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

CV 1 & 2 of 2018

BETWEEN: LORD SEVELE-'O-VAILAHI

Plaintiff

AND: PACIFIC GAMES ORGANIZING COMMITTEE

First Defendant

THE KINGDOM OF TONGA

Second Defendant

BETWEEN: SAKOPO LOLOHEA

First Plaintiff

'ETONISIA TONGA

Second Plaintiff

PAULA TU'UTAFAlVA

Third Plaintiff

NAITILIMA TUPOU

Fourth Plaintiff

POLUTELE TU'ihalAMAKA

Fifth Plaintiff

SOAKAI MOTU'APUAKA

Sixth Plaintiff

MELE LUPE 'ILAIU

Seventh Plaintiff

IAN TU'ihalANGINGIE

Eighth Plaintiff

MANGISI HALAFIHI

Tenth Plaintiff

AND: PACIFIC GAMES ORGANIZING COMMITTEE

First Defendant

THE KINGDOM OF TONGA

Second Defendant

rec'd 08/11/18  
JHC

## **BEFORE LORD CHIEF JUSTICE PAULSEN**

**Counsel:**           **Mr. W C Edwards Snr SC for the plaintiffs**  
                          **Dr R Harrison QC, SC and Ms. S. Moa for the second defendant**

**Date of Hearing:**       **1 November 2018**

**Date of Ruling:**      **8 November 2018**

### **RULING**

#### **The applications**

- [1]     The plaintiffs (in both CV 1 and 2 of 2018) obtained judgment by default as to liability against the second defendant (the Kingdom) on 2 August 2018. This ruling concerns applications by the Kingdom to set aside the default judgments. The applications are made in reliance upon O. 14 Rule 4 of the Supreme Court Rules, as well as the inherent jurisdiction of the Court and are opposed by the plaintiffs.

#### **The background**

- [2]     The Pacific Games Organizing Committee (the Committee) was a statutory authority established under the Pacific Games Organization Act 2013 (the Act). Under s. 5(1)(a) of the Act the purpose and function of the Committee included being responsible for the preparation, management and conduct of the 2019 Pacific Games in Tonga (the Games).
- [3]     The plaintiff in CV 1 of 2018 was the Chief Executive and Chairperson of the Committee and, it is pleaded, was appointed pursuant to s. 9 of the Act. It is also pleaded that he was engaged pursuant to a written contract dated 9 May 2014 as varied on 23 June 2015.
- [4]     The plaintiffs in CV 2 of 2018 were all engaged as employees of the Committee under written contracts of various dates. It is pleaded that all of these plaintiffs were engaged by the Committee pursuant to powers conferred upon it by s. 6 of the Act to employ staff to prepare for and conduct the Games.

- [5] On or about 17 May 2017, the Government of Tonga made a decision to withdraw from hosting the Games.
- [6] On 29 June 2017, the Legislative Assembly passed the Pacific Games Organization (Repeal) Act 2017 (the Repeal Act) which by s. 2 repealed the Act (subject to Royal Assent).
- [7] At a meeting of 27 July 2017, the Committee decided to wind up its affairs and agreed to terms upon which the plaintiffs' employment would be terminated. In each case the Committee accepted a contractual liability to the plaintiffs to make payment of a sum of money in consideration for the early termination of their contracts of employment (the settlement payments).
- [8] On or around 3 August 2017, the Committee notified the Government of the terms of settlement with the plaintiffs.
- [9] On 5 September 2017, the Repeal Act received Royal Assent and became law.
- [10] On or about 27 September 2017, the plaintiffs' Counsel wrote to the Minister of Finance 'giving notice that the Government is responsible for payment of the plaintiffs' employment contracts'.
- [11] These proceedings were commenced on 9 January 2018. The plaintiffs seek to recover from the Committee and from the Kingdom the settlement payments.
- [12] The proceedings were served upon the Kingdom on or about 12 January 2018 and came to the attention of the Solicitor General, Mr. Sione Sisifa, on 23 January 2018. Mr. Sisifa had communications with the plaintiffs' Counsel, Mr. Edwards Jnr, to which I shall refer in more detail later in this ruling.
- [13] No statement of defence was filed by the Kingdom and on the plaintiffs' application judgment in default of defence as to liability was entered against the Kingdom on 2 August 2018.
- [14] The Kingdom applied to set aside the default judgments on 22 August 2018.

## The law

- [15] As noted above, the Kingdom relies upon O. 14 Rule 4 and the inherent jurisdiction of the Court. The Rule provides:

### 0.14 Rule 4. Setting aside judgment

(1) A judgment entered under rule 1 may be set aside if the defendant satisfies the Court that —

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

(2) Application notice under paragraph (1) shall be supported by an affidavit.

