

**IN THE SUPREME COURT OF TONGA
APPELLATE JURISDICTION
NUKU'ALOFA REGISTRY**

Solicitor General
30/11/15
AM 17 of 2015 *Scum Rhand*
[MC, CV 84 of 2014] *File*

BETWEEN : MARCO MAINI
- **Applicant**

AND : 'ANA TAUMU'A TALANOA
- **Respondent**

**Counsel : Mr. 'O. Pouono for the applicant
Ms F. Fa'anunu for the respondent**

Hearing : 25 August 2015

Ruling : 5 October 2015

RULING

Issues

[1] This is an application for leave to appeal out of time against a decision of Magistrate Kaufusi given on 16 March 2015 in which the Magistrate dismissed the applicant's claim for damages for defamation against the respondent. The issues that arise are:

[1.1] Whether the Court has the power to grant leave to appeal out of time from a decision of the Magistrate's Court.

[1.2] If so, whether the applicant has made out grounds for the granting of leave.

The facts

[2] Miss. Talanoa had been employed by the applicant Mr. Maini and his wife as a house girl and resided with them. She was removed from the home and her employment. Having nowhere to live she sought a place at 'Anana with Fanaafi Valu, Maria Finau and Loloahi Kolo. The allegation underlying the claim in the Magistrate's Court was that Miss. Talanoa made a comment to Loloahi Kolo that she was drunk and passed out one night and that Mr. Maini had licked her vagina. In the Magistrate's Court Miss Talanoa's evidence was that Mr. Maini had told her that while she was passed out drunk he had licked her vagina but she did not know if this had in fact occurred. She said that she had repeated what Mr. Maini had told her to Fanaafi Valu and Maria Finau. Loloahi Kolo overheard the conversation and then relayed the comment to Mrs. Maini over

Facebook. The Court proceedings followed alleging defamation. I should make it clear that Mr. Maini has always denied that he committed any indecencies upon Miss. Talanoa and that he told her that he had done so.

- [3] In the Magistrate's Court Miss. Talanoa defended the claim relying on the defence of privilege under section 10 of the Defamation Act. It is not necessary for me to set out here the legal arguments advanced in support of the defence. It is enough that I note that in his decision Magistrate Kaufusi dismissed the claim. Surprisingly given that result, he made no order as to costs and provided no reasons for that.
- [4] Mr. and Mrs. Marco did not file an appeal from Magistrate Kaufusi's decision. For her part, Miss Talanoa filed an appeal from his failure to award her costs. That appeal came on for hearing before me on 16 July 2015. At that hearing I was advised by Counsel that by consent the appeal was to be allowed and costs awarded to Miss. Talanoa in the Magistrate's Court. The quantum of those costs was not agreed. Miss. Talanoa sought costs of \$6,436 which Mr. Maini would not accept. When no agreement was reached, on 18 August 2015 I ordered that Magistrate Kaufusi was to tax Miss. Talanoa's

costs. The Magistrate issued a decision on 7 September 2015 taxing costs in favour of Miss Talanoa in the sum of \$1,926.

[5] The present application was filed on 21 July 2015, that is, 5 days after I made consent orders on Miss. Talanoa's appeal but slightly more than 4 months after the issue of Magistrate Kaufusi's decision dismissing Mr. & Mrs. Mainis' claim. The notice of application does not state grounds upon which leave to appeal out of time is sought other than to refer to an affidavit filed in support of the application by Mr. Maini and a decision of *Kaitu'u Finau v Fakahua* (AM 9/2013, 23 July 2013, Scott LCJ).

[6] In his affidavit in support of his application for leave to appeal Mr. Maini states:

[6.1] That he did not tell Miss Talanoa that he had committed indecencies upon her nor did he commit any indecencies upon her.

[6.2] That the reason he had commenced the defamation proceeding was because he was outraged and humiliated by Miss Talanoa's "wild and unfounded accusation".

[6.3] That he did not agree with the Magistrate's ruling.

[6.4] That he was baffled by the claim for costs by Miss. Talanoa of about \$6,000.

[6.5] That he wants to appeal so that he can obtain the transcript of the Magistrate's Court hearing.

Does the Court have the power to extend time?

[7] Section 74 of the Magistrate's Courts Act provides that:

In every civil case...every party shall have a right of appeal to the Supreme Court from any judgment...or order of a Magistrate.

[8] Section 75(1) of the Magistrate's Courts Act provides

The appellant shall within 10 days after the date of the Magistrate's decision give written notice to the Magistrate and to the other party stating his intention to appeal and the general grounds of appeal.

