

IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 13 of 2018

BETWEEN : 'ATENISI INSTITUTE INC

Plaintiff

AND TONGA NATIONAL QUALIFICATIONS AND
ACCREDITATION BOARD

Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: Mr. J Appleby for the plaintiff
Mr. S Taione for the defendant

Date of Hearing: 14 December 2018

Date of Ruling: 8 February 2019

RULING

The application

- [1] The plaintiff ('Atenisi) has for some years operated as an educational provider known as the University at 'Atenisi Institute. The defendant (TNQAB) is a statutory body established under s. 3 of the Tonga National Qualifications and Accreditation Board Act (the Act) concerned, *inter alia*, with the registration of providers of post compulsory education and the accreditation of their courses of study.

[2] This ruling concerns an application by 'Atenisi for an interim injunction restraining TNQAB from:

- (a) Imposing a condition that 'Atenisi ceases recruitment of new students in 2019;
- (b) Imposing new or amended, or the revocation of, conditions on the registration of 'Atenisi's qualifications; and
- (c) Publishing in Tonga or elsewhere through any medium of communication, any information about 'Atenisi in respect of 'Atenisi's compliance or otherwise with the Act.

The statement of claim and the evidence

[3] The second amended statement of claim (which is the latest pleading) relevantly asserts the following by way of background:

- (a) 'Atenisi has operated without interruption since 1975 and has developed a global reputation for academic competence;
- (b) 'Atenisi lodged an application for registration to TNQAB in 2010. It sought registration as a University but was (following litigation) registered under the Act as the Tertiary Academy of 'Atenisi Institute in 2011;
- (c) 'Atenisi's registration was renewed in 2013 and 2015 until 22 August 2017. Mr. Appleby advised me that its registration then lapsed;
- (d) In 2015 'Atenisi raised again the issue of it being registered as a University but was advised by TNQAB that it would not be permitted to renew its registration as a University;
- (e) That in October 2017 a member of 'Atenisi's Board noticed that upon the TNQAB website it stated that TNQAB would only assess the quality of 'non-university tertiary providers'. This was removed from the website in November 2017;
- (f) In February 2018 'Atenisi filed an action for a declaration that it was a University and entitled to hold itself out as such;

- (g) On 6 March 2018 'Atenisi received a letter from TNQAB dated 22 February 2018 in which TNQAB advised that it considered 'Atenisi was delivering certain unaccredited programmes. The letter required 'Atenisi to provide an action plan of what would be done to accredit those programs and that if 'Atenisi did not comply TNQAB 'may immediately impose new or amend or revoke any existing condition(s) on registration or any of its qualifications.' 'Atenisi was also advised that it was to cease all recruitment of students in 2018 for all unaccredited programmes; and
- (h) That TNQAB has accredited the University of the South Pacific despite it offering some unaccredited courses.
- [4] Whilst the content of the statement of claim is not evidence I have decided to have regard to it because I understand that (for present purposes at least) the matters referred to above were not disputed. In addition, the affidavits filed in support of the application for injunction are extremely curt and do not contain the detail that could be expected. The evidence consists of affidavits of the Dean of Faculty of 'Atenisi, Dr. Lorenz Gonshor, and a member of 'Atenisi's Board, Mrs. Lose Jenner-Helu.
- [5] Mr. Gonshor deposed that in 2015 'Atenisi welcomed two new students, one new student in 2016 and eight new students in 2017. As a result of the ban on recruitment imposed by TNQAB in its letter of 22 February 2018, 'Atenisi had forgone certain recruitment activities. The financial effect of this was unknowable. It was not known either how many enrolments were lost but recruitment presentations and advertisements are important marketing initiatives and serve to enhance enrolments.
- [6] Mrs. Jenner-Helu deposed that 'Atenisi's financial situation requires delicate financial management. 'Atenisi relies upon tuition fees to cover fixed costs and pay academic salaries. The existence of 'Atenisi is threatened because of its inability to recruit new students. If the recruitment ban continues the financial impact might result in 'Atenisi's demise.

