FSM SUPREME COURT APPELLATE DIVISION

BERYSIN SALOMON and NANCY SALOMON, Petitioner, vs. ASSOCIATE JUSTICE LARRY WENTWORTH, Respondent, and FEDERATED STATES OF MICRONESIA DEVELOPMENT BANK, Respondent-Real Party in Interest.	)	APPEAL CASE NO. P5-2021 (Civil Action No. 2014-021 and Civil Action No. 2014-023)

ORDER DENYING WRIT OF PROHIBITION

Dennis K. Yamase
Chief Justice

Decided: April 6, 2021

APPEARANCE:

For the Petitioner: Yoslyn G. Sigrah, Esq.
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HEADNOTES

Mandamus and Prohibition – Procedure

Upon receipt of a petition conforming to Appellate Rule 21's requirements, the clerk shall file the petition and submit it to any remaining article XI, section 3 justices of the Supreme Court appellate division who are not the subject of the action. The remaining justices, acting as the appellate division, are eligible to consider the petition. Salomon v. Wentworth, 23 FSM R. 215, 217 (App. 2021).

Mandamus and Prohibition – Procedure

If the remaining fulltime justices are of the opinion that the writ of mandamus clearly should not be granted, they shall deny the petition. Otherwise, they shall order that an answer be filed. The order shall be served by the clerk on the judge or justice named respondent and on all other parties to the action in the trial court, and all parties below other than the petitioner shall also be deemed respondents for all purposes. Salomon v. Wentworth, 23 FSM R. 215, 217 (App. 2021).

Mandamus and Prohibition – Nature and Scope

Writs of mandamus and prohibition are similar in that the former commands the trial court to do something, while the latter commands the trial court not to do something. Salomon v. Wentworth, 23 FSM

R. 215, 217 (App. 2021).

Mandamus and Prohibition – Nature and Scope
A writ of mandamus or prohibition is an extraordinary remedy, the object of which is not to cure a mere legal error or to serve as a substitute for appeal, but to require an official to carry out a clear, nondiscretionary duty. Such a writ may only force a ministerial act or prevent a clear abuse of power and cannot be used to test or overrule a judge's exercise of discretion. Mere legal error by a judge, even gross legal error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support the issuance of a writ of mandamus or prohibition. Salomon v. Wentworth, 23 FSM R. 215, 218 (App. 2021).

Mandamus and Prohibition – Nature and Scope
The single issue presented by a writ of prohibition is whether an inferior court or tribunal is without jurisdiction or is about to act in excess of its jurisdiction. The extraordinary writ of prohibition is proper to prevent an inferior tribunal acting without or in excess of jurisdiction which may result in a wrong, damage, and injustice when there is no plain, speedy, and adequate legal remedy otherwise available. Salomon v. Wentworth, 23 FSM R. 215, 218 (App. 2021).

Appellate Review – Stay – Civil Cases; Mandamus and Prohibition – Procedure
It is well recognized that the Rules of Civil and Appellate Procedure do not stay trial division proceedings while a writ of mandamus or prohibition is sought. As such, the trial division is free to exercise its jurisdiction and act, unless a stay has been specifically ordered, and a writ applicant must seek a stay first from the trial division, and, if unsuccessful there, from the appellate division. Salomon v. Wentworth, 23 FSM R. 215, 218 (App. 2021).

Mandamus and Prohibition – When May Issue
Presumption and belief, irrespective of who makes the assumption or holds the belief, are insufficient to support allegations entitling a petitioner to mandamus relief. A petition for a writ of prohibition to disqualify a trial court judge is procedurally deficient when it includes a lone exhibit which reflects the trial judge's order; when there is no affidavit stating the reasons for the belief that grounds for disqualification exist; when it lacks a memorandum of points and authorities; and when it includes a motion to stay that does not properly belong before the appellate division since it should have been filed in the trial court. A petitioner seeking a writ of prohibition must allege facts that show an appearance of partiality, and without a supporting affidavit, the purported facts underpinning the allegation are absent, and only the petitioner's subjective assertions remain, and when the petitioner's unsupported allegations that the judge is not impartial are purely speculative, they are insufficient to support his disqualification. Salomon v. Wentworth, 23 FSM R. 215, 219 (App. 2021).

