**IN THE COURT OF APPEAL**
**OF THE REPUBLIC OF VANUATU**
*(Civil Appellate Jurisdiction)*

**Civil Appeal**
**Cases No. 21/3241 & 21/3748 COA/CIVA**

**BETWEEN: LETLET AUGUST**
*Appellant*

**AND: OMBUDSMAN OF THE REPUBLIC OF VANUATU**
*Respondent*

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| ***Coram:*** | ***Hon. Chief Justice V. Lunabek***<br>***Hon. Justice J.W. von Doussa***<br>***Hon. Justice R. Asher***<br>***Hon. Justice O. Saksak***<br>***Hon. Justice D. Aru***<br>***Hon. Justice Viran Molisa Trief*** |
| ***Counsel:*** | *Mr Hurley for the Appellant*<br>*Mr Godden for the Respondent* |
| ***Date of Hearing:*** | *15 November 2021* |
| ***Date of Judgment:*** | *19 November 2021* |

# JUDGMENT

## Introduction

[1] This appeal concerns a search warrant obtained by the Ombudsman of the Republic of Vanuatu, the respondent (the Ombudsman), which resulted in its execution on the appellant Letlet August's (Mr August) premises on 5 June 2021.

[2] Subsequently, the execution of the search warrant in this way gave rise to two different claims for judicial review, which led to two different decisions.

[3] The first claim was made on the basis that the Ombudsman had not followed the correct procedure specified in s 24 of the Ombudsman Act in applying for a search warrant to be issued permitting the Ombudsman to search premises at which documentary evidence was sought or where it was likely that such documents were located. That challenge was on the basis that the notice requirements of s 24 for obtaining a warrant were not observed by the Ombudsman. In the decision on that application, delivered on 23 September 2021 (the first decision) the application for judicial review was declined. It was held that the search warrant issued and executed was lawful and that the fruits of the search were available to the Ombudsman. The Ombudsman received a costs award for VT125,000.

[4] The second claim relating to the same search warrant was made on the basis that the application for the warrant should have been made to the Supreme Court rather than the Magistrates Court. The second judicial review claim was by consent dealt with on the papers. It was ultimately not contested by the Ombudsman that the application was made in error to the Magistrates Court and not the Supreme Court, and this was accepted by the primary judge. The judge then proceeded to consider the claim for damages, and apply s 41 of the Ombudsman Act. He held that the Ombudsman could claim immunity for obtaining the warrant wrongfully under s 41 of the Ombudsman Act, because "Only if an applicant can establish that the Ombudsman or his appointed members of staff acted in bad faith is it open to the Court to award damages". He declined to award any damages, but ordered the Ombudsman to pay Mr August's costs.

[5] The appellant challenges both decisions, the first in whole and the second in part. He submits through his counsel Mr Hurley that the first judicial review claim should have been determined in the appellant's favour because the warrant was obtained unlawfully and in breach of s 24 of the Ombudsman Act. He contests the second submitting that the primary judge should not have determined the issue of damages without hearing further from Mr August's counsel on that point, and that damages are in fact payable. He asks for the damages decision to be set aside, and for a hearing in the Supreme Court on damages.

[6] We were concerned that the second decision had made the first moot, but have been persuaded that despite the fact that in part the first decision has been overtaken by the second decision, there is a costs issue in favour of the Ombudsman still standing, and the issue of a breach of s 24 might be relevant to an assessment of whether s 41 does or does not apply in relation to damages. We proceed to consider the two claims and decisions.

**The first decision – was the warrant obtained in breach of s 24 of the Ombudsman Act?**

[7] It was submitted by Mr Hurley for Mr August that while the Ombudsman may have obtained search warrants under s 24 of the Act, the Ombudsman may do so only once he or she has first issued a notice to the person who would be the subject of the warrant under s 22 of the Ombudsman Act, which had not been done. In contrast, the Ombudsman contended that a warrant is lawfully available, both where s 22 notices have issued and not been complied with, but also in circumstances where there have been no notices, but there are reasonable grounds for suspecting that a warrant is necessary to avoid the loss or destruction of evidence.

[8] The question that arises is one of statutory interpretation, in particular what s 24 means. We look at the sections setting out the Ombudsman's powers.

[9] Section 21 sets out the procedures of the Ombudsman, which are described in general terms not of direct relevance.

