

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

**Pl. No. 4/98**

**BETWEEN**            **APOLO DEAN** of Rarotonga,  
Administration Officer

**Plaintiff**

**AND**                **MELEONI TUMII** of Rarotonga,  
Laboratory Technician

**First Defendant**

**NORMAN GEORGE** of Rarotonga,  
Member of Parliament

**Second Defendant**

**Misc. No. 18/98**

**BETWEEN**            **MELEONI TUMII**, President of the  
**DEMOCRATIC ALLIANCE PARTY**, a  
duly incorporated society under the  
Incorporated Societies Act 1908

**Applicant**

**AND**                **FRED GOODWIN** of Matavera,  
Rarotonga, Retired Public Servant

**First Respondent**

**AND**                **APOLO DEAN** of Arorangi, Rarotonga,  
Retired Public Servant

**Second Respondent**

**AND**                **DR TEREPAI MAOATE** of Ngatangia,  
Rarotonga, Member of Parliament

**Third Respondent**

**AND**                **DR ROBERT WOONTON** of Arorangi,  
Rarotonga, Member of Parliament

**Fourth Respondent**

**Counsel:** Mr D.A.R. Williams Q.C. and Mr J.M. Hosking for the Plaintiff in Plt. 4/98 and the Respondents in Misc. 18/98  
Mr Norman George in person and for the Defendants in Plt. 4/98, and for the Applicant in Misc. 18/98

**Judgment:**

3rd April 1998

**Judgment of Quilliam C.J.**

These are two proceedings involving the same issues and which have therefore been dealt with together.

There has been no oral hearing. The evidence has, by consent, been presented by affidavits which have not involved any major issue of credibility. There is no real dispute as to the basic facts.

The proceedings arise out of a falling out between two groups of members of the Democratic Alliance Party Incorporated ("DAP"), which is the present opposition party in the Cook Islands Parliament. The falling out was precipitated by a caucus vote on 10 November 1997 in which Dr. Terepai Maoate (then Deputy Party Leader) was elected Leader of the Opposition defeating the then Party Leader, Mr Norman George. From this starting point two factions developed, namely supporters of Dr. Maoate on the one hand and supporters of Mr George on the other. Each faction claims to represent the DAP and each has asserted the right to use that name. The result has been an inevitable confusion which can have done the party little political good. The purpose of these proceedings is to determine which faction is properly to be regarded as the DAP and entitled to use that name. For the sake of convenience, I refer to Dr. Maoate's

supporters as the Plaintiffs and to Mr George's supporters as the Defendants.

### **Factual Background**

As I have said, the basic facts are not in dispute and (although using the emotive expression "breakaway group" to describe the Defendants) are conveniently summarised in the submissions of counsel for the Plaintiffs in Plt. 4/98 as follows:

- (a) *24 March 1994* – In the general election the Cook Islands Party wins 20 seats and the Democratic Party and Alliance Party hold 5 seats between them (this is now 18:7).
- (b) *8 February 1996* – The Democratic Party and Alliance Party informally merge to form a single unified opposition party, the DAP. This is formally adopted at the inaugural DAP conference on 27-28 March 1996. The DAP is registered as an incorporated society on 23 May 1996 and receives official Parliamentary recognition on 1 July 1997 (following the enactment of the Civil List Amendment Act).
- (c) *27 – 28 March 1996* – DAP Constitution is formally adopted at the inaugural annual conference and the executive office holders and Party Leader (Mr George) and Deputy Party Leader (Dr. Maoate) are elected.
- (d) *2 July 1997* – DAP wins Nikao-Panama by-election.
- (e) *28 July 1997* – NEC sets Annual Conference date of 3-4 December 1997, as notified on 22 August 1997.
- (f) *10 November 1997* – DAP caucus meeting elects Dr. Maoate as Leader of the Opposition defeating Mr Norman George. That evening, this is debated at an NEC meeting and Mr George

announces that he will meet with his Alliance Party followers on 11 November 1997.

