

**PETER TAHANI -v- ATTORNEY-GENERAL AND
COMMISSIONER OF LANDS)**

HIGH COURT OF SOLOMON ISLANDS
(FRANK O. KABUI, J)

Civil Case No. 245 of 2001

Date of Hearing: 12th April 2002

Date of Ruling: 18th April 2002

Mr P. Tegavota for the Plaintiff

Mr S. Manetoali for the Defendant

RULING

(Kabui, J): This is an application by Notice of Motion filed by the Plaintiff on 17th February 2002 for the determination of a point of law under Order 27, rules 2 and 3 of the High Court (Civil Procedure Rules) 1964 (the High Court Rules.

The Background

By Writ of Summons and Statement of Claim, the Plaintiff claims a declaration that the Search Warrants issued against the Plaintiff on 23rd May 1996 and 29th August 1996 were unlawful, null and void as being contrary to section 101 of the Criminal Procedure Code Act (Cap.). If the Court finds in favour of the Plaintiff in this regard, the Plaintiff will claim consequential orders that the-

- (i) execution of the said Search Warrants was in breach of sections 3, 8 and 9 of the Constitution; and further orders for;**

- (ii) **payment of compensation/damages for trespass to property to be assessed;**
- (iii) **payment of compensation/damages for breach of sections 3, 8 and 9 of the Constitution to be assessed;**
- (iv) **loss of business to be assessed;**
- (v) **loss of use of properties for income generating business to be assessed**
- (vi) **loss of all properties in the total sum of \$224,579.55;**
- (vii) **loss of salary due to unlawful termination of employment to be assessed;**
- (viii) **costs.**

The pleadings have closed since the filing of the reply on 17th February 2002.

The Point of Law Issue

Order 27, rules 2 and 3 of the High Court Rules are in the following terms-

1.
2. **Any party shall be entitled to raise by his pleading any point of law, and any points so raised shall be disposed of by the Court at or after trial, provided that by consent of the parties, or by order of the Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.**
3. **If, in the opinion of the Court, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the Court may thereupon dismiss the action or make such other order therein as may be just.**

- 4.
- 5.

My reading of rule 2 above is this. Any point of law or points of law for that matter can be disposed of by the Court at or after trial. This can however be done only with the consent of the parties or by order of the Court on the application of either party that the point of law or points of law be set for hearing and disposed of at any time before the trial. At pages **163-164 in Australian Civil Procedure by Bernard C. Cairns, 1981, the learned author says,**

...“Any matter which could, at common law, be raised by a demurrer can now be raised by stating a point of law in the pleadings. If a point of law is raised it is decided by the trial judge, either during or after the trial. By the consent of the parties, or order of the court, a point of law raised in the pleadings may be set down for hearing as a preliminary matter. In those cases where the decision on that point disposes of the action, judgment is entered without the need for a trial. Remedies available under the rules are similar to those provided by the demurrer, except that one party cannot unilaterally set down a preliminary matter. That can be done only with the consent of the parties or, failing such consent, leave of the court. Control is thus conferred so that the action is not unnecessarily delayed by a defendant playing for time”...

In this case, I cannot recall making an order or otherwise for the setting down a point of law for hearing under Order 27 above. The Notice of Motion filed on 19th February 2002 would appear to be the actual hearing of a point of law that has never been set down for a hearing. I cannot also recall either Counsel informing me that the Notice of Motion was by consent of both parties and that there were documents to prove that in Court. For example in **Osborne v Amalgamated Society of**

Railway Servants [1911-13] A.E.R Rep. 102, at 104 Cozens-Hardy M.R.

said,

..."By a consent order made in chambers it was ordered that the points of law raised should be disposed of as a preliminary point at the trial of the action as if the said points had been set down for hearing pursuant to Ord. 25, r. 2. The parties having consented to this course, it is our duty to treat all the allegations in the statement of claim as true, and to consider whether they suffice to entitle the plaintiff to any relief"...

There was no consent order in this case. Again, in **National Real Estates and Finance Co., Ltd v Hassan** [1939] 2 A.E.R. 154, MacKinnon, L.J. after citing at 159 Order 25, rule 2 which is the equivalent of Order 27, rule 2 of the High Court Rules said at 160,

..."No order under that rule ought ever to be made in such terms. No one can say what is the point of law. It is merely a vague direction that it be set down for hearing on a preliminary point of law, and upon such an order, when it comes before the court, it is inevitable that a good deal of time would have to be wasted in trying to discover what the point of law is"...

This was a case where the Order for the hearing of a point of law was said to be insufficient and should not have been made in the first place. Again, no such Order of whatsoever nature had been made in this case. I do not think therefore that I do have the jurisdiction to bear a point of law that was never put to me for that purpose. This application is dismissed with costs.

F.O. Kabui

Judge