

IN THE COURT OF APPEAL OF TONGA  
NUKU'ALOFA REGISTRY

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AC 15 of 2018

Solicitor General

  
01/03/19.

**BETWEEN :** FRIENDLY ISLANDS SATELLITE COMMUNICATIONS  
LIMITED

**Appellant**

**AND :** PUBLIC SERVICE ASSOCIATION INCORPORATED

**First Respondent**

**SAMIUELA 'AKILISI POHIVA**

**Second Respondent**

**KINGDOM OF TONGA**

**Third Respondent**

**Counsel:** Mr W C Edwards for the Appellant  
Dr. R Harrison SC QC for the Second Respondent

**Hearing:** On the papers  
**Date of Ruling:** 28 February 2019.

**INTERIM RULING ON APPLICATION FOR SECURITY FOR COSTS**

**The application**

- [1] This interim ruling concerns an application by the second respondent that the appellant provide security for his costs in this appeal. He also seeks an order that the appeal be stayed until the appellant gives security for costs as ordered.

**The facts**

- [2] The appeal is from judgments given by me in the Supreme Court (CV 48 of 2014) on 17 August 2018 and 5 September 2018. I made declarations concerning the lawfulness of the expenditure of aid grant funds amounting to USD\$49.9 million

rec'd 01/03/19  
HHC

received by the Kingdom from the People's Republic of China that in the event were paid or applied almost entirely for the benefit of the appellant.

- [3] The appeal was filed on 16 October 2018 and it was accompanied by a notice of motion for leave to adduce further evidence of four witnesses. The appellant also gave notice that if it is granted leave to adduce further evidence it will ultimately be seeking a retrial.
- [4] The second respondent filed a cross notice seeking (if necessary) to have the judgments upheld on grounds other than were relied upon by me in the judgment of 17 August 2018.
- [5] I made timetable directions on 1 November 2018. Having been made aware that an application for security for costs was likely to be made, and after hearing from Counsel, I directed dates by which applications and responses to them were to be filed. I also directed (consistently with O. 7 Rule 2(4)(b) of the Court of Appeal Rules) and without opposition from Counsel that any applications would be determined on the papers.
- [6] In compliance with the timetable directions, the second respondent filed this application for security for costs along with an affidavit in support on 11 December 2018. Any opposition to the application was (by the same timetable) to be filed by 1 February 2019. No opposition was filed by that date.
- [7] On 1 February 2019, Mr. Edwards filed a memorandum seeking until 15 February 2019 to file the appellant's response to the application for security for costs. This indulgence was granted without opposition from the second respondent. Despite the accommodation given, no response to the application was filed by 15 February 2019 (or at all).
- [8] On 27 February 2019, Counsel were advised that I would issue a ruling on the application on 28 February 2019. Counsel did not raise any objection to that.

- [9] The second respondent's application for security for costs is effectively unopposed. Notwithstanding the absence of any opposition, I must make a ruling on the application on its merits.

### **Jurisdiction**

- [10] In a memorandum that accompanied the application, Dr. Harrison addressed the issue of the Court's jurisdiction to make an order for the payment of security for costs. He correctly noted that in Tonga, and unlike the position in many other jurisdictions, an appellant is not required to provide security for costs as a matter of course (see for instance *Reekie v Attorney General* [2014] NZSC 63).

- [11] Dr. Harrison submitted that the jurisdiction of this Court to order security arises from three sources namely, s. 11 Court of Appeal Act, O. 2 rule 2 of the Court of Appeal Rules and/or the inherent jurisdiction of the Court to make procedural orders governing its processes to effectually perform its judicial functions

- [12] I am not aware of any decision of this Court where the source of its power to order security for costs has been directly addressed. The Court has however ordered that security for costs be provided in other cases before it. I am satisfied that the Court of Appeal has a comparable power as the Supreme Court to order security for costs arising from s. 11 of the Court of Appeal Act. That section reads:

For all the purposes of and incidental to the hearing and determination of any appeal under this part of the Act and the amendment, execution and enforcement of any order, judgment or decision made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the Supreme Court or Land Court (excepting matters relating to the determination of hereditary estates and titles).

- [13] It follows that the four step approach for determining applications for security for cost in actions before the Supreme Court under O. 17 Supreme Court Rules, as set out in *Public Service Association and anor v Kingdom of Tonga and anor* [2015] Tonga LR 439, will apply *mutatis mutandis* to the consideration of such applications in this Court.

