

**IN THE SUPREME COURT OF SAMOA**  
**HELD AT MULINUU**

**BETWEEN:** **SALA FILI LAUANO, TUALA**  
**TELE'A LILII, TUALA**  
**TASIPALE MOLI, TUALA**  
**SEGI REUPENA TUALA,**  
**SALA TAGOAI LUPE CHAN**  
**MOW, VAIFALE VEI, TEVAGA**  
**VAILUA, TAU NAIME,**  
**TAGOAI ALISI POLU,**  
**LEMALU IOANE VAIMOLI,**  
**TUALA ENELE, TUI SEU,**  
**FAATOAFE FAIGA, LEMALU**  
**PAULO, TUALA MALEKO,**  
**MUAGUTUTIA KOLOKO,**  
**MALIA PULOU, KOSE SEVE,**  
**KIA VILIAMU, LAVE**  
**SIPOLOA, SIAOSI SAGOTE**  
**MALO** Matais of Leauva'a for and  
on behalf of **ALII & FAIPULE OF**  
**LEAUVA'A**

*Plaintiffs*

**AND:** **PRESIDENT OF THE LANDS**  
**AND TITLES COURT, THE**  
**LANDS AND TITLES FIRST**  
**COURT AND LANDS AND**  
**TITLES HIGH COURT,**  
established under Article 104 of the  
Constitution of the Independent  
State of Samoa 1960

*First Respondent*

**AND:** **MAULOLO TAVITA AMOSA,**  
**UTUTAALOGA CHARLIE**  
**ULIA, FATA ROKETI, FATA**  
**VAAFAI TOLUTASI** matai of  
Afega for and on behalf of **ALII**  
**MA FAIPULE OF AFEGA**

*Second Respondents*

**Coram:** Justice Tuatagaloa  
Justice Young (via video-link)

**Counsel:** J. Stowers (via video-link) for the Plaintiffs  
D.J. Fong for First Respondent  
T. Toailoa & P. Chang for the Second Respondents  
S. Ainuu for the Samoa Law Society (Amicus Curiae)

**Hearing:** 01 May 2024

**Judgment:** 02 May 2024

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**JUDGMENT OF THE COURT  
(Recusal Application)**

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**Preliminaries**

[1] This judgment deals with an application by the second respondents for the recusal of the Chief Justice from hearing (a) contempt proceedings against them and (b) the substantive proceedings set down for hearing on 15 May 2024. The recusal application is based on the Chief Justice's judgment of 9 April 2024 in which he granted an interim injunction against the second respondents and what he is alleged to have said at the hearing on 3 and 4 April that preceded his judgment.

[2] The contempt proceedings are scheduled to be called before the Chief Justice on Friday 3 May 2024 and, as noted, the substantive proceedings are to be heard on 15 May. Given the associated time constraints, we are issuing this judgment in short form.

**Our legal approach**

[3] Consistently with the substance of the approach of the Court of Appeal in *Land and Titles Court v Lautogia* [2018] WSCA 4, we propose to determine the recusal application on the basis that we must:

- (a) identify the factors that are said to require recusal; and
- (b) determine whether such factors give rise to a real, and not a remote, risk that the Chief Justice might decide the case otherwise than on its legal or factual merits.

### **The factors that are said to require recusal**

[4] These are as follows:

- (a) by issuing an interim injunction in his judgment of 9 April 2024, the Chief Justice has predetermined the jurisdiction issue;
- (b) the Chief Justice, as a Catholic, may be predisposed to favour the Leauva'a parties who are said to be predominantly Catholic;
- (c) a comment said to have been made by the Chief Justice at the interim injunction hearing to the effect that the Police had a choice as to which court orders they should enforce; and
- (d) the refusal of the Chief Justice to release a transcript of the hearing on 3<sup>rd</sup> and 4<sup>th</sup> April.

[5] We will deal separately with each of these grounds. We will do so primarily by reference to recusal in relation to the hearing of the substantive proceedings. We will address the contempt proceedings separately.

### **By issuing an interim injunction, the Chief Justice has predetermined the jurisdiction issue**

[6] The second respondents say that the 9 April 2024 judgment of the Chief Justice means that he has already concluded that the Supreme Court has jurisdiction to judicially review and stay execution of the relevant Land and Titles Court decisions.

