Kongungaloso Timber Co Ltd v Attorney-General [1999] SBHC 105; HC-CC 229 of 1998 (22 October 1999)

HIGH COURT OF SOLOMON ISLANDS
Civil Case No. 229 of 1998

KONGUNGALOSO TIMBER CO. LTD

v

ATTORNEY-GENERAL
(On behalf of the Minister of Provincial Government - M.P.G)

High Court of Solomon Islands
Before: Muria, CJ.
Civil Case No. 229 of 1998

Hearing: 18 October 1999
Judgement: 22 October 1999

A. Nori for Applicant
S. Manetoali for Respondent

MURIA CJ: By its Amended Originating Summons, the applicant seeks to challenge the valid of the Minister's Order of 17 March 1998 which suspended all Area Councils in the country. The Order was published in Legal Notice No. 34 of 1998.

Background
In my judgment on 19 April 1999 on the issue of locus standi, I set out the background to this case. I do not need to repeat it all here. Suffice to say briefly, however, that the applicant is a private company who applied for a Timber Rights Agreement (TRA) over an area of land between Tetekavoro and Patusora in the Gatokae Islands, Western Province. At its hearing on 12 May 1998, the Marovo Area Council (MAC) heard the applicant's timber rights application and approved it. The objectors appealed to the Customary Land Appeal Court Western (CLAC) but their notice of appeal was rejected by the Principal Magistrate who is the Clerk to the CLAC(W) on the basis that the Minister's Order suspended all Area Councils, including the MAC, in the country and as such the MAC could not have validly convened on 12 May 1998 to consider the applicant's timber rights application. The Principal Magistrate's stand was contained in a letter dated 13 July 1998 addressed to the party who appealed to the CLAC(W).

Effect of the stand taken by the Clerk to CLAC(W).
The Principal Magistrate concerned here was and is still a Member of the CLAC(W). He is also the Clerk to that Court. In his capacity he administers the administration of the

CLAC through the office of the Magistrates Court. It was in this capacity that the Principal Magistrate as Clerk to the CLAC(W) rejected the filing of the appeal to the CLAC by those who were aggrieved by the decision of the MAC despite the required fees being paid for the appeal. The decision made by the Clerk in the letter of 13 July 1998 is also important in this case and I set it out here.

> *"Mr Shane Sarere Tutua*
> *PO Box 984*
> *HONIARA*
>
> ***RE: TIMBER RIGHTS APPEAL - NGALOSO:***
>
> *I refer to your letter dated 1st July, 1998.*
>
> *Whilst I appreciate payments of required fees and the map you disclosed, I wish to draw your attention to the fact that all Area Councils operated under current Governmental system were suspended per Solomon Islands Gazettee [sic] dated 17th March, 1998.*
>
> *Marovo Area Council determination in respect of Konggu - Ngaloso application was displayed on Form II dated 25th May, 1998, none [sic] weeks after it was suspended. That in itself reflected the legal stand that any determination made after 17th March, 1998 must be invalid. Hence I am in the process of dispatching all your fees back to you.*
>
> *Thank you.*
>
> *Yours faithfully,*
>
> *REX FAUKONA*
> *PRINCIPAL MAGISTRATE(W)"*

There are two very important points arising out of Principal Magistrate's letter and which clearly led the applicant to institute these proceedings. In other words, the effect of this letter was two folds.

Firstly, the Principal Magistrate's letter contains his decision as Clerk to the CLAC to hold the determination of the MAC as invalid because of the Minister's Order. To the applicant, this meant that the MAC's decision in its favour was ineffective since the Council could not have lawfully convened on 12 May 1998. To the aggrieved party, this meant that, there was no decision in existence to be appealed against and so the CLAC had nothing lawfully before it to be heard. Such an effect of the Clerk's decision must certainly be of importance to both applicant and objectors in the MAC's determination. The position taken by the Clerk to the Court was more than just expressing a legal view of the position of the MAC's decision but rather, he was in effect preventing the appellant from challenging the MAC's decision. With respect, the Clerk had no power to stop the appellant from exercising his right of appeal under statute against the decision of the

MAC simply on the basis of his view of the legal standing of all Area Councils pursuant to the Ministers Order. It was incumbent on the Clerk to accept the properly filed notice of appeal and to have it listed before the Court. No doubt one of the matters which would be raised would be the status of the MAC. It might be raised by the parties themselves or by the Court and then submissions on the issue should be heard from the parties. Thereafter the Court should decide on all the matters placed before it.