Mandamus and Prohibition – Procedure
A petition for a writ of prohibition must contain copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition, that would, at a minimum, be the trial judge's written order denying her recusal and the reasons for that denial or, if the denial was oral, a transcript of that denial. Salomon v. Wentworth, 23 FSM R. 215, 219 (App. 2021).

Civil Procedure – Affidavits; Courts – Recusal – Procedure; Mandamus and Prohibition – Procedure
The disqualification statute requires that an application to disqualify a justice be accompanied, at a minimum, by an affidavit stating the reasons for the belief that grounds for disqualification exist. An undated and unsigned report is not an affidavit. Salomon v. Wentworth, 23 FSM R. 215, 219 (App. 2021).

Mandamus and Prohibition – When May Issue
When a petition is utterly deficient in grounds to justify the issuance of a writ of prohibition, the petition

for a writ of prohibition will be denied. Salomon v. Wentworth, 23 FSM R. 215, 219-20 (App. 2021).

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COURT'S OPINION

DENNIS K. YAMASE, Chief Justice:

This matter comes before the Court on the Petitioners' application for a writ of prohibition to issue to Associate Justice Larry Wentworth, preventing him from further presiding over the consolidated trial court case of: Federated States of Micronesia Development Bank v. Berysin Salomon et al., Civil Action No. 2014-021 (Con. Civil Action No. 2014-023). The petitioners also submitted a supplement to their writ of prohibition on April 5, 2021. For the reasons stated below, the writ of prohibition is hereby denied.

To begin, the Court's Rules of Appellate Procedure provide that an application for a writ of prohibition directed to a judge or justice shall be made by filing a petition with the clerk of the Court's appellate division with proof of service on the respondent judge or justice and on all parties to the action in the trial court. FSM App. R. 21. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. *Id.* Upon receipt of a petition conforming to the above requirements, the clerk shall file the petition and submit it to any remaining article XI, section 3 justices of the Supreme Court appellate division who are not the subject of the action. FSM App. R. 21(a). The remaining justices of the Court, acting as the appellate division, are eligible to consider the petition. *Id.*

If the remaining fulltime justices are of the opinion that the writ clearly should not be granted, they shall deny the petition. FSM App. R. 21. Otherwise, they shall order that an answer be filed. *Id.* The order shall be served by the clerk on the judge or justice named respondent and on all other parties to the action in the trial court. *Id.* Heirs of Tulenkun v. Aliksa, 19 FSM R. 191, 194 (App. 2013) (if the appellate division is of the opinion that a writ of prohibition clearly should not be granted, it must deny the petition; otherwise, it must order that an answer be filed).

All parties below other than the petitioner shall also be deemed respondents for all purposes. FSM App. R. 21. Two or more respondents may answer jointly. *Id.* If a judge or justice named respondent does not desire to appear in the proceeding, the judge or justice may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. *Id.* The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. *Id.* The proceeding shall be given preference over ordinary civil cases. *Id.* The remaining justices of the Supreme Court to whom the petition is submitted may sit as the appellate division hearing the case or, if there are fewer than three, may, at their discretion, seek appointment of a temporary justice pursuant to the special assignment powers of the chief justice under article XI, section 9 of the Constitution. *Id.*

It is well recognized that this Court has inherent constitutional power to issue all writs, including writs of mandamus and writs of prohibition. Etscheit v. Amaraich, 14 FSM R. 597, 600 (App. 2007). The extraordinary writ of mandamus is used to compel public officials to perform a duty ministerial in nature and not subject to the official's own discretion while the extraordinary writ of prohibition is used to prevent a trial court from exceeding its jurisdiction and exercising unauthorized judicial or quasi-judicial power. *Id.* at 600. The writs of mandamus and prohibition are similar in that the former commands the trial court to do something, while the latter commands the trial court not to do something. *Id. See* Peterson v. Anson, 20 FSM R. 657, 659 (App. 2016) (party seeking the extraordinary and exceptional remedy of a writ of prohibition

must show that the party's right to the writ is clear and indisputable and that all of the following five elements are satisfied: 1) the respondent must be a judicial or other public officer; 2) the act to be compelled must be non-discretionary or ministerial; 3) the respondent must have a clear legal duty to perform the act; 4) the respondent must have failed or refused to have performed that act; and 5) there must be no other adequate legal remedy available).

