IN THE SUPREME COURT OF NAURU

Miscellaneous Cause No. 4/98

IN THE MATTER of a Petition for a Declaration under Article 36 of the Constitution by **MESSRS L.G.N. HARRIS & ORS**

Miscellaneous Cause No. 5/98

IN THE MATTER of Election Petition filed by **MESSRS L.G.N. HARRIS & ORS**

INTERIM DECISION OF THE FULL COURT

In our ruling of 19 November 1998 we stated we were deferring consideration of certain specified matters raised in the submissions of Mr Audoa that we had received since the initial hearing. This ruling covered other matters and was a final one. It required no answer from Counsel thereon. Notwithstanding this Mr Audoa has presented us with yet another submission.

We presume that he, in compliance with the Rules, has given a copy of these latest submissions to the Respondent. We have received no reply thereto by him. He may have considered a reply is unnecessary. We need no assistance in the consideration of this uncalled for submission. We would have ignored it. However since it contains numerous erroneous legal propositions, as well as a repetition of insulting references in respect of the Court's handling of these cases, we feel that rather than deferring until final judgment a consideration of this submission, it is imperative that certain contentious matters raised by Mr Audoa be put to rest now by this interim decision. We deal with these matters under sectional subheadings.

Representation

On 16 October 1998 the Court for stated reasons, held that Mr Audoa, in law, was a Barrister and Solicitor for all Petitioners in these cases and was their Counsel. That Ruling is binding,

yet he still persists pressing his rejected submissions thereon. We emphasise that our Ruling must be complied with. Nothing since it was issued has been done to alter the legal position - Mr Audoa must understand that, irrespective of whatever complexion he puts on his appearance, the law must be complied with.

Two consequences flow from this ruling:

1. If Mr Audoa is to withdraw as the Petitioners' Barrister and Solicitor, he is duty bound:

   (a) In law, to take the steps specified in Order 44 of the Civil Procedure Rules 1972 to effect the change in representation.

   (b) As Solicitor for the Petitioners to advise them of the requirements of Order 44 to be complied with to effect the change of representation either by the engaging of another lawyer to represent them, or to the conducting of the proceedings themselves in person.

   (c) To notify in accordance with the said Order, the Respondent of his withdrawal from the proceedings as representative of the Petitioners. Until such notice is given to him, the Respondent cannot recognise any change in representation.

   Strict compliance with Order 44 is necessary. It cannot be bypassed. There is no alternative procedure.

2. Mr Audoa's incredible and unjustified intransigent stance in refusing to comply with the Law is seriously prejudicing the Petitioners to whom he is legally answerable.

Mr Audoa presumes he can bypass the Law by claiming to act in the proceedings not as Barrister and Solicitor for the Petitioners, but, as their agent. Representation by an "agent" in Court proceedings is not a right available to any party. There is no provision in our Law for such representation. Section 70 of the Courts Act 1972 deals with "Representation of the Parties". It reads:

"Subject to the provisions of the last preceding section, any party to any cause or matter in the Supreme Court or the District Court may employ as his legal representative therein a barrister and solicitor or a pleader, being a person who is entitled to be in or to enter, Nauru."

The only recognition of an "agent" in Court proceedings is in the Civil Procedure Rules Order 44 Rule 2 which makes provision for change of a Barrister and Solicitor who is acting as "agent" for another Barrister or Solicitor in any proceedings.

In some instances, the Court, in its discretion, will allow another person, not legally qualified, to assist a litigant. However, that can only happen if the leave of the Court is, on application, first obtained. No such leave has been granted here. No application has been made. It is unlikely the Court, in its discretion, would allow a Barrister of the Court to represent a party other than in his capacity as an Officer of the Court. A Barrister, being an Officer of the Court, cannot divest himself of that responsibility. Mr Audoa's representation as either an "agent" or a layman assisting a party cannot be recognised by the Court. He, of course, is entitled to be heard in his own cause.

