

**BETWEEN: The Apostolic Church (Vanuatu)
Committee**

Appellant

AND: George Andrews

First Respondent

**AND: Zebedee Tanga, Paul Yau, Bradley
Moli, Silas Fatu, Harry Tura, Simon
Paia, Amos Karae, Hollingsworth Tari,
Levi Karo, Joseph Vira, Isaiahiokam,
Freeman Nariu and Zulu Molou**

Second Respondents

Coram:

**Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Dudley Aru
Hon. Justice Daniel Fatiaki
Hon. Justice Paul Geoghegan**

Counsel:

**Mr. S. Hakwa for the Appellant
Mr. J.S. Tougon for the First Respondent
Mr. R. T. Kapapa for the Second Respondents**

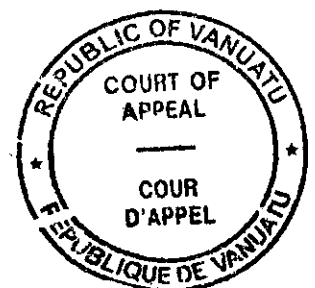
Date of Hearing: 7th November 2017

Date of Judgment: 17th November 2017

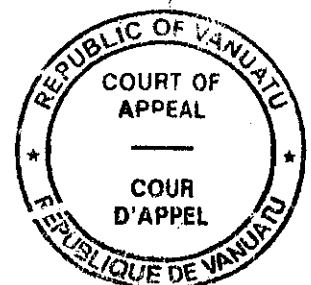
JUDGMENT

Background and Chronology

1. The underlying dispute in this case concerns competing assertions by two factions each claiming to have legitimate control over the affairs of the Apostolic Church (Vanuatu) Committee (Inc.) ("*the Church*") which was incorporated in 1992 under the Charitable Associations (Incorporation) Act [CAP. 140] with an original governing Council comprised of 13 appointed members. ("*the original Council*")

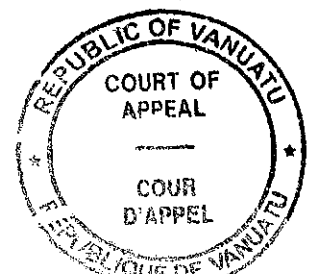


2. ~~Soon after its incorporation cracks began to appear between members of the Church and a breakaway faction was set up in 1993 under the name: Apostolic Life Ministries at Tebakor. The remaining original faction moved to Ohlen in Port Vila. Then followed a period of relative calm until 2014 when there was an attempt to compulsorily retire the senior pastor of the Ohlen assembly. This led to the amendment of the Church's Constitution and the formation of a new governing council by the breakaway faction ("the new Council"). The new Council sought recognition from the Registrar of Charitable Associations.~~
3. By letter dated 02 April 2015 the Registrar acknowledged receipt of the amended Constitution and the new organisational structure of the Church which would: "... be filed for our records and we consider that the new committee members are elected in accordance with the provision of the constitution of the Apostolic Church of Vanuatu".
4. Surviving members of the original Council voiced their concern and dismay to the Registrar at the acceptance and registration of the new Council as well as the amended Constitution and sought the reversal of the Registrar's decisions in letters dated 4 June 2015 and 21 December 2015.
5. Matters escalated and officers of the Registrar of Charitable Associations held a meeting on 4 March 2016 with representatives of the disputing factions in an attempt to resolve their differences with little success.
6. On 8 April 2016 in a lengthy letter jointly addressed to the leaders of both factions the Registrar of Charitable Associations determined that the new Council was not appointed in accordance with the existing Constitution and all decisions on amendment of the Constitution, church structure and approval of by-laws or appointments "are null and void" and therefore "the Registry (sic) will be amended accordingly". In essence the original Constitution and original Council were reinstated.
7. By letter dated 12 May 2016 solicitors acting for the new Council wrote to the Registrar inviting him to reconsider and change his decision failing which a judicial review application would be filed. The Registrar declined and an application for judicial review was filed in the Supreme Court on 30 September 2016.
8. Principal amongst the grounds raised in support of the judicial review was an assertion that since its incorporation in 1992 membership of the original Council had reduced from 13 to 3 with the passing away of 9 members without any replacements being made or officially notified. The



~~claim averred that the original Council had "become defunct, dissolved and/or unable to function properly or"~~