A writ of mandamus or prohibition is an extraordinary remedy, the object of which is not to cure a mere legal error or to serve as a substitute for appeal, but to require an official to carry out a clear, nondiscretionary duty. Etscheit v. Amaraich, 14 FSM R. 597, 600 (App. 2007). Such a writ may only force a ministerial act or prevent a clear abuse of power and cannot be used to test or overrule a judge's exercise of discretion. Mere legal error by a judge, even gross legal error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support the issuance of a writ of mandamus or prohibition. *Id.* at 600. The issuance of writs is discretionary and must be used with great caution. *Id.*

The single issue presented by a writ of prohibition is whether an inferior court or tribunal is without jurisdiction or is about to act in excess of its jurisdiction. Tilfas v. Aliksa, 19 FSM R. 181, 184 (App. 2013). The extraordinary writ of prohibition is proper to prevent an inferior tribunal acting without or in excess of jurisdiction which may result in a wrong, damage, and injustice when there is no plain, speedy, and adequate legal remedy otherwise available. A writ of prohibition cannot be used as a substitute for a pending appeal of attorney sanctions that is currently being briefed, especially when the sanctions have been stayed while that appeal proceeds. *Id.* at 184. That is an adequate legal remedy for the attorney sanctions. *Id. See* Peterson, 20 FSM R. at 658-59 (writ of prohibition clearly should not be granted based on a judge's adverse ruling that did not even remain adverse when the justice changed her mind and on factors that arose as part of the give and take during a contentious oral hearing on a controversial topic).

With regard to the petition at hand, as an initial matter, it should be noted that I am the sole, remaining article XI, section 3 justice of the Court who is eligible to consider the petition in this case. Thus, I am serving as the Court's appellate division for this particular matter. FSM App. R. 21.

That aside, the petitioners' arguments in support of issuing a writ of prohibition are utterly lacking in merit. Indeed, the petitioners first maintains that because the Judgment entered in the case of Federated States of Micronesia Development Bank v. Berysin Salomon et al., Civil Action No. 2014-021 (Con. Civil Action No. 2014-023), is now on appeal, *see* Berysin Salomon v. Federated States of Micronesia Development Bank, Appeal No. P3-2020 (appeal of final judgment) and Berysin Salomon v. Federated States of Micronesia Development Bank, Appeal No. P3-2021 (appeal of order for sale of land), Associate Justice "Wentworth lost jurisdiction over this case at the trial division level." It is well recognized by the Court, however, that the Court's Rules of Civil and Appellate Procedure do not stay trial division proceedings while a writ of mandamus or prohibition is sought. Young Sun Int'l Trading Co. v. Anson, 20 FSM R. 577, 578 (App. 2016). As such, trial division court is therefore free to exercise its jurisdiction and act, unless a stay has been specifically ordered. Moreover, a writ applicant must seek a stay first from the trial division, and, if unsuccessful there, from the appellate division. FSM App. R. 8. *See* Young Sun Int'l Trading Co., 20 FSM R. at 578 (when no stay was ever issued (and none apparently ever sought), the trial division justice may, while a petition for a writ of prohibition to disqualify that justice is pending in the appellate division, continue to make such orders, and do all acts, not inconsistent with law or with the rules of procedure and evidence as may be necessary for the due administration of justice).

