

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

**CV 35 of 2015**

02/02/17  
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**BETWEEN : LORD LASIKE**

**Plaintiff**

**AND : KINGDOM OF TONGA**

**Defendant**

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Counsel: Mr. C. W. Edwards SC for plaintiff  
/ Mr. S. Sisifa SC for defendant**

**Hearing: 27 & 30 January 2017.**

**Date of Ruling: 2 February 2017.**

**RULING**

**The nature of claim**

- [1] On 9 July 2012 the plaintiff was convicted in the Supreme Court of the offence of possession of ammunition without a license under section 4(2)(b) of the Arms and Ammunition Act. He appealed from his conviction but nevertheless was deprived of his hereditary title and estates of Lasike, his seat in the Legislative Assembly and his position as Speaker. On 12 October 2012, the Court of Appeal quashed the

plaintiff's conviction. He was restored to his hereditary title and estates but not to his seat in the Legislative Assembly or as Speaker. The plaintiff seeks declaratory relief that his removal from the Legislative Assembly and as Speaker was unlawful and contrary to the Constitution, that he remained a member of the Legislative Assembly from 9 July 2012 until the end of its term on 24 November 2014 and that he is entitled to remuneration and emoluments that were not paid to him following 9 July 2012.

- [2] The defendant argues that upon his conviction the plaintiff ceased to be a member of the Legislative Assembly as a matter of law and that his appointment as Speaker was lawfully revoked by His Majesty the King. It also argues that the decision of the Court of Appeal operates prospectively so that the quashing of the plaintiff's conviction did not invalidate earlier acts taken in reliance upon it. The plaintiff is, the defendant argues, a victim of the law and entitled to no relief.

**The facts**

- [3] There is no dispute about the facts and no need for me to set them out in greater detail than follows.
- [4] The plaintiff has held the title and estates of Lasike since 2002. In 2005 he was elected to the Legislative Assembly as the Nobles Representative for 'Eua. He was re-elected in 2008 and again in 2010. On 17 December 2010 he was made Speaker of the Legislative Assembly.
- [5] On 9 July 2012, the plaintiff was convicted in the Supreme Court on a charge of possession of ammunition without a license under section

4(2)(b) of the Arms and Ammunition Act. This is an indictable offence. It is punishable by imprisonment for a term of up to five years. The plaintiff was fined \$500. The plaintiff immediately appealed against both conviction and sentence to the Court of Appeal.

- [6] It is common ground that the offence was one to which both clause 23 of the Constitution and section 37 of the Land Act (prior to their 2013 amendments) applied. Clause 23 provided that no person convicted of a criminal offence punishable by imprisonment for more than two years was qualified to hold office under the Government or to be elected to the Legislative Assembly. Section 37 provided that the holder of any hereditary estate who was convicted of any indictable offence ceased to hold their title and estate.
- [7] On around 11 July 2012, the Attorney General, Mr. Adsett, reported the result of the case and consequences of the plaintiff's conviction to the Prime Minister, Lord Tu'ivakano, and the Deputy Prime Minister, Mr. Samiu Vaipulu. It was decided that the Government would take no steps until the appeal was heard. Subsequently the Attorney General had a change of mind. He reported this to the Prime Minister and Deputy Prime Minister. He was now adamant that a by-election should be held to replace the plaintiff as a Nobles Representative and that the plaintiff should be removed as Speaker. The Prime Minister and Mr. Vaipulu insisted that nothing be done because it would create considerable problems for the Government if the plaintiff's appeal was allowed. The Attorney General advised them that whether they liked it or not he would advise His Majesty to revoke the plaintiff's appointment as Speaker and the Legislative Assembly to call a by-election, which is what he did.

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- [8] On 17 July 2012, the plaintiff received a letter from the Palace Office signed by the Lord Chamberlain giving him notice on behalf of His Majesty that his appointment as Speaker was revoked.
- [9] On 18 July 2012, the Attorney General sent a letter of advice to the Acting Chief Secretary and Acting Secretary to Cabinet (copied to the Ministers of Finance and Lands, the Lord Chamberlain and the Clerk of the Legislative Assembly). He advised that the plaintiff had ceased to hold his Noble title and his seat in the Legislative Assembly from the date of his conviction and that he should not be paid for any period after 9 July 2012. He further advised that the plaintiff's appointment as Speaker had been revoked by His Majesty on 17 July 2012 and he should receive no payments in respect of his holding that position from that date. He also noted that the Deputy Speaker assumed the role of Speaker until the appointment of a new Speaker, who was to be appointed by His Majesty within 7 days of the vacancy arising. He said there would need to be a by-election to replace the plaintiff as a Noble's Representative.
- [10] Lord Fakafanua was appointed to replace the plaintiff as Speaker on 20 July 2012.
- [11] A by-election was held on 2 August 2012 and Lord Nuku was elected to replace the plaintiff as the Nobles' Representative for 'Eua.
- [12] All payments of remuneration, allowances and other entitlements to the plaintiff ceased from 9 July 2012. It is not disputed that the amount that the plaintiff would have received for the balance of the Legislative Assembly's term had he not been removed from his positions amounts to TOP\$223,385.

