Solicitor General

IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

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CV 38 of 2015

BETWEEN: VILIAMI TU'AKOI
-First Plaintiff

MATAFONUA FOTOFILI
Second Plaintiff

SIONE MATAELE PINOMI
Third Plaintiff

AND : FREE WESLEYAN CHURCH OF TONGA
-First Defendant

AND : RT. HON. LORD TUPOU K.C.

REV. 'UNGATEA KATA

REV. DR. MA'AFU 'O TU'I TONGA PALU

REV. TU'A MAHE
Second Defendants

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: Mr. S J Stanton SC for the plaintiffs
Mrs. 'A Taumoepeau SC for the defendants

Date of Hearing: 14 June 2016
Date of Ruling: 17 June 2016

RULING

rec'd 20/6/16

1. This is an application for an interim injunction. The plaintiffs seek to restrain the Free Wesleyan Church of Tonga (the Church) from acting upon a decision that the plaintiffs say was made by the second defendants, sitting as a sub-committee of the Church, purporting to dismiss and remove the plaintiffs as ordained Ministers.

2. The plaintiffs allege that the decision was made in breach of the rules of natural justice, principally because they were given no notice of the hearing at which the decision was made. They also argue that the decision was made in breach of undertakings given to the Court on 10 July 2015 that in adjudicating upon the plaintiffs' entitlements to continue as ordained Ministers the Church would provide the plaintiffs with the information that was to be relied upon, a fair opportunity to consider the information and the opportunity to be represented by counsel at any hearing.

3. The Church denies that the plaintiffs have not been afforded natural justice or that it breached any undertakings. Furthermore, the Church argues that the second defendants did not make any decision to remove the plaintiffs as ordained Ministers and that a final decision as to whether the plaintiffs are to be removed as Ministers will only be made at a meeting of the

Annual Ministers' Conference to be held on 21 June 2016 at which the plaintiffs may be heard and represented by counsel.

Preliminary observations

The third plaintiff

4. After this application was filed but before the hearing the third plaintiff died. It is unclear what utility this application now serves as far as the third plaintiff is concerned but I am told that the administrator designate wishes to pursue it. There is however no evidence that an application has been made for letters of administration. As I have decided that the application for injunction should be dismissed I have not felt it necessary to deal separately with the position of the third plaintiff.

The timetable

5. The Church failed to comply with the agreed timetable for the filing of evidence. Its first affidavit was filed 10 days late. It filed two further affidavits on the morning of the hearing. It is now all too common that counsel fail to comply with court agreed timetables. In many cases, and this is one, there is no excuse and it will have consequences in costs.

6. The plaintiffs did not seek an adjournment but asked that the Church's affidavits not be read by the court. I decided to admit the affidavits and to consider them only to the extent that I was satisfied that the plaintiffs were not prejudiced by the lack of any opportunity to reply.

The position of counsel

7. Much of the evidence concerned correspondence and personal exchanges between counsel. The evidence is contentious. It is inevitable that the conduct and advice of counsel will be an issue at trial whether or not they are required to give evidence. Counsel must immediately consider whether it is appropriate for them to continue to act in this action (Rule 7.07 and 7.08 Tonga Law Society, Rules of Professional Conduct for Law Practitioners and see also in a New Zealand context Rule 13.5 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008).

The facts

8. The Church is a voluntary unincorporated association with churches in Tonga, New Zealand and, relevantly for present purposes, Australia. It is also the national church of Tonga. The plaintiffs were all ordained as Ministers of the Church.