The Request for Court Record of Counsel's Argument

On 27 September 1998, Mr Audoa filed a submission which he (*inter alia*) requested "the record of the argument submitted by Mr Hulme for an Order to have the matter dismissed forthwith".

The Court in its ruling of 16 October 1998 said:

"2. Mr Audoa requires a "...record of oral submissions by Mr Hulme Q.C..."

A recording of those oral submissions was not made. It was quite unnecessary for that to be done. They did no more than refer to the typed submissions and the typed analysis of the principle involved as presented by Mr Hulme. Mr Audoa acknowledges he has those submissions and analysis."

Despite this Ruling, Mr Audoa still insists he is entitled to more than the written submissions given to him by Mr Hulme. This is the only record the Court has. What he must do is to examine his apparent neglect as Counsel to take adequate notes of his opponent's legal argument. He apparently has none. That indicates lamentable neglect on his part.

The Court is not his recording agent. Judges take their own notes. These are personal to the Judge, as any competent Barrister knows, and any request for these notes is out of order. Judges' notes do not form part of the records of the Court. They are not available either to any party or to any other Court.

Court's Records - The Legal Requirements

Paragraph 2 of Mr Audoa's submission, in summary, says that the Supreme Court of Nauru is required in proceedings "to record everything (that happens) in writing including "everything done during the proceedings"". He claims support for this contention can be found in the Constitution and the "Rule of Law". He does not refer to any specific rule.

Had he researched the "Rule of Law", he would have found certain duties were imposed on the Court by enactments - the Courts Act 1972, the Civil Procedure Act 1972, and the Civil Procedure Rules 1972 to which we shall refer later. However, in an earlier submission on 9 November 1998, Mr Audoa revealed the Article of the Constitution on which he relied to support his contention that "the Court has failed to comply with the Constitution". That Article is Article 48(1) which reads:

> "48(1) There shall be a Supreme Court of Nauru which shall be a Court of Record."

Quite clearly, that Article has no reference at all to the points Mr Audoa tries to make. We were puzzled as to why he considered it did. Our conclusion was that he was indeed beguiled by the term "Court of Record", and felt it assisted him in his argument. For his information we feel we should explain the legal meaning of the Article.

The term "Court of Record" is one of well accepted legal connotation and any Court which has power to fine or imprison for contempt or for any other offence is at common law a Court of Record. Article 48(1) creates the Supreme Court of Nauru. In addition to creating the Court, Parliament was required to give it power. That it did by conferring on the Court the power of "Court of Record".

We conclude that Mr Audoa has undertaken little legal research on the points he argues. We consider he could profitably take heed of the words of that eminent jurist Lord Coleridge who said.

> "We must not be guilty of taking the Law into our own hands and converting it from what it really is to what we think it ought to be."

Subject to the requirement of Section 57(1)(a) of the Courts Act dealing with the recording of evidence, the recording of proceedings of the Court is under the complete control of the presiding Judge and such records as are to be kept are to be decided by him. Section 56(2) of the Courts Act provides that the record of Court proceedings in the Supreme Court is not available as of right to any person and only a Judge in his discretion may allow inspection of it. Mr Audoa is entitled to no more of the proceedings of the initial hearing than he already has.

Paragraph 3 of the Submission of 27 November 1998

Although this paragraph contains a measure of incoherence, from it we glean that the thrust of Mr Audoa's argument is that this Court is now dealing with an "interlocutory application". It certainly is not and there is no legal reasoning available to argue that it is.

We are therefore required to spell out, for his benefit, what is presently before the Court and what is required of the parties and their Counsel at this stage of the proceedings.

For reasons which we shall state later, the Court at this initial hearing could hear only the Respondent's argument in support of an application to dismiss the petition. Because the petitioners' senior counsel was unable to attend this hearing, and they desired he and not Mr Audoa to present the reply to that application, after Counsel for the Respondent completed his case, leave was given to the Petitioners to reply thereto by written submissions, a timetable being fixed by the Court for that to be done. Also at this hearing, the Court required the Respondent to present to it an official record of the resolutions of Parliament suspending the Petitioners. Mr Hulme later presented an affidavit by the Clerk of Parliament recording the official record as requested. As well, he supplied the official Standing Orders

of Parliament. The affidavit was admitted without objection and constituted "the agreed facts" referred to in the Court's ruling of 2 September 1998.