[10] In contrast, s 22 deals with evidence and provides for the Ombudsman obtaining evidence and information by informal request or seeking the cooperation of those concerned. He may issue a notice in writing in a form contained in the schedule to require a person to appear before the Ombudsman for examination, and to furnish any information or documentary evidence needed for an enquiry to the Ombudsman. Except in very limited circumstances, no statement made or

answer given to a person in the course of any enquiry is admissible in evidence against that person or any other person in any court.

[11] Section 23 deals with one course of action open to the Ombudsman in the event of a failure to comply with a s 22 notice. If a person fails or refuses to appear before the Ombudsman, or fails or refuses to furnish any information or documentary evidence, the Ombudsman may apply to the court for the person to be summoned to appear before the court to furnish to the court the information or the documentary evidence requested. The failure to comply with a s 22 notice is an offence under s 49, punishable by a fine, 6 months' imprisonment or both.

[12] Section 24 deals with another course of action open to the Ombudsman, obtaining a warrant to enter premises. It provides for a different remedy than s 23 that can be brought into play by the Ombudsman in the event of a failure to comply with a s 22 notice:

> ***24. Power to enter premises etc.***
>
> *(1) If the Court is satisfied by information on oath that:*
>
> *(a) a person served with a notice to provide documentary evidence under section 22 has:*
>
> *1. failed or refused to provide the documents; or*
>
> *2. failed or refused to provide all relevant documents in his or her possession or control; and*
>
> *(b) there are reasonable grounds for suspecting that documents needed for an Ombudsman's enquiry will be destroyed or otherwise become unobtainable unless a search warrant is issued to the Ombudsman;*
>
> *the Court may issue a search warrant to the Ombudsman for premises at which such documents are located or at which it is likely that such documents are located.*
>
> *(2) The Ombudsman or an officer authorized by him or her has at any time the right:*
>
> *(a) to enter and inspect any premises for which a warrant has been issued; and*
>
> *(b) to call for and examine any document needed for his or her enquiries which is kept on the premises; and*
>
> *(c) if necessary, to seize, retain and remove any such document, or take extracts from, or make copies of, any such document.*
>
> *(3) The occupier of the premises for which a warrant has been issued must provide the Ombudsman or person authorized by him or her, as the case may be, with all reasonable facilities and assistance for the effective exercise of his or her powers under this section.*
>
> *(4) A person is guilty of an offence if:*
>
> *(a) the person obstructs the Ombudsman or his or her officer in the exercise of his or her powers under this section; or*

(b) *the person fails to provide the Ombudsman or his or her officer with all reasonable facilities and assistance as required by subsection (3).*

*Penalty: VT100,000 or imprisonment for 6 months or both.*

[13] The argument for Mr August in both the Supreme Court and before us was that an order issuing a search warrant to the Ombudsman to enter premises at which documents are located can only be made first if there are failures or refusals of s 22 notices in under s 24(1)(a) and, second, that there are reasonable grounds for suspecting that documents needed for the Ombudsman's enquiry will be destroyed or otherwise become unobtainable unless a search warrant is issued under s 24(1)(b). The judge, at first instance accurately identified the issue as being whether the word "and" at the conclusion of s 24(1)(a) and just before the start of (b) is to be read conjunctively, as Mr August argued, or disjunctively, as the Ombudsman argued. The judge correctly identified that it was the intention of Parliament that must dictate the answer.

**Discussion**

[14] Section 8 of the Interpretation Act [Cap132] as amended is as follows:

***8. General principles of interpretation***

*(1) Every Act must be interpreted in such manner as best corresponds to the intention of Parliament.*

*(2) The intention of Parliament is to be derived from the words of the Act, having regard to:*

*(a) the plain meaning of ordinary words; and*

*(b) the technical meaning of technical words; and*

*(c) the whole of the Act and the specific context in which words appear; and*

*(d) headings and any limitation or expansion of the meaning of words implied by them; and*

*(e) grammar, rules of language, conventions of legislative drafting and punctuation.*

*(3) Where the application of subsection (2) would produce:*

*(a) an ambiguous result; or*

*(b) a result which cannot reasonably be supposed to correspond with the intention of Parliament, the words are to receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.*

*(4) In applying subsection (3), the intention of Parliament may be ascertained from:*

*(a) the legislative history of the Act or provision in question; and*

*(b) explanatory notes and such other material as was before Parliament; and*

*(c) Hansard; and*

*(d) Treaties and International Conventions to which Vanuatu is a party.*

*The plain meaning*

[15] As identified in s 8(2)(a) bearing in mind the need to interpret the section in accord with the intention of Parliament, the starting point is to consider first the plain meaning of the section to be interpreted. To be specific, should s 24(1) be interpreted as requiring the service of notice and a failure or refusal to comply, as a prerequisite to obtaining an order under s 24(1)(b)?

