

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)**

MISC. NO. 334/2023

IN THE MATTER of section 3 of the Declaratory
Judgments Act 1994 and Rule 193
and Rule 132 of the Code of Civil
Procedure of the High Court 1980-
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AND
IN THE MATTER of Article 34, Article 3(c), Article
5(b), Article 8, Article 38(c) and
Article 56 of the Constitution of
the Cook Islands Football
Association Inc.

BETWEEN **TIRAA ARERE**
Applicant

AND **MOEROA TAMANGAROA**
First Respondent

AND **TEINA SAVAGE**
Second Respondent

AND **GROVER HARMON**
Third Respondent

(continued on next page)

Hearing: 6 June 2023

Counsel: Mr T Vakalalabure for Applicant
Mr T Nicholas for the First to Tenth respondents

Further submissions: 31 July 2023 and 17 August 2023

Judgment: 2 October 2023

JUDGMENT OF TOOGOOD J

AND **TEARIKI MAURANGI**
Fourth Respondent

AND **TERRY PIRI**
Fifth Respondent

AND **TUAINÉ FATIAKI**
Sixth Respondent

AND **MII PIRI SAVAGE**
Seventh Respondent

AND **PAUL ALLSWORTH**
Eighth Respondent

AND **MATHILDA TAIREA**
Ninth Respondent

AND **ALLEN PARKER**
Tenth Respondent

Introduction

[1] Association Football (football) is governed throughout the world by Federación Internacional de Fútbol Asociación (FIFA), an association registered in the Commercial Register of the Canton of Zurich under the Swiss Civil Code. The Oceania Football Confederation Incorporated (the OFC) is an incorporated society registered in New Zealand under New Zealand law and is a confederation recognised by FIFA. In the Cook Islands, football is administered by the Cook Islands Football Association Incorporated (CIFA). CIFA is an ordinary member of the OFC which has oversight of other football associations within the Oceania region.

[2] The affairs of FIFA, OFC and CIFA are governed and managed in accordance with constitutional documents, such as statutes, rules and regulations. The aim of the constitutional arrangements is to provide for an essentially democratic network of contractual arrangements entered into between, and administered by, the various elected bodies and officials.

This proceeding

[3] On 6 March 2023, Mr Tiraa Arere, who had been appointed to the office of president of CIFA in June 2022, filed an application for orders under the Declaratory Judgments Act 1994 (the Act) relating to his position as president. The application alleges that the first to sixth respondents, who comprised the CIFA Executive Committee, unlawfully suspended Mr Arere from his presidential role by a decision made at a meeting held on 6 January 2023 and thereafter assumed control of CIFA's management, administrative, financial, and operational functions. Mr Arere alleged that the seventh respondent, Ms Mii Piri Savage, had been appointed unlawfully to take over certain financial responsibilities relating to CIFA's affairs.

[4] The substantive application was accompanied by an application for interim injunctions prohibiting the respondents from taking certain steps which, Mr Arere alleged, include interfering with his attempts to fulfil his duties as president of CIFA; withholding his salary, housing and related entitlements; and holding executive meetings related to his position. He also sought interim orders regarding the taking of financial accounts and inquiries into Ms Savage's role.

The respondents' responses to the proceeding

[5] The respondents raise two principal arguments in opposition to Mr Arere's claims. First, they argue that the Court does not have jurisdiction to hear the case. They say that questions about Mr Arere's conduct in his role as CIFA president; any disciplinary action taken by CIFA, through its Executive Committee; and any challenge to such disciplinary action, must be addressed exclusively within the framework of the rules established by the governing bodies of the sport. The respondents' jurisdictional argument, in essence, is that the relevant organisational rules comprise a network of contractual provisions binding on Mr Arere as a CIFA official. A key element of those provisions is a prohibition on any person bound by the rules from having recourse to the ordinary courts, in any jurisdiction in which football is played.

[6] Second, the respondents argue that, if the Court does have jurisdiction to hear Mr Arere's application for declarations and other orders, the application discloses no reasonably arguable cause of action.

[7] The respondents ask the Court to strike out Mr Arere's claims or, alternatively, to stay the proceeding pending the completion of disciplinary action within the rules governing football, including any challenges or appeals.

The factual and procedural background to the proceeding

[8] These issues must be understood against the background of the procedural steps taken by Mr Arere and the respondents respectively. This case turns on the legal implications of the procedures that have been implemented by Mr Arere and the respondents from time to time. It is important to say, in fairness to Mr Arere, that I have not been required to consider any evidence about the merits of the allegations which led to his suspension from office, and he has had no opportunity to answer the allegations. It would be wrong, therefore, to make any assumption that they are well-founded.

