NANETTE TUTUA AND SHANE TUTUA (REPRESENTING THE SEIJAMA FAMILY) –V- SIMEON NANO & THE MAROVO LOCAL COURT

High Court of Solomon Islands
(Palmer ACJ)

Civil Case Number 65 of 2002

Hearing: **19th April 2002**
Judgment: **26th April 2002**

A. Radclyffe for the Applicants
First Respondent not present
S. Manetoali for the 2nd Respondent

PALMER ACJ: This is an application for a Writ of Certiorari to be issued to quash the decision of the Marovo Local Court dated 21st October 2001, in Local Court Case Number 1/2001 between Nanette Tutua and Shane Tutua (representing the Seijama Family) ("the Applicants") and Simeon Nano ("the 1st Respondent").

The ground relied on was that the decision of the Local Court was not a true decision in that it did not correctly reflect the ruling of the Local Court Justices who heard the case. The Applicants rely on the affidavit of Shane Tutua filed 11th March 2002 which contained signed statements of the Marovo Local Court Justices Elihu Lipa (President), David Whitney (member) and John Lilivae (member) denying the accuracy of the copies of the judgment dated 21st October 2001, which had been posted to the parties.

The 1st Respondent did not appear at the hearing of the Applicants' Notice of Motion although he had been served and was aware of the hearing date.

The 2nd Respondent relies on three affidavits, one by Ian Bara (a police officer I believe stationed at Seghe Police Station), filed on 18th April 2002 in which he deposes that he only signed as a witness to the three statements of the three Local Court Justices ("LCJ") after much insistence from certain persons. The second affidavit was from Mores Riki (also I believe a police officer stationed at Seghe Police Station) who deposed that he had been approached on 20th November 2001 to witness a document but that he had refused. What that document though, was not identified in his affidavit. The third affidavit was that of the Local Court Clerk Davis Vurusu ("Vurusu") of the Marovo Local Court filed 18th April 2002. He confirmed in his affidavit that as far as he was concerned, the correct judgment was the judgment sent out to the parties dated 21st October 2001. He explained he was present throughout the decision making process and accurately recorded what the LCJ said. After writing up the judgment he had it read and explained to them (see paragraph 9 of his affidavit). He says that all three agreed and signed the hand written judgment (paragraph 10). It was then typed up and sent out to the parties. A copy of the hand written judgment is annexed to Vurusu's affidavit as "Exhibit DV-1". His explanation has been virtually unchallenged.

CERTIORARI

Certiorari issues to quash a decision, that is ultra vires or vitiated by error on the face of the record. It looks to the past and seeks to bring up to this court any decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed. The underlying rationale is that all inferior courts and authorities have limited jurisdiction or powers and must be kept within their legal limits.

Error on the face of the record

The Applicants say in their Notice of Motion filed 18th March 2002 as read with the Statement filed 11th March 2002 that the judgment dated 21st October 2001 was not the true judgment of the Marovo Local Court as shown by the separate statements of the LCJ denouncing that judgment. What in essence is being alleged is that there is an error on the face of the record, which goes to jurisdiction and vitiates the whole judgment of the Marovo Local Court. That error is the statement by the LCJ that the decision of 21st October 2001 did not correctly reflect their decision; that is, it was an erroneous decision and therefore ought to be quashed.

The Evidence

It is unfortunate to some extent that in this case the LCJ have not been joined in their personal capacity or required to file affidavits in response to the affidavit of Vurusu and be cross-examined. They have made serious allegations of impropriety against Vurusu, which he is entitled to respond to. He has done that in his affidavit filed 18th April 2002. The LCJ however have failed to respond to Vurusu's explanation. I find his explanations plausible and convincing.

Has an error of law been committed?

The affidavit evidence before this court is that the LCJ have issued separate statements denouncing the veracity and correctness of their judgment issued on 21st October 2001. Whilst the affidavit of Vurusu directly contradicts what they had said in their statements, it has not been denied or contested that they did make those statements. This in my respectful view is quite crucial to the Applicants' case. Even if what Vurusu has said might be the truth, the fact that they had denied the truth and accuracy of their judgment raises a real sense of apprehension and doubt in the public mind, that somehow the judgement was erroneous. What is crucial in my respectful view is not so much the fact that there was an error of judgment as the appearance of an error of judgment portrayed in their open statements denying the veracity and accuracy of their judgment. What would others say about the judgment; the measuring rod is the usual standard of a reasonable person.

Should the Court intervene?

What are we to make of what they (the LCJ) have said? If what Vurusu says in his affidavit is the truth, does it reflect a change of mind, uncertainty, bias, error of judgment or perhaps even incompetence on the part of the LCJ? Whatever the reason or motive for denouncing their own judgment as wrong or wrongly recorded by Vurusu, should this court intervene at any rate, and if so, on what basis?