[9] As noted above, Mr. Maini relies upon *Kaitu'u Finau v Fakahua* as authority that the time limit in section 75(1) Magistrate's Courts Act is directory and not mandatory so that the Court may extend time for the filing of an appeal against a decision of the Magistrate's Court. I made Counsel aware of a decision in *Tu'inukuafe v Police* (AM10/2015, 16 July 2015, Paulsen LCJ) in which I came to a contrary view and held that the time limit in section 75(1) is strict and cannot be dispensed with. I set

out my reasons at paragraphs [7]-[17] of the decision, which I do not need to repeat here. I was not specifically referred to *Kaitu'u Finau* when I decided *Tu'inukuafe*. Although *Kaitu'u Finau* was a civil case and *Tu'inukuafe* a criminal case, section 74 confers a right of appeal in both civil and criminal cases triable summarily so that the different conclusions arrived at in the two cases cannot be explained on that basis.

[10] In his written submissions, Mr. Pouono referred me to Order 5 Rule 1 Supreme Court Rules which 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.

[11] This rule does not assist Mr. Maini. The Rules of the Court cannot override the terms of the Magistrate's Courts Act.

[12] Furthermore, where time limits are contained in rules or regulations the Court generally has power to extend time for the avoidance of injustice but when, as is the case here, the time limit is contained in statute the Court cannot extend time unless, as a matter of construction, that is consistent with the

legislative intention. See Scott LCJ in *Kaitu'u Finau* at paragraph [11].

[13] Mr. Pouono also referred me to a case of *Sione Lakalaka v Tonga Forest Products Limited* AM26/14 where earlier this year I granted leave to Mr. Lakalaka to appeal from a decision of a Magistrate refusing to set aside a default judgment, notwithstanding that the judgment was entered on 23 May 2013. I can take nothing from that decision as the application was unopposed and the issue of whether section 75(1) prevented the Court granting leave to appeal out of time was not raised before me.

[14] In *Kaitu'u Finau* Scott LCJ succinctly stated his reasons for finding that the time limit in section 75(1) is directory only at paragraph [12] as follows:

Taking into account, in particular, the wording of section 74(1), the difficulties facing the courts and practitioners in Tonga and the dire consequences of strict adherence to a 10 days limit, I am satisfied that Section 75(1) is directory rather than imperative..

[15] It is with reluctance that I take a contrary view to the former Lord Chief Justice on this issue. In my view, the wording of sections 74 and 75 of the Magistrate's Courts Act do not

suggest that the time limit in section 75(1) is directory only and I am not aware of any difficulties that face the Courts or legal practitioners which would justify such an interpretation either. I agree with the comments of Webster CJ in *AJ & E Limited v FC Nichols (Wholesales) Limited* [2006] Tonga LR 78 that there is a tendency in Tonga to regard time limits as unimportant.

[16] I do accept that there may be unfortunate consequences in individual cases resulting from a strict adherence to the 10 day time limit in section 75(1). This is particularly so in cases involving self-represented litigants but potentially also when parties are represented by law practitioners due to the prevailing attitude to time limits to which I have referred. I expressed these concerns at paragraph [10] of my decision in *Tu'inukuafe*. The possibility of injustice is an important consideration but it cannot displace the clear legislative intention that is contained in section 75(1). Section 75(1) was enacted at time when the Magistrate's Court had a more limited jurisdiction than is now the case. If it is felt that there is now a case to allow time to appeal to be extended then the Act should be amended to provide for that.

[17] It follows that I do not consider that I have the power to grant Mr. Maini leave to appeal from Magistrate's Kaufusi's decision and his application must be dismissed. However, in case I am wrong in my conclusion and out of deference to the submissions of Counsel, I will now go on and consider the case advanced by Mr. Maini for the granting of leave.

Applications to extend time

[18] The principles that govern when leave to appeal out of time (in cases where such power exists) will be granted have been set out in case law.

[19] In *AJ & E Limited v FC Nichols (Wholesales) Ltd* (supra) Webster CJ said that the basic principle is that the matter is entirely in the discretion of the Court and that the discretion is to be exercised judicially. Importantly the Chief Justice also noted:

My starting position in considering this application is that it is important that there should be finality in litigation so that parties know where they stand and matters taken as decided are not later re-opened at the whim, as it were, of the losing party.

and

Any failure to comply [*with time limits in rules of the Court*] calls for a full and proper explanationand it should not be taken for granted that the Court will exercise its powers to enlarge time.

[20] In *Moapa Enterprises v Island Beverages Ltd* [2009] Tonga LR 273 Ford CJ approved the statement in the White Book that:

It is entirely in the discretion of the Court to grant or refuse an extension of time. The factors which are normally taken into account in deciding whether to grant an extension of time for serving a notice of appeal are (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if time for appealing is extended; and (4) the degree of prejudice to the would be respondent if the application is granted

[21] Ford CJ also approved the principle from *Revici v Prentice Hall Inc and others* [1969] 1 ALL ER 772 that:

The rules of the court must be observed and it mattered not that the plaintiff had offered to pay the costs and that no injustice would be done to the other side. If there was non-compliance with rules it must be explained and prima facie if no excuse was offered no indulgence should be granted.

