

Latu and ors v Fonua and ors

Supreme Court
Williams J
Civil Case 132/1974

3 March 1983

Voluntary association - breach of Constitution of Free Church - adultery not a necessarily a disqualification for office of President

10 *Voluntary Association - rule of voluntary association authorising expulsion of member who seeks investigation of officers of association is contrary to natural justice and of no effect.*

Latu and another Minister of the Free Church of Tonga brought proceedings in the Supreme Court against the President of the Church, KSL Fonua and other members of the Church and the Church itself, alleging that the President and the trustees had used the money and property of the Church, and had failed to account for their use of such money and property, and that the President had appointed certain persons as ministers of the Church, had dismissed other ministers of the Church, had acquired property of the Church, and had disqualified himself from leadership of the Church by his adultery, all in
20 contravention of the Constitution of the Church.

The defendants denied these allegations and there was a hearing of 5 weeks before a judge appointed from outside Tonga, at the conclusion of which a very extensive judgment was delivered upholding most of the plaintiff's claims. The judgment is too extensive to reproduce in full in these Reports but excerpts of the judgment which describe the claim of the plaintiff and summarise the findings of the judge have been included.

30 Counsel for plaintiff : Mr Edwards
Counsel for 1st 2nd 3rd and 4th defendants : Mr Ryan
Counsel for 5th, 6th and 7th defendants : Mr Niu

Williams J

Judgment

The Statement of Claim of 27.5.82 sets out that the 1st and 2nd plaintiffs are Ministers of the Church but that is denied by the defendants.

Paragraphs 8 to 11 allege that defendants 2, 3 and 4 are trustees of the Church and responsible for its land and monies. The defence admit this but deny that they are responsible for monies of the Church.

In paragraphs 14 to 17 it is alleged that the President in breach of his oath under the Constitution has committed acts of adultery and prayers (a) to (d) ask for an Order that he be disqualified from office and for his removal. The adultery is denied.

Paragraphs 18 and 19 allege the President's failure to maintain the Village Trustee system under the Constitution. It is denied.

Paragraph 20 to 23 plus paragraphs 42 to 50 refer to an annual collection of monies called "misinale" and allege that it has been wrongly used to create the limited liability companies SII-KAE-HA HOLDING Co. (defendant 6) and 'EFALATA BUILDING SUPPLY Co. and that \$40,000.00 invested in 'EFALATA in the President's name is Church money, and that operation by the Church of such companies is ultra vires the Constitution. Whilst creation of the companies is admitted any impropriety is denied by the President.

Paragraphs 23 to 26 complain that contrary to the Constitution the President was placed in charge of all the Church's money for 5 years by a resolution of the 1978 Conference and that he has failed to present any accounts in respect of it. The defendant 1 (President) claims that the resolution was proper and denies failure to account.

Paragraphs 27 and 28 allege that the President's salary has been Unconstitutionally increased from \$400 to \$7000.00 per annum.

Paragraphs 29 to 31 state that the President's purported appointment of 10 Ministers in the New Zealand branch of the Church was in excess of his authority under the Constitution. Breach of the Constitution is denied.

Paragraphs 32 to 36 refer to a property at 69 Vermont Street, Auckland, being purchased by the President's father and predecessor in office with Church money in March 1953 for Church purposes and that it is now registered in the President's name as his own. The defence claim that it was purchased by the former President with his own money.

Paragraphs 37 to 40 allege the making by the President of unlawful i.e. un-Constitutional loans. He pleads that they are lawful.

Paragraphs 42 to 48 refer to a limited liability company SII-KAE-HA HOLDINGS COMPANY LIMITED, joined as the 6th defendant. They allege that land on Kanatea Island was linked with Church land for the creation of a large tourist hotel/resort complex but that it is registered as a private company.

