

IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 24 of 2016

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08/06/18
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BETWEEN : SIOSIFA MOSA'ATI UHI

Plaintiff

AND : KINGDOM OF TONGA

Defendant

BEFORE PRESIDENT PAULSEN

To: Mrs. F Vaihu for the plaintiff
/ Mr. S. Sisifa SC for the defendant

Hearing: On the papers
Date of Ruling: 8 June 2018

RULING ON COSTS

The claim for costs

[1] This brief ruling concerns the plaintiff's application for costs.

The course of the action

[2] As originally filed the action raised a range of issues and involved a second defendant. The plaintiff sought an interim injunction but was unsuccessful and the application was dismissed with no costs. The plaintiff appealed that

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ruling to the Court of Appeal where, before the hearing of the appeal, the parties reached an agreement and the appeal was withdrawn with costs being 'in the cause'. The action then proceeded to trial after the completion of the usual interlocutory steps.

- [3] The trial itself was a stop-start affair during the course of which the second defendant was removed as a party. The trial involved four days of hearing but with numerous mentions in between those hearing days as the parties attempted to resolve their differences with the encouragement of the Court.
- [4] Before the trial concluded the parties managed to resolve all of the issues between them except one. I issued a written ruling on 30 April 2018 which dealt with that one issue. It concerned the amount of damages payable to the plaintiff for the removal of overburden from his land.
- [5] This was not an issue that had been raised in the pleadings but was identified by the parties and their experts during the negotiations. In my ruling I held that the plaintiff was entitled to payment of TOP\$99,716 for the overburden. I reserved leave for any party to apply for costs if not agreed.
- [6] The plaintiff has applied for costs and the defendant resists.

The submissions

- [7] In her memorandum of 4 May 2018, Mrs. Vaihu's primary submission in support of the plaintiff's application for costs is the general rule that costs should follow the event. She argues that the plaintiff was successful. The action was necessary, she submits, due to the unsatisfactory manner in which the defendant had handled the Quarry Agreement, the plaintiff was forced to

bring an action to the Court to resolve his issues of concern and he obtained an award of damages in respect of the overburden.

[8] Mr. Sisifa responded in a memorandum of 29 May 2018. He made the following points:

- (a) The Court has already determined that there will be no costs on the injunction application.
- (b) The appeal to the Court of Appeal was withdrawn and the decision of the Land Court was not reversed. Costs of the appeal were to be in the cause.
- (c) The plaintiff alleged that the defendant had acted fraudulently when having him sign the Quarry Agreement and had failed to make out that claim.
- (d) Whilst the plaintiff did achieve an award in his favour it was for a much smaller amount than he had claimed. In reliance upon the Court of Appeal's decision in *'Uta'atu anor v Naufahu anor* [2013] Tonga LR 64 Mr. Sisifa submits that costs should therefore lie where they fall.

[9] In a memorandum in reply of 5 June 2018 Mrs. Vaihu took issue with all of Mr. Sisifa's submissions. She argues that the filing of the injunction and the appeal were appropriate. She submits also that it was proper for the plaintiff to allege that the defendant was fraudulent. She also submits that the plaintiff was getting nowhere with the Government and had it not been for the filing of the action the dispute would not have been resolved and the issue of the illegal removal of the overburden would not have been discovered. She also submits

that the plaintiff has little education and was, effectively, taken advantage of by the defendant.

Discussion

- [10] Mrs. Vaihu is correct that the general rule is that costs should follow the event. The plaintiff was, in my view, successful in that it was as a result of the action that the disputes pleaded were resolved on an agreed basis and, in addition, the plaintiff identified and was able to pursue the overburden issue and obtain a substantial damages award in his favour.
- [11] Whilst I respect the authority of the Court of Appeal's ruling in *'Uta'atu*, I do not think it assists the defendant because in that case the plaintiffs were deprived of their costs as they had, in substance, failed in the action. The same cannot be said for the plaintiff in this case.
- [11] Mr. Sisifa is correct however that the issue of costs on the application for the injunction has already been decided. The Land Court ordered that there would be no costs and that ruling was not overturned in the Court of Appeal and must stand.
- [12] In addition, the Court may in its discretion depart from the general rule (that costs follow the event) if there is good cause to do so. In my view such cause exists in this case to a limited extent.
- [13] The issue of the overburden was raised at a late stage during the course of the trial. The defendant co-operated fully with the plaintiff to allow him to raise that new matter even though it was not pleaded, it agreed to adjournments to allow the plaintiff to present his best case and it also adopted the position that the plaintiff was entitled to be compensated for the overburden at the rate

which the Court subsequently found was correct. The plaintiff did not accept that position and adopted what I regard as an unrealistic stance as to the value of the overburden necessitating a hearing involving the calling of experts.

[15] Whilst it is true that the plaintiff was ultimately successful he incurred and imposed upon the defendant unnecessary costs in failing to frame his case correctly, raising a new issue (concerning the overburden) at a very late stage and in the pursuit of a ruling relating to the overburden when, in the event, he obtained no better relief than the defendant had expressed a willingness to offer him in settlement.

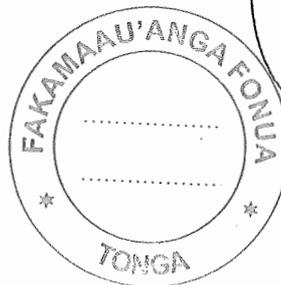
[16] In the circumstances I consider that the plaintiff's cost should be reduced by 20% to take account of these factors.

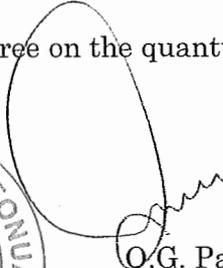
Decision

[17] The plaintiff is awarded 80% of his costs of this action which are to exclude any costs incurred in respect of the plaintiff's application for interim injunction before the Land Court.

[18] In the event that the parties are unable to agree on the quantum of such costs they shall be fixed by the Registrar.

NUKU'ALOFA: 8 June 2018




O.G. Paulsen
PRESIDENT