- (g) *19 November 1997* – Dr. Maoate meets with his former Democratic Party supporters and others who resolve to defer the DAP Annual Conference.
- (h) *24 November 1997* – NEC meeting debates leadership and whether to postpone Annual Conference. No resolution is reached so the meeting decides to leave the final decision on the Annual Conference to the next NEC meeting to be held on 1 December 1997.
- (i) *25 November 1997* – Mr George passes a letter to the Clerk of Parliament stating that he and another DAP MP, Mr Upoko Simpson, are disenfranchising themselves from the rest of the opposition.
- (j) *26 November 1997* – DAP public meeting held to discuss Mr George's split from the DAP caucus and further votes to postpone the Annual Conference until March 1998 to allow time for proper preparation, with this decision to be formally adopted at the NEC meeting scheduled for 1 December 1997.
- (k) *29 November 1997 – 1 December 1997* – Mr George publishes notices purporting to be on behalf of the DAP, advertising an NEC meeting at the Atiu hostel at 7.30 pm and advising that the Annual Conference will proceed on 3-4 December 1997 at the Pukapuka Hostel.
- (l) *1 December 1997* – Mr Goodwin and Mr Dean on behalf of the NEC, publish a "reminder notice" of the NEC meeting to take place at Opposition House at 8.00pm and distinguish it from Mr George's meeting.

- (m) *1 December 1997 and following* – Mr Dean, on behalf of the NEC, sends advance notices to outer island constituencies advising that the Annual Conference has been postponed.
- (n) *1 December 1997* – NEC meeting at 8.00pm at Opposition House votes to postpone Annual Conference to March 1998 and to cancel Mr George's membership of the DAP because of his failure to heed warnings not to call his own NEC meeting nor to continue with the DAP Annual Conference.
- (o) *1 December 1997* – Despite receiving a written letter from the NEC not to proceed with the meeting, Mr George holds a purported NEC meeting at 7.30pm at the Atiu Hostel and votes to proceed with the Annual Conference on 3-4 December 1997.
- (p) *3 December 1997* – High Court refuses interim injunction brought by the original DAP to prevent purported DAP Annual Conference from proceeding.
- (q) *3-4 December 1997* – The breakaway group holds a purported DAP Annual Conference which purports to elect a new DAP Executive, amend the DAP Constitution and confirm Mr George as Party Leader.
- (r) *4 December 1997 to present* – Both groups continue to claim to be the legitimate DAP. The breakaway group lodges Misc 18/98 on 3 February 1998 and the original DAP lodges PI 4/98 on 9 February 1998.
- (s) *11 February 1998* – Both parties voluntarily agree to refrain from using the name DAP until the resolution of the Court proceedings. In accordance with this, on 23 February 1998 the original DAP NEC decides to postpone the Annual Conference which had been set down for 19/20 March 1998

until a date as soon as possible after the resolution of the Court proceedings.

### **Formation and Management of the DAP**

The DAP was incorporated and registered as an incorporated society under the Incorporated Societies Act 1908 on 23 May 1996. Following the passing of the Incorporated Societies Act 1994, the DAP's registration was formally amended to recognise registration under the latter Act.

It is fundamental that an incorporated society and all its members are bound by the rules or constitution which it adopts, and also, of course, by the Act.

The statutory provisions of particular relevance for present purposes are:

- (a) The rules of the Society must state or provide for the matters listed in S.5 (1) (e.g objects, appointment of officers etc) although the rules "may contain any other provisions which are not inconsistent with this Act or with law" (S.5(2))
- (b) No society may be registered under a name which is identical with any other incorporated society or company or other body corporate, nor may it have a name which "so nearly resembles that name as to be calculated to deceive." (S.12)
- (c) A society may "alter its rules in the manner provided by the said rules, but subject to the provisions of this Act." (S.23(1)) Such alterations must be in writing and must be registered in accordance with the procedure outlined in the Act (S.23(2) and (3)). Only upon registration is the alteration effective.