Paragraphs 49 and 50 refer to the un-Constitutional creation of another limited company, 'EFALATA BUILDING COMPANY LIMITED, the 7th defendant, allegedly as a Church owned company. Their complaint is that no proper provision is made to safeguard the interests of the Church, and accountability for Church funds used in establishing it.

In paragraphs 51 and 52 it is alleged that the third defendant Semisi Fonua, being a trustee of the Church, and Principal of the Church College of Tailulu, operated a petrol station business at Tailulu without accounting to the Church.

The 2nd, 3rd and 4th defendants are accused in paragraphs 53 and 54 of failing in

their duties as trustees in not watching the first defendant's expenditure, and in failing to have certain real property of the Church registered in the trustees' names.

The allegations conclude by stating that the 1st defendant (President) has breached his oath of office in failing to administer the Church's affairs in accordance with the Constitution and that he has thereby disintitiled himself to continue in office.

I will not recount the fifty or so prayers at the end of the Statement of Claim.

It is sufficient to say at this stage that the Statement of Defence amounts to a denial of all the allegations.

90 The Church, 5th defendant, filed a counterclaim the first paragraph of which refers to Writ 70/81 in which the Church as plaintiff sued the 1st plaintiff Ma'ake 'A hokava Latu and a Supreme Court direction on 9.6.81 to join it as a counterclaim in the present action. There is nothing in the record to indicate that the plaintiffs have ever complied with that direction. It may be that counsel considers that the issues raised in the instant pleadings include those raised in Writ 70/81. The counterclaim alleges that the plaintiffs 1 and 2 have violated the Constitution in the way in which they have precipitated the present action, that the second plaintiff has behaved improperly in regard to Church property and funds in New Zealand and that at the '79 Conference they were dismissed from the Church. I might indicate here that these matters were raised and evidence was called thereon by the 1st
100 defendant (President). The Church seeks a declaration that plaintiffs 1 and 2 are no longer Ministers or members and a direction that plaintiff 2 accounts for monies and properties in New Zealand as from 1974.

It is pleaded in the Statement of Defence of defendants 1, 2, 3 and 4 dated 21.4.81 that the plaintiffs 1 and 2 are not Ministers of the Church. The Statement of Defence filed by defendants 5, 6 and 7 dated 1.2.83 quotes Regulation XXXII of the Laws and Regulations which purports to lay down that any one who proposes to check the affairs of the Church without the consent of the President and Plenary Conference shall be struck from the membership. A counterclaim of the 5th Defendant (Church) asks for a
110 declaration that plaintiffs 1 and 2 are not Ministers or members of the Church and for an injunction restraining them from holding themselves out as Ministers.

If Regulation XXXII were to be followed literally one could never investigate Church affairs if the President were implicated because he would be unlikely to consent. The person who does investigate without consent is expelled under Regulation XXXII and if he litigates the President and Church argue that because he is no longer a member he cannot sue. This stance has been adopted by the President and Church against the 1st and 2nd plaintiffs.

120 Plaintiff No. 1, Ma'ake 'A hokava Latu, was "dismissed" by the 1979 Conference for bringing charges concerning the affairs of the Church without permission under Regulation XXXII. The dismissal is contained in a letter Ex.D.1 dated 18/5/81. A purported dismissal on such ground is ineffective. The President and the Conference Ministers are in a fiduciary position and as such they cannot say "you are not allowed to inquire into my conduct without my permission." It would defeat any attempt to ensure that justice was done to the members of the Church.

I find that Plaintiff No. 1 is still a Minister and a member of the Church.

130 With regard to Plaintiff 2, Peni Latu, the defence appear to rely entirely on a temporary injunction of the Supreme Court of N.Z. that he should not hold himself out in N.Z. as a Minister of the Free Church. However, the N.Z. action has not been heard. The

temporary injunction issued in July '79 i.e. 3 1/2 years ago; it is a long time for a temporary injunction to remain in force. Whilst this Court will and should pay the greatest of respect to a permanent injunction issued in N.Z. after a thorough investigation, this Court in making a full investigation cannot restrict itself because of the temporary injunction. I do not know what affidavit evidence the N.Z. court had before it.