[16] In our view the answer is clear that on the plain meaning of the words in s 24(1), the requirements of s 24(1)(a) and s 24(1)(b) must both exist before the court may issue a search warrant. That is what the section says. The word "and" is used and links the two requirements. "*And*" is a conjunctive word in its ordinary meaning. It is the interpretation dictated by an application of the plain meaning of words.

[17] This is because the word "and" is a conjunction used to connect words in the same part of speech such as clauses or sentences that are to be taken jointly. They can be used to connect, imply progression, or causation.[1] Examples given by dictionaries are phrases like "*boys and girls*",[2] and "*I pulled the door closed and did up my boots*".[3] This is the ordinary usage of "*and*". A disjunctive meaning is not discussed. We see no ambiguity in the use of this word. On its face it has a conjunctive meaning.

[18] We are mindful of s 8(3)(a) and (b) of the Interpretation Act which provide that where the result of a reading of words is ambiguous, or a result which "cannot reasonably be supposed to correspond with the intention of Parliament," the words "are to receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit". We accept also that in certain extreme cases the word "*and*" can have a disjunctive meaning, where a conjunctive meaning would lead to a plainly absurd or unfair result which cannot have been the intention of Parliament.

[19] Mr Godden, for the Ombudsman, while not contesting the plain meaning, argued that indeed a conjunctive meaning would lead to such an absurd result, or at the very least a result plainly not in accord with the intention of Parliament. That appears to have been the view of the learned judge. Mr Godden submitted that having regard to the whole of the Act and the specific context in which the words in s 24(1) appear, there is a gradation of the powers vested in the Ombudsman to obtain information. First, under s 22, second under s 23, and then finally under s 24. He supported the judge's reliance on the context of the Act.

[1] *Oxford English dictionary*
[2] *Cambridge English Dictionary*
[3] *Collins English Dictionary*

*The context*

[20] In assessing the context, we start by going back further in the Act than the sections in question, and consider the functions of the Ombudsman set out in s 11. The Ombudsman has the function of enquiring into the conduct of government agencies, defects in law or in practices, alleged or suspected discriminatory practices, and enquiries or investigations into the conduct of leaders, as well as conducting mediations. Under s 12 the Ombudsman's findings include findings that conduct was oppressive or improperly discriminative or based wholly or partly on improper motives, irrelevant grounds or considerations, was contrary to natural justice, or was conduct for which reasons should have been given but were not. The Ombudsman may find in relation to a leader that the leader has failed to carry out or breached the duties and responsibilities of office, or has breached the leadership code. The areas of enquiry and the findings referred to are not of the type found in the criminal law, where there is the ability to seek a warrant without notice under the Criminal Procedure Code.

[21] A less invasive level of enquiry is indicated than that which exists in the criminal sphere. This is also seen in s 21(1), which provides that before commencing an enquiry into the conduct of a government agency or a leader, the Ombudsman must give written notice to the person in charge (unless to do so would interfere with the enquiry). Under s 21(4) the Ombudsman must not make a report that is adverse to a government agency or a leader unless they have given the person at the centre of the enquiry an opportunity to comment either orally or in writing on the subject of the enquiry. Under s 21(5) the explanation provided to the Ombudsman must in the event of an adverse report, be reported in substance, save in certain specified circumstances.

[22] Against this relatively non-invasive background, s 22 then provides for the Ombudsman obtaining an appearance or information by issuing a notice in writing. Section 23 sets out in part the results of a failure to comply. The Ombudsman may apply to the court for the person to be summoned to appear before the court, or to furnish to the court the information or documentary evidence requested. Section 24 covers a different way of getting information in the face of a refusal or failure to comply with a s 22 notice, by warrant to enter. It does not deal like s 23 with forcing the production of information or evidence, but rather the power to enter premises to uplift the information or evidence.