- [14] Before proceeding to the merits of this application I remind myself of two other matters. First, the onus of persuading the Court that an order for security for costs should be made rests upon the applicant. Secondly, it is a fundamental principle that it is the right of all persons (including corporations) to have access to the Courts for resolution of their disputes on their merits (*Public Service Association* at [24]-[25]).

**The appellant's ability to pay costs**

- [15] The notice of application asserts that the appellant is a limited liability company (it clearly is) and that it is impecunious and/or may be unwilling to pay costs in the appeal if ordered to do so. This engages O. 17 rule 1(b) of the Supreme Court Rules.
- [16] In support of this assertion the second respondent puts forward the following evidence in paragraphs [4], [6]-[8] and [10] of his affidavit:

[4] Given what I believe to be Tongasat's complete insolvency and/or in any event, lack of ability and indeed willingness to honour a costs order if made against it, I seek an order staying pursuit by Tongasat of all aspects of its appeal until it has provided security for my costs.....

[6] My further concern arises out of the evidence at trial concerning Tongasat and its current financial position. That evidence was drawn either from Tongasat's own discovered documents or the evidence under cross-examination of its managing director Ms Lucy 'Ilaiu. In my view, the only possible conclusion to be drawn from that evidence was that Tongasat (i) had long since been stripped by HRH Princess Pilolevu of all significant financial assets, including but not limited to Tongasat's share of the first and second tranche payments the subject of the litigation, leaving Ms 'Ilaiu in control of an effective shell, and (ii) was an insolvent and worthless company in any event. There was no suggestion in evidence that Tongasat continued to trade following the termination of its Agency Agreement with the Kingdom which featured in the proceedings.

[7] This suggests that Tongasat's own legal representation in relation to the appeal – now for the first time involving overseas counsel – is being independently funded from some outside source....The likelihood of any such outside source being prepared to pay any costs order made in my favour should Tongasat be unsuccessful is in my view non-existent.

[8] I also draw to the Court's attention that Tongasat has an ongoing history of failing and indeed refusing to honour Court orders for costs made against it. Earlier in the CV 48 of 2014 Supreme Court proceedings, the plaintiffs as part of one of their interlocutory applications complained about non-payment by Tongasat of two costs orders made against it on 31 March 2016.....The affidavit for the plaintiffs in support of their enforcement application (dated 27 February 2017) complained of the non-payment by both defendants (the Kingdom as well as Tongasat) of the costs order in CV 48 of 2014 in the sum of T\$25,660.11. It further complained about Tongasat's failure to pay – despite repeated formal demand – the costs order in CV 64 of 2014 in the sum of T\$41,232.12.

[10] The outstanding costs award in CV48 of 2014 was subsequently paid to the plaintiffs by the defendants. As recorded in Paulsen CJ's subsequent Minute dated 4 August 2017 at para [1.3], His Honour declined to make any order in the CV 48 of 2014 proceedings for enforcement of the CV 64 of 2014 costs order. Despite demand, Tongasat has failed and refused and continues to fail and refuse to pay the CV 64 of 2014 costs order down to the present time.

[17] This evidence has not been challenged by the appellant and is compelling. I am also in the fortunate position of having heard the evidence given in the Supreme Court as to the appellant's financial circumstances which appeared parlous.

[18] I am satisfied that there is good reason to believe that the appellant will not be in a position to pay costs on this appeal should it be required to do so.

**The approximate level of costs to be awarded to the second respondent if successful**

[19] The second respondent seeks security for costs in the sum of TOP50,000. This is a greater sum than would ordinarily be awarded to a successful party on an appeal to the Court of Appeal. This is not a typical appeal however. The appeal is undoubtedly complex. It is also of special importance to Tonga because of the circumstances under which the aid grant funds were received by the Kingdom and then expended and because of the amount involved.

[20] There is a great deal of evidence that was given in the Supreme Court that will in due course have to be considered by this Court. The second respondent says in his affidavit, and I agree:

...Overall, the intended grounds of appeal effectively involve a complete re-argument of all matters, both factual and legal, in issue in the Supreme Court trial.

[21] Quite reasonably both parties expect to be represented by Senior Counsel from overseas with the additional costs and expenses that will entail (higher hourly rates, airfares, accommodation, living expenses etc.).

