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COPY

THE DIRECTOR OF DISTRICT SERVICES AND
NATIVE AFFAIRS

W.S.No.26
of 1961(P)

v.

THE ADMINISTRATION OF THE TERRITORY OF PAPUA
AND NEW GUINEA.

Reasons for Directions as to Disposal of Moneys held by Registrar for
investment on behalf of certain infants.

C.J. 1962.

The Registrar has received the sum of £1360 from the Administration pursuant to a judgment of this Court pronounced on the 27th February 1962 which required the Administration to pay this amount to the Registrar to be held and invested by him on behalf of certain infants. In purported compliance with this judgment, the Treasurer has sent the Registrar a cheque for £1360, but has instructed the Crown Solicitor that "The cheques are payable to officers of the Administration, therefore Section 43 of the Treasury Ordinance shall apply."

A somewhat Gilbertian situation now arises. The remark of the Treasurer is in terms a direction which in form might satisfy the requirements of Section 20 of the Treasury Ordinance, and if the Registrar is an "accounting officer" under that Ordinance for the present purpose, he may be liable to a penalty to be imposed by the Administrator, without right of appeal, if he should comply with the express terms of the order of the Court. If he fails to comply with this order he will no doubt be liable to punishment for contempt of Court.

Further, if provisions of the Treasury Ordinance apply to the fund in question, the Administration, having paid the sum which it is bound to pay under an order of the Court, will be entitled to receive that sum back again immediately, without any express obligation to apply the monies in accordance with the Court's order. Prima facie also, any interest earned as a result of the investment of the funds pursuant to the Court's order, would be payable according to the terms of Section 46 of the Ordinance as it now stands, to the revenue account of the Territory and not for the benefit of the infants whose interests are protected by the Court order.

Section 43 of the Ordinance provides that certain monies coming to the possession or control of any person in the Public Service, in his capacity as such, or in any capacity arising out of his office, are, subject to certain exceptions, to be dealt with in the manner provided in Section 42, which requires that person to transmit the monies to the Treasurer to be placed by him to the credit of a "trust fund". There are no express statutory provisions appropriate to impose upon the Treasurer equitable obligations or to preserve interests of an equitable nature in the monies in question, or to require him to carry out any personal obligation which might attach to the Public Servant. It is therefore a fair inference, that the intended scope of the Ordinance in this respect is that the Treasurer should exercise personal control and supervision over monies which come into the hands of public servants in their official capacity, so that trusts and obligations of all kinds attached to the monies are already the obligations of the Administration. This view is confirmed by the insertion into Section 43 of the Ordinance by the Treasury Ordinance No.27 of 1960, of the words "in his capacity as such or in any capacity arising out of his office."

The Registrar exercises his authority by virtue of his appointment by the Governor-General. His duties are as prescribed by law, and as directed in relation to any particular matter coming before the Court, by the presiding judge acting in his judicial capacity, and in relation to the general administration of Court business in matters incidental to the exercise of the judicial functions of the Court as directed by myself.

Under the present Constitution of the Territory, unsatisfactory as it may now be, it is clear that the Judiciary is in no way subject to the

direct or indirect control of the Administration or any of its officers. The exercise of judicial control over monies in Court and property within the jurisdiction of the Court provides the essential foundation for much of the Court's equitable jurisdiction, and the loss of effective control in these matters, would render the exercise of effective judicial power abortive. It would therefore in my view require the express statutory sanction of the Commonwealth Parliament, to negate the apparent intention of the present Commonwealth legislation.

