


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

CV 48 of 2014

BETWEEN:

- 1. PUBLIC SERVICE ASSOCIATION
INCORPORATED**
- 2. SAMIUELA 'AKILISI POHIVA**

- Plaintiffs

AND:

- 1. THE KINGDOM OF TONGA**
- 2. THE ATTORNEY GENERAL**
- 3. FRIENDLY ISLANDS SATELLITE
COMMUNICATION LIMITED**

- Defendants

R.E. Harrison QC SC for the Plaintiffs

S.J. Stanton SC with S. Sisifa for the First & Second Defendants

W. Edwards for the Third Defendant

DECISION

[1] This is yet another action arising out of the disbursement by the then Government of the Kingdom of Tonga in favour of the Third Defendant and others of the greater part of USD\$25,450,000.00 received by it in grant aid from the Government of the People's Republic of China.

[2] Among other proceedings arising from the same events directly or indirectly are the private criminal prosecutions which led to Criminal Appeals AM 20 of 2013 and AM 4/2015 and civil actions CV 75/14, CV 55-58/14, CV 87 & 95/14 & CV 49/14. It is plain that the central issue, still unresolved, is one of significant public importance.

[3] These proceedings were commenced on 7 July 2014 that is, just over three years after the matters complained of. The Plaintiffs seek declarations that the disbursement of the aid funds was unlawful, that the Third Defendant was unjustly enriched and that it is unlawfully retaining or has converted the funds. The Plaintiffs also seek repayment or damages in lieu.

[4] There are now three applications before the Court. They are:

- 1) Application by the Defendants to strike out the writ on the grounds that a) the Plaintiffs lack standing to bring the action b) that the proceedings ought to have been commenced by application for leave to move for judicial review and c) that the Plaintiffs claim discloses no reasonable cause of action.

- 2) Application by the Defendants for security for costs to be provided by the Plaintiffs.

3) Application by the Plaintiffs for leave to move for judicial review, an application, in effect to continue the present proceedings in the revisional rather than the civil jurisdiction of the Court.

[5] Counsel filed comprehensive written submissions for which I am grateful and to which reference is respectfully made.

[6] In my view applications 1(b) and 3 raise the fundamental questions to be answered and I will therefore take them first.

[7] Section 16 of the Supreme Court Act provides for a five year limitation period where debt is alleged or damages sought. This period does not, apparently, apply for actions for a declaration. Judicial review, on the other hand must, by the Supreme Court Rules, be commenced by application made "promptly and in any event within three months from the date when the grounds for the application first arose unless the Court considers that there is good reason for extending that period".

[8] Judicial review is designed to provide a uniform, flexible and comprehensive code of procedure for the exercise by the Supreme Court of its supervisory jurisdiction free of the procedural difficulties associated with obtaining prerogative writs. Apart from inferior courts

or tribunals it is available against any person or body charged with a public duty. Because of its possible impact on administrative decisions taken or pending it must be applied for promptly and in considering applications made out of time the Court must be mindful of the needs of public administration (see *R v Monopolies and Mergers Commission Ex parte Argyll* [1996] 1 WLR 763)

- [9] In *Argyll* the Court also stressed “the need to be concerned with substance rather than form, with the legitimate interests of individual citizens and of the desirability of decisiveness and finality”.
- [10] In the present case, the decision impugned, namely the decision to disburse the grant aid funds to the Third Defendant and others is now final and complete; the money has been disbursed. The central legal question which is whether the funds were lawfully or unlawfully disbursed seems to me to be unaffected by the passage of time and to be capable of being critically examined either in the civil or the revisional jurisdiction of the Court. The claim for damages favours the former.
- [11] That the decision to disburse these funds has been a matter of national controversy since it was taken is clear from the exchanges of letters and the questions and motions in Parliament which followed within weeks of the decision being taken. Although the criminal prosecutions were misconceived, which is why they failed, the

Defendants therein and the Defendants herein cannot reasonably suggest that they have been taken by surprise by the commencement of the present proceedings.

[12] In my view this civil action is properly constituted. There is no need to apply for judicial review.

[13] Mr Stanton advanced several technical arguments in support of his submission relating to lack of standing. In my view however the Court's discretion is sufficiently broad properly to entertain proceedings for a declaration commenced by a respected and senior member of Parliament who complains of the unlawfulness of the actions of a previous Government. The standing of the First Plaintiff is less clear. It does not however seek relief for itself and its presence in the suit seems to add little of value to the proceedings. At the very least, however, the members of the trade union are presumably taxpayers and have an interest in the lawfulness of Government expenditure for that reason alone. I am satisfied that the Second Plaintiff has sufficient standing to bring these proceedings and see no advantage in dismissing the First Plaintiff from the suit.

[14] The Second Defendant's claim that the Plaintiffs have no cause of action against him is conceded in paragraph 6 of Dr Harrison's submissions dated 21 November 2014 and accordingly the Attorney General is dismissed from the suit.

[15] The remaining application is for security for costs. The relevant Order is RSC O 17 r 1:

"Where on the application of a defendant to any proceeding it appears to the Court that:

(b) The plaintiff may be unable to pay the costs of the defendant if ordered to do so;

the Court may, if after having regard to all the circumstances of the case it thinks just to do so, order that all the action be stayed until the plaintiff gives security for the defendant's costs of the proceeding in such sum and in such manner as the Court may determine".

[16] As to the First Plaintiff, section 17 of the Incorporated Societies Act – Cap 28 – requires a Plaintiff Society to satisfy the Court that it has sufficient assets to meet the costs of an unsuccessful action.

[17] All parties are in agreement that the central issue, the lawfulness of the disbursement in question is a matter of national concern which will involve careful consideration of important and sometimes difficult questions of law and fact. Leading Counsel will be involved on both sides. The trial will probably take at least 1 week. The position of the First Plaintiff is that TOP\$47,445 is held on term deposit. There is nothing however to show that the constitution of the Society permits

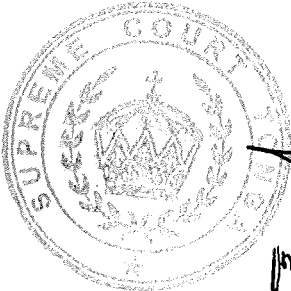
member's funds to be spent on or secured to an action of the present kind in which the interests of the Society are at best tangentially involved.

[18] It is a matter of record that the Second Plaintiff has incurred substantial unpaid costs from previous associated proceedings and that he has previously made public appeal for donations to allow him to proceed further. In all the circumstances I am satisfied that each of the Plaintiffs should pay to the Registrar of the High Court TOP\$20,000 by way of security. Pending payment the proceedings are stayed.

- Result:
1. Application to strike out the claim dismissed.
 2. Second Defendant dismissed from the suit.
 3. Security for costs assessed at \$20,000 each to be provided by the First and Second Plaintiffs.
 4. No order on the application for leave to move for judicial review.

Dated: 19 March 2015.

M. Taufa
4/3/2015

 *M. D. Scott*
M. D. Scott
JUDGE