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

NO.C.1310/98

BETWEEN : Lata-'i-Manamo'ui Kaufusi : *Defendant;*

AND : Kingdom of Tonga
(sued in respect of Ministry of Finance) : *Plaintiff:*

BEFORE THE HON. CHIEF JUSTICE WARD in chambers.

COUNSEL : William Edwards for the Plaintiff
: Solicitor General for the Defendant

Date of Hearing : 18th February, 1999
Date of Ruling : 1st March, 1999

RULING

This is a claim for malicious prosecution. Before filing a defence, the defendant has moved to have the proceedings struck out on the grounds that the statement of claim discloses no reasonable cause of action, it is unclear or may delay the fair trial of the action and it is otherwise an abuse of process.

The first ground of challenge must be decided on the pleadings alone and no evidence may be considered.

The statement of claim avers that the defendant prosecuted the plaintiff on two charges, one of falsification of accounts and the other of knowingly dealing with a forged document. At the trial the plaintiff was acquitted when the trial judge found there was no prima facie case against him. It continues that there was no reasonable or probable cause for the proceedings and the defendant instituted and carried on the prosecution maliciously.

The particulars of malice are set out in detail as follows:
(a) In preparing the prosecution the defendant or its counsel ought to have known there was no case or evidence against the plaintiff
(b) the defendant or its counsel was grossly ignorant of the law
(c) During the first week of March, 1997, the plaintiff and his counsel William Edwards were asked to meet with Crown counsel Mrs Simiki and Miss Tapueluelu. The plaintiff was asked to plead guilty and if so the Crown Counsel would ask for the court for a conviction and discharge. If the plaintiff refused to plead guilty the Crown would file more charges against the plaintiff. The plaintiff refused to plead guilty and as a result he

was indicted with an additional 16 charges without any preliminary hearing in the Magistrates' Court on or any evidence adduced in the Supreme Court for the purpose of any such further charges.

(d) The plaintiff was intimidated and threatened to plead guilty and on or about 13 March 1997 was charged with an additional 16 charges

(e) There were 11 people suspended from the Treasury and two people from the Ministry of Health. There were 7 people from the Treasury who were reinstated and treated differently from the plaintiff and others notwithstanding that they were all alleged to have committed the same improper conduct

(f) The work of the plaintiff in the Treasury was carried out openly and on instructions and authorisation of the Accountant General and also at the request of other Ministries

(g) That the said arrangement between the Treasury and other Ministries were agreed upon by the Heads of Department involved and authorized by Accountant General

Later in the statement of claim in paragraph 8 further particulars are supplied:
"That the additional charges against the plaintiff were brought recklessly and without the proper procedures being applied to lay the proper foundation for the said charges. The court refused to proceed with the said additional charges."

In considering whether there is a reasonable cause of action shown , the statement of claim refers to a prosecution having been instituted and that it was determined in the plaintiff's favour. Whether it was without reasonable cause is a matter of evidence and so long as it has been pleaded it reveals a basis for the cause of action. Of the particulars of malice subparagraphs (a) and (e) and paragraph 8 could reveal a reasonable cause of action and so the first ground of objection fails. However, I must further consider the identity of the defendant in relation to the submission that the pleading was unclear.

In determining whether the pleadings are unclear or may delay the fair trial of the action or that they are an abuse of process, the court may consider evidence. The plaintiff has not sought to produce any. The defendant has produced an affidavit by the Chief Establishment Officer in the Prime Minister's Office.

That affidavit sets out a little of the background . He deposes to the fact that, in 1993, the acting Auditor General filed a report that suggested there were irregularities in the payments of overtime by staff in the Treasury. Cabinet considered the matter and, in October of that year, suspended a number of civil servants including the plaintiff. Having sought the plaintiff's explanations, Cabinet decided, in January 1994, to dismiss him. A letter was then sent to Cabinet by a senior Treasury official asking it to reconsider the decision, which it did but, in March 1994, the decision was reaffirmed.

At the time of the decision in January to dismiss the plaintiff, Cabinet also resolved to refer the matter to the Ministry of Police to consider charges and such charges were laid. It was those that were dismissed for failure to establish a prima facie case. The judgment in that case is exhibited to the affidavit and shows that the grounds, upon which the trial Judge found the evidence failed, related to a failure by the investigating police officer to ask the accused whether he did actually work the overtime that formed the basis of the charge. The learned trial Judge considered that, on the evidence produced by the prosecution, "a jury may be left suspicious of him but it could never be said that there is sufficient evidence....to enable the jury to reach a verdict." He concluded; "Initially I formed the view at the close of the Crown

case that there may be cases to answer. On a reconsideration of the evidence and the record of interview I have reversed my opinion."

Order8 rule 6(1)(iii) provides that a pleading may be struck out if it is unclear, or may otherwise prejudice or delay the fair trial of the action. The first part of this subrule is, as far as my researches a reveal, unique to this jurisdiction. There is no corresponding provision in the English Rules of the Supreme Court from which the remainder of the Order is clearly derived. The provision in the corresponding English rule that has been replaced by "unclear, or may otherwise prejudice or delay the fair trial" is that the pleading "may prejudice, embarrass or delay the fair trial".

Embarrassment has been said to occur if the plaintiff's case is in such an unintelligible form that the defendant is unable to meet it. The pleading should state the facts which will put the defendants on their guard and tell them what they will have to meet when the case comes on for trial.

