

01/08/19

IN THE COURT OF APPEAL OF TONGA
NUKU'ALOFA REGISTRY

AC 15 of 2018

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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. S Stanton SC and Mr. W C Edwards for the Appellant
Dr. R Harrison SC QC for the Second Respondent

Hearing: On the papers
Date of Ruling: 31 July 2019.

RULING ON APPLICATION FOR SECURITY FOR COSTS (NO. 2)

[1] The second respondent applied for security for costs against the appellant. In an interim ruling of 28 February 2019, I ordered that security was to be provided in two stages. In relation to the appellant's application to adduce further evidence, I fixed the quantum of security at TOP15,000, to be provided no later than 15 March 2019. In respect of security for the balance of the appeal, I ordered, at [35]:

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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.

- [2] The appellant provided security in respect of its application to adduce further evidence. Its application was heard and dismissed by the Court at the last session.
- [3] Unfortunately, the appeal was then overlooked and did not come back before me until 16 July 2019. I recorded in a minute of 28 June 2019 that this was, *inter alia*, to address “[t]he outstanding issue of security for costs.”
- [4] Prior to the conference of 16 July 2019, Dr. Harrison filed a memorandum (dated 10 July 2019) dealing with the quantum of the further security to be provided by the appellant, as well as the contents of the case on appeal.
- [5] Following a hearing before me on 16 July 2019, I issued a further minute requiring:
- (b) The appellant is to respond to paragraphs 10-15 of Dr. Harrison’s memorandum of 10 July 2019 (which deals with both security for costs and the contents of the Case on Appeal) by Friday, 19 July 2019;
 - (c) Any response from the respondents shall be filed by Tuesday, 23 July 2019; and
 - (d) I will issue a decision on the quantum of security for costs and a timetable for the future conduct of the appeal prior to my departure on 31 July 2019.
- [6] The next thing to happen, as far as the Court is concerned at least, was the receipt of a memorandum from Dr. Harrison of 22 July 2019 responding to a memorandum of Mr. Stanton of 19 July 2019. Mr. Stanton’s memorandum had not been received by the Court. It was supplied by Mr. Edwards on 25 July 2019. I note that it was apparently sent by email to my assistant but not to her work email address nor was a copy sent to the Registrar.

[7] In his memorandum, Mr. Stanton submits, on behalf of the appellant, that the second respondent should now file a fresh application for security for costs which will be timetabled to a hearing late in the year. Mr. Stanton's justification for this course is:

A fresh Motion for security should be filed, as there is now a Cross-Appeal that Motion should be extant to ensure that all arguments are able to be made with the fact of the Cross-Appeal being filed and moved on by the Cross-Appellant.

[8] I do not accept Mr. Stanton's submission, largely for the reasons advanced by Dr. Harrison in his latest memorandum, which I summarise as:

- (a) The question whether the appellant should provide security for costs has already been determined against it. I have ruled that security is to be provided in relation to the whole appeal;
- (b) The Cross-Appeal was filed before my ruling on security for costs was made; and
- (c) At the hearing on 16 July 2019 it was plain that Mr. Edwards understood that the issue for determination related only to the quantum of the security to be provided.

[9] Mr. Stanton did not address the second respondent's contention that the quantum of security that should be provided is the sum of TOP42,000 (including disbursements), as set out in Dr. Harrison's memorandum of 10 July 2019. The only challenge that has been made to that assessment was Mr. Edwards's faint objection at the last hearing that it appeared excessive

[10] Based on the comprehensive and complex nature of the grounds of appeal, which are likely to require an in-depth analysis of the evidence, voluminous exhibits and legal issues, my assessment, in the absence of any objection from the appellant, is that the sum sought appears reasonable. However, I note

that in his notice of application the second respondent sought security for the whole appeal of TOP50,000 or such other sum as the Court saw fit. I propose to limit the total security that that the appellant must provide to that sum.

- [11] I order that the appellant is to provide further security for the second respondent's costs in the sum of TOP35,000. As the appeal will now be heard in the first session of 2020 (at the earliest), there is no prejudice to the second respondent if the appellant be given some time to provide the further security. I will allow the appellant until no later than 1 November 2019 to do so, by making payment to the Registrar of the Supreme Court. In the event that the payment is not made by that date, the appeal is to be stayed pending further order of the Court.

Other matters

- [12] In my minute of 17 July 2019 I also directed the appellant to respond to paragraphs 10-15 of Dr. Harrison's memorandum of 10 July 2019. Mr. Stanton did that. However, as Dr. Harrison's latest memorandum points out, I should have sought Mr. Stanton's response to paragraphs 7 and 9 also.
- [13] I am not going to make directions without hearing further from Mr. Stanton. As I am about to finish my tenure, I will refer the file to the next President of the Court to deal with these matters upon payment of the security for costs.

Result

- [14] The appellant is to provide further security for the second respondent's costs in the sum of TOP35,000 by no later than 1 November 2019 by making payment of that sum to the Registrar of the Supreme Court. In the event that the payment is not made by due date the appeal is stayed pending further order of the Court.

[15] This appeal is to be referred to the President of the Court on 1 November 2019 who, assuming security for costs has been provided by the appellant as ordered, shall convene a conference of Counsel to address the matters in paragraphs 7, 9 and 10 of Dr Harrison's memorandum of 10 July 2019, as well as such further matters as he may deem appropriate.

[16] Costs on this further consideration of the application for security for costs are reserved.



A handwritten signature in black ink, consisting of a large, sweeping initial letter followed by several smaller, connected strokes.

NUKU'ALOFA: 31 July 2019

PRESIDENT

cc Mrs L Folaumoetui for the Kingdom of Tonga
Mrs T M 'Amanaki Samate for the Public Service Association