

**IN THE HIGH COURT OF NIUE  
(CIVIL DIVISION)**

**Application No: CV2022-00084**

**IN THE MATTER OF** Sections 67, 101(a) and 107 of the Niue Act 1966,  
and Niue Island Sports and Commonwealth Games  
Association Constitution 2017

**BETWEEN** NIUE LAWN BOWLS ASSOCIATION  
INCORPORATED  
**Applicant**

**AND** NIUE ISLAND SPORTS AND  
COMMONWEALTH GAMES ASSOCIATION  
**Respondent**

**Date:** 20 March 2023 (NZT)

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**JUDGMENT OF CHIEF JUSTICE C T COXHEAD**

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## **Introduction**

[1] In 2022, I issued two decisions concerning the Niue Lawn Bowls Association Incorporated (“the applicant”) and the Niue Island Sports and Commonwealth Games Association (“the respondent”).

[2] The applicant now applies for costs totalling \$16,493.30 with regards to the 30 June 2022 matter in which they were successful. They do not mention the other related decision that I provided on 10 July 2022 where they were not successful. The respondent largely opposes the application for costs.

[3] I must also address a preliminary issue; the respondent questions whether a lawyer who does not hold a practising certificate can charge for their services. The issues for me to determine are therefore:

- (a) Can a lawyer who does not hold a licence to practice charge for costs?
- (b) Should I award costs in this matter?

## **Background**

[4] I issued the two decisions concerning these parties on 30 June 2022 and 10 July 2022 respectively.

[5] The 30 June 2022 decision concerned the respondent’s actions, inactions, processes, procedures, and decisions relating to the applicant and Niue athletes due to compete at the Birmingham 2022 Commonwealth Games.<sup>1</sup> I made the following orders pursuant to s 107 of the Niue Act 1966:<sup>2</sup>

- (a) A declaration that the suspension of the applicant by the respondent violated the rules of natural justice and is therefore null and void; and

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<sup>1</sup> *Niue Lawn Bowls Association Incorporated v Niue Island Sports and Commonwealth* [2022] NUHC; Application CV2022-00072 (30 June 2022).

<sup>2</sup> Above n 1, at [33].

- (b) A declaration that the respondent had acted ultra-vires per articles 3H and 4B of the Niue Island Sports and Commonwealth Games Association Constitution, and therefore its unilateral selection of the Niue lawn bowling team for the 2022 Commonwealth Games is null and void.

[6] Following my decision of 30 June 2022, the applicant sought two subsequent findings. The first, an injunction for the purpose of prohibiting and restraining the respondent from sending the Niue lawn bowls team to the 2022 Commonwealth Games, and the second being contempt of Court.<sup>3</sup> I dismissed both findings sought by the applicant.<sup>4</sup>

[7] On 13 July 2022, the applicant filed a memorandum seeking costs. The respondent filed memoranda in opposition on 13 July 2022 and 12 October 2022.

[8] Additional supporting submissions were received on 22 September 2022 and 18 October 2022 by the presidents of both the applicant and respondent respectively.

### **Can a lawyer who does not hold a licence to practice charge for costs?**

#### *The applicant's submissions*

[9] Mr Toailoa, agent for the applicant, does not hold a practising certificate, however, he submits that he can obtain costs for his representation fees.

[10] Mr Toailoa identifies that the respondent refers to the revocation of a practising certificate in Samoa. In response, he states that Niue is a separate jurisdiction, and the practice of law in Niue is unregulated and does not require lawyers to hold practising certificates or to be members of a law society. Therefore, Mr Toailoa submits that non-lawyers are able to charge for their services.

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<sup>3</sup> *Niue Lawn Bowls Association Incorporated v Niue Island Sports and Commonwealth* [2022] NUHC; Application CV2022-00081 (10 July 2022).

<sup>4</sup> Above n 3, at [17] and [23].

[11] Mr Toailoa also submits that these concerns should have been raised at the beginning of proceedings, and by failing to do so, the respondent is merely attempting to avoid the costs sought by the applicant.

[12] Mr Toailoa submits that he has been serving the courts of Niue for numerous years without issue, and that the Court has previously acknowledged that he was able to do so.

