

SUPREME COURT OF TONGA

Civil Case 1059/92

KINGDOM OF TONGA -v- 'AKILISI POHIVA

DALGETY J.

Solicitor-General (Taumoepeau) for Plaintiffs.

Defendant in person.

Hearing : 27th January 1993.

Judgment : 10 February 1993.

J U D G M E N T

1: The Plaintiffs in this case are the Kingdom of Tonga. They have sought an interim injunction against the Defendant, 'Akilisi Pohiva to restrain him, pending trial, publishing confidential Government information provided to him, presumably by civil servants in breach of their obligation of secrecy under the Official Secrets Act (cap.5). Having considered the terms of the Statement of Claim, the nature and extent of the publications complained of and the supporting affidavit of Mrs 'Eseta Fusitu'a (Acting Chief Secretary and Cabinet Secretary); and having had the benefit of hearing well argued legal submissions by the Solicitor-General and a reply thereto by the Defendant in person, my approach to the guidelines suggested by the House of Lords in American Cyanamid -v- Ethicon [1975] 1 All E.R.504 is firstly, that there is a serious issue to be tried in this case, and, secondly, that damages would not be adequate compensation for anything the Plaintiffs might suffer between now and the date of the trial were I, as an interim measure, to restrain further publication of confidential Government information.

2: I now turn to consider the issue of the balance of convenience. The Plaintiffs argued that Government secrets should be protected from exposure to public scrutiny in the Press, secrets for this purpose being all Government information not officially released. The Defendant claims that under Section 7 of The Act of Constitution of Tonga (cap.2) as amended he has total freedom to write and print his opinions as also a right to publish any information in his possession under the constitutional guarantee of "freedom of the press for ever." That Section as amended by Act 23 of 1990 provides that -

"It shall be lawful for all people to speak, write and print their opinions and no law shall ever be enacted to restrict this liberty. There shall be freedom of speech and of the press for ever but nothing in this clause shall be held to outweigh the law of Defamation, official secrets, or the laws for the protection of the King and the Royal Family."

The Plaintiffs state that they need to protect official secrets if they are to function effectively as a Government and that unauthorised publications must be restrained. This is certainly a compelling argument. Had this been an action between a non-governmental person or organisation and the Defendant then, following the decision of this Court in Tonga Development Bank -v- 'Akilisi Pohiva, case 192/92 decided 30th November 1992, I might well have concluded that pending trial the balance of convenience favoured the making of a restraining order. This however is an action by State itself and different considerations might apply: I have yet to here adequate argument on this subject, the matter having been touched on only briefly at the Hearing. Section 7 was argued as a defence in the Tonga Development Bank case but as it had not been pled as a defence, as it should have been if the Defender wished to rely on it, any comments on that section in that case are necessarily obiter. The Defendant seeks to focus on Section 7 in this case and will presumably arrange his pleadings so as to entitle him to do so. In the Tonga Development Bank case the decision turned essentially upon the Common Law (of England) which forms a part of the law of Tonga under the Civil Law Act (cap.25). Where however there is a written Constitution guaranteeing certain basic freedoms it does not follow

that the rules of the Common Law followed in the Tonga Development Bank case will apply mutatis mutandis. Lord Keith recognised this inescapable fact in Attorney General -v- Guardian Newspapers Limited (No.2), [1988] 3 All E.R.545 at page 646, letter H, where he commented that the United States Constitution posed clear problems in attempting to restrain publication of written material in the United States of America. There is more than a superficial resemblance between the provisions of that republic's Constitution and the rights of a subject declared in Section 7 of the Constitution of the Kingdom of Tonga. It is curious that there are no authorities in point in Tonga. I certainly cannot trace anything relevant and the parties did not direct my attention to any such case. Constitutional rights are the keystone of a subject's liberties and a bulwark against the power of the State, and require to be protected by the Courts. The Defendant's Constitutional defence is not a frivolous one but as substantial and serious an issue as the Plaintiff's claim against him. If he has the constitutional right he asserts it would plainly be wrong to issue any restraining order against him, no matter how short the period of validity of that Order. In the whole circumstances I am not persuaded that the balance of convenience favours the granting of the interim Order now sought. I shall therefore refuse to grant such an Order.

- 3: A full trial of this case will be necessary before I am in a position to make a proper determination as to the respective merits of the case for each party. Because of the importance of this case that Trial should not be delayed and I shall direct that an early trial date be fixed. As this case will also be the first in which Section 7 of the Constitution will be a crucial determining factor it is important that both parties address me on this subject with full citation of authorities. This is a legal issue of some complexity and parties are unlikely to do justice to their case unless these arguments are advanced by Counsel. The Plaintiffs have employed Counsel. As yet the Defendant has not - he should not delay for long doing so.

4: Accordingly, I shall pronounce an ORDER in the following terms:-
IT IS ORDERED THAT the Application for an Interim Injunction
dated 19th January 1993 be refused in hoc statu.

NUKU'ALOFA, 10th February 1993.



Jammy R. Dalgely