

04/09/18

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

CV 34 of 2017

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BETWEEN: IZAAC PRASAD aka ISAAC PRASAD

Plaintiff

AND: SATEKI TU'UTAFIVA

First Defendant

KINGDOM OF TONGA

Second Defendant

BEFORE THE LORD CHIEF JUSTICE PAULSEN

**Counsel: Mr. L Niu SC for the plaintiff
Mr. J Lutui for the defendants**

**Date of Hearing: 12 December 2017
Date of Ruling: 19 December 2017**

RULING

The application

- [1] This ruling is concerned with an application to set aside a default judgment obtained by the plaintiff (Mr. Prasad) against the defendants (referred to as the Kingdom and Acting Inspector Tu'utafaiva respectively) on 13 October 2017.
- [2] Mr. Prasad argues that the default judgment should not be set aside because neither the Kingdom nor Acting Inspector Tu'utafaiva have satisfied

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their burden to show that there was good reason for their failure to file a defence or that they have an arguable defence as required by Order 14 Rule 4 Supreme Court Rules.

The background

- [3] Mr. Prasad's action alleges that he was the victim of a malicious prosecution by the defendants in respect of the theft of \$200,000 and that he spent 48 days in prison. He seeks damages of more than \$60,000. The background in so far as it is relevant to this application follows.
- [4] On 22 April 2016, there was a theft of a large sum of money from a vehicle outside Narottam's store. There were two witnesses to the incident namely, Sione Halapio and Teisa Pahulu. Sione Halapio made a statement to the Police on 23 April 2016. Teisa Pahulu made a statement on 23 April 2016 and another statement on 12 July 2016.
- [5] On 12 July 2016, Acting Inspector Tu'utafaiva arrested and charged Mr. Prasad with the theft. Mr. Prasad was held in custody until the following day when he was taken before the Magistrate's Court and remanded in custody.
- [6] On 15 July 2016, Mr. Prasad appeared in the Supreme Court on an unrelated matter and Cato J remanded him in custody until 29 August 2016. I do not know to what extent the fact that Mr. Prasad was already charged with theft influenced Cato J, but for present purposes it is not material.
- [7] Mr. Prasad alleges (but it is denied) that whilst he was in custody Acting Inspector Tu'utafaiva told him that if he gave him \$10,000 he would release him.
- [8] On 29 August 2016, Mr. Prasad appeared before Cato J again where he was released on bail. Mr. Prasad had spent 48 days in custody.

- [9] On 7 February 2017, the theft charge was struck out in the Magistrate's Court. I understand that the prosecution offered no evidence.
- [10] Mr. Prasad alleges (and again it is denied) that in March 2017 Acting Inspector Tu'utafaiva took him food and pleaded with him not to sue him as he would lose his job.
- [11] Mr. Prasad commenced this action on 1 August 2017. On 3 August 2017 the papers were served on Crown Law for the Kingdom. On 7 August 2017 they were served on Acting Inspector Tu'utafaiva.
- [12] The defendants did not ignore the claim. Crown Law sought instructions with a view to filing a defence by 31 August 2017. Acting Inspector Tu'utafaiva searched for the relevant file, which initially could not be found. In late August 2017 Acting Inspector Tu'utafaiva located the file. He was instructed to hand a copy of it to Superintendent Vailea, whose responsibility it was to send the file and full instructions to Crown Law. Superintendent Vailea did not forward the file or any instructions to Crown Law and the matter was overlooked.
- [13] On 12 October 2017, Mr. Prasad applied for judgment by default. On 13 October 2017, judgment was entered as to liability with damages to be assessed by the Court. That matter was set down for hearing on 22 November 2017.
- [14] On 10 November 2017, the Acting Attorney General and Director of Public Prosecutions become aware of the default judgment. Instructions were sought from Acting Inspector Tu'utafaiva and the Police. The Police file was reviewed by Mr. Lutui who recommended that an application to set aside the judgment be made.
- [15] This application was filed promptly on 22 November 2017.