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- [13] The Court of Appeal allowed the plaintiff's appeal on 12 October 2012. The Court ordered:

Accordingly we .....allow the appeal. The conviction and sentence are set aside and we direct that a judgment and verdict of acquittal be entered in relation to the charge.

- [14] Following his successful appeal the plaintiff sought reappointment and also compensation but was told that he had lost his positions by operation of the law and nothing could be done by the Government to remedy the situation. There were discussions about settlement but no agreement was reached. On 15 October 2012, the plaintiff wrote to the Speaker and the Legislative Assembly requesting that consideration be given to reinstating him as Speaker or paying compensation but he did not receive a reply.

- [15] On 7 February 2013, His Majesty in Council restored the plaintiff to his hereditary title and estate of Lasike. The decision stated:

For the avoidance of any doubt [*His Majesty in Council*] Finds and Declares that [*the plaintiff*] was on 9<sup>th</sup> July 2012, and has been at all times since then, and remains, the holder of the hereditary title and estate of Lasike.

- [16] The plaintiff does not accept that he was, as the defendant contends, a victim of the law. He says he was a victim of a hasty decision to remove him notwithstanding that his appeal had not been heard. He says, and I accept, that he was greatly distressed by what had occurred and publicly humiliated and that he had to move from his home in Taufa'ahau Road Kolofo'ou to Lakepa to get away.

**The arguments of Counsel**

- [17] I first summarise the defendant's arguments justifying the steps taken to remove the plaintiff from his positions in the Legislative Assembly and then the plaintiff's arguments that his removal was unlawful.
- [18] The defendant argues that upon the plaintiff's conviction section 37 of the Land Act automatically applied so that he ceased to hold the title and estate of Lasike. At the time section 37 relevantly read:
- Any holder of any hereditary estate convicted of an indictable offence....shall as from the date of such conviction..cease to hold such title and the estate.
- [19] The conviction also triggered clause 23 of the Constitution so that the plaintiff was ineligible to hold office as an elected representative in the Legislative Assembly. At the time clause 23 relevantly read:
- No person having been convicted of a criminal offence punishable by imprisonment for more than two years, shall hold any office under the Government whether for emolument or honour nor shall he be qualified to vote for nor to be elected a representative of the Legislative Assembly....
- [20] For completeness I should add that both section 37 and clause 23 have since been amended substantially but those amendments do not assist to resolve this case.
- [21] Mr. Sisifa submitted that once the plaintiff ceased to be a member of the Legislative Assembly his appointment as Speaker was revocable by His Majesty under clause 61(2)(c) of the Constitution and was revoked.

Pursuant to clause 61(4) His Majesty was required to appoint a new Speaker within 7 days. Sections 61(2)(c) and (4) read:

- (2) The Speaker shall remain in office until-
  - (c) he dies, resigns or his appointment is revoked after he ceases to be an elected representative of the nobles for any reason other than the dissolution of the Legislative Assembly.

....

- (4) The King shall appoint a Speaker within 7 days of the occurrence of a vacancy.

[22] The defendant argues that as clause 23 applied automatically there was no need for the Legislative Assembly to initiate impeachment proceeding against the plaintiff to remove him from his seat. Such proceedings would, it was argued, be futile as there was nothing for the Legislative Assembly to adjudicate upon.

[23] Mr. Sisifa submitted that the steps taken to remove the plaintiff did not become unlawful when the Court of Appeal quashed his conviction. This was because the decision of the Court of Appeal operated prospectively only. He argued that the Courts have never held that a decision quashing a conviction applied retrospectively from the date of the original conviction. He was not able to provide any authority for that submission. He supported the argument by noting that a person found to have been wrongfully convicted and imprisoned has no right in law to compensation.

