

IN THE
APPELLATE DIVISION
CHUUK STATE SUPREME COURT
Federated States of Micronesia

RESWITH NIKI CHI W, as Tolensom
Election Commissioner,

Petitioner,

vs.

ASSOCIATE JUSTICE MACHIME O' SONIS,

Respondent,

AMANTO MARSOLO and MAKASA KAREN,

Real Parties in Interest-
Respondents.

ORIGINAL ACTION NO. 02-2004

OPINION AND
ORDER GRANTING WRIT
OF PROHIBITION

Argued: January 27, 2005
Decided: January __, 2005

BEFORE:

Honorable Dennis K. Yamase, Temporary Justice, Presiding*
Honorable Benjamin Rodriguez, Temporary Justice**
Honorable Camillo Noket, Temporary Justice***

*Associate Justice, FSM Supreme Court, Chuuk
**Associate Justice, Pohnpei Supreme Court, Kolonia, Pohnpei
***Attorney at Law, Weno, Chuuk

APPEARANCES:

For the Petitioner
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For the Real Parties in
Interest-Respondents
Wesley Simina
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* * * *

PER CURIAM:

The petitioner, Tolensom Election Commissioner Reswith Niki chiw, filed this original action in the appellate division on

December 28, 2004. It seeks the issuance of an extraordinary writ of prohibition directed to the respondent sitting as a trial division justice. The petition alleges that the respondent had exceeded his jurisdiction in trial division Civil Action No. 146-2004, Marsolo v. Nikichiw.

On January 5, 2005, the court issued an order directing an answer to the petition, deeming the petition to be the petitioner's opening brief, and setting a schedule for further proceedings. The respondent trial justice filed an answer on January 14, 2005. On January 21, 2005, the respondent justice, as is his right under Appellate Procedure Rule 21(b), filed a letter that he did not wish to participate further in the proceeding. The real parties in interest filed their brief on January 24, 2005, and the petitioner filed his reply brief on January 26, 2005. Oral argument was heard from the petitioner and the real parties in interest on January 27, 2005. Those parties stipulated that the court could take judicial notice of the trial division files in Civil Action No. 146-2004, Marsolo v. Nikichiw and in Civil Action No. 132-2004, Marsolo v. Nikichiw.

After carefully considering the filings, the arguments, and the files' contents, we grant the petition and issue herewith the writ of prohibition directed to Associate Justice Machime O' Sonis. Our reasoning follows.

I.

This action arises out of the Tolensom municipal election held on September 28, 2004. On October 1, 2004, certain candidates in

that election filed a complaint for injunctive relief and a declaratory judgment in the Chuuk State Supreme Court trial division along with an ex parte motion for a temporary restraining order. It was docketed as Civil Action No. 132-2004. On October 2, 2004, Acting Chief Justice Keske S. Marar issued the temporary restraining order halting the counting and tabulating of votes. On October 4, 2004, Acting Chief Justice Marar, ruling that "all of the Justices of the Chuuk State Supreme Court Trial Division have either recused themselves or are subject to disqualification from presiding over this case," appointed a special trial division justice to handle Civil Action No. 132-2004. The plaintiffs amended and supplemented their pleadings on October 12, 2004. No party objected to the special trial justice's appointment or exercise of jurisdiction.

The plaintiffs sought as relief that of the seven ballot boxes not yet counted, five should not be counted but voided and nullified instead because of various alleged irregularities at those polling stations and that the other two should be counted and the election certified within seven days. After various motions, filings, and a trial, the special trial justice issued an order on November 1, 2004, denying a preliminary injunction and directing that all remaining ballot boxes be counted and tabulated and that the election be certified within seven days. By that order, the special trial justice also specifically "retain[ed] jurisdiction over th[e] case for such other Orders as the circumstances and justice may require."

On November 5, 2005, the plaintiffs in Civil Action No. 132-2004 filed a Verified Complaint for a Temporary Restraining Order (TRO) and for Injunctive Relief, which was docketed as Civil Action No. 146-2004, and which named as defendants the same parties previously named as defendants in Civil Action No. 132-2004. Associate Justice Machime O'Sonis issued the requested ex parte temporary restraining order the same day. The plaintiffs sought as relief that the results from two ballot boxes (which were among the five boxes they had originally objected to) be voided because of various alleged irregularities involving those two boxes discovered during the opening, counting, and tabulating of the seven uncounted Tolensom election ballot boxes. (A copy of the certified election results, dated November 4, 2004, was filed in Civil Action No. 132-2004 on November 8, 2004.)