It must be noted that the two authorities, namely, the Minister who sought to exercise his executive power under the Provincial Government Act and the CLAC who exercises judicial power under the Forest Resources & Timber Utilities Act (FRTU Act) are different in the discharge of their functions. It does not necessarily follow that because the Minister by Order suspended all Area Councils including MAC "*any determination made after 17th March, 1998 must be invalid*." There are other factors and considerations which come into play, such as the possibility of a challenge to the Minister's Order or the possibility of a valid appeal being denied a hearing. Unfortunately the Clerk, in the present case, allowed the CLAC judicial junction [sic] in this case to be comprised [sic] by his personal view of the Minister's executive order.

Secondly, as I have alluded to, by taking the view which the Principal Magistrate took of the Minister's order, the parties had been denied the opportunity to address the Court before any decision could be taken on the appeal which was lawfully brought before the Court. The right to be heard is a fundamental right both under the Constitution and at common law and everybody who sought the Court's indulgence to be heard on his [sic] matter brought before the Court must be afforded the opportunity to be heard on the matter. In this case, the action taken by the Clerk to the CLAC(W) denied both parties the opportunity to be so heard.

The comments I make regarding the action of the Clerk to the CLAC(W) are, of course, not fatal to the issues raised by the applicant in these proceedings, as we are not concerned with an appeal here. This is a challenge to the Minister's exercise of his executive power. It is to that which I now turn.

Order of the Minister

The Order of the Minister dated 17 March 1998 was said to have been made pursuant to his power under section 47 of *the Provincial Government Act*, 1997. That Order is the centre of dispute in this case and as such I set it out in full hereunder:

> *"THE PROV. GOVT ACT 1997*
> *(No. 7 of 1997)*
> *THE PROVINCIAL GOVERNMENT (SUSPENSION OF AREA COUNCILS)*
>
> *THROUGHOUT SOLOMON ISLANDS ORDER 1998*
> *IN exercise of the powers conferred by section 47 of the Provincial Government Act 1997, the Minister hereby makes the following order-*

1. This Order may be cited as the Provincial Government (Suspension of Area Councils) Order 1998

2. All Area Councils throughout Solomon Islands are hereby suspended from the date hereof.

Dated at Honiara this seventeenth day of March 1998.

Japhet Waipora
Minister of Provincial Government"

The basis upon which the Minister made the order was set out in paragraphs 3, 4, 5 and 6 of his affidavit filed on 6 April 1999. I feel it is-also necessary that I set out those paragraphs of the Minister's affidavit hereunder to appreciate to [sic] reasons for the Minister's decision.

"3. The order was made by me in exercise of the powers conferred by section 47 of the Provincial Government Act 1997.

4. The suspension of the Area Councils came about due to the current bad financial situation experienced by the Government. The Government cannot afford to pay the salaries and allowances of the 542 politicians that we have in the three layers of government. that is, 50 National Parliamentarians, 164 Provincial Assembly members and 328 Area Councillors. Of the total annual budget of the Minister of Provincial Government which is about 20 million dollars, 94% goes to the 9 provinces and 6% to the Ministry Headquarter.

5. It is the policy of the SIAG Government to review the present Provincial Government system. The Government realises that Provincial Government and Area Councils are very expensive to run. One of the ways that costs can be reduced is to temporarily suspend the Area Councils until such time the Provincial Government system is reviewed.

6. The suspension of the Area Council was done according to the SIAC Government Policy."

The two basic reasons for making the Order suspending the Area Council were the current bad financial situation experienced by the Government and the SIAC Government policy of reviewing the present Provincial Government system.

Case for the applicant

On behalf of the applicant Mr. Nori advanced three contentions. In the first place, Mr. Nori argued that section 47 of the *Provincial Government Act* did not empower the Minister to make the Order which he made. Secondly, Counsel argued that in making the order, the Minister had acted in breach of the rule of natural justice. Thirdly, Mr. Nori submitted that the Minister had acted unreasonably by relying on grounds which were unreasonable.

Case for the respondent

Mr. Manetoali, in support of the Minister's Order contended that section 47 of the Provincial Government Act is wide enough to empower the Minister to make the order which he made. As such when he made the Order, the Minister was acting within his power under that section. Counsel further submitted that the reasons for making the order were set out in the Minister's affidavit and that those reasons justified the action taken by the Minister.

Section 47

As the Minister's Order was made pursuant to his power under section 47 of the Act, it is worth setting out that provision. Section 47 provides as follows:

> *"47. (1) Notwithstanding the provisions of this Act or other law, the Minister may by order published in the Gazette, make such provisions as appear to him necessary or expedient for the purposes of -*
>
> *(a) providing for any unforeseen or special circumstances; or*
>
> *(b) resolving, determining or adjusting any doubt, question or matter, which may arise in relation to the application or implementation of this Act or in respect of which no provision or effective provision has been made in or under this Act.*
>
> *(2) An order made under subsection (1) shall be subject to* ***negative resolution****."*