[9] The relevant facts are not disputed and may be summarised briefly. Mr Arere was elected CIFA President on 23 June 2022. On 24 December 2022, six of the eight members of CIFA's Executive Committee wrote to Mr Arere, asking him to respond to certain allegations relating to his employment contract, tenancy

arrangements, and FIFA projects. As well, it was alleged that Mr Arere had inappropriately interfered with the actions of judicial bodies, interfered with national team selection and failed in other respects to carry out his duties as CIFA President. I refer to the allegations collectively as “the December allegations”.

[10] Mr Arere did not respond to the letter of 24 December. On 4 January 2023, six members of the Executive Committee requested Mr Arere, purportedly in accordance with CIFA’s constitution, to call an Executive Committee meeting on 5 January 2023 to discuss the December allegations. The constitution, however, required the president to convene the meeting within 21 days. Nevertheless, six of the Executive Committee members convened an Executive Committee meeting themselves, on 6 January 2023.

[11] At that meeting they resolved to temporarily suspend Mr Arere from his role until the next Annual General Meeting of the Association. The Committee appointed an acting chairperson to the OFC Disciplinary and Disputes Committee (the DDC). Mr Arere was notified of these events on 10 January 2023. On 13 January 2023, he lodged a complaint to OFC and FIFA about the actions taken by the members of the Executive Committee.

[12] On 1 February 2023, the DDC, led by the new acting chairperson resolved to suspend Mr Arere until CIFA’s next Annual General Meeting. On 2 February, however, FIFA and OFC informed CIFA’s General Secretary that the meeting on 6 January 2023 at which Mr Arere had been temporarily suspended had not been convened in accordance with CIFA’s constitution. FIFA and OFC declined, therefore, to recognise the provisional suspension of the CIFA president. One of the constitutional breaches was the assumption of authority by the CIFA disciplinary committee when CIFA’s rules required the internal dispute between Mr Arere and the other officials to be referred to an arbitral panel.

[13] On 14 February 2023, six members of CIFA’s Executive Committee requested Mr Arere, in his role as president, to convene another Executive Committee meeting within 21 days (by 7 March 2023) to consider the December allegations. Reminders were sent to Mr Arere on 27 February 2023 and 6 March 2023. Mr Arere did not convene a meeting as requested. His response was the filing of this proceeding.

[14] Mr Arere's failure to convene the Executive Committee meeting as requested resulted in his being provisionally suspended by the Executive Committee on 8 March 2023. Moeroa Tamangaro was appointed acting president.

[15] On 15 May 2023, the DDC determined that Mr Arere was banned for a period of 10 years from all football related activity. The reason for this serious disciplinary step was not that the December allegations had been found to have been proved, but that Mr Arere had breached the FIFA, OFC and CIFA rules against resorting to the jurisdiction of ordinary courts to resolve disputes.

The constitutional arrangements for the governance of football worldwide

[16] Member football associations that belong to the same continent have formed six confederations, recognised by FIFA, covering South America, Asia, Europe, Africa, North and Central America and the Caribbean, and Oceania. Each of the confederations is obliged by the constitutional arrangements to comply with and enforce compliance with the statutes, regulations and decisions of FIFA.

[17] The constitutional documents of FIFA, OFC and CIFA provide collectively for an exclusive dispute resolution regime. Among other things, the arrangements ensure that there is consistent decision-making among the hierarchy of bodies established for disciplinary purposes and the arbitration of disputes.

The banning of Mr Arere by the Disciplinary and Disputes Committee

[18] It was held by the DDC that the filing of this proceeding in the Court amounted to a breach of art 59(2) of FIFA statutes, art 44(2) of the OFC statutes and art 57(a) of the CIFA Constitution, by which members and officials are prohibited from having recourse to the ordinary courts for the resolution of disputes.

[19] Irrespective of the merits of the disciplinary procedures and orders to which Mr Arere has been subjected, therefore, the respondents argue that the issuing of proceedings by Mr Arere in this Court amounts to a serious and wilful breach of the governing rules, as confirmed by the sanctions imposed in the 15 May decision. They are:

- a) expulsion for seriously violating the FIFA and OFC statutes and the CIFA constitution;
- b) suspension from taking part in any football-related activity for 10 years; and
- c) suspension from entering any stadium and football venue for 10 years.

[20] The respondents note that Mr Arere had a right of appeal against the 15 May decision under art 126 of the CIFA Disciplinary Code and submits that that is the only means available by which he was able to challenge his expulsion.