[7] We invited counsel for the second respondents to identify any passage in the Chief Justice's judgment in which he expressed a concluded view that this Court has such jurisdiction. She was unable to do so. This is unsurprising. All the Chief Justice held was that there is arguable case as to jurisdiction and that this was sufficient to empower him to grant an interim injunction pending substantive determination of the applicants' proceedings including the jurisdiction issue.

[8] Whether the Chief Justice's reasoning – that an arguable case as to jurisdiction was enough to justify the interim injunction – was correct can, at least theoretically, be challenged in the Court of Appeal prior to the resolution of the substantive proceedings in this Court. We say "at least theoretically" because:

- (a) the jurisdiction issue will be determined in proceedings in this Court to be heard in two weeks' time and the resolution of that issue will render moot the correctness or otherwise of the interim injunction; and

- (b) there are likely to be logistical and practical difficulties with arranging a Court of Appeal hearing ahead of the hearing in this Court on 15 May.

[9] What is more to the present point is that the issue determined by the Chief Justice is not the issue that must be determined in the substantive proceedings. In those proceedings, the key question will not be whether the interim injunction ought to have been granted. Rather it will be whether there is jurisdiction to grant the substantive relief that is sought. The Chief Justice's conclusion that there is an arguable case as to jurisdiction is not indicative of a closed mind as to that issue.

[10] We are not aware of any decision in which a conclusion by a Judge in interlocutory proceedings that the plaintiff has an arguable case has resulted in that Judge being held to have predetermined the substantive issue. When this was put to counsel for the second respondents, she drew a distinction between merits and jurisdictional arguments, accepting that an arguable case conclusion in relation to the merits of a case did not disqualify a judge from hearing substantive proceedings but claiming that this was not so when jurisdiction was in issue. She cited no authority in support of this distinction.

[11] In the course of argument before us, counsel for the second respondents suggested that the Chief Justice had made remarks during the hearing of the application for an interim injunction that indicated a concluded view on the substantive issue of jurisdiction. Similar contentions were made in her written submissions.

[12] We think it likely that the Chief Justice did express the view that, assuming an arguable case, this Court had jurisdiction to grant interim relief. Such a view is expressed in his written judgment. But we think it highly unlikely that he would have expressed a concluded view as to substantive jurisdiction. In a written submission filed after the hearing on 3 April, counsel for the second respondents recorded the Chief Justice's view that he had jurisdiction "to determine interim orders" and the primary complaint she then made was that the Chief Justice intended to do so without reaching a definitive conclusion as to substantive jurisdiction. This suggests to us that any remarks made by the Chief Justice as to jurisdiction were in the context only of interim relief and this was well-appreciated by counsel.

[13] We will deal later with a related complaint from counsel as to the lack of a transcript.

[14] Counsel for the second respondents also referred to an inquiry by the Chief Justice to the general effect that by reason of s 59 of the Land Titles Act 2020, enforcement of Land and Titles Court judgments requires the approval of the Supreme Court. She suggested that this suggests a view

that Land and Titles Court decisions “are subject to the jurisdiction of the Supreme Court”. We do not see it in that light. It is plainly just a reference to s 59.

**The Chief Justice, as a Catholic, may be predisposed to favour the Leauva’a parties who are said to be predominantly Catholic**

[15] Christianity plays a huge part in the lives of Samoans and almost everyone is affiliated to a denomination. If such affiliation on the part of a Judge was seen as disqualifying that Judge for hearing cases involving parties of the same affiliation, it would be particularly disruptive of the business of the courts. Such disruption would be entirely inappropriate and unnecessary as no reasonable person would think that a Judge in Samoa would breach his or her judicial oath to favour parties of his or her religious persuasion.

[16] We appreciate that this litigation has given rise to strong feelings. But even so, this argument should not have been advanced.

**The comment that the Chief Justice is said to have made that the Police will have to choose which order to enforce**

[17] It seems to be accepted that some such comment was made in the course of the hearing. But what was not explained by counsel for the second respondents is why such a remark is indicative of bias.

[18] Given that the Chief Justice is of the view that the injunction he granted should be complied with and, if necessary, enforced, the remark could only be an allusion – probably tongue in cheek as the applicants suggest – to a difficulty inherent in a system in which there are two court systems that operate independently of each other.

