

BETWEEN: Zebedee Paul Tanga, Paul Yau, Bradley Moli,
Silas Fatu, Harry Tura, Simon Paia, Amos Karai,
Hollinsworth Tari, Levi Karo, Joseph Vira, Isaiah
Iokam, Freeman Nariu, Zule Molou
Appellants

AND: James Bani, Krem Joshua, John Vira and Kami
Toa
Respondents

Date of Hearing: 15th November 2021

Before: Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice G. Andrée Wiltens
Hon. Justice Viran Molisa Trief

Counsel: Mrs. M. Nari and M. Bakeo for the Appellants
Mr. S. Hakwa the Respondents

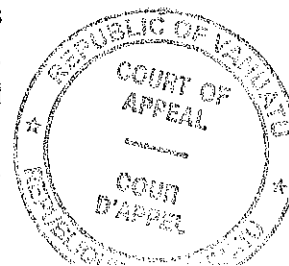
Date of Decision: 19th November 2021

JUDGMENT

1. The appellants seek to appeal from the decision of the Supreme Court which upheld the claims of the respondents and made various declarations and restraining orders against them. They require leave to appeal as their appeal papers were filed 18 days out of time. The respondents oppose the grant of leave. The Court decided to defer a ruling on the application until after hearing the substantial appeal as an assessment of the merits will dictate whether leave should be granted.

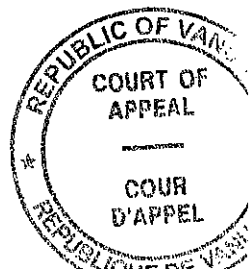
Background and Chronology

2. This appeal arises out of a long running dispute between two competing 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] (the Act). The rules filed with the Registrar on which the registration was granted are described as the Second Constitution. This Constitution provides for two separate organs with management powers and functions. One is titled the Council and the other the Committee. Their respective roles are discussed



later in these reasons. Under the Act it is the Committee that upon registration is incorporated and given statutory powers and responsibilities. On registration there was a Committee of six people and a Council comprised of 13 appointed members (*the original Council*).

3. 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 breakaway group drafting an amended Constitution (the Third Constitution) and the formation of a governing council constituted by members of the breakaway faction to operate under the rules of the Third Constitution (*the breakaway Council*). The breakaway Council sought recognition from the Registrar of Charitable Associations by registering the Third Constitution in place of the Second Constitution and by having the breakaway Council registered as the new incorporated committee.
4. By letter dated 2 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.*
5. Surviving members of the original Council voiced their concern and dismay to the Registrar at the acceptance and registration of the breakaway 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.
6. 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.
7. On 8 April 2016, in a lengthy letter jointly addressed to the leaders of both factions, the Registrar of Charitable Associations determined that the breakaway 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 Second Constitution and the original Council were reinstated.
8. By letter dated 12 May 2016, solicitors acting for the breakaway 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 seeking to quash the Registrar's decision of 8 April 2016.
9. 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 and the departure of another, without any

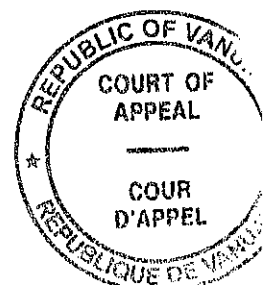


replacements being made or officially notified. The claim averred that the original Council had *become defunct, dissolved and/or unable to function properly....*

10. On 16 November 2016, whilst the case was still being managed in the Supreme Court, official records of the Church were updated by the Registrar to record the appointment of 13 named individuals (being the appellants now before this Court) as the incorporated Committee. Those members included the surviving members of the original Council and 11 new members. This led to an application by the breakaway Council to amend the judicial review to quash the registration of the names of the 11 new members and a counter-application by the 11 new members 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 new members were joined as interested parties.
11. On 27 April 2017, the interested parties (the present appellants) urgently sought an injunction to restrain 21 named individuals associated with the breakaway Council from using, affiliating, and/or organising any meeting in the name of the Church. It seems that this application was never heard.
12. 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.
13. 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 to the parties to ensure that the case was ready to proceed on 29 and 30 August 2017.
14. 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 all the Defendants. On 29 August 2017, in the absence of counsel for the breakaway Council, the Trial Judge made an order for costs against three of its members who had filed affidavits in support of the application. He noted that he had been informed the breakaway Council had commenced fresh proceedings and that those proceedings were with another judge
15. The breakaway Council appealed against this costs order. The Court of Appeal dismissed the appeal and ordered members of the breakaway Council personally to pay the costs of the appeal as well of the costs of the discontinued proceedings in the Supreme Court: *Apostolic Church (Vanuatu) Committee v Andrews* [2017] VUCA 43.
16. It is the trial of the new proceedings that gives rise to the present appeal.

