

BETWEEN : HON. FUSITU'A - Plaintiff;

AND : 1. KALAFI MOALA - First Defendant
2. 'AKILISI POHIVA - Second Defendant
3. 'ULITI UATA - Third Defendant.

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel: Mr Tu'utafaiva for the Applicant
Miss Tonga for the Plaintiff

Date of hearing: 27 September, 1999

Date of ruling: 29 September, 1999

Ruling

The plaintiff claims defamation by the defendants in two articles published in the newspaper of the first defendant on different dates but relating to the same allegations.

The third defendant moves to strike out the claim on the grounds that it discloses no reasonable cause of action and that the claim will prejudice the third defendant because there are two separate articles in two separate editions of the paper with different contents and against which different claims are made.

The first ground must be decided on the pleadings alone. They clearly claim defamation by the second defendant. Mr Tu'utafaiva for the applicant points out that, although paragraph 4 of the claim states that the third defendant spoke the defamatory words to the first defendant and that it was published in his newspaper, paragraph 7 only refers to the publication by the first defendant and makes no reference or suggestion that the third defendant was involved in the publication.

I must decide whether that reveals a triable issue and not consider the chances of success. Defamation clearly is a triable issue and the reference in paragraph 4 reveals a publication by the third defendant when he made the allegedly defamatory remarks to the first defendant. I find that does demonstrate a reasonable cause of action and the first ground of objection fails.

The second claim is based on the practical problem of the form the case must take. The second defendant has elected trial by jury and so that must be the form of the hearing. The suggested meaning of the words in the article attributed to the second defendant is set out in paragraph 6 of the claim and the meaning in relation to the third defendant's article is in paragraph 8. Those two paragraphs are not in the same terms and Mr Tu'utafaiva suggests it would be impossible for a jury to be able to decide one without being affected by the other. An example is the allegation that the second defendant's article suggests that the plaintiff is incompetent and has attempted to conceal a misappropriation of Government funds by the Legislative Assembly whilst the suggestion in paragraph 8 includes no reference to incompetence or attempt to conceal the misappropriation claiming instead a withholding of the relevant report.

Counsel for the applicant suggests that it would be virtually impossible for the jury, if it found the first matters of incompetence and concealing a misappropriation, then to consider the lesser effect alleged against the third defendant.

I agree. Although the two claims relate to the same matter, they raise separate matters for the jury to decide both in terms of the liability and the apportionment of blame for any consequences that would flow from a finding in favour of the plaintiff. However, I do not think this is a ground for striking out the claim. I consider the appropriate order must be to order the plaintiff to separate the two actions. That must be done by filing an amended statement of claim in relation to the first and second defendants and to initiate a fresh action against the first defendant and the third defendant. This must be done within 28 days of this order.

There is also an application before the court for judgment in default of defence against the first defendant. In light of my order for severance, each of the fresh statements of claim will need to be served again on the first defendant and the application for judgment in default is, for that reason, refused at this stage.

I view of the orders I have made, I shall make no order for costs of this application.



NUKU'ALOFA: September, 1999.

CHIEF JUSTICE