During a recess the Judges perused the Records of Parliament set out in the Affidavit and considered the Standing Orders relevant to suspension. They were of the opinion certain important issues arose therefrom which could appropriately be considered by Counsel at that stage of the proceedings since a finding on them in their view would determine the future course of the proceedings.

Since the hearing was to proceed no further, in view of the adjournment granted to meet the desire of the Petitioners to have their senior counsel present, it was considered that during the period of the adjournment Counsel for the parties should consider and make written submissions to the Court on the following questions:

"1) Has Standing Order 47 which requires sequential terms of suspension been complied with by the resolutions of suspension of Parliament?

2) Standing Order 47, on the face of it, makes provision for the suspension of a member during any period commencing on the 1st January and ending on the 31st December -

(a) Is any suspension extending beyond the 31st December lawful.
(b) If the answer to (a) above is NO - in computing any period of absence without leave as specified in Article 32(d) of the Constitution should that period include the period of unlawful suspension?"

On the adjournment of the hearing we issued a ruling which set the future course of the proceedings. It is dated 2 September 1998. It (*inter alia*) directed and ordered:

1. The filing of a reply by the petitioners to the Respondent's application to dismiss.

2. Submissions on the points put by the Court in accordance with a specified timetable.

We would again note that this Ruling was final.

As stated, Mr Audoa contends that this hearing was an "interlocutory" application presumably made under Order 7 of the Rules, the only Order applicable to interlocutory proceedings. This is crass ignorance on his part.

He has inferred that the questions put by the Court favoured the Respondent. We find it almost unbelievable that a lawyer could so conclude. We suggest he study more responsibly these questions. We would advise him to ponder on the consequences of a negative answer to Question 1, likewise a negative answer to Question 2(a).

Mr Audoa knows, or should know, that there can be no further hearing until there have been filed and considered the submissions ordered by our ruling of 2 September. He has argued many times that the blame for the delay in proceeding further with these cases lies with the Court. The reality, and Mr Audoa is fully aware of it, is that it is he who is substantially to blame for the Court's inability to proceed to final judgment. For the benefit of the petitioners he represents, we consider that there should now be detailed the events leading up to the hearing which limited the scope of that hearing and prompted the procedure adopted thereat.

The Hearing and Reasons Therefor

The course adopted at the hearing was set by the events preceding it. Nauru's needs, like those of other small Pacific territories, do not justify the appointment of a full time resident Judge. Fixtures for the Supreme Court depend on the availability of the Judge. They also, in cases where litigants engage the services of overseas counsel, as in these cases, must be made well in advance to enable all concerned to be prepared and ready for attendance at the trial. Due to the expense for both the Republic and the litigants, fixtures once made cannot be aborted close to the hearing date, except for special and weighty reasons. In these cases a firm fixture was made for the hearing to commence on 31 August 1998. It was made nearly two months prior to that date.

On Friday 14 August the Respondent Secretary for Justice applied to the Chief Justice in Chambers for an order for directions. The application was set down for hearing at 3.30 p.m. on that day. Mr Audoa was served with the application. Mr Connell for the Respondent appeared. Mr Audoa failed to appear. The Chief Justice therefore refused to make any Order. However he was told by Mr Connell that the main reason for the application was that

the Court's direction for the exchange of affidavits of evidence had not been complied with The Chief Justice, being aware of Mr Connell's departure for Melbourne next day, suggested he see Mr Audoa and, if they were able to agree on the manner of presentation of their evidence, the Court at the hearing would accept what had been agreed upon and proceed on that basis. The two Counsel conferred the next day. On Tuesday 18 August the Registrar advised the Chief Justice that Counsel had agreed that the trial be adjourned. The Chief Justice forthwith directed that no adjournment would be effected without application therefor being made to and granted by the Full Court. He said such application would have to be made on 31 August. He directed the Registrar to advise immediately the parties of this. He gave the reasons for that Order in a Minute issued the next day. A copy is annexed to this decision. Mr Audoa later that day sought an audience with the Chief Justice. He advised him that his overseas counsel could not appear on 31 August. The reasons he gave for that were:

1. Mr Audoa, after he agreed with Mr Connell to adjourn the hearing, telephoned the senior counsel in Australia advising him that the hearing would not proceed.