It is necessary to set out those provisions in the DAP's constitution which have particular relevance in these proceedings:

**"25. NATIONAL EXECUTIVE**

- (a) The affairs of the Party as a whole shall be managed and controlled by the National Executive duly elected at each Annual Conference and holding office until the next Annual Conference and consisting of:
1. President
  2. Vice-Presidents
  3. Secretary-General
  4. Assistant Secretary-General
  5. National Treasurer
  6. Assistant National Treasurer
  7. The Leader and Members of Caucus
  8. Members elected on the Executive by the Party Annual Conference
  9. All the chairpersons and Secretaries of each Electorate.
  10. All selected candidates and their Campaign Managers
  11. Two representatives from the Youth Division
- (b) The National Executive may determine the date, time and place of all its meetings, and shall record minutes at such meetings.
- (c) In the event of any member of the National Executive resigning during his term of office, or failing without reasonable excuse to attend 3 consecutive meetings of the National Executive, he shall be deemed to have vacated his office and the National Executive shall have the power to fill the vacancy
- (d) All Honorary, Life Members and Party Advisors may attend all National Executive meetings, Party Conferences and functions."

**"12. VOTING**

- (a) Voting at all meetings of the Annual and Special Conferences, National Executive, Electorate Branch Committees shall be by word of mouth or by show of hands at the discretion of the Chairman,

provided that voting shall be by secret ballot for the election of officers and nominees for offices. This requirement may be waived by show of hands of the majority of those present.

- (b) There shall be three voting delegates at every Annual and Special Conference, from each Electorate.
- (c) All members of the Parliamentary Caucus are entitled to vote in addition to the Electorate Delegation at every Annual and Special Conference.
- (d) Every financial member of the Party may attend, in addition to the Electorate Delegation at every Annual and Special Conference, but are not entitled to vote. A party member in attendance may speak at such Conferences by leave of the Chairman of the Conference Delegates.
- (e) The President and the Secretary-General may vote at all Annual and Special Conference.
- (f) The President has the right to exercise a casting vote in the event of a tie and such a vote must be exercised only to negative or stop a positive act from proceeding."

### "13. QUORUM

The quorum for meetings of the Annual and Special Conference shall be 50 members. The quorum for meetings of the National Executive shall be 50% of the members entitled to attend such meetings (provided always that such shall include at least the President or the Vice President or Secretary-General or Assistant Secretary-General) and in the event that a quorum is not reached then after an adjournment of half an hour the persons present at the meeting shall be deemed to constitute a quorum (provided always that such shall include the President or Secretary-General) or Vice President or Assistant Secretary-General. The quorum for the Electorate and Branch Committee shall be determined by the Committees concerned at their Annual General Meetings."



**"33. CAUCUS**

- (a) Caucus shall appoint its own office bearers, subject to Rule 20 which relates to the appointment of the Party Leader and Deputy Leader.
- (b) The Party Leader unless he decides otherwise shall be Chairman of Caucus.
- (c) Caucus may reappoint one of its members to be:
  - Chairman
  - Secretary
  - Party Whip

**34. CABINET SELECTION**

- (a) The Leader shall appoint a Cabinet of six members.
- (b) All other appointments to the office of Prime Minister and Cabinet shall be at the discretion of the Leader."

**"20. POWERS OF ANNUAL CONFERENCE**

...

- (b) The Party Leader and Deputy Leader shall be elected by the Party Conference once during a Parliamentary term, within 3 months after a General Election.
- (c) The Party Leader and Deputy Leader may put their positions up for re-election either jointly or separately at any Annual or Special Conference whenever they choose.
- (d) By a special resolution of the Annual or Special Conference the position of the Leader or Deputy Leader may be discussed and declared vacant, if two-thirds majority vote that the Conference no longer has confidence in the Leader or Deputy Leader of the Party.

- (e) If at any time the leadership of the Party falls vacant, the Deputy Leader shall assume the position of Leader until confirmed or replaced by the next Annual or Special Conference.

..."

In accordance with the provisions of the Civil List Amendment Act 1997, the caucus of the DAP was required to determine by vote who "commands the support of the majority of the DAP Members of Parliament." This vote was won by Dr. Maoate on 10 November 1987 who thereupon became the Leader of the Opposition although Mr George remained the Leader of the Party.