[16] When the matter came before the Court on 23 November 2017 I adjourned the hearing to assess Mr. Prasad's damages and timetabled the application to set aside the default judgment.

The relevant principles

[17] The claim is brought on the basis that the Kingdom is vicariously liable for the actions of Acting Inspector Tu'utafaiva.

[18] A plaintiff bringing an action for malicious prosecution must establish five elements. Those elements are; (1) the defendant prosecuted the plaintiff on a criminal charge, (2) the criminal proceedings terminated without the plaintiff being incriminated, (3) the defendant had no reasonable and probable cause for bringing the proceedings, (4) the defendant acted maliciously, and (5) the plaintiff suffered damage as a consequence (Todd, Hawes and Cheer 'The Law of Torts in New Zealand' 7th Ed at 1037).

[19] Order 14 Rule 4 provides that the Court may set aside a judgment entered by default if the defendant satisfies the Court that:

- (a) there was good reason for the failure to file a defence in time; and
- (b) there is an arguable defence; and
- (c) the plaintiff will not suffer irreparable injury if the judgment is set aside.

[20] Whilst Order 14 Rule 4 permits the setting aside of a judgment in certain circumstances it does not prohibit the setting aside of a judgment in other circumstances in the exercise of the Court's inherent powers (*Apex Insurance Brokers Ltd v Finau* [2012] Tonga LR 112, 119).

[21] In *Apex* the Court of Appeal referred with approval to *Evans v Bartlam* [1937] AC 473 as follows:

[56] In *Evans v Bartlam* [1937] AC 473, 480 Lord Atkin said, in the context of Order XXVII r. 15 which gave the Court a discretion, untrammelled in terms, to set aside default judgments:

"The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that...there must be an affidavit of merits...It was suggested...that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default...I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court has regard. If there was a rigid rule...the two rules [of Court] would be deprived of most of their efficacy...Even the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from. The supposed second rule does not in my opinion exist."

[57] Lord Atkin also said at p. 480

"The principle obviously is that unless and until the Court has pronounced a judgment upon the merits, or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

[58] Lord Wright said in the same case at p. 489

"The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will

not prima facie desire to let a judgment pass on which there has been no proper adjudication."

[59] Lord Atkin's statement of principle quoted in paragraph 58 was recently reaffirmed by the Privy Council in *Strachan v The Gleaner Co. Ltd* [2005] 1 WLR 3204, an appeal from Jamaica, in the judgment of Lord Millett at p. 3211. In that case the Courts in Jamaica had set aside a judgment in default of defence for damages to be assessed, after the assessment had taken place. The plaintiff's appeal to the Privy Council was dismissed.

This application

- [22] Mr. Niu accepts that Mr. Prasad will not suffer irreparable harm should the judgment be set aside. He argues that the defendants have not shown 'good reason' for failing to file a defence or that they have an arguable defence. He submits that the failure to establish any one of the three elements in O.14 Rule 4 means that the application must fail.

Good reason for failing to file a defence

- [23] The obligation to establish 'good reason' in O.14 Rule 4 does not mean that the failure to file the defence was justified or correct. In most cases such a requirement will never be satisfied because typically applicants will have failed to file a defence through some mistake or a lack of care in some respect. What the applicant must show is that their failure is reasonably explained. Each case must be decided on its own facts (*Currie v Tokoroa Earthmovers Ltd* [1960] NZLR 611, *Paterson v Wellington Free Kindergarten Association Inc* [1966] NZLR 975 and *Sevele v Pohiva anor* [2008] Tonga LR 37). An applicant who has simply ignored the action or made a deliberate choice not to file a defence may not be able to show good reason, but this is not such a case.

