

IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No.17 of 2006

**BETWEEN: THE VANUATU MARITIME
AUTHORITY**

Claimant

**AND: SIMEON ATHY, DIRECTOR
GENERAL OF FINANCE**

Defendant

Coram: Justice P. I. Treston

Mr. Sugden for Claimant

Mr. Gilu for Defendant

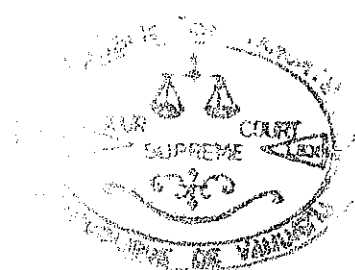
Dates of Hearing: 21 June 2006

Date of Decision: 14 July 2006

**REASONS FOR DECLINING TO HEAR
CLAIM AND STRIKING IT OUT**

CLAIM

In a claim for judicial review filed on 22 February 2006, the Claimant filed against Defendant a claim for judicial review setting out the mandatory and prohibiting orders which it sought.

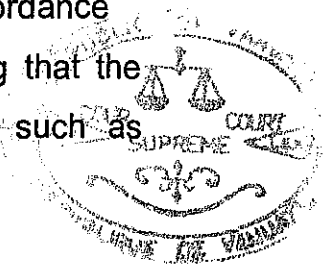


In an amended claim for judicial review dated 14 March 2006 and filed on that date an expanded claim was set out.

A further amended claim for judicial review dated 22 March 2006 and filed on that date was annexed to an application joining the Attorney General as a Defendant to the claim which sought to amend the claim in accordance with that latest document because it was contended that the annexed document better expressed the claim.

In an even further amended claim for judicial review dated and filed on 5 May 2006, the Claimant claimed as follows: -

- (A) A mandatory order requiring the Defendant to place in the actual and sole control of the Claimant the totality of the moneys allocated to it each year by Parliament in the Annual Appropriation Acts and Supplementary Appropriation Acts and to not, for any reason place within the Claimant's disposal a sum less than that allocated by Parliament.
- (B) A mandatory order requiring the Defendant to immediately pay to the Claimant.
 - (a) The sum of VT7,579,960 that he deducted from the budgetary payment allocated to the Claimant by Parliament for the year 2005.
 - (b) The sum of VT5,342,817 that he has deducted from the budgetary payment allocated to the Claimant by Parliament for the year 2006.
- (C) A mandatory order requiring the Defendant to act in accordance with the law and to diligently apply himself in ensuring that the VMA is able to meet its unbudgeted for expenses such as



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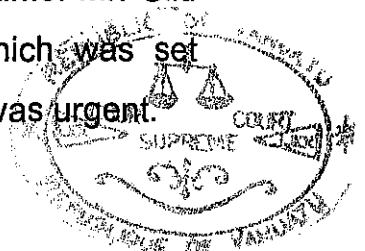
judgment sums, legal costs and other expenses necessary for the VMA to function from grants from the Government and other sources as provided in section 3 of the VMA Act.

- (D) A declaration that, in withholding out of moneys allocated to the Claimant by Parliament, sums that he, using his own discretion, has decided should not be provided to the Claimant, the First Defendant was acting and continues to act contrary to law.
- (E) A declaration that, in using his position as Director General of Finance to pursue a personal animosity that he bears the individuals through which the Claimant currently acts and functions, by limiting at every opportunity the moneys made available to the Claimant to enable it to meet its expenses of functioning, the Defendant is acting contrary to law and grossly abusing his position.
- (F) Costs on an indemnity basis against the Defendant.

In extensive grounds in support of the claim, the document effectively set out the Claimant's contention that the Defendant was refusing to pay to the Claimant its normal costs of functioning by means of an appropriation by Act of Parliament out of Vanuatu's revenue and that the Defendant was effectively endeavouring to bring about the demise of the Claimant.