I think what is so devastating about the conduct of the LCJ is in openly coming out with statements to the effect that the judgment was erroneous and that it did not correctly reflect their views or findings. Instead of disclosing their disagreement to the Applicants, I would have expected them to do the right thing and get in touch first with the Local Court Clerk or the Principal Magistrate (Western) to inform them about their disagreement and take instructions as to what should be done.

They did not do that and I find with respect their conduct to be prejudicial and embarrassing to the due administration of justice in the country. The impact of such statements whether sworn or un-sworn cannot be under-estimated or overlooked by this Court. It gives the **manifest impression** that the said judgment was erroneous and therefore a nullity. In such circumstances it seems that the only option open to this court would be to intervene.

The circumstances surrounding this case can be likened to the cases dealing with bias. That whilst it appears that the LCJ may have agreed together on their decision of the 21st October 2001, the impression given to other people as a result of their statements is what matters here; that there exists a real likelihood that the judgment of 21st October 2001 was erroneous. The court does not look so much on whether the judgment was in fact erroneous as to **whether there is a real likelihood of it being erroneous**. If reasonable people might think that it is, that there exists a real perception (there is some material in existence to demonstrate that that may be so) that the decision may be erroneous, then that should be sufficient. Applying what Lord Dennning said in *Metropolitan Properties (FGC) Ltd. v. Lannon [1969] 1 QB 577*, regarding bias, the same in my respectful view can be said in the circumstances of this case, that *justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: the judgement was erroneous.* That is the picture, which has been painted in the mind of the Applicant and others here.

There is also however another matter equally of grave concern. It is the doubt that is raised in my mind as to the objectivity, integrity and competence of those LCJ. Why in having made a valid decision, they should later denounce its veracity and accuracy?

The maxim that justice must not only be done but must be seen, to be done is so apposite to the circumstances of this case. Already there is a perception in the mind of the Applicants and others that somehow justice had not been done to their case. But even if what the Local Court Clerk says is true, then the Justices themselves cannot be trusted to adjudicate fairly and objectively in this case, saying one thing in the judgment and another in a separate statement. Whatever their motives and their conduct, their conduct can only be described as prejudicial to the administration of justice. The Applicants are entitled to say that they have been prejudiced by that judgment especially if this court does not intervene. They are entitled to come to court and say that there is a real likelihood that the judgment is erroneous, that they are being prejudiced by it and that this court must not allow it to remain on the records. These LCJ simply cannot be trusted to make a fair and objective decision in their case. I can only agree in full.

As justices of the local court, they are duty-bound to ensure that they make decisions without fear or favour, ill will or affection towards anyone, and without respect of persons. They have failed to demonstrate that in their conduct. They have created a very bad picture and impression in the public mind that there was something fundamentally wrong with that particular judgment and therefore it should not be allowed to remain. They have brought embarrassment to the Local Court and the administration of justice in the country and I do not see how they should be allowed to continue as local justices. Their warrants of appointment should be considered for purposes of having them terminated forthwith. I take judicial notice of the fact that the Principal Magistrate (Western) had initiated an enquiry into the alleged botch up by the Clerk and the LCJ and appropriate action to be considered.

Procedure to be adopted by the Local Courts when giving judgment

I feel it is pertinent that I point out what I consider to be obvious but unfortunate omissions by the Clerk and the LCJ when delivering judgment. **I do not know how the practice of adjourning local**

court hearings to deliver judgment by post came about but I can only describe that practice as bad and must be stopped. I have already adverted to this in a previous judgment (see *Iada Tutue & Others v. Robert Noga LAC 8 of 1999*, judgment delivered 18th February 2002 at page 1), that after the hearing has been completed, the court must retire to consider judgment, have it delivered in open court in the presence of the parties before dispersing. That would have avoided such an embarrassing and ridiculous situation from happening. **The Local Court Clerks too must take note of this and ensure that judgments are delivered in open court before the court formally disbands.** Adequate time should be given to the Local Court Justices to retire and consider judgment before having it delivered in open court. The judgment should then be typed up straight away by the Local Court Clerk on his return to his office and copies sent out to the parties. Time for purposes of appeal should begin to run from the date the judgement was delivered in open court in the presence of the parties. Only in exceptional cases, should judgments of the Local Courts or Customary Land Appeal Courts be delivered by post.

Conclusion

I am satisfied in the circumstances that the judgment of the Marovo Local Court dated 21st October 2001 cannot be allowed to stand on the grounds that there is a real likelihood that it is erroneous and that allowing it to remain on the record will prejudice the Applicants in this case. The only way this irregularity therefore can be purged is for this court to intervene with the issue of a Writ of Certiorari. I grant the order sought in the Notice of Motion filed 18th March 2002.

Orders of the Court:

1. **Grant order for the issue of a Writ of Certiorari to have the judgement of the Marovo Local Court in Local Court Case Number 1/2001 dated 21st October 2001 brought up to this court and quashed.**

2. **Direct that the matter be re-heard by the Marovo Local Court de novo consisting of different local court justices.**

3. **Each party to bear their own costs in this appeal.**

The Court.