1.3) rather than concede that their natural or ordinary meaning would convey dishonesty. They deny all other imputations.

79. The Defendants claim that the respective votes received by the candidates show the accuracy of their defences. They claim, by inference, that the size of the majority (1,664 to 663) show that the Plaintiff would have lost in any event and

the publication therefore caused no harm. The contention is rejected. The Court cannot determine whether, or if so, the numbers the publication affected voters. That is not the point. It was his reputation which was harmed. His reputation was personal, commercial and political.

80. Damages will be assessed as both general and aggravated forms of remedy.

81. The Court has attempted to determine a general level of damages previously awarded for the purpose of balance and parity.

82. In *Alesana v Samoa Observer Company Limited* (supra), an award of $50,000 was made for the contents of an editorial. In that case the aggrieved party published a rebuttal of the editorial by the Prime Minister and the trial Judge did not seek to distinguish between general and aggravating damages. Allowance ought be made in the value in the change of money between 1998 and 2011.

83. In *Mauli v University of the South Pacific* (supra), the Court awarded as compensation the sum of $15,000 but the Court took into account that there had been publication to 'only a handful of people', the response did not entirely remove the sting and damages were to be assessed 'at the lower end of the scale'.

84. The case of *Enosa v The Samoa Observer Company Limited & Ors* [2009] WSSC 95, Nelson J awarded $25,000 as general damages limited because the Plaintiff

succeeded in only part of the claim. The case involved a report and editorial of Government and its officers. Much of the material was factually correct and dealt with actions taken by police and Cabinet. The first cause of action was dismissed and the second were upheld. The second cause succeeded on the basis that an ordinary reading of the report would be that the Plaintiff was corrupt in relation to a commercial transaction in a business operated by a family, and there had been a conflict of interest. The Plaintiff had sought general damages of $800,000 and exemplary damages of $200,000. The Plaintiff had not pleaded the particulars of the claim for exemplary damages and it was accordingly dismissed. Nelson J followed the approach taken in *Dingle* (supra) by Lord Denning at p753 that the Plaintiff

> "…has not been given by the (defendant newspaper) such a complete withdrawal as he might have been; and he was never given an apology."

85. This Court will follow in general terms the approach taken in *Enosa* (supra) but will depart from the quantum awarded.

86. In the cases of *Uili v Malifa* [1991] WSSC 2 and *Malifa v Uili* [1993] WSCA 6, the Courts awarded compensation of $20,000 in each case. In the latter case, the Court found the defamation to be far less serious.

87. The Court will use those cases to establish a range of awards as between $20,000 for less serious defamation and $50,000 for more serious imputations. But it will

take into account the difference in the value of money between 1998 and 2011.

88. Here there was sting but no balm.

89. The Plaintiff was a public figure. The imputations were of a most serious nature. His reputation in commerce and politics has been tarnished. Adjusting *Alesana* (supra) which involved a right of reply for inflation general damages are assessed in the sum of $80,000.

Aggravated Damages

90. The Defendants have made no apology, retraction or provided a proper right of reply. They persisted with their pleading of truth and justification up until and during trial. They persisted with a mild concession of 'could' in every available claimed defence.

91. No apology was offered by either Crichton or Farao during their evidence given at trial.

92. There was no evidence that Apia Broadcasting Limited published the apology given by Moli in May.

93. The Third Defendant breached his own Code of Ethics.

94. Their conduct, at least since May, has been nothing but denial and defiance. No

Defendant sought the aid of the Act sections 14, 15 to mitigate the damage.

95. Their conduct has prolonged the personal harm to the Plaintiff and general harm of his reputation within the community.

96. The publication of the defamation to the community of Samoa was through the widest medium of communication and was repeated. The Second Defendant had the opportunity to forewarn the Plaintiff of the intended publication before the Monday 'panel discussion.'

97. Aggravated damages are assessed in the sum of $40,000.

Punitive or Exemplary Damages

98. The Court has considered an award of punitive damages in accordance with the principles stated in cases such as *Rookes v Barnard* [1964] AC 1129 (affirmed in *Broome and Cassell Co. Ltd* [1972] AC 1129) and *Uren v John Fairfax and Sons Pty Ltd* (supra) (upheld by the Privy Council on appeal in *Australian Consolidated Press Ltd v Uren* [1961] 1 AC 590).

99. *Uren* (supra) has been followed by the New Zealand Courts and ought be the law of Samoa. There are significant differences as between the decisions of the House of Lords and the Privy Council and as between the English, Australian and New Zealand courts which have refused to apply *Rookes v Barnard* (supra).

100. Here the circumstances would permit an award on either of the competing tests. This Court will apply the Australian and New Zealand principles where they differ from the English.

101. The Court has considered the imposition of punitive damages because of the breaches of the JAWS Code of Ethics. It will do so but take into account the existing award of aggravated damages and assess the award in the amount of $10,000.

Conclusion

102. The Defendants are jointly and severally liable to pay compensation to the Plaintiff in the sum of $130,000.

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JUSTICE SLICER