[23] Therefore s 24 gives an alternative power to s 23 to the Ombudsman if faced with non-compliance with a s 22 notice. It gives the Ombudsman the power to seek to enter premises and take the documents.

[24] This involves a significant infringement of the rights of the occupant to enjoy their premises. It could be seen as more draconian than the s 22 power. It does not compel disclosure or appearance, but rather makes the subject of the inquiry subject to a forced entry and removal of documents. The considerations are different from the human rights considerations arising in ss 21 and 22, which deal more with the provision and obtaining of information without any question of entry into premises. Nevertheless, with all these sections, notice is stated to be a prerequisite.

[25] This is consistent with the overall context of the Ombudsman Act which, as we have said, sets out limited functions and obligations where the giving of notice, or to put it another way, fair warning, are part of the scheme, and mediation is one of the processes of achieving an outcome. The powers are different from the more invasive powers of, say, the police. We do not see this a lacuna in the Ombudsman's powers. The Ombudsman can always refer a matter to the Police if it is thought that there is criminal conduct and the likelihood of documents being destroyed if any notice is given.

[26] Thus we consider that interpreting "and" as having a conjunctive meaning as consistent with the context of the Ombudsman Act.

*The legislative history*

[27] Under s 8(4) of the Interpretation Act the intention of Parliament may be ascertained from the legislative history of the Act or provision in question. We see the legislative history as supporting the conjunctive meaning of "*and*".

[28] The Ombudsman Act 1988 had a surprising history in that it replaced the Ombudsman Act 1995, an Act that was only three years old.

[29] Under the Ombudsman Act 1995 s 21 of the Act read:

> ***21. POWER TO ENTER PREMISES ETC.***
>
> *(1) Where the Court is satisfied that –*
>
> *(a) a person summoned to provide documents under section 17(7) has failed or refused to do so or failed or refused to provide all relevant documents under his possession or control; or*
>
> *(b) there is a likelihood that documents needed for the Ombudsman's enquiry will be destroyed or otherwise become unobtainable unless a search warrant is issued to the Ombudsman,*
>
> *(c) the Court may issue a search warrant to the Ombudsman in respect of any premises at which the documents needed for his enquiry are located or at which there is a likelihood of their being located.*
>
> *(2) (a) The Ombudsman or an officer authorized by him shall at anytime have the right to enter and inspect any premises in respect of which a warrant has been issued to call for, examine and, where necessary, seize, retain and remove any document needed for his enquiries which is kept on these premises or make extracts from copies of any such document.*
>
> *(b) The occupier of the premises in respect of which a warrant has been issued shall provide the Ombudsman or person authorized by him as the case may be with all reasonable facilities and assistance for the effective exercise of his powers under this section.*
>
> *(c) Any person who obstructs the Ombudsman in the exercise of his powers under this section or who fails to provide the Ombudsman or his officer with*

*all reasonable facilities and assistance as required by paragraph (b) of this subsection is guilty of an offence.*

*Penalty: VT100,000 or imprisonment for 6 months or both.*

[30] It is to be noted that the word "or" not "and" was used between ss 21(1)(a) and s 21(1)(b). Under the 1995 Act the Ombudsman could obtain a warrant without giving notice.

[31] That section was repealed when the 1998 Act was passed. Mr Hurley pointed out in an uncontested submission that there were a number of changes made by Parliament in the 1998 Act, which were intended to address concerns regarding the Ombudsman's powers, including a refinement of the powers. There is no doubt that the surprising repeal after three years and enactment of a new Act, meant that any provision which affected the Ombudsman's powers was likely to have been the subject of close scrutiny. In our view the change of the word from "or" to "*and*" must, in the overall legislative context, be regarded as deliberate and significant. In our view this is an indication that it was the intention of Parliament to deliberately use the word "and" rather than "or", and to require the issue of warrants in s 24 as only being available after the giving of notice.

*Conclusion*

[32] Thus in all respects, we are driven to the conclusion that "and" means what it says in the context, and consistently with the legislative background. The Ombudsman cannot obtain a warrant under s 24(1) without having first issued a s 22 notice and there having been a failure or refusal as defined. On this point we differ from the Learned Judge at first instance. In our view the warrant obtained on 5 June 2021 was not a valid warrant. An essential prerequisite to its issue had not occurred, namely the issue of s 22 notice.

