

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

Solicitor General
Sam + Fil
18/06/14
AM 1 of 2014
[MC. CV143/2013]

BETWEEN: PALU TAUFATEAU

- Appellant

AND: YOSHIMITSU KAWATA

- Respondent

'O. Pouono for the Appellant

Mrs D. Stephenson for the Respondent

JUDGMENT

[1] The Appellant is a law practitioner admitted to the Tonga Bar. The Respondent is a Counsellor at the Embassy of Japan. In accordance with Section 8 of the Diplomatic Relations Act (Cap 158) the Secretary for Foreign Affairs ad interim issued a certificate on 26 August 2013 confirming that the Respondent:

“is afforded the privileges and immunities guaranteed by the Vienna Convention on Diplomatic Relations 1961 in particular Articles 29 and 31 of the aforesaid Convention”.

[2] Article 31, so far as relevant to this appeal, reads as follows:

“1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of

(a) –

(b) –

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions”.

[3] Article 1 of the Convention defines a “diplomatic agent” to be the head of the mission or a member of the diplomatic staff of the mission. In the premises, the Respondent is a diplomatic agent.

[4] In 2010 the Appellant and the Respondent entered into a written agreement. Unfortunately, I was not provided with a copy of this contract however according to the Plaintiff’s submission filed in the Magistrate’s Court on 4 December 2013 the contract was:

“to retain Mrs Taufaeteau to be legal counsel to the Embassy of Japan ...”

[5] According to a Defendant’s submission in response filed the following day in the Magistrate’s Court:

“The contract for legal services between the Plaintiff and the Defendant clearly stated in the first sentence that the Defendant was acting in accordance with the authority vested in him by the Embassy of Japan”.

- [6] The Appellant commenced proceedings in the Magistrate’s Court in August 2013. She alleged breach of contract and sought damages.
- [7] On 30 August 2013 Counsel for the Defendant filed an application to strike out the claim. The application was based on Section 4(1) of Cap 158, the Section 8 Certificate and Articles 1 and 31 of the Convention.
- [8] Counsel for the Appellant filed the 4 December response referred to in paragraph 4 above. It was submitted that the contract between the parties was a “private” contract and that the Respondent waived his diplomatic status when he entered into it. It was also argued that Section 24 of the Law Practitioners Act which grants a practitioner the right to sue for services rendered does not distinguish between a diplomatic or a non diplomatic client.
- [9] In the Respondent’s own response (see paragraph 4 above) it was submitted that no waiver by the Respondent had occurred, that the Appellant’s rights under the Legal Practitioners Act were unenforceable by virtue of Article 31 and that the Section 8 Certificate was conclusive evidence that the Respondent was beyond the jurisdiction of the court.

[10] On 22 January 2014, after considering the written submissions presented by the parties on 4 and 5 December, the Magistrate struck out the Appellants action. Although the translation of the Magistrate's judgment is not very good it is clear enough that the Magistrate found that it had been proved that the contract was entered into by the Respondent in his official capacity on behalf of the Embassy of Japan, that it was not without Article 31(1)(c), that the Respondent was a certified diplomatic agent and that consequently he was immune from the civil jurisdiction of the Court.

[11] This appeal was filed on 31 January 2014. The notice advances two principal grounds. The first was that the Magistrate erred in his application of the Diplomatic Relations Act. It was suggested that the Respondent had waived his diplomatic status by entering into the contract and was therefore liable to be sued upon it. Secondly, it was suggested that the Magistrate failed to consider the strike out application in open court and failed to give the Appellant, in particular, adequate opportunity to address him before making his ruling.

[12] In my judgment, once the conditions precedent for Article 31(1) to apply have been satisfied, the immunity is absolute unless (a) the contract was "outside his official functions" or (b) the immunity was waived. As to the former, I am satisfied, for the reasons set out in paragraphs 4 and 5 above that the contract was not outside the Respondent's official functions; on the contrary, the Appellant was retained officially by a diplomatic agent to be the legal counsel to the Japanese Embassy. As to the latter, the only form of waiver which

could assist the Appellant was a waiver provided by the Respondent as laid down by Article 32 (1) & (2) of the Convention but no such waiver was forthcoming. In my opinion, the Magistrate applied the law correctly. The Respondent was immune from the jurisdiction of the courts and therefore the Appellant's claim against him whether based on Statute, contract, equity or any other cause of action was not justiciable.

- [13] As to the procedure adopted by the Magistrate, Mrs Stephenson, without contradiction by Mr Pouono, in paragraph 6.3 of her submissions filed in this Court on 19 May 2014 stated:

“The [application to strike out] was mentioned in open court and counsel for both parties agreed to it being determined on written submissions”.

- [14] It is an accepted part of the civil procedure of our Courts that a particular method of dealing with a particular application (of the kind envisaged by Rule 11 of the Magistrate's Courts (Civil) Rules 2007) may, with the approval of the tribunal be agreed by counsel. I accept that this is what happened in this case. I can find no error in the procedure adopted by the Magistrate. Furthermore, Section 81 of the Magistrate's Court Act (Cap 11) may again be referred to:

“No decision of a Magistrate shall be reversed or varied for any defect in form therein or in any of the proceedings before the Magistrate but every appeal shall be decided on its merits only.”

[15] The only other matter of substance raised by the Appellant is the award of \$1000 costs by the Magistrate without hearing the parties. I note that the sum awarded precisely corresponds with Mrs Stephenson's calculations in paragraph 7 of her submissions but am of the view that counsel should have been heard before any award was made. I see no value in remitting this aspect of the matter to the Magistrate and will instead (under Section 5 of the Supreme Court Act) hear submissions on the Respondent's costs in the Magistrate's Court and in this Court after delivering this judgment.

Result:

The Appeal is dismissed, save as to the costs awarded to the Respondent in the Magistrate's Court. I will hear submissions in respect of those costs and the costs of this appeal.

DATED: 13 June 2014.




CHIEF JUSTICE

N. Tu'uholoaki

13/6/2014.