The causes of action

- [7] 'Atenisi pleads three causes of action which may be summarised as follows:

- (a) That 'Atenisi is not a 'provider' as defined in the Act and not therefore required by s. 10 to either register or attain accreditation under the Act;
- (b) That 'Atenisi changed its position in reliance upon the official TNQAB website that stated TNQAB is only responsible for non-university tertiary training providers so that TNQAB is estopped and cannot require 'Atenisi to register and attain accreditation under the Act; and
- (c) That TNQAB has failed to apply appropriate assessment criteria in assessing 'Atenisi's courses for accreditation.

[9] In respect of the first and second causes of action, 'Atenisi seeks a declaration that it is not required to register or attain accreditation under the Act. In respect of the third cause of action, 'Atenisi seeks a direction that TNQAB reassess its accreditation application applying appropriate criteria and a sum by way of damages to be quantified at trial.

The course of this application and 'Atenisi's submissions

- [10] When this application first came before the Court Mr. Appleby filed written submissions and he spoke to them. I also heard briefly from Mr. Taione for TNQAB. As a result of discussions between Counsel it was thought this case would settle and the application was adjourned for that purpose.
- [11] The case did not settle and on 15 January 2019 'Atenisi filed an amended application for injunction and a memorandum of Counsel repeating Mr. Appleby's earlier submissions, asking for the matter to be determined and informing the Court that TNQAB intended to extend its ban on recruitment by 'Atenisi for 2019.
- [12] Following a directions conference, TNQAB filed an amended notice of opposition to the application for injunction on 31 January 2019. TNQAB asked for a further hearing on the application but has now withdrawn that request.
- [13] The heart of Mr. Appleby's submissions in support of the application for injunction were that 'Atenisi has a strong *prima facie* case that TNQAB has no jurisdiction to find 'Atenisi non-compliant under the Act or to impose any condition on it to cease recruitment. Broadly, this is because s. 10 requires the registration of 'providers' which by definition (in s. 2) means an entity that has been accredited by the Board

of TNQAB. As 'Atenisi is non-accredited it cannot be compelled to register under the Act nor comply with any direction of the Board of TNQAB.

- [14] Mr. Appleby submitted that there is no requirement in the Act for any educational institute to be registered or accredited or to only recruit students to an accredited programme.
- [15] He further submitted that there is nothing in the Act or in regulations made under it that empower TNQAB to impose conditions upon 'Atenisi, as it had purported to do in its letter of 22 February 2018.
- [16] Mr. Appleby argued that the ban preventing recruitment was having, and would continue to have, an impact on 'Atenisi's viability that could not be adequately compensated in damages because 'Atenisi might not survive as a result of the loss of students.
- [17] Whilst acknowledging that it was open to 'Atenisi to simply recruit students notwithstanding the ban, and that there is no sanction in the Act for the failure to comply with any direction of TNQAB, Mr. Appleby submitted that ignoring the ban would not prevent damage which might accrue should TNQAB advertise 'Atenisi's lack of registration and accreditation. He argued this was 'an action [TNQAB] has no legal authority to take'. For this reason 'Atenisi amended its application for injunction to seek an additional order restraining TNQAB from:

...publishing in Tonga or elsewhere, through any medium of communication, any information about ['Atenisi] in respect of ['Atenisi's] compliance or otherwise with the Tonga National Qualifications and Accreditation Board Act.

Discussion

- [18] Counsel did not refer me to the legal principles that I should apply in considering this application. I adopt the established approach (*Paea anor v Sika* [2016] Tonga LR 335 and *Sevele v Prime Minister of Tonga and another* [2016] Tonga LR 342) as follows:
- [18.1] Is there a serious question to be tried?
- [18.2] Does the balance of convenience favour the granting of the injunction?
- [18.3] Does the overall justice of the case favour the granting of the injunction?

