

- [4] The Magistrate's Court has heard many cases, usually for protection orders or maintenance, where one of the parties was represented by the FPLAC with Mrs. Fa'anunu appearing as Counsel.
- [5] When the appellant's case came before the Senior Magistrate on 5 July 2018 he refused to hear it. The Senior Magistrate did not issue a written decision. It is not entirely clear what he intended by his refusal, but in effect he ordered a permanent stay of the appellant's action. From that order the appellant appeals.
- [6] I have a transcript of the hearing recording the Senior Magistrate's exchange with Counsel. It emerges that the Senior Magistrate's refusal to hear the case was based on the following:
- (a) He was not satisfied that the FPLAC was established lawfully; and
 - (b) He considered that Mrs. Fa'anunu could not appear as Counsel before the Court because she is a civil servant employed by the Ministry of Justice and therefore not independent of the judiciary.
- [7] Since the Senior Magistrate made his decision the Magistrate's Court has refused to accept filings from the FPLAC, other than applications for protection orders.

Discussion

- [8] It is a serious step for a Judge to refuse to hear any person's case except on its merits. It is a decision that could only be made in the clearest of cases. It is the duty of the Judges to administer justice in accordance with the constitution and the laws of this country. Any Judge refusing to hear a person's case should provide a written ruling that is very clear both as to the reasons why the Judge is taking that course and the terms of the Orders that are being made.

- [9] Whilst the refusal of a Judge to hear a case is unusual enough, it is an even more serious matter for a Court to refuse to accept filings from an entire class of litigant. That is what has occurred here since the Magistrate's Court has refused to accept filings from the FPLAC. Such a step should not have been taken without reference to the Lord Chief Justice. Any filings made should have been accepted and set down for hearing following the determination of this appeal.
- [10] The FPLAC was established pursuant to a decision of Cabinet, No 564 dated 9 June 2017, as a pilot project. The Cabinet Decision reads:
- Recommendation is approved
- That Hon. Cabinet Ministers note and approve the legal aid project set up to assist survivors of domestic violence in Tonga for one year, which shall be funded under the auspices of the SPC/RRRT and managed and co-ordinated with the assistance of the Ministry of Justice.
- [11] The SPC/RRRT is the Secretariat of Pacific Communities, Regional Rights Resource Team which provides training, technical assistance and funding to advance the observance of human rights standards in Pacific Island countries and which has provided great assistance in recent times to Tonga to address a serious domestic violence problem. The FPLAC is a very worthwhile initiative to which the judiciary should be lending its full support.
- [12] By clause 51 of the Constitution, the executive authority of the Kingdom vests in Cabinet, which is responsible to the Legislative Assembly for the executive functions of the Government.
- [12] There was nothing before the Senior Magistrate to suggest that Cabinet did not have power to establish the FPLAC. It was not an issue which

was before him or on which he had to decide to deal with the appellant's case.

- [13] Whilst the Courts have a role in reviewing the exercise of executive powers that only arises in actions properly brought before the Supreme Court. There are not, and have never been, any proceedings before this Court calling into question Cabinet decision No 564.
- [14] Turning to the Senior Magistrate's second concern, Mrs. Fa'anunu is a law practitioner holding a current practicing certificate and she has statutory right under s. 8 of the Law Practitioners Act to appear as Counsel before the Courts. She has rights of audience whether she is a civil servant or not.
- [15] The Senior Magistrate's concern that as a civil servant Mrs. Fa'anunu is not independent of the judiciary is misconceived. The Senior Magistrate appears to have considered the judiciary a part of the Ministry of Justice. The judiciary is not part of the Ministry of Justice nor is it any part of the civil service. The Judges of Tonga are not employed by the Ministry of Justice. The judiciary is the third branch of Government acting independently of the executive (of which the Ministry of Justice is part) and the legislature. The independence of the judiciary is enshrined in clause 83A of the Constitution.

Result

- [16] The Senior Magistrate should not have refused to hear the appellant's action. The appeal is allowed.

- [17] I direct the Chief Magistrate to immediately set the appellant's action down for hearing. The respondent must be given adequate notice of the hearing.
- [18] I also direct that the Magistrate's Court is to accept for filing all actions filed by the FPLAC which should be determined on their merits according to law.
- [19] I understand that the appellant's legal costs are paid from funds provided for the operation of the FPLAC and make no orders as to costs.



A handwritten signature in black ink, appearing to read "O.G. Paulsen".

NUKU'ALOFA: 27 July 2018.

O.G. Paulsen
LORD CHIEF JUSTICE