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

CV 1 & 2 of 2018

CV 1 of 2018

BETWEEN: LORD SEVELE-'O-VAILAHI

Plaintiff

AND: PACIFIC GAMES ORGNIZING COMMITTEE

First Defendant

THE KINGDOM OF TONGA

Second Defendant

CV 2 of 2018

BETWEEN: SAKOPO LOLOHEA

First Plaintiff

'ETONISIA TONGA

Second Plaintiff

PAULA TU'UTAFAIVA

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 ORGNIZING COMMITTEE

First Defendant

THE KINGDOM OF TONGA

Second Defendant

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BEFORE LORD CHIEF JUSTICE PAULSEN

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

Date of Hearing: On the papers
Date of Ruling: 18 December 2018

RULING ON COSTS

An issue of costs

[1] On 8 November 2018, I issued a ruling granting applications by the second defendant to set aside judgments obtained by the plaintiffs by default. In that ruling I reserved costs pending receipt of memoranda from Counsel and noted that I would deal with the matter of costs on the papers unless any party specifically requested a hearing.

[2] I have received the memoranda but no request for a hearing and I am therefore dealing with the matter on the papers.

The parties' positions

[3] The plaintiffs seek costs on the applications to set aside judgment or in the alternative argue that costs should be in the cause.

[4] The second defendant seeks cost on the basis that the plaintiff in CV 1 of 2018 and the plaintiffs in CV 2 of 2018 (the latter jointly and severally) pay half each of the second defendant's costs and disbursements of the applications. In relation to disbursements, the second defendant accepts that the overall claims in this area should be limited to 50% of total expenditure reflecting the fact that on the same day as the applications to set aside judgment were heard Dr. Harrison also argued another matter before this Court in *Pacific Games Council v Kingdom of Tonga* (CV 16 of 2018).

The arguments

The plaintiffs

[5] In seeking costs, the plaintiffs submit that the Court must consider the circumstances under which the default judgments were obtained and that this was a very 'bad case' of default by the second defendant in failing to file its defenses. Furthermore, the plaintiffs argue that as the decision to set aside a default judgment is the exercise of discretion it cannot be said that the plaintiffs were wrong to oppose the applications. The plaintiffs also contend that the result of the applications was not 'inevitable and crystal clear' so they were entitled to oppose them.

The second defendant

[6] The second defendant argues that it was successful and the applications were strong. It goes so far as to say that its success in having the default judgments set aside was inevitable. It submits that the arguments advanced by the plaintiffs in opposition to the applications were never going to be sufficient for them to retain their judgments given the strong defenses available to the second defendant and the absence of any evidence that irreparable injury would result if the judgments were set aside

[7] In addition the second defendant contends that it had established good reason for the failure to file a defense and the plaintiffs' criticisms for the delay in doing so were not valid as the plaintiffs' had filed for judgment without warning and in an effort to steal a march.

[8] I was also referred to 'without prejudice except as to costs' correspondence between Counsel in which Dr Harrison had, on 28 August 2018, proposed that the plaintiffs consent to the applications on the basis that costs would lie where they fall. The plaintiffs rejected that offer with Mr. William Edwards Jnr asserting that the arguments advanced for the second defendant were 'non meritorious and quite frankly nonsense' and that 'there is some anger exhibited from my clients'.

Discussion

[9] Order 13 Rule 8(1) of the Supreme Court Rules provides that in making an order in respect of an application the Court may make such order as to costs as it thinks fit. The often stated principle that costs should follow the event is primarily directed to a

consideration of the merits of the action as a whole and does not necessarily apply in respect of every step taken in a proceeding. Importantly, it has been held that a party who seeks an indulgence of the Court may be ordered to pay the other party's costs resulting from the Court assessing the former's application for this purpose. Consistent with this, it is usually the case that a successful applicant should pay a respondent's costs of an application to set aside a default judgment when the judgment has been obtained as a consequence of some default by the applicant.

