

IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 55 of 2018

BETWEEN : DIANNE WARNER

- Plaintiff

AND : YANJIAN TONGA LIMITED

- Defendant

BEFORE HON. JUSTICE NIU

Counsel: Mr. S. Fonua for applicant
Mr. W. C. Edwards Snr for respondent

Hearing: 21 February 2019

Ruling: 22 February 2019

R U L I N G

[1] The plaintiff has applied by way of ex-parte application dated 26 November 2018 for orders:

- (a) that the plaintiff, as liquidator (appointed by the Court), shall not be personally liable for legal costs or other expenses while acting as liquidator under these proceedings; and
- (b) fixing her hourly rate of remuneration as liquidator at \$200 per hour.

[2] I overlooked to attend to it and I proceeded to issue my ruling in the 3 matters, that is, CV35/2018, CV40/2018 and this present matter CV55/2018 on 30 November 2018, in which I dismissed all three applications and claim of the plaintiff in those matters with costs against her. The plaintiff has appealed to the Court of Appeal against that ruling.

[3] Mr. Fonua, counsel for plaintiff, inquired about the said plaintiff's application and upon further discussion with him he agreed that counsel for defendant, Mr. Clive Edwards, be notified and be given a copy of the application for his response. Mr. Edwards was notified and served with a copy of the application and he filed his opposition and objection to the application on 18 February 2019. He however did not attend for the hearing which was held in my chambers on 21 February 2019.

Personal liability as liquidator

[4] Mr. Fonua submitted that the plaintiff, Mrs. Warner, should not be personally liable for the costs and expenses ordered against her and that such costs and expenses be borne only by the assets of the company for which she was acting as liquidator, as she is entitled to remunerate herself therefrom. S.287 of the Companies Act (the Act) provides for that. It says:

“287. The expenses and remuneration of the liquidator are payable out of the assets of the company.”

[5] There is however no provision in the Act, or in any other Act or law, that the liquidator is not liable for costs or expenses in respect of any proceedings brought by or against her in her capacity as liquidator. Mr. Edwards pointed that out in his opposition. He submitted that the plaintiff was trying to seek immunity from liability for costs in proceedings which she has chosen to bring against the defendants and respondents in these proceedings, and that was not right and it was an abuse of the process of the Court and was scandalous.

[6] Mr. Fonua submitted that the Court appointed the plaintiff as liquidator and that the plaintiff needs protection against costs in order that she is able to carry out her duties and functions under the Act. He submitted that this is a matter of

public policy otherwise no one would be willing to be appointed to act as a liquidator.

- [7] The Act is comprehensive, and until the Legislature has amended it to so provide, I cannot insert into it a provision such as the plaintiff now seeks for me to do. Every person who consents to act as liquidator must be aware of the provisions of that legislation and he or she is deemed to be aware of and to accept the provisions contained therein. If she wishes to take proceedings against a person, he or she must consult and instruct legal counsel to do so on his or her behalf, thereby undertaking and accepting the consequences of such proceedings, one of which is the payment by him or her of the costs of those proceedings in the event he or she is unsuccessful. That was fully argued by Mr. Fonua and Mr. Edwards before me in the question of costs in the 3 proceeding before I dismissed them on 30 November 2018.

- [8] I had asked Mr. Fonua if he could provide any case authority for the order sought by the plaintiff and he provided me with a copy of a New Zealand case of *Elaine Katavich* (2011). He referred to a statement made by the Judge, Duffy J, which stated:

“I consider that the approach she took in arguing that S.255 required a private liquidator to fund investigations out of his or her own pocket was unrealistic.”

Mr. Fonua argued that that statement meant that the liquidator should not be personally liable (ie. out of his or her own pocket) for the expenses of the liquidation.

- [9] I however do not agree because, one sentence after Duffy J said what I have quoted above, he stated:

“Whilst I have given serious consideration to the arguments Mrs. Katavich has set out in her memorandum in reply to the liquidators costs memorandum, I remain of the views I have set out herein and consider that she should be liable for the costs I have awarded against her.”

- [10] I must therefore find, and I find, that there is no authority given to this Court to make an order that a liquidator appointed by authority of the Act, is not liable or personally liable for costs in respect of any proceedings brought by her or against her in respect of her position as liquidator.

Remuneration and rate of remuneration

- [11] In her second application, the plaintiff asks for an order that her remuneration for her work as liquidator be fixed by the Court as \$200 per hour. In support of her application she has produced a copy of a bill which she had filed in this Court in the receivership of Seaview Lodge Limited dated 28 February 2013 in which she charged \$200 per hour and which she says was approved by the Court.
- [12] When Mr. Fonua had inquired about this application in late January, I had asked him to provide me with the rate of charge which the plaintiff was charging for her normal work as accountant. That was on 28 January 2019. On 31 January, Mr. Fonua informed me that the plaintiff told him that her normal rate of charge as accountant was \$200 per hour. I told Mr. Fonua that I wanted to see copies of bills – that he must file and serve bills of works the plaintiff had carried out and rendered as accountant but properly blacked out to protect her clients to prove the rate she charged for her service as accountant. Mr. Fonua did not do that. He instead has only produced the bill filed by the plaintiff as receiver in the Seaview Lodge receivership. I can only conclude that if she produced the bills rendered by her to her clients, they would not support the rate that she now wants the Court to approve for her in respect of this liquidation.