What the Court has been asked to do

[21] Notwithstanding their firm view that this Court is not empowered to adjudicate on Mr Arere's complaints, the respondents properly conceded that the interests of justice required the Court to deal with the matters before it in some way. It was accepted that the Court could not merely leave the proceedings in abeyance while the disciplinary proceedings remained on foot and while Mr Arere had rights of appeal which he was entitled to exercise. The parties agreed that the Court should address the interlocutory issues which were identified as involving:

- a) Mr Arere's application for interim injunctions restraining the football organisations from taking any further steps in the disciplinary proceedings and seeking remedies, on an interim basis, the effect of which would be to set aside at least temporarily the decisions and orders which have been made in the disciplinary context.
- b) An application by the respondents for an order striking out Mr Arere's proceedings on the ground that the Court has no jurisdiction to hear it; or alternatively
- c) An application by the respondents for a stay of the proceedings in this Court pending completion of the disciplinary process, including the exercise or expiry of any appeal rights held by Mr Arere.

[22] Counsel filed comprehensive written submissions which were addressed orally in a hearing on 6 June 2023.

The Court's jurisdiction under the Declaratory Judgments Act 1994

[23] In the preparation of my reasoned judgment on the respondents' applications to strike out the applicant's claims, I formed a tentative view that s 3 of the Act, on which the applicant relies, may not provide the Court with jurisdiction to grant the relief the applicant seeks.

[24] I issued a minute calling for further submissions from counsel. They were received and I have considered them carefully.

[25] I understand that all parties would welcome the views of the Court on the implications of the FIFA, OFC and CIFA rules for the Court's ability to determine the validity of the disciplinary steps taken by the respondents. There is no merit, however, in the Court expressing its views, obiter, on the important legal issues raised by the pleadings if it has no jurisdiction under the Declaratory Judgments Act to entertain this proceeding. I turn to the nature of the Court's jurisdiction under the Act.

[26] So far as is relevant, s 3(1) of the Act provides that, where any person

... has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any enactment, or any deed, will, or document of title, or any agreement made or evidenced by writing, or any memorandum or articles of association of any company or body corporate, or any instrument prescribing the powers of any company or body corporate ... such person may apply to the High Court by originating summons for a declaratory order determining any regulation, bylaw, deed, will, document of title, agreement, memorandum, articles of [sic, "or"?] instrument, or of any part thereof.

[27] Considering the equivalent provision in the Declaratory Judgments Act 1908 (the New Zealand Act) which is, for all relevant purposes similarly worded, Elias CJ said in *Mandic v The Cornwall Park Trust Board (Inc)*¹, that the jurisdiction under the New Zealand Act enables anyone whose conduct or rights depend on the effect or meaning of an instrument, including an agreement, to obtain an authoritative ruling.

[28] Looking more closely at the wording of s 3 of the Declaratory Judgments Act 1994, it may be seen, first, that the Court may provide its ruling in circumstances

¹ *Mandic v The Cornwall Park Trust Board (Inc)* [2011] NZSC 135 at [9].

where the person applying for it “has done or desires to do any act....” This is not such a case. In this proceeding, the applicant does not seek the Court’s ruling on any act or intended act of his own. He seeks the Court’s ruling on the actions of the respondents.

[29] Second, and more fundamentally, Mr Arere does not ask the Court to determine the effect or meaning of any of the various FIFA, OFC and CIFA statutes and rules that are relevant to the proceeding. He asks the Court to declare that:

- (a) he is the duly elected president of CIFA;
- (b) the actions of the respondents on 6 January 2023 were unlawful and not in compliance with the CIFA Constitution and its related regulatory regime; and
- (c) all subsequent actions after 6 January 2023 by the respondents are –
 - (i) ultra vires and of no legal effect; and
 - (ii) in breach of their fiduciary duty to the members of CIFA.

[30] To uphold those claims, the Court would need to hear evidence from Mr Arere and the respondents and to make findings about the reasons for the disciplinary and other actions taken. The Court would then need to resolve whether the respondents’ actions were inconsistent with their obligations to Mr Arere under the regime of statutes, regulations and rules governing football in the Cook Islands. That type of investigation and determination is not embraced by the statutory concept in s 3 of a ruling on the meaning and effect of the documents that make up the disciplinary rules by which the parties are bound. As Mr Vakalalabure properly conceded in addressing this issue, the jurisdiction is not an advisory jurisdiction. It is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else.²

² *Mervin Communications Ltd v Telecom Cook Islands Ltd* [2008] CKHC 30; *Gouriet v Union of Post Office Workers* [1977] UKHL 5; (1978) AC 435 at 501 per Lord Diplock.

[31] Third and finally, the relief Mr Arere seeks involves more than the making of declarations about the lawfulness of the respondents' actions. Given that the circumstances have changed since Mr Arere first asked the Court to intervene, effective remedies would involve questions of his entitlement to be reinstated or otherwise compensated for the loss of his benefits as president of CIFA. He seeks orders regarding the taking of financial accounts.