- [19] When an interim injunction is sought in a judicial review proceeding the Court must look at the balance of convenience in a wide context, reflecting the fact that one party will generally be a public authority performing public duties and obligated to enforce the law for the public benefit. Given the element of public interest involved, the most important factor for the Court's consideration will generally be whether the balance of convenience favours the injunction rather than whether damages would provide an adequate remedy (which may not be available in a particular public law context). In the final analysis, whether to grant an injunction or not is a matter for the Court to determine in its discretion. The Court will take the course that will produce the most just result.

Serious question to be tried

- [20] I am unable to accept the submission that 'Atenisi has shown a strong *prima facie* case (or a serious question to be tried) for the reasons that follow.
- [21] The premise for the first cause of action (that being non-accredited 'Atenisi is not a provider under s. 2) may be open on a literal interpretation but is unlikely to be correct. It would mean that registration and accreditation are voluntary thereby undermining the purpose of the Act to develop a national qualifications framework and regulate, monitor and oversee the quality, accreditation and delivery of post compulsory education courses of study and training by the Board.
- [22] In relation to the second cause of action, I received no submissions as to whether estoppel may be raised against public bodies or officials in the performance of their duties (an issue touched upon in *Tapealava v Minister of Lands* [2015] Tonga LR 313). Leaving that aside, from the facts pleaded in the statement of claim it is clear that 'Atenisi did not rely upon the representation on the Boards' website to its detriment and estoppel cannot be advanced.
- [23] As to the third cause of action, I have reservations whether the Court would review assessment criteria adopted by the Board. It is the kind of issue upon which at the very least the Court could be expected to exercise a high degree of deference to the views of the Board. In any event, there is insufficient evidence before me to suggest even an arguable case that the Board's assessment criteria are inappropriate.

Balance of convenience

- [24] There are a number of factors under this heading which weighed in the balance lead me to conclude that the application for injunction should be refused.

- [25] If as 'Atenisi contends it is not subject to the Act, the Board's letter of 22 February 2018 is of no legal consequence. Mr. Appleyard acknowledged as much in his submissions. He accepted also that there does not appear to be any sanction in the Act for a failure to comply with a direction of the Board. The Court will not make coercive orders in the nature of injunction which plainly serve no purpose.
- [26] I understand (although there is no evidence on the point) that 'Atenisi's response is that it will suffer harm should the Board publish any information concerning its compliance (or non-compliance) with the Act, as this will affect its ability to attract new students. I do not accept this as a reason to grant an injunction.
- [27] It is fundamental in free societies that persons should not be restrained from expressing opinions or disseminating information unless there are pressing grounds to do so. This applies equally in a public sphere to the performance of duties by public bodies and officials as it does to private individuals.
- [28] In addition, I must take into account the public interest which operates here on at least two levels. First, the Court should place considerable weight on the desirability of enforcing what appears to be the position at law, which is a requirement for registration of post compulsory education providers under the Act. Secondly, there are the interests of prospective students who should be aware that their proposed courses of study are to be delivered by an entity that is not registered under the Act and that any qualifications earned may not be recognised in this country, at least by the largest employer which is the Government of Tonga. The students' right to be informed outweighs 'Atenisi's interest in recruiting them.
- [29] In addition to the above matters, there have been delays in making and then pursuing this application. When it was heard the Court was asked not to rule upon it for some time. In addition, timetabling orders made to ensure an early hearing have not been complied with. I do not accept that 'Atenisi's position can be so dire that it is necessary to issue an injunction. Rather, I have allocated an early hearing date for the trial of the action.

Overall justice

- [30] Standing back and looking at the overall justice of the case, the making of the orders sought would serve no useful purpose and 'Atenisi has not satisfied me that it has good prospects of success. The action can be heard on an urgent basis. Whilst 'Atenisi may

suffer damage until the case is concluded, the risk of that is outweighed by the public interest in declining the application.

Result

- [31] The application for injunction is declined.
- [32] In circumstances where there are public interests at play I consider it appropriate to reserve costs pending determination of the action.



NUKU'ALOFA: 8 February 2019.

A handwritten signature in blue ink, consisting of a large, stylized 'O' followed by a cursive 'G' and 'Paulsen'.

O.G. Paulsen
LORD CHIEF JUSTICE