2. When he was advised of the Chief Justice's decision requiring the hearing to proceed, he tried to communicate with Counsel but ascertained that he was not in his office. He had departed from the city on unspecified business, and could not be contacted. His expected absence was said to be for several days and he was not likely to be back in time to attend the hearing as planned.

Mr Audoa assured the Chief Justice that the Counsel had been briefed and his travel and accommodation had been confirmed sometime previously. He stressed that it was the Petitioners' wish that their senior counsel be present at the hearing.

In the result, the hearing commenced on the late afternoon of 31 August and proceeded spasmodically over the next two days. As has been stated, the Petitioners were not called upon to reply to the Respondent's submission, but were given leave to submit their reply in writing. They were in no way prejudiced by Mr Audoa's inability to secure senior counsel's presence at the hearing. However, an unfortunate consequence of this part hearing is that Mr Audoa has been able to present several written submissions containing a plethora of untenable arguments and propositions, compromising both himself and his clients, which he never would have been permitted to present orally at a hearing.

Paragraph 5 of the Submission

This extraordinary submission informs the Court that although the Petitioners know the Law, they would not comply with the orders made in the ruling of 2 September, or apparently any other ruling. However unwise and unjustifiable as this attitude is, if that is the Petitioners' decision, presumably based on their counsel's advice, the Court accepts that no further submissions from the Petitioners will be received.

Paragraph 9 of the Submission

This reads:

> "The Petitioner does not want to waste his invaluable (sic) time and also Court's time to making the same submission which has already been submitted in Paragraph 1 of this submission."

Apart from being devoid of reason, this statement serves no purpose other than to display inexcusable rudeness to the Court which Mr Audoa, on several occasions, in his submissions reviles, accusing it, without justification, of bias, partiality, constitutional violation and misconduct.

Counsel's conduct greatly concerned us. He should assess his position. His submissions go well beyond the bounds of acceptable advocacy. They contain certain remarks displaying contempt. His stance in these cases has been one of arrogance which, we are constrained to observe, is exceeded only by his ignorance of the law which he contends supports many of his arguments.

This assessment gives us no pleasure in the making. Mr Audoa, however, has invited it. In Paragraph 6 of his submission he said:

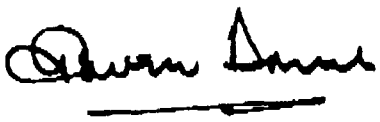
> "The Full Court must be well aware of its responsibility before making allegations against a well qualified barrister and solicitor ..."

We are very conscious of our responsibility to oversee the conduct of the Bar and our observations have been made only after grave and weighty consideration of Counsel's

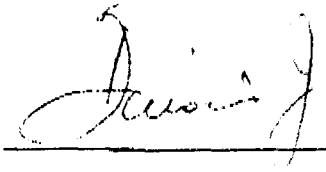
conduct which we can say is of a nature which neither of us in our long and extensive judicial service in the Pacific and elsewhere hitherto has been called to deal with.

We require and order that our rulings made as to the conduct of proceedings be complied with.

Dated this 17th day of December 1998.



Chief Justice



Dillon J.

ANNEXURE "A"

IN THE SUPREME COURT OF NAURU

Miscellaneous Cause No. 4/98

IN THE MATTER OF a Petition for a Declaration Under Article 36 of the Constitution filed by Messrs L.G.N. Harris & Ors.

MINUTE OF DONNE C.J.

