

Malaysian Bar regrets dismissal of Dr M's suit against Najib
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Bar president says High Court should have examined nature of powers of the office of the PM to determine whether that office qualifies as a public office under common law.

KUALA LUMPUR: The Malaysian Bar today expressed concern over the decision of the High Court to strike out a claim brought by Dr Mahathir Mohamad and two others against Prime Minister Najib Razak for the tort of misfeasance in public office.

Malaysian Bar president George Varughese regretted the “rigid approach” to the application of common law, and to the tort of misfeasance in public office, by the court.

Last year, Mahathir, and former Umno members Khairuddin Abu Hassan and Anina Saadudin, filed a suit against Najib for interference and for ensuring that all relevant authorities discontinued carrying out investigations into his alleged misconduct over billions of ringgit he had received.

On April 28, High Court judge Abu Bakar Jais struck out the suit saying they had been unable to prove that Najib was a public officer in public office. The court also ordered the trio to pay Najib RM30,000 in costs.

Varughese said in a statement that the claim centred on alleged financial improprieties concerning 1Malaysia Development Berhad (1MDB) and its related companies by the prime minister as chairman of the board of advisers of 1MDB.

“It includes allegations that sums of RM2.6 billion and RM42 million were transferred from SRC International Sdn Bhd into the personal bank accounts of the prime minister, and that he had abused the powers of his office to interfere with investigations into the alleged financial improprieties.”

He said the High Court relied primarily on the Interpretation Acts of 1948 and 1967, and Article 132 of the Federal Constitution, in deciding that the prime minister was not a public officer and, therefore, could not be made liable for the tort.

“This narrow interpretation and reasoning are troubling, and irreconcilable with the established principles in this area of law.

“The tort of misfeasance in public office is a tort derived from common law, which is unwritten law but fully applicable in Malaysia. The action was, therefore, not brought under the Federal Constitution or any written legislation, and the High Court should, therefore, not have relied on either of these in determining whether the prime minister is a public officer.

“The nature of the powers of the office of the prime minister ought to have been examined to determine whether that office qualifies as a public office under common law.”

He said the focus of the tort was on the nature of the powers in question and not on the person exercising the powers.

The rationale behind misfeasance in public office being a tort, he said, was that in any legal system based on the rule of law, executive powers must be exercised for the good of the public.

“The High Court’s decision thus runs contrary to the recognition and use of common law in our legal system.

“The High Court’s decision seems to suggest that although a sitting prime minister holds office based on trust from the electorate and is paid from public funds for the powers he exercises, he nevertheless owes no fiduciary duty nor is answerable to the public in the event that he misuses the powers of his office. This flies in the face of the rules of democratic governance,” Varughese said.

The Bar president added that the claim involved matters of “grave public interest”, including unanswered questions surrounding the 1MDB saga and the numerous allegations of impropriety implicating the prime minister, “which continue to cloud our nation”.

“This was, therefore, not a plain and obvious unsustainable claim that deserved to be dismissed summarily, but should have been allowed to proceed to trial for determination of the merits of the claim.”

He said it was “unfortunate” that this decision came in the same week as the Federal Court’s “commendable judgment” in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Anor*.

“That decision reinstates the inherent judicial power of the courts and restores the independence of the judiciary, allowing it to play its role as the third organ of the state and keep in check any excesses of the executive or legislature,” Varughese noted.

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