

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 108 of 2019

Attorney General of Fiji
for and on behalf of the Ministry of Education, Heritage and Arts
Plaintiff

v

Vatuvonu SDA College
First Defendant
And

Luke Narabe, Aisake Tiko Kadukeinadave, Victor Bonetti, Ram Chandar and Josateki
Taleimaitoga, as registered trustees for the Seventh-Day Adventist Church, Fiji
Second Defendants

v

Counsel: Ms B. Narayan with Ms S. Chand and Ms O.Solimallagi
for the Plaintiff
Mr D. Bennet QC with Mr A.Tokeley QC, Mr W. Clarke
and Ms. M. Tikoisuva for the Defendants
Date of hearing: 24th June, 2019
Date of Judgment: 22nd November, 2019

JUDGMENT

1. The Plaintiff brings this originating summons on behalf of the Ministry of Education, Heritage and Arts,(the Ministry).The First Defendant,(the School) is an aided school registered under the Education Act. The Second Defendants,(the Church) is the controlling authority of the School. The Church had decided to close the School and reopen as a private school, consequent to the appointment of Mr Raikivi as the Head/Acting Principal of the School by the Ministry, as he is not a Seventh day Adventist,(SDA). The Plaintiff contends that the Church cannot close the School without the sanction of the Permanent Secretary of the Ministry. The Church argues that it has the right to appoint a SDA as Principal, in terms of section 22(4) of the Constitution of Fiji. The Plaintiff states that the insistence of the Church to appoint a Principal of the SDA faith is contrary to section 22(4) and unfairly discriminates against Mr Raikivi under section 26(3). Mr Raikivi passed the test under the Open Merit Recruitment and Selection,(OMRS) process and was at the top of the order of merit.

2. The Plaintiff seeks:

- a) *A Declaration that the 2nd Defendant has no lawful authority or rights whatsoever to effect closure of the 1st Defendant at any time without the sanction of the Permanent Secretary for Education;*
- b) *A Declaration that only the Permanent Secretary for Education has the lawful authority subject to the provisions of the Education Act 1966 to order any closure of the 1st Defendant;*
- c) *A Declaration that the Plaintiff pursuant to section 127(8) of the Constitution of the Republic of Fiji ("Constitution") has the lawful right to appoint any suitable Head of School and/or teachers and any Acting positions thereof for the 1st Defendant in terms of the Open Merit Recruitment and Selection process without any interference by the 2nd Defendant.*
- d) *An Order that the 2nd Defendant do not interfere in any manner with the Plaintiff's rights pursuant to section 127(8) of the Constitution to appoint any suitable Head of School or teachers or staff and any Acting positions thereof for the 1st Defendant in terms of the Open Merit Recruitment and Selection process.*
- e) *An Order that the 2nd Defendant forthwith handover the management and control of the 1st Defendant to the Plaintiff including the responsibility for the public funds given by the Ministry for the education and maintenance of the students and 1st Defendant respectively until the outcome of the investigations being conducted by the Ministry into the complain of alleged abuse of funds by the Defendants and any prosecution thereof.*

3. On 15th April, 2019, the High Court made Orders restraining the Defendants from:

- a) *"effecting any closure of the 1st Defendant on 18th April 2019 or at any time whatsoever without the sanction of the Permanent Secretary for Education".*
- b) *"interfering in any manner with the Plaintiff's right to appoint any suitable Head of School or teachers or staff and any Acting positions thereof for the 1st Defendant in terms of the Open Merit Recruitment and Selection process".*
- c) *"restricting or preventing the right of access or entry to the 1st Defendant for the purpose of effecting the school's normal day to day operations by the Plaintiff through its servants or agents including the Head of School and teachers or staff appointed by the Plaintiff through its servants or agents including the Head of School and teachers or staff appointed by the Plaintiff or by any of the students currently enrolled in the said school".*
- d) *the "2nd Defendant do forthwith handover the interim management and control of the 1st Defendant to the Plaintiff, including the responsibility for the public funds given by the Ministry for the education and maintenance of the students and the 1st Defendant respectively until the final determination of this action and/or until further order of this Court".*