- [13] S.285 and S.286 of the Act provides as follows:

“S.285 (1) Subject to section 293(1)(e), every liquidator, not being the Official Liquidator, appointed under section 250(1)(a) or (b) is entitled to charge reasonable remuneration for carrying out his duties and exercising his powers as liquidator.

(2) Unless the Court otherwise orders, every Official Liquidator who is appointed a liquidator under section 250(2)(a) and every

liquidator appointed under section 250(2)(c) shall charge remuneration either –

(a) of an amount equal to the amount fixed under section 286;

or

(b) at, or in accordance with, such rate or rates as may be prescribed under that section.

286 (1) His Majesty may by Order in Council, make regulations fixing an amount or prescribing a rate or rates in respect of the remuneration of liquidators to which section 285 applies.

(2) Without limiting subsection (1), such regulations may –

(a) prescribe an hourly or other rate or rates of remuneration and different rates may be prescribed in respect of work undertaken in the liquidation by different classes of person;

(b) prescribe a rate or rates by reference to the net value of the assets realised by the liquidator, together with such other amounts as may be specified.

(c) prescribe a rate or rates in respect of the exercise of a particular function or power.

(d) prescribe a rate or rates by reference to such other criteria as may be specified.

I note that the plaintiff was appointed as liquidator under S.250(2)(c) and S.250(2) provides that she shall charge her remuneration either as an amount fixed under S.286 or in accordance with such rate as may be prescribed under S.286. I must uphold that provision.

- [14] Mr. Fonua told me that as yet, His Majesty in Council has not made any regulation under S.286 fixing an amount or prescribing a rate or rates for the remuneration of liquidators to which S.285 applies up to now.
- [15] Despite the absence of such rate of remuneration fixed by the King in Privy Council, it would appear that the Court has appointed liquidators and has approved rates of remuneration for them, such as the plaintiff has claimed has been done with regard to the Seaview Lodge receivership. However, no reference or material have been provided to me to show the basis and justification upon which the rate of \$200 per hour was considered to be appropriate and to be approved if it was so approved by the Court. I consider that just because the King and Privy Council has not set a rate for liquidators, or been asked to set such rate, the Court is thereby given an authority to approve or not approve a rate a liquidator may charge. I consider that the discretion granted to the Court under S.285(2) is to be exercised to give to a liquidator a remuneration which may be higher, or lower, than a rate which shall have already been fixed by regulation made by the King and Privy Council, (such as circumstances may in each case warrant). I do not think that the Act intended that the Court was to set the rate or any rate of remuneration of liquidators. The Act expressly requires the King in Privy Council to set it but that the Court may, if justified in a particular case, approve a higher or a lower rate of remuneration than the one set by the King in Privy Council. Without such rate having been set, above or below which rate can the Court approve the remuneration of a liquidator? If the Court now approves a rate for the plaintiff at \$200 per hour, the Court will thereby set a rate of remuneration for liquidators, instead of it being set by the King and Privy Council, and that cannot be right.
- [16] The setting of a rate of remuneration of liquidators is a policy matter directed by the Act to be considered and approved by the King and Privy Council no doubt because of the need to properly remunerate the liquidator, but more importantly to ensure that the remuneration of the liquidator does not unduly absorb the assets of the liquidated company, such that the creditor or creditors for whose benefit the liquidation is ordered by the Court receives very little or nothing at all.

The Act therefore requires that the King and Privy Council, no doubt with the advice and recommendation of the Minister of Labour, Commerce and Industries, who is also the Registrar and the responsible officer for administration of Act, to set an appropriate rate of remuneration for liquidators. This is reflected in the enactment of S.285(2)(a), (b), (c) and (d) as quoted above. These are not matters for the Court. They are public policy matters which are required to be considered and specified by regulations made by the King and Privy Council. I do not think that the Court is empowered by the Act to set such policy by approval of rates which the Court may consider fair. That task is expressly given, as I find, to the King and Privy Council.

- [17] I therefore find and I hold that the Court has no authority, in the absence of rates of remuneration set by the King and Privy Council, to set or approve any rate of remuneration of a liquidator.

Orders

- [18] Accordingly, I order that both applications of the plaintiff are dismissed with costs to the defendant, to be taxed if not agreed.



A handwritten signature in blue ink, appearing to be "Niu J", written in a cursive style.

Niu J

J U D G E

NUKU'ALOFA: 22 February 2019.