The Registrar happens also to be a member of the Public Service of the Territory, and the question arises whether this fact alters the position, and whether in consequence he comes under the direction of the Treasurer rather than of the Court, in relation to monies paid into Court. According to the Treasurer's own statement that the cheques are payable to officers of the Administration, and therefore Section 43 of the Treasury Ordinance shall apply it would appear that the Public Service is identified with the Administration. The Papua and New Guinea Act affords no justification for this view. The Public Service which is set up under that Act, is not an organ of Government and exercises no powers of government. It is a service established mainly for the purpose of increasing the efficiency of departmentalized government, and to protect the rights and interests of public servants. Because of the departmentalized structure of the Administration, the Service as such, and the Public Service Commissioner, have much to do with the organization of the Executive Government of the Territory but the powers of Government are vested not in the Public Service as such, but in the Administrator and in a broad sense in the branch of Government collectively referred to as the "Administration". There is no objection to the Public Service nominating persons for appointment to Statutory Office by the Governor-General or otherwise assisting the Courts of the Territory in achieving efficiency of management, by the provisions of suitable staff working under appropriate conditions of service. It is a very different thing entirely, to suggest that because the person who carries out the functions of Registrar of the Supreme Court happens to be a member of the Public Service, he must therefore be regarded as an officer of the Administration as such or attached to some department of the Administration in order to give the Public Service Commissioner some semblance of jurisdiction to deal with him notwithstanding the separate entity of the judiciary established by Commonwealth legislation.

It seems to me therefore to be perfectly plain that the obligations of the Registrar in relation to the handling of monies which are in the possession and under the control of the Court, are not obligations which are owed to the Administration as such. They are obligations in respect of which he is wholly and solely accountable to the Court itself and he is strictly bound to carry out the directions of the Court. In his capacity as a public servant, he has no authority in relation to the judiciary or the business of the Court and his appointment to his present office by the Governor-General does not create a capacity arising out of his office as a public servant. Further the money received by the Registrar is received on behalf of the Court, to be dealt with according to law and as directed by the Court, and it is not, in my opinion, appropriate for such monies to be described as having been received by a Public Servant on account of or for the use or benefit of any other person. The whole of the provisions of Section 43 are satisfied by the inference that its application extends only to such monies as are received by a public servant who is an officer of the Administration in his official capacity and under circumstances which would impose upon the Administration some obligation in respect of that money.

The foregoing has application only to money and property which come into the hands of the Registrar as an officer of the Court in relation to the Court's judicial functions. My directions are not concerned with monies collected in respect of fees or estate duty

which are payable to the account of the revenue of the Territory, and come within the definition of public monies for the purposes of the Treasury Ordinance. In relation to such monies, the authorised member of the Registrar's staff is collecting revenue on behalf of the Administration, and is bound to comply with the requirements of the Treasurer.

Monies paid into Court fall within two broad categories. Where under the Rules, a party pays money into Court in satisfaction or part-satisfaction of a claim made against him, and the Court is obliged to hold these monies at the disposal of any party who may have a right to withdraw them at any time, the Registrar must keep these monies under his immediate control, and pay them into a bank account, and not part with them unless authorized to do so by the Rules of Court or by the direction of a Judge. In relation to monies which require long-term investment, or which are likely to be held for a considerable period, and should therefore be invested for the ultimate benefit of the parties entitled, the Registrar is strictly bound to comply with the directions of the judge who pronounces any appropriate order.

Some time ago, I arranged with the then Treasurer and Director of Finance that monies in this latter category might be made the subject of a direction to the Registrar to pay them to the Treasurer for investment, subject to the control and direction of the Court. The sole justification for this was that the Treasurer is in a better position than the Registrar to invest money in such a way as to secure the greatest possible benefit to the persons entitled. This implies no possible advantage to the Administration, which has no interest in the monies in question.

I instructed the Registrar that unless a judge made a specific order to the contrary for reasons which appeared to him to be sufficient, orders for the investment of money should be expressed in terms appropriate to give effect to such an arrangement. This is not the same thing as saying that these monies fall within the scope of Section 43 of the Treasury Ordinance, in which event the Court might well lose control of funds the control of which is the foundation for the exercise of an essential jurisdiction of the Court.

I accordingly propose to direct the Registrar that he is not to pay over to the Administration monies which are subject to the jurisdiction of the Court, unless it is clear that the monies and the interest accruing thereto, are held and administered subject to the jurisdiction of the Court and not by virtue of Section 43 of the Treasury Ordinance.