

Sixth Kelulul a Kiuluul v. Ngirameketii, 5 ROP Intrm. 321 (Tr. Div. 1995)

**SIXTH KELULUL A KIULUUL,
NGI WAL STATE LEGISLATURE,
Plaintiff,**

v.

**AUGUST NGIRAMEKETII,
GOVERNOR, NGI WAL STATE,
Defendant.**

CIVIL ACTION NO. 58-95

Supreme Court, Trial Division
Republic of Palau

Decision

Decided: June 27, 1995

JEFFREY L. BEATTIE, Justice:

Plaintiff, the Sixth Kelulul a Kiuluul (“KAK”), being the Ngiwal State Legislature, commenced this action to recover money which the defendant allegedly expended from the Ngiwal Treasury without authorization. Defendant, the current Governor of Ngiwal State, filed a counterclaim to have a recent Ngiwal Public Law, which declared him disabled and the office of governor vacant, declared void. Having heard the testimony at trial, examined the other evidence adduced by the parties and heard the arguments of counsel, the Court, pursuant to Rule 52 of the Rules of Civil Procedure, makes the following findings of fact and conclusions of law.

I. DISCUSSION AND ANALYSIS

Under the Ngiwal State Constitution, the governor has the duty to propose a Ngiwal State Budget on an annual basis. Ngiwal Const. Art. VII, § 2(g). The KAK has the responsibility to approve the appropriation of funds. Ngiwal Const., Art. VIII, § 3(h). Once funds have been appropriated by the KAK, the governor has the power “to expend public funds pursuant to appropriations.” Ngiwal Const., Art. VII, Sec. (2)(i). Thus, any expenditure by the governor must be for the purpose for which funds were appropriated and must not exceed the amount appropriated for that purpose. Otherwise, the expenditure is unauthorized.

The KAK passed the Ngiwal State Unified Budget for fiscal year 1993 which appropriated \$246,801.03 for operational expenses, community programs and capital improvement projects for Ngiwal. For fiscal year 1994, the KAK passed a unified budget appropriating **1322** \$230,323. The budgets appropriated specific amounts for each budget item. However, the budget acts gave the governor authority to “reprogram” up to 15% of each budget category, with certain exceptions.

In this action the KAK alleges that the governor spent Ngiwal funds in a manner not

Sixth Kelulul a Kiuluul v. Ngirameketii, 5 ROP Intrm. 321 (Tr. Div. 1995) authorized by the 1993 and 1994 budgets. It alleges that some funds, although spent on items for which they were appropriated, were spent in excess of the amount appropriated. Also, the KAK contends that some funds were spent on items for which no appropriation was made at all. The governor concedes that some funds were spent in a manner not authorized by the budgets. The dispute centers on the amount so spent and the remedy to which the plaintiffs are entitled.

The Ngiwal State Treasurer, as part of the Annual State Financial Reports for Ngiwal, prepared a report for each of the fiscal years 1993 and 1994 entitled “Ngiwal State Government Expenses v. Budget”. The Parties stipulated that the information contained in these reports is accurate. Thus, these reports are the starting point for the Court’s determination of the amount of unauthorized expenditures by the governor.

The “Expenses v. Budget” report for fiscal year 1993, as interpreted by the Ngiwal Treasurer, who prepared the report, indicates that \$33,961 in unauthorized expenditures were made that fiscal year. These sums included \$3,647 which was spent for a vehicle for the use of Krispin Termeteet, the Speaker of the KAK, for which no amount had been appropriated in the budget, and \$6,340 in excess salaries paid to KAK members. These items and the other unappropriated expenditures were, in effect, financed largely by using the money that had been appropriated for a youth center (\$20,000) and a bai (\$10,000).

The Expenses v. Budget report for 1994, as interpreted by the Ngiwal Treasurer, indicates that \$58,152 in unauthorized expenditures were made in that fiscal year. These expenditures included \$11,514 for a trip to Guam and Saipan for Speaker Termeteet, five other KAK members and the governor. These expenditures were financed largely by using money that had been appropriated for purchasing a state boat (\$40,000).

