HIGH COURT OF SOLOMON ISLANDS

Civil Case No. 86 of 1998

LUKE PITANOE

-V-

MINISTER FOR FORESTRY, ENVIRONMENT & CONSERVATION, THE NORTHWEST CHOISEUL AREA COUNCIL, EAGON RESOURCES DEVELOPMENT COMPANY (SI) LIMITED

High Court of Solomon Islands
(Kabui, J)

Hearing: 21 May 1998
Judgment: 22 May 1998

M. Kirkpartick for Applicant
Sol-law for Respondent

JUDGMENT

(KABUI J)

This is an *ex parte* application by one Luke Pitakoe ("the Applicant") of Supizae Island, Choiseul Bay, Choiseul Province, filed in the High Court on 20th May 1998 by his solicitor Mr Kirkpatrick by way of *exparte* summons. The application is for leave of the Court so that the Applicant can proceed to the next step of asking the court to grant orders for Mandamus, Prohibition, Certiorari, Declaration and Injunction in his favour and for those whom he represents as their spokesman. By sworn affidavit filed on 20th May 1998, the Applicant describes himself as the Chief of the Varidasinana Tribe and is one of the owners of Varidasinana Land. Apart from being the spokesman and representative of his Tribe, he is also the authorised representative of the owners of -

(a) the Pua Paqapekapeka Land;
(b) Tarelavata Land;
(c) Kabolasi (Kabalasi) Land;
(d) Sibosibo Land; and
(e) Gulugula Land. All these areas of land are located on the Island of Choiseul.

The third respondent in this action is Eagon Resources Development Company (S.I.) Limited ("the Company") which is in possession of a Timber Licence No. TIM2/14 granted to it on 10th September, 1987 by the then Chief Forestry Officer of the Government. The Licence is valid and current until 10th September, 2007. The Licence covers Wards 13, 14, 15, 16, 17, 18 and 19 excepting Wagina. In fact, the Licence covers the whole of the Island of Choiseul.

The Moratorium

On 2nd October, 1997, the then Permanent Secretary of the Ministry of Forests, Environment and Conservation ("the Ministry") issued a Circular Memorandum under his signature advising that the Minister had directed that the acceptance or consideration of any new applications be suspended and that no licence would be issued in respect of them. This was being done in anticipation of the Government's new policy on forestry and that the enforcement of this directive was necessary until further review.

Action by the Company

In the meantime, the Company decided to apply to the Commissioner of Forest Resources for consent to negotiate with the Choiseul Provincial Government, the North West Choiseul Area Council and the landowners of the land areas in respect of which the Company had applied under Section 5B of the Forest and Timber Utilisation Act ("the Act") (Cap. 90). There were six applications of this nature. They were made well after the Moratorium was issued and published. There is no dispute about this. It is apparent that consent to negotiate for timber rights must have been given by someone in the Ministry for the North West Choiseul Area Council is currently scheduled to hold hearings on these applications on 25th May, 1998 on the Island of Choiseul at Taro, in Choiseul Bay.

The Applicant's Case

The Applicant and those whom he represents in this Court are not happy about the Form I applications and the scheduled hearings on 25th May 1998. The Applicant says the Form I applications are in contravention of the Moratorium issued on 2nd October 1997 by the Ministry. Contact with the Ministry has not been fruitful in terms of cancelling Form I applications in line with the spirit of the Moratorium. The Applicant is of the firm view that the Ministry had acted in bad faith and had been unreasonable in terms of not upholding the spirit of the said Moratorium. He is therefore asking the court to intervene for him against the actions taken by the Ministry and, in line with this course of action, to stop the North West Choiseul Area Council from conducting hearings under section 5C of the Act to determine timbers rights in the land areas covered by the Form I applications. He also wants to stop the Company from lodging further Form I applications.

Relief Sought

The Applicant wants the following orders to be made should leave be granted -

(a) an order for mandamus to compel the First Respondent to cancel the consents given by the Ministry in response to Form I applications; or

(b) an order for certiorari to quash the decisions to grant consent in response to Form I applications;

(c) an order for Prohibition to stop the North West Choiseul Area Council from proceeding to conduct hearings in respect of Form 1 applications;

(d) a declaration that the Ministry had acted ultra vires the Moratorium;

(e) an injunction to stop the Company from lodging further Form I applications whilst the Moratorium is in force.

Legal Arguments for the Applicant

From the outset, Mr Kirkpatrick maintains that the matters before the Court is simply on *ex parte* application for leave; it is not an *inter partes* hearing. As a matter of courtesy, the Attorney-General and the solicitor for the Company have been served with all the documents relating to the application. He says the Court is only concerned with the merits of the Applicant's case and not the substantive issues. He points out that in an *ex parte* hearing such as this, the Court should look to see whether the court has jurisdiction, the Applicant has standing and that there is a *prima facie* case. I think what is meant here is whether or not in this case there are merits in the issues to be considered in the *inter parte* hearing.

