

IN THE COURT OF APPEAL OF TONGA

CIVIL JURISDICTION

AC 10 of 2012

NUKU'ALOFA REGISTRY

[AM24 of 2011]

**BETWEEN : 1. LAUCALA POHIVA
2. MATENI TAPUELUELU
3. NUSIPEPA KELE'A**

- Appellants

AND : WILLIAM CLIVE EDWARDS

- Respondent

**Coram : Salmon J
Moore J
Blanchard J
Tupou J**

**Counsel : Mr 'O. Pouono for the Appellants
Mr. W. Edwards for the Respondent**

Date of Hearing : 24 March 2015

Date of Judgment: 31 March 2015

JUDGMENT OF THE COURT

- [1] The respondent successfully sued the defendants in the Magistrates' Court for defamation and on 7 June 2011 obtained judgment for \$10,000 and costs of \$4500. The appellants' counsel filed an appeal to the Supreme Court on 20 June 2011. Their notice of intention to appeal did not, however, state the grounds of appeal even in general terms as required by s 75(1) of the Magistrates' Courts Act (The Act). It said only that the Magistrate had been wrong in allowing the claim or wrong in allowing the full claim of \$10,000 and had been wrong to allow the costs claimed.
- [2] The respondent was later informed by the Magistrates' Court that the appeal had been filed. On 10 February 2012 some 7½ months after the filing of the appeal, with nothing having been done on behalf of the appellants in the interim, the respondent applied in the Supreme Court to have the appeal struck out, alleging failure to give notice of the appeal, failure to give proper grounds and abuse of the process of the Court.
- [3] We should say at this stage that although in his supporting affidavit the respondent mentioned the requirement in s.75(1) of the Act that within 10 days of the Magistrate's decision written notice of intention

to appeal shall be given to the Magistrate “and the other party”, that point does not appear to have been pressed below and was not the subject of submission in this Court save after mention by the Bench. In any event, if the point had been taken below the appellants could have sought an order extending the time for service. Order 5 Rule 1 of the Supreme Court Rules provides:

“The Court may, on such terms as it thinks just, order that the time within which a person is required to or authorised to do any act in any proceedings, whether before or after judgment, be extended or abridged”.

A “proceeding” is defined in Order 3 Rule 2 to include any legal matter involving the exercise of the civil jurisdiction of the Supreme Court, which must include its appellate jurisdiction.

- [4] An extension order would almost certainly have been made since the absence of notice to the respondent appears to have caused him no prejudice. We therefore put this matter to one side.
- [5] There was a hearing concerning the strike out application before Lord Chief Justice Scott on 22 February 2012 which was adjourned to enable grounds of appeal to be filed without delay, as the then counsel for the appellants, who was not Mr Pouono, agreed to do. It

was also agreed that translation of the relevant pages of the trial transcript would be undertaken by the appellants.

[6] But neither of these things was done, despite a reminder to counsel, and on 26 April 2014 the respondent asked the Court to list the matter in Chambers for an early hearing of the strike out application.

[7] There had still been no attempt by counsel to progress the appeal by 5 June 2012 when, after a hearing at which assistant counsel for the appellants appeared, the Lord Chief Justice struck out the appeal. He said there had been inordinate and inexcusable delay which had caused substantial prejudice to the respondent. The reference to prejudice was presumably to the fact that the respondent had not been paid the judgment sum.

[8] From that decision this present appeal is brought.

[9] Normally, we consider, the failure by an appellant to progress an appeal, including failure to properly articulate grounds of appeal, for such a period (nearly a year) would fully justify the exercise of the Court's inherent jurisdiction to strike out the appeal. We would not want this judgment to be regarded as a general precedent to the

contrary. The short time frame of 10 days fixed in s.75(1) for the bringing of an appeal is an indication that appellants are expected to progress their appeal expeditiously and that undue delays will not be tolerated.

[10] It is apparent, however, that the appellants have not been personally at fault either in respect of what occurred, or more accurately did not occur, before the strike out order was made or in respect of delays in getting the appeal before this Court. They have been badly let down by the counsel who was instructed on the appeal. He failed to keep them informed of events and they knew nothing of the strike out application or the failure to provide proper grounds of appeal until they were informed that the appeal had been struck out.

[11] It is often the case that when a lay client instructs counsel he or she must, as against the other party, accept the consequences of counsel's advice and conduct of the proceeding. (Where counsel has neglected to take proper procedural steps there will usually be a right to sue counsel for loss so caused to the client). But the Courts in Tonga have been prepared on occasion not to approach the matter in this way and instead to grant relief to the lay client: see, for example,

Fonua v Tonga Communications Corporation Ltd [2006] Tonga LR 278.

[12] In this case, not without some hesitation, we have concluded that, as the appellants themselves did not contribute in any way to the delays and omissions that occurred and, importantly, as it is possible to remedy the prejudice to the respondent in standing out of the sums awarded to him for a lengthy period, it is appropriate to give them a final opportunity to have their appeal restored.

[13] In coming to this decision we have considered the merits of the appeal. Whilst they are not obviously strong we are unable to say that all of the grounds which have now been particularised are unarguable.

[14] Accordingly we make the following order:

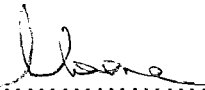
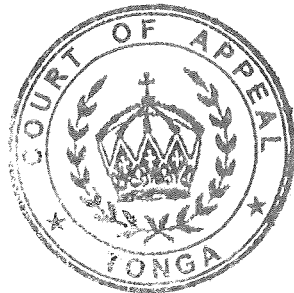
- (a) The appellants are to pay to the respondent the damages of \$10,000, the costs of \$4500 and interest on the aggregate sum calculated at the rate of 7% per annum from 17 June 2011 to the date of delivery of this judgment within 10 days of receipt from the respondent of a written undertaking that, in the event that the Supreme Court allows the appellants' appeal, he will immediately repay all of those sums together with interest thereon at the

same rate. If the Supreme Court varies the amount of damages or the costs award the repayment is to be pro rata;

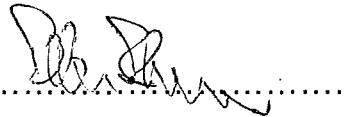
- (b) If payment is made by the appellants within the period stipulated in (a), the strike out order will be set aside and their appeal to this Court will be allowed.
- (c) If payment is not made within the said period, the appeal to this Court against the striking out order will be dismissed;
- (d) Costs in this Court are awarded to the respondent and are payable in either case.



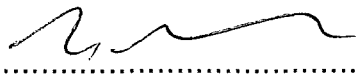
Salmon J



Moore J



Blanchard J



Tupou J