### **Issues for Determination**

1. Whether the National Executive Council (NEC) meeting of 1 December 1997 at Opposition House was validly called by the NEC.
2. Whether the competing meeting of the Defendants at the Atiu Hostel was valid.
3. If the NEC meeting of 1 December 1997 at Opposition House was valid, whether the resolution passed at that meeting to postpone the Annual Conference was valid.
4. Whether the resolution of the NEC meeting of 1 December 1997 to cancel Mr George's membership was valid.
5. Whether the purported Annual Conference held by the Defendants on 3-4 December 1997 and the election of officers and amendment of the DAP constitution at that conference was valid.
6. Whether to grant or decline the declaration sought by the Plaintiff in Plt. 4/98 in para. (a) of the prayer in the first cause of action.
7. Whether to grant or decline the permanent injunction or inquiry as to costs sought by the Plaintiff in Plt. 4/98 in the prayer to the second cause of action.

8. Whether to grant or decline the injunction sought by the Applicant in Misc. 18/98.

I deal with these issues in turn. In doing so I do not propose, and do not consider it necessary, to deal with the many areas of disagreement which exist between the factions. It is unfortunate that these areas of disagreement should have provoked such heated charge and countercharge. I should mention also in this context that it has been less than helpful to the Court that Mr George, who has been the focus of what occurred and whose actions have come under such close scrutiny, should have thought it appropriate to act as counsel for his faction. Someone able to present a more detached view of the matters in issue may well have been in a better position to assist the Court.

1. The meeting of 1 December 1997

The question of the validity of this meeting is acknowledged by both parties to be at the heart of the dispute and vital to the determination of the proceedings. It is necessary therefore, to set the background to it with some care.

Mr George attributes the split in the party to what occurred on 10 November 1997. It was on that day that the DAP caucus, as required by the Civil List Amendment Act, 1997, held a vote as to which of its Members commanded the support of the majority of Members in the Opposition. This vote was won by Dr. Maoate, notwithstanding that Mr George already occupied the position of Leader of the Party. There can be little doubt that this vote crystallised what was evidently a growing feeling of discontent with Mr George within the party. A decision had previously been made by the NEC to hold the party's Annual Conference on 3-4 December 1997 but Mr George's evident discontent with the trend which was appearing prompted the Plaintiffs to take the view that the Conference should be deferred.

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On the 24 November 1997 an NEC meeting was held at which questions as to the leadership of the Conference was discussed. Mr George attended that meeting. In general terms, the Plaintiffs wanted the Annual Conference to be deferred and the Defendants wanted it to proceed on the arranged date of 3 December. In the result it was decided to leave a decision to the NEC meeting due to be held on the 1 December. It should be mentioned that meetings of the NEC were not called by notice but were held at 8.00pm on every Monday at the party's office known as Opposition House. This was a practice which was in conformity with Article 25 (b) of the Constitution which authorised the National Executive to "determine the date, time and place of all its meetings."

Because of the developing split between the two factions the Plaintiffs decided to ascertain the views of the DAP's members and called a public meeting for 26 November 1997. That meeting was attended by over 150 people and after a lengthy debate, voted to postpone the Annual Conference.

At this stage, Mr George published a notice under the purported authority of the NEC calling a meeting of the NEC on 1 December 1997 at the Atiu Hostel at 7.30pm and announcing that the Annual Conference would be held on 3-4 December 1997 at the Pukapuka Hostel (but subject to confirmation or cancellation at the NEC meeting on 1 December).

The split was now complete and each faction was to hold a meeting under the guise of the National Executive Council of the DAP. The question, therefore, is which of the meetings was valid.

Following the public meeting of 26 November a notice was issued in the following terms:

"The President, General Secretary and the Democratic Alliance Party Executive wishes to inform you that the Party Conference scheduled for December 3 and 4, 1997 has been deferred. The decision was made at a meeting on Wednesday night (26.11.97).....You will all be notified in plenty of time when the next conference will be held next year.

Yours sincerely

Apolo Dean

GENERAL SECRETARY

DEMOCRATIC ALLIANCE PARTY"

It was Mr George's submission that this notice was issued without any authority and was ineffectual to achieve a postponement of the Annual Conference. He contended that this left him, as Leader of the Party, free to call his own meeting and to assume the authority which the Plaintiffs had forfeited.