[33] Thus we will allow the appeal in relation to the first decision of 23 September 2021, and the claim for judicial review succeeds. We quash the decision that the search warrant issued and executed was lawful, and declare it to have been unlawful. The orders made in the second decision for the return of property apply.

[34] Costs should follow the event in both the Supreme Court and in this Court. The order for costs in the Supreme Court is quashed, and those costs are set at VT175,000, and to be paid by the Ombudsman to Mr August. We make a single order for costs in this Court at the end of this judgment.

**The second decision – damages**

[35] As we have set out, in the second decision it was found effectively without opposition that the search warrant, because it was issued by the Magistrates Court and not the Supreme Court, was unlawful. That declaration, the declarations that the entry search seizure and removal were unlawful, and the order that the Ombudsman return to source all property seized and removed were not in contention. The judge declined to make a restraining order.

[36] He then stated:

> *Further, I decline to award damages as section 41 of the Ombudsman Act, in this instance, fully indemnifies the Ombudsman and his staff.*

[37] Section 41 of the Ombudsman Act reads:

> ***41. Immunities***
>
> *(1) Neither the Ombudsman nor an officer or employee of the Ombudsman is liable for any act or omission done or ordered to be done or made in good faith and without negligence under or for the purposes of the Constitution or this Act.*
>
> *(2) Neither criminal nor civil proceedings are to be issued against the Ombudsman, or an officer or employee of the Ombudsman, for anything done, said or omitted by the Ombudsman, or the officer or employee, under or for the purposes of the Constitution or this Act.*
>
> *(3) However, subsection (2) does not apply if it is shown that the Ombudsman, or the officer or employee, acted in bad faith.*

[38] In the written submissions for Mr August in the Supreme Court, Mr Hurley did not address s 41 of the Ombudsman Act. Mr Godden did briefly address it, it seems, although in general terms he relied on s 41 and submitted that the section precluded any award of damages be made.

[39] The judge noted in relation to Mr Hurley's position that "he also did not elaborate on the question of damages, other than to seek the relief outlined in the claim".

[40] Mr Hurley explained that he interpreted the agreement that submissions be provided in writing as covering the substantive question of whether the search warrant had been obtained and executed unlawfully. He did not address damages because he did not think that they were an issue. In general terms we see this as a misunderstanding on both sides as to what was to be covered by the written submissions. Mr Godden did not disagree with this interpretation of events. The misunderstanding meant that Mr August was deprived of a fair hearing on the damages point.

[41] Although we express no opinion as to its merits, there is an argument available to Mr Hurley that s 41 does not give the Ombudsman immunity. This is because s 41 only applies if acts are done in good faith "and without negligence". The judge referred only to "good faith" and not "negligence" when he summarised the section.

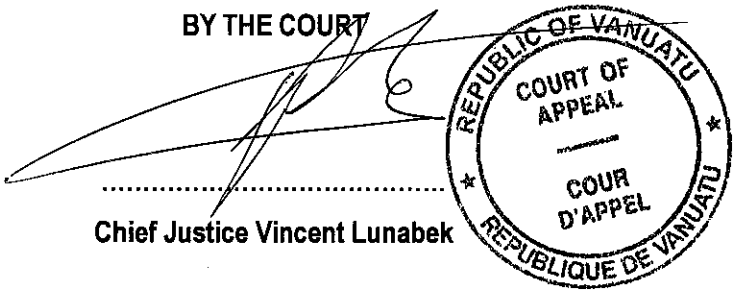
[42] Mr Hurley wishes to allege negligence and pursue damages for Mr August. In our view he should be given the opportunity to do so. We therefore quash the declinature of damages in the second decision, and order a hearing as to damages in the Supreme Court. At that hearing the judge can take into account the two errors made by the Ombudsman in seeking the warrant, first the failure to give notice, and second the filing in the wrong court.

[43] The Supreme Court costs order in the second decision is quashed. The Ombudsman is to pay costs of VT175,000 on that second judicial review claim in the Supreme Court to Mr August.

[44] In relation to costs in this Court, costs must follow the event. This appeal was heard together with the s 24 appeal. The Ombudsman having been unsuccessful in the appeals against both decisions, is to pay a single set of costs of the appeals of VT175,000 to Mr August.

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

**BY THE COURT**

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**Chief Justice Vincent Lunabek**