HIGH COURT OF KIRIBATI

Civil Case N° 5/2020

ENGIRAN IUTA *Applicant*

v

MINISTER FOR FINANCE AND ECONOMIC DEVELOPMENT *Respondent*

Taoing Taoaba for the applicant
Ruria Iteraera, Solicitor-General, for the respondent

Date of decision: 22 January 2020
Date of judgment: 7 September 2020

JUDGMENT

[1] On 1 January the Minister for Finance and Economic Development[1] issued a warrant authorising the release of $30,000,000 from the Development Fund to meet civil service salaries and other expenses of the government. The applicant is a member of the Maneaba ni Maungatabu representing Beru, and chair of the opposition Boutokan te Koaua political party. He challenges the lawfulness of the warrant, on the ground that the Minister has failed to comply with the rules governing the operation of the Development Fund. He also seeks an order restraining the Minister from issuing any similar warrants.

[2] The originating summons was filed on 14 January, and the hearing of the matter was expedited, in accordance with the directions of the Court given that day.

[3] On 16 January, after hearing submissions from counsel for both parties, I gave oral judgment for the respondent and dismissed the application. I advised the parties that I would publish my reasons later. On 22 January I refused an application from the applicant to reopen the matter and again indicated that

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[1] The respondent holds office as both Minister for Finance and Economic Development and Kauoman-ni-Beretitenti. For the sake of convenience, I refer to him in this judgment as 'Minister', as it is his actions in that capacity that are being challenged. No disrespect is intended.

I would publish my reasons later. Here now are my reasons for finding as I did, and I apologise to the parties for the delay in finalising them.

[4] It is helpful to start by summarising the relevant constitutional and legislative provisions, as follows:

a. the government's financial year runs from 1 January to 31 December;[2]

b. all revenues of government are (unless another law provides otherwise) to be paid into the Consolidated Fund;[3]

c. money can only be withdrawn from the Consolidated Fund on the authority of a warrant issued by the Minister responsible for finance, and only then if the expenditure—

i. is authorised by an Appropriation Act;

ii. is authorised under section 109(4), 110 or 111 of the *Constitution*; or

iii. is statutory expenditure;[4]

d. the Maneaba ni Maungatabu may establish Special Funds, which do not form part of the Consolidated Fund;[5] and

e. the Development Fund—

i. is a special fund;[6]

ii. consists of money appropriated from the Consolidated Fund, together with grants or loans received for development purposes by the government from elsewhere, and interest on that money;[7]

iii. is to be operated in accordance with Rules set out in Schedule 2 to the *Public Finance (Control and Audit) Ordinance*,[8] which can be amended by the Beretitenti, acting in accordance with the advice of the Cabinet.[9]

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2 Section 116(a), *Constitution*.

3 Section 107(1), *Constitution*.

4 Section 108, *Constitution*.

5 Section 107(2), *Constitution*.

6 Section 10(2), *Public Finance (Control and Audit) Ordinance* (Cap.79).

7 Section 10(1), *Public Finance (Control and Audit) Ordinance* (Cap.79).

8 Section 11(1), *Public Finance (Control and Audit) Ordinance* (Cap.79).

9 Section 11(2), *Public Finance (Control and Audit) Ordinance* (Cap.79). Under section 11(3), any order made amending the Rules must be tabled by the Minister at the next sitting of the Maneaba ni Maungatabu.

[5] The central facts are not in dispute. On 12 November 2019, the government's Appropriation Bill to authorise expenditure from the Consolidated Fund for the 2020 financial year was rejected by the Maneaba ni Maungatabu. On 14 November the Maneaba adjourned *sine die*,[10] with no plans to meet again before its dissolution on 5 February 2020.[11] Without an Appropriation Act to authorise Consolidated Fund expenditure for the 2020 financial year, the government was left in something of a quandary. The other options provided under the *Constitution* were not available: Section 109(4) was not applicable; the Maneaba ni Maungatabu had not passed a resolution under section 110; and section 111 could not be used to authorise expenditure until the Maneaba formally dissolved on 5 February. There appeared to be no way that the Minister could lawfully authorise expenditure from the Consolidated Fund to cover the period from 1 January to 5 February 2020.

