

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

C. 1021/99

BETWEEN : BARRY WILSON : Plaintiff;

A N D : ATTORNEY GENERAL OF TONGA : Defendant.

BEFORE THE HON. CHIEF JUSTICE WARD

COUNSEL : Ms Mavaetangi Manavahetau and Mr 'Aminiasi Kefu.

Date of Hearing : 7th January, 2000

Date of Ruling : 11th January, 2000

RULING OF WARD CJ

By a writ issued on 29 September 1999, the plaintiff seeks payment of costs awarded against the defendant on behalf of the Crown in a case heard in the Supreme Court in 1996. The defendant now applies to have the action struck out under Order 8 rule 6(1)(i) on the ground that it discloses no cause of action against the defendant. By rule 2, no evidence may be heard on such an application and it must be decided on the pleadings alone.

The statement of claim is short. The plaintiff is a barrister practicing principally in New Zealand. In October 1996 he was instructed by his present solicitor to appear in an application for a writ of habeas corpus in this court. The case was heard by the, then, Chief Justice and the application was successful.

I set out paragraphs 6,7 and 8 of the statement of claim in full.

"6 ON the 21st day of January 1997 following hearing of a written application for costs by the Plaintiff (as Applicant) and the Crown (as Respondent) the then Chief Justice made an award of costs in the following terms:

IT IS ORDERED that there be an award of costs in favour of the Applicants against the Respondents in the sum of \$6,500.00 (such figure being a global sum and being in effect an award towards the fees of both counsel for the Applicants and their disbursements).'

- 7 THAT the arrangement between counsel was in line with the recognised practice that Plaintiff as senior counsel would receive two thirds of the costs involved while the Defendant as junior counsel would receive one third of such costs award namely the sum of \$4,333.00.
- 8 THAT despite written and oral demand the Defendant has refused to pay such costs award by the Supreme Court to the Plaintiff."

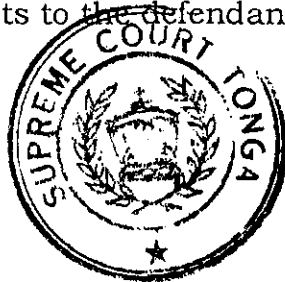
Counsel for the defendant relies on those paragraphs to support his application to strike out. He is on very firm ground.

Costs are awarded to and against litigants. Almost inevitably, they will include counsel's and solicitor's fees so the successful litigant can pay them out of the award. They may, in practice, be paid to the lawyer through whom the litigation was conducted but it is a remarkable claim that the award of costs was made by the court to him in his personal capacity. No authority was advanced to suggest this could have been the basis of such an award neither do I know of any.

The statement of claim shows that the applicant for the writ of habeas corpus was Eakalafi Moala. He was the party to whom the costs were awarded. If they have not been paid, he is the person entitled to bring an action to recover them, not the lawyer representing him.

The suggestion in paragraph 7 that there is some recognised practice that the defendant, who was the losing party against whom the costs order was made, should receive one third of the winner's costs is as startling as it is incomprehensible.

The action is struck out with costs to the defendant.



A. Sano

NUKU'ALOFA: 11th January, 2000

CHIEF JUSTICE