There appears to have been an agreement by counsel in this case that the fixture made for the hearing of it by the Full Court at its Sessions commencing on the 31st August 1998 be vacated.

The apparent reason for this move is that the requirement was that all evidence proposed to be adduced at the trial should be by affidavits which were to be filed and served on the other party not later than 14 days before the 31st August and that this has not been done by either the Petitioners or the Respondent.

The fixture made is a firm one by order of the Court and it can be vacated only by order of the Court. It cannot be vacated on the whim of the parties. Counsel should be aware of this. If it is desired that the fixture be vacated, there must be an application to the Full Court for leave to vacate. Such leave will be granted only on good grounds.

The failure of a party to provide an affidavit of evidence within the prescribed time, or in fact provide none at all, may be a matter for appropriate order of the Court. *Prima facie*, it is not a ground for aborting the trial which, I consider, as a matter of public interest is one to be accorded urgency insofar as hearing is concerned.

This case must proceed as set down for hearing by the Full Court, the Sessions for which commence on the 31st August 1998 at 2:15 P.M.

CHIEF JUSTICE

19/8/98

ADDENDUM

The above decision was made by the Court which convened on 17 December 1998. It was due to be delivered on 21 December.

On that day we received the submission of one of the petitioners, Mr Harris, made on behalf of all the petitioners other than Mr Audoa.

Mr Harris seeks a hearing "*de novo*".

Although all petitioners (with the possible exception of Mr Benjamin, who is away from Nauru) have, on our instructions, received all our rulings since the initial one of 2 September 1998 delivered at the hearing, the Court, until now, has heard only from Mr Audoa for all the petitioners. The petitioners are thus fully aware of all steps of the proceedings to date.

They are aware the Court has ordered submissions to dispose of:

1. the application to dismiss;
2. the points put by the Court.

This ruling stands.

When it was apparent Mr Audoa would fail to comply with this order, we directed the Registrar to serve the "Queen's Counsel" briefed by the Petitioners with certain rulings. The Registrar advised us that he could not do this since he could not obtain instructions of the Queen Counsel's address to enable service. In this connection we would mention that we, until the receipt of Mr Harris's submissions, were also unaware of the identity of Counsel. We have now seen the letter written by Mr Audoa on 11 June to the Registrar advising him of his briefing, on behalf of the Petitioners, of Mr Tuckfield Q.C. At the Chamber Hearing of Dillon J. referred to in the submission neither Mr Saksena nor Mr Audoa named their proposed Queen's Counsel.

Mr Tuckfield Q.C. must be served immediately and appraised with our ruling. He must be fully informed of all steps in the proceedings to date. We shall minute hereunder the documents.

(a) Rulings and minutes of the Court dated 2 September 1998; 7 October 1998; 16 October 1998; 11 November 1998; 19 November 1998; 2 December 1998.

(b) Submissions by Mr Audoa dated 28 September 1998; 9 November 1998; 13 November 1998; 27 November 1998.

(c) Registrar's report dated 14 October 1998.

It should be obvious to Mr Tuckfield Q.C. that the petitioners have not been prejudiced by what occurred at the initial hearing. It should also be obvious that the future of the Petition under Article 36 will be decided by a finding on the points put by the Court.

As to the submissions of Mr Harris, apart from the practice of service on the Repsondent being complied with, it is certainly necessary, in view of the criticism of the Respondent's counsel stated therein that the Respondent's Queen's Counsel shall be given the opportunity to reply. He must be served with a copy of Mr Harris's submissions.

We require from both Mr Tuckfield Q.C. and Mr Hulme Q.C. for the Respondent advice, in the case of the former, of his intentions as to what steps he proposes to take in the proceedings, and in the case of the latter if he desires to reply.

We fix 22 January 1999 as the date for Mr Tuckfield Q.C. to file his submissions, and 29 January 1999 as the date for Mr Hulme Q.C. to file his submissions.

Dated this 23rd day of December 1998.

Chief Justice

Dillon J.