- [16] The relevant principles that apply to such applications are well settled and Dr. Harrison referred me to a line of decisions of the Court of Appeal and the Supreme Court namely *Jewett Cameron South Pacific Ltd v Tu'uholoaki* [1999] Tonga LR 51; *Tonga Water Board v Likiliki* [2008] TOCA 9; *Hoar v du Bois* [2009] TOCA 15; *Moebau v Pacific Stores Ltd* [2009] Tonga LR 382; *Apex Insurance Brokers Ltd v Finau* [2012] TOCA 4; *Prasad v Tu'utafaiva* [2017] TOSC 42 and; *Wallace v Tupou* [2018] TOSC 14.

- [17] Dr. Harrison submitted, and I agree, that the authorities establish that O. 14 Rule 4 is not the only source of jurisdiction to set aside a judgment entered by default, and that the O. 14 Rule 4(1)(a) – (c) criteria are neither mandatory hurdles, nor exhaustive.

- [18] In *Apex Insurance Brokers Ltd v Finau* (*supra*) at [42] the Court of Appeal noted that whilst ordinarily the Court would consider the criteria identified in the Rule before determining whether judgment should be set aside, the Court must also step back and contemplate overall an exercise of the Court's inherent jurisdiction, 'untrammelled in terms', to set aside default judgments. The Court referred with approval to *Evans v Bartlam* [1937] AC 473 where, at page 489, Lord Wright said that:



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.

### **Good reason for the failure to file a defence**

- [19] To understand why the Kingdom did not file a defence to the plaintiffs' claims it is necessary to have regard to the evidence of Mr. Sisifa and Mr. Edwards and the email correspondence that passed between them prior to time that the plaintiffs obtained their default judgments. There is not a great deal of dispute between them as to what occurred.
- [20] Once the Kingdom was served with the proceedings there were delays whilst Mr. Sisifa obtained instructions for a variety of reasons (including Tropical Cyclone Gita). Requests by Mr. Sisifa for time to take instructions and file a defence were granted by Mr. Edwards up to 13 April 2018. It was then further agreed that the Kingdom would not file its defence (which Mr. Sisifa said was prepared) in favour of a meeting on 18 April 2018 to discuss settlement. On 13 April 2018, Mr. Edwards emailed Mr. Sisifa, with what he described as an undertaking, that if at the meeting there was no satisfactory resolution 'I will still give you time to file a defence'. There was a settlement meeting on 18 April 2018 which Mr. Edwards said 'went well' and then further correspondence between Mr. Edwards and Mr. Sisifa concerning settlement, culminating in Mr. Edwards writing to Mr. Sisifa on 9 May 2018 setting out proposed terms of settlement. Mr. Sisifa did not respond to that letter until 29 May 2018 when he advised that he was awaiting instructions and would respond by 'this Friday'. He did not do so. It appears that in June, and possibly also in July, Mr. Edwards and Mr. Sisifa met at Court where the matter was discussed. Mr. Edwards filed the plaintiffs' applications for judgment by default on 20 July 2018 and did not give notice to Mr. Sisifa of his intention to do so.
- [21] The Kingdom argues that there was good reason for its failure to file a defence as the parties' preference was to reach a negotiated settlement and Mr. Sisifa had received an undertaking that if no settlement was reached the Kingdom would be given time to file its defence. It is the Kingdom's case that the plaintiffs attempted to 'steal a march' by applying for judgment by default.
- [22] The plaintiffs argue that the Kingdom had been granted extensions of time to file its defence which was considerably overdue and that Mr. Edwards' 'undertaking' did not

grant the Kingdom 'unlimited time' to file a defence. When Mr. Sisifa failed to respond to the plaintiffs' settlement offer, the plaintiffs contend, they were entitled to apply for judgment by default without giving further notice.

[23] The Kingdom was overdue in filing its defence and it would have been prudent for Mr. Sisifa to have done so. I accept that when he applied for judgment on the plaintiffs' behalf Mr. Edwards was not breaching his undertaking, at least according to its terms if not its spirit. However, the Kingdom had not ignored the claims and it was known to Mr. Edwards that it intended to file a defence if there was no settlement. Against the background of the extensions of time that had been given, the undertaking, the settlement negotiations (which had not concluded) and discussions that had occurred between Mr. Edwards and Mr. Sisifa at Court, it is understandable that Mr. Sisifa considered that there was no need for him to file the Kingdom's defence.

[24] The case law is clear that a failure by a solicitor to protect his/her client's position and file a defence may amount to 'good reason' for the purposes of O. 14 Rule 4. In *Hoar v du Bois* at [12], the Court of Appeal noted that Counsel accepted 'total responsibility' for the failure to file a defence in time and that this 'provides a reason for the failure to file the Statement of Defence'

[25] Similarly in *Prasad v Tu'utafaiva (supra)* at [23], I observed:

The obligation to establish "good reason" in O.14 Rule 4 does not mean that the failure to file a 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 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 ... 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.

