The Senate v. Remeliik, 1 ROP Intrm. 90 (Tr. Div. 1983)

THE SENATE OF THE FIRST OLBIIL ERA KELULAU,

v.

HARUO I. REMELIIK, President of the Republic of Palau, Defendant.

CIVIL ACTION NO. 192-83

Supreme Court, Trial Division
Republic of Palau

Order and judgment
Decided: November 29, 1983

BEFORE: MAMORU NAKAMURA, Chief Justice.

Plaintiff's motion for summary judgment, that was filed in this Court on November 11, 1983, came on regularly for hearing on Tuesday, November 22, 1983, at 8:10 a.m. Plaintiff was represented by Lyle Williamson, Legislative Counsel for the Senate of the First Olbiil Era Kelulau, and defendant was represented by Russell E. Weller, Jr., Attorney General of the Republic of Palau.

The function of summary judgment proceeding is to determine whether there is a material issue of fact to be tried; if there is none, the court may proceed to determine the controversy as a matter of law. *Alten v. Alten*, 5 TTR 223 (Tr. Div., 1970). Mere formal denial or general allegations which do not show the facts in detail and with precision [are] insufficient to prevent the award of summary judgment. *New Hampshire Ins. Co. v. Saipan Shipping Co., Inc.*, 5 TTR 408 (Tr. Div. 1971).

The summary judgment rule is concerned with substantial issues, not with phantom issues. And an issue of fact raised by a pleading is a phantom issue when it is clearly established what the material facts are and that there is no genuine issue as to them. It is the function of the court to pierce the pleadings to find out as to whether there is any genuine issue of material fact. *Moore's Federal Practice*, Vol. ⊥91 6, § 16.15(3).

I have carefully examined the entire record, including all the contentions of the parties and memoranda submitted in support of those contentions, and I find that none of the material facts of this case are controverted.

Defendant by his answer admits the constitutional authority of the plaintiff, the constitutional authority of the defendant, that the Supreme Court of the Republic has jurisdiction over this cause of action by virtue of Article X, Sections 1 and 5, that the defendant is

constitutionally obligated and still carries the legal duty to appoint a qualified Public Auditor pursuant to Article XII, Section 2 of the Constitution, and Palau Public Law No. 7-8-14, Section 2, and that the plaintiff on February of 1982, by Senate Resolution No. 108, SD1, has urged the defendant that he immediately appoint a Public Auditor.

In response to plaintiff's request for admission, the defendant, the President of the Republic of Palau, admits that he has a constitutionally imposed duty to appoint a Public Auditor and that he has not appointed a Public Auditor. Also, in said response, the defendant admits that the plaintiff, the Senate of the First Olbiil Era Kelulau, has vested constitutional rights to confirm the appointment of the Public Auditor and to receive, on a basis no less frequent than once every year, government audits from a duly appointed Public Auditor.

The primary issues in this case are two-fold: (1) Whether the President is mandated by Article XII, Section 2, of the Constitution to appoint a Public Auditor; and (2) If the answer to the first question is in the affirmative, whether the court should compel the President to appoint one.

This is a matter of first impression in the Republic of Palau, and it is indeed a very delicate one. And the great public importance of the matter militates its prompt resolution.

It has been well-established that "[it] is emphatically the province and duty of the judicial department to say what the law is." *Remeliik v. The Senate*, Civil Action No. 62-81 (Tr. Div. 1981); *United States v. Nixon*, 418 U.S. 700, 703, 94 S. Ct. 3090, 3105, 41 L.Ed.2d 1039 (1974); *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803).

It is also well established that "Regardless of its physical power to enforce them, the court has a duty to issue appropriate orders." In re . . . *Subpoena* . . . U.S.D.C. Dist. ⊥92 Cal., 42 L.W. 2125.

The requirement that a Public Auditor be appointed is clearly couched in mandatory and ministerial terms. Article XII, Section 2 of the Constitution states in part: "A Public Auditor shall be appointed for a term of six (6) years by the President subject to confirmation by the Olbiil Era Kelulau . . ." (Emphasis added).

Plaintiff cites *2A Sands, Sutherland Statutory Construction*, §57.13, 4th ed., at 433, as supporting its position that the provision is mandatory and ministerial:

> As a general proposition, there is greater likelihood that constitutional provisions will be given mandatory effect than is true of any other class of organic law. Indeed such a construction accords with the generally acknowledged import of constitutional fiat, that its character is such as to require absolute compliance in all cases without exception, and the very principles of our institutions, involving as they do concepts of constitutional supremacy, are such as to form reasonable grounds for a presumption that the framers of a constitution intended that just such efficacy be given to it. (Emphasis added).