CONFERENCE

A conference was set for 21 June 2006 even though the defence had not yet been filed. That was perhaps understandable in view of the number of amended claims which were filed from time to time. Mr. Gilu from the State Law Office attended the conference which was set largely because the Claimant had claimed that the matter was urgent.



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The Claimant had filed an amended application to join the Attorney General as a Defendant to the claim and to amend the claim for judicial review in accordance with the latest amended claim dated 5 May 2006.

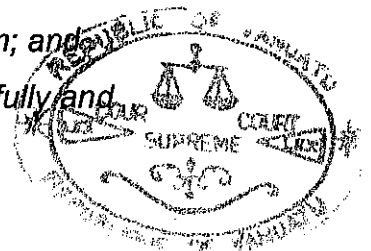
At the conference the Claimant abandoned the application for an order joining the Attorney General as a Defendant to the claim. The Claimant had argued that, as he was seeking declarations, the Attorney General must be named as a Defendant. However, the Court advised Mr. Sugden on behalf of the Claimant that in its view Rule 17.4 of the Civil Procedure Rules No. 49 of 2002 only allowed a declaration in relation to an enactment under Rule 17.4 (1) (a) and in that case the Attorney General must be named as a Defendant in accordance with Rule 17.4 (2)(a). Counsel for the Claimant accepted that Rules 17.4 (1) and (2) must be read together and that it was not necessary to join the Attorney General because the Claimant was not seeking a declaration about an enactment.

However, the Claimant wished to pursue his application for leave to amend the claim for judicial review in accordance with the latest amended claim of 5 May 2006 and the defence did not object to that save in so far as the Attorney General did not need to be named as Second Defendant.

Rule 17.8 provides that at the conference, the judge must consider the matters in subrule (3) which provides as follows: -

"The judge will not hear the claim unless he or she is satisfied that:

- (a) the claimant has an arguable case; and*
- (b) the claimant is directly affected by the enactment or decision; and*
- (c) there has been no undue delay in making the claim; and*
- (d) there is no other remedy that resolves the matter fully and directly."*

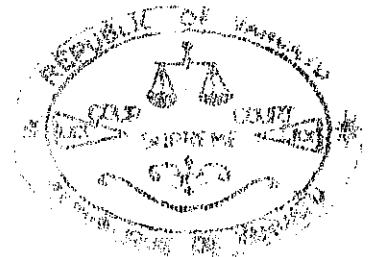


In accordance with Rule 17.8 (4), I considered the papers filed in the proceedings and heard argument from the parties.

FINDINGS

I found that the Claimant did not have an arguable case because even in the amended application it was not clear what decision the Claimant was seeking review of. In the orders sought no specific decision of the Defendant was challenged. The Claimant argued that it was a matter of inference from the grounds in support of the claim, which decision was being challenged but in my view the pleadings did not set that out clearly. A decision is defined in Rule 17.2 for the purposes of this case as being a decision, an action or a failure to act in relation to the exercise of a public function. I am of the view for reasons that I shall expand on below that the Defendant was not exercising a public function in these circumstances

More importantly however, it was my view that the Claimant did not have an arguable case and effectively the application for judicial review was misconceived because it effectively amounted to an arm of the Government issuing civil proceedings against an officer of the Government in another Government department or in effect asking the Government to review itself. The Claimant argued that it was in fact suing an individual officer of the Government in exercising a public function, I did not accept that submission. In short I was of the view that in the papers filed in the proceeding the Claimant did not have standing to sue (or locus standi) because it was an arm of government seeking to review an officer in another area of the same government. That is different to a private citizen seeking to review a decision of a government acting in a public function.