[22] In *Fonua v Tonga Communications Corp Ltd* [2006] Tonga LR 278 the Court of Appeal noted at paragraph [13]:

The power to extend time is a discretionary power. In exercising the discretion, time should be extended only if it is necessary to do

justice between the parties. It is necessary to have regard to the history of the matter, the conduct of both parties, the nature of the litigation and consequences for the parties of the grant or refusal of the extension. A relevant consideration is the prospect of the applicant succeeding in the appeal.

[23] The kernel of Mr. Pouono's submissions is that unless granted leave to appeal Mr. Maini will end up being stigmatised as a person who molests his female staff. However his failure to file an appeal in time is entirely unexplained. Not only did Mr. Maini not file his own appeal but he agreed to consent orders being made in favour of Miss. Talanoa upon her appeal against the Magistrate's failure to award her costs. If the consequences of the dismissal of his claim were in fact grave, as Mr. Pouono suggests, it is difficult to see why he would not have pursued his appeal in a timely manner. I should note also that in his affidavit Mr. Maini makes no comment whatsoever about the consequences of the Magistrate's decision upon him.

[24] Mr. Pouono also submitted that there was merit in the proposed appeal. My own assessment is that the grounds of appeal advanced by Mr. Maini are arguable in some respects but not strong.

[25] Mr. Pouono argued that the Magistrate did not in fact make a finding that Miss Talanoa had a defence under section 10 of the Defamation Act. It is quite clear from reading the decision as a whole that the Magistrate did make such a finding.

[26] A number of other matters were advanced by Mr. Pouono which were in reality challenges to factual findings made by the Magistrate. This Court would be slow to interfere with the Magistrate's factual findings on appeal. *Moapa Enterprises* (supra) at paragraph [14].

[27] Mr. Pouono also advanced an argument that Miss. Talanoa could not, as a matter of law, rely on section 10 of the Defamation Act because "section 10 only applies to comment based on facts". I do not accept this submission. The defence under section 10 may be available in cases where the statements complained about are both defamatory and in fact untrue. *Watt v Longsdon* [1930] 1 K.B. 130, 142.

[28] Finally, Mr. Pouono submitted that the Magistrate was incorrect to find that Mr. Maini could not succeed because the claim alleged that Miss Talanoa had told Miss. Loloahi Kolo her story when she had in fact spoken to Fanaafi Valu and Maria Finau. It appears to me that the Magistrate's approach was unduly pedantic but that would not ensure Mr. Maini success on appeal

when Miss. Talanoa had available to her the defence under section 10 of the Defamation Act.

[29] There are a number of telling factors against the granting of leave to appeal out of time. First, the period of Mr. Maini's delay in applying for leave to appeal is substantial, although I accept not so as to be determinative of this application. What is of greater importance is that Mr. Maini's failure to appeal within time is totally unexplained and in the absence of an explanation no indulgence should be granted to him. It is a reasonable inference that Mr. Maini was quite prepared to accept the Magistrate's decision until he became liable to make payment of costs. In this respect the comments of Webster CJ noted at paragraph 19 are particularly apposite. Mr. Maini should not be allowed to re-open this litigation at a whim.

[30] Also of significance is that by applying for leave to appeal Mr. Maini is in effect seeking to challenge the orders made upon Miss. Talanoa's successful appeal to which he consented. I do not consider it is proper that he be permitted to do so.

[31] As I have indicated earlier, I am not satisfied that the consequences of refusing leave to appeal are grave and the case does not raise any issues of general importance. It is of no interest other than to the parties involved.

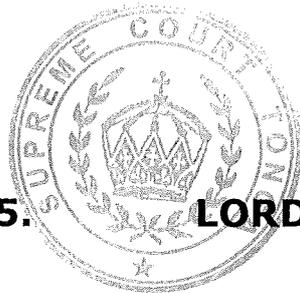
[32] Finally, as I have noted, Mr. Maini's chances of successfully appealing the decision of the Magistrate on the grounds advanced are, in my view, not strong.

[33] For all of those reasons I would not have granted Mr. Maini leave to appeal out of time even had I considered that I had the power to do so.

The Result

[34] Mr. Maini's application for leave to appeal out of time is dismissed.

[35] Miss. Talanoa is entitled to the costs of this application which are to be taxed if not agreed.



A handwritten signature in black ink, appearing to read "O.G. Paulsen", is written over the seal.

O.G. Paulsen

DATED: 5 October 2015. LORD CHIEF JUSTICE