Peni Latu in his evidence-in-chief at P.W.8 stated that he was not aware of the Conference decision in 1979 to dismiss him. He says the temporary injunction followed the institution by him of these proceedings.

140 The President in his evidence-in-chief stated that all 3 plaintiffs were dismissed by the 1979 Conference. He says that plaintiffs 1 and 2 were dismissed for instituting proceedings without raising it in Church. No doubt he had Regulation XXXII in mind and I have already expressed my views on it. In my view Regulation XXXII is contrary to natural justice.

The Supreme Court in New Zealand was probably unaware that Peni Latu was dismissed as a Minister because he questioned in Court the handling of the Church's temporal and financial affairs by the Conference and the President without their consent.

I find that Peni Latu's purported dismissal was improper and contrary to natural justice and that it is ineffective to deprive him of his post as a Minister.

150 At the time they instituted the proceedings, plaintiffs 1 and 2 were Ministers i.e. as at February 1979 they were then entitled to issue their writ. I am satisfied that they are still Ministers.

The plaintiffs 1 and 2 are suing in their own names whilst the third plaintiff purports to represent a section of the members of the Church. As I have indicated the evidence reveals that the President's influence in the Conference is very substantial and the Conference has purported to invest him with power and authority which is outside the Constitution, and the Ministers of the Conference have ignored their Constitutional duty to care for the Church's money. Those who have endeavoured to inquire have been stifled or dismissed from their posts. I conclude that the plaintiffs come within the exception shown in Burland v Earle [1902] A.C. 83 referred to by the Privy Council in its judgment of 5th May 1982..

160 The defendants contend that the plaintiffs are not motivated by decent and honest intentions but are activated by a spirit of maliciousness and are attempting by this action to detract from their own dubious behaviour in New Zealand in relation to Church property there. Plaintiff 2, Peni Latu, gave evidence of the build up of a Church from residential property in New Zealand, and of purchases of property in New Zealand by a Trust Board which held them for the Church. Property purchased by the Church in Tonga appears to have been under mortgage at the time it was sold to the Church by arrangement with Peni Latu (Plaintiff 2.). It appears that he also sold a property to the Church a very short while after he had purchased it and that he made \$9,000.00 profit on the re-sale. His profit was in the region of 85% to 90%. He was not at all anxious to admit this dubious behaviour during cross-examination.

170 Counter issues were raised by Peni Latu such as heavy expenses incurred by the Trust Board in paying mortgage interest, stamp duties, and rates, and that for some years Tongan Church Ministers or members residing in the houses were refusing to pay rents at the instigation of the Church in Tonga.

180 None of the matters referring to house purchases, and sale by Peni Latu and the Trust

Board on which he was cross-examined were referred to in the Statement of Defence of defendants, 1, 2, 3 and 4, no declarations are sought, and no order for accounts.

They are matters going to the credibility of the plaintiffs and in the absence of an exhaustive inquiry which is not justified on the pleading I am unable to conclude that Peni Latu (Plaintiff 2) or the other plaintiffs are discredited.

The Church as 5th defendant endeavoured by way of counterclaim to consolidate with these proceedings an action initiated by the Church, in Tonga Action No. 70/81, against plaintiff No. 1, Ma'ake 'A'hokava Latu. No doubt it related to misinale of Ha'apai, But no step had been taken to obtain any orders for consolidation or directions thereof and I did not entertain that action as a counterclaim in these proceedings.

I conclude that the action by the plaintiffs is maintainable. To so hold at this late stage may seem incongruous but I think it is apparent that such a decision required a consideration of the whole of the evidence.

I have endeavoured to make the judgment intelligible to the Church members and this has had the result of making it rather verbose.

