06/04/23

IN THE COURT OF APPEAL
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

AC 24 of 2021

BETWEEN:

IKANI TALIAI Appellant

-and-

[1] MINISTRY OF INTERNAL AFFAIRS
[2] DR SAIA PIUKALA
[3] FOTU KUOHIKO VALELI FISI'IAHI Respondents

JUDGMENT OF THE COURT

Court: Whitten P
Harrison J
Morrison J

Appearances: Mr D Garrett SC for the Appellant
Mr S. Sisifa SG for the first and Third Respondents
Mr S. Taione for the Second Respondent

Hearing: 29 March 2023
Judgment: 6 April 2023

Introduction

[1] This appeal from a judgment of Niu J in the Supreme Court raises one discrete issue: was the Judge correct to dismiss a claim by the appellant, Ikani Taliai, for damages for breach of a consultancy contract with the first respondent, the Ministry of Internal Affairs, in consequence of his unchallenged finding that Mr Taliai did not perform any of the duties which he contracted to provide.

Supreme Court

[2] On 4 August 2017 Mr Taliai signed a contract with the Ministry of Internal Affairs to act as consultant director of National Sport of Tonga. The term was for two years from 1 July

2017 for an annual salary of A$60,000 plus expenses of A$14,000. There is no dispute about the validity or performance of the terms of that contract.

[3] On 30 August 2019 the same parties signed a second or extended contract for an additional term of one year from 1 September 2019. Mr Taliai was engaged to further assist in the development of the Tonga Sports Council, of which he had earlier been appointed chairman. He was to be paid an annual salary (called "the Base Fee") of TOP$140,000 in equal monthly amounts of TOP$11,666. But the Ministry refused to pay the first series of four monthly invoices which Mr Taliai submitted thereafter for "consultancy" or any subsequent amounts. Mr Taliai sued the Ministry for specific performance of the contract and damages for unpaid fees.

[4] Nui J dismissed the Ministry's primary defence that the contract was invalid because it was never approved as required by the *Public Procurement Regulations* made pursuant to s 44 of the *Public Finance Management Act* 2002. There is no cross appeal against that finding. Nevertheless, the Judge dismissed Mr Taliai 's claim for specific performance of the contract or for damages on the ground that Mr Taliai breached his contractual obligations by failing to provide any of the contracted services. Nui J entered judgment for the defendants and ordered Mr Taliai to pay their costs. Mr Taliai appeals.

Analysis

[5] Mr Garrett SC for Mr Taliai submits that Nui J erred by not finding that (1) it was the Ministry , not Mr Taliai, which breached its contractual obligations in refusing to pay the four invoices submitted by Mr Taliai without raising any specific dispute on liability; (2) alternatively, the Ministry was in breach of the contract in preventing Mr Taliai from performing or not calling upon him to perform his contracted services (described as "freezing him out") following a change of government immediately after the contract was signed; and (3) Mr Taliai remained ready, willing and able to provide his contracted services throughout its term.

[6] We reject these submissions. They fail to address Nui J's definitive factual finding, based on Mr Taliai's own admission at trial, that Mr Taliai never performed any of the contracted services. The Judge's finding that the contract obliged Mr Taliai to perform the

specified consultancy services as a precondition to an entitlement to payment is supported by a brief recitation of the agreed terms and conditions.

[7] Clause 1 provided that "*The Consultant shall perform the service of Project Manager for the Project as specified in Annex A which is an integral part of this Contract* [all described in vague aspirational terms]"; Clause 2 required the Consultant *to "provide the Services"* within the one year term of the contract; Clause 3A , under the Heading " *Payment- Base Fee*" provided that "*...(f)or Services rendered in accordance with this contract,* [the Ministry] *shall pay the Consultant a Base Fee not exceeding TOP$140,000 spread across the life of a 12 month contract*"; Clause 3C1 provided that "[the Ministry] *shall pay the Consultant for services rendered on the basis as specified in Annex B* [the annual Base Fee payable monthly]"; Clause 3C2 required the Ministry to pay Mr Taliai the Base Fee a month in advance within three days of receipt of an invoice; Clause 4B obliged the Consultant to " *keep accurate and systemic (sic) records and accounts in respect of the Services which will clearly identify all charges and expenses"* , reserving to the Ministry a right to audit the Consultant's " *records relating to amounts claimed*"; Clause 5 required the Consultant to perform the Services with high standards of professional and ethical competence and integrity; and Clause 11 entitled the Ministry to terminate the contract on 20 days' notice *"if the Consultant fails to perform the assigned deliverables* [the services]". When read together, the import of these provisions is unequivocal: Mr Taliai's right to payment of the Base Fee was contingent upon his provision of the agreed services.

[8] We refer back to the Ministry's obligation in cl 3C2 to pay the Base Fee *"a month in advance ... within 3 business days of receipt of an invoice or claim*". The reference to payment a month in advance is meaningless when read in conjunction with the surrounding provisions. The Ministry's oft repeated responsibility was to pay for *"services rendered"*. The use of the past participle recognised the Ministry's obligation to pay for what had been performed; the consultant had no contractual right to submit an invoice or demand payment for services which he had not performed. So no obligation to pay in advance could arise.

[9] Mr Garrett's submission that the Ministry was in breach because it froze Mr Taliai out of or interfered with his ability to perform his contractual duties cannot be sustained. Mr Taliai's various statements of claim never pleaded that legal ground for relief and Nui J was not required to make a finding on it. The closest Mr Taliai came to arguably raising a cause of action based

on the prevention principle[1] was in his Reply[2], alleging that his performance was "*largely impossible as the first and third defendants had not provided the required directions for performance because of the views held expressed in their defence to the proceedings*". Mr Garrett pressed the same proposition in argument before us. However, he accepted that the contract did not require the Ministry to issue directions for the performance of Mr Taliai's contracted services . Moreover, those services were discrete or self-contained and solely within his power of delivery, and capable of performance independently of any activity or inactivity by the Ministry.

[10] It is axiomatic that one party's breach of its essential contractual obligation to provide personal services discharges the other from its obligation to pay. This principle is fundamental to the doctrine of mutuality of obligations. Mr Taliai had no right to payment for services which he undertook to perform but failed to do so. His claim was doomed from the outset. It is regrettable that the Ministry's reliance on unmeritorious affirmative defences about validity and enforceability diverted and complicated what should have been a simple trial on liability.

Decision

[11] The appeal is dismissed.

[12] The appellant must pay the respondents' costs to be taxed in default of agreement.

Whitten P

COURT OF APPEAL TONGA

Harrison J

Morrison J

[1] See e.g. *Mackay v Dick* (1881) 6 App Cas 251; *Butt v M'Donald* (1896) 7 QLJ 68; *New Zealand Shipping Co v Societe des Ateliers et Chantiers de France* (1919) AC 1, 9 (Lord Atkinson), cited with approval in *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, 440–1.

[2] Filed 12 October 2020 at [9].