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31/05/19

IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY CV 1 of 2019

BETWEEN : 1. 'UNUAKI-'O-TONGA ROYAL INSTITUTE
2. 'ETUATE S. LAVULAVU
3. 'AKOSITA H. LAVULAVU
- PLAINTIFFS

AND : AUDITOR GENERAL
- DEFENDANT

BEFORE HON. JUSTICE NIU

Counsel : Mr. O. Pouono for first and third plaintiffs.
Mr. 'E. Lavulavu for himself as second plaintiff.
Mr. 'A. Kefu SC for defendant

Hearing : 7 and 10 May 2019.

Ruling : 28 May 2019

RULING

[1] The defendant has applied to strike out the claim of the plaintiffs upon the grounds that –

(a) the claim is in fact an application for judicial review because it includes prayers for orders of declaration, namely, that

rec'd 29/05/19

(i) the defendant acted in bad faith,

(ii) the defendant infringed the plaintiffs' rights to natural justice, and that

(iii) the defendant's report dated 5 October 2016 was biased and unfair;

but no leave has been applied for or granted by this Court, and that even if it was applied for it is well out of time because it is well over 3 months since the date of issue of the report on 5 October 2016;

(b) the claim discloses no reasonable cause of action: and

(c) the second defendant is not a practising law practitioner but he purports to sign the claim and to act as such for the first and third plaintiffs.

Representation

[2] The plaintiffs have opposed the application, and Mr. Pouono has now appeared and acted for first and third plaintiffs, and Mr. Lavulavu has appeared and represented himself. That has cured the problem with regard to representation of the plaintiffs.

Cause of action

[3] It is not disputed that this audit carried out on the first plaintiff was done in pursuance of the powers of the defendant under the Public Audit Act 2008. That Act empowers the defendant, under S.8(1), to employ the persons that he instructed to carry out this audit and to determine their terms and conditions of employment. And if those persons had already been appointed before the Act came into force, then S.8(2) provided that all such persons were deemed to have been appointed by the defendant at no less favourable terms and conditions as before.

[4] As his employees, the defendant may be vicariously liable for all acts and omissions of those persons who were carrying out the audit of the first plaintiff. Those persons are authorised officers and they may, under S.15(2) of the Act, "examine or audit any transactions, books and accounts and other financial records the

Auditor General is required or authorised by any Act to examine or audit and to report thereon to the Auditor General."

[5] In paragraph 17 of the statement of claim, the plaintiffs say that the audit team of the defendant were spreading negative report about them, namely, that they had found fraud and lies in the records of the first plaintiff. If that is true, then it may have been wrongful for the officers to have done that because their duty was to report to the Auditor General and to no one else, and the Auditor General may only report to the chief executive officer of the Government Ministry or agency in whose interest the audit was being done (S.23(1)), and such wrongful act may be actionable.

[6] In paragraph 19, the plaintiffs say that the audit team of the defendant took and removed from the premises of the first plaintiff the students' confidential informational documents without the knowledge or consent of the second and third plaintiffs who were the directors and persons responsible for the first plaintiff. The plaintiffs say that that was wrongful and that no list was made of every document that was taken and removed. If that is true, then it is difficult to ascertain now what document was taken or was not taken or which may be claimed was not taken. That may be serious and may be actionable.

[7] In paragraphs 21 to 26, the plaintiffs say that the defendant Auditor General has issued his final report on the audit carried out by his audit team without giving them the right to be heard in their defence to his findings in the report, namely that they had misused and converted to their own use grant funds unlawfully, and that they had used names of people as alleged students of the first plaintiff when such people were not students of the first plaintiff. They say that that is a breach of natural justice, and they pray that declarations be made that the defendant acted in bad faith, that the defendant infringed their rights to natural justice and that the report was biased and unfair.

[8] Whether or not the plaintiffs are entitled to such declarations or to damages, which they also seek, I cannot say because that cannot and need not be decided in this application. All I have to decide is whether or not the plaintiffs have stated or

disclosed in their statement of claim a reasonable cause of action. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in *Drummond Jackson v British Medical Association* [1970] 1 W.L.R 688). So long as the statement of claim discloses some cause of action, or raise some question fit to be decided by judge or jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out (*Moore v Lawson* 31 T.L.R 418 CA; *Wenlock v Moloney* [1965] 1 WLR 1238). I consider that the statement of claim of the plaintiffs in the present case does disclose some questions fit to be tried and that they do have some chance of success.

[9] Accordingly, I find that the statement of claim of the plaintiffs, as I have referred to above, does disclose a reasonable cause of action.

Leave to apply for judicial review

[10] It is clear that the claim of the plaintiffs is a judicial review application and that it has been filed as an ordinary civil action without leave having been applied for or been granted by this Court, as required by Order 39 of the Supreme Court Rules 2007. That order provides that "no application shall be made for judicial review unless the leave of the Court has been obtained in accordance of this rule". That provision is mandatory. Order 39 Rule 1 provides what is a judicial review proceeding. It is "any action against an inferior Court, tribunal or public body (including an individual charged with public duties) in which the relief claimed includes an order of mandanus, prohibition or certiorari, or a declaration or injunction ...".

[11] And rule 2(2) of that order provides:

> *"(2) An application for leave to apply for judicial review shall be made promptly and in any event within 3 months from the date when grounds for the application first arose unless the Court considers that there is a good reason for extending that period."*

[12] The defendant says that the grounds for the application first arose on 5 October 2016 when the audit report was issued, and that it is 2 years and 3 months later

that this claim has been brought by the plaintiffs, and that there is no good reason for extending the 3 months period provided by the rule.