I can find no authority to assist with the meaning or scope of the word "unclear" used in our rule. Far too many actions in this Court are commenced by, and tried on, unclearly worded pleadings and so the power to strike out under this provision must be based on something substantially more. Clearly when the rule was made, there was an intention to convey something different from a possibility it may embarrass the other side. The use of the comma followed by the words "or otherwise" in our rule also show that it was intended to mean something other than that it would delay the fair trial. I take it therefore to be a wider ground for striking out and that it must include any case where the pleading is so unclear that the other party cannot know with any certainty the case he has to answer.

The basis on which the defendant suggests the pleadings are unclear relates to the identity of the defendant and of the person or body that had malice. By the Crown Proceedings Act, the Government is properly sued in the name of the Kingdom as has been done. The problem is that, if malice is to be established, it is necessary to know who is claimed to have shown that malice and that the malice related to the institution of the prosecution. Without that it is impossible to defend.

No doubt in an attempt to clarify this point, the writ names the defendant as the Kingdom of Tonga sued in respect of the Ministry of Finance. However, apart from the averment that the plaintiff was employed by the defendant and the evidence of the Chief Establishment Officer that he was in the Treasury, there is no other mention of the Ministry of Finance in the statement of claim.

Paragraph 2 of the claim states; "the defendant is sued in respect of the Audit Department, Cabinet and Crown Law." The Solicitor General who appears for the defendant complains that he has no indication from the pleadings who is actually being sued.

I have some sympathy with his predicament. It is he who has to prepare the defence. In order to do so he is entitled to know exactly who is, in truth, being sued. Clearly if it is a Government servant acting in the course of his employment, the Kingdom should be joined as a party but no individual is named. Malice requires a personal state of mind. Who is the person who is alleged to have held the malice that led to the prosecution and in which of the three departments of Government named does he work?

I have already pointed out that the Ministry named in the title of the action is not mentioned. In view of paragraph 2 of the claim, I must take the remaining references to "the defendant" as being made in terms of that paragraph.

Like the Finance Ministry, the Audit Department and Cabinet never again appear nor is any allegation made specifically against a member of either. It appears from the affidavit of the Chief Establishment Officer that there was a report by the acting Auditor General and that the Cabinet, amongst other steps, referred the matter to the police for investigation. If that was their involvement, there needs to be some explanation in the claim as to why the plaintiff is alleging malice by them. There is none and the defendant is right to say that it is unclear.

That only leaves Crown law. Paragraph (a) of the particulars of malice could be a basis of an allegation of malice if it is being suggested that they actually deliberately ignored or failed to check whether there was a case and prosecuted whatever but the words "ought to have known" read with paragraph (b) appear to be suggesting incompetence and ignorance rather than malice. I do not accept that either ignorance or incompetence is a basis for a claim of malice.

Paragraphs (c) and (d), if proved, would suggest a most unfortunate approach to the case by counsel in the Crown Law Department but I do not accept it shows any allegation of malice in relation to the institution of the prosecution.

The affidavit of the Chief Establishment Officer discloses nothing to suggest the procedure by which the prosecution was brought was anything but the usual one for instituting a criminal prosecution. The matters he describes show a reasonable and probable cause of the prosecution. The allegation set out in subparagraphs (c) and (d) and paragraph 8 may suggest an improper meeting and intimidating actions. This is not the time to decide that, but I am satisfied that, even if proved, they are not a basis upon which malice could be established.

The Solicitor General's problem about the identity of the person who actually held the malice is further compounded by subparagraphs (e), (f) and (g). If re-instatement of others and different treatment of them is put forward as evidence of malice, then the pleadings must disclose who that person or body was and the manner in which the plaintiff was treated differently and maliciously. It would certainly not appear to be the Crown Counsel named in the preceding subparagraphs.

Apart from the intimidating actions alleged to have been done by Crown Counsel and the fact that the case was stopped by the Judge at the close of the prosecution case, nothing is pleaded to suggest there was anything unusual in the way this case was referred to the police. There is nothing to suggest that, having done so, Cabinet tried to influence the investigation. The police having investigated the case, however incompletely or incompetently, brought charges. There is nothing to suggest the charges that were eventually tried followed anything but the usual course in the magistrates' court. There is nothing to suggest that the conduct of the trial was motivated by anything improper other than the allegation in subparagraph (a). The Judge's ruling shows that the failure of the evidence was a failure by the investigating officer to ask some all-important questions and that, even without them in the prosecution case, he was, for some time at least, uncertain. None of these matters is clarified.

On those grounds I feel the defendant's complaint is justified. The case on the statement of claim is unclear to the extent that I do not consider the defendant can possibly know the case he has to answer in order to draft a defence.

The application of the defendant is that the writ be set aside and the claim be dismissed. The power of the court to strike out pleadings is one that should only be exercised in the clearest cases. It is an important principle that every man is entitled to his day in court. There is clear authority also that, rather than strike out a defective pleading, the court should always consider whether the defect could be cured by amendment.

This action started as a claim not only for malicious prosecution but also for wrongful dismissal and unfair treatment. I ordered that those were matters for judicial review and that, as the defendant was so very far out of time, they would be struck out. I gave time to the plaintiff to amend his pleading and pointed out the need to set out the allegation of malice. Having had time to do so, the present statement of claim has filed. I do not think, therefore that further amendment would help. On the pleading before me, the plaintiff could never succeed and I am satisfied it is a proper case to order that it is struck out and, for the same reason, I consider the appropriate order is that the plaintiff's action be dismissed with costs to the defendant.

This ruling applies to the parallel case of Tu'itupou –v- Kingdom of Tonga No.1309/98 save for the order for costs. The defence have liberty to apply to re-instate that action on 5 days notice.

SUPREME COURT TONGA

Dated: 1st March, 1999

CHIEF JUSTICE