Primary Produce Exports Ltd & ors v Masima & ors

Supreme Court, Nuku'alofa
Hampton CJ & Lewis J
C.1089/96, 1090/96, 1091/96

18 & 21 October 1996

Constitution - discriminatory law - Land Act - void
Land - discriminatory provision - inconsistent with constitution
Contract - growing crops - unlawful - unconstitutional
Practice and procedure - full Court - importance

The plaintiffs, squash exporters, took proceedings to enforce growing contracts with certain not the defendants and to restrain those defendants from selling their squash to other exporters the defendants. Interim injunctions restraining defendants were granted and on application to discharge those orders it was argued that the effect of s.16 Land Act, making it unlawful for a Tongan subject to mortgage pledge charge or sell his growing crops, made the contracts "void for illegality" and therefore the growers were free to sell to whomsoever they wished.

Held:

1. Because of the matter's importance the Court sat, for the first time, as a full Court.
2. The Crown, although not a party, were invited to take a part and argue the matter because of its importance.
3. S.16 may well be a protective piece of legislation rather akin to the now repealed Contracts Act.
4. Cl.1 of the Constitution did not, and could not, affect this matter.
5. Cl.4 did however. S.16 refers to only to "any Tongan subject". So a non-Tongan squash grower would be bound by such a contract as here, although on the defendants' argument a Tongan would not be bound.
6. Cl.4, reflecting some of what preceded it in cl.1, spells out classes of persons as Tongans and non Tongans, and as chiefs and commoners and that the law shall be the same for all classes, all people.
7. S.16 does discriminate between classes and does enact a law for one class (Tongans) and not for another (non-Tongans) whereas the preceding sections in that part of the Land Act and creating various other offences did not (i.e. offences by land holders who by definition can be Tongans and aliens (non-Tongans).
8. Therefore s.16 is inconsistent with the Constitution (cl.14) and to the extent

of that inconsistency is void (under cl.82). So the whole of s.16 was void as the inconsistency affected all of the section.

NOTE: The Crown later sought leave to appeal, which was refused. (A short report as to that follows immediately).

Cases considered : P.P.E.L. v Lauti & ors (C.928/95 Lewis J)
Touliki v Fakafanua & K.O.T. [1996] Tonga LR 145
Fotofili v Siale (1987) SPLR 339 & [1996] Tonga LR 227

Statutes considered : Land Act ss. 16, 2, 12, 13, 15
Constitution
Interpretation Act, ss 34, 2(1)
Nationality Act, s 2

Counsel for plaintiffs : Mr W. Edwards
Counsel for defendants : Mr Tu'utafaiva (C.1089 & 1091)
Mrs Vaihu (C.1090)
Counsel for Crown : Mrs Taumoepeau

Judgment

We start by thanking the Acting Solicitor General for coming on such short notice and providing us with the helpful submissions which she has this morning on a matter of some importance.

Some general matters. First, proceedings have been taken (3 actions in C.1089, C.1090. C.1091/96) by two companies we will describe as Squash Exporters to enforce contracts entered into earlier this year with individual Squash Growers (being in these proceedings each of the first defendants and in 1091/96 the second defendant as well).

Secondly the actions are not only to enforce the contracts but also to restrain growers from selling their 1996 Squash to other exporters who are also named in the proceedings. Interim injunctions have been granted and the essential terms of all the orders restrain the growers from selling and disposing of their squash to the other exporters, and restraining those other exporters from buying and/or obtaining, from the contracted growers, squash.

The defences filed and the applications made to discharge the injunctions (and in particular the applications and the defences of the growers) raise questions as to Section 16 of the Land Act (Cap.132). An instance of that is in 1090/96 where it is pleaded by the grower there that Section 16 of the Land Act makes the contract "void for illegality".

I should add that these matters before us were argued on the basis that the growers are Tongan subjects and that, therefore Section 16 of the Land Act applies to them. I will come to the importance of the expression "Tongan subject" in due course.

