

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

Sava & AL
02/09/15
CV 45 of 2015

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02/09/15

BETWEEN: ATTORNEY GENERAL

- **Plaintiff**

AND: MATENI TAPUELUELU

- **Defendant**

Counsel: Mr 'A. Kefu SC for the plaintiff
Mr. 'O. Pouono for the defendant

Date of Hearing: 31 August 2015.

Date of Ruling: 2 September 2015.

R U L I N G

[1] In this proceeding the plaintiff seeks declarations that the defendant's nomination, election and declaration as the people's representative for the Tongatapu 4 electoral constituency were unlawful and invalid.

[2] The plaintiff alleges that all of the aforementioned were in breach of clause 65 of the Constitution because when the defendant submitted

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his nomination for election there was an outstanding Court order against him, namely a Magistrate's Court judgment of 17 June 2011 which ordered the defendant to pay William Clive Edwards Snr \$10,000 in damages and costs of \$4,500.

[3] The defendant has yet to file a statement of defence but that is expected by 4 September 2015. A timetable has been made for discovery of documents and for the filing of evidence by affidavit and the trial will be held on 12 and 13 November 2015.

[4] The case came before the Court on 31 August 2015 to deal with two applications, namely:

[4.1] An application by the plaintiff for an order requiring the salary and benefits of the defendant as a people's representative to be paid into Court or withheld by the Crown until this case is heard; and

[4.2] An application by the defendant to strike out the claim on the grounds that it does not disclose a cause of action or is an abuse of the process of the Court.

[5] At the hearing I was advised by the Acting Attorney-General, Mr. Kefu SC, that given the proximate trial date he no longer wishes to pursue

the application in [4.1]. This leaves the defendant's application under [4.2] to be determined.

The strike out principles

[6] The defendant's application is made in reliance upon O.8 Rule 8(1)(a) and (d) of the Supreme Court Rules. The power to strike out a pleading is permissive. The rules confer a discretion to be exercised having regard to all the circumstances and quality of the pleading.

[7] The guiding principle on an application to strike out a claim was stated by the Court of Appeal in *Jagroop v Soakai and the Kingdom of Tonga*¹ as:

No party should have his claim denied without a hearing in the ordinary way, except where the claim is so hopeless that it cannot possibly succeed.

[8] As I have stated on other occasions² the striking out of a claim (or the dismissal of a defence) at an early stage of a proceeding is a matter of last resort. Facts pleaded in the statement of claim, whether or not admitted, are assumed to be true. Before striking out a claim the cause of action must be clearly untenable. The Court must be certain

¹[2001] Tonga LR 234, 236

²Fau v Fau LA 20 of 2014, 16 April 2015 Paulsen LCJ.

that the claim is hopeless and cannot succeed. As a general rule I consider that the discretion should be rarely used in cases that raise issues of general or constitutional importance.

Is there an arguable claim?

[9] The first ground advanced by the defendant is that the statement of claim discloses no reasonable cause of action. In his oral presentation Mr. Pouono argued that there had clearly been no breach of clause 65 of the Constitution as the Magistrate's Court judgment was subject to a stay ordered by the then Chief Justice, sitting as a member of the Court of Appeal, on 30 August 2012. The fact of the stay is not disputed by the plaintiff and is pleaded at paragraph 15 of the statement of claim.

[10] Clause 65 of the Constitution relevantly provides:

Representatives of the people shall be chosen by ballot and any person who is qualified to be an elector may nominate as a candidate and be chosen as a representative for the electoral constituency in which he is registered, save that no person may be chosen against whom an order has been made in any court in the Kingdom for the payment of a specific sum of money the whole or any part of which remains outstanding or if ordered to pay by instalments the whole or any part of such instalments remain outstanding on the day on which such person submits his nomination paper to the Returning Officer...

[11] The defendant has not satisfied me that the plaintiff's claim cannot possibly succeed for the following reasons. First, clause 65 prohibits a person being chosen as a people's representative "against whom an order has been made in any court in the Kingdom for the payment of a specific sum of money the whole or any part of which remains outstanding". The statement of claim alleges that the defendant is such a person.³ For the purposes of a strike out application I must accept that pleading as correct.

[12] Secondly, the case law has interpreted clause 65 literally and strictly.⁴ In *Fuko*⁵ the Court of Appeal stated:

There is no ambiguity in the wording of the clause, no obscurity, and simply no room for holding that the clause does not mean exactly what it says in clear terms. The appellant fell fairly and squarely within its terms.

[13] Relevant to the circumstances of this case are the comments made in *Pohiva v Mafi and ors*⁶ by Scott LCJ who said:⁷

³ At paragraph [3].