9. On 16 November 2016 whilst the case was still being managed in the Supreme Court, official records of the Church recorded the appointment of 13 named individuals as committee members. This led to an application to amend the judicial review to quash the registration of 11 of the named individuals and a counter application by the 11 individuals to be joined as persons likely to be affected by the outcome of the judicial review application. By order dated 10 February 2017 the 11 individuals were joined as interested parties.
10. On 27 April 2017 the interested parties urgently sought an injunction to restrain 21 named individuals from using, affiliating, and/or organising any meeting in the name of the Church.
11. In a lengthy Minute on 18 May 2017 the judicial review application was listed for a 2 day trial starting 29 August 2017. The trial judge also made numerous pre-trial orders for the filing of sworn statements, cross-examination notices, an agreed bundle of documents and written submissions and outline of arguments all to be filed by 14 August 2017.
12. On 14 August 2017 counsel for the Registrar of Charitable Associations filed an outline of submissions. On 16 August 2017 the Court issued. A further Minute in the following terms:-
 - "1. This case is listed for trial on 29th and 30th August. Directions were given on 17th May. Counsel are to confirm that all the directions have been complied with.
 2. Counsel are given clear warning that if the directions have not been complied with then the trial is likely to be vacated. If the trial is vacated that will have costs consequences. That may even involve orders that counsel are personally liable to pay costs.
 3. In all the circumstances counsel are to:
 - i) ensure they have complied with all directions;
 - ii) be ready to say why they should not personally be liable for costs. (Please refer to Division 3 Rules 15.26 of the Civil Procedure Rules).
13. On 28 August 2017 the day before the trial was to commence, counsel for the Church filed a Notice of Discontinuance of the claim against the Defendants.
14. On 29 August 2017 in the absence of counsel for the Church, the Court issued a Decision on Costs in the following relevant terms:



1. *A notice of discontinuance was filed by the claimants yesterday. Counsel for the defendants have appeared today and asked for costs. Rule 9.9(4)(c) of the CPR allows such an application to be made. The claimants are not here to argue against an order but that is a decision made of their own violation.*
2. *I will make an order that the claimants pay the costs of the First and Second Defendants such costs to be taxed on a standard basis by the Master of the Supreme Court if not agreed.*
3. *For the purposes of the costs order the claimants are there who filed sworn statements in support, namely Allarow Bani, Kami Toa and William Koli.*

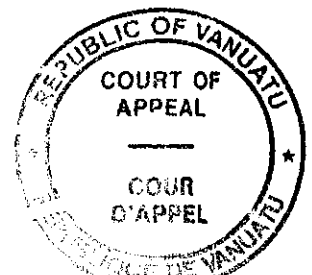
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6. *The order made is:-*

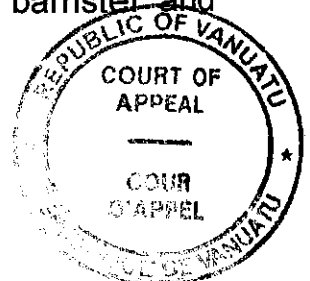
- (i) *The claimants shall pay the first and second defendants costs, such costs are to be taxed on a standard basis by the Master of the Supreme Court unless the costs are agreed.*
 - (ii) *For the purposes of costs and on the basis no application was made for an order pursuant to Rule 3.12 of the Civil Procedure Rules the claimants are (jointly & severally) Allanrow Bani, Kami Toa and William Koli.*
15. In so ordering the trial judge accepted that the true claimant in the case was not the Church but rather the members of the illegitimate new Council which included the 3 named individuals. It was accepted at the hearing of the appeal that William Koli was wrongly named in the costs order and other members who should have been named were not. Counsel also accepted that if the appeal fails then the unnamed members should be added in any order for costs.

The Appeal and Discussion

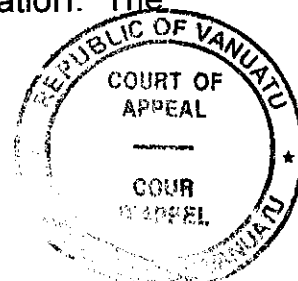
16. On 29 September 2017 the Church filed a Notice of Appeal appealing against the decision on costs advancing several grounds of appeal which are conveniently reduced in counsel's submissions to two (2) issues as follows:
- (1) *The Appellant was not given any opportunity at all to be heard on costs before the learned trial judge made his decision; and*
 - (2) *Neither the first nor the second respondents were entitled to costs because they were not represented by a lawyer during the proceedings (Rule 15.4 Civil Procedure Rules 2002)*