The importance of the matter led, with the consent of all parties, to this question (which will be read shortly) being referred to the full Bench of this Court. As I understand it this may well be the first time that a full Bench of this Court has sat in relation to any matter and it underlines the importance that this particular question has. It shows the importance that the matter may have in relation to the whole squash industry in the Kingdom.

The question itself is framed in this way: "Upon hearing counsel, this being a question of importance and urgency, it is ordered that the following question be referred for the consideration of, and the interpretation of, the Full Bench of the Supreme Court namely: do the provisions of the Land Act, Cap 132, being an Act relating to Land and in particular section 16 of the Act", and I will not set out the body of this section at this stage, "render agreements and formal contracts made between growers and exporters of buttercup pumpkin squash containing a clause or clauses which compel a grower to sell to the other contracting party in exchange for plant seeds chemicals fertilizers and like commodities void?".

It is that question and that question alone, which is in issue before us here. In fact we have been asked to rule on the question as part of the hearings before Mr Justice Lewis, i.e. as part of the applications made to discharge the injunctions. The urgency and importance attached to the matter is because the squash harvest is in full swing and we were told that shipments are at wharf awaiting export.

If Section 16 renders the contracts which the growers entered into unlawful, that would be the end both of the Interim Injunctions and, in effect, of the litigation as presently framed before the Court. Because if the growers are right then there would, in effect, be nothing for the exporters (the plaintiffs) to take action on and try and enforce in this Court.

We received written and oral arguments from Counsel for the parties on Friday the 18th October and then adjourned until today, Monday 21st, because, as it became apparent

in the course of argument, there were serious matters here touching on the consistency or inconsistency of Section 16 with the Constitution. Constitutional matters were in issue. Mr Justice Lewis and I took the view that, in that situation the Crown should be put on notice and the Crown asked if it wanted to take a stance in relation to the arguments before this Court. As was indicated, we heard Mrs Taumoepeau for the Crown earlier this day.

The Court unanimously has come to a clear view. It is important that that view be expressed immediately not only so that the parties know where they are with this litigation but, as well, because of the possible ramifications for the Squash industry generally and the marketing and exporting of squash in this year.

Section 16 of the Land Act is at the heart of the matter and it reads in this way:

> "It shall be unlawful for any Tongan subject to make any mortgage agreement or other document pledging or charging or selling his growing crops of coconuts, yams or other produce or any part thereof. Any person acting in contravention of this Section shall on conviction be liable to a fine not exceeding $100 or to imprisonment for any period not exceeding 6 months."

The Land Act was enacted in 1927. Nothing has been put before us as to the history of the section, Section 16, or as to how it may have been discussed in debate before the Legislative Assembly. The reasons for its enactment remain unclear although it may well be, as has been suggested by various counsel before us, including the Crown, that it is a protective piece of legislation rather in the same light as the Contracts Act, Cap 26, which as we know, was repealed in 1990. It may well have been a somewhat paternalistic and protective piece of legislation, trying to protect Tongan crop growers.

We do know that the section contains a significant penalty provision and that that must have been seen as a substantial penal provision at the time of the enactment in 1927. As we understand the position this section has not been amended since its first enactment.

So far as we are aware there has been no previous litigation in relation to the section, with one exception. That exception related to a matter that came before Mr Justice Lewis last year in C928/95 Primary Produce Export Ltd -v- Lauti and others. There, as in these cases, there was an application to discharge an Interim Injunction. It was an application based on a variety of arguments.

On of the arguments put before Mr Justice Lewis which was the subject of some comment in his ruling in November 1995 was as to the effect of Section 16 of the Land Act. There, in that ruling, Mr Justice Lewis referred to the matter in this way (page 4):

> "There next argument advanced by the Respondents to the Injunction is that the so called Contract offends against Section 16 of the provisions of the Land Act" (he then set out the provision of Section 16 itself and went on) "Parliament has clearly placed a sanction upon the proscribed activities in Section 16 and the sanction is extensive and clearly embraces squash pumpkin, the subject of the present application. On any reading of the statutes there is no saving section for pumpkin squash. Pumpkin squash must be read as being produce within the meaning of Section 16. The clear and unmistakable object of the contractual relations between the sellers and buyers in this case is to pledge or charge a growing crop. I conclude that it is not to strain the legislation if one is to construe the provision of Section 16 in this way".