What are the Issues?

The main thrust of Mr Kirkpartick's argument is that Form I applications were in contravention of the Moratorium issued on 2nd October 1997. He says this is wrong in that -

(a) Form I applications were lodged after the date of the Moratorium;

(b) Both the Minister and the Permanent Secretary were both alarmed by the approval of the Form I applications and were of the view that this was a serious matter, worthy of investigation;

(c) The Commissioner of Forests Resources had a discretion to decide whether to give consent or not in terms of Form I applications;

(d) The discretion vested in the Commissioner of Forests Resources could be fettered by Government Policy. In other words, the Moratorium in place should have been borne in mind when deciding to give consent under section 5B of the Act.

(e) The consent given by the Ministry was improper, irrational, unreasonable and biased in favour of the Company.

Legal Arguments for the Company

Mr Katahanas for the Company has entered a conditional appearance in that the Applicant's action had not been properly commenced in court by way of a writ of summons under the appropriate rules of court. He therefore objects to the proceedings as being fatally defective and therefore should be struck out. He further says that the Applicant has no standing in that the proper forum for the determination of his rights is the Customary Land Appeal Court under section 5E of the Act if he was not satisfied with the determination of the North West Choiseul Area Council. He should not be coming to the High Court for redress at this early stage thus compromising the proper procedure for redress under the Act. He argues that the Applicant's case has been misconceived. He points out that his client has already obtained a valid licence and the Moratorium does not prevent his client from lodging Form I applications under section 5B of the Act. If anything, the Moratorium would only apply to new Form I applications to be followed by the issue of Timber Licences as the case may be. Furthermore, he says the Minister has no power under the Act to impose a Moratorium binding upon the Commissioner of Forests Resources and his officers in the Ministry. The Moratorium can be

disregarded if it has no legal force. There is no *prima facie* case for the Applicant and his case stands or falls on this point alone.

Court Ruling

The Applicant's case depends entirely upon the lawfulness of the Moratorium as being the basis for a *prima facie* case. The disregard for the Moratorium by some forestry officers in the Ministry in giving consent in terms of Form I applications is evidence of a *prima facie* case. I do not think this is the case. There is nothing in the Act giving the Minister statutory power to issue Moratoriums of any kind. Even the Cabinet does not possess the power to impose Moratoriums under the Act. Section 5B of the Act says nothing about Moratoriums being taken into account when deciding whether or not consent should be given in respect of Form I applications. Such consent is entirely a matter for the Commissioner of Forests Resources to decide. My experience as former Attorney-General is that very rarely have consent been refused under section 5B of the Act. The reason being that the whole idea behind part IIA of the Act is the acceptance that the ownership of timber rights is vested in the resource owners. They decide. The Ministry would only intervene if the provisions of the Act have not been complied with by the parties and authorities involved in the timber rights acquisition procedure under Part IIA of the Act. This acquisition procedure has been heavily criticised by many leaders in this country as being tantamount to playing into the hands of logging interests in this country. As much as this so, the law has not changed a bit. The Solomon Islands Law Reform Commission has addressed this very issue and produced a report which recommends changes. Until these changes are implemented by Parliament, the present law stands. The present law being the whole of the Act excluding the Moratorium issued in October 1997. The Moratorium cannot override the Act no matter how commendable and appropriate it is. In my view the Applicant has failed to make out a *prima facie* case based upon the Moratorium as set in his *ex parte* summons and the affidavits in support thereof. There is no *prima facie* evidence produced by the Applicant to suggest that he and the landowners he represents would suffer damages or inconvenience worthy of the Court's attention and finally its intervention. As much as I am synthetic with the Applicant's expectation of the Moratorium, as new Government policy, it is not the law. The Applicant and those whom he represents must seek to vindicate their rights as owners of timber rights at this stage within the confines of the acquisition procedure under Part IIA of the Act. This being the case I do not wish to address the various forceful arguments put forward by Mr Katahanas regarding what he calls "fatal irregularities" and the rest of his arguments on those and related matters. I am mindful of the possibility that if I should strike out the Applicant's case on the basis of fatal irregularities in court procedure, he may rebounce in the correct manner and would oblige the court to consider and the parties to repeat the same arguments all over again. Such situation would be a waste of time and costly for everyone. I am most grateful to counsel on both sides in assisting the Court by producing written arguments. The application for leave is refused.

Parties will bear their own costs.

Dated this 22nd day of May 1998
At the High Court,
Honiara

F.O. Kabui

Judge