9. The Constitution and Laws of the Church provide in relation to the discipline of Ministers as follows:

> **THE JUDGING AND DEMOTING OF MINISTERS**
>
> i. If there is any matter relating to a Minister such as inappropriate behavior, or the breaching the laws, or not following the Doctrine, the President or the Chairing Minister and the Conference Committee of the Ministers can question him, and have the authority to suspend him from his job, until the Quarterly Meeting of the Ministers is held who will be judging him. If it appears that the accusation is true, those Ministers can decide to demote him from his job, until the next Conference is held. And the Conference, which has the authority to demote him or make any other decision.
>
> ii. If a Minister is being suspended from his job awaiting judgment, he will not be receiving any salary during that time and if he is absolved after being judged, it is up to the Conference to make any decision relating to his wages.
>
> iii. The Conference has the authority to demote any Minister from his position, and to decide to exclude him from the Conference because he has done something that is inappropriate, and for which the Conference deem it appropriate that he should step down from his position.
>
> iv. If any Minister has been demoted, and will not be allowed to hold any position in the Church, unless otherwise decided by the Conference.

10. The plaintiffs were stationed in Australia and employed pursuant to written agreements with Free Wesleyan Church of Tonga District Australia Incorporated (FWCTA) and paid a stipend by FWCTA. They contend that there was no contractual nexus between FWCTA and the Church. FWCTA went into receivership

in 2012 and was de-registered in 2015. A new entity called Free Wesleyan Church of Tonga – District of Australia Incorporated was then registered and maintains an affiliation with the Church.

11. From at least 2014 the Church held concerns about the conduct of the plaintiffs. The concerns primarily, but not exclusively, related to allegations of financial mismanagement by the plaintiffs causing FWCTA to go into receivership along with the loss of substantial Church properties and a failure to account for donations received to pay debts incurred to acquire a Church property known as Pulela'a. There are also allegations that the plaintiffs had lost a substantial number of members of the Church, that the plaintiffs had provided false information to the Church and that they had damaged the sanctity and failed to uphold the beliefs of the Church and their oaths as Ministers.

12. On 8 July 2015 the plaintiffs filed an application for an *ex parte* injunction to restrain the Church at its Annual Conference from adjudicating upon and dismissing them as ordained Ministers. I granted the injunction on 9 July 2015 but had the matter brought on for review on 10 July 2015, at which hearing the injunction was discharged by consent on the basis of undertakings of the Church as follows:

> [1.1] The [Church] shall provide the Plaintiffs with a statement of the allegations that are being made against them; and

[1.2] The [Church] shall provide the Plaintiffs with the information that it has in its possession which may be relied upon by it when adjudicating upon the allegations; and

[1.3] The Plaintiffs shall be afforded a fair opportunity to consider the information provided by the [Church] and to be represented by counsel at any hearing.

13. Following the discharge of the injunction the plaintiffs were not reappointed by the Church's Conference to their previous stations. They were appointed to a Special Counselling Committee. The plaintiffs refused to accept their new appointments. There is correspondence in evidence from the plaintiffs' lawyers to the Church's lawyer challenging the decision and threatening, amongst other things, further injunction applications, which were never made.

14. There was also a good deal of correspondence between the parties' lawyers (and others) during the period July 2015 to October 2015 concerning the steps that the Church was taking to provide details of the charges against the plaintiffs, the information supporting the charges and the arrangements for a hearing. I am in no position to draw final conclusions on the evidence but as a matter of impression I found the correspondence of the plaintiffs' lawyers to be often intemperate and not at all constructive. It contains numerous, and I consider ill-advised, threats to seek further injunctive relief. Seemingly

the plaintiffs were not desirous of progressing the matter with any haste and then only according to processes that they approved and within timeframes that suited their legal counsel. In the context of an internal disciplinary process of a church, demands for consideration of audio visual link ups for overseas witnesses, that the plaintiffs' approve the hearing panel and that the hearing be conducted other than in Tonga are simply incongruous.

15. In early December 2015 the Church's lawyer, Mrs. Taumoepeau, met with the plaintiffs' local lawyer, Mr. Pouono. Mr. Pouono says that at this meeting he advised Mrs. Taumoepeau that the plaintiffs' senior counsel, Mr Stanton, was overseas and that Mr. Stanton was to be in the United States for personal reasons between 28 December 2015 and 3 March 2016.