That ruling is a reflection of the argument that was put in front of Mr Justice Lewis and is a further reflection of the arguments that are being put in front of this Court, on

behalf of the growers. But we do note this. That in the case before Mr Justice Lewis last year there was no point raised, let alone argued, as to the now alleged inconsistency between Section 16 and various provisions of the Constitution itself, so that the position here is clearly different.

The question before us, as has been said, relates to Section 16 of the Land Act. There was raised in argument (and in one of the Statements of Defence at least) a question as to Section 13 of the Land Act and its potential to render these Contracts unlawful. We will not set out Section 13 in full. It is not the question before us and we do not intend to express any final conclusion in relation to that. But we do note in passing that, it seems to us in the context of the Land Act, section 13 relates to ensuring that all landholders use proper prescribed forms, (i.e. documents in the manner prescribed in the Land Act) to register and secure their holding or interest in land, whatever that holding or interest might be. Section 13 seems to us to have nothing at all to do with these matters. It relates to all landholders (as that term in defined in the Land Act, and we will come to that later in this judgment).

To turn then to Section 16. First the agreements or contracts themselves have been produced, attached to affidavits in these proceedings. Put shortly the agreements, in effect, say that it shall not be lawful for the growers to sell or dispose of the squash other than to the Plaintiff companies.

As has been said the contracts are with Tongan subjects, (the growers), and the question is whether they, (the growers), can be held to the contracts assuming, for the present purposes, that the contracts are otherwise validly entered into. Can the growers be held to the Contracts by the exporters who have, in fact, provided the growers with seeds and fertilisers or are the contracts unlawful by the terms of Section 16 and the growers therefore free to sell to whomsoever they wish?

On the one hand the growers say "look at the clear words of Section 16, they apply to us, we are able to ignore the contracts that we have entered into as the contracts themselves are illegal and we can sell to whoever we like". In fact, that is the same argument as put before Mr Justice Lewis in the case last year.

And we would add that if the growers are right, and the contracts are illegal or unlawful, then it would seem to us that that illegality goes to the heart of the contracts so it would not be a case of the Court being able to sever off the unlawful part. If it is unlawful, it goes to the heart of the contract, the whole contract must fall.

In answer to that the plaintiffs, the exporters, raised the claim that Section 16 is inconsistent with the Constitution and the section itself therefore is void. So it is claimed that section 16 cannot affect these contracts and that the question asked of this Court must be answered to the effect that Section 16 does not render these contracts void.

The plaintiffs raised 2 arguments based on the Constitution, (and we will deal with them briefly). The first is based on the meaning which Mr Edwards in particular said could be given to the last sentence in Clause 1 of the Constitution (and to related later provisions in the Constitution). In effect, an argument that the State could not, and should not, interfere in private property and contractual arrangements, which are protected under the Constitution.

It seems to us that that argument is a reworking of the matter which was decided, in a binding fashion in so far as this Court is concerned, by the Court of Appeal in the case of Touliki -v- Fakafanua and the Kingdom of Tonga, Appeal No.3 of 1995, Judgment 31

May 1996, [1996] Tonga L.R.145.

That issue was dealt with at some length in the Court of Appeal Judgment at pages 11-18 and we do not intend to cover that same ground in this Judgment. That argument is rejected.

The second argument raised, as we understood it, was a claim that Section 16 would discriminate, and therefore offend, against Clause 4 of the Constitution. Discriminate, in effect, between a "poor" grower of squash who could not afford seed, fertiliser and so on other than by entering into a Contract such as a contract in the form under discussion here and therefore would be affected by Section 16; as opposed to a "well off" or "well to do" grower, who could afford his own seed, fertilizer and so on and therefore would not be trammelled in the same way by having to enter into such a Contract in advance and then be faced with Section 16.