[13] Mr. Lavulavu has submitted that the report was not official until it was tabled in the Legislative Assembly on 15 October 2018, and that date is the date on which the 3 months began. I do not agree. The critical date is the date on which "the grounds for the application first arose." In paragraph 19 of the claim, the date on which the documents were taken by the audit team was the 9 June 2016. That is the date on which one of the grounds of the claim first arose. The other grounds arose when the report was issued without having afforded to the plaintiffs the right to be heard, on 5 October 2016. They did not arise only when the report was tabled in Parliament.

[14] The reason for the requirement that application for leave be made within 3 months is to give the plaintiff applicant sufficient time to consider the decision and its validity or invalidity and to file his application for leave. That 3 month period is also sufficient time for the public official or body to wait and see if his or its decision is being challenged, before he or it proceeds to enforce it. Chief Justice Lewis alluded to that in his ruling in *Holani v Kingdom of Tonga* [1997] Tonga LR 264, at 265: "The Rules are designed to ensure application within a specified time so that the class against whom review may be sought will not be disadvantaged or prejudiced."

[15] Was the defendant prejudiced or disadvantaged by the long delay? Was the defendant misled into thinking that his report would not be challenged by the long delay in filing this claim against him? The second plaintiff has filed on 1 April 2019, his response to the application of the defendant to strike out the claim. In that reply he has attached copies of correspondence which he made to and received from

(a) the defendant,

(b) the chief executive officer of the Education department,

(c) the Ombudsman,

(d) the Attorney General,

over the period 6 October 2016 (day after the report was issued) to November 2018, 2 years.

[16] And in an affidavit which he filed on 7 May 2019, but which he had not as yet signed or sworn, he outlined the gist of what those correspondence were about, from para. 34 to para. 69. What is important about those correspondence, for the purpose of this application of the defendant, is that they show that the defendant was left in no doubt at all that the plaintiffs, or at least the second plaintiff, was not satisfied with the report that he had issued on 5 October 2016, for the same grounds he now discloses in the present statement of claim, and that he would be bringing this claim if he received no satisfaction. He says that it was only in January 2019 that the CEO of the education department informed him that he would not agree to this matter being arbitrated. Hence the filing of this action on 22 January 2019.

[17] Even the Police were not prejudiced because they issued their summons and had the second and third plaintiffs arrested and charged with criminal offences in respect of the funds audited and in respect of which the defendant's report was issued on 5 October 2016. Those summons and arrests were done in March 2018.

[18] So that it would be fair to say that the plaintiffs have consistently maintained their challenge of the report of the defendant from October 2016 to January 2019 when they filed their present claim in this Court, so that the defendant has not been prejudiced or disadvantaged by the late filing of this claim.

[19] On 10 May 2019, the second plaintiff filed his response to the application to strike out the claim, and in addition to the submissions which he set out in some 14 pages filed, he sought orders as follows:

"And upon any further grounds that may appear in the affidavit of support of my case.

Wherefore, I seek the following orders from this Honourable Court:

1. The Defendant Counsel's strike out application be quashed on the ground that issuance of the writ of summons number CR87-92/2018 was premature as dialogue between me, the Ministry of Education and Training and the Defendant were still ongoing at the time; there is no abuse of your court's process; and there are adequate reasonable causes of action against the Defendant as mentioned.

2. Leave of Court to go through a trial or judicial review to assess if my rights to natural justice was affected in due process when the Defendant performed his duties, and if the Defendant failed to perform appropriate care of duty, and if there any negligence in the part of the Defendant when performed his duties.

3. Defendant Counsel's application for legal costs be quashed.

4. Such further order as this Honourable Court deems just."

[20] This Court therefore has an application or request of the plaintiffs for leave of the Court for the plaintiffs to apply to this Court for judicial review of the acts of the defendant in carrying out the audit and the issue of his report of that audit on 5 October 2019.

[21] It is true that the plaintiffs have not properly sought the leave of the Court to file its application (statement of claim) for judicial review of the defendant Auditor General's action and action of his audit team and to do so within 3 months of the date of issue of the report on 5 October 2016, but as I have stated, no disadvantage or prejudice has been suffered by the defendant because the plaintiffs immediately and continuously pursued their dissatisfaction with the report right up to filing of their claim in this Court in January of this year.

[22] I consider that it is in the interests of justice that the application of the plaintiffs for judicial review be heard by this Court and that leave be granted for them to do so. There has been a good reason for the delay in bringing it, namely, the pursuit of other avenues open to them.

Orders

[23] Accordingly, I make the following orders:

(a) Leave is granted to the plaintiffs to apply for judicial review of the actions of the audit team of, and the issuance by, the defendant Auditor General of his report of 5 October, as presently stated in their statement of claim.

(b) The defendant shall file his defence to the application, that is, statement of claim within 28 days from the date of these orders.

(c) The plaintiff shall file any reply to the defence within 14 days of service of the defence on them.

(d) This matter will be called in chambers at **9:00am, 16 July 2019** for timetabling and trial date.

(e) The costs of this application shall be costs in the cause.

SUPREME COURT TONGA

L. M. Niu

NUKU'ALOFA: 28 May 2019. **JUDGE**