IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 210/96

BETWEEN: SU'A RIMONI AH CHONG

Plaintiff

A N D: THE ATTORNEY GENERAL

Defendant

Counsel: R Drake for plaintiff
B Heather for defendant

Hearing: 27 February 1997

Judgment: 24 March 1997

JUDGMENT OF SAPOLU, CJ

Before the Court is a motion by the Controller and Chief Auditor for orders to consolidate three sets of proceedings and to remove them into the Court of Appeal for hearing. He is the plaintiff in all three proceedings. In the first set of proceedings, the remaining defendants are the Attorney General, sued on behalf of the Prime Minister and the Government of Western Samoa, and members of the commission of inquiry which was appointed to inquire into the report submitted by the plaintiff to the Legislative Assembly. In the second set of proceedings, the defendant is the Attorney General sued on behalf of the Prime Minister. And in the third set of proceedings, the defendant is again the Attorney General sued on behalf of the Prime Minister, other members of the Cabinet and the Treasury.

On 24 March 1997, I gave judgment on the motion with my reasons to be given in writing to counsel in due course. I give those reasons now.

Motion to remove proceedings into the Court of Appeal:

Article 79 of the Constitution provides :

> "Subject to the provisions of this Constitution, the Court of Appeal shall "have jurisdiction to hear and determine such appeals (including "proceedings removed by order of the Supreme Court to the Court of Appeal) "as may be provided by Act".

Section 55 of the Judicature Ordinance 1961 then provides :

> "(1) The Supreme Court may order the removal into the Court of Appeal of "any of the following proceedings :
>
> "(a) any notice of motion;
>
> "(b) any petition presented;
>
> "(c) any special case stated;
>
> "(d) any question of law ordered to be argued.
>
> "(2) On removal the Court of Appeal shall have the same power to "adjudicate on the proceedings as the Supreme Court had".

The wording of section 55 of the Judicature Ordinance 1961 is very similar to that of section 64 of the New Zealand Judicature Act 1908 so that case law on the New Zealand provision would be relevant to the consideration of the issue in this case.

As it appears from the wording of section 55, the jurisdiction vested in the Supreme Court to order the removal of proceedings into the Court of Appeal

is discretionary. How the discretion is to be exercised must depend on the circumstances of each case. That being so, a decision on the exercise of discretion in one case, cannot be treated as binding on how the discretion is to be exercised in another case.

The approach to the exercise of the discretion was stated by Cooke P in the New Zealand Court of Appeal in the case of *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon [1981] 1 NZLR 614* where it is said at p.616 :

> "Section 64(b) of the Judicature Act enables any notice of motion in the "High Court to be removed into this Court, but in this and the other "categories of case covered by the section the jurisdiction is in practice "exercised sparingly. Parties are prima facie entitled to the benefits of "both a determination at first instance and a review on appeal. The "appellate Court then has the advantage of the opinions and findings of "the trial Court; we value and respect them as to both fact and law. The "two tier pattern (three in the event of an appeal to the Privy Council) "is departed from only exceptionally and for clear reason applicable to "the particular case. We agree with Speight J that the need for a "prolonged inquiry into the facts tells against removal, but the "jurisdiction does extend to the removal of questions of fact".

So the approach to be adopted to the exercise of the Court's discretion is clear. But the actual exercise of the discretion must depend on the facts of the case at hand.

Counsel for the plaintiff advanced several grounds in support of the motion to remove proceedings to the Court of Appeal. She gives these as the public importance, exceptional nature and urgency of the case, the continuing damage to the plaintiff's reputation so long as his suspension from the office of Controller and Chief Auditor continues, the real likelihood of an appeal to the

Court of Appeal by one or other side regardless of the outcome of any proceedings before the Supreme Court, and the limited extent of any factual disputes. On the other hand, counsel for the defendants in opposing the motion emphasised the defendant's entitlement to the benefits of both a determination at first instance and a review on appeal and the presence of disputed issues of fact which are more appropriately to be dealt with in the Supreme Court at first instance rather than the Court of Appeal. She also submits that a matter as significant as an alleged breach of the Constitution is properly dealt with by the Supreme Court with the prospect of referral to the Court of Appeal being an option available to all parties. She also mentions that there is already before this Court a motion to strike out proceedings.

I have carefully considered and weighed the various circumstances which are relevant to this case, and I am not satisfied that an order for removal of proceedings to the Court of Appeal for hearing is warranted. I will now explain why.

It is not the norm for disputed issues of fact to be tried before an appellate Court which is not a trial Court. The functions of an appellate Court are primarily framed and designed to deal with appeallate work. In this case, there are disputed issues of fact. I am not satisfied that the scope of the evidence which will be called in relation to those disputed issues of fact would be as restricted and narrow as counsel for the plaintiff has put it. With regard to the action against the Attorney General, sued on behalf of the Prime Minister and the Government, and the members of the commission of inquiry appointed to inquire into the plaintiff's report, it is expected that evidence will be called

by all those defendants. The extent of that evidence cannot be certain at this stage. The plaintiff himself is also expected to give evidence. As to the two actions regarding the two separate suspensions of the plaintiff evidence would also be expected from the defendants as well as the plaintiff. However, as no statements of defence have been filed in those two actions because there has been a motion to strike out proceedings, one cannot be certain at this stage whether evidence will in fact be called and the extent of that evidence, until the outcome of the motion to strike out is known.

It is true as counsel for the plaintiff pointed out that in ***Re Erebus Royal Commission; Air New Zealand Ltd v Mahon [1981] 1 NZLR 614*** the New Zealand Court of Appeal held that the jurisdiction to remove proceedings from the High Court to the Court of Appeal for hearing extends to the removal of questions of fact. But that is not the norm, it is the exception. In fact there is no reported Western Samoan decision that I am aware of where proceedings which include disputed issues of fact have been removed from the Supreme Court to be tried before the Court of Appeal. Certainly nothing of that sort occurred in the last 21 years.