I am not satisfied that adultery is set out in the Constitution as an inevitable disqualification from office Regulations of the Church exhort worshippers and officers in the Church to follow the dictates of the Bible and it is left to an offender's peers to consider how to deal with him. Whilst I consider the President's conduct in seducing young girls, daughters of Ministers, living at his home or that of his mother as being reprehensible I do not think that I would be justified in holding that he must be dismissed by this Court on that ground. He should be dealt with for his short-comings by an impartial meeting of Ministers at Conference, subject always to his accountability as determined by the Official Referee mentioned hereinafter.

I do not propose to set out verbatim and answer each of the 50 or so prayers in the Statement of Claim.

I make the following declarations which already appear in the judgment:-

- (i) The President has committed adultery during the past 14 years on numerous occasions with Falesima and at least once with 'Alisi.
- (ii) The 10 persons named in paragraph 28 of the Statement of Claim and purportedly appointed as Ministers by the President are not Ministers or Trainee Ministers as the case may be of the Church.
- (iii) The business of lending from the Church funds as conducted by the President is unauthorised by the Constitution and is un-Constitutional.
- (iv) Creation and registration of the 'Efalata Building Supply Company Limited was and is contrary to the Constitution.
- (v) The President as sole trustees of the Church's funds since February '78 has deprived Village Trustees of their Constitutional portion of the misinale.
- (vi) The President as sole trustee of the Church's funds since February '78 has failed to distribute the Misinale in accordance with the Laws and Regulations of the Church.
- (vii) The President as sole trustee as aforesaid has appropriated Church funds to the 'Efalata Company Limited in breach of his Constitutional powers.
- (viii) The President is not empowered under the Constitution or Regulations to assume sole control of Church monies and his assumption of such authority in 1978 was Unconstitutional and accountable.

- (ix) The purported dismissal of the plaintiffs under Regulation XXXII is contrary to natural justice and they remain Ministers of the Church.
- (x) The dismissal of any other Minister under the purported authority of Regulation XXXII is invalid and contrary to natural justice.

ORDER THAT:

- (i) The Conference and President are restrained from recognising or in any way treating the 10 persons named in paragraph 28 of the Statement of Claim as aforesaid as Ministers or Trainee Ministers of the Church.
- (ii) The Conference and President are restrained from declaring that the plaintiffs are not Ministers of the Church and from attempting to bar them from any meetings attended by Ministers under the Constitution or regulations of the Church or from exercising any of the privileges or performing any of the duties of Ministers.
- (iii) The 'Efalata Building and Supply Co. Limited shall forthwith be wound up and cease to be involved in further business. The directors shall account for the expenditure of all monies received from the Church; the signatories to the company's cheques namely Lelea Fonua, Ma'ata Fonua and Sione Foliaki shall account for all monies withdrawn from its bank account. The company will be debited in its accounting for all petrol and diesel supplied by Tailulu Petrol Station. Upon realisation of the company's assets and cash any deficit due to the Church shall be noted. From the date hereof all cheques drawn by 'Efalata company shall be countersigned by the Registrar of the Supreme Court and only drawn against written demands.
- (iv) The President shall account for all petrol and diesel purchased by the Church and Tailulu Petrol Station since its inception to the date hereof.
- (v) The President shall provide a record of all monies received by the Church funds since 2/2/74 and of all repayments and of interest earned thereon in Tonga and New Zealand.
- (vi) The President shall provide a record of all monies received by the Church in Tonga since 1/4/78 to the date hereof and of all Church monies expended in the same period.
- (vii) The President is forthwith restrained until the further Order of the Court from signing any cheques on the Church's bank accounts in Tonga and New Zealand unless countersigned by the Registrar of the Supreme Court.

Every such cheque shall be crossed account payee and shall only be drawn against a written demand signed by the payee and giving details of the payment demanded.