⁴ *Vaikona v Fuko (No 2)* [1990] Tonga LR 68, 73 per Webster J, approved by the Court of Appeal in *Fuko v Vaikona* [1990] Tonga LR 148. See also *Namoa, Piukala and Tapueluelu v Att-Gen* (Court of Appeal, unreported, 6 March 2002), *Att-General v Helu* (Webster CJ, unreported 10 March 2005), *Supervisor of Elections and ors v Tupouniua CV32/2014*, *Pohiva v Mafi and ors CV75/2014* (Scott LCJ, unreported, 17 October 2014) and *Taufeateau v Supervisor of Elections CV 06/2015* (Paulsen LCJ unreported, 17 March 2015).

⁵ At page 150.

⁶ CV 75 of 2014, 17 October 2014.

⁷ At [17].

Secondly, the Clause operates as a complete and final bar to a particular nomination. It contains no provision for its suspension pending review by the Court followed by retrospective operation if the review fails.

[14] Based on the case authorities and the facts as pleaded in the statement of claim the plaintiff has clearly shown an arguable case.

[15] Thirdly, the arguments advanced by Mr. Pouono did not address the nature of a stay. For present purposes it will suffice to say that I consider it arguable, as submitted by Mr. Kefu, that the stay obtained by Mr. Tapueluelu of the Magistrate's Court judgment did no more than protect him from enforcement of the judgment by Mr. Edwards but did not alter the fact of the judgment or release him from the disability that the judgment imposed upon him under clause 65.⁸

Is the claim an abuse of process?

[16] Mr. Pouono argued that the claim was an abuse of process because it was a challenge to the result of the 2014 General Election and that such a challenge can only be made by electoral petition within 28 days

⁸ Clifton Securities Ltd v Huntley and Others [1948] 2 All ER 283.

of the result of the poll being declared.⁹ I am satisfied that the claim is not an abuse of process for the following reasons.

[17] Whilst not intended as an exhaustive description, the term “abuse of process” usually connotes that the processes of the Court are being used for improper purposes or that a party is not *bona fide* or that the claim is groundless or unfounded in the sense that the plaintiff does not know of any facts to support it. There is nothing to suggest that such is the case here.

[18] Secondly, Mr. Kefu argues that the election petition procedure is one that is only available to electors, unsuccessful candidates or candidates but that it is not the only process by which an election can be challenged. The election petition process is, he submits, intended to apply only to what he described as politically motivated challenges to an election result but cannot have been intended to prevent the Attorney-General (who cannot file an election petition) as the First Law Officer of Tonga from fulfilling his obligation to protect the Constitution. It cannot have been intended, he says, that a candidate who unlawfully secures election can sit out his term in office in breach of clause 65 the Constitution. In this respect it is pertinent to note the words of the Court of Appeal in *Attorney General v Fuku*:¹⁰

⁹ Part V of the Electoral Act particularly sections 25, 26 and 27.

¹⁰ [2002] Tonga LR 184, 185.

In the affairs of the Kingdom there can be no drawing back from obedience to the Constitution. The representatives of the people who are involved in the making of the laws, must themselves comply, and be clearly seen to comply with the fundamental law of Tonga.

[19] The interpretation of the Electoral Act that the defendant advances has a quality of simplicity and certainty about it but I am not satisfied that it is the correct one having regard to the purpose and object that Part V of the Electoral Act seeks to accomplish and the requirement that Acts must be construed subject to the Constitution.¹¹ Difficult questions of interpretation arise in this case that cannot be resolved on this application.

[20] Thirdly, I accept Mr. Kefu's submission that it is arguable that if the Electoral Act does, upon a proper construction, impose a time bar on the application of clause 65 of the Constitution then it is inconsistent with the Constitution and to that extent void under clause 82 of the Constitution.

The result

[21] The plaintiff's application referred to in paragraph [4.1] is withdrawn by leave.

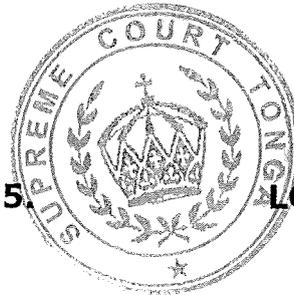
¹¹ Section 34 Interpretation Act.

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[21] The defendant has failed to satisfy me that there are any grounds to strike out this proceeding. Accordingly the defendant's application in paragraph [4.2] is dismissed.

[22] I reserve costs on both applications.



A handwritten signature in black ink, appearing to be "O.G. Paulsen", written in a cursive style.

NUKU'ALOFA: 2 September 2015.

O.G. Paulsen

LORD CHIEF JUSTICE