[6] The course ultimately adopted by the Minister was to issue a warrant on 1 January (number 01/20), addressed to the Accountant General, authorising expenditure from the Development Fund totalling $30,000,000. The warrant is said to have been issued under rules 3(1) and 6 of the *Development Fund Rules*. The stated objective of the authorisation is to fund a project entitled 'Short Term Bridge Financing for Government Expenditure'. The warrant specifies 30 separate heads of expenditure, covering such matters as: salaries; allowances; Provident Fund contributions; utilities, transport; scholarships; grants to local government; and land rent. It is not disputed that this sort of expenditure would ordinarily come from the Consolidated Fund.

[7] On 3 January, Pinto Katia (a member of the Maneaba ni Maungatabu from Makin and a member of the applicant's party) sent an email to the Accountant General at the Ministry of Finance and Economic Development. He asked for an explanation as to how government expenditure would be authorised in the absence of an Appropriation Act for 2020. In a response emailed later the same day, the Accountant General said that the government had approved 'bridging finance' to cover expenditure in January and early February. He said that the Minister had acted "under s11 and s10 the Public Finance (Control and Audit) Act (Cap 79) and Rule 3(1) of the Development Fund Rules 1982".

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[10] See *Titabu Tabane* v *Attorney-General (in respect of the Speaker of the Maneaba ni Maungatabu)* [2019] KIHC 122.

[11] Section 78(2), *Constitution*.

[8] The rules for the operation of the Development Fund that had been included as Schedule 2 to the *Public Finance (Control and Audit) Ordinance* at the time of its passage in 1976 were repealed with effect from 4 January 1983, on the commencement of the *Development Fund Rules* 1982 ('the 1982 Rules').[12] Rule 3(1) of the 1982 Rules provides:

> No moneys shall be issued from the Fund except by warrant of the Minister directed to the Chief Accountant, specifying the accountable officer, and the development project.

The expression 'development project' is not defined.

[9] On 13 January, the present application was filed. The applicant claimed that, by issuing the warrant on 1 January, the Minister had breached section 107(3) of the *Constitution*,[13] section 11(4) of the *Public Finance (Control and Audit) Ordinance*,[14] and rule 3(2) of the *Development Fund Rules*.[15] It was claimed that the Minister had used the Development Fund for a purpose other than that for which it had been established. Money in the Development Fund was to used only to fund development projects, and recurrent expenditure for matters such as civil service salaries fell outside the scope of the Fund's purpose.

[10] At the hearing of the applicant's application for an expedited hearing of this matter on 14 January, I canvassed with counsel the possibility that the 1982 Rules had been amended. Counsel for the applicant said that she was of the view that there had been no changes to the 1982 Rules. The Solicitor-General did not demur. I asked the Solicitor-General to make enquiries, to ensure that the hearing proceeded on the correct legislative footing. On the morning of 16 January, some 10 minutes before the hearing of the substantive application was to begin, I was provided with a copy of the *Development Fund Rules* 2019

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12 Published in Gazette Supplement N° 1 on 28 January 1983, as Legal Notice N° 1. Somewhat confusingly, the Rules are entitled "The Development Fund Rules 1983" but, by rule 1(1), are to be cited as the *Development Fund Rules* 1982. Rule 9 states: "All former Development Fund Rules are hereby repealed".

13 Which provides: "The receipts, earnings and accruals of Special Funds established under this section and the balance of such funds at the close of each financial year shall not be paid into the Consolidated Fund but shall be retained for the purposes of those funds."

14 Which provides: "Subject to the provisions of this section and of any other law for the time being in force moneys forming part of the Development Fund which are not required for immediate use for development purposes may be invested in like manner to that permitted by section 6 in respect of the Consolidated Fund."

15 Rule 3(2) of the 1982 Rules provides: "Subject to rules 6 and 7 hereof moneys may only be expended in accordance with these Rules if within the level of the latest estimate of total expenditure approved by prior resolution of the Maneaba ni Maungatabu."