Plaintiff claims that, in addition to the foregoing unauthorized expenditures, the defendant made \$33,000 in unauthorized expenditures in 1995. These expenditures consisted of \$31,500 for the purchase of a generator for a new power plant for Ngiwal and \$1,500 in salaries. The expenditures were made subsequent to March 31, 1995, the date on which, according to the **1323** stipulation of the parties, the continuing resolution giving budget authority for fiscal year 1995 expired.

However, on May 26, 1995, the KAK enacted NWPL 6-006, adopting a budget for fiscal year 1995, which was approved by the “acting governor,” Krispin Termeteet, on May 29, 1995. This budget appropriated \$60,000 for the purchase of a new power plant and appropriated over \$85,000 for salaries, \$25,000 of which was for the executive branch. By appropriating those sums for salaries and a new power plant, the KAK authorized the expenditure of those sums for those purposes during fiscal year 1995. The Court finds that the KAK thereby ratified the governor’s expenditure of \$33,000 in fiscal year 1995 for those purposes¹.

¹ The 1995 Budget Act contains a provision stating that it was passed in reliance on Resolution 6-6S-005, which declared defendant “disabled” and the office of governor vacant. The Budget Act further stated that if defendant is reinstated as governor, the Budget Act is null and void. Defendant was reinstated when the Court, on May 31, 1995, found that defendant’s failure to render accountings and reports and his unauthorized expenditures did not render him

Having determined that defendant made \$92,113 in unauthorized expenditures during the 1993 and 1994 fiscal years², the Court must determine the remedy available to plaintiffs. Plaintiffs contend that defendant is personally liable for the amount of unauthorized expenditures and that a standard of strict liability governs these matters, leaving no defense to defendant. However, if the KAK had intended strict liability to be imposed on the governor for unauthorized expenditures, it could have imposed it by statute. *Compare*, 40 PNC § 401(c). In the absence of a statute, the Court will not impose strict liability for the expenditures. 1324

The Court is unaware of any Palauan law on the subject, nor have counsel directed the Court's attention to any. Turning to the common law of the United States, as required by 1 PNC § 303, it appears that personal liability has been imposed under circumstances similar to those presented here, even in the absence of a statute. 56 Am. Jur. 2d, *Municipal Corporations*, § 288. The Court holds that the best rule to apply is that, at least to the extent that he did not personally gain from the unauthorized expenditures, the governor will be held personally liable for unauthorized expenditures only if he acted without due diligence, prudence and good faith.

There is not a shred of evidence indicating that defendant was guided by corrupt motives in making the unauthorized expenditures. The money was spent for Ngiwal State government purposes. Except for a relatively small amount in excess salary and the governor's trip to Saipan, none of the funds were spent for personal gain of the governor and none went into his pocket. Indeed, more of the misspent funds inured to the personal gain of plaintiffs than defendant.

However, defendant was obligated by the Constitution to spend Ngiwal's funds in the manner they were appropriated in the state budgets, and he made little or no effort to do so. The accounting system in operation was not designed to give the governor the information he needed to comply with the law. He should have directed the treasurer to design a system that was up to the task, with some method of making sure that before an expenditure was made, the financial records were checked to verify that the expenditure was authorized by the budget. The verification could be as simple as the treasurer's written certification that funds were appropriated in the budget for the expenditure and the amount of the expenditure would not, when added to previous expenditures, exceed the amount appropriated.

"disabled" within the meaning of the Ngiwal Constitution. However, even assuming that the KAK has the power to make its budget appropriations contingent upon it having its way on who sits as governor, the fact remains that the Budget Act was in effect from May 29 to May 31, 1995, and the appropriation and ratification was accomplished at that time.

² Defendant argues that he had authority to reprogram 15% of some of the budget categories, with certain exceptions such as the appropriations for the youth center, bai and state boat. However, defendant made no effort to demonstrate the amount of appropriations or identify the budget items, if any, which were reprogrammed. Clearly, he could not reprogram any portion of an appropriation which was already exceeded. The Court will not attempt to calculate from the financial statements the amounts which may have been properly reprogrammed where defendant has made no attempt to do so.

