

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

Scan + Copy  
+ file

17/12/14

CV 75 of 2014

---

**BETWEEN: SAMUELA 'AKILISI POHIVA**

**- Applicant**

**AND : SALESI MAFI**

**- First Respondent**

**AND : 1. LORD TUIVAKANO  
2. H.R.H PRINCESS SALOTE PILOLEVU TUITA  
3. WILLIAM CLIVE EDWARDS  
4. FRIENDLY ISLANDS SATELLITE COMMS. LTD**

**- Second Respondents**

**Applicant in Person**

**A Kefu S.C (Ag Attorney General) for the First Respondent**

**W. Edwards for the Second Respondents**

**DECISION**

[1] On 12 February 2013 the Applicant commenced private criminal prosecutions against the Second Respondents in the Kolofou

Magistrate's Court. Details of the serious allegations of theft, conspiracy and receiving are set out in my judgment AM 20 of 2013 dated 17 January 2014.

- [2] A preliminary enquiry was held in the Magistrate's Court. The First Respondent presided. On 26 April 2014<sup>3</sup> an interim judgment dismissing all the charges was delivered and this was followed in May by a more detailed judgment affirming the same result.
- [3] On 19 July 2013 the Applicant appealed to the Supreme Court. That appeal was dismissed on 17 January 2014.
- [4] On about 26 April 2014 the Second Respondents applied to the Magistrate's Court for their costs of the unsuccessful private prosecution. On about 16 July 2014 the Court found in their favour and on 10 September 2014 TOP\$22,000 was awarded to them.
- [5] On 30 September the Applicant filed an ex parte application for leave to move for judicial review of the award. He sought a declaration that the award was "unlawful and invalid" and certiorari to quash it.
- [6] The application for leave was accompanied by a "memorandum of counsel for the Applicant" dated 29 September 2014. I have on several occasions pointed out that the filing of memoranda by counsel addressed to the judge is improper, most particularly so in connection with an ex parte application. Direct communication by counsel with a judge whether orally, or by telephone, facsimile, letter or memorandum is unacceptable. In future, such communications will be returned unread to the sender.

- [7] Given the subject matter of the application I set it down on 30 September for hearing inter partes on 7 November. On 9 October a second ex parte application, the present application, was filed. It was accompanied by yet another memorandum from counsel for the Applicant. This memorandum incorrectly stated in paragraph 1 that leave to move for judicial review had been granted. It then proceeded (as had the earlier memorandum) to advance submissions in support of the application. This method of placing submissions before the Court is unacceptable
- [8] The application seeks a stay of the Magistrate's Court award on the ground that the Applicant, a prominent parliamentarian, wishes to nominate as a candidate in the forthcoming General Election. The closing date for nomination is 22 or 23 October. This date is prior to the hearing of the application for leave to move for judicial review of the costs award which will therefore still be in place on nomination day.
- [9] Clause 65 of the Constitution of Tonga relevantly states:

"Qualification of Representatives

Representatives of the people shall be chosen by ballot and any person who is qualified as an elector may nominate as a candidate and be chosen as a representative of the electoral constituency in which he is registered save that *no person may be chosen against whom any 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....*"  
(emphasis added)

- [10] The basis of the application is that unless the order awarding costs is set aside, or at the very least stayed, prior to the close of nominations, the Applicant will be prevented from standing for election.
- [11] At the hearing of the application on 15 and 16 October Mr. Pohiva was unrepresented. He relied on the memoranda filed by Mr. Harrison who has filed appearance on his behalf but who was not able to attend.
- [12] Both Mr. Kefu and Mr. Edwards opposed. Mr. Kefu suggested that the judicial review application was itself procedurally suspect. He also submitted that the Applicant's wish to nominate was an unacceptable ground for staying the costs order.
- [13] Mr. Edwards pointed out that Order 39 Rule (4) of the Supreme Court Rules upon which reliance was placed by Mr. Harrison in his memorandum of 8 October only came into play *after* leave had been granted, not as in this case before the application for leave had been dealt with. He questioned whether the Court had any jurisdiction to grant interim relief at this stage. He also suggested that the chances of the award being set aside were slim. It could not be right that private actions be allowed to proceed without there being at least some risk of liability in costs in the event of failure.
- [14] In reply, Mr. Pohiva repeatedly affirmed his belief that the costs award was wrongly made. Therefore, he suggested, he was entitled to have it set aside. Furthermore, he was entitled to have it set aside

before nomination day in order to exercise his right to stand in the election. In his own written submission filed on 16 October he suggested that the granting of interim relief would not have the effect of circumventing Clause 65. If he was not granted the relief he would suffer great injustice.

- [15] The arguments advanced by counsel were helpful and valuable but in my opinion the principal difficulties faced by the Applicant are the plain wording of the Clause and the consequences which would flow from its avoidance. While I am inclined to the view that the Court has jurisdiction to grant interim relief even before leave has been granted (see *M v Home Office* [1994] 1 AC 377). I am of the firm view that in this case it should not.
- [16] The Clause does not differentiate between orders of the Court which have been appealed but upheld or which have not been appealed on the one hand and orders which are still, or may be still, the subject of appeal or review and which are therefore, at least in theory, still liable to be overturned or modified. The Clause does not differentiate between orders which are highly likely or likely or somewhat likely or not at all likely to be successfully appealed. The merits of the orders which have not been complied with are not, in my opinion, relevant to the operation of the Clause at all.
- [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. In other words, any candidate who owed money could

apply for relief, obtain a stay, nominate, lose his appeal or review without his nomination being at risk of later being declared invalid.

[18] Thirdly, it must be borne in mind that this is a constitutional provision enacted by Parliament of which the Applicant is a prominent member. The Supreme Court should be very careful not to interfere in the processes which Parliament has laid down to govern election to its membership.

[19] In my opinion this application is an attempt to circumvent the effect of Clause 65. However fervently the Applicant believes he has been wronged cannot, in my opinion, affect the plain meaning of the Clause. Despite everything that has been urged upon me I find it clear beyond doubt that there is an order of the Court which has <sup>not</sup> been satisfied and therefore, until the order has been complied with, Clause 65 applies.

[20] Mr. Edwards indicated that his clients would be content if the amount awarded were to be paid into Court before nomination day. For the avoidance of doubt I declare that such payment will bring the Applicant into conformity with the Clause.

- Result:**
- (1) Application dismissed.
  - (2) It is declared that payment by the Applicant of TOP\$22,000 to the Register <sup>not</sup> of the Supreme Court by close of business on 21 October 2014 will be sufficient compliance with Clause 65 of the Constitution.

(3) Second Defendants costs to be taxed if not agreed.

DATED: 17 October 2014

E. Takataka  
17/10/2014

