Solicitor General
29/10/12

IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION **CV 50/2012**
NUKU'ALOFA REGISTRY **[and see LA 7/2012]**

IN THE MATTER OF Sections 387(i)(d)(iii) and 387(i)(e) of the Companies Act 14/1995

AND
IN THE MATTER OF SIOSIUA RAMSAY.

P. Bloomfield for the Applicant
T.J. Darby with D. Corbett for the Respondent

DECISION

INTRODUCTION

[1] This is an application by Nunia Ramanlal (the Applicant) for the removal of her brother Siosiua Ramsay (the Respondent) from his position as one of the two directors of Tofa Ramsay Enterprises Limited (the Company). The application is made on the grounds that the Respondent:

> "(iii) acted in a reckless and incompetent manner in the performance of his duties as director" and/or
>
> "(e) has become of unsound mind".

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Although, if made out, these allegations provide discrete grounds for removal, the application focused on Section 387(i)(e) with allegations of reckless or incompetent behavior being advanced as evidence of the Respondent's unsoundness of mind.

[2] The proceedings were commenced by an application seeking an interlocutory injunction to restrain the Respondent from further dealings with the Company pending the hearing of the application for the substantive orders. The interim Order was issued on 24 July and extended with variation on 3 August. It was further extended until further order on 27 September.

[3] On 21 August 2012 Respondent's counsel filed an application seeking inter alia :

(a) Discharge of the Order of 3 August;
(b) Appointment of the Respondent as managing director of the Company;
(c) Removal of Tuna Likiliki as company director; and
(d) An order restraining the applicant and Tuna Likiliki from interfering with the Respondent's management of the Company;

[4] On September 2012 Respondent's counsel filed a further application seeking, inter alia :

(a) an order amending the Company's shareholding to show that the Respondent holds 51% of the shares;
(b) removal of the Applicant as a director of the Company; and

(c) removal of Tuna Likiliki as the company's accountant.

[5] Although the various applications were filed separately, it was plain from the contents of the affidavits that the fundamental preliminary question was whether the Respondent should be removed as a Director on the grounds of mental ill health.

[6] The following affidavits were filed :

(A) Nunia Ramanlal, 23 July 2012;
(B) Tuna Likiliki, 23 July 2012 ;
(C) Siosioua Ramsay, 31 July 2012 ;
(D) Siousiua Ramsay, 21 August 2012 ;
(E) Tuna Likiliki, 23 August 2012 ;
(F) Nunia Ramanlal, 23 August 2012 ;
(G) Lopeti Kamipeli Tofa Ramsay, 10 September 2012 ;
(H) Lopeti Kamipeli Tofa Ramsay, 20 September 2012 ;
(I) Nunia Ramanlal, 26 September 2012.

THE HEARING

[7] The hearing took place on 27 September 2012. It was agreed that this present company matter would be heard first and that a connected matter (LA7/2012) in which the Applicant and her older sister Langaola Ramsay sought an injunction restraining Lopeti Ramsay (the present Respondent's eldest brother – deponent of affidavit G - H) from entering premises being used by the Company, would be heard later. In the event, it was subsequently agreed that Lopeti's undertaking not to go to those premises would be extended until further order.

[8] The witnesses for the Applicant were the Applicant herself and her daughter Tuna Likiliki. Mr Darby called two witnesses for the Respondent namely legal practitioner Mrs P. Taufaeteau and Lopeti Ramsey. Although the Respondent, in his affidavit (C) had appeared to indicate that he wished to attend the hearing (see paragraphs 3 and 4) he did not, in the event, attend. Mr Darby told the Court that the Respondent had been admitted to hospital in New Zealand on mental health grounds but whether his admission was voluntarily or not, was not known. He was due for release on the day of the hearing however an adjournment of the hearing in order for him to be able to attend was not sought : "He was prepared to come but I advised him that was better that he stay in New Zealand".

[9] The Applicant confirmed the truth of the contents of her affidavits (A) and (F). She told the Court that she had been the company's *de facto* Managing Director since it was incorporated in 1993. She and her daughter Tuna shared the day to day responsibility for managing the Company's operations which principally involve providing a ferry service.

[10] The Applicant told the court that the Respondent has been unwell for over 20 years. He spends much of his time in New Zaaland receiving medical attention. The problems mainly arise when he returns to Tonga and stops taking his medicine. His bi-polar condition then results in erratic and extravagant behaviour. He spends lavishly, pledging the company's credit. He claims to be the majority shareholder in the Company and enters into contracts and arrangements which are not favourable to the Company and which have not been the subject of agreement. The Respondent told me that

the Company had made an operating loss for the last two years but despite this, the Respondent has taken more than T$20,000.00 from the Company to which he was not entitled. The Applicant emphasized that even if the Respondent were to be disqualified as a director, the Company would continue to pay him at the current rate of T$1000 per week. From that sum he receives a net payment of T$400. It is necessary to deduct $600 from his weekly payments in respect of debts which he has incurred. The Applicant put her case succinctly : unless removed as a director, the Respondent, by his erratic and unauthorized behavior would bring about the collapse of the Company. This would not only injure the Company, its employees and shareholders, it would severely damage the Respondent himself whose only source of income was the salary he received from the Company itself.

