

(Civil Jurisdiction)

BETWEEN: ARNOLD WABAK

Claimant

AND: THE COMMISSIONER OF POLICE

Defendant

Mr Justice Oliver A. Saksak

Mr George F. Boar for the Claimant
Ms Jennifer Harders for the Defendant

Date of Hearing: 4th May 2009
Date of Judgment: 29th July 2009

JUDGMENT

1. Two applications were heard on 4th May 2009. The first was an application by the Attorney General filed on 4th September 2007 to strike out the claimants' claims. The application was filed pursuant to Rule 9.10 of the Civil Procedure Rules.

The grounds were stated as –

- (a) The defendant not being the employer of the Claimant, therefore the Claimant has no cause of action against him.
- (b) The claim is statute bared pursuant to Section 3 of the Limitations Act No. 4 of 1991.
- (c) Paragraph 9 of the claim is an attempt to seek judicial review.

Mr Justin Ngwele filed a statement in support of the application dated 4th September 2007.

2. The second application was made by the Claimant seeking orders to set aside the order for security for costs issued against the Claimant on 11th July 2008. The application was made pursuant to Rule 15.23 of the Rules and filed on 25th August 2008.
3. At the hearing of both applications Ms Harders relied on her written submissions filed on 4th May 2009, and Mr Boar relied on his submissions filed on 28th August 2008.
4. Following the order in which they were heard the Court deals first with the first application since it was filed first in time. The history of the case is better understood by setting out the chronology of events that took place –
 - (a) 27th April 2007 – The claim was filed.
 - (b) 17th July 2007 – The defence was filed.
 - (c) 4th September 2007 – Defendant filed application to strike out.
 - (d) 6th September 2007 – Claimant sought an adjournment of the hearing of the defendant's application.
 - (e) 6th November 2007 – Court made orders requiring the Claimant to file a response to the application within 21 days. No such response was filed and served.

- (f) 2nd April 2008 – Claimant sought further adjournment of the hearing of the strike out application. The adjournment was granted but the Court awarded wasted costs of the appearance. The Court further ordered the Claimant to file a response to the strike out application within 21 days.
- (g) 11th July 2008 – The Claimant failed to attend the hearing of the Defendant’s application and the Court ordered the Claimant to pay VT100.000 as security for costs within 14 days.
- (h) 28th August 2008 – The Claimant applied to set aside order for security for costs. To date the Claimant has not responded as directed and he has not paid the wasted costs ordered against him on 2nd April 2008.

Jurisdiction

5. The State Law Office submitted the Court has inherent jurisdiction to strike out a statement of the case which does not disclose a reasonable claim upon reliance on Noel v. Champagne Beach Working Committee [2006] VUCA 18 and Kalses v. Le Manganese de Vate Ltd [2005] VUCA 2. Further they submitted the Court’s jurisdiction is complemented by Rule 1.4 which provides a wider scope for dealing with dilatory claimants. The following cases were cited:
- Bank of NZ v. Sarvil Contractors [2005] 2 NZLP 475
- Securum Finance v. Ashton [2001] ch. 291
- Batistatos v. RTA [2006] HCA 27 at [68]
- Christmas Island Resort v. Gerald Building Co. (No. 5) (1997) 140 FLR 452 at 462.

6. Mr Boar did not address this point in his verbal response. Indeed it appears on the basis of the cases cited (although no copies were made available to the Court) that jurisdiction was and is not in issue, and the Court accepts those submissions that the Court has inherent jurisdiction to strike out a statement of case which does not disclose a reasonable claim or cause of action.

Cause of action

7. On this point the State Law Office contended that the Claimant's claim appears to allege a breach of the Police Act and that he has named the Police Commissioner as the defendant but as such he is not the employer of the Claimant. That being so, they submitted there is no cause of action disclosed.

Mr Boar did not respond adequately or at all to these arguments and submissions.

8. The claim names the Commissioner of Police as the Defendant and alleges under paragraph 2 that the defendant is the employer charged with the direct supervision of his employment as a VMF Member. Further, under paragraph 3 that under section 6 of the Police Act (Cap. 105) the Defendant makes force orders for the general government of members of the VMF.
9. Section 6 of the Police Act provides for the general powers of the Commissioner as follows:-

“(1) The Commissioner shall have the command, superintendence and direction of the Force and, subject

to the provisions of this Act and the general directions of the Minister may –

(a) Make such appointments, promotions and reduction in rank in respect of subordinate officers as he may consider fit; and

(b) Make Force Orders for the general government of members in relation to their enlistment discharge, training, arms, clothing, equipment and other appointments and particular services as well as their distribution and inspection and other such orders as he may deem expedient for preventing neglect and for promoting the efficiency and discipline of all members.”

(Emphasis by underlining).

10. It is correct the Commissioner does have command and superintendence but he is subject to the Act and the general direction of the Minister. It appears from this that ultimately it is the Minister and the Government of Vanuatu that is the employer of the Claimant and not the Police Commissioner. Therefore as such it is the Government that should have been named as the First Defendant. This is so that if liability was established, it is the Government as employer who would pay the arrears and damages claimed, through the Commissioner of Police as Head of the Vanuatu Mobile Force.

Limitation Act

11. The Claimant seeks among other things salaries and living allowances in respect of the period 20 November 1996 to March 2003. The State

Law Office submitted that the claim or parts of it are time-barred by operation of Section 3 of the Limitation Act 1991.