Again we see no force in that argument and, indeed, to try and draw distinctions of "class" on that basis is something that was commented on in the Touliki decision at page 18 where it was said:

> "It remain of the Clauses on which the Appellants rely to consider the terms of Clause 4. This is a provision relating to legislation. The Appellants argue that it forbids a law affecting a particular group in the community and exporters of squash (generally, or to Japan) are groups entitled to the constitutional protection. But it would not be a normal use of language to describe growers as a "class" or exporters as a "class". Ram -v- Minister for Immigration and Ethnic Affairs (1995) 130 A.L.R. 314. The Law about the export of squash, in the present matter, applies equally to everyone who wishes to grow or export squash. The law is "the same"; only the activities to which it attaches are different. It follows that Clause 4 is of no assistance to the appellants".

So that second basis on which the matter was argued is also rejected by us.

But in the context of discussion and argument about Clause 4 and discrimination, a further argument was raised in this Court going to another and more fundamental aspect (in this Courts' view) of discrimination. And that is in the use in Section 16 of the words "any Tongan Subject". (We note in passing that a Tongan subject is defined in terms of Section 2 of the Nationality Act, Cap 59).

Section 16 relates only to Tongan subjects and purports to make unlawful agreements or other documents pledging or charging or selling crops by Tongan subjects.

So on the face of it a non-Tongan subject could arrange to have some land, grow squash on it under contractual arrangments similar to the contracts before us and be held to those contractual arrangements (if necessary in a Court). But a Tongan subject in the same situation could say "I thumb my nose at this agreement. It is unlawful and I can deal with whoever I like".

The Tongan growers here argue a breach of Clause 4 of the Constitution. Clause 4 says:

> "There shall be but one law in Tonga for Chiefs and commoners, for non-Tongans and Tongans. No laws shall be enacted for one class and not for another class but the law shall be the same for all the people of this Land".

It is argued that Section 16 is not a law that is the same for all the people of this Land. The Court's jurisdiction in this matter is to be found in this way.

Clause 90 of the Constitution says: "The Supreme Court shall have jurisdiction in all cases in law and in equity arising under the Constitution and Laws of the Kingdom ...".

Clause 82 says: "This Constitution is the supreme law of the Kingdom and if any other law is consistent wit this Constitution that other law shall to the extent of inconsistency be void".

In the Privy Council in 1987 in the case of Fotofili -v- Siale and Others (which for convenience can be found in 1987 S.P.L.R. 339 at 347) this was said:

> "It follows that in England the validity of an Act of Parliament is not open to challenge on the ground that its passage through the House was attended by any irregularity. The same is not true in Tonga where there is a written Constitution. If, on a true construction of the Constitution, some event or circumstance is made a condition of the authentic expression of the will of the legislature or otherwise of the validity of a supposed law, it follows that the question whether the event or circumstance has been met is examinable in the Court notwithstanding that the question may involve internal proceedings of the Assembly. Again a statutory provision can be examined and struck down if it is contrary to an express provision of the Constitution, although its passage through the House was not attended by any irregularity"

That view in the Privy Council has been commented on, and acted upon, in various cases and was re-affirmed by the Court of Appeal in the Touliki case at pages 10 and 11.

We return then to the Constitution. It is important to look first to Clause 1 which says this:

> "Since it appears to be the will of God that man should be free as He has made all men of one blood therefore shall the people of Tonga and all who sojourn or may sojourn in this Kingdom be free for ever. And all men may use their lives and perons and time to acquire and possess property and to dispose of their labour and the fruit of their hands and to use their own property as they will", (emphasis added).

Clause 4 again:

> "There shall be but one law in Tonga for chiefs and commoners, for non-Tongans and Tongans. No laws shall be enacted for one class and not for another class but the law shall be the same for all the people of this land".