[10] In *Burgoine v Taylor* (1878) 9 Ch. D 1 a defendant was not represented at trial because of the negligence of his solicitor. The judgment obtained by the plaintiff was set aside, but in relation to costs Jessel M. R. said at pg 4-5:

> We think that the order asked for by the Defendant ought to be made. Solicitors cannot, any more than other men, conduct their business without sometimes making slips; and where a solicitor watches the list, and happens to miss the case, in consequence of which it is taken in his absence, it is in accordance with justice and with the course of practice to restore the action to the paper, on the terms of the party in default paying the costs of the day, which include all costs thrown away by reason of the trial becoming abortive. As a general rule, solicitors in my branch of the Court consent to such an order as is now asked, and that such an application should be opposed is to me a novelty. Still, as the Appellant was in default, he must pay the costs of the application to the Court below, but no costs of the appeal.

[11] In a Tongan context, in *Moehau anors v Pacific Stores Limited* [2009] Tonga LR 382 a default judgment was obtained and the Supreme Court refused to set it aside. On appeal the Court of Appeal set aside the default judgment and in relation to costs said at [12]:

> ....the default judgment entered against the Appellants should be set aside. As the normal order below in such circumstances would require the Appellants to pay the costs of and incidental to their application for an indulgence, while the Appellants, as successful parties to the appeal, would normally receive their costs of the appeal, we think justice would be done by an order that there be no order as to the costs of and incidental to the application below or the costs on appeal, and we so order.

[12] Similarly in *Apex Insurance Brokers Ltd v Finau* [2012] Tonga LR 112 a successful appellant from the Supreme Court's refusal to set aside a default judgment was required to pay the costs in the Supreme Court.

[13] At the Supreme Court level in both *Jewett Cameron South Pacific Ltd v Tu'uholaki* [1999] Tonga LR 51 and *Sevele v Pohiva anor* [2008] Tonga LR 37 the defendants who successfully obtained orders setting aside default judgment were ordered to pay the costs of the application.

[14] However, the general rule (that a party seeking an indulgence shall bear the costs) is not to be invoked as 'some universal talisman independent of the circumstances of the case' (Dal Pont 'Law of Costs' at [14.37]). It is open to the Court to make some other order in relation to costs as the justice of the case requires. The authors of Dal Pont note:

> ..it may be inaccurate to view an application as an indulgence if it seeks the exercise of a statutory discretion conferred on the court. There may, moreover, be a valid explanation for the delay attending to the application, such as attempts to resolve the matter….it is open to the Court to reserve the question of costs to the ultimate hearing or make them costs in the cause.

[15] The plaintiffs' judgments were regularly obtained. They were entitled to apply for judgment by default. The second defendant's then Counsel was imprudent in failing to file statements of defence in compliance with the Rules. However, it was not in the spirit of the dealings between Counsel that judgments were obtained without notice and there is some force in Dr. Harrison's submission that a realistic appraisal of the applications should have led the plaintiffs' Counsel to an understanding that the applications were very likely going to be granted. It was notable in this regard that at the hearing Mr. Edwards was unable to maintain an argument that the second defendant did not have an arguable defence to the claims. Furthermore, in the face of what was in the circumstances a sensible offer to resolve the applications the plaintiffs determined to persist with their opposition when their grounds for doing so were not strong.

[16] I consider the merits in this case are finely balanced. On the one hand, the second defendant is asking for an indulgence and the Court should encourage parties and their Counsel to respect and comply with the requirements of the Rules. On the other hand, the Court could have expected the plaintiffs' Counsel to make a more realistic appraisal of their position and should discourage the taking of positions on unmeritorious

grounds resulting in unnecessary costs. On balance I have decided costs should lie where they fall.

Result

[17] The costs and disbursements on the application to set aside the default judgments of 2 August 2018 are to lie where they fall.

O.G. Paulsen
LORD CHIEF JUSTICE

NUKU'ALOFA: 18 December 2018.