Mr Boar conceded that parts of the claims are time-barred but did not specify which ones. And he did not make any submissions in respect to Section 3 of the Limitation Act.

The Court is of the view the relevant legal provision applicable is Section 20 of the Employment Act Cap. 160. It states –

“PERIOD OF LIMITATION.

No proceedings maybe instituted by an employee for the recovery of remuneration after the expiry of 3 years from the end of the period to which the remuneration relates.”

Initially the period was 1 year but this was amended by Amendment Act No. 8 of 1995, Section 1 to 3 years.

There is nothing in the claims pleading portions or contractual liability. In paragraph 11 of the claims the Claimant alleges:

“The actions of the Defendant mentioned herein above are contrary to the provision of the Act and the Claimant is entitled to be paid his outstanding of the portion of salary.”

And at paragraph 12 he alleges:

“As a consequence of the Defendant’s actions the Claimant suffered loss and damage.”

These are inadequate to found an action on tort or contract to rely on the 6 year period provided by Section 3 of the Limitation Act.

As such the only conclusion the Court can reach is that the whole of the Claimant's claims are time-barred under Section 20 of the Employment Act. That is sufficient to dispose of this claim and proceedings. But other issues were raised.

Paragraph 9

12. The Claimant alleged in paragraph 9 as follows:-

"Furthermore the Defendant fail to afford the Claimant any opportunity to be heard and/or his right to natural justice upon disposing the Claimant's position of salary once the interdiction is removed."

The State Law Office submitted this was an attempt to seek judicial review and should be struck out.

Mr Boar did not address this issue in his response. Mr Ngwele deposed to a letter dated 16th July 2007 marked "JN1" to his sworn statement in which the Solicitor General pointed out these defects and invited Counsel to amend the claim before the next conference date or face a strike out application. Counsel did not respond or take any steps to rectify the defects.

The Court agrees paragraph 9 is an attempt to seek judicial review in a normal claim and as such is an abuse of process. The paragraph should be struck out.

Damages

13. The Claimant seeks both punitive and exemplary damages. It was submitted by the State Law Office that these are the same, and that the Claimant did not plead them in his claims. Mr Boar did not respond adequately or at all to this submission. At paragraph 12 of the claims the Claimant asserts he suffered "*loss and damage.*" But as found earlier under paragraph 11 of this judgment the Claimant has not pleaded any breaches in tort or contract to claim an entitlement for loss and damages to be awarded on a punitive basis. The Court therefore agrees with the Defendant on their submissions on this point.

No Steps Taken

14. It was further submitted by Defendant's Counsel that as the Claimant has not taken any steps in the proceeding for more than 6 months, and having failed to comply with directions made at conferences, that the Court should strike out the proceeding under Rule 9.10.

The chronology of events shows much delays and these were attributed to the Claimant. On at least three occasions Counsel for the Claimant wrote to the Court Registry advising he would not attend due to other Court commitments in Vila. These were on 20th July 2007, 10th October 2007 and 11th July 2008. But in none of those correspondences did Counsel ever notify the Court his client was serving on an overseas mission in Bosnia. This was disclosed to the Court only on 4th May 2009 at the hearing of these applications and Mr Boar did admit to the Court he was aware his client was serving overseas for a certain period. Further, no explanation has ever been given why wasted costs order dated 2 April 2008 has never been complied with by Counsel to date.

These failures and/or omissions by the Claimant gave rise to the Defendant's application for security of costs.

Security For Costs

15. It is therefore appropriate to determine the Claimant's application to set aside the orders for security for costs issued on 11th July 2008.

Mr Boar made extensive written submissions which were filed on 28th August 2008. Ms Harders responded to these in her written submissions of 4th May 2009.

The application was made pursuant to Rule 7.2, 7.3, 7.8 and 15.23 of the Civil Procedure Rules 2002. It was argued and submitted by Mr Boar that the security for costs was not necessary because the requirements in Rule 15.19 were not satisfied. These requirements are listed in Rule 15.19(a), (b), (c), (d), (e), (f) and (g). The orders of 11th July 2008 were necessary ***because "the justice of the case requires the making of the order."*** These arose as a result of the Claimant's delays, failures and/or omissions.

The Claimant alleges breach of natural justice. But Rule 15.23 provides a remedy for that. The Claimant has applied to have the costs orders set aside and he has been heard in respect to the application. His arguments are that the security is no longer necessary and that there are other special circumstances.

The Court disagrees with those arguments and submissions. No special circumstances have been shown or demonstrated by the Claimant to have arisen. And there is nothing that he has shown to show that security for costs is no longer necessary.

16. The Court therefore accepts Ms Harder's Submissions that the Claimant's application is misconstrued and should be dismissed.
17. The conclusions reached by the Court are –
- (a) The Defendant's application to strike out the Claimant's claims is successful. The claims of the Claimant are struck out in their entirety.
 - (b) The Claimant's application to set aside the security for costs orders fails and is accordingly dismissed.
 - (c) The Defendant is entitled to their costs of the application and to costs of and incidental to the proceeding including wasted costs as ordered, and VT100.000 awarded as security for costs on 11th July 2008.

DATED at Luganville this 29th day of July 2009.

BY THE COURT



OLIVER A. SAKSAK

Judge.