On November 10, 2004, the Attorney General's Office filed a motion to disqualify Justice O'Sonis, with a supporting affidavit filed the next day. Pursuant to Chuuk State Law No. 190-08, § 22(5), which requires that a disqualification motion be ruled upon by another judge, the motion was apparently assigned to Associate Justice John Petewon for decision who, on November 17, 2004,¹ issued a notice of hearing for the motion. The Attorney General's Office then filed a motion to disqualify Justice Petewon.

On November 18, 2004, Acting Chief Justice Marar having

¹Current plaintiffs' counsel first appeared for the plaintiffs on this date. They were previously represented only by Hans Wiliander.

returned from judicial business in the outer islands, issued an order assigning Civil Action No. 146-2004 to the same special trial justice that was handling Civil Action No. 132-2004. The special trial justice had also returned from the outer islands. On November 22, 2004, without waiting for the motion to disqualify himself to be ruled upon by another judge, Justice Petewon denied the motion to disqualify Justice O' Sonis. The Attorney General's Office appealed that denial. That appeal was not assigned to this panel and the appellant has since filed a motion to dismiss it.

On November 25, 2004, the Attorney General's Office filed a Special Appearance to Object to Justice Machime O' Sonis Presiding over Any Further Proceeding in CSSC Civil Action No. 146-2004. (The Attorney General's Office had earlier filed a motion to dismiss for failure to state a claim in Civil Action No. 146-2004.) On December 8, 2004, Justice O' Sonis granted the plaintiffs' request for a preliminary injunction and set a trial or hearing date. Justice O' Sonis continued to take other actions in Civil Action No. 146-2004.

On November 18, 2004, the Civil Action No. 132-2004 special trial justice to whom Acting Chief Justice Marar had also assigned Civil Action No. 146-2004, consolidated the two cases under docket number 132-2004 and repeated that he "retain[ed] jurisdiction over th[e] consolidated case for such other orders as the circumstances and justice may require." Apparently no other filings in either 132-2004 or 146-2004 made their way to his file or to his attention. On December 15, 2004, the special trial justice issued

his Statement of the Case; Findings of Fact; Conclusions of Law; Judgment² based on what had been previously before him.

On December 28, 2004, the petitioner, a defendant in both civil actions, filed this original action in the appellate division for a writ of prohibition barring any further action by Justice O'Sonis on Civil Action No. 146-2004. The plaintiffs in both civil actions are the respondents who are the real parties in interest before us.

II.

The real parties in interest suggested that, as an initial matter, the court may not have jurisdiction to proceed because of the appeal of Justice Petewon's denial of the disqualification motion might need to be disposed of first and because in early January, 2005, the national government filed a petition to remove the case to the FSM Supreme Court because it had been named as an enjoined party in Justice O'Sonis's December preliminary injunction. At oral argument, they acknowledged that the other appeal would not be an issue since the appellant in that case had filed a consent to their motion to dismiss that appeal, although they rightfully stated that since that appeal had not been assigned to this panel, this panel could not dismiss it. The real parties in interest also questioned whether the appointment of a special trial justice in 146-2004 was proper because a constitutionally

²No judgment in compliance with Chuuk Civil Procedure Rule 58 ("[e]very judgment shall be set forth on a separate document") has been entered by the clerk.

appointed justice had previously been assigned the case.

We see no impediment to our jurisdiction over this petition. Any challenge to another judge's authority must be brought up in a proceeding other than this. The sole issue before us is whether the petitioner has established that Justice O'Sonis must be prohibited from acting in Civil Action No. 146-2004, not whether some other judge may also be disqualified. The national government's removal action does not affect our jurisdiction for the same reason. We have no way of knowing whether the required procedural steps to effect removal to that court were completed, or, even if they were, whether it might be remanded to the Chuuk State Supreme Court. This is not an appeal from Civil Action No. 146-2004. The issue is whether Justice O'Sonis may properly sit on Civil Action No. 146-2004. We also note that since the purported removal action started, Justice O'Sonis has issued another preliminary injunction that does not name the national government as a party being restrained. We therefore conclude that the later "removal" did not deprive us of jurisdiction over this original action. We may therefore turn to the merits of the petition.