('the 2019 Rules'),[16] rule 9 of which repeals the 1982 Rules. Given the Accountant General's express reference to the 1982 Rules in his email to Pinto Katia on 3 January, the existence of the 2019 Rules came as something of a surprise.

[11] In many regards, the 2019 Rules are identical to the 1982 Rules. Significantly however, rule 2(2) now provides a definition of the term 'development project', as follows:

> Development Project, other than continuing and new projects, also includes ***special need(s)*** arising out of a special circumstance that regardless of their nature or character they are extremely important for the interest of the public and Kiribati as a whole which cannot without serious injury to the public interest be postponed. The funding of such special need shall be temporary and immediately cease when other sources are available and must not be repeated for the same circumstance.

[12] Save for a change in designation of the office of Chief Accountant to that of Accountant General, rule 3(1) of the 2019 Rules is in identical terms to rule 3(1) from the 1982 Rules (see [8] above).

[13] When the hearing commenced on 16 January, I said to counsel for the applicant that the 2019 Rules, in particular the expansive (if poorly drafted) definition of 'development project', appeared to leave her with little room to move. Counsel agreed that, in light of the new information, it appeared that the Development Fund could now be used for almost any purpose deemed 'special' by the Minister. She requested time to consider her position and the hearing was adjourned to that afternoon.

[14] When the matter resumed, counsel for the applicant conceded that she could no longer argue that the Minister had failed to comply with the *Development Fund Rules*. In the circumstances, that was an appropriate concession to make. The *Constitution* empowers the Maneaba ni Maungatabu to establish special funds. The Maneaba ni Maungatabu has established the Development Fund as a special fund, and delegated the function of determining the rules governing the operation of the Fund (including the Fund's scope and purpose) to the Beretitenti and Cabinet. The 2019 Rules have been promulgated in the manner required by law. The definition of 'development project' under

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[16] While no provision is made in the 2019 Rules for their commencement, under section 17(1) of the *Interpretation and General Clauses Ordinance* (Cap.46) the Rules entered into force on the date of their publication "by exhibition at the Public Office of the Beretitenti", namely 30 December 2019.

rule 2(2) is broad enough to encompass the predicament in which the government found itself. This is so despite the fact that the predicament was arguably one of the government's own making.[17]

[15] Having made that concession, counsel for the applicant then applied to amend her application. She provided a proposed draft of the amended application. The effect of the amendment, if allowed, would have been to join the Beretitenti as a respondent, and to challenge the validity of the 2019 Rules, on the grounds that they were both unconstitutional and *ultra vires* the *Public Finance (Control and Audit) Ordinance*. The original basis for the application would be effectively abandoned. The application to amend was strenuously opposed by the Solicitor-General, who contended that the applicant was seeking to introduce a fundamentally different cause of action under the guise of an amendment.

[16] I refused the amendment application. This was, in reality, not so much an application to amend, rather the applicant was seeking to replace the original application with a completely different one. Instead of challenging the validity of the warrant issued by the Minister, the applicant now sought to impugn the validity of the very Rules under which the warrant was issued.

[17] I have some sympathy for the applicant's position. The Accountant General had led him to believe that the Minister was purporting to act under the 1982 Rules. There is nothing to explain the Accountant General's misstatement, even though one might assume that a person in his position would have been privy to the decision to make the 2019 Rules only 4 days earlier. If the Minister had in fact issued the warrant under the 1982 Rules, the application might have had a better chance of success. It was not until the morning of the hearing that the applicant became aware of the existence of the 2019 Rules. Despite this, it would not have been appropriate to allow the applicant to make such radical changes to the original application. There is nothing to prevent him from bringing a fresh application to challenge the validity of the 2019 Rules, but I cannot allow the present application to be used as the vehicle for such a challenge.