[24] For the plaintiff Mr. Edwards advanced two principal arguments. First, he submitted that the decision of the Court of Appeal operated retrospectively so that the plaintiff's conviction must be regarded as having never been entered. As a result the steps taken to remove the plaintiff in the Legislative Assembly were unlawful. In direct contradiction to Mr. Sisifa's submission, Mr. Edwards argued that the proposition that a decision quashing a conviction acts prospectively is unheard of in Tonga. He too provided no authority. He did however quote extensively from the decision of the High Court of New Zealand in *Marino v Department of Corrections* [2016] NZHC 3074 which, consistent with the declaratory theory of law, states that judgments overturning previous decisions of the Court have retrospective effect.

[25] The second ground advanced for the plaintiff is that under clauses 74 and 75 of the Constitution a Nobles Representative only ceases to hold his seat upon death, resignation or impeachment, none of which applied in this case. Mr. Edwards argued that His Majesty had no power to revoke the plaintiff's appointment as Speaker under clause 61(2)(c) unless the Legislative Assembly has first recommended that course to him following impeachment proceedings.

### **Discussion**

[26] There is no right of appeal from conviction at common law. The right to appeal is derived from statute and so the starting point in my analysis of this case is section 17(2) of the Court of Appeal Act. It is concerned with the determination of appeals in criminal cases and provides:

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...the Court of Appeal shall, if they allow an appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial.

- [27] The word 'quash' generally means to make void or to annul (*Butterworths New Zealand Law Dictionary*, Sixth Edition) but it may have a range of meanings depending on the context in which it is used and the subject matter to which the word is applied (*Dreja v The State of Western Australia* [2012] WASCA 151 at [12]). It may mean make null and void for all purposes or in some contexts make null and void for the future only (*Hancock v Prison Commissioners* [1960] 1 QB 117).
- [28] In the context that the word applies in this case, a conviction that is quashed on appeal is to be regarded as if it is no conviction at all (*R v Barron* (1914) 10 Cr App R 81; *Dreja* (supra); *Lynch v Hargrave* [1971] VR 99; *R v Lapuse* [1964] VR 43 and *Commissioner for Railways (NSW) v Cavanough* [1935] HCA 45;).
- [29] In *Cavanough*, at pg 225, the judgment of the majority (Rich, Dixon, Evatt and McTiernan JJ) states that a conviction overturned on appeal is "utterly defeated and annulled" (quoting *Lord Sancher's case* (1613) 9 Co. Rep 117). The remaining member of the Court, Starke J, said at pp 227-228 that the consequence of the reversal of a conviction is that it is annulled, obliterated and held for nothing.
- [30] I do not accept Mr. Sisifa's submission that the decision of the Court of Appeal operated prospectively. To the contrary, I consider it operated retrospectively and must be taken to have annulled the conviction entered in the Supreme Court from the date that it was made.

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- [31] That does not mean that the plaintiff's conviction was a nullity for all purposes (*Roads and Maritime Services v Porret* [2014] NSWCA 30 at [29]). This is because acts done in reliance upon a judicial order are protected in law. As it was put in *Cavanough* at page 224, "Acts done on the exigency of a judicial order afterwards reversed are protected: they are 'acts done in the execution of justice which are compulsive'".
- [32] *Cavanough* is a case with very close parallels to the present. It concerned an officer in the employment of the Commissioner of Railways for New South Wales who was convicted of a felony. By section 80 of the Government Railways Act 1912 (NSW) an officer convicted of a felony was deemed to have vacated his office. The conviction was subsequently set aside but from the date of his conviction until its reversal the plaintiff received no salary and was suspended. He brought an action to recover his unpaid salary. The High Court of Australia upheld his claim.
- [33] As in the present case, the defendant in *Cavanough* argued that the plaintiff had lost his office by operation of law and the setting aside of his conviction did not entitle him to be reinstated and he had no right to payment for any period between his conviction and when the conviction was set aside. The High Court rejected those arguments finding that whilst acts done in reliance upon the judgment were protected from challenge, the effect of setting aside the conviction was that the plaintiff was entitled to be restored to all things which he had lost by reason of his erroneous conviction. The majority judgment said at pg 225:

Acts done according to the exigency of a judicial order afterwards reversed are compulsive" (*Dr. Drury's Case*). And proceedings which, although based upon a judgment, are brought to completion before its reversed are not avoided. For "collateral acts executory are barred, but not collateral acts executed" (*Dr. Drury's Case*). But "upon the reversal of a judgment against any person convicted of any offence, the judgment, execution and all former proceedings become thereby absolutely null and void. If living, he (or if dead, his heir or personal representative, as the case may be) will be entitled to be restored to all things which he may have lost by such erroneous judgment and proceedings, and shall stand in every respect as if he had never been charged with the offence in respect of which judgment was pronounced against him" (*Archibold's Criminal Pleading, Evidence and Practice, 21<sup>st</sup> ed. 1893*), pp. 226, 227).

