

Amwano v Nauru Phosphate Royalties Trust [2007] NRSC 2; Civil Action No 6 of 2006 (26 June 2007)

IN THE SUPREME COURT OF NAURU

Civil Action No. 6/2006

BETWEEN:

**ALOYSIUS AMWANO & ORS
PLAINTIFFS**

AND:

**NAURU PHOSPHATE ROYALTIES TRUST
1ST DEFENDANT**

AND:

**THE SECRETARY FOR JUSTICE
2ND DEFENDANT**

Mr. Leo Keke for the Plaintiffs
Mr. Reuben Kun for NPRT
Mr. Robert Kaierua for Sec for Justice

The Plaintiffs are landowners and beneficiaries of the Nauru Land Owners Royalty Trust (known as the No. 2 fund). They seek this relief:-

- A. That the Court declares that the First Defendant and the Second Nominal Defendant representing the Minister responsible for the Nauru Phosphate Royalties Trust are breach of their duties under the Nauru Phosphate Royalties Trust Act 1968 – 1997.
- B. That the Court orders the First Defendant and the Second Nominal Defendant representing the Minister responsible for the Nauru Phosphate Royalties Trust to issue to the Plaintiffs a statement of their account in the Nauru Land Owners Royalty Trust Fund (Fund No. 2) in respect of the years ending 30th June 2002, 2003, 2004 and 2005.
- C. That the Court orders the First Defendant and the Second Nominal Defendant representing the Minister responsible for the Nauru Phosphate Royalty Trust to issue to pay to the Plaintiffs the RONWAN interest credited to their account as beneficiaries of the Nauru Land Owners Royalty Trust Fund (Fund No. 2) in respect of the years ending 30th June 2002, 2003, 2004 and 2005.
- D. That the Court orders the First Defendant to pay interest on the outstanding RONWAN interest credited to the accounts of the Plaintiffs as from 31st October of each year when due in respect of the years ending 30 June 2002, 2003, 2004 and 2005.

The First Defendant filed a defence in the action to the effect that the Government owes the Trust money, acknowledging that "the beneficiaries or Landowners have not received income payments under Fund No. 2 for any financial years after the year ending 30 June 2001" but alleging that it has no money to make payments.

The Second Defendant allowed judgment by default to be obtained against him on 15th November 2006. When the action was called on for hearing Mr. Robert Kaierua appeared for the Second Defendant. He applied for the default judgment to be set aside. There being no objection by the Plaintiff or First Defendant, I ordered the default judgment to be set aside and gave leave, nunc pro tunc (a defence of the Second Defendant already being on the Court file) for the Second Defendant to file an appearance and defence.

Mr. Kun was in Court during the hearing but called no evidence, did not cross examine witnesses nor make any submissions except to adopt those of the First Defendant.

Without allowing Mr. Leo Keke, for the Plaintiff, to open this case Mr. Reuben Kun for the First Defendant complained forseefully about the case being heard at this time, not giving his client time to arrange or overseas counsel nor for interlocutory proceedings and so on. The complaints are rejected.

On the 29th March during the last sittings, echoing what I said in open court in the presence of the representatives of all parties, I made this note on the file.

The parties could have been in no doubt that the hearing would proceed during these sittings come what may. Dates of the sittings were known many weeks if not months ago. At earlier sittings before last Christmas I indicated that the Registrar would deal with interlocutory matters. If the Solicitors for the First Defendant were not ready for this hearing, theirs is the responsibility.

Overseas Solicitors should know that, while their convenience will as much as possible be taken into account, their convenience is not the decisive consideration in fixing the sittings of the court.

There is no doubt that as a matter of law statements of account for the years ending 30th June 2002 and the years since should have been issued and interest paid according to the entitlements of individual beneficiaries. I have no difficulty in making the declarations sought and Mr. Kun for the First Defendant did not resist their making.

The real question is whether interest should have been or now should be paid to the Plaintiffs and the many other individual beneficiaries (perhaps numbering thousands). The answer depends on whether, once the statement have been issued, there is any money to pay interest.