There is clearly given to the Minister under this section a wide power which he can use to "*make such provisions as appeared to him necessary or expedient*" for the purpose specified in subsection (1)(a) and (b). Mr. Nori's contention, however, is that the words "*necessary or expedient"* in that provision do not confer power on the Minister to suspend Area Councils. Councils are creatures of Provincial Assemblies and so matters affecting Area Councils fall within the competence of the Provincial Government. I accept that Area Councils are creatures of the Provincial Assemblies but there can be no doubt also that the Minister has controlling authority over Provincial Assemblies in Solomon Islands. Thus, the Area councils being part of the Provincial Government system, is under the controlling umbrella of the Minister or in the last resort, the National Parliament. One can see this general controlling power when looking at the various provisions of *the Provincial Government Act* such as section 44(1) which empowers the Minister to suspend Provincial Government; sections 30(2) and 32(1) which empower the Minister to withhold assent to an Ordinance, including Ordinance setting up the Area Councils, passed by the Provincial Assembly: section 35 (2) which empower the Minister to limit, suspend or even cancel Appropriation Ordinance for a Province; and section 47(1) which is a legislative permission, empowering the Minister by order, to "*make such provisions as appear to him necessary or expedient*" for the purposes of the matters set out in

paragraphs (a) and (b) of subsection (1) which may arise in relation to the application or the implementation of the Act or in respect of which no provision or effective provision has been made under the Act. This overall control over the Provincial Government system is envisaged under the *Constitution* which provides for the establishment of Provinces and authorising Parliament to make laws for the setting up of the Government system for those Provinces. Thus the *Provincial Government Act* was enacted with the clear scheme that the Provincial Government is responsible to the Minister who in turn is answerable to Parliament on Provincial Government matters.

Mr. Nori suggested that section 47 does not provide for the power to suspend Area Councils but only to resolve doubts arising in relation to the application of the Act. It is worth noting that, section 47(1) starts with the words, "*Notwithstanding the provisions of this Act or any other law*" which words must be taken, in my view, to mean that the Act or any other law shall not be an impediment to the exercise by the Minister of his power under this section.

On this construction, the provisions of the Act or any other law which must also include Ordinances passed by the Provincial Assembly, cannot impede the Minister's exercise of his power under section 47(1) "*as appear to him necessary or expedient*" provided that his action can lawfully be regarded as coming within the matters provided in paragraphs (a) and (b) of the subsection. I think this is really the test here, that is, whether the action taken by the Minister is lawfully within the matters set out in paragraphs (a) or (b). If it is, then whether it is necessary or expedient is not for the Court to decide. It is therefore necessary to consider the scope of paragraphs (a) and (b) of section 47 (1) of the Act.

Under paragraph (a), the Minister is empowered to make provisions for "*any unforeseen or special circumstances*." Those words are of wide import and they are not defined in the section. It must, however, be observed that such unforeseen or special circumstances must be those arising in relation to the application or implementation of the Act. It will also be observed that under paragraph(a), the Minister can also make provisions to provide for unforeseen or special circumstances where no provision has been made under the Act. That is clearly a very wide power and where it is necessary or expedient to exercise it, the Minister is authorised to do so.

Mr. Manetoali's contention is that the Government was and still is experiencing severe financial situation to run the country. As a measure to help alleviate this financial burden, the Government had decided that it would be in the interest of the country to temporarily suspend Area Council. This is the special circumstance which had arisen in connection with the implementation of the Act under which the Ordinance establishing the Area Councils were made. In addition Counsel argued that no provision has been made in the Act to specifically take the action necessitated by the unforeseen or special circumstances in the present economic situation of the Government. Hence, Counsel submitted, section 47 provides for the legal machinery to remove this difficulty created by the lack of provision or effective provision in the Act.

Mr. Nori's contention on the other hand is that the difficulty provided for under section 47 relates to statutory application of the Act and not to financial burden. So that if the Government felt that the Area Council's are too expensive, the Minister should take a Bill

to Parliament to amend the law to provide for the power to suspend the Area Councils. By invoking section 47 to suspend all the Area councils, the Minister acted unlawfully and that is the position maintained by Mr. Nori throughout.

In a perfect world everything is catered for and will be in order. But in the world in which we now live, unfortunately, there are so many unforeseen circumstances which belie those responsible for our governance, especially those shouldering the responsibility of ensuring *peace, order and good government* in our country. As such permission is given by law to provide for unforeseen or special circumstances or for resolving the difficulties such as the suspension of Area Councils where no provision has been effectively made under the Act. So that despite what is a strong case ably contended for by Mr. Nori, I find myself convinced that the construction placed on section 47(1)(a) and (b) favours the position contend for by Mr. Manetoali. I hold that section 47(1) empowers the Minister by order, to make provisions for suspending the Area Councils.

