IN THE HIGH COURT OF SOLOMON ISLANDS

CIVIL JURISDICTION

Civil Case Number 562 of 2015

BETWEEN: **WILSON SUHARA AND NELSON KEPULU** - Appellants/Applicants
(Representing the Koenihao Tribe of Central Guadalcanal)

AND: **ATTORNEY GENERAL** - Respondent
(Representing the Commissioner of Lands)

Date of Hearing: 25th August 2022.
Date of Ruling: 30th September 2022.

Counsel; Mr. Tovosia for the Appellants/Applicants.
Counsel; Mr. Banuve for the Respondent

KENIAPISIA; PJ:

RULING ON APPLICATION TO RECUSE

Introduction.

1. Justice Keniapisia should step aside from presiding over this matter. Justice Keniapisia has made earlier statements that were conclusive to the substance of this appeal. Because of the pre-determined conclusive statements, Justice Keniapisia is not an impartial judge to decide this appeal on the legal and factual merits. The earlier pre-determined conclusive statements complained of was: -

> **"At the moment, on the materials before me, Koenihao tribe does not have interests diminished inside Tina Hydro Lands, under the Minister's compulsory acquisition because Koenihao land, is situated outside of the Tina Hydro land, referred to as the core lands"[1]**

Context in which Justice Keniapisia made the alleged conclusive statements.

2. In **June 2016**, Appellants came to court to obtain freezing orders to stop Government, not to pay $6.9 million dollars to Roha Tribe. Roha Tribe is the tribe that the Commissioner of Lands ("COL") had accepted and assessed their compensation claim. The COL was satisfied that Roha Tribe has interests in the land that the Minister of Lands acquired for Tina Hydro Project ("THP"). **The COL on the other hand, rejected Appellants' compensation claim. For the COL says Appellants Koenihao land is located outside the core lands that the Minister of Lands acquired for THP. Hence the Appellants are not entitled to compensation in respect of the THP lands.**

3. Because of the COL's decision, Appellants were clearly not entitled to the $6.9 million assessed and awarded to Roha Tribe. So, the Court refused to issue restraining orders to stop the Government, from releasing the pending compensation payment of $6.9 million

[1] See paragraph 13 of Ruling delivered on 9/06/2016.

dollars to Roha Tribe. But there is a further fundamental reason in law, for the Court's refusal. And that is, injunction is not lawfully available against the Crown under the *Crown Proceedings Act (Cap 8) – Section 18.*

4. Justice Keniapisia made what the Appellants deemed as conclusive statements, at an interlocutory application for injunction. Every practicing lawyer knows what considerations are at play, at any interim application for injunction. More so where freezing orders are concerned, the Rules give the judge guidelines to use in deciding, whether or not to grant freezing orders. One of the guidelines is, whether the applicant has a good and arguable case (*Rule 7.17 (b) (i)*). Another is where any judgment or order in the case will involve the thing sought to be restraint (*Rule 7.17(b)(ii)*).

5. Justice Keniapisia was of the view that Appellants case at the inter-locutory application for interim injunction fell short of the 2 said guidelines. The reason is that, whilst the Applicants/Appellants sought to restraint the $6.9 million dollars, their claim/appeal does not seek relief against the award of $6.9 million dollars to Roha Tribe. Their claim seeks to set aside the COL's decision rejecting their entitlement to receive compensation for the lands, the Minister acquired for THP. If they succeeded, this Court will set aside the COL's decision. It will mean their case before the COL will be reconsidered. It will not mean they are entitled to the $6.9 million dollars payable to Roha Tribe, sought to be restraint in **June 2016**.

6. And then I said the application for freezing orders was misconceived. So, I refused to stop the release of $6.9 million dollars. One of the reasons, I gave for refusal was, any compensation payment to be made to the Appellants, if entitled to, is isolated from Roha Tribe's $6.9 million. Any compensation to Appellants will be considered relative to what interests Koenihao Tribe lost in the lands acquired for THP. As to the substantive relief, (setting aside of COL's decision), I said that Court will decide on the substance of the appeal at the conclusion of trial[2].

7. So, when one considers the context in which I made those statements complained of, it is clear to say that I was not employing a pre-determined mind about the substance of the appeal. I was using the materials before me to conclude on whether or not to stop the release of $6.9 million dollars due and payable to Roha Tribe. And on the materials consistent with the **decision of the COL, Koenihao land is located outside of the THP acquired lands**. I was merely repeating the essence of the COL's decision under appeal. That is the very decision which I will properly investigate at trial, with a view to setting aside or affirming. The relief sought in this appeal *inter alia* is to set aside the COL's said decision.

Should I recuse for making perceived adverse statements against Appellant – Tests and Standards laid down in SMM Solomon Limited.

8. As a general rule, a judge, who has made adverse findings against any litigant is not disqualified to hear the same case against the same litigant, even if the judge has made adverse findings and expressed typical judicial restraint against a particular litigant[3].

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[2] See paragraph 11 read with paragraph 14 of Ruling delivered on 9/06/2016.
[3] See paragraph 19 of Court of Appeal decision in SMM, full citation at footnote 4 below.