It must be said at once that the meeting of 26 November was a public meeting only, and not an NEC meeting. It had no jurisdiction to decide to postpone the Annual Conference. Only the NEC could do that (Art. 19 of the Constitution). The public meeting could achieve no more than to provide a guide for the NEC meeting which was to follow on 1 December. That meeting was held at the arranged time and place and it was resolved that the Annual Conference should be postponed. It was also resolved that Mr George's membership of the DAP be cancelled. I will refer later to this separate topic.

While the issuing of the notice after the public meeting was an unfortunate departure from correct procedure it can have had no more significance than that. In so far as it purported to postpone the Annual Conference, its decision was a nullity. There had been no change in the structure of the DAP or the NEC. The same office bearers who had been elected at the inaugural conference remained in office, and the management and control of the party rested still

with the NEC. Nothing had occurred to change that and there can be no doubt that the meeting of the NEC on 1 December 1997 was validly called and its decision to postpone the Annual Conference was within its competence.

A further submission made by Mr George was that a decision had been made by the Plaintiffs to cancel the NEC meeting of 1 December. It was said that Dr. Maoate had given an instruction to Mrs Elia, the Assistant Secretary-General of the DAP, to cancel the meeting, and Mrs Elia made an affidavit to that effect. That affidavit was made at a late stage and prompted an application by the Plaintiff to file further affidavits in response. That application was not opposed, and further affidavits were filed by Mr Goodwin, President of the DAP, Dr. Maoate and Mr Dean, the Secretary-General. These seem clearly to establish that no instruction was given by Dr. Maoate to cancel the meeting, but in any event he had no power to give an effective instruction of that nature. This could only, in terms of the Constitution be done by the NEC.

What was done, however, by the NEC was to publish in the Cook Islands News a reminder notice of the NEC meeting on 1 December. This notice was prompted also by the fact that Mr George had by then given notice of the rival meeting which he had arranged at the Atiu Hostel.

I am satisfied that there was no cancellation of the NEC meeting at Opposition House.

A further submission made by Mr George was that the public meeting of 26 November had created a split in the DAP with the result that there was in effect a crisis in the party and that he had acted unilaterally as a matter of necessity. I cannot accept this. As I have said earlier, nothing had happened to change the nature of the DAP or the NEC or to deprive any of the office-holders of their elected offices.

Certainly nothing in the Constitution authorised any one person to assume authority or to purport to act on behalf of the party. Indeed, Article 9 of the Constitution forbade any such thing. The proper course, which was open to Mr George and his followers was to attend the duly constituted meeting of the NEC on 1 December for the purpose of seeking a resolution acceptable to the Defendants. Mr George, however, chose not to attend.

I consider the Plaintiffs are entitled to a declaration that the meeting of the NEC on 1 December was valid.

2. The Meeting at Atiu Hostel

Having regard to what I have said on the previous issue, it follows that the rival meeting called by Mr George at the Atiu Hostel on 1 December was invalid. It was not called by the NEC and could never have had any valid status under the Constitution. Notwithstanding that Mr George was at the time when he called the meeting still the Leader of the Party, he had no jurisdiction to act unilaterally and in defiance of the NEC.

3. The postponement of the Annual Conference

I have already dealt with this. The finding that the meeting of the NEC on 1 December was a valid meeting means that the decision made at that meeting to postpone the Conference was a valid decision.

4. Cancellation of Mr George's membership

At the NEC meeting of 1 December 1997 a resolution was proposed and seconded that Mr George "be dismissed from the DAP and that he never becomes a member of that party, if he insists that the Conference proceeds." The resolution was passed after the meeting

had been informed that it had power to act by reason of the provisions of Article 8 of the Constitution, namely:

**"8 CANCELLATION AND SUSPENSION OF MEMBERSHIP**

The National Executive or any Electorate Committee may cancel or suspend the membership of the Party of any person whose actions, in their opinion, prejudice the interests of the Party or in any way contravenes the provisions of this constitution.

Such cancellation or suspension, unless imposed by the National Executive, must be approved by the National Executive before it is enforced.

Any person who is enrolled as a member of the Party and who in opposition of the Party's official candidate, accepts nomination for any Parliamentary decision, or who nominates any other person in opposition to the official candidate, shall thereupon cease to be a member of the Party.