[22] Significant to the ultimate resolution of this application is that the appellant is taking a two staged approach to its challenge to the judgments of the Supreme Court. At stage one the appellant seeks the leave of this Court to adduce further evidence. If the appellant is successful at the first stage it will be at a late sitting of the Court (possibly in the second session of 2019) that the further evidence will be heard and the witnesses will be cross-examined. This will extend the hearing well beyond what would ordinarily be required to dispose of an appeal. The importance of this is that a realistic assessment of what the second respondent is likely to be awarded as costs on the appeal if successful cannot be made until the Court rules on the appellant's motion to adduce further evidence. This is a matter to which I return later in the ruling.

**Will the appellant be 'good' for an award of costs**

[23] For the reasons given above, there is good reason to believe that the appellant is not in a position to pay costs. That said, the appellant must already have incurred significant legal costs on the appeal. The second respondent asserts in his affidavit that the likelihood is that the appellant is funded from an outside source who is unlikely to be prepared to pay costs in the event that the appeal is unsuccessful. I accept that is a reasonable inference given the appellant's failure to challenge this assertion and the state of the appellant's financial circumstances as disclosed at the trial.

**In all the circumstances does justice require that the appellant provide security?**

- [24] In *Public Service Association* the Court identified a non-exhaustive range of factors or circumstances that the Court may take into account when balancing the justice of the case. For present purposes the following appear significant.
- [25] The first is the strength or weakness of the appellant's appeal. I am cautious about expressing a view on this matter when the appeal is a challenge to my own decisions. However, I do note that whilst framed as an appeal the appellant primarily seeks a new trial at which it proposes to call further evidence and this must support an inference that the judgments under appeal are sound.
- [26] The risk that a costs award will not be met by the appellant is significant and supports the making of an order that security be provided. There is also nothing before me to suggest that the making of an order for security will stifle the appeal.
- [27] The case raises issues of public interest but as a factor weighing against ordering security this is of less importance than it might be in a first instance case. The appellant has already had its case heard and adjudicated upon after a lengthy trial before the Supreme Court. In addition, the appellant has benefited by the impugned transactions, received a very large sum of grant aid funds and has divested itself of those funds in their entirety. It has commercial interests at stake in this litigation. This is not a case where the aspects of public interest that arise could support an argument that the Court should not award costs against the appellant if the appeal fails.
- [28] I note also that it may be inferred on the evidence before me that a third party is standing behind the appellant and funding its appeal. This is also a factor that inclines the Court to order security.
- [29] There being no other matters put before me by the appellant I am satisfied that the justice of the case requires the appellant to provide security for costs.

**The means by which security will be provided.**

- [30] I have noted above that the assessment of the second respondent's likely costs can only be made once the Court rules on the appellant's motion to adduce further evidence. That does not mean that the second respondent should be required to defend that motion without security for any costs award that may be made in his favour.
- [31] In the circumstances I propose to deal with the matter in this way. I will order that the appellant provides the second respondent with reasonable security for costs he may be awarded on the appellant's motion to adduce further evidence. The issue of what further security is to be provided will be deferred until a decision has been made upon the appellant's motion to adduce further evidence.

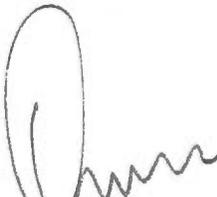
**Result**

- [32] The second respondent's application is successful and is granted. The appellant shall provide security for the second respondent's costs.
- [33] Specifically in relation to the appellant's motion to adduce further evidence, the appellant shall provide security for the second respondent's costs by making payment to the Registrar of the Supreme Court of the sum of TOP15,000 by no later than 15 March 2019. This amount has been assessed by reference to usual awards of costs on appeals to the Court of Appeal after making allowance for the involvement of Senior Counsel in this case.
- [34] In the event that the appellant fails to make the payment in paragraph [33] above on due date this appeal shall be stayed pending further order of the Court.
- [35] The application shall be called before me again on **3 May 2019 at 9am** for mention. By that date the Court will have ruled on the appellant's motion to adduce further evidence. At that time I will timetable the filing of submissions as to what further security is to be provided by the appellant and the timeframe and means by which it is to be provided.

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[36] The second respondent is awarded costs of this application to be fixed by the Registrar if not agreed.

NUKU'ALOFA: 28 February 2019



PRESIDENT

cc Mr. 'A Kefu SC for the Kingdom of Tonga  
Mrs T M 'Amanaki Samate for the Public Service Association