9. But in the Court of Appeal case,[4] Counsel Tovosia relied heavily on, the Court of Appeal did recuse a judge, because it found that, in the context, in which the judge made adverse comments against a particular litigant, those comments, were not *adverse judicially expressed comments*, rather were *adverse demeaning personal character assassination comments.*

10. Court of Appeal agreed with the appellant company (SMM Solomon Ltd – "SMM"), that where the judge made demeaning/degrading/or character assassinating comments against officers of SMM at an earlier discovery interlocutory application, the judge should not sit to hear a subsequent contempt interlocutory application against the same officers of the SMM company. If the judge has already formed an adverse opinion against the characters of the officers, the judge may not be impartial to hear a contempt application against the same officers. A contempt hearing will potentially require the judge to consider the character of the same officers.

11. To do so, the Court of Appeal say, may lead a fair-minded lay observer to entertain a reasonable apprehension, that the judge might not bring an impartial and unprejudiced mind to the resolution of the issues involved in the subsequent application (contempt issues).

12. The fair-minded observer, the Court of Appeal say, is the appropriate test to use for recusal. "Any ordinary Solomon Islander, who is made aware of the necessary facts, is the one who must be considered." "What would that ordinary Solomon Islander think, if he knew what the judge had earlier said and done during an earlier judgment?" In the context of what the judge earlier said, the test was any ordinary Solomon Islander. The judge had earlier labelled officers of SMM company as **"dishonest, dishonoured, deceitful, malfeasant, manipulative, didactic and opinionated as well as lacking in respect for Solomon Islanders"**. Those statements as to character, so demeaning, could be understood by any ordinary Solomon Islander, as purely character assassination. So, if the same judge was to hear a contempt application (which will apparently touch on character) against the same officers, the judge may be seen as having a pre-determined conclusion, which will then negatively affect the same officers against whom contempt is being brought. Comments to say some one is dishonest posed a negative character that an ordinary Solomon Islander will conclude that the judge is already against a particular litigant, prior to the subsequent contempt hearing.

13. That needs to be distinguished against the context, in which, this Court made earlier adverse *judicially expressed statements* on the materials, Court had before it, as opposed to the context of SMM, where the judge made *personal character assassination adverse statements*. In the context of the present case (application for freezing orders), the statements I made are not adverse against the Appellant. The statements I made were purely *judicially expressed statements* in view of the legal principles at play at an application for freezing orders against the State. I was merely repeating the essence of COL's decision made against the Appellant. That is the very decision, subjected to this appeal. I also made it absolutely clear that the said decision (substantive issue of this appeal) will be properly investigated at trial (repeat and reaffirm footnote 2 above).

Test to use for recusal in SMM Solomon Limited must be differentiated.

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[4] *SMM Solomon Ltd –v- Axiom KB Ltd (2017) SBCA12; SICOA-CAC 14 of 2017 (13th October 2017).*

14. The test Court of Appeal used in SMM, was – "Any ordinary Solomon Islander, who is made aware of the necessary facts". "What would that ordinary Solomon Islander think, if he knew what the judge had said and done during an earlier judgment/decision?" The ordinary Solomon Islander test would be appropriate to the context of SMM, because the adverse comments made against litigant party officials were clear *adverse personal character assassination comments*, rather than *adverse judicially expressed comments*. Here, the comments made rejecting injunction were adverse, but were actually *judicially expressed statements*, employing the considerations under the Rules for issuance or refusal of freezing orders. For *judicially expressed statements* though adverse it may be, the test, in my view should not be "Any ordinary Solomon Islander". The test should be "Any legal practitioner Solomon Islander, having practical judicial knowledge, of the technicalities at play at an inter-locutory application". For instance, the technicality requires that no injunction (freezing order) can be issued against the Crown (repeat paragraph 3 and 4 above). That is a judicial technicality - legal fact that any ordinary Solomon Islander will not know.

Conclusion and Orders.

15. Employing the legal practitioner Solomon Islander test, having practical judicial knowledge about inter-locutory application for injunction against the Crown, the statements complained of as adverse were actually *judicially expressed comments* that the judge is entitled to make, though adverse it may seem to a particular litigant party. And so, you cannot say the judge was already making a pre-determined mind on the substance of the appeal because the judge also says the substantive issues in the appeal would be properly investigated at trial.

16. Judges should take application for recusal seriously because a negative perception of bias is attached with such application. And so, when a good reason is disclosed for a judge to recuse, the judge must stand aside to protect the integrity, independence and impartiality of the Court. On the other hand, a judge should not easily give in to recusal. Recusal means a judge is off-loading extra work to another judge who is already carrying his/her own load.

17. **Here, Court do not see any good reason given for Justice Keniapisia's recusal. Court will decline the application. Counsel can prepare this matter for trial with haste. No order on cost. Counsel can identify necessary trial preparations and file consent trial preparation directions, without further Court appearance.**

THE COURT

JUSTICE JOHN A KENIAPISIA
PUISNE JUDGE