The affidavit in support

4. Alison Burcell, Permanent Secretary of the Ministry in her affidavit in support of the summons states that the position of the Ministry, as communicated to Mr Nemani Tausere, Education Director,(ED) and representatives of the Church is as follows. Mr Raikivi's appointment is an interim acting appointment, whilst awaiting completion of the next round of appointments in line with the OMRS process; the Church was free to practice their faith in the school, have a religious teacher and encourage a teacher of their faith to apply and be appointed on merit in the next appointment of Principal; the Church must recognize the Government's prerogative in administering education; the Government's policy is that if the Head is paid by the Ministry and the School receives the Free Education Grant,(FEG) he has to be a civil servant appointed under the OMRS policy.
5. Mr. Raikivi, in a meeting with the Church and its Executive Committee raised issues on the abuse of school funds by the current manager of the School. The Vatuvonu community supports the Government's policy on the OMRS, to ensure that the appointment of the Acting Principal and all staff are based on their ability to perform the job and does not discriminate or give preference to any group or individual. On 11 April, 2019, the office of the Hon. Prime Minister received a Petition from concerned relatives and parents seeking that the current School Manager be investigated on the alleged misuse of funds, the Government take full ownership and control of the School and keep it open.
6. On 12 April, 2019, she received a Preliminary report from Ministry officials conducting investigations that the School financial records have revealed that a huge amount of FEG has been receipted to the School Manager and former Principal, both members of the Church.
7. The General Secretary of the Church informed her that the School will be re-opened from the second term this year, as a private school. The Vatuvonu community will have to pay fees, which they cannot afford. They will be forced to send their children to schools far from their home. She attaches a Petition from concerned relatives and parents of students of the School to the Hon. Prime Minister seeking his intervention against the closure of the School. The Church does not have the powers to decide to open the School in week 2 of Term 2, instead of week 1. Only the Permanent Secretary has power to close the School.

8. Ms Burcell states that the insistence of the Church to appoint a Principal of the SDA faith denies the students their right to freedom of education under section 31 of the Constitution. As Permanent Secretary, she is bound by section 3 of the Education Act, to have regard to the principle that pupils should be educated in accordance with the wishes of their parents.

The affidavit in opposition

9. Nemani Tausere states that he is employed by Church as its DE, since January, 2016. He is authorized to depose to his affidavit on behalf of the First Defendant and each of the Second Defendants by virtue of his office.
10. The Church does not have access to sufficient funds to achieve full compliance with its educational philosophy and fundamental principles. It is critical that its students are educated in a manner that conforms with the Adventist ethos, philosophy, principles and values. It is not enough to have a religious teacher. All other SDA schools have Heads of their faith. The Church requested the Ministry to consider a number of suitable SDAs. A list was submitted.
11. He is pleased that the allegations regarding the finances of the School are being investigated. The Church welcomes and has always been supportive to allow the Ministry to carry out investigations. The issue of non-compliance with FEG documentary requirements is very common and numerous schools have had their funds centrally managed by the Ministry.

The affidavit in reply

12. Ms Burcell states that the appointment of teachers and the Head is made by the Ministry under the OMRS process, as they are employees of the Ministry. The Ministry filled some of the substantive posts of Heads of school. The rest could not be filled, as the applicants did not qualify under the OMRS process and acting positions were made on order of merit.