**The refusal of the Chief Justice to release a transcript of the hearing on 3 and 4 April**

[19] A request by the second respondents for a transcript of the hearing on 3 and 4 April was declined by the Chief Justice in a minute of 11 April. This is what he said:

The Second Respondents seek a transcript of the hearing on 3 and 4 April 2024, for an unspecified application. A transcript is the court’s record of its work. The Second Respondents were represented by counsel at the interlocutory application and at the delivery of the decision on the application for interim injunction. The “express statement” that the Court has an inherent jurisdiction to grant the interim order is

referred to in the written judgment. In the circumstances, request for a copy of the transcript is declined.

[20] The written submissions of the second respondents in support of the application for recusal assert:

The Chief Justice's refusal to provide transcripts of these proceedings – which will contain his Honour's remarks now in issue – further point to inability to bring an impartial mind to these proceedings, as it is clear that the Chief Justice's statements in open court will be the subject of the parties' application and fair-minded lay-observer will reasonably apprehend that the Chief Justice might not bring an impartial mind.

[21] The application for recusal was not filed until 16 April 2024.

[22] The application for a transcript that the Chief Justice refused was presumably directed towards comments in the hearing to the effect that the Court had inherent jurisdiction to grant an interim injunction, a view which he expressed in his judgment. The reference to "unspecified application" in the Chief Justice's remarks indicates that there was no explicit reference to a possible recusal application. Further, there is no indication in the material we have that the request for a transcript was based on concern about the remarks now attributed to him by counsel for the second respondent. As well, it does not appear that the second respondents made a further request for a transcript directed to the remarks now complained after the recusal application was filed.

[23] In that context it was not right to imply, as counsel for the second respondents did, that the Chief Justice withheld the transcript knowing that the remarks now complained of would form the basis of a recusal application. There is no reason to think that he had such knowledge. This is another submission that should not have been advanced.

### **The contempt proceedings**

[24] The second respondents wish to defend the contempt proceedings on the basis that the injunction is invalid, and that breach of an invalid injunction is not a contempt of court. If the assumed invalidity of the interim injunction is a defence to the contempt proceedings that might place the Chief Justice in a position of re-assessing the correctness of his 9 April 2024 judgment. While this means that the application for recusal in respect of the contempt proceedings is not in exactly the same position as it is in relation to the substantive proceedings, we are not persuaded that this warrants recusal.

[25] First some general context:

- (a) It is far from clear to us that the alleged invalidity of an interim injunction is a defence to contempt proceedings that are premised on it. The courts generally adopt the view that court orders must be complied with even if their validity is challenged and this is particularly so where the orders have been made by a Court with the status of the Supreme Court of Samoa.
- (b) Further, where the Supreme Court has issued an interim injunction against which an appeal has been lodged (as one has in relation to the Chief Justice's judgment of 9 April) the Supreme Court is probably entitled to proceed on the basis that the interim injunction must be treated as valid unless and until the Court of Appeal rules otherwise. Judges do not usually engage with collateral challenges to the decisions of superior courts such as the Supreme Court.
- (c) On the approach just outlined the Judge hearing the contempt proceedings would not have to get into any argument whether the interim injunction is valid (and thus as to the correctness of the Chief Justice's 9 April judgment).

[26] It may be that on full argument, counsel for the second respondents will be able to establish that invalidity of the injunction, assuming it is established, would be a defence to the contempt proceedings. But before us, she simply assumed that the invalidity of the interim injunction, if established, would be a defence and made no attempt to persuade us that this is so.

[27] We are not prepared to direct the recusal of the Chief Justice on an assumption as to what will be in issue in the contempt proceedings that was not advanced in any detail and is not self-evidently correct.

#### **Additional comments**

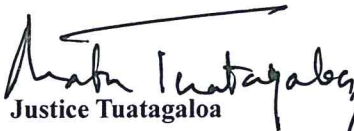
[28] As is apparent, the second respondents have adopted the position that that they do not need to comply with the interim injunction, maintaining that the interim injunction is invalid and that an invalid interim injunction cannot support contempt proceedings.


[29] As was pointed out from the bench during the hearing and as will be apparent from what we have just said, the second respondents are adopting a risky strategy:

- (a) The Chief Justice's 9 April 2024 judgment states the current law, and the interim injunction is in place. Supreme Court judges are at least likely to take the view that in the meantime the injunction must be complied with and can be enforced by contempt proceedings and thus not engage with what would be a collateral challenge to it.
- (b) Even a later conclusion by the Court of Appeal that the injunction ought not to have been granted would not necessarily excuse past non-compliance.

**The result**

[30] The application for recusal is dismissed. Costs are reserved.

  
Justice Tuatagaloa

  
Justice Young

