

*Tudong v. Sixth Kelulul A Ngardmau*, 13 ROP 111 (2006)  
**J. SCHWARTZ TUDONG,**  
**Appellant,**

v.

**SIXTH KELULULA NGARDMAU,**  
**Appellee.**

CIVIL APPEAL NO. 06-013  
Civil Action No. 06-061

Supreme Court, Appellate Division  
Republic of Palau

Argued: May 1, 2006  
Decided: May 4, 2006

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: Raynold B. Oilouch

BEFORE: LARRY W. MILLER, Associate Justice; KATHLEEN M. SALII, Associate Justice;  
and J. UDUCH SENIOR, Associate Justice Pro Tem.

Appeal from the Supreme Court, Trial Division, the Honorable LOURDES F. MATERNE,  
Associate Justice, presiding.

PER CURIAM:

### **BACKGROUND**

On February 28, 2006, the 6th Kelulul a Ngardmau (“Legislature”) served Appellant J. Schwartz Tudong (“Tudong”) with notice of a hearing to be held on Resolution No. 6-08-06, which was a resolution to impeach Tudong and remove him from office as Governor of Ngardmau State. The notice provided him with a copy of the resolution, informed him of the allegations against him, and asked him to appear at a hearing on March 4, 2006. Following the hearing, the Legislature passed the resolution, and Tudong was impeached and removed from office as Governor of Ngardmau State.

In Resolution No. 6-08-06, the Legislature summarized the reasons for Tudong’s impeachment as follows:

1. He spent public funds of Ngardmau State to pay himself without authority by law or specifically authorized by appropriation law.

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2. He kept and maintained another account for Ngardmau State in violation of Art. X of Ngardmau State Constitution under savings account with the Bank of Guam, Koror Branch, with a balance in substantial amount and withdrew money therefrom without authority by law or specifically authorized by **L112** appropriation law.

3. He squandered, used for himself, and/or failed to account for public funds, without authority by law or specifically authorized by appropriation law.

Specifically, the resolution alleged that beginning January 5, 2005, the date Tudong took office as Governor of Ngardmau, and ending December 31, 2005, “certain revenues collected by Ngardmau State and which were under the control of Governor J. Schwartz Tudong [we]re not accounted for . . . [and further] Tudong expended certain public funds for his personal benefit without authority of law or specifically authorized by appropriation law.” The resolution continued that Tudong violated Article X of the Ngardmau State Constitution by maintaining a commercial bank account for Ngardmau State. Lastly, the Legislature found that from January 1, 2006, until the time of his impeachment, Tudong paid himself in the form of a salary despite the fact that there was no valid budget for Ngardmau State.<sup>1</sup>

On March 22, 2006, Tudong filed a Complaint for Declaratory Judgment and Permanent Injunction in the Trial Division of this Court. In his complaint, Tudong asserted that the factual allegations supporting his impeachment were untrue, and that even if true, the acts he was accused of did not amount to treason, bribery, or personal enrichment, which are the only grounds for impeachment provided for in the Ngardmau Constitution. As relief, Tudong sought (1) a preliminary injunction to prevent the Legislature from removing him from office pending the disposition of the action; (2) a declaration that Resolution No. 6-08-06 was null and void *ab initio* and that he remained Governor; (3) an injunction restraining the Legislature from removing him from office; and (4) an award of costs of litigation, including reasonable attorney’s fees. The trial court immediately enjoined the Legislature from executing or enforcing Ngardmau State Resolution No. 6-08-06 or otherwise seeking to remove Tudong from office until a hearing on his motion for preliminary injunctive relief could be held. At the trial court’s suggestion and with the agreement of the parties, the hearing on Tudong’s motion was consolidated with a trial on the merits and held on March 28, 2006.

By Decision and Order dated March 31, 2006, the trial court announced that it would not review the substantive merits of Tudong’s impeachment because the Ngardmau State

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<sup>1</sup> The Sixth Kelulul a Ngardmau maintains that the 2006 Unified Budget Act for Ngardmau State was never properly enacted. Article VII, Section 7 of the Ngardmau Constitution provides in part that if the Governor disapproves a bill, “a conference shall be established consisting of representatives of the Governor, Council of Chiefs and Kelulul a Ngardmau to consider the reasons for the return of a bill, and if resolved, the bill shall become law.” After Tudong disapproved and made changes to the Budget Act, he convened a conference with Speaker Obakrairur and Chief Beouch Sakaziro to resolve any disagreements. Tudong claims that their differences were resolved because he and Chief Beouch agreed to accept his version of the Act. Because the Speaker of the Legislature never agreed to Tudong’s version of the Act, the Legislature contends that the Act has no force or legal effect and that any spending of public funds pursuant to the Act was unlawful. Tudong notes that members of the Legislature accepted their salaries paid under this allegedly unlawful Act.

