

Solicitor General
Scan, email, upload
& file
07/10/19

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

CV 1 and 2 of 2018

BETWEEN:

CV 1 of 2018

LORD SEVELE-'O-VAILAHI

Plaintiff

-and-

THE KINGDOM OF TONGA

Defendant

CV 2 of 2018

SAKOPO LOLOHEA *and eight others*

Plaintiffs

-and-

THE KINGDOM OF TONGA

Defendant

DEFENDANT'S STRIKE OUT APPLICATION FILED 16 SEPTEMBER 2019

BEFORE: LORD CHIEF JUSTICE WHITTEN
COUNSEL: Mr S. Stanton SC for the Plaintiffs
Dr R. Harrison QC SC for the Defendant

Date of hearing: 3 October 2019

Date of ruling: 3 October 2019

RULING

Defendant's third strike out application

1. On 31 July 2019, Paulsen LCJ struck out the plaintiffs' then cause of action alleging breach of clause 18 of the Constitution, but he held [53] that " the plaintiffs' cause of action alleging breach of clause 20 are not struck out but the plaintiffs' remedy is limited to declaratory relief only".

rec'd 03/10/19
JTB

2. Consequently, on 13 August 2019, the plaintiffs filed their Third Amended Statements of Claim, by which references to clause 18 were deleted from paragraphs 3, 29 and 30, as was the previous paragraph 31(a). However, the prayer for relief was amended to the following:
 - (a) *A declaration that the Repeal Act is invalid as it breaches clause 20 of the Constitution and does not in the circumstances apply to the Settlement of the Contract;*
 - (b) *A declaration that the Plaintiff is entitled to payment of the Settlement together with 10% interest thereon;*
 - (c) *Any further order that this Honourable Court may deem just and equitable; and*
 - (d) *Costs and disbursements of and incidental to this proceeding.*
3. On this third application, the defendant applies to have prayers (b) and (c) struck out.
4. The parties filed extensive written submissions.

Submissions

5. The principal basis for the defendant's application is, Mr Harrison submitted, that the combined effect of the rulings by Paulsen LCJ on the first and second strike out applications constitutes a res judicata or issue estoppel precluding the plaintiffs from now seeking any relief by way of compensation or damages.
6. Further or alternatively, the defendant submits that the offending prayers should be struck out on the merits, by repetition of its successful arguments on the last application, namely that:
 - (a) clause 20 of the Constitution confers no right or cause of action for damages or monetary compensation; and
 - (b) the challenged prayers are prohibited by reason of clause 103A of the Constitution.
7. During the course of argument, Mr Stanton SC, who, with Mr W. Edwards, appeared for the plaintiffs, stated frankly that he had not drafted prayer (b). He agreed that if the

Plaintiffs are successful on their constitutional challenge to the validity of the Repeal Act (prayer (a)) in this proceeding, such that the 2013 principal Act and the Pacific Games Organising Committee will be revived, the plaintiffs will be at liberty to seek recovery of their alleged monetary entitlements under the compromise agreement on their employment contracts from the Committee, failing which, they may commence proceedings against the Committee for damages for breach of that agreement. He added that in that event, and in any such proceedings, the Kingdom might also be joined on the basis of the plaintiffs' contention that section 17 of the principal Act prescribed the Kingdom as the "funder of last resort".

8. Mr Stanton conceded, with equal candour and correctly with respect, that in that eventuality, prayer (b) here is unnecessary; and in the face of the defendant's arguments on this application (a number of which had not been answered by the plaintiffs in their written submissions), it should go.
9. Rather than file a Fourth Amended Statement of Claim, the Third will remain in place save that all copies, including the one on the court file, will have prayer (b) struck through.
10. Mr Harrison pressed the application in respect of prayer (c), mainly out of a concern born of the history of the matter that a new "Hydra" head of claim might emerge. In light of the outcomes on now three strike out applications and the frank exchanges with Mr Stanton during submissions today which I trust have now focused all parties attention on the single principal issue of the constitutional validity of the Repeal Act, I do not consider it likely that the defendant's concern will manifest. It is therefore neither necessary or appropriate to strike out the commonly pleaded prayer (c).

Result

11. Accordingly, I make the following orders for the disposition of this application and directions for the future conduct of the matter:
 - (a) Paragraph (b) of the prayer for relief in the Third Amended Statement of Claim is struck out.
 - (b) The defendant's application to strike out paragraph (c) of the prayer for relief is dismissed.

- (c) The plaintiffs are to pay the defendant's costs of and incidental to this application, to be taxed in default of agreement.
- (d) The defendant is to file and serve its Statement of Defence by 1 November 2019.
- (e) Any Replies by the plaintiffs are to be filed and served by 8 November 2019.
- (f) The evidence for trial shall be by way of affidavit, exhibiting all documents upon which any party intends to rely at trial, to be filed and served by 19 November 2019.
- (g) The plaintiffs shall file and serve an outline of submissions for trial by 24 January 2020.
- (h) The defendant shall file and serve its outline of submissions in response by 7 February 2020.
- (i) The proceedings are listed for trial before me on 14 February 2020 on an estimate of one day.

NUKU'ALOFA
3 October 2019




M.H. Whitten QC
LORD CHIEF JUSTICE