The determination

13. At the commencement of the hearing, Mr Bennet QC, counsel for the Defendants sought leave to file a counterclaim. He said the counterclaim should have been filed earlier. His Instructing Solicitor's instructions for it to be filed and served were not obeyed, due to an oversight. He submitted that there was no prejudice or surprise to the Plaintiff, as the Defendants seek a converse of the reliefs sought by the Plaintiff.
14. Ms Narayan, counsel for the Plaintiff objected to the filing of the counter claim on the ground that the Defendants had adequate time to file it earlier. The summons and affidavit were served on 16th April,2019. The Defendants filed a response on 3rd June, 2019. The hearing cannot proceed, if it is filed, as the Plaintiff needs to reply.
15. The reason given as to why the counterclaim was not filed earlier is inconsistent with the Instructing Solicitors' letter of 4th June,2019, to the Plaintiff and the Registry stating that they are ready for the hearing on 24th June, instructed Queen's Counsel from Sydney to appear and suggesting exchange of submissions.
16. I declined to grant leave to file the counterclaim.
17. Or. 28,r.8(2) provides that a "*defendant who wishes to make a counter claim .. must at as early a stage in the proceedings as is practicable, inform the Court of the nature of his claim.*"
18. The *Supreme Court Practice*,(1988) *White Book*, para 28/7/1 states that a counterclaim should be served before the hearing.
19. Ms Narayan objected to the affidavit in opposition filed by Mr Tausere on the ground that it is not in conformity with Or 41, r.5. She submitted that although he is the DE of the Church, he has not been authorized by the school management committee to depose to the affidavit.
20. Mr Tausere is admittedly, the DE of the Church. In my view, he knows and can depose to the facts.

21. The first question for determination is whether the Church has the right to close the School.
22. The backdrop to this issue is as follows. The ED states that the trustees and he had no option other than to close the School despite the impact on the communities, as the Ministry was unwilling to replace Mr Raikivi, the Acting Principal with a SDA Head. After receiving representations from community members and the Ministry, the trustees resolved that the School reopen from the commencement of the 2nd term, as a private school.
23. Mr Bennet contended that the right conferred on the Church by section 22(4), (see below) “*to establish, ..places of education*” includes a right to close, as provided in section 44 of the Interpretation Act,1967.
24. The answer to that contention is contained in the proviso to section 44. The proviso states that where the power to dissolve a body established is exercisable “*only upon the recommendation, or is subject to the approval or consent, of some authority, then such power shall, unless a contrary intention appears, be exercisable only upon such recommendation approval or consent*”.(emphasis added)
25. Ms Narayan submitted that the Permanent Secretary is the only lawful authority who can order the closure of the School, as provided in Section 19(2) of the Education Act.
26. Section 19(2) of the Education Act titled “*Closing of schools*” provides:

The controlling authority of any school may, at any time, request the Permanent Secretary to close such school and, in such event, the Permanent Secretary may order the manager of such school to close the school.(emphasis added)
27. In my view, the section clearly provides that the controlling authority of any school may request the Permanent Secretary to close a school, but only the Permanent Secretary can order a closure.
28. In my judgment, the Church has no right to close the School at any time, without the sanction of the Permanent Secretary for Education.

29. The pivotal question for determination is concerned with the appointment of the Principal of the School.
30. Ms Narayan submitted that the Plaintiff does not dispute the right of the Church to manage places of education. The insistence of the Church to appoint a Principal of the SDA faith is contrary to section 22(4), which requires standards prescribed by law to be maintained and unfairly discriminates against Mr Raikivi under section 26(3). The Permanent Secretary appoints civil servants as Principals of government and religious schools under sections 127(8) and 163(2) of the Constitution. The Principal is paid by the Ministry. The Permanent Secretary's power to make appointments is subject to the guidelines and policies issued by the Public Service Commission.
31. In reply, Mr Bennet submitted that the word "*manage*" in section 22(4) must at the very least include the right of a religious community to insist that the Principal and management committee are members of their religion. Sections 127(8) and 163(2) are concerned with the employment of staff in the Ministry. The Head and teachers of a school are not staff in the Ministry. The Government does not have the power to appoint the Principal and management committee.
32. Mr Tokeley argued that even if the position was a public office, section 127(8) cannot prevail over the right conferred by section 22(4). Section 127(8) does not address the question of appointment of Principals to faith based schools. The right to manage includes the right to appoint teachers and Principals. Section 22(4) triumphs over the general provisions of section 127(8). There is no evidence that the Principal is a public office.
33. Section 26(3)(a) states that a person must not be unfairly discriminated against, directly or indirectly on the grounds of his inter alia religion.
34. In my view, section 26(3)(a) is couched in general terms. It does not deal with educational institutions. The principle of statutory interpretation, *generalia specialibus non derogant* applies, as submitted by Mr Bennet.