It seems to us that that Clause, amongst other things, spells out "classes" of persons as "non-Tongans" and "Tongans" and as "chiefs" and "commoners". Clause 4 clearly reflects some of what preceded it in Clause 1 as we have emphasised, and that again can be found underlined by the passage which occurs in the Touliki case in the Court of Appeal which can be found at pages 12 and 13.

Perhaps we should add that, that fundamental freedom or liberty declared in Clause 1 of the Constitution is not only entrenched but it would seem completely protected from amendment by Clause 79 of the Constitution which says inter alia:

> "It shall be lawful for the Legislative Assembly to discuss amendments to the constitution provided that such amendments shall not affect the law of liberty ....." (we stop there; it goes on in relation on other matters).

I now return to the passage from Touliki which starts on page 12:-

> "The Constitution of Tonga opens (in the first sentence of cl.1) with a profound philosophical concept linking the inhabitants of the Kingdom with the whole

of human kind as inalienably free and equal. This concept may be seen, not only as the fundamental basis of all that follows but also as a constitutional guarantee against both slavery or serfdom and the arbitrary or despotic exercise of power. So far as slavery is concerned, cl.2 goes on to provide a more specific guarantee. But cl.1 itself contains a second sentence referring to the right of all to "use their lives and persons and time to acquire and possess property and to dispose of their labour and the fruit of their hands and to use their own property as they will". Historically, as emerges clearly from S. Latukefu on The Tongan Constitution at pp 20 - 34, this sentence seems to have been added in order to put it beyond question that customary rights of chiefs ove the property and labour of other Tongans, rights analogous to those of the lords over their serfs in feudal Europe, were forever abolished. It is significant, as an indication of the role of the second sentence in cl.1, that it is introduced by the word "And". It is not an independent guarantee with respect to property rights - cls. 14 and 18 provide that - but a statement of a corollary of the opening affirmation of human liberty and equality.

To see cl.1 of the Constitution as concerned with establishing the foundation of the Tongan State in such an affirmation is not to see it as less, but as more, important. The Constitution itself does not place first the possession of Tongans, but their liberties. In subsequent clauses, the Constitution proceeds to deal with property, taxation, resumption and other significant matters affecting the organisation and activities of the State. But before doing so, it gives concrete application, in a series of clauses, to the basic statement with which it opens.

Clause 2 directly forbids the institution of slavery, and makes a proclamation of freedom for all who live under the flag of Tonga. In the original form of the Constitution of 1875, an additional clause, cl.3 (since repealed), took the same theme one step further by making provision to deal with the then prevalent practice of indentured or forced labour procured from other Pacific islands. Clause 4 reflects the equality implicit in cl.1 (we are all "of one blood") by requiring that the general law of Tonga apply equally to all".

It seems to us that Section 16, of the Land Act does discriminate between classes, does enact a law for one class (ie. Tongans) and not for another (non-Tongans).

For the Crown today, Mrs Taumoepeau said, in effect, that we should look at the Land Act generally. That Act, she argued, was created under the Constitution to inter alia, protect the right of Tongans to Tongan land, and that Section 16 was part of that general intention. In that regard she referred to Clause 104 of the Constitution. Clause 104 it seems to us does not say that. The effect of that Clause is to emphasise that all Tongan Land will always be vested in the Crown.

Mr Edwards, in reply to that submission of Mrs Taumoepeau (about the Land Act protecting the rights of Tongans to Tongan land and Section 16 being part of that general intention), rightly in our view, said that Section 16 however is not about land, but is about crops.

We come back, despite Mrs Taumoepeau's arguments, to the clear words of Section 16, vis-a-vis Clause 4 of the Constitution which says the Law shall be the same for all the people.