Mr. Nori's second argument is that the Minister, even if he has the power to do what he did, acted in breach of the rule of natural justice by not giving notice to the Provincial Governments before suspending the Area Councils. Counsel submitted that in this case the Western Provincial Government had not received any formal notification of the suspension of the Area Councils, as a result the Provincial Legal Adviser based in Gizo attended the Marovo Area Council meeting on 12 May 1998 with the understanding that the Area Councils were still in place. This is said to be clearly evidence of the breach of the rule of natural justice in this case. It is true that the *audi alteram partem* rule is not to be readily excluded in a situation where the competent authority's discretionary power is exercisable when it "*appears to*" him to be necessary or expedient or when he "*is satisfied*." See *Durayappah -v- Fernando* [1967] 2 AC 337, 348 also *Stevenson -v- United Road Transport Union* [1977] 1 CR 893. But as had been pointed out in *Essex CC -v- Ministry of Housing and Local Government* (1967) 66 L.G.R 23, the making of a subordinate legislative instrument need not be preceded by notice or hearing unless the parent Act so provides. See also *Bates -v- Lord Hailsham of St. Marylebone* [1972] 1 WLR 1373 which was a case involving the making of legislative orders for solicitors' remunerations. So the *audi alteram partem* rule does not have to be observed in such a case especially, as in this case, where the Minister was surely exercising his ministerial function when he made the order pursuant to his power under section 47(1) of the Act. While the Provincial Governments might be prejudiced by the Minister's order, I do not think they have any implied right to be heard before the Minister could make his order. Even if there is implied right to be heard in the matter, a breach of the rule would not entitled the applicant any remedy in respect of such a breach in this case.

The third contention relied on by Mr. Nori is that the Minister acted unreasonably when he based his order on the grounds set. out in his affidavit. Those grounds argued Counsel, were unreasonable. However the reasonableness of the Minister's action must be a matter which led him to decide whether it was "*necessary or expedient*" for him to exercise his power. As I have found that it was for the minister to decide what was necessary or expedient, this Court cannot delve into the reasons why the Minister felt it was so necessary or expedient to do what he did. Provided the subject of the order was lawfully within the parameters of section 47, the reasonableness of the Minister's action is not for

this Court to decide. It would be otherwise if the subject matter of the order was not lawfully within the scope of section 47.

In the light of all that had been said, and despite the strong contention ably put by Mr. Nori on behalf of the applicant. my construction of section 47(1) favours the position contented [sic] for by Mr. Manetoali on behalf of the Minister. In those circumstances, the Court would have to answer the questions posed in paragraph (1) in the affirmative.

The second question posed for the Court's determination is whether the suspension of the Area Councils invalidated the determination of the Marovo Area Council made on 12 May 1997. It is obvious from the evidence before the Court that the Western Province Government authorities did not have any formal notification of the Minister's Order. Certainly the Marovo Area Council did not know of the suspension Order and so on 12 May 1997 it sat at Seghe to consider the applicant's timber rights application. The legal adviser to the Western Province attended the Council's Meeting as legal adviser assisting the Marovo Area Council Everyone who attended, including the Marovo Area Council itself, did so in good faith and in ignorance of the Area Council's suspension. The parties has [sic] accepted the authority and the actions of the Area Council in accordance with its functions under the FRTU Act. The effect of such a situation in law is that the acts done must [be] regarded as valid although there is truly no legal power for so doing at-the particular time. Of course, this does not mean that the body concerned can act outside the law. This principle of common law known as the doctrine of *de facto* office exists to give validity to acts of *de facto* body despite there may be defects in the legality of its appointment status. The doctrine is founded, as a matter of policy and necessity, for the protection of the public and individuals whose interests may be affected.

In the case of *Norton -v- Shelby County* (1886) 118 US 425 which was applied in *IN THE MATTER OF sections 27(2), 48 and 49(1) of the CONSTITUTION* [1988-1989] SILR 99 ("*The Governor-General's case"*) Field J. pointed out at page 441 that:

> *"The doctrine which gives validity to acts of officers de facto, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of plicy [sic] and necessty [sic] for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public and private parties are not permitted to inquire into the title of persons clothes [sic] with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined."*

and at page 444 the learned Judge further said:

> *"where an office exists under the law. it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insighnia [sic] of the office, and exercise its power and functions"*

Those principles are sound and accepted as applicable in Solomon Islands. There is a further matter to note and that is the acts performed by the body *de facto* are accepted as valid before its lawful position was determined. That has now been done and any further acts done by the Marovo Area Council as an Area Council from now on will not be lawful unless the Minister's Order which suspended all Area Councils is revoked and the Area Councils restored.

Question 2 in the Amended Originating Summon is answered in the negative.

Conclusion and Order

The questions raised in the Amended Originating Summon are answered:

1. Yes

2. No

As to the orders sought in paragraph 3:

(a) Refused

(b) Refused

(c) No order for costs.

SIR JOHN MURIA
CHIEF JUSTICE