

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

**CV 40 of 2016**

09/11/16  
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file

**BETWEEN: PACIFIC INTERNATIONAL COMMERCIAL BANK  
LIMITED**

**Plaintiff**

**AND : THE NATIONAL RESERVE BANK OF TONGA**

**First Defendant**

**SIONE NGONGO KIOA**

**Second Defendant**

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Hearing: 3 November 2016.**

**Date of Ruling: 4 November 2016.**

**Counsel: Mr. S. Tu'utafaiva for plaintiff  
Mr A. H. Waalkens QC and Mr. R. Stephenson for  
first and second defendants**

**RULING ON COSTS**

- [1] The defendants have applied to strike out this action and in the event that the strike out application is unsuccessful they seek security for costs, an extension of time for the filing of a defence and for an order removing the plaintiff's election for trial by jury.

rec'd 09/11/16  
HLC

These applications previously came on for hearing before Scott. J on 6 October 2016 but were adjourned, despite the vigorous objection of Mr. Waalkens, because Scott J was told and understood that Mr. Tu'utafaiva, counsel for the plaintiff, was unwell.

[2] Earlier in the week I had asked my assistant to contact Mr. Tu'utafaiva to confirm that the plaintiff would be in a position to proceed with these applications. As a result of that enquiry I was advised that the matter would proceed and that counsel from New Zealand, Mr. Joshua McBride, was now instructed to act for the plaintiff and that he would be appearing on the applications. Related to that, an application for Mr. McBride's admission to the Roll was filed and approved by me on the afternoon of 1 November 2016.

[3] Late in the day on Wednesday, 2 November 2016, Mr. Tu'utafaiva filed a memorandum in which he advised that having discussed the matter with Mr. McBride they were of the view (subject to their client's instructions) that this action ought to have been brought by way of judicial review with the consequence that leave would have to be sought to pursue the claim (which is out of time) and a new pleading filed. Mr. Tu'utafaiva proposed a further adjournment until such time as an application for leave had been filed.

[4] Not surprisingly Mr. Waalkens, who had travelled to Tonga for a second time to deal with the applications, opposed a further

adjournment and asked that the applications be heard. He also indicated the defendants' intention to seek indemnity costs.

[5] After hearing from counsel it was agreed that the following orders can be made by consent:

[5.1] The statement of claim is struck out in its entirety.

[5.2] The plaintiff may seek leave to apply for judicial review of the first defendant's decision of 26 July 2016 to revoke its banking licence within 21 days.

[5.3] The plaintiff is to serve the application for leave on the defendants' counsel.

[5.4] Once the plaintiff's application has been filed I will make a timetable for its resolution.

[6] That left only the issue of costs. The defendants are seeking indemnity costs. Mr. Waalkens provided a helpful chronology of events to date and made detailed submissions. It will suffice if I note that Mr. Waalkens submitted that indemnity costs were appropriate because this action was ill-conceived from the start and had no prospect of success, that the plaintiff had been put on notice from an early stage that the proceeding was irregular and had done nothing to acknowledge that until Wednesday afternoon and that the plaintiff had been given plenty of time to instruct counsel but had waited until the last minute to do so

necessitating the adjournment application. He also complained of the failure of Mr. Tu'utafaiva to act professionally in certain respects including in not providing a medical certificate as required by Scott J and failing to respond to correspondence and telephone calls.

[7] Mr. Waalkens referred me to the decision of Ward J in *Fonua v MBf Bank Ltd* [1999] Tonga LR 4 and in the materials he handed up to me were included extracts from the High Court Rules (NZ) and a decision of Cull J in *Rabson v Judicial Conduct Commissioner* [2016] NZHC 2539, which I have considered.

[8] Mr. Tu'utafaiva submitted that it was not appropriate to award indemnity costs. He argued that the agreed order striking out the statement of claim was not a determination on the merits. He also argued that the case was not hopeless and that the decision to proceed without first obtaining leave to seek judicial review was based on a consideration of the ruling of Ford J in *'Asitomani v Superintendent of Prisons* [2003] Tonga LR 84. He apologised to Mr. Waalkens if his conduct was considered discourteous and said that a medical certificate had been obtained in relation to the earlier hearing.

[9] There are clear parallels between this case and the *Fonua* case. In deciding to award the defendant indemnity costs in that case Ward CJ had this to say at pages 13 and 14:

Where, however, a totally worthless action has been brought, it must be reasonable to say that the person who has suffered the inconvenience and expense of defending an action that should never have been brought should not be left having also to pay the costs of fighting it. ...

I add that there are too many hopeless civil cases pursued to trial in Tonga. Future litigants must understand that, where their case is totally unmeritorious, the court will consider awarding costs on this basis even where they have not been sought in their opponent's pleadings. Lawyers equally must ensure they give their clients sound and firm advice about the chances of success and the consequences of pursuing a worthless case.

[10] Notwithstanding all that Mr. Tu'utafaiva has impressed upon me, I have reached the firm view that this is a case which justifies indemnity costs being awarded to the defendants. My reasons are:

- (a) In my view the case as it is presently presented was hopeless. It certainly could never proceed without leave to seek judicial review having been first granted.
- (b) The plaintiff ought to have been aware of the hopelessness of its position from an early stage and certainly by 11 August 2016 when the matter was discussed in Court. That was before the present applications were filed.

- (c) I do not accept that the '*Asitomani*' case could ever reasonably have been thought to provide a proper basis to proceed without first obtaining leave.
- (d) Even after these applications were made Mr. Waalkens provided the plaintiff with an opportunity to withdraw and avoid costs consequences which was ignored.
- (e) The actions of the plaintiff in failing to instruct counsel in a timely manner and then advising the court and the defendants that it could not proceed with the hearing at the eleventh hour was, in the circumstances of this case, completely unacceptable. I cannot conceive of any reason why the plaintiff would not have known about this well before then. I should note as something of an aside that the inconvenience that was caused was not limited to the defendants and their counsel. On the basis of Mr. Tu'utafaiva's advice earlier in the week I had spent a good part of a day reading the file in preparation for the hearing.

**Result**

[11] In accordance with what has been set out above I make the following orders (Orders 11.1 – 11.4 by consent):

[11.1] The statement of claim is struck out in its entirety;

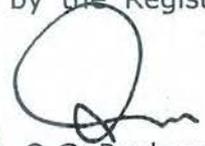
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- [11.2] The plaintiff may seek leave to apply for judicial review of the first defendant's decision of 26 July 2016 to revoke its banking licence within 21 days;
- [11.3] The defendants are to be served with that application;
- [11.4] Once the plaintiff's application has been filed I will make a timetable for its resolution;
- [11.5] The defendants are awarded costs on all steps taken in the proceeding since 11 August 2016 on an indemnity basis to be fixed by the Registrar if not agreed.



  
O.G. Paulsen

**NUKU'ALOFA: 4 November 2016.**

**LORD CHIEF JUSTICE**