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

CV 43 of 2016

**BETWEEN: 1 TOMIFA PAEA
 2 SIMANA KAMI**

- Applicants

AND: HON SEMISI SIKA

- Respondent

BEFORE LORD CHIEF JUSTICE PAULSEN

**Counsel: Mrs. P Tupou for the applicants
 Mr. S Sisifa SC for the respondent**

Date of Hearing: 8 September 2016

Date of Ruling: 13 September 2016

RULING ON APPLICATION FOR INJUNCTION

[1] The applicants commenced this action seeking a declaration that the decision of the respondent, who is the Minister of Tourism, that their appointments as the Chairperson and a Director, respectively, of the Tonga Tourism Authority Board had expired, and that they were to vacate their offices, was invalid. The applicants also seek orders that set aside the decision and direct the applicants to resume their duties forthwith.

- [2] This ruling concerns an opposed application by the applicants for an urgent injunction to restrain the respondent from removing them from their positions on the Board until further order of the Court.
- [3] The application was filed on 12 August 2016 along with an application for leave to apply for judicial review. On 15 August 2016 I granted the applicants leave to apply for judicial review under Order 39 Rule 2 Supreme Court Rules and required the injunction application to proceed on notice. I adjourned the matter to 19 August 2016 for service and on that date made timetabling orders for the filing of evidence. I also directed that the application was to be heard on 8 September 2016. Although the timetable was not complied with the application was argued on 8 September 2016 at the conclusion of which I reserved my decision.
- [4] I have concluded that I should refuse the injunction application and intend to set the substantive action down on an urgent basis before Scott J on 21 September 2016. I consider that in view of the imminent trial it is sufficient and appropriate that I record the facts (which I do not understand are materially disputed) and my reasons concisely.

The facts

- [5] On 1 October 2015 the Ministry of Infrastructure and Tourism submitted a proposal to cabinet to approve the nomination of a Chairperson and three Directors to the Board of the Tonga Tourism Authority which I understand were to fill vacancies following resignations of Directors and the Chairperson in 2013 and 2015.

- [6] On 2 October 2015 Cabinet approved the appointment of the applicants (and two others) to the Board. The Cabinet decision records that the first named applicant, Mr. Paea, was to be appointed as Chairperson of the Board to replace Mr. Ross Chapman. It did not otherwise state the terms and conditions of the appointments.
- [7] The applicants received letters of offer dated 5 October 2015 for appointment to the Board which were signed by the then Minister of Infrastructure and Tourism, Hon 'Etuete Lavulavu. The letters stated that the appointments would be for "a term of up to three (3) years" from 2 October 2015. Other terms and conditions of the appointments included those set out in sections 8, 9 and 10 of the Tonga Tourism Authority Act 2012 ('the Act').
- [8] The applicants accepted the appointments and on around 20 January 2016 they received further letters from the Minister confirming their appointments from 2 October 2016. The letters also confirmed the earlier advice that the appointments were for a term of up to three years and that sections 8, 9 and 10 of the Act applied to the appointments.
- [9] On 17 June 2016 the applicants received a letter from the newly appointed Minister, the respondent Hon Semisi Sika, that the applicants' appointments had expired on 3 May 2016. His reason was that the applicants had been appointed to fill vacancies on the Board and that, pursuant to section 9(10) of the Act, every person appointed to fill a vacancy could only be appointed for the remainder of the term for which the vacating Director was appointed. Whilst acknowledging that the former Minister had

written that the applicants' appointments were to be for up to three years, the Minister stated that "we must follow the Act" and that the applicants could be reappointed to the Board subject to Cabinet approval.

- [10] On 21 July 2016 the applicants received letters from the Acting Chief Executive Officer for Tourism requiring them to vacate the offices of the Tonga Tourism Authority. Again reliance was placed upon section 9(10) of the Act to assert that the applicants' appointments had expired.

The positions of the parties

- [11] The applicants argue that the Minister's decision was unlawful on five grounds. First, they say that they were appointed for three years under sections 9(1)(b) and (2)(a) of the Act, and not to fill a vacancy under sections 9(9) and (10). They submit that the Act does not expressly prohibit an appointment under section 9(1)(b) and (2)(a) when a vacancy arises. In the alternative the applicants argue that even if their appointments for three years were "irregular or defective" in excess of Cabinet's powers, they were entitled to retain their appointments under the doctrine of de facto officer. The second ground is that the decision was made in breach of the principle of natural justice in that the applicants were not given an opportunity to be heard prior to the decision being made. Thirdly, the applicants contend that as a result of the former Minister's representations they had a legitimate expectation to serve on the Board for three years. Fourthly, it is said that the Minister's decision was made under a mistake of fact that the appointment of the applicants was made under section 9(10) of the

Act when it was made under sections 9(1)(b) and 9(2)(a). The final ground advanced is that the Minister's decision was unreasonable as it was made without regard to the applicants' interests and rights.

- [12] The respondent argues that he made no decision to remove the applicants from their positions but that their tenure had expired as a matter of law under section 9(10) of the Act. He argues that the rationale behind section 9 is to ensure that the term of tenure of Directors, whether initially appointed or replaced, is to be completed after three years unless they are reappointed.

The legal principles

- [13] I did not understand there to be any difference between the parties as to the legal principles to be applied by the Court when deciding whether to allow an application for an interim injunction. The Court should follow the approach set out in *American Cyanamid Company v Ethicon Limited* [1975] AC 396 and *Klissers Farmhouse Bakeries v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) as follows:

[13.1] Is there a serious question to be tried?

[13.2] Does the balance of convenience favour the granting of the injunction?

[13.3] Does the overall justice of the case favour the granting of the injunction?