Indeed it is worth looking at the scheme of the Land Act. Under that Act an alien, that is a non Tongan (see Section 2(1), Interpretation Act, cap 1 - a person "other than a naturalised or native-born Tongan subject") can in fact hold land. That is the effect of Section 14 of that Act which says:

> "It is unlawful for any alien to hold or to reside upon or to occupy any land without having first obtained from the Minister of Lands a permit so to do issued by him in exercise of the pwoers conferred under section 19(4) of this Act. Any alien who contravenes the provisions of this section shall on conviction be liable to a fine not exceeding $20 or in default of payment to imprisonment for any period not exceeding 3 months.

So aliens can hold land. It seems to us that such a person is a "landholder" within the meanings given that expression in Section 2 of the Land Act, where 'landholder' is defined, inter alia, as being f) any person who claims to be entitled to any land or interest in land whether in actual possession or occupation or otherwise".

Indeed when one looks at some of the alternative definitions of 'landholder' in Section 2, aliens could well be landholders under, for example, paragraph d) or paragraph e) it seems to us. So non-Tongans (aliens) can be landholders.

One turns then to Division II of the Land Act. It contains five Sections which deal, as the heading to the Division puts it, with "penalties for unlawfully dealing with land".

Two of those Sections, Section 14 and Section 16, we have already referred to. Section 12, 13 and 15 create various offences which can be committed by "landholders", that is offences which can be committed by Tongans and non-Tongans alike.

That is to be contrasted with the language used in Section 16. It speaks of 'any Tongan subject'. Section 16, as opposed to the other three Sections we have mentioned, clearly discriminates between Tongans on the one hand and non-Tongans on the other. The use of the word 'landholder' in the previous provisions underlines, in our view, that discrimination.

That discrimination may have been promulgated with the view to it being in the best interests of Tongan farmers at that time (as argued, out of some protective interest) but it is still, in our view, discriminatory. It flie in the face of Clause 4 of the Constitution.

Therefore, using the terms of clause 82, section 16 is inconsistent with the Constitution and, to the extend of that inconsistency, is void. It is further our view that the whole provision of Section 16 is void.

It was argued by Mrs Vaihu, using the terms of Clause 82 itself, and reinforced by Section 34 of the Interpretation Act., Cap 1, that the whole provision should not be struck down but rather that we should take out what she would term the offending word 'Tongan subject' and replace them with a neutral word such as 'person'. So that the provision would read "It shall be unlawful for any person to make any mortgage agreement or other document....."

We reject that submission. That would mean that this Court was in effect acting as the Legislature. Not only that, but we would be giving to the Section a meaning quite different to the one obviously intended by the Legislature. That would be wrong. There is no such jurisdiction in this Court.

As has been said, it seems to us, that the whole of Section 16 is inconsistent with Clause 4 (and reinforced by relating back to that portion of Clause 1 of the Constitution we have earlier referred to). Insofar as that inconsistency affects the whole section, that

whole Section is void.

To turn then to the question posed to this full Bench, we answer that question in this way: That the provisions of the Land Act, and in particular Section 16, do not render agreements and contracts between growers (whether Tongan or otherwise) and exporters of squash pumpkin void, on the ground that Section 16 itself is void as being inconsistent with the Constitution.

That is the formal answer which we give. We go no further than to say that the balance of the litigation is remitted to Mr Justice Lewis for determination, in the light of this ruling, i.e. for the determination of the applications made to discharge the Injunctions and any other hearings, interlocutory or substantive, which may follow in these proceedings.

We also add that, pending that further argument before, and determination by, Mr Justice Lewis on the applications to discharge the Injunctions, the Injunctions that have been made in each of these actions shall continue in force in the meantime.

(Counsel for the parties were invited to make submissions on costs. None wished to be heard).

The matter of costs is also remitted for determination in front of Mr Justice Lewis, that being more appropriate as he will be dealing with the overall issues and he being fully conversant with all matters.

(Equiry was then made as to the Crown's position on costs. Mrs Taumoepeau replied that her instruction from the Attorney General was to help the Court and that no question of costs was to be raised).