III.

The petitioner contends that Justice O'Sonis should be prohibited from conducting any further proceedings in Civil Action No. 146-2004 because (1) a special trial justice had been appointed to handle the case by the Acting Chief Justice; (2) a final judgment has been rendered in the consolidated cases by the special trial justice; and (3) state law (including the ABA Code of

Judicial Ethics as adopted by reference by the Chuuk Judiciary Act) requires that Justice O'Sonis recuse himself from Civil Action No. 146-2004 since (the petitioner alleges) the lead plaintiff's sister resides in the justice's household and is married to the justice's nephew (who is also the justice's adopted son). The petitioner contends that the Acting Chief Justice's November 18, 2004 assignment of Civil Action No. 146-2004 to the special trial justice divested Justice O'Sonis of any jurisdiction he might have had and since 146-2004 was actually part of the same case as 132-2004 and 132-2004 was assigned to the special trial justice no other judge could assume jurisdiction over what was the same case.

The real parties in interest contend that since, in their view, the appointment of a special trial justice for Civil Action No. 146-2004 was invalid, Justice O'Sonis was, and is, not impliedly disqualified from Civil Action No. 146-2004 since Justice O'Sonis had already assigned it to himself in his capacity as Acting Chief Justice. They contend that since Acting Chief Justice Marar was unavailable in the Chuuk outer islands, Justice O'Sonis, as the next senior justice, was the acting chief justice and therefore his assignment of the case to himself is a valid exercise of an acting chief justice's authority and that once assigned to him it could not be reassigned by the action of another, especially to a judge who was not constitutionally appointed. They state that General Court Order 2-94, under which special trial justices are appointed, has no procedure to positively determine when or whether all constitutionally-appointed justices are disqualified. The real

parties in interest urge that we adopt a bright-line rule altering General Court Order 2-94 to require that all constitutionally-appointed justices must be shown to be disqualified before a special trial justice may be appointed.

They further contend that the issues raised in Civil Action No. 146-2004 are different from those litigated in Civil Action No. 132-2004, because they could not have been known until after the ballot boxes were opened to be counted and therefore Civil Action No. 146-2004 may proceed as a separate case before Justice O' Sonis. They also contend that, since the special trial justice's issuance of a judgment in that case after he purportedly consolidated the two cases was only based on issues raised before the boxes were opened, his judgment should only have a res judicata effect on the issues in 132-2004 and would violate their due process rights, and is therefore void, if applied to the issues in Civil Action No. 146-2004. Lastly, the real parties in interest contend that the grounds for disqualifying Justice O' Sonis based on his alleged close relationship to the lead plaintiff were not shown by competent evidence and that the affidavits in support of the disqualification motion contained hearsay and therefore the motion could not be granted.

IV.

The general requirements for the issuance of an extraordinary writ of prohibition are that a court or officer is about to exercise judicial or quasi-judicial power, that the exercise of such power is unauthorized or the inferior tribunal is about to act

without or in excess of jurisdiction which may or will result in damage or injury for which there is no plain, speedy or adequate legal remedy. Election Commissioner v. Petewon, 6 FSM Intrm. 491, 497, 1 CSR 5, 9 (Chk. S. Ct. App. 1994). We will usually not issue such a writ unless the petitioner has objected in the lower court to that court's exercise of jurisdiction. Id. We have the power to issue writs of prohibition in the appropriate case. Chk S.L. No. 190-08, § 4; Chk. App. R. 21.

One instance where it is appropriate to issue a writ of prohibition is when a trial court justice is about to exercise unauthorized power without or in excess of his jurisdiction by exercising jurisdiction over a case where another judge already has jurisdictional priority over the parties and the issues.

[A]ny case over which the trial division has jurisdiction may be heard by any of the justices as assigned by the Chief Justice. Once a case has been assigned to a particular justice, that justice has jurisdictional priority over the parties and issues of the case to the exclusion of all other justices in the trial division. This exclusive jurisdiction continues until the case is terminated in the trial division. While the case is pending, the priority extends to any other case involving the same parties and issues, even if filed later before a court that could also take jurisdiction.