16. The next communication between Mr. Pouono and Mrs. Taumoepeau was in early February 2016 when Mrs. Taumoepeau suggested that the hearing of the charges against the plaintiffs would be conducted on 25 February 2016. Mr. Pouono says in his affidavit that he told Mrs. Taumoepeau that the date was not satisfactory as Mr. Stanton was unavailable and there were other outstanding issues to be resolved before the hearing so that the "Plaintiffs would not be able to participate as guaranteed by the Court's Orders made 10.07.15". Mr Pouono did nothing further

about the matter and then he travelled overseas on 16 February 2016.

17. On 15 February 2016 Mrs. Taumoepau prepared a letter to Mr. Pouono giving notice that the Ministers' Committee of the Conference of the Church would meet at 10am on 25 February 2016 at the Head Office of the Church in Nuku'alofa to hear the charges against the plaintiffs. She attempted to deliver that letter to Mr. Pouono's office on 15 February 2016, which was the day before he went overseas, but the office was closed. On 22 February 2016 the letter was emailed to both Mr. Pouono and Mr Stanton, but it appears neither read the email until well after the meeting of the Ministers' Committee.

18. On 25 February 2016 the Ministers' Conference Standing Committee of the Church met and the charges against the plaintiffs were considered in their absence. A decision was made to suspend the plaintiffs from their Ministerial duties. This was confirmed at a further meeting on 3 March 2016, although it was never explained to me why that was considered necessary. On 14 March 2016 an email was sent by the Secretary General of the Church to, amongst others, the second and third plaintiffs. The email advised that the Ministers' Conference Standing Committee had resolved that they were "no longer authorised to act and perform as Reverends under the Free Wesleyan Church of Tonga". In his affidavit Mr. Pouono states that he was advised

by the wife of the third plaintiff that the email was not received by her. At this time the third plaintiff was gravely ill.

19. The plaintiffs filed this application on 11 April 2016 on an *ex parte* basis but I directed it proceed on notice.

20. On 13 June 2016, the day before hearing, Mrs. Taumoepeau wrote to Mr Stanton and Mr Pouono inviting the plaintiffs to attend before the Ministers' Committee of the Full Conference of the Church on 21 June 2016 at 7.30pm to answer the charges. Mrs. Taumoepeau noted that this was "the final authority in the Church's disciplinary process" and "The Church continues to be willing to hear your answers to the Charges." In a letter dated 13 June 2016, Mr. Stanton replied referring to the offer as desperate, a nonsense and a mockery. He also stated that neither he, his clients nor their witnesses could attend before the Ministers' Committee for practical reasons in any event.

Injunction principles

21. Mr. Stanton addressed me on the principles to be applied by the Court in deciding whether to grant interim injunctive relief. He relied on *Friendly Island Satellite Communications (Tongasat) Limited v Pohiva* [2015] TOSC 78 at [78] adopting *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 140 (CA).

22. The purpose of an interim injunction is to maintain the status quo until the rights of the parties can be determined at the hearing. A plaintiff must show that there is a serious question to be tried (in the sense that the plaintiff has made out a *prima facie* case) and that the balance of convenience favours the granting of the injunction. The Court must look at the impact on the parties of the granting or the refusal of an order. Finally, an assessment of the overall justice of the case is required.

23. If it can be shown that a plaintiff will be adequately compensated in damages or will suffer no irreparable injury if the injunction is not granted they are important factors against the making of an order. However, the grant of an interim injunction involves the exercise of a discretion and the approach outlined cannot be taken as suggesting a rigid or mechanical approach.