### *The respondent's submissions*

[13] The respondent seeks clarification from the Court as to whether a lawyer whose licence to practice was revoked in another jurisdiction can charge for his services in Niue. The respondent submits that any lawyer whose licence to practice was revoked cannot charge or set a fee for their services other than that sanctioned by the Court.

[14] Maru Talagi, president of the respondent, filed submissions in support. He submits that he is often requested to assist people summoned to appear in court, despite not practising as a lawyer. However, Mr Talagi submits that this is at no cost to the Justice Department, nor does he charge for his services.

### *Law*

[15] An agent who does not hold a practising certificate can represent parties of court proceedings in Niue. The parties do not dispute this.

[16] Section 80 of the Niue Act 1966 states:

#### **80 Right of audience in the High Court**

In any proceedings, whether civil or criminal, any party may be represented either by a barrister or solicitor of the High Court of New Zealand, or, with the leave of the Court, by any other agent, but such leave may at any time be withdrawn.

[17] However, the parties dispute whether an agent can apply for costs for such activities.

[18] The Court of Appeal in *Tuhipa v Hipa* identified that the rationale of costs is that a party should be able to recover a reasonable contribution towards their legal expenses, therefore, an award of costs is for legal costs – the costs of a lawyer.<sup>5</sup> However, there are exceptions to this. The Court emphasised that fixing costs is fundamentally an exercise of judicial discretion, and that the Niuean context, where there are few lawyers, should be taken into consideration.<sup>6</sup>

[19] The question as to whether Mr Toailoa can receive costs for representing a party is an issue that came before the Court in *Lui v Tafatu*.<sup>7</sup> The Court stated:<sup>8</sup>

Counsel for the appellant has noted that at the time this case was proceeding, Mr Toailoa did not hold a Practising Certificate issued by the New Zealand Law Society. I accept counsel's submission that this puts Mr Toailoa on the wrong side of s 80 of the Niue Act 1966. I note that it is Mr Toailoa's usual custom to seek leave of the Court to appear as an agent representing his clients in order to trigger his right of audience under s 80. No such leave taking is recorded in the transcript from the hearing, so I assume it was overlooked in this instance.

Notwithstanding, I am prepared to accept Mr Toailoa appeared as an agent in this case and entertain his costs application in this case. Whilst seeking leave to appear brings into play s 80, I consider that it is well-known in Niue that Mr Toailoa represents land owners. Should he wish to appear in the future as an agent for an owner, I remind him that he must seek leave to do so.

[20] The Court in *Lui v Tafatu* then went on to award costs to Mr Toailoa's clients at 30 percent of that which Mr Toailoa had sought.

[21] The issue of whether Mr Toailoa is able to receive an award of costs has been previously determined. I see no reason to depart from the reasoning in *Lui v Tavatu*.

[22] Therefore in these circumstances, Mr Toailoa, being a lawyer who does not hold a licence to practice, having represented the Niue Lawn Bowls Association Incorporated is able to be granted an award of costs.

[23] However, the question becomes whether the Court should grant costs in this matter.

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<sup>5</sup> *Tuhipa v Hipa* [2020] NUCA 1; Application 11253 (18 November 2020), at [21].

<sup>6</sup> *Tuhipa v Hipa*, above n 5, at [21].

<sup>7</sup> *Lui v Tafatu* [2019] NUHC; Application 11251, 11258 (11 December 2019).

<sup>8</sup> At [28]-[29].

## **Should I award costs in this matter?**

### *The applicant's submissions*

[24] The applicant seeks a finding of costs totalling \$16,493.30 calculated as follows:

- (a) Legal costs: \$6,437.50.
- (b) Niue Lawn Bowls Association management costs: \$10,000.00.
- (c) Disbursements (court filing): \$56.30.

[25] The applicant submits that at least 80 percent of the costs claimed should be awarded because:

- (a) The applicant was forced into bringing legal proceedings to protect its rights because of the deliberate violations by the respondent, which the applicant submits had severe negative implications;
- (b) The respondent acted without regard to the rules of natural justice and the relevant provisions of its own constitution;
- (c) The application was urgent and required immediate attention by counsel;
- (d) The costs claimed are reasonable and not excessive, they also relate to the time spent trying to resolve the differences between the parties and for Court disbursements.