As the respondent in contemplation of law was never out of office, he is entitled to the salary attached to it...

- [34] *Cavanough* is a principled decision which produces just results and has been consistently approved and applied not only in Australia but also in other jurisdictions (see for example *P & O Nedlloyd B.V. and Arab Metal Co* [2006] EWCA Civ 1717 at [29]).
- [35] Applying the principles in *Cavanough* to the present case, the acts taken by the defendant to remove and replace the plaintiff as an elected representative and Speaker were not unlawful simply because the plaintiff's conviction was subsequently quashed. This makes perfect sense. It is necessary that Court orders be treated as valid and may be acted upon unless and until they are set aside (*DDP v TY* [2009] VSCA 226 at [23]). It is for this reason that breach of an order

for injunction may be regarded as a contempt even though the injunction is subsequently set aside. It also explains, to take Mr. Sisifa's example, why a person subject to imprisonment following conviction has no right (unless provided by statute) to compensation for their wrongful detention. It is not therefore the case, as I understood Mr. Sisifa to be submitting, that if the Court of Appeal's ruling was applied retrospectively it would be necessary to 'untangle' the revocation of the plaintiff as Speaker, his removal as a Nobles Representative and the election of a new Nobles Representative for 'Eua.

[36] But it is also not the case that the plaintiff must be regarded for all purposes as a victim of the law and entitled to no redress for what he lost as a consequence of his wrongful conviction. As far as is possible he is to be "restored to all things which by reason of the judgment he has lost" (*Cavanough* per Starke J at 228). How could the law be otherwise? Upon his successful appeal the plaintiff could not be restored to his positions in the Legislative Assembly but he was entitled to the salary and emoluments attaching to those positions of which he was deprived. The quantum of the salary and emoluments is not disputed.

[37] I can deal briefly with the plaintiff's alternative argument that the plaintiff could not be removed from his seat in the Legislative Assembly, and consequently not as Speaker either, because he did not resign nor was he impeached. The short answer is that clause 23 (prior to its amendment) was a self operating provision and the plaintiff ceased to hold office from the moment of his conviction (*Veikune v The Kingdom of Tonga* [2007] Tonga LR 284). I see nothing in section

61(2)(c) of the Act to make His Majesty's power to revoke the appointment of the Speaker subject to the will of the Legislative Assembly.

**The relief sought**

[38] The plaintiff seeks declaratory relief. The declarations sought are as set out in paragraph 9.1(a) to (d) of Mr. Edwards' closing submissions. They differ significantly from what is sought in the amended statement of claim. Mr. Sisifa understandably and correctly objected to the changes whilst accepting that the Court has a wide discretion as to the terms of any declaration it might make.

[39] The declarations sought are to the effect that:

- a the plaintiff was unlawfully and in breach of the Constitution removed as Speaker and as a member of the Legislative Assembly;
- b that the plaintiff did not resign from nor was he dismissed after impeachment from his position as a member of the Legislative Assembly;
- c that the plaintiff remained a member of the Legislative Assembly from 9 July 2012 until the end of its term on 24 November 2014; and
- d that the plaintiff is entitled to receive payment of his remuneration from 9 July 2012 until 24 November 2014, along with interest.

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[40] For the reasons I have given I am not prepared to make declarations in terms of paragraphs 39(a) and (c) above.

[41] Paragraph 39(b) has never been in dispute and I cannot see any utility in making a declaration in those terms.

[42] As far as paragraph 39(d) is concerned, for the reasons given I make a declaration as follows:

The plaintiff is entitled to payment from the defendant of the remuneration that he would have earned as a member of the Legislative Assembly and as Speaker for the period 9 July 2012 to 24 November 2014 in the sum of TOP\$223,385.

[43] I make no declaration as to the payment of interest on the TOP\$223,385. A declaration is not coercive and does not create a judgment debt in terms of O.30 Rule 2(1) Supreme Court Rules and no justification was advanced for the claim to interest.

[44] As far as costs are concerned, they are reserved. If the parties are unable to agree on costs they should file written submissions within 21 days.

**NUKU'ALOFA:**

**2 February 2017**



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

**O.G. Paulsen  
LORD CHIEF JUSTICE**