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Constitution places the power of impeachment in the legislative branch. The ¶113 trial court found that the role of the judiciary is limited to ensuring that procedural due process requirements are satisfied during the impeachment process and to interpreting disputed constitutional provisions, neither of which were found to be involved in the instant action. The trial court also noted a couple of U.S. state cases that left open the possibility for courts to review the merits of an impeachment in the most egregious cases of factually unsupported impeachments; however, the trial court concluded that the instant action did not present such an extreme situation.

On March 31, 2006, Tudong filed the instant appeal. On appeal, Tudong submits that the trial court erred in refusing to consider the merits of his complaint because the court “has jurisdiction and authority to review factual determinations by a state legislature in an impeachment proceeding against the governor for the purpose of ascertaining whether the facts relied upon substantively constitute any of the grounds for impeachment according to the legal meaning of the terms describing the grounds for impeachment in the state constitution.” As support for his contention, Tudong essentially proffers two arguments.<sup>2</sup> First, he complains that the resolution impeaching him did not allege that he had committed one of the three constitutionally prescribed grounds for impeachment – treason, bribery, or personal self-enrichment – or provide any valid factual basis for finding that he had committed acts amounting to personal self-enrichment. Second, Tudong suggests that the Court’s holding in *Francisco v. Chin*, 10 ROP Intrm. 44 (2003), mandates that courts have the authority to review the facts upon which an impeachment was premised to ensure that those facts substantively constitute the constitutionally prescribed grounds for impeachment according to the court’s definition of those terms. The Legislature responds by contending that the trial court correctly decided not to interfere with Tudong’s impeachment as the only issue presented was a challenge to the Legislature’s factual determination that the acts charged amounted to personal self-enrichment, and Tudong neither made allegations of procedural due process violations nor raised issues requiring constitutional interpretation.<sup>3</sup>

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<sup>2</sup> Tudong briefly touches on a third argument, in which he urges this Court to treat states in Palau as municipal corporations as opposed to the equivalent of U.S. states. Tudong argues that because states in Palau do not have reserved powers, *see* Palau Const. art. XI, § 2, Palauan states are more akin to municipal corporations, the actions of which are subject to judicial review due to the lack of separation of powers concerns. Appellee counters that states in Palau are constitutionally created governments entirely separate from the national government, and warns that any decision adopting Tudong’s argument would not only “reverse the very course set forth by our national Constitution over 20 years ago today” but would render the state constitutions meaningless. As this argument was not raised below, we need not consider it now, *see Shmull v. Rosenthal*, 8 ROP Intrm. 261, 262 (2001); however, even if we were to entertain this argument, Tudong has failed to present a compelling argument for making the leap from the fact that states in Palau have no reserved powers to the conclusion that the constitutionally created state governments in Palau should be treated as municipal corporations. Accordingly, we hold that this argument fails to provide grounds for relief.

<sup>3</sup> The Legislature also argues that the instant appeal has become moot because Tudong has filed a petition to run for Governor of Ngardmau in the upcoming election. This argument is frivolous because there is no guarantee that Tudong will win in the election; however, if he is successful on appeal, and the trial court ultimately were to decide that his impeachment was unconstitutional, he would once again be Governor of Ngardmau.

### ANALYSIS

Tudong first asserts that the trial court erred in refusing to determine whether the legislature exceeded its authority where the resolution impeaching him “did not even mention any of the constitutionally prescribed grounds for impeachment, which are ‘treason, bribery, and personal self-enrichment,’” and the factual allegations supporting his impeachment – that he spent public funds pursuant to the terms of a contested budget – did not per se amount to personal self-enrichment. A review of the record reveals that Tudong’s assertions concerning the form of the impeachment resolution are baseless.<sup>4</sup> The resolution specifically provides “that between January 5, 2005 and December 31, 2005, Governor J. Schwartz Tudong expended certain public funds for his personal benefit without authority of law or specifically authorized by appropriation law.” This allegation makes it clear that Tudong was being impeached pursuant to the “personal self-enrichment” provision of the Ngardmau Constitution; therefore, his assertion that the resolution does not even mention one of the constitutionally provided grounds for impeachment is clearly unsupported. Likewise, the record does not support his claim that the resolution impeaching him only alleges that he spent public funds pursuant to an invalid budget because the resolution accuses Tudong of unlawfully spending public funds for his personal benefit in the year 2005, in addition to asserting that he spent public funds pursuant to the disputed 2006 budget.<sup>5</sup>

In his briefs and at oral argument, Appellant relied heavily on *Francisco v. Chin*, 10 ROP 44 (2003), for the proposition that the courts have a duty and the authority to review the substantive basis for an impeachment to determine whether the factual support amounts to one of the constitutionally prescribed grounds for impeachment according to the court’s definition of those terms. Tudong argues that the trial court erred in refusing to review the Legislature’s factual determination that he had committed an impeachable offense. We disagree.