[26] To the extent that the Kingdom's failure to file its defence may be regarded as due to some default or failing on the part of its Counsel a similar approach as was taken in *Hoar* and *Prasad* is clearly warranted. I am satisfied that good reason for the failure of the Kingdom to file a defence in time is established.

- [27] Mr. Edward referred me to *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 as authority that the Court should adopt a new approach of strictly enforcing the requirements of the Rules. I get no assistance from *Mitchell* which is concerned with a legal environment far removed from the one that exists in Tonga.

**Is there an arguable defence?**

- [28] I understood Mr. Edwards to accept that the Kingdom does have an arguable defence to the claims. That concession was correctly made.
- [29] The plaintiffs' advance two causes of action. The first cause of action is that the Kingdom had a contractual obligation under the plaintiffs' contracts of employment to honor the settlement payments.
- [30] The Kingdom was not a party to the plaintiffs' employment contracts nor was it a party to the terms of settlement. I know of no principle that would make the Kingdom liable on the Committee's contracts simply because the Committee was a statutory authority (as the plaintiffs have pleaded), particularly in circumstances where the Committee was a separate legal entity that was financially autonomous and independent of any Government Department (s. 5(2) of the Act). It is plain that the Kingdom has an arguable defence to this cause of action without having regard to further matters advanced by Dr. Harrison based on frustration of contract and the Public Finance Management Act.
- [31] The plaintiffs' second cause of action is that the Kingdom breached an alleged statutory duty to meet the settlement payments. The duty is said to arise under s. 17(2) of the Act which provided:

The Government of the Kingdom shall ensure that, as a funder of last resort the Organizing Committee receives sufficient funds to enable it to generally organize and conduct the Games.

- [32] A number of arguable defences are available to the Kingdom in respect of this cause of action. First, to the extent that s. 17 imposes any duty upon the Kingdom it was a qualified duty 'as a funder of last resort' to provide sufficient funds to the Committee 'to enable it to generally organize and conduct the Games'. It is arguable that such a duty was not intended to found a cause of action or was not owed to the plaintiffs and that



the settlement payments were not in respect of the organization or conduct of the Games (*Clark v Pikokivaka* [1993] Tonga LR 50)

[33] Secondly, I agree with Dr. Harrison that the plaintiffs' cause of action proceeds on the basis that the Kingdom was in breach of duty prior to the repeal of s 17. This is not accepted by the Kingdom and the Court could only reach such a conclusion based on a detailed consideration of the facts including, inter alia, the Committee's financial position between the date the Committee agreed to the settlement payments and the repeal of the Act.

[34] It is not necessary for me to consider additional defences that the Kingdom intends to advance challenging the validity of the plaintiffs' contracts of employment and the Committee's resolution to make the settlement payments.

[35] I am satisfied that the Kingdom has an arguable defence to the plaintiffs' claims.

**Will the plaintiffs suffer irreparable injury if the judgments are set aside?**

[36] Mr. Edwards submitted that the plaintiffs will suffer prejudice because had the Kingdom filed a defence as required by the Rules these cases would have been resolved sooner rather than later. I do not accept this submission. Had the Kingdom filed a defence the cases would not have been resolved but would have proceeded as defended actions. To the extent that there have been significant delays that is attributable largely to the plaintiffs' failure to give notice before seeking judgment and their opposition to these applications.

[37] There is a suggestion in the evidence that if the judgments are set aside some of the plaintiffs may not, by reason of their ages, receive the enjoyment of their monetary claims. I cannot accept that submission as there is nothing to suggest any of the plaintiffs are in dire financial need.

[38] It was also suggested that the Kingdom would not suffer any injury if the judgments were not set aside as it has substantial funds gathered from foreign exchange and departure tax levies that it has made to cover the cost of the Games. Such a submission has no factual foundation and in any event this is not a matter relevant to whether the plaintiffs will suffer irreparable injury.



- [39] I am satisfied that the plaintiffs will not suffer irreparable injury if the judgments are set aside.

### **Inherent jurisdiction**


- [40] All of the requirements of O. 14 Rule 4 are satisfied. Had I felt it necessary to have resort to the Court's inherent jurisdiction, given what appears to the Kingdom's strong defences to the causes of action that are pleaded, I would have set aside the judgments in any event.

### **Result**

- [41] The Kingdom's applications are successful. The judgments in default of defence obtained by the plaintiffs are set aside.
- [42] I reserve costs pending receipt of memoranda within 14 days. Upon receipt of the memoranda I will make a decision on the papers unless any party specifically requests a hearing.
- [43] The actions shall be called for mention and timetabling at **9am on 23 November 2018**. Counsel should confer as to a suitable timetable.
- [44] Mr. Edwards should give consideration also to Dr. Harrison's suggestion that the Committee be removed as a named party.

NUKU'ALOFA: 8 November 2018.



  
O.G. Paulsen  
LORD CHIEF JUSTICE