[11] In cross-examination it was suggested that the company was dishonestly operating two sets of books (see paragraph 50 and exhibit Q of affidavit G and paragraphs 42 & 61, 63 & 66 of affidavit H). This was denied by the Applicant although she conceded that the financial side of the Company's affairs was principality the responsibility of her daughter Tuna Likiliki who is an accountant. The Applicant was referred to exhibit C of affidavit F, a document apparently signd by her and translated at exhibit E of affidavit G. The document, dated 1996, appears to be instructions to lawyers to prepare alterations to the memorandum of association of the Company in order to reflect the Respondent as chairman of the board with a shareholding of 51%. The Applicant's evidence followed the same lines as her evidence contained in paragraphs 29 to 31 of her affidavit F.

[12] The Applicant was referred to the two Medical Reports by Doctor Mapa of the Psychiatric Unit at Vaiola Hospital (see exhibits A & B to affidavit G). In answer, the Applicant referred to exhibits A, B and C of her original affidavit A. She denied that she was wanting to "throw out the Respondent". She told the Court that "I suggest that he steps down because he gets unwell and the Company and he suffer".

[13] The second witness, Tuna Likiliki, told the Court that she was the Company's part time accountant. She also works as an Accountant for Air New Zealand. She confirmed the truth of her affidavits B and E. She denied that the Company was involved in operating two sets of books or of defrauding the Inland Revenue. She was referred to exhibit A to affidavit B and confirmed that the only registered directors of the Company were the Applicant and the Respondent. She was unaware of any unregistered director. She was asked about scrap metal referred to in paragraph 2 of the Respondent's application filed on 21 August 2012 and paragraph 5 of the application filed by the Respondent on 11 September 2012 as well as paragraphs 2 & 6 of affidavit C. The witness denied that the scrap metal which had been sold was anything like as valuable as claimed. It was sold for the best price available and the proceeds (T$2000) were credited to the Company.

[14] Mrs Taufaeteau (who is representing Lopeti Ramsay in LA7/2012) told the Court that she remembered Exhibit E of affidavit G referred to in paragraph 11 above. She was working in her brother's law office when the Applicant, the Respondent and one Paula Lavulo arrived and asked her to prepare the document. This she did. It was written in her handwriting. Subsequently some of the words had been deleted but

by whom and when she did not know. After the document was drafted, the Applicant and her companions took it away. She did not give it to her brother or to the Registrar of companies and did not think that it was ever registered.

[15] The last witness was Lopeti Kamipeli Tofa Ramsay who also confirmed the truth of the affidavits G and H which he had filed. He told the Court that he had been to the Ministry of Labour to see what had been done about the document drafted by Mrs Taufaeteau. He tried to follow it up. When the Respondent came to Tonga in 1996 "he wanted the power to decide how the Company was run". Lopeti told the Court that he visited the company's premises early this year and saw the scrap metal. "I found 8 engines there which belonged to vessels operated by the Company. The engines were worth well over T$100,000.00". Lopeti tell the Court that he had no shares in the Company and that he was not a director. He did however have a power of attorney for the Respondent which was exhibit C to affidavit G.

SUBMISSIONS

[16] Mr Bloomfield submitted that the evidence in support of the Applicant's request to heve the Respondent removed on the basis of unsoundless of mind was clear. He suggested that the Respondent's mental condition appeared to be deteriorating and that his actions have imperrilled the Company's existence. There was no reasonable alternative to his removal. In written submissions filed following the hearing it was suggested that removal would only have the effect of curtailing the Respondents powers as a director. His rights and

entitlements as a shareholder would be unaffected. Mr Bloomfield suggested that consideration should be given to the appointment of another director to take the Respondent's place (see Section 153 of the Act and paragraph 23 of affidavit F, but see also paragraph 26).

[17] Mr Darby (who also filed very helpful written submissions following the hearing) suggested that the Applicant had failed "by a considerable margin" to show that the Respondent had behaved so recklessly as to warrant his removal as a director. He referred to *First City Corporation v Downsview Nominees* [1989] 3 NZLR 710 and suggested that "conduct that is willful or deliberate or culpable so as to involve dishonesty or gross or serious failure to meet the relevant standards" had not been proved to the "right decree of probability" that was required. While it was conceded that the Respondent suffered from Bipolar Affective Disorder, Mr Darby suggested that the differences of emphasis between the medical reports showed that there was "considerable debate" as to the extent of his illness. Where there was uncertainty it should be resolved in favour of the Respondent.