Election Commissioner, 6 FSM Intrm. 491, at 498, 1 CSR at 10. The petitioner and the real parties in interest both rely on this case in their briefs and arguments.

The parties are identical in Civil Actions No. 132-2004 and 146-2004. The plaintiffs sought the same relief in both Civil Action No. 132-2004 and Civil Action No. 146-2004) that the contents of certain ballot boxes not be counted and tabulated

because of election irregularities. The only difference in Civil Action No. 146-2004, was that the plaintiffs were contesting only two of the five boxes they contested in Civil Action No. 132-2004 and that the irregularities alleged in 146-2004 were discovered during and in the course of the litigation of Civil Action No. 132-2004 (that is, during the counting and tabulating ordered by the special trial justice in Civil Action No. 132-2004). Such irregularities would be expected to be brought immediately before the judge on the case in which they were discovered. They were not. Instead they were filed as a separate case.

We do not fault Justice O'Sonis for acting on the temporary restraining order application when it was filed. The assigned special trial justice was unavailable in the outer islands. The request for a temporary restraining order needed prompt action. He was the senior justice present on island. Someone had to consider the motion. That he assigned that task to himself seems proper. However, once the special trial justice again became available, the case should have been left to the special trial justice to act upon. It was not.

We therefore conclude that Justice O'Sonis's presiding over Civil Action No. 146-2004 is in excess of his jurisdiction since the special trial division justice had jurisdictional priority over the parties and the issues in that case to the exclusion of all other justices in the trial division. The petitioner objected to Justice O'Sonis's exercise of jurisdiction over Civil Action No. 146-2004 from the start. As Tolensom Election Commissioner, he

will be injured if the writ does not issue since he will be subject to conflicting and contradictory orders from two different trial division justices. There is no plain, speedy, or adequate remedy otherwise available.

V.

Accordingly, the writ of prohibition ordering Justice O' Sonis not to take any further action or to exercise further jurisdiction over Civil Action No. 146-2004 issues herewith. Having determined that the writ must issue based on the principle in Election Commissioner v. Petewon, we do not reach the issue of whether Justice O' Sonis should have been disqualified because of his alleged close relationship to a plaintiff or whether his impartiality might reasonably be questioned based upon that relationship. Nor do we take any position on the merits of the trial division case. The qualification or appointment of the special trial division justice was also not before us. Nor do we address the procedures that a chief justice must follow before he appoints a special trial justice.

If it should seem unfair that the plaintiffs may now lack a forum which may hear their claims concerning the two boxes they still dispute, we note initially that it is a problem partly of their own making caused by filing those claims as a separate action. However, there may still be avenues that might afford them relief) Civil Procedure Rule 54(b) (if no final judgment has been entered because of failure to comply with Rule 58); Civil Procedure Rules 59 or 60; or possibly Appellate Procedure Rule 4(a)(5).

SO ORDERED the 31st day of January, 2005.

_____/s/_____
DENNIS K. YAMASE
Temporary Justice, Presiding

_____/s/_____
BENJAMIN RODRIGUEZ
Temporary Justice

_____/s/_____
CAMILLO NOKET
Temporary Justice

ENTERED this 31st day of January, 2005.

_____/s/_____
Clerk of the Appellate Division

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ORIGINAL ACTION NO. 02-2004

WRIT OF PROHIBITION

To: The Respondent Honorable Associate Justice Machime O' Sonis

This original action came before us on a petition for a writ of prohibition and the issues having been heard and duly submitted, and our order granting the petition having been duly entered,

NOW THEREFORE IT IS HEREBY ORDERED that you are prohibited from taking any further action in or exercising any further jurisdiction over Civil Action No. 146-2004, Marsolo v. Niki chiw or the subject matter thereof.

SO ORDERED the 31st day of January, 2005.

/s/
DENNIS K. YAMASE
Temporary Justice, Presiding

/s/
BENJAMIN RODRIGUEZ
Temporary Justice

/s/
CAMILLO NOKET
Temporary Justice