Neither the President, his wife, his children or their spouses, nor his brothers, sisters nor their spouses shall be payees for the purposes of this Order nor shall any further payment be made from Church funds for the benefit of Tailulu Petrol Station nor the 'Efalata Building Company Limited.

- (viii) The President's records of the accounts of loans made and repaid, of Church funds received, collected and expended as aforesaid shall set out the dates of all payments and purchases supported by relevant invoices, statements, vouchers, bank statements and other relevant documentation; all omissions shall be explained in the account and the whole verified by affidavit, and filed

in Court in triplicate on or before 30/6/83.

- (ix) Tonga Management and Consultancy Services (partners: Graham Johns, Evelyn Joan Johns), box 74, Nuku'alofa, Tonga is appointed official referee to examine and check the accuracy of the records compiled under the foregoing orders for which purpose he shall check on misinale collections gathered in all Districts and paid to the President as from 2nd February 1978, and may ask the operators of Tailulu Petrol Station, and the Director and Secretaries of 'Efalata Building Company Limited for explanations and information; likewise the District Secretaries, and Conference Secretaries. They shall record as far as possible the total sums accounted for from the misinales in Tongatapu, from those collected in Ha'apai and from those collected in Vava'u as from 1/4/78 to the date hereof, and losses if any incurred in the operation of 'Efalata Limited and Tailulu Petrol Station from their inception to the date of his report.

The Official Referee shall be remunerated in the sum of \$4000.00 and should the period of his employment exceed 4 weeks he shall be remunerated at \$150.00 per day, such sum to be paid for from Church funds. His findings should be filed on or before 30th September '83 and forthwith notified to the parties by the Registrar.

It is apparent that the Conference as at present constituted is unlikely to be impartial in its election of a President during the 1983 Conference. The current Conference Secretary is hereby restrained from taking part in the election of a President. The Conference members shall be informed of their right to cast a vote for any Minister who offers himself as a candidate for the office of President. All Ministers who have given evidence in these proceedings are restrained from voting in the 1983 Conference for a President. In addition the following persons shall be restrained likewise from voting:-

The President, the defendants 2, 3 and 4, the plaintiffs, Falesima's husband and father, brothers and brothers - in - law of the President who are Ministers and 'Alisi Maka's father and husband if Ministers and directors of 'Efalata Building Company Limited.

I do not consider that the Court should assume the responsibility of dismissing the President or declaring him unfit for office on the issue of adultery only. The Ministers entitled to vote under these Orders will have to indicate their own views in the 1983 District Meetings and Conference on the adultery aspect. Accordingly I do not restrain the President, or any other defendant or any of the plaintiffs, or witnesses or other persons from being candidates in the 1983 Conference for the post of President. Although they may be candidates for President they shall not be permitted to vote and shall not attend the Conference whilst nominations for President are received and voted upon. The Conference shall be chaired by the most senior Minister excluding the parties and witnesses in these proceedings.

It is of course open to the Conference to determine whether to permit the President to be a candidate at the 1983 Conference having regard to his breaking rules of the Constitution.

The counterclaim of the Church (defendant 5) is dealt with in the foregoing Declarations and Orders and it is dismissed with no order as to costs.

Directions for the winding-up of 'Efalata if required may be issued by this Court as necessary.

Should sums averaging more than \$2000 p.a. be unaccounted for by the President under the Official Receiver's report from Church misinane funds as from 1/4/78 the plaintiffs shall be at liberty to move this Court, within 4 weeks from the date the Registrar notifies them of such filing, for the President's dismissal from the post of Minister of the Church. Notice of such motion to be served upon the President not less than 21 days before it is set down for hearing.

The plaintiffs will pay the taxed costs of defendants 2, 3 and 4.

The defendants 1 and 6 will pay the plaintiff's taxed costs each bearing 50%.

Should any sums unaccounted for average less than \$2000 per annum or the plaintiffs fail to move the Court as aforesaid defendants the may apply for removal of all restrictions under these Orders in so as they apply to him.