The use of the word "shall" in Section 2(a), Article XII of the Constitution also indicates this. *See Cruz v. Johnston*, 6 TTR 354, 357 (Tr. Div. Oct. 1973). The facts of *Cruz* case are almost identical to the facts of this case. In that case, the High Commissioner of the Trust Territory of the Pacific Islands, the highest executive officer, was ordered by the High Court to perform his ministerial duty imposed upon him by 67 TTC § 208, and he so complied.

Article XII, Section 2(b) of the Constitution states in pertinent part:

> The Public Auditor shall report the results of his inspections and audits to the Olbiil Era Kelulau, at least once a year, and shall have such additional functions and duties as may be prescribed by law. (Emphasis added).

The Public Auditor under Section 2(b) of the Constitution and Section 2 of Palau Public Law No. 7-8-14, must ⊥93 make a report to the Olbiil Era Kelulau at least once a year. This means that the Public Auditor should have been appointed well before the end of the President's first year in office. This was necessary in order for the Public Auditor to make his first annual report as mandated by Section 2(b) of the Constitution. *See, Jenkins v. Knight*, 293 P.2d 6 (1954). In *Jenkins*, the Supreme Court of the State of California stated that:

> Where no discretion exists and specific legal duty is imposed, ministerial in its character, an officer of the executive department of government, like any other citizen, is subject to judicial process and that, if this were not so, the government would cease to deserve "high appellation" of being a government of laws. 293 P.2d, at 8; *see also, Cruz, supra*, at 359.

The other factors favor the conclusion that the duty of appointing the Public Auditor should have been done well before the end of the President's first year in office and that the time is long past:

> (1) The Public Auditor is not purely a political appointee, because the appointment of the Public Auditor is "for a term of six (6) years . . . [and] subject to confirmation by the Olbiil Era Kelulau." Article XII, Section 2(a).
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> (2) The Public Auditor's position is one of unusual public trust, because "The Public Auditor shall be free from any control or influence by any person or organization." Article XII, Section 2(a).
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> (3) The Public Auditor's position is one of great importance to the efficient functioning and operation of "every branch, department, agency, or statutory authority of the national government . . . ." Article XII, Section 2(b).

The above factors indicate that the Public Auditor's position is one of great importance to the efficient functioning and operation of the total National Government, and that the position should have been filled well before the end of the President's first year of his office. The time

for him to appoint a Public Auditor is long overdue. It should be noted, however, that this Court is not telling the President ⊥94 who to appoint.

Defendant argues that the position of Public Auditor has not been filled because the Olbiil Era Kelulau has not appropriated adequate funds for that office. I am not impressed with this argument. As stated in *Jenkins, supra*, at 9, "When the duty to [appoint] is enjoined by law, performance of the duty cannot be refused upon the ground that there may not be sufficient funds in the treasury to defray the expense of the [appointment]".

There remains for discussion only the question raised by the defendant as to whether the plaintiff, the Senate of the First Olbiil Era Kelulau, as [a] body, has the legal capacity to sue. Defendant contends that "There exist no authority to allow the Olbiil Era Kelulau to be a party to a lawsuit, either as Plaintiff or as Defendant. The proper party Plaintiff in this case would have been all of the individual members of the Olbiil Era Kelulau who wished to participate."

I find it unnecessary to determine whether or not plaintiff has capacity to sue under Palau law since I find that Rule 17 of Trust Territory Rules of Civil Procedure confers capacity on organizations to bring this type of action. Rule 17(b)(1) of Federal Rules of Civil Procedure confers capacity on an unincorporated association to "sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States . . ." (Emphasis added). *See Ripon Society v. National Republican Party*, (AC DC, 1975) 525 F.2d. 567, cert denied (1976) 424 U.S. 933, 96 S.Ct. 1147, 1148, 47 L.Ed.2d 341. ". . . when a federal question is involved, suit may be brought in the partnership name even where that procedure would be impossible under state law." *McCormick v. Theo. Hamm Brewing Co.*, 284 F.Supp. 158; *see also, Moore's Federal Practice* § 17.25. In Palau, unincorporated associations have been allowed to sue in their common names. *See Liberal Party v. Election Commissioner*, 3 TTR 293 (1967).

The Court takes judicial notice that the Senate of the Olbiil Era Kelulau is a constitutionally established legal entity. Article IX, Section 1, 2 and 3. It would be absurd to prevent the plaintiff from bringing its cause of action into court especially when it has been established that it has a standing. "A ruling that a party has standing to raise a constitutional point disposes of any real party in interest." *Apter v. Richardson*, 510 F.2d 351 (1975).

⊥95 After reviewing all the memoranda filed and after hearing the oral arguments of both counsel, I am convinced that the purpose of Section 2, Article XII, was to have the Public Auditor appointed by the President well before the end of the President's first year in office.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that:

(1) Defendant's motion to dismiss this action is DENIED.

(2) Plaintiff's motion for summary judgment is GRANTED.

Accordingly, it is further ordered that a mandatory injunction is issued compelling

defendant to appoint a full time Public Auditor without undue delay.