17. Before dealing with the grounds of appeal it became necessary at the hearing of the appeal to clearly establish the representation of the parties. After discussions, appellant's counsel accepted that he was not acting for the Church in the appeal but, rather, for the individuals named in the Application lodged with the Registrar of Charitable Associations dated 19 November 2017.
18. The appellant's first ground of appeal was a complaint that the costs order of 29 August was made in their absence. Whatever the merits of this argument counsel for the appellants could not identify any additional matters the judge failed to take into account in awarding costs. The appellants inevitably faced a costs award against them given the late abandonment of their proceedings. The order made was costs only on a standard basis. We dismiss this ground of appeal.
19. The second ground of appeal was clarified in counsel's written submissions and during the hearing of the appeal. There are two aspects to this second ground that differs with each respondent as follows:
- (a) In respect of the first respondent who is the Registrar of Charitable Associations the complaint is that he was represented by an "in house" lawyer who worked for the organisation and was therefore not a lawyer in private practice; and
 - (b) In respect of the second respondent, their lawyers although in private practice had no practising certificate and therefore were not entitled to represent the second respondent.
20. Rule 15.4 of the Civil Procedure Rules 2002 ("CPR") provides:
- "A party who is not represented by a lawyer:*
- (a) ...
 - (b) *is not entitled to recover costs."*
21. Plainly the Rule recognises and distinguishes between a "party" in an action and the "lawyer" representing that party. In the case of the first respondent who is improperly sued in this personal name, it is common ground that he never appeared in person and was always represented throughout the proceedings by a "lawyer" namely John Stephen Tougon.
22. On that basis alone the Rule has no application to the first respondent who was not a "self-represented" party. Additionally, Rule 20.1 defines a "lawyer" as a person entitled to practice in Vanuatu as a barrister and solicitor.



23. Appellant counsel submits however, that the lawyer representing the first respondent was a full-time paid employee of the organisation that was headed by the first respondent and, as such, the first respondent was not entitled to costs. We disagree.
24. The lawyer concerned had to be specially assigned to represent the first respondent and had devoted a good deal of time and effort corresponding with the disputing factions of the Church as well as taking instructions, settling pleadings and representing the first respondent at several conferences and in court. In doing so the first respondent's lawyer was performing legal services and acting "as a barrister and solicitor" and that does not change merely because the lawyer is coincidentally an employee of the organisation headed by the first respondent. It is the services undertaken and not the employment status of the lawyer that matters in an award of costs.
25. Needless to say if an outside lawyer had been instructed to appear for the first respondent no possible complaint could be made about the costs order. In our view the employment status of the first respondent's lawyer does not prohibit the costs order made in favour of the first respondent.
26. As to limb (b) of the second ground of appeal, the appellant submits that the first respondent could not seek costs because their purported lawyer Mr. Tougon was not an unconditionally registered legal practitioner. Mr. lauma and Mr. Kapapa has also represented the second respondents and there was no evidence they too were unconditionally registered legal practitioners.
27. We reject this ground of appeal. There was no evidential basis for the appellant's submissions. In the absence of any recorded objection to the appearance of Mr. Tougon at any of the several conferences held during the management of the case and on the face of a Certificate of Unconditional Admission issued to Mr. Tougon on 27 August 2008 unconditionally admitting him "to practice as a Barrister and Solicitor of the Supreme Court" and furthermore, given the absence of any evidence to support counsels' bald assertion that Mr Tougon has no practising certificate, we reject and dismiss the submission as unfounded speculation.
28. Similarly, in the case of Robin Tom Kapapa the lawyer for the second respondents, this Court was provided at the hearing of the appeal with a copy of his Certificate of Unconditional Admission issued by the Chief Justice and dated 21 July 2011. We also reject the Appellant's submissions in respect of Mr. Kapapa as unfounded speculation. The



position is the same with respect to Mr. Iakama who appeared at the initial stages for the second respondents.

29. In this regard also the Appellant's submissions ignores the long-established presumption of regularity ("*omnia praesumuntur rite esse acta*") which applies in the present circumstances and which places an evidential burden on the Appellant to establish that the lawyers for the second respondents did not have a valid "*practising certificate*". This burden has not been discharged. We therefore reject the second ground of appeal.

Decision

30. The appeal is dismissed and the order of the Supreme Court is upheld as to Order (i). Order (ii) is amended with the agreement of the counsel, by deleting the name of William Koli and adding the names of Paul Simeon; John Vira; Phillip Gambetta; Hannah Liunak Walau; Shirley Taga; Julie Vari and Bill Robson as jointly and severally liable for the costs order.
31. The Respondents are also awarded the costs of the appeal to be taxed if not agreed.

DATED at Port Vila this 17th day of November, 2017.

BY THE COURT

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Hon Vincent Lunabet
Chief Justice