- [14] However, as I recently noted in *Lord Sevele of Vailahi v Prime Minister of Tonga and another* (Supreme Court, CV 26/2016, 26

August 2016, Paulsen LCJ) when an interim injunction is sought in the context of a judicial review proceeding this approach needs to take account of the public law factors involved including the overarching consideration that in order to ensure societal and legal stability, it is generally in the public's interest that decisions of public authorities are respected until dealt with before the Court (*R v MAAF, Ex parte Monsanto Plc* [1999] QB 1161; *R v Secretary of State for Transport, Ex parte Factortame Limited and Ors (No 2)* [1991] AC 603),

[15] Given the element of public interest involved in judicial review proceedings, the more important factor for the Court's consideration will generally be whether the balance of convenience favours the injunction rather than whether damages would provide an adequate remedy. The Court must assess the balance of convenience taking into account the strength of the claimant's case and the extent of the loss or prejudice that would be suffered by each party if the Court grants or does not grant the injunction and one of the parties is then successful in Court.

[16] Whether to grant an injunction or not is, in the final analysis, a matter for the Court to determine in its discretion and in consideration of all the circumstances of the case.

Is there a serious issue to be tried?

[17] I have given careful consideration to all the grounds advanced by the applicants in support of their claim. The grounds were not fully argued by either party and my comments are preliminary and broad brush and cannot be taken as necessarily reflecting the final

outcome. Nevertheless, it is necessary for me to make some assessment of the relative strengths of the cases presented to me.

[18] The applicants posit that Cabinet has the power to appoint Directors under sections 9(1)(b) and (2)(a) or under section 9(10) of the Act. However, it appears to me that those sections do not operate conjunctively but disjunctively. They apply in different circumstances. Once it is accepted that the applicants were appointed to fill a vacancy on the Board there is a strong argument that their appointments could only ever be for the remainder of the term for which the vacating Director was appointed. I do not consider the doctrine of de facto officer applies to the circumstances of this case.

[19] If this interpretation of the Act is correct, it would follow that the respondent did not make a decision to remove the applicants but, as the respondent contends, their appointments simply expired. There could in those circumstances be no obligation on the respondent to offer the applicants an opportunity to be heard and the arguments based on mistake and unreasonableness would also fall away.

[20] The best argument made for the applicants before me was that they had a legitimate expectation of appointment for three years which it would be unjust to frustrate (*R v North East Devon Health Authority, Ex parte Coughlan* [2001] QB 213; *R v Inland Revenue Commissioners, Ex parte Preston* [1985] AC 835; *R v Secretary of State for Education and Employment, Ex parte Begbie* [2000] 1 WLR 1115 at [53]), but there are clearly counter arguments that such expectation must yield to the clear terms of the Act and that in

any event the applicants were never offered appointment for three years but only for "up to three years".

[21] I am not required to resolve these matters. It is sufficient for present purposes for me to note that my assessment is that the applicants' case is not strong.

Where does the balance of convenience lie?

[22] Both parties argued that the balance of convenience favoured them. Both argued that should the Court decide the application for injunction against them they would suffer damage to their reputations. I accept some reputational damage is possible but also that both parties overstate the case. They also both argued that if the Court decides the application in their favour the other party will suffer little if any loss. I consider that neither party will suffer significant hardship regardless of the result of this application for reasons I shall come to.

[23] The applicants submit that the granting of the injunction would allow them to unfreeze the bank account of the Authority so that it can operate normally and continue on with work they had planned for the benefit of tourism in Tonga. I put only limited weight on these factors as the applicants' Counsel advises me that the bank account is frozen as a result of the actions of the applicants and because I consider that the applicants and the Authority are unlikely to progress their work significantly before the hearing of the substantive action.

- [24] The applicants also argue that an injunction is necessary to protect the applicants from the appointment by Cabinet of further Directors, but against that I understood Mr. Sisifa to say that such appointments are awaiting credibility checks and will not be made prior to the hearing of the substantive action on the dates I have proposed to Counsel.
- [25] It was also argued that without an injunction the applicants will lose work and remuneration until the claim is finally determined, but the remuneration is not significant and Mrs. Tupou did not try to press that argument.
- [26] In my view the balance of convenience favours the refusal of the injunction for these reasons. First, I do not consider that the applicants, who must make the case for an injunction, will suffer significant loss to their reputation or finances should an injunction be refused. Secondly, the granting of an injunction will not advance the interests of the applicants or the Authority before the substantive action is heard and could possibly cause further disruption should the applicants ultimately be unsuccessful. Thirdly, and as I noted earlier, in applications of this kind the Court should have regard to the public's interest that decisions of public authorities are respected until dealt with before the Court. Finally, I am able to offer the parties a hearing for the substantive action on 21 September 2016 before Scott J to resolve the matter. I do not consider it appropriate to make interim orders when the case can be heard so promptly.
- [27] Counsel have advised me that the proposed date for the trial is suitable and that neither intends to file further evidence. If either

party wishes to cross-examine on the affidavits then they can give notice of that and I consider that such cross-examination as is necessary can be accommodated within the time available.

Should the injunction be granted in the overall justice of the case?

[28] Standing back and looking at the matter as a whole, the relative weakness of the applicants' case, the lack of any real prejudice to the applicants if the injunction were to be refused or any significant advantage if it were granted, and the availability of a very early hearing date strongly indicate to me that the overall justice of the case favours refusing the injunction.

Result

[29] The application for injunction is refused.

[30] Costs are reserved.

[31] This action is set down for trial before Scott J on 21 September 2016. Any party wishing to cross examine on any affidavit must note the requirement to serve notice in accordance with Order 27 Rule 7 Supreme Court Rules.



[Signature]
O.G. Paulsen

NUKU'ALOFA: 13 September 2016 LORD CHIEF JUSTICE