In applying the approach in ***Re Erebus*** to this case, I am of the view that one should bear in mind in the exercise of discretion that the situation in New Zealand is not the same as it is in Western Samoa. The New Zealand Court of Appeal is a permanent appellate Court which sits throughout the year and therefore has all the time to try a case which involves any disputed issues of fact referred to it from the High Court, and, if necessary, to adjourn the trial from time to time. The same cannot be said of our Court of Appeal which sits

only once a year for a very limited period of time to hear appeals from decisions of the Supreme Court. This is a consideration which does not apply in New Zealand and could not have been considered by the New Zealand Court of Appeal in *Re Erebus*. The Supreme Court here will therefore be most hesitant to burden the Court of Appeal with work which the Supreme Court can deal with itself, because of the time constraints on the Court of Appeal. Even though counsel for the plaintiff submitted that any inquiry as to disputed facts in this case would not be as prolonged as it was in the *Re Erebus* case, it must not be overlooked that what was said in that case was said in the context of New Zealand with a permanent Court of Appeal. Therefore what would be a factual inquiry of convenient length before the New Zealand Court of Appeal, which is a permanent Court, may not be convenient for our Court of Appeal which sits only for a very limited period of time once a year. One may add to that comparison the fact that there is also a motion to strike out which has been filed by counsel for the defendants and yet to be determined. If proceedings are removed into the Court of Appeal, then that motion must necessarily be removed to the Court of Appeal as well. As long as the present situation with our judicial system continues, this Court would be most hesitant to remove into the Court of Appeal the trial of proceedings which the Supreme Court can deal with itself. That will be more so where the proceedings also include disputed issues of fact.

Court -

Emphasis was also placed in this case on a party's entitlement to the benefits of a determination at first instance and a review on appeal. With respect, I may be giving more weighty consideration to that factor in this case than perhaps, the New Zealand Court of Appeal did in *Re Erebus* case. The reason is this. If the present proceedings and their disputed issues of fact are

removed into the Court of Appeal for hearing, the entitlement of a party to the benefits of a determination at first instance and a review on appeal would disappear completely. That would not normally be so with New Zealand proceedings removed from the High Court for trial in the Court of Appeal for there is still a right of appeal to the Privy Council. So the right in New Zealand to the benefits of a trial determination at first instance and a review on appeal, in my view, would still remain substantially intact. In fact that was what happened in *Re Erebus*. After removed proceedings were heard in the Court of Appeal, the decision of that Court was appealed to the Privy Council. In Western Samoa, the effect of ordering removal of present proceedings from the Supreme Court to the Court of Appeal would be to take away completely the right to the benefits of a trial determination and reveiw on appeal, because our Court of Appeal is the ultimate Court at the apex of our hierarchy of Courts.

Counsel for the plaintiff also mentioned that if proceedings are heard in this Court, then regardless of the outcome one or the other party would appeal. While that is a factor to be considered with other factors in the exercise of discretion on a motion for removal of proceedings for trial before the Court of Appeal, on its own, I do not consider it to be a very influential factor.

Regarding the urgency, continuing damage to the plaintiff's reputation so long as his suspension continues, and the public importance of this case, I agree that there is an element of urgency involved in this case, even though an Acting Controller and Chief Auditor has been appointed and the plaintiff is still being paid his salary as Controller and Chief Auditor. I am not so confident whether there is continuing damage to the plaintiff's reputation so long as his

suspension continues as claimed by counsel for the plaintiff. The reports published by members of the news media which have been commenting on the plaintiff's situation have been predominantly and highly favourable to the plaintiff. Moreover, apart from the assertion by counsel, no evidence of damage to the plaintiff's reputation was really produced. I am not suggesting that there has been no damage to the plaintiff's reputation because of his suspension. All I am saying is that on the material which has been placed before this Court, I cannot conclude with confidence that there has been the continuing degree of damage to the plaintiff's reputation as asserted. On the question of public importance of this case, I would accept that it is a case of public importance. It concerns not only the suspension from office of the Controller and Chief Auditor, but the nature of the functions and responsibilities of that Office. It is also an office of constitutional importance. Those and other related matters raised by counsel for the plaintiff have to be properly considered and weighed by the Court in the exercise of its discretion.

Another factor to be considered is the advantage of opinions and findings of a trial Court to the appellate Court. In *Re Erebus* the New Zealand Court of Appeal said that it values such opinions and findings as to fact and law. There is also a motion to strike out proceedings which has been filed by counsel for the defendants which is yet to be determined.

In considering and weighing all those various factors, and bearing in mind that the discretion to order removal of proceedings into the Court of Appeal for trial has to be exercised sparingly, I have, with respect, come to the conclusion that on balance, the motion for removal of proceedings into the Court of Appeal

for hearing should be denied.

Motion to order consolidation of proceedings:

After considering submissions by counsel, I have come to the conclusion that for the purpose of clarity, and to avoid any possible confusion, proceeedings should be heard one immediately after the other. Counsel to reach agreement within 14 days as to order proceedings are to be heard. Failing to do so, the Court will decide the order of proceedings.

I have allowed for 14 days as counsel for the plaintiff is present out of the country.

Motion to strike out proceedings:

The motion to strike out proceedings which has been filed by counsel for the defendants is set down for mention on 7 April 1997, which is the next mention date, for a hearing date to be fixed.

Costs are reserved.

TFM Sapolu
.....
CHIEF JUSTICE