The Charitable Associations (Incorporation) Act and the Second Constitution

17. The Act in s.4 provides for the incorporation of the committee of any association established for a charitable purpose. On incorporation the members of the committee become a body corporate which may sue and be sued and suffer to be done all that a



corporate body may do. Under s.8, on registration all the assets and liabilities held for the benefit of the association including interests in land invest in the committee. The names of the committee at the date of incorporation are registered. Section 13 makes provisions for the registration of resignations, renewals and appointments of committee members. The Act vests the property of the association, and inferentially the normal powers of ownership in the committee.

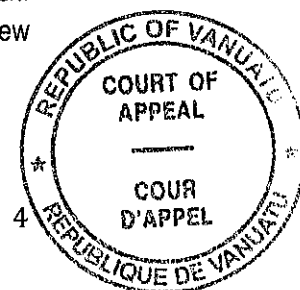
18. The Constitution makes provision both for a Council and for a Committee. The functions and powers of the Council are set out in clauses 8 and 9. Under cl 8 the Council has overall control and management of the Church (that is, the association) and the property and affairs thereof; and under cl 9 the Council has the power to expend the funds of the Church in such manner as they shall consider most beneficial for the purposes of the Church, to enter into contracts, to borrow money and under cl 9 (g):

Generally to do all things necessary or expedient for the conduct of the affairs of the Church not herein and otherwise provided for.

19. Under clause 22 the Council is responsible for the oversight of the accounts of all monies and assets.
20. No functions of the Committee under the Constitution are set out. Clauses 11, 12 and 13 make provision for membership of the Committee and for the calling and conduct of meetings to be held annually. Clause 22(c) requires the Council to lay before the general meeting of the Church in each year income and expenditure accounts and a balance sheet. Perhaps a function, of the Committee is to arrange and call the annual meeting of the Church. No other particular function can be inferred from the Constitution.
21. On a fair reading of the Constitution a Council member has the functions and powers of a Committee member within the meaning of the Act. In the judicial review proceedings the breakaway Council pleaded:

At all material times, it was generally accepted by the leaders of the ACV that the members of the Committee for the purposes of Section 2(1) of the Act (hereinafter referred to as "the Committee") would comprise the same persons who for the time being were members of the initial Council even though no such express provision is made therefore in the Second Edition Constitution.

22. We consider that pleading expresses the correct interpretation of the Constitution. It is also the interpretation applied by the Registrar in his decision, recorded in his letter of 8 April 2016. It follows from this that when the Register was updated on 16 November 2016 to show the appellants as the committee for the purposes of the Act, they were being recognised in the statutory records of the Registry as the current Council of the Church. It was this situation that the breakaway Council challenged in the judicial review proceedings.

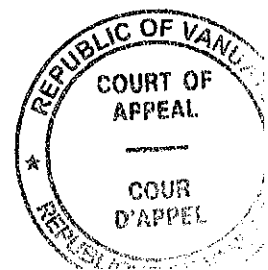


The Trial Proceedings

23. In the judicial review proceedings, the claimant was named as The Apostolic Church of Vanuatu (Inc) and the proceedings were prosecuted by members of the breakaway Council which had been constituted at a meeting held by them on 19 February 2015. The new proceedings in the Supreme Court were brought by four of those members as practising members of the Apostolic Church of Vanuatu situated in the Ohlen area of Port Vila. The Registrar of Charitable Associations was not named as a defendant, and the new proceedings did not expressly attack the Registrar's decision of 8 April 2016. The named defendants were the present appellants - the current members of the Council.
24. The pleadings in the Supreme Court followed closely the substance of the pleadings of the breakaway Council in the judicial review proceedings; and, against the appellants, sought orders to the same effect. In particular, the claimants sought an order declaring that the appellants were not members of the Council of The Apostolic Church of Vanuatu Committee Inc. A range of ancillary reliefs were also sought to give wide effect to that declaration.
25. The claimants alleged that the initial members of the Council and the Committee registered at the time of incorporation had failed to comply with the provisions of the Constitution and the Act and that all appointments and elections purportedly made by the Council thereafter were unlawful, null and void. Central to their cases were the provisions of clause 7 of the Constitution, which provides for the composition and appointment of council members. It reads:

"CONSTITUTION AND APPOINTMENT OF COUNCIL MEMBERS

7. (a) *The Council shall consist of the President of the church for the time being and twelve (12) elected members.*
- (b) *The Council shall meet two (2) times in any one year approximately six (6) months apart. The first meeting in any year shall be held in the month of February. The second meeting in any year shall be held in the month of August, and it shall be at this meeting that the appointments and termination of appointments of Council and Committee members shall be made.*
- (c) *The manner of appointment of new council members shall be by consensus and ten (10) members of the council shall be a quorum. In the case where there is no consensus the matter shall be deferred to the next meeting.*
- (d) *Appointment will be based on suitable qualifications particularly those of character, experience and education.*
- (e) *The first appointed members shall consist of the persons named in schedule 1 of this Constitution.*
- (f) *At its August meeting the council shall review the terms of its members who are eligible for retirement and who submit their applications or requests to resign with justifiable reasons. Members attaining 60 years of age will be eligible for retirement. Members who are older than sixty*



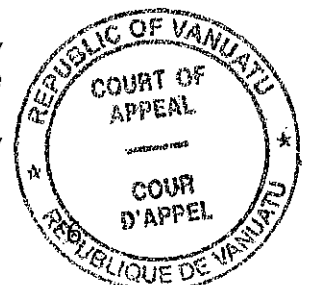
(60) will be permitted to continue in office should they so choose and should the council agree.

- (g) The council may act for all purposes notwithstanding any vacancy in their number and all proceedings at any meeting of the council shall be valid and effectual notwithstanding that it may be afterwards discovered that any member of council has been informally elected or is not properly qualified. "

26. The claimants contended that many Council meetings were invalid as the requisite quorum of Council members was not present, and this had a cascading effect over the years such that all the business of the Council took place at the meetings without the requisite number of validly appointed Council members so that for many years all Council decisions were null and void. Other lesser breaches of the Constitution were also alleged, which led to the same result. The purported election of the appellant Zebedee Tanga as President of the Council was attacked on these grounds.
27. The appellants denied the allegations made against them and their predecessors and they counterclaimed for orders restraining the claimants from asserting their status to be that of members of the Apostolic Church of Vanuatu. However, the grounds of defence pressed at trial were different. They focused on the relationship in time between the commencement of the proceedings before the court and the sudden discontinuance of the judicial review proceedings. They contended that the proceedings should be dismissed for the following reasons:
- The claim is *res judicata*
 - The claim could not be maintained under CPR rule 9.9(4)(a)
 - The claim was an abuse of the Court process
28. The appellants also alleged that the claimants lacked standing to bring the proceedings as they had been disciplined and removed from the Church by decisions of the Council.
29. The trial judge accepted the claimant's arguments, finding that the purported decisions of the Council had for very many years been null and void. It followed that the alleged disciplinary action against the claimants was without effect and they therefore had standing to bring the claim.
30. As for the other grounds of defence advanced at trial the trial judge said:

Res Judicata and abuse of process

34. These are matters raised by the defendants and can be easily disposed of as follows. Although raised in their submissions these matters were not pleaded in their defence and counterclaim. Secondly, there is no judgment giving finality to the issues raised by the claimants therefore *res judicata* does not arise.



35. *There may be argument that the matter is an abuse of process but this is not pleaded by the defendants in their defence therefore they cannot now raise it in their submissions.....*

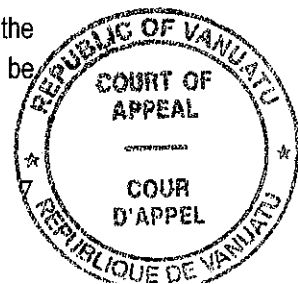
This Appeal

31. Both sides filed detailed written submissions. The appellants' main arguments contended that the Trial Judge had failed to consider clauses 7(g) and 9(g) of the Constitution which would excuse procedural irregularities in the conduct of Council meetings over the years. The respondents sought to uphold the reasons of the Trial Judge.

Discussion

32. Although the appellants' written submissions do not canvas the decision of the Trial Judge not to consider the abuse of process submission, this Court has done so as it is the role of the Courts to protect the justice system against abuse of the processes under which the Courts operate. Moreover, in this case the submissions of the appellant in the Court below did clearly raise *res judicata*, abuse of process and the provisions of CPR rule 9.9(4)(a) which provide that if a claimant discontinues a claim the claim may not be revived. These grounds of defence should have been considered.
33. This Court considered a similar situation where fresh proceedings were issued by a claimant who then discontinued other proceedings which pleaded the same claims in *Chen Jinqi v Ly Nu Loung*¹. In that case the Court of Appeal upheld the decision of the Trial Judge to strike out the second proceedings as an abuse of process, observing that it was hard to think of a more blatant abuse of the courts processes (at [64]). The Court considered there had been an attempt to *judge shop*. That is the case here. It is clear on the papers that the Judge managing the judicial review proceedings had, in conference, been urging the parties to resolve their disagreements between themselves out of court; and in the course of discussions had canvassed issues raised in the pleadings and possible outcomes, some not to the advantage of the breakaway Council. The new proceedings had the effect of transferring the claim to a different judge.
34. The new proceedings here were also a direct attempt to re-cast the structure of the claims being made by the breakaway Council so as to leave out the direct challenge to the decision of the Registrar that was against their interest and to seek to undermine it indirectly in the new proceedings where the Registrar would no longer be a party. It is not without importance that it was the breakaway Council who brought the judicial review proceedings against the Registrar in the first place. The breakaway Council had the opportunity in the judicial review proceedings to challenge the Registrar's decision, and the Court had set the scene for the challenge to be heard. Then, by discontinuing the judicial review proceedings on the eve of trial, they gave up that challenge. It would be