The Plaintiffs through their witnesses, Mr. Aloysius Amwano (himself Minister for Finance in 2002 and one time Chairman of the Nauru Phosphate Royalties Trust), Mr. Alexander Deiye (also a past Chairman of the Trust) and Mr. Detonga Deiye (a member of the Trust from November 1996 to July 2003) gave evidence that in 2002 the Trust had approved the payment out of \$14,228,024.68 in interest to the beneficiaries of the No. 2 fund. The payment was subject to approval by the Government. The evidence of all three gentlemen is sufficiently summed up in 4 paragraphs of Mr. Alexander Deiye's affidavit sworn on 19th June 2007:

4. In 2002, the Trust approved an amount of about \$14, 228024.68 for payment of RONWAN interest for the year ending 30 June 2002 (the 2002 interest). The due date of payment of the 2002 interest was 31 October 2002. Of the \$14,228,024.68 an amount of about \$8m was identified by the Trust from sale of assets in Honolulu, Hawaii, which had received the approval of Cabinet. This was advised to the Trust by the Minister or Finance in a letter dated 3rd March 2003.

5. A shortfall of about \$6m had to be sourced from other sales of Trust assets. The Trust then proposed to Cabinet the sale of an asset on the United States mainland that would meet financial commitments of the Trust including the RONWAN interest shortfall of about \$6m. The Cabinet urged that the Trust reassess its payment plans and reschedule payment from "Bentwood sale". The Bentwood sale is a reference to a property on the United States mainland.

6. In anticipation of Cabinet's formal approval for the sale of further Trust assets, the Trust prepared and processed for payment the RONWAN interest cheques which were signed by me as Chairman and another Trustee. Due to intervening political and other critical financial circumstances the formal Cabinet approval for the sale of further assets never materialized.

I accept that the three gentlemen are genuine in believing that the formalities required before payment out to beneficiaries had been completed. Yet I have come to the conclusion beyond the bare balance of probabilities that they are mistaken, perhaps through lapse of memory over the years, perhaps through lack of understanding of the legal requirements.

Mr. Kun called two witnesses, Mrs. Romys Eobob (Finance Manager of NPRT), since 2003 based at the Melbourne Office but from 2001 in the office here in Nauru and Mrs. Alvina Aremwa the present chairperson of the Trust, herself a landowner and beneficiary of No. 2 fund.

Through Mrs. Eobob a statement for the year ending 30/06/2002 was tendered (Ex D1). It shows a distributable income of \$14,228,024.68. This is the document to which the witnesses for the Plaintiffs referred and on which they relied. Mrs. Eobob explained that it is only a draft: no final statement for that year (or subsequent years) has yet been issued. I notice the document is marked "Draft" which goes to confirm Mrs. Eobob's explanation. As well, in looking again at Mr. Alexander Deiye's affidavit, I notice paragraph 6 begins; "In anticipation of Cabinet's formal approval" and ends "the formal Cabinet approval for the sale of further assets never materialized."

Exhibit D1 is a draft only, not a final statement. It was not a sufficient authority for payment out. Mrs. Aremwa said the 2002 interest has not been paid because there is "no cash." She went on to say that the Trust can produce statements for 2002 and can pay out whatever moneys the statement shows is available. There is money in the accounts but she cannot at present say how much. [The Honourable Roland Kun, M.P., Minister responsible for the Nauru Phosphate Royalties Trust, in Parliament on 16th June made a statement (Handsard admitted as Exhibit P4) that the funds held by the Receivers and Managers of NPRT total \$68,857,243.09.]

Mrs. Aremwa said the Trust would try to produce the statement for 2002 in two months and those for the years 2003-2006 four months later.

In summary, the defendant has an obligation to produce the statements but how much, if anything will be available to pay out to beneficiaries' remains to be calculated.

I shall make the declarations sought in A. and B. It would be futile at this stage to order payment as contemplated in C. and D. of the relief claimed.

**THE HON. ROBIN MILLHOUSE QC
CHIEF JUSTICE**

26 June 2007