[32] Put simply, Mr Arere's claims are for breaches of contract and for remedies to rectify or compensate him for any proved breaches.

Should the Court permit the amendment of Mr Arere's proceeding?

[33] Properly recognising the obstacle faced by Mr Arere's election to use the Declaratory Judgments Act as the vehicle for obtaining the remedies he seeks currently, Mr Vakalalabure submits that, if the Court concludes that it does not have jurisdiction to deal with the claims in their present form, it should permit Mr Arere to amend his pleading under r 69 of the Code of Civil Procedure.

[34] Counsel proposes that the statement of claim be amended to provide that the sole remedy sought under s 3 of the Act would be an order that:

The Applicant is the duly elected President of the Cook Islands Football Association (hereinafter called "CIFA") and should NOT BE PROHIBITED from fulfilling his obligations as President.

[35] The proposed amended grounds on which the Court would be asked to determine the issues, however, do not engage the Court exclusively in determining and declaring the meaning and effect of the constitutional provisions comprising the disciplinary regime. They read:

- A The purported Executive meeting of 6 January 2023 did not comply with the CIFA Constitution and its related regulatory regime.
- B The Respondents have refused and continue to refuse to accept the recommendations made by FIFA and OFC Governance directive dated 2 February 2023 despite the stipulation that all CIFA bodies and officials must observe and comply with the Statutes, Regulations, Directives, Decisions, and Code of Ethics of FIFA, of OFC, and CIFA in their activities.

- C The OFC Disciplinary and Ethics Committee have yet to issue any decision regarding the complaint despite the passage of 49 days since filing the complaint with them.
- D The first six Respondents have rejected the Applicant's offer for Arbitration as required by the CIFA Constitution. Accordingly, the Applicant has exhausted all avenues of seeking redress within the CIFA regulatory regime, and the Applicant has no other option but to resort to this Honourable Court.
- E The appointment of the General Secretary can only be proposed by the President. However, the tenth Respondent was purportedly appointed by the first six Respondents on 3 February 2023, effectively expanding FIFA Forward funds.
- F That the first six Respondents collaborating with the General Secretary (then and now) have effectively taken over control of the CIFA General Secretariat, its management, administrative, finance and operational functions; and have withheld the salary and benefits of the Applicant since January 2023 and have arbitrarily prohibited the Applicant from attending to his duties under the CIFA Constitution and its related regulatory regime.
- G The first six Respondents had reconstituted a CIFA judicial body – Disciplinary Disputes Committee (the "DDC"), to hear allegations against the Applicant when the DDC did not have jurisdiction to hear such matters and/or was not properly authorized to hear such matters and/or not properly constituted.
- H That the first six Respondents had purportedly dismissed/suspended the Applicant, and are demanding that the Applicant exercise his powers under the CIFA Constitution (which are purportedly suspended), to convene an Executive Committee Meeting on 7 March 2023 for "provisionally dismissing" the Applicant based on investigations and decisions made after 6 January 2023
- I That the Respondents' actions, collectively and/or individually, on 6 January 2023 were unlawful and not in compliance with the CIFA Constitution and its related regulatory regime.
- J That all subsequent actions from 6 January 2023 made by the Respondents collectively and/or individually are ultra-vires and of no legal effect, namely:
- i Re-constituted Dispute & Disciplinary Committee;
 - ii Issuance [sic] trespass notice;
 - iii Appointment of Allen Parker; and
 - iv Retainment of former General Secretary
- K That all subsequent actions from 6 January 2023 made by the Respondents collectively and/or individually are in breach of their fiduciary duty to the members of CIFA, namely non-compliance with FIFA and OFC Directives.

Conclusions and orders

[36] I am satisfied that the Court has no jurisdiction under s 3 of the Declaratory Judgments Act 1994 to address Mr Arere's claims and that the amendments to the pleadings that are now proposed would not cure the ills of the claim as presently drafted.

[37] I decline to permit amendment of the pleadings and direct that the proceeding shall be struck out.

Costs

[38] The claim having failed, the respondents are entitled to costs which are reserved for discussions between counsel. Unless the parties agree on costs:

- (a) the respondents shall have until Friday 21 October 2023 to file and serve submissions as to costs;
- (b) the applicant shall have until Friday 11 November 2023 to file and serve submissions as to costs in response; and
- (c) the respondents shall have until Friday 18 November 2023 to file and serve submissions strictly in reply.

[39] Costs shall then be determined on the papers unless the Court directs otherwise.



C H Toogood, J