In *Francisco*, an action arising out of the Senate’s refusal to seat Senator-elect Chin ¶115 for failure to meet the membership requirements set forth in the Constitution, the Court found that the question whether the Senate’s interpretation of one of these requirements conflicted with the Court’s preceding interpretation of that requirement presented a justiciable controversy.

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<sup>4</sup> The trial transcripts from the hearing below are not available due to the expedited nature of this appeal; however, the record provides sufficient evidence to discount Tudong’s claims.

<sup>5</sup> Because we reject Tudong’s claim that the impeachment resolution completely failed to allege facts amounting to personal self-enrichment, we need not address his argument that the trial court should not have relied on *Ngirmekur v. Palau Election Comm’n*, 9 ROP Intrm. 295 (Tr. Div. 2002), in refusing to review the factual grounds for his impeachment. The court in *Ngirmekur* held that, absent allegations of due process violations, the judiciary does not have a role to play in evaluating the merits of an impeachment. Tudong focuses on the *Ngirmekur* court’s acknowledgment of several U.S. state opinions leaving open the possibility that in some rare instances a more in depth review of an impeachment may be warranted. In the instant action, after a full trial on the merits, the trial court concluded that “Tudong’s assertion that he has not committed an impeachable offense does not constitute the type of extreme abuse of the impeachment process discussed in the cases cite[d] by the court in *Ngirmekur*.” We see no reason to disturb the trial court’s conclusion.

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*Francisco*, 10 ROP at 52.<sup>6</sup> Tudong attempts to persuade the Court that this action presents a justiciable question because the Legislature here, like in *Francisco*, created its own definition of a constitutional term when it found that spending public funds pursuant to an invalid state budget amounted to personal self-enrichment. As noted above, however, the resolution impeaching Tudong accuses him of spending public funds for his own benefit without authorization of law. Tudong has not and cannot successfully assert that this definition of personal self-enrichment is different from any definition the judiciary would provide, or that this action is similar to the situation warranting judicial review in *Francisco*.

Instead, it is quite clear that the issue presented to the trial court was not a matter of constitutional interpretation of the term “personal self-enrichment,” but an attempt to have the court review the Legislature’s factual determination. *Francisco* does not dictate a finding that the trial court erred in refusing to review the Legislature’s factual determination that Tudong was guilty of personal self-enrichment. *Francisco* provides that where the constitution empowers the legislature to make a factual determination, the interpretation of a constitutional term may raise a justiciable issue; however, the factual determination as to whether the facts of a particular case satisfy that constitutional term, once defined, is non-justiciable and lies with the legislature. *Francisco*, 10 ROP at 52. The Ngardmau Constitution clearly places the power of impeachment with the Legislature, and where, as here, there is neither an assertion of a procedural due process violation nor a valid question raised as to the definition of a constitutional provision, the trial court did not err in holding that Tudong failed to present a justiciable controversy.<sup>7</sup>

¶116 Our decision today does not imply that state legislatures have free reign to impeach and remove from office elected officials for purely political reasons without factual support for the constitutionally supplied grounds for impeachment. But the principal restraint on that power lies not with the Court, but with the people of Ngardmau, who will have the immediate opportunity to say whether they wish Tudong to remain in office as Governor, *see supra* note 3, and who, sooner or later, will determine whether to retain in office the legislators who voted to impeach

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<sup>6</sup> The definition disputed in *Francisco* surrounded the residency requirement for members of the Senate. Importantly, the Senate had passed a resolution creating a definition of the residency requirement that directly contradicted the Court’s definition of the same term. The Court noted that in a previous case, it had “emphasized that a resident need only maintain a residence in Palau to which he intends to return ... [i]n contrast, the Senate found that a resident must maintain ‘actual’ residence in Palau, meaning, we presume, that such resident could not have a home anywhere else and must reside in Palau exclusively ... , and [f]urther Resolution 6-54 stated that a resident must live in Palau ‘except for short, temporary, and intermittent absences,’ whereas we said ... that a resident could be ‘absent for an extended period of time’ provided he intended to return to his Palau residence.” *Francisco*, 10 ROP at 52.

<sup>7</sup> Tudong also urges this Court to adopt the holding in *Larsen v. Senate of Pennsylvania*, 152 F.3d 240, 245-48 (3rd Cir. 1998), for the proposition that the separation of powers concerns underlying the political question doctrine are inapplicable where, as here, a federal court is reviewing the acts of a state legislature. The structure of the judiciary in Palau is not analogous to the judiciary of the United States. Where the trial court must review allegations that a state legislature violated a state constitution, the trial court in Palau is essentially sitting as a state court. In this action, Tudong does not argue that the state’s actions violated the national constitution, which was the case in *Larsen*; instead, he claims that the Ngardmau Legislature violated the Ngardmau State Constitution. Therefore, *Larsen* does not dictate a finding that the trial court erred in refusing to review the factual determination of the state legislature that Tudong committed impeachable offenses.

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him.

### **CONCLUSION**

For the foregoing reasons, we affirm the judgment of the trial court.