24. Mr Stanton referred also to the words of Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 407-408. In that case Lord Diplock said:

> The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult

> questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that it "aided the court in doing that which was its great object, viz. abstaining from expressing any opinion on the merits of the case until the hearing" :*Westfield v Duke of Buccleuch* (1865) 12 LT 628, 629. So unless the material available to the court at the hearing of the application fails to disclose that the plaintiff has any real prospects of succeeding in his claim for a permanent injunction at the trial the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

Is there a serious issue

25. The kernel of the plaintiffs' case is that the decision to deprive them of their status as ordained Ministers was made without notice of the hearing and that they were therefore denied natural justice such that the decision should be set aside. It appears that the plaintiffs have proceeded on a misunderstanding that the decision they challenge was made by the second defendants. It appears reasonably clear that this is not the case but nothing turns on that for present purposes.

26. To succeed in their action the plaintiffs will have to satisfy a threshold question as to whether their claim is justiciable. Traditionally the courts have been reluctant to interfere in the

internal proceedings of religious organisations except to the extent necessary to decide disputes about property.

27. Mr Stanton relied upon *Graham v Baptist Union of New South Wales* [2006] NSWSC 357, which was a case where the New South Wales Supreme Court granted an injunction to prevent the Baptist Church from continuing with disciplinary proceedings to remove an accredited Minister on the grounds that he had been denied natural justice. Relevantly, however the court in *Graham* noted at [37] that it was not argued that the dispute between the parties was not justiciable or amenable to the jurisdiction of the court. Furthermore, there was no dispute in that case as to the application of the rules of natural justice which were required to be observed by the internal rules of the discipline committee. Mr Stanton referred me to other cases also, including a helpful decision of the Supreme Court of New South Wales in *Sturt v Bishop of Newcastle* [2012] NSWSC.

28. I do not need to decide this issue on this application and resist any attempt to do so. Ultimately this is a matter for trial to be determined having regard to the terms of the Constitution and Laws and teachings of the Church which are the basis for the relationship between the plaintiffs and the Church.

29. The next issue in this case will be whether, and to what extent, the Church is required to observe the rules of natural justice

when conducting disciplinary proceedings against Ministers. That there is such an obligation cannot be assumed given the nature of the proceedings and in circumstances where the relevant provisions in the Church's Constitution say nothing about observing natural justice. (*Davies v Presbyterian Church of Wales* [1986] 1 WLR 323 referred to in majority judgment of Lord Sumption in *The President of the Methodist Conference v Preston* [2013] 2 WLR 1350 at [5]). Mr Stanton referred to a number of cases supporting the plaintiffs' position that the Church was required to observe natural justice. He also argued that the Church had voluntarily assumed an obligation to observe natural justice when providing its undertakings to the Court of 10 July 2015. I consider this latter argument to be erroneous as those undertakings did not supplement the Church's Constitution but are independently subject to enforcement under the rules of court.

30. There is of course the further issue in this case as to whether the Church failed to observe natural justice, assuming such obligation exists. I consider there is an arguable case that it did so. Where, as was the case here, a hearing is proposed, persons who may be affected by the decision should be given notice of the date, time and place of the hearing. When through some administrative error notice of a hearing is not received by an affected party the courts have been prepared to intervene notwithstanding that no fault can be attributable to the decision

maker (*Isak v Refugee Status Appeals Authority* [2010] NZAR 535 (HC), Phillip A Joseph, Constitutional and Administrative Law in New Zealand, 4th Ed at 25.4 pages 1046-1048 and JRS Forbes, Justice In Tribunals, 4th Ed at Chapter 10)

31. The evidence of Mr. Pouono, which is effectively unchallenged for present purposes, is that no prior notice of the hearing of 25 February 2016 was received by the plaintiffs or their lawyers. Whilst Mrs. Taumoepeau did on 22 February 2016 send an email to Mr. Pouono and Mr Stanton to advise them of the hearing date it appears they did not receive it until much later and it is at least arguable that in the circumstances as existed that would have been insufficient notice of the hearing in any event.

32. In all the circumstances I am satisfied that there is a serious issue to be tried as between the plaintiffs and the Church and accordingly it is necessary for me to consider where the balance of convenience lies.