Sixth Kelulul a Kiuluul v. Ngirameketii, 5 ROP Intrm. 321 (Tr. Div. 1995)

But the governor's practice was that, when he would sign a government check to make an expenditure, he would not take any steps to ascertain whether the amount and purpose of the expenditure were authorized by the budget. Although he would discuss expenditures with the treasurer, the discussions focused on the availability of funds and not availability of appropriated and authorized funds. The Ngiwal Treasurer, Jonathan Masaichi, testified that they operated on the understanding that, if they had the money, they would go ahead and spend it even if it was not 1325 appropriated³. It was only after the end of the fiscal year that the treasurer would tally the expenditures to see how they compared to the budget.

The Court finds that, by operating and making expenditures in this manner, the defendant did not act with due diligence nor did he act prudently. Although he spent state funds in a manner which he reasonably believed was in the state's best interest, he made no reasonable effort to comply with the Ngiwal Constitution in making the expenditures. Under the Ngiwal Constitution, the governor and the KAK each play a role in deciding the purposes for which state funds will be spent and the amount of state funds to be spent for those purposes. The governor's role is to propose a budget, and the KAK's role is to approve or reject the budget. Once the budget is approved by the KAK, the governor must abide by it. Because the governor made the foregoing expenditures without authorization and without a diligent and prudent attempt to comply with the Ngiwal budget acts, it follows that they were not made in good faith and that the governor is therefore personally liable to Ngiwal State for the sums so spent.

Although it may appear harsh to hold the governor personally liable when the expenditures of state funds, although unauthorized, were apparently for Ngiwal State purposes and not for personal gain, any other rule would give the governor unlimited license to freely and whimsically spend state funds on whatever he wanted as long as they were spent for state purposes. He would have no reason to follow the state constitution or pay any attention to appropriations made by the legislature. This would eliminate the only check on his power over state funds. The framers of Ngiwal's Constitution, in clear and unambiguous terms, designed the structure of the state's government so as to avoid giving sole power of the state's purse strings to its governor.

It may seem ironic that the same group who, without complaint, enjoyed many of the fruits of the expenditures now have succeeded in their claim that they were unauthorized expenditures. However, nothing herein prevents the governor from pursuing claims against the individuals who directly benefitted from the expenditures by receiving a state financed trip to Saipan, excess salary, a vehicle, or other benefits. *Cf. Berkeley Metropolitan District v. 1326 Poland*, 705 P.2d 1005 (Colo. App. 1985). Moreover, to the extent that the governor pays back funds used to purchase assets for Ngiwal, he may well have a lien on the assets to the extent of such paybacks. The Court need not decide these issues at this time inasmuch as defendant did not file any counterclaim or third party claims addressing these issues.

³ Mr. Masaichi did recall one instance in which he told the governor that he could not make an expenditure because it was not authorized by the budget. That was when he advised the governor that the trip to Saipan was not authorized. In that instance, the governor went ahead and made the expenditure anyway.

II. COUNTERCLAIM

Defendant filed a counterclaim seeking to have KAK Resolution No. 6-6S-005 declared void. In that Resolution, the KAK determined that, because the defendant had misspent state funds, had failed to properly respond to KAK requests for information and had generally done things the KAK disagreed with, the defendant exhibited “moral and mental disability as envisioned in Art VII Sec. 5 of the Ngiwal State [Constitution].” That provision of the Ngiwal Constitution provides that if a vacancy occurs in the office of the Governor due to the governor’s death, resignation or disability, the speaker of the KAK becomes acting governor pending state-wide election for governor. The Resolution declared the Office of Governor vacant and called for an election for governor.

Clearly, the acts and omissions of the governor relied upon by the KAK as recited in the Resolution do not indicate that the governor is disabled as that term is used in the Ngiwal Constitution. It is arguably evidence that he is not performing his duties properly or is inept as governor, but it is no evidence that he is physically or mentally disabled. Indeed, the Court’s observation of defendant at trial and his testimony indicated that he suffers no apparent disability. The Resolution declaring the office vacant is in violation of the Ngiwal Constitution and it is void. If the plaintiffs are unhappy with the governor’s performance, they can take action in the form of a petition for recall or, if grounds exist, commence impeachment proceedings, both under Art. VII, Sec. 6 of the Ngiwal Constitution.

For the foregoing reasons, judgment will enter against defendant in the sum of \$92,113.