¹ [2019] VUCA 13

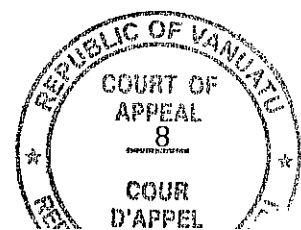


a serious abuse of the processes of the Court to allow members of the breakaway Council to revive that challenge. It would also be contrary to the principles in *Henderson v Henderson*² and *Anshun estoppel*³ that hold that a claimant who has had the opportunity of having the issue before the Court determined is estopped from reviving the claim in respect of the same facts and issues.

35. We consider the new proceedings should have been struck out in the Court below as an abuse of process. Accordingly, this appeal should be allowed and the decision below set aside, along with all the ancillary orders that were made.
36. The Trial Judge was correct to hold that the principle of *res judicata* could have no application, as there was no judicial decision made in the judicial review proceedings. There may however have been substance in the submission under CPR rule 9.9(4) that the new proceedings amounted to a prohibited revival of the claim. In *Chen Jinqi* it was argued that there was no *revival* as the second proceedings had been commenced before the first proceedings were discontinued. The Court of Appeal left open the question whether there was nonetheless a revival, although the Court saw merit in that proposition (at [45]).
37. As the proceedings should have been struck out in the Court below, the occasion does not arise for us to consider the submissions of the parties that go to the factual issues that gave rise to the dispute between the parties. The situation now is that the decision of the Registrar remains on foot and the Registrar is taken to correctly record the people who are the present members of the Council of the Apostolic Church of Vanuatu.
38. As there are now no proceedings on foot in the Supreme Court, this Court should not make declarations or injunctive relief against anyone. If any party on account of the behaviour of others hereafter thinks relief from the Court is appropriate, fresh proceedings will be necessary. Hopefully that will not be necessary.
39. As to costs, the respondents have been unsuccessful in this Court and in the Court below, and under the normal rule they must pay the successful party's costs.
40. Finally, as we have observed, the processes that have been followed constitute a serious abuse of the processes of the Court. The lawyer for the breakaway Council has acted in breach of his professional duty and obligation not to allow those processes to be improperly used. As this Court did in *Chen Jinqi*, we consider it is appropriate to refer this judgment to the Law Council.
41. We feel bound to comment on the state of affairs that appears to exist between the protagonists in the past court proceedings. It should be apparent to them now that all the effort and lawyer involvement over the past 5 years has resolved their disagreements, and have probably served to seriously escalate the animosity between them. They should reflect on the objects and charitable purpose of the Church. It is

² [1843 Eng R 917; (1843) 67 ER 313

³ Port of Melbourne Authority v Anshun Pty Ltd [19812] HCA 45



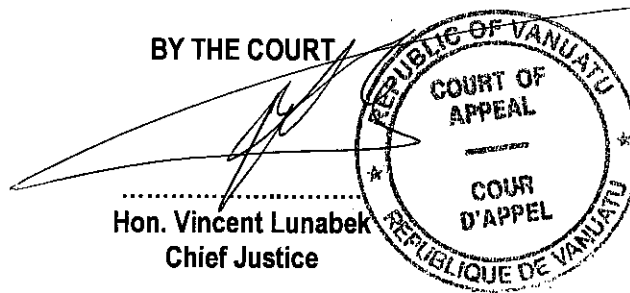
highly likely that any further attempts to pursue their disagreements through the Courts will lead only to more wasted costs and bitterness.

42. The formal orders of the court are:

1. Leave to appeal granted;
2. Appeal allowed. Judgment in the Court below is set aside, along with all ancillary orders and declarations there made.
3. Civil Case 1173 of 2017 is struck out.
4. The respondents are to pay the costs of the appellants, in this court and in the Supreme Court, to be taxed on the standard basis unless agreed.

DATED at Port Vila this 19th day of November, 2021

BY THE COURT



Hon. Vincent Lunabek
Chief Justice