[18] Mr Darby concluded his submissions by suggesting that an order for disqualification, by departing from "a well established body of [New Zealand] case law relevant toTonga", the making of a disqualification order in this case "could erode public confidence in the judicial branch of govarnment as such an order might be regarded as interfering in commerce and a restriction of peoples commercial rights".

CONSIDERATION OF THE ISSUES

[19] I have not thought it desirable to refer in any other than the minimum necessary detail to the considerable body of evidence contained in the affidavits. This application to remove the Respondent as a director of the family Company originally founded by a father who had excluded his eldest son Lopeti from any part in the Company has quite understandably resulted in a large amount of emotionally charged allegations, responses and cross applications. The essential question however, as I find, is whether the Respondent is, in fact of unsound mind, to such an extent that, in the circumstances of this particular company, he should, for the sake of the company be removed.

[20] In my view there is not, as suggested Mr Darby, any real doubt about the Respondent's medical condition at all. As explained by Doctor Wyness (Exhibits A & B to affidavit A) the Respondent suffers intermittent mood disorder which, when in relapse can be so severe that he has had to be compulsory admitted to hospital under the Mental Health Act. The evidence of Doctor Mapa does nothing to contradict this description of the Respondent's disorder or its most extreme consequences; all that it does is to suggest that when in remission, the Respondent behaves perfectly normally. That, however, is not the question. The question is, given the tendency of the Respondent to relapse, can his mind be described as sound for the purposes of the Act? It is not the ability of the Respondent to function normally when his condition is in remission which is at issue. It is his ability to avoid relapse with all the consequences that flow therefrom, including the consequences for the Company. It is not the

Respondent's conduct when in remission that the Applicant complains of, it is his conduct when his condition is in relapse.

[21] Having heard the Applicant and her daughter Tuna Likiliki and having read the medical evidence and taking into account the fact that the Respondent himself chose not the attend the hearing, I find myself abundantly satisfied that the Respondent is indeed of unsound mind for the purposes of this application under the Companies Act and that his conduct represents a serious risk to the wellbeing of the Company and indirectly to himself. With respect to Mr Darby, I found that his authorities cited, while relevant to the removal of a director who, though of sound mind, has behaved recklessly or incompetently are of limited relevance to a director who has been shown not to be in command of his mental faculties.

[22] The duties and responsibilities of directors are wide ranging and are set out in Part VIII of the Act. They include the duty to act in the interests of the company, in compliance with the constitution of the company, with reasonable care, diligence and skill and so on. Although he might wish to perform these duties and exercise the discretions imposed upon him, I am satisfied that a person whose mental condition is from time to time so serious as to warrant compulsory committal cannot be relied upon to behave in a way that is consistent with the duties imposed upon him.

[23] I am satisfied that the Respondent has been shown to be of unsound mind and that therefore, but for any remaining impediment, he should be removed as a director. I do not find that, apart from the consequences of that unsoundness of his mind, the Respondent has

behaved recklessly. In other words my conclusion that the Respondent qualifies for removal is in no way to be taken as a reflection on his honesty, integrity or competence when his mental condition is in remission. It is no reflection on his character, merely a consequence of his mental ill-health.

[24] As has already been noted, the consequences of removing one of only two directors were considered. I do not accept Mr Darby's suggestion that Clause 76 of the Company's Articles (see Affidavit F, exhibit D) would necessary be breached by the removal of the Respondent since the evidence is that the company was re-registered in May 2010 and was subject to sections 33 & 35 of the Act. Section 80 of the Act only requires a company to have at least one director. I do, however, accept that the position is not entirely clear and neither is it cleer how in future the company should be directed. Mr Darby put forward Mr Lavulo as a possible replacement for the Respondent (paragraph 6 of his written submissions) while, the Applicent suggested that the Respondent's daughter Kimberly Ramsay Read should take his place (paragraphs 23 & 26 of affidavit F).

[25] In my view, the operation of the Company with only one director and the sole shareholders each having 50% of this stock (which I find to be a fact conceded by the Respondent himself – "an equal shareholder" - in paragraph 6 of his affidavit C) and following a finding of unsoundness of mind, presents real problems which will have to be carefully considered before the Court, if necessary, decides to appoint an additional director or directors under the provisions of section 153 of the Act. I do not think any order of this type should be made at

of the company or from holding himself out as a director of the same until further order.

2. The parties are to meet to consider how the consequences of the eventual removal of the Respondent as a director should best be addressed in the interests of the parties and the well-being of the Company.

3. The parties will have liberty to apply for further directions once paragraph 2 has been complied with.

DATED: 22 October 2012.

M.D. Scott
CHIEF JUSTICE

N. Tu'uholoaki
22/10/2012