- [24] Both the Kingdom and Acting Inspector Tu'utafaiva took steps to defend the claim. Crown Law sought instructions with a view to filing a defence. For his part, Acting Inspector Tu'utafaiva searched for and located the file and in accordance with the instructions given to him he handed a copy of the file over to Superintendent Vailea believing that it would be delivered, along with instructions, to the Attorney General's office to file a defence.
- [25] Mr. Niu argues that Acting Inspector Tu'utafaiva cannot 'shirk' the responsibility to file a defence and now blame Crown Law 'because the Crown Lawyer is the lawyer for [the Kingdom] and not his lawyer'. That submission is unfair and incorrect. Acting Inspector Tu'utafaiva was entitled to believe that Crown Law would file a defence and that Crown Law was acting for both him and the Kingdom (as indeed it is).
- [26] As far as the Kingdom is concerned, Mr. Niu says it has no good reason for not filing a defence because the Police file was located within the time for the filing of a defence and Crown Law was aware of the need to file the defence by 31 August 2017. What this overlooks is that Superintendent Vailea failed to hand over the file or give instructions to Crown Law. Crown Law could not file a defence in those circumstances.
- [27] I am satisfied that the failure to file the defence was the result of a mistake by Superintendent Vailea for which he was responsible. The failure to file a defence by both defendants has been reasonably explained.

An arguable defence

- [28] As far as the elements of Mr. Prasad's cause of action are concerned, the contest between the parties is directed at whether the defendants had reasonable grounds to bring the prosecution and whether they acted maliciously in doing so.

[29] Mr. Niu made detailed submissions referring to Police documents and witnesses statements in an effort to convince me that there was no arguable defence. On what is before me he had a very difficult task. The defendants have satisfied me that they do have arguable defences. The defences are that there were reasonable grounds to charge Mr. Prasad and that they did not act maliciously in doing so.

[30] Mr. Niu's arguments are based on; (1) interpretations of documents which I do not accept are necessarily correct; or (2) require me to reject the sworn evidence of Acting Inspector Tu'utafaiva, when I do not have any adequate reason to do so.

[31] Based on my reading of the statements of Teisa Pahulu alone it is plainly arguable that she had a good opportunity to observe the person who committed the theft (including his full facial features) and that she identified Mr. Prasad as being that person. Her statement as to what happened on the day of the theft and as to the description of the offender is corroborated to an extent by the statement of Mr. Halapio. In my view it is arguable that this was sufficient to charge Mr. Prasad.

[32] As regards the requirement that the prosecution be malicious, Mr. Niu argues that this is established because Acting Inspector Tu'utafaiva told Mr. Prasad that he would release him for \$10,000 and later took him food and asked him not to sue him. Both of these matters are denied by Acting Inspector Tu'utafaiva. For the purposes of this application there is nothing before me that I consider reason to disbelieve him.

The discretion

[33] Had I been of the view that the defendants had failed to establish 'good reason' for failing to file a defence I would still have set this judgment aside in the exercise of my discretion. The allegations that Mr. Prasad makes against Acting Inspector Tu'utafaiva are extremely serious. To put it simply,

he alleges that Acting Inspector Tu'utafaiva is a corrupt Police Officer. Any such finding by the Court will have most serious consequences for Acting Inspector Tu'utafaiva. It will also bring the Tonga Police into disrepute. In a case where the allegations are denied and the defendants always intended to defend themselves against them, I believe that they must be allowed to be heard.

Result

- [34] The judgment obtained by the plaintiff against the defendants on 13 October 2017 is set aside.
- [35] In relation to costs, the plaintiff has unsuccessfully opposed this application but on the other hand the defendants are being granted an indulgence. Costs shall lie where they fall.
- [36] The defendants are to file their statements of defence by 19 January 2018.
- [38] The action will be listed for mention at **9am on 26 January 2018** for timetabling.

The seal of the Supreme Court of Tonga is circular, featuring a crown in the center surrounded by a wreath. The words "SUPREME COURT TONGA" are inscribed around the perimeter. A star is positioned at the bottom center of the seal. A signature is written over the seal.
O.G. Paulsen
LORD CHIEF JUSTICE

NUKU'ALOFA: 19 December 2017