Balance of convenience

33. The plaintiffs' evidence on this aspect is lacking in detail. The plaintiffs' written submissions focused almost entirely upon whether there was a breach of natural justice. Mr. Stanton argued that the balance of convenience favours the plaintiffs because if the injunction is not granted the plaintiffs will be

unable to carry out their duties as Ministers of the Church and will thereby have lost the right to a livelihood and their reputations. I do not find these arguments at all convincing.

34. There is no evidence before me that the plaintiffs will suffer any economic loss should the injunction not be granted and as a result the usual question as to whether damages would be sufficient remedy should the injunction be refused simply does not arise in this case.

35. Since 15 July 2015 the plaintiffs have refused to perform their duties as Ministers as required by the Church. In a letter from Mr. Pouono to Mrs. Taumoepeau dated 23 July 2015 the plaintiffs stated their intention to continue their religious work in Australia notwithstanding they considered themselves already suspended from the Church. The letter reads:

> The failure to appoint our clients and in particular Reverend Pinomi and Reverend Fotofili to their parishes, was tantamount to a suspension without a hearing and without any right being given to be heard in the event that their non re-appointment was to be regarded as a suspension and which of course it inevitably has come to be perceived, not only by them but by the congregation which they have served and will continue to serve in Australia, as is their contractual right.

36. Whilst the plaintiffs did challenge the Church's decision not to reappoint them to their stations I do not consider that they can claim hardship as a result of being deprived of their status as ordained Ministers yet refuse to accept that the Church has any authority to control their religious activities.

37. As to the matter of the plaintiffs' reputations, Mr. Pouono's letter makes clear that they considered that such damage had already occurred when they were not reappointed to their stations in July 2015. I do not see that their position is made worse (or better for that matter) by any decision this Court might make on this application.

38. For the Church Rev. Ungatea Kata in her affidavit gives evidence that should the Court grant the injunction that will cause significant reputational damage to the Church. She said, and I accept, that it will affect the credibility, accountability and transparency of the processes of the Church. She also states that this dispute significantly affects the members of the Church particularly at the time of the Church's Conference attended by some 2000 voting and non-voting members and during the historic 150th Anniversary of Tupou College.

39. Rev. Kata also notes that from the Church's perspective the disciplinary process is not yet complete and will not be complete

until the matter finally comes before the Annual Ministers' Conference presently scheduled for 21 June 2016.

40. Rev Kata's evidence reflects, in my view, a genuine and realistic concern that the intervention of the court will cause significant damage to the morale and general health of the Church community.

41. There is nothing which suggests to me that the plaintiffs might suffer irreparable harm should this court refuse their application for an injunction. In contrast, I am satisfied that should I grant the injunction there is a real risk of damage and injustice to the Church.

Overall justice of the case

42. Standing back and looking at the overall justice of the case I am moved by the following considerations. As I have noted earlier, it is my strong impression that the plaintiffs have not sought to constructively resolve the dispute with the Church and have taken positions which have delayed a resolution.

43. Furthermore, the court must consider how the granting of an injunction will practically affect the ultimate resolution of the dispute between these parties. The dispute has been festering since at least 2014. The relationship between the parties has

clearly broken down. There is little cause for confidence that the parties will now be able to agree on or implement a process that the plaintiffs will accept is fair to them. The Court could not monitor or supervise any process that they do agree upon nor should it have to do so. That could result in further applications for injunctions. In those circumstances the granting of an injunction would, in my view, almost certainly prolong the dispute without benefitting anyone. The interests of both parties are best served by securing the prompt hearing of the substantive action rather than granting interim relief.

The result

44. The plaintiffs' application for injunction is dismissed.

45. I direct that the case be called before me on Friday, 1 July 2016 for a directions conference at which time the court will be in a position to timetable the action to an early hearing.

46. In light of the Church's failure to comply with the court's timetable without any reasonable excuse I make no order as to costs in its favour.

SUPREME COURT TONGA

O.G. Paulsen

DATED: 17 June 2016. **LORD CHIEF JUSTICE**