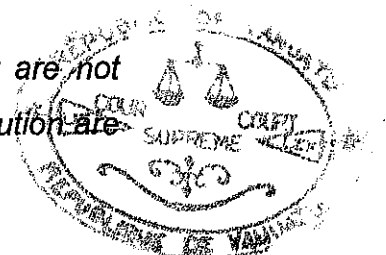


There can be no doubt that the Claimant is an arm of government. While it is true under section 3 (2) (a) of the Maritime Authority Act No. 29 of 1998 ("the Act"), the Authority is a body corporate with perpetual succession and under section 3 (2) (c) the Authority may sue and be sued in its corporate name, I was of the view that the Claimant is still an arm of Government because under section 4 (1) of the Maritime Authority Act its members are appointed by the Minister responsible for the maritime transport industry and the Authority is thus subject to the Government and it is a matter of common sense it cannot sue the Government or any officer of the Government. Other sections of the Act give credence to that view. Under s.21 any fees charges etc. must be paid into the Public Fund. Section 22 provides that any borrowing of money by the Authority is subject to written approval of the Minister responsible for finance and the Authority must be audited by the Auditor General under s.26 (3).

Significantly also there was no sworn statement from any member of the Authority itself. The Commissioner of Maritime Affairs deposed that he was acting by delegation of the Authority. He seemed to be the driving force behind the claim but after all he is an officer appointed by the Authority subject to the written consent of the Minister (s.12(1)) and did not depose that he was authorized to issue such a claim. The Commissioner's prime functions and powers are set out in Part 5 of the Act and relate basically to maritime matters. He is responsible to the Authority for the proper administration of the Act and the day to day running of the affairs of the Authority but I did not accept that it extended to issuing this claim.

In "Judicial Review of Administrative Action", Aronson & Dyer 2nd Edition it was said at p.519

*"The Courts decline to hear some cases because they are not
judicial. This may be because the criteria for their resolution are*



essentially political, and prudence requires judicial deference to the other branches of government (see per Kirby J in Thorpe v Commonwealth [No.3] (1997) 71 ALJR 767 at 777 - 779)".

This is the case here where the issue is an internal matter of government and should be dealt with in another way without recourse to the Courts. The issue is essentially political. Thus I was satisfied that there was another remedy to resolve the matter fully and directly within government itself.

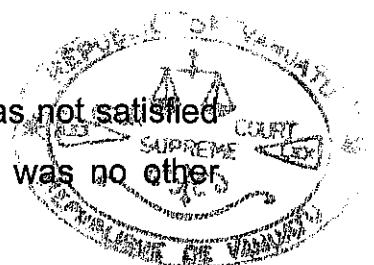
Here the Defendant is also not exercising a public power but an internal function of government which should not be subject to judicial review. As was said in "Judicial Review of Administrative Action" (above) at p.674 "...one of the most fundamental assumptions underlying the law of judicial review is that it is the duty of superior Courts of general jurisdiction to ensure that public power is exercised according to law". This case is not arguable under that principle as it relates to the internal workings of government and not the exercise of public power. In short I was satisfied that judicial review was an inappropriate remedy for a public body corporate to take against its own government.

It was my view that the right of the Claimant to sue and be sued was not the test. The true test is whether or not the Government exercises control over the Claimant which it clearly does.

Accordingly, it was my view that the claim for judicial review was misconceived in that the Claimant was seeking review of a Government officer's action when it was itself an arm of Government.

CONCLUSION

For those reasons in accordance with Rule 17.8 (5), I was not satisfied that the Claimant had an arguable case nor that there was no other




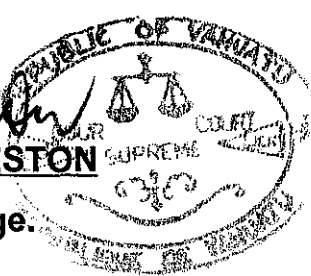
remedy that could resolve the matter fully and directly and I declined to hear the claim and struck it out.

In my view, no question of costs arose one way or the other.

Dated AT PORT VILA on 14 July 2006

BY THE COURT


P. I. TRESTON
Judge.



The seal of the Supreme Court of Vanuatu is circular. It features a central scale of justice. The words "REPUBLIC OF VANUATU" are written along the top inner edge of the circle. Below the scale, the words "SUPREME COURT" are visible. The bottom part of the seal contains a decorative flourish.