Any person whose membership has been cancelled, suspended or whose membership has ceased may only become a member of the Party again if all the provisions of Rule 4 are satisfied and that person is approved for membership by the National Executive."

It is doubtful whether this resolution could have had any valid effect. That part of the resolution which states "that he never becomes a member of that party" would appear to be in conflict with the final paragraph of Article 8 in so far as it purports to determine in advance that any future application by Mr George for membership would not be entertained, notwithstanding that Rule 4 permits such an application to be made and considered.

It should be mentioned also that the resolution was conditional only, that is, it was to take effect only "if he insists that the Conference proceeds." Mr George did indeed insist on that and purported to hold such a Conference, but the moment at which that insistence would make the resolution effective was left unclear.



Although there may well have been justification for a resolution terminating Mr George's membership, that should only have been done in my opinion upon a clear and unambiguous resolution. It is easy to understand the frustration of the Plaintiffs at Mr George's determination not only to defy the duly elected NEC but to assert that he and his followers had somehow become the incorporated society which was registered on 23 May 1996. Nevertheless his rights of membership should only be regarded as terminated in clear and unmistakable compliance with the Constitution. This is all the more so in view of the fact that Mr George was still the elected Leader of the Party. A valid termination of his membership would also, of course, have automatically terminated his tenure as Leader of the Party and left that office vacant.

In the circumstances I am not prepared to hold that Mr George's purported dismissal was valid. It may be that at some future meeting of the NEC a further resolution for his dismissal could be debated, but that must be a matter for the NEC to decide. An Annual Conference at some later date will also be free to debate the position of the Leader as provided in Article 20 (d) of the Constitution.

5. The Annual Conference

It follows from what I have said earlier that the Conference which took place at the Pukapuka Hostel could never have had any validity. Only the NEC could decide when and where to hold an Annual Conference and Mr George was never in a position to achieve that lawfully on his own. He has acknowledged that the purported changes to the Constitution which were discussed at that meeting were not in compliance with the Constitution and therefore invalid.

I am satisfied that the purported Annual Conference on 3-4 December 1997 was invalid and achieved no lawful result.

6. The Plaintiffs' first cause of action

This cause of action related to identifying the DAP and, for the reasons already given, there must be a declaration as sought.

7. The Plaintiff's application for an injunction

Again it follows from the findings already made that an injunction must issue.

8. The Defendants' application for an injunction

It follows also that the Defendants application for an injunction must fail.

**Summary**

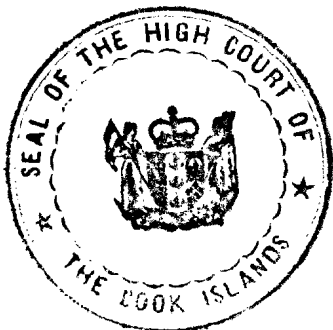
For the reasons set out above there will be the following declarations:

1. That the National Executive Council meeting of 1 December 1997 at Opposition House was validly called by the Council.
2. That the competing meeting called by Mr George at the Atiu Hostel on 1 December 1997 was invalid.
3. That the resolution passed at the National Executive Council meeting at Opposition House on 1 December 1997 to postpone the Annual Conference was valid.
4. That the resolution passed at the National Executive Council meeting at Opposition House on 1 December 1997 to cancel Mr George's membership was invalid.
5. That the purported Annual Conference called by Mr George and held on 3-4 December 1997 at the Pukapuka Hostel was invalid.
6. That, as prayed in the Statement of Claim in Plaint. 4/98, the "Democratic Alliance Party Incorporated", or "DAP", is the party which was incorporated on 23 May 1996 under the Incorporated Societies Act 1908, whose Secretary-General is Mr Apolo Dean.

7. That there will be a permanent injunction restraining the Defendants in Plaint. 4/98 from using the name and holding themselves out as the Democratic Alliance.
8. That the application by the Applicant in Misc. 18/98 for an injunction is declined.

Leave is reserved to the Plaintiffs in Plaint. 4/98 to apply further for an inquiry as to costs as sought in the second cause of action in the Statement of Claim.

Leave is also reserved to both parties to apply in respect of the costs of both proceedings.



*William J.*