The petitioners next assert that Associate Justice Wentworth "cannot be 'fair and impartial' when it comes to cases involving [the] FSM Development Bank and [its counsel of record] Nora Sigrah [Esq.]." As evidence of this purported bias, however, the petitioner merely states that "the narratives [in support of this claim] are lengthy, [as such the] Petitioner reserves the right to submit additional [s]tatement[s] and

documents in support of this statement." The petitioners failed to include an affidavit supporting their claim of bias on the part of Associate Justice Wentworth. Although the petitioners included a copy of a letter that Berysin Salomon wrote to me, as the Chief Justice of the Court, in November 2017, requesting that Associate Justice Wentworth be removed from presiding over the trial court case at issue here, that letter is not notarized, nor is the accompanying "Statement to the Court." Similarly, the signed statement by the Pohnpei Traditional Leaders that was submitted by the petitioners is neither notarized, nor does it attest to any alleged favoritism to the FSM Development Bank and its counsel, Nora Sigrah, Esq., on the part of Justice Wentworth. Instead, merely requests that Justice Wentworth not be permitted to order the sale of the petitioners' land in satisfaction of the outstanding judgment entered in the case of Federated States of Micronesia Development Bank v. Berysin Salomon et al., Civil Action No. 2014-021 (Con. Civil Action No. 2014-023).

As this Court has explained, presumption and belief, irrespective of who makes the assumption or holds the belief, are insufficient to support allegations entitling a petitioner to mandamus relief. Shrew v. Sigrah, 13 FSM R. 30, 34 (Kos. 2004). Indeed, a petition for a writ of prohibition to disqualify a trial court judge is procedurally deficient when it includes a lone exhibit which reflects the trial judge's order; when there is no affidavit stating the reasons for the belief that grounds for disqualification exist; when it lacks a memorandum of points and authorities; and when it includes a motion to stay that does not properly belong before the appellate division since it should have been filed in the trial court. Halbert v. Manmaw, 20 FSM R. 245, 249 (App. 2015). A petitioner seeking a writ of prohibition must allege facts that show an appearance of partiality. Without a supporting affidavit, the purported facts underpinning the allegation are absent, and only the petitioner's subjective assertions remain, and when the petitioner's unsupported allegations that the judge is not impartial are purely speculative, they are insufficient to support his disqualification. *Id.* at 250.

More recently, this Court has found that FSM Appellate Rule 21(a) requires that a petition for a writ of prohibition contain copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition, that would, at a minimum, be the trial judge's written order denying her recusal and the reasons for that denial or, if the denial was oral, a transcript of that denial. Miju Mulsan Co. v. Carl-Worswick, 20 FSM R. 660, 662 (App. 2016). In the case at hand, the copies of pleadings and orders from the underlying trial court case at issue here do not, in any way, demonstrate any type of bias or favoritism toward the FSM Development Bank and/or its counsel, Nora Sigrah, Esq., on the part of Justice Wentworth. The relevant judicial disqualification statute requires that an application to disqualify a justice, be accompanied, at a minimum, by an affidavit stating the reasons for the belief that grounds for disqualification exist. *Id.* at 662. This is particularly applicable to the petitioners' supplemental filing in support of their petition for a writ of prohibition. Indeed, filing presents a document which purports to be an expert report on the lending practices of the Federated States of Micronesia Development Bank. It is undated and unsigned, the latter of which means that it is not in the form of an affidavit. Moreover, this document has apparently never been previously considered by Justice Wentworth in connection with the adjudication of any trial-court level proceedings that involve the petitioners. As such, it does not in any way demonstrate that Justice Wentworth has acted in any manner that would warrant the type of relief sought by the petitioners.

In short, when the procedural deficiencies in a petition for a writ of prohibition are too many to overlook, the petition will be denied without prejudice to any future petition in which these procedural deficiencies have all been cured. Miju Mulsan Co., 20 FSM R. at 662. In this case, the petition now before the Court is utterly deficient in grounds to justify the issuance of a writ of prohibition. *See* Halbert, 20 FSM R. at 249, 250 (the court may issue a writ of prohibition only when the party seeking a writ has met his burden to show that his right is clear and indisputable; a petitioner seeking a writ of prohibition to disqualify a trial judge must show an abuse of discretion, as the appellate court will not merely substitute its judgment for that of the trial judge).

Accordingly, the writ of prohibition at issue in this case is hereby denied. The Clerk of Court is hereby instructed to file a copy of this Order in the file for the underlying case captioned as: Federated States of Micronesia Development Bank v. Berysin Salomon et al., Civil Action No. 2014-021 (Con. Civil Action No. 2014-023). The Clerk of Court is further instructed to serve a copy of this Order on all parties to the underlying trial court case at issue here.

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