35. Section 22(4) states:

Every religious community or denomination, and every cultural or social community, has the right to establish, maintain and manage places of education whether or not it receives financial assistance from the State, provided that the educational institution maintains any standard prescribed by law.(emphasis added)

36. The term “manage” is defined in *Black’s Law Dictionary*, (Tenth Edition) as “1. To exercise executive, administrative and supervisory powers. 2. To conduct, control, carry on, or supervise. 3. to regulate or administer a use or expenditure”.

37. The Court is of the view that the Constitution does not make provision for the appointment of a Principal. The Principal does not fall within the category of “*staff in the Ministry*” in section 127(8). The proviso to section 22(4) deals with the prescribed standards to be maintained by a school.

38. In my view, the right to manage a school does not include the right to appoint the Principal. Thus the ED, in his affidavit in opposition requests the Ministry to “*continue to provide FECS to the School notwithstanding the fact the Church has a say in determining who the Head of School is*”. He requested the Permanent Secretary to consider several candidates.

39. It is undisputed that the Principal is a civil servant. As Ms Narayan pointed out, the ED states that the “*Head of school is an employee of the government and is responsible and directly accountable to the Ministry*”.

40. The appointment must then be made in terms of the Civil Service Act. Section 3 defines “*civil service*” to mean “*the service of the State in any capacity*”. The Civil Service (General) Regulations, 1999, provides in section 5 that “*the appointment of a person to an office must be made on the basis of merit after an open, competitive selection process*”.

41. In my judgment, the Government is required to appoint a civil servant as Principal of the School, in terms of the OMRS process and in a manner consistent with the constitutional right in section 22(4), which means that the proposed appointment must be acceptable to the Church.

42. In the result, I decline the applications for a declaration and Order that the Plaintiff has the right to appoint any suitable Head of the School and any Acting positions without any interference by the Church.
43. The case of *Reddy v Permanent Secretary for Education*, [2007] FJCA 24, Civil Appeal No, ABU 0043 of 2005, (23 March, 2007) as relied on by Ms Narayan was concerned with the 1997 Constitution, which did not contain a provision equivalent to section 22(4). That case is relevant to the extent that it held the appointment of the Principal has to be in accordance with the Public Service Act and Regulation 5 of the Public Service (General) Regulations, 1999.
44. The Plaintiff seeks an order that the Church handovers the management and control of the School to the Plaintiff in order “*to preserve the children’s right to have freedom of access to education at the School and ...also in light of the investigations carried out on the alleged abuse of Government funds*”, as stated in the affidavit in support.
45. I have held that the Church cannot close the School without the approval of the Permanent Secretary. I therefore decline the application for the management and control of the School to be taken over by the Plaintiff. Accordingly, the relief sought by the Plaintiff on the basis of the *parens patriae* jurisdiction does not arise for consideration. The investigation on the alleged abuse of Government funds can continue.
46. In consequence of my Orders, the interim injunctions granted on 15th April, 2019, are hereby discharged.

47. *Orders*

- (i) I grant a declaration that the Second Defendant has no lawful authority or right to effect closure of the First Defendant at any time, without the sanction of the Permanent Secretary for Education.
 - (ii) I grant a declaration that only the Permanent Secretary for Education has the lawful authority under the Education Act, 1966, to order closure of the First Defendant .
48. I grant a declaration that the Plaintiff has the lawful right to appoint a suitable Head of School and any Acting positions in terms of the OMRS process and in a manner consistent with the constitutional right in section 22(4).
49. I decline the application for a declaration that the Plaintiff has the lawful right to appoint any suitable Head of the School and any Acting positions thereof without any interference by the Second Defendant.
50. I decline the application for an Order that Second Defendant does not interfere with the Plaintiff's rights to appoint any suitable Head of the School and any Acting positions thereof.
- (iii) I decline to grant an order for the Second Defendant to handover the management and control of the First Defendant to the Plaintiff, until the outcome of the investigations conducted by the Ministry into the complaint of alleged abuse of funds by the Defendants and any prosecution thereof.
 - (iv) I make no order as to costs.



A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam

JUDGE

22nd November, 2019