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[17] Section 110 of the *Constitution* provides a process for dealing with the situation in which the government found itself. Without an Appropriation Act to cover recurrent expenditure for the period from 1 January to 5 February, the Maneaba ni Maungatabu could have passed a resolution to give the Minister the power to authorise the necessary expenditure from the Consolidated Fund. There was nothing before me to explain why the Minister had not sought such a resolution.

[18] The application to amend having been disposed of, and the applicant having conceded that the Minister's actions were in accordance with the provisions of the 2019 Rules, there was nothing to be done but to dismiss the original application. It is dismissed and struck out. In all the circumstances, I make no order as to costs.

[19] That was not to be the end of the matter however. On 20 January the applicant filed a further notice of motion, asking for an order that the hearing be reopened, as well as an order permitting the introduction of what was said to be fresh evidence. I heard both counsel on 22 January. The Solicitor-General opposed the application.

[20] I pressed counsel for the applicant as to what fresh evidence she intended to introduce. She could not point to any matter of fact having come to light in the 6 days since the dismissal of the original application. Rather, it transpired that counsel had come to regret the concession she had made the week before, namely that the Minister had acted in accordance with the 2019 Rules when he issued the warrant on 1 January. Having reflected, counsel for the applicant now wanted an opportunity to argue that the Minister was not entitled to hold the view that a "special need" or "special circumstance" had arisen at the time the warrant was issued, such as would entitle him to authorise expenditure out of the Development Fund.

[21] Counsel for the applicant accepted that, had the Minister not issued the warrant, there would have been no money to maintain government services for the period from 1 January to 5 February. She submitted however that such a circumstance could not possibly be 'special' because the crisis was one of the government's own making and was entirely foreseeable.

[22] Such an argument cannot succeed. Putting to one side the issue of whether a party can come back for a second attempt in the manner sought by the applicant after oral judgment had been given, her revised strategy was always doomed to fail. The definition of 'development project' in rule 2(2) of the 2019 Rules does not require that, for the need or circumstance to be 'special', it cannot be foreseeable, nor can it have been a result of some action on the part of the government. Counsel for the applicant would have me read into the definition words that are simply not there.

[23] The 2019 Rules do not specify who it is that must be satisfied that a special need has arisen out of a special circumstance. However, given that it is the Minister who issues the warrant, it is logical to conclude that it is he who must be so satisfied. In reviewing the exercise of a statutory power, the Court of Appeal has said that the Court's role is to "ensure that there was no procedural unfairness, that the decision was not unlawful, and that it was reasonable".[18] In her revised approach, counsel for the applicant submits that the Minister could not have been satisfied that a special need had arisen out of a special circumstance, so that his decision was therefore unreasonable.

[24] On the question of reasonableness, the Court of Appeal[19] endorsed the decision of the English Court of Appeal in the case of *Mahmood*,[20] where Laws LJ (May LJ concurring) said:

> On this model the court makes no judgment of its own as to the relative weight to be attached to this or that factor taken into account in the decision-making process; it is concerned only to see that everything relevant and nothing irrelevant has been considered, and that a rational mind has been brought to bear by the [decision maker] in reaching the decision.[21]

[25] In the absence of clear evidence to the contrary, a Court cannot deny the validity of the Minister's judgment. As in the Court of Appeal decision referred to in [23] above, it "must be implicit in the regulatory scheme that the [Minister] will have the knowledge and skills, and the political awareness, necessary to make the necessary decisions".[22] A Court will not readily overturn a Minister's decision that a need (or a circumstance) is 'special'.

[26] For the reasons set out above, and given the absence of any merit in the applicant's revised challenge to the lawfulness of the Minister's issuance of the warrant, the application for the matter to be reopened is refused. As with the original application, I make no order as to costs.

Lambourne J
Judge of the High Court

HIGH COURT OF KIRIBATI

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[18] *Etera Teangana* v *Anote Tong* [2004] KICA 18, at [47].

[19] *ibid.*

[20] *R (Mahmood)* v *Secretary of State for the Home Department* [2001] 1 WLR 840.

[21] *ibid.*, at page 847.

[22] *Etera Teangana* v *Anote Tong* [2004] KICA 18, at [46].