

Tulmau v. R.P. Calma & Co., 3 ROP Intrm. 205 (1992)

**SALOME Y. TULMAU,
Appellant,**

v.

**R. P. CALMA & CO.,
Appellee.**

CIVIL APPEAL NO. 13-92
Civil Action No. 405-91

Supreme Court, Appellate Division
Republic of Palau

Appellate decision
Decided: November 11, 1992

Counsel for Appellant: William L. Ridpath

Counsel for Appellee: J. Roman Bedor

BEFORE: ARTHUR NGIRAKLSONG, Acting Chief Justice; ROBERT A. HEFNER, Part-time Associate Justice; ALEX R. MUNSON, Part-time Associate Justice

PER CURIAM:

The issues to be decided in this appeal are:

1. Does the Foreign Investment Act (the“Act”) provide for both criminal and civil remedies, or only criminal remedies?
2. Can the Olbiil Era Kelulau (the“OEK”) delegate to private citizens the right to enforce civil remedies under a “private Attorney General” theory?
3. Has the OEK given sufficient guidelines for enforcement of the Act’s provisions to enable a private citizen to enforce it?

¶206 We hold that the Act provides for both criminal and civil remedies, and that private citizens may enforce the civil provisions of the Act.

FACTS

Appellant brought suit in the Trial Division of this Court, seeking an order that Appellee’s Foreign Investment Approval Certificate (a “Certificate”) be revoked and that Appellee be prohibited from obtaining another Certificate for one year. This was on the alleged grounds that

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Appellee had conducted business in Palau before it obtained a Certificate.

Appellee's answer included, among others, the argument that Section 21 of the Act, the "private Attorney General" provision, is unconstitutional as a usurpation of the President's power to execute the laws.

The trial court held that the Act provided for criminal penalties, which could not be enforced by a private citizen, and on that basis issued an order granting Appellee's motion for summary judgment. Appellant appeals that order.

NATURE OF THE ACT'S PENALTIES

The Act, which is codified at 28 PNC secs. 101-121, creates a Foreign Investment Board (the "Board") under the executive branch of the government to review and approve applications for Certificates. Under section 12 of the Act, the Board may modify, suspend or revoke a Certificate if certain conduct by the holder of the Certificate is found to have occurred -- fraud in the application, violations of Palau law, and the like. Section 13 of 1207 the Act provides for fine or imprisonment if specified kinds of misconduct have occurred. That section also provides, independently of fine or imprisonment, that a non-citizen violating the prohibition against doing business in Palau without a Certificate shall be disqualified from obtaining a Certificate for one year.

While the fine and imprisonment provisions are criminal in nature, the revocation of a license or an injunction against obtaining a license is not. 1 Am. Jur. 2d *Actions* sec. 44; *see* 51 Am. Jur. 2d *Licenses and Permits* sec. 72. Indeed, equitable relief by way of an injunction is a common civil remedy sought by private Attorneys General. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 966 (1968).

Section 23 of the Act states that the provisions of the Act are severable, if any of them is held to be not applicable to any person. Therefore, we may consider whether the civil provisions of the act are enforceable by a private Attorney General, even if the criminal provisions are not. *Gibbons v. Government of Palau, et al.*, 1 ROP Intrm. 634 (1989).

THE PRIVATE ATTORNEY GENERAL

Section 21 of the Act provides:

Any citizen or resident of the Republic of Palau, any political subdivision of the Republic of Palau, or any incorporated or unincorporated association shall have standing and capacity to bring suit to enforce the provisions of this chapter as a private Attorney General.

28 PNC sec. 120.

1208 The trial court based its decision in part on the case of *Gibbons v. Government of Palau*,

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et al., 1 ROP Intrm. 634 (1989). In that case, the Appellate Division of the Supreme Court, contemplating the predecessor statute to the Act, stated that “there is no private right of action with respect to foreign investors permits.” *Id.* at 646. The statute ruled upon in *Gibbons* did not contain a provision authorizing private Attorneys General to enforce the act, and the opinion does not state whether the *Gibbons* court would have recognized a private right of action if so provided by the statute.

In August 1990, presumably in response to the *Gibbons* case, the OEK enacted section 21 of the Act. The legislative history of that enactment states the OEK’s concern that the government was not enforcing the Act; the OEK’s solution was to enable private citizens to bring suit to enforce the Act. House of Delegates Standing Committee Report No. 9 regarding House Bill No. 3-15-1 (April 11, 1989).

We begin our inquiry upon the long-established premise that there is a strong presumption of constitutionality of legislative acts, and clear inconsistency with the provisions of the Constitution must be shown to overcome the presumption. *Alik v. Amalei*, 1 ROP Intrm. 513A, 513D (citing *United States v. Moy*, 241 U.S. 394, (1916)); *ROP v. Sisor*, Crim. Case No. 337-91 (Tr. Div. Order Dec. 23, 1991) (citing *Butterfield v. Stranahan*, 192 U.S. 470, 24 S.Ct. 349, 354 (1904)).

¶209 The private Attorney General concept in the United States allows a private citizen to enforce laws of public benefit and recover his attorney’s fees for his efforts. It used to be available, whether or not authorized by statute, as an incident of the court’s power to award attorneys’ fees. Now, a private Attorney General is allowed to proceed only where authorized by statute, on the theory that in enacting the law, only the legislature may determine who will recover their fees in enforcing it. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612 (1975).

The ability of the private Attorney General to enforce civil remedies has not been subject to constitutional challenge in Palau. Nor have either of the parties pointed to such a case. By way of comparison, the concept of the private Attorney General, where authorized by statute and used to enforce civil remedies for the public benefit, has won implicit acceptance in the United States, including the Supreme Court. *See Alyeska*, 95 S.Ct. at 1623-24.

Appellee argues that the use of a private Attorney General violates the separation of powers set forth in the Palau Constitution, because only the executive can enforce Palau law by virtue of Article VIII, Section 7(1) of the Constitution. However, section 21 of the Act does not authorize a private citizen to enforce the Act, but rather to bring suit to enforce the Act. Upon a private citizen’s suit, the actual enforcement of the Act will be done by the courts and the Foreign Investment Board, an executive agency, under the court’s direction.

¶210 The Court hereby approves the use of a private Attorney General to bring suit to enforce the civil remedies of the Act.

DELEGATION OF AUTHORITY

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When a legislature creates a licensing board and delegates the authority for enforcement of its provisions, it must provide clear guidelines for the guidance of the officials in exercising their power. Very little discretion is to remain with the person charged with granting, refusing or revoking a license. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064 (1886); 51 Am. Jur. 2d *Licenses and Permits* secs. 53, 58.

The Court notes that section 12 of the Act states that the Board “may” modify, suspend or revoke a Certificate when certain conditions are met. In order to provide a specific rule of action for enforcement of the Act, the Court interprets this provision to mean that the court and the Foreign Investment Board, upon suit brought by a private Attorney, must modify, suspend or revoke a Certificate upon the occurrence of those events specified in subsections (1)(a) through (f) of the Act (codified at 28 PNC sec. 112, subsections (1)(a) through (f)). *See State ex rel. Griffin v. Greene*, 104 Mont. 460, 67 P.2d 995, 999-1000 (1937) (interpreting a provision that a licensing board “may” issue a license to mean that it must issue a license when the specified conditions were met).

CONCLUSION

Appellants have standing and authority to proceed as a private Attorney General to bring suit to enable the trial court to decide **1211** whether and how the Foreign Investment Board should enforce the remedies of sections 12 and 13(d) of the Act. The decision of the Trial Court is reversed and the case is remanded for further proceedings consistent with this opinion.