[26] The applicant submits that an award of costs should be made for the following reasons:

- (a) The applicant was the successful party in the 30 June 2022 decision, and therefore costs should follow the event;

- (b) The issues were not straightforward and therefore required an engagement of legal counsel;
- (c) The matter was pursued within a formal framework; and
- (d) There is no reason to depart from the ordinary costs principles.

*The respondent's submissions*

[27] The respondent accepts the costs for disbursements but otherwise submits that the costs sought are exorbitant considering the applicant brought both applications before the Court.

[28] The respondent further submits that the application for costs is punitive and vague as there has been no adequate break down of the costs sought.

[29] The respondent indicates that it is a not-for-profit organisation pursuant to the Incorporated Society Act 1908, and therefore submits that it does not have the means to meet such high costs sought by the applicant. The respondent states that it has grants but that these can only be used for the purpose of which they have been approved and allocated.

*Law*

[30] The Court of Appeal in *Hekau v Tongahau* adopted a two-step approach to costs.<sup>9</sup> Firstly, should costs be awarded? Secondly, if costs should be awarded, what is an appropriate amount?

[31] The Court of Appeal in *Oloapu v Vilitama* listed the considerations for whether to grant costs:<sup>10</sup>

- (a) Costs usually follow the event;
- (b) Costs are a discretionary measure available to the Court;

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<sup>9</sup> *Hekau v Tongahau* [2012] NUCA 5; Application 10305 (14 September 2012).

<sup>10</sup> *Oloapu v Vilitama* [2018] NUCA 1; Land Division 11001 (19 June 2018), at [19].

- (c) In a community such as Niue, the Court plays a role in facilitating amicable and ongoing relationships between parties, particularly in regard to land ownership, and such costs may not be considered appropriate in some circumstances;
- (d) A successful party should be awarded a reasonable contribution to the costs that were actually and reasonably incurred;
- (e) Where proceedings involved counsel, and where the parties pursued and contested litigation within a relatively formal framework, an award of costs should be made;
- (f) There is no basis for a departure from the ordinary principles of costs, where the proceedings were difficult and hard fought, and where a party succeeded in the face of serious and concerted opposition...

[32] The Court of Appeal also listed considerations for the level at which to set costs:<sup>11</sup>

- (a) The Court has a broad discretion when deciding the level of costs;
- (b) The Court should have regard to the nature of the court proceedings; whether the proceedings were formal or informal; the importance of the issues; and the conduct of the parties;
- (c) If a party has acted unreasonably, for example by pursuing a wholly unmeritorious and hopeless claim or defence, it is within the Court's discretion to award a higher level of costs against them;
- (d) Where the unsuccessful party has acted reasonably, it should not be penalised by having to bear the full costs of their adversary as well as their own solicitor/client costs...

[33] Costs are objectively assessed with regard to the factors set out above, and a reasonable contribution will usually fall within the range of 10 percent to 80 percent of a reasonable fee.<sup>12</sup>

### *Discussion*

[34] As indicated, I made two decisions regarding these parties. The first on 30 June 2022 and the second on 10 July 2022. That is the full context of these applications which should be taken into account. Not just one of the decisions. The applicant was

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<sup>11</sup> *Oloapu v Vilitama*, above n 7, at [20].

<sup>12</sup> *Peauvale-Misikea v Asekona - Section 109C, Part Togatupo, Alofi North* [2018] NUCA 3; Application 11684 (28 November 2018), at [18].



only successful in the first decision, whereas in the second decision of 10 July 2022, I dismissed both aspects of their claims. Therefore, the applicant was not the successful party in both proceedings.

### **Decision**

[35] Both the applicant and respondent have been successful in one of the two proceedings and therefore both were successful in one of the related proceedings and unsuccessful in the other.

[36] Costs should lie where they fall.

[37] The application for costs is therefore dismissed.

Dated at Rotorua, Aotearoa/New Zealand on this 20<sup>th</sup> day of March 2023.

C T Coxhead  
**CHIEF JUDGE**