

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

Judicial Case No.2460 of 2016 SC/JUDR

**IN THE MATTER OF THE POLICE SERVICE COMMISSION AND THE  
POLICE ACT CAP 105**

**BETWEEN: API JACK MARIKEMBO**  
*Applicant*

**AND: PRESIDENT OF THE REPUBLIC OF VANUATU**  
*First Respondent*

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

**AND: MINISTER OF INTERNAL AFFAIRS**  
*Third Respondent*

*Date of Hearing: Tuesday May 2<sup>nd</sup> 2017 at 9 am*

*Date of Judgment: Friday, May 12, 2017*

*Before: Justice JP Geoghegan*

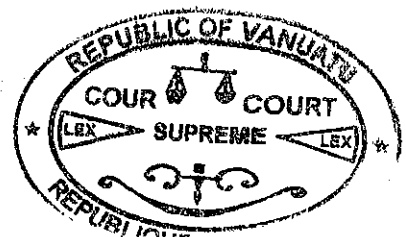
*Appearances: Mr Robin Kapapa for the Applicant  
Mrs Adeline Bani (SLO) for the First, Second and Third  
Respondents*

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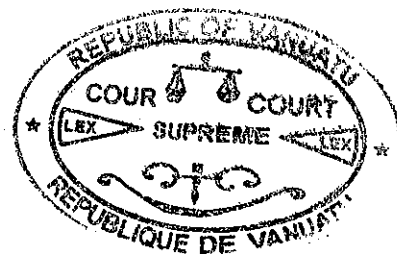
**JUDGMENT**

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1. On May 16<sup>th</sup> 2016, Mr Marikembo was appointed both as member and chairman of the Police Service Commission.
2. On July 12<sup>th</sup> 2016, Mr Marikembo's appointment was terminated by means of an instrument of removal signed by his Excellency the President of the Republic of Vanuatu. For present purposes the reasons for the termination of Mr Marikembo's appointment are irrelevant.



3. On July 22<sup>nd</sup> Mr Marikembo filed an application for judicial review claiming that the actions of the President, the State and the Minister of Internal Affairs were unlawful. Pursuant to that application Mr Marikembo sought specific relief namely:-
- a) An order/declaration that the purported decision of the respondents in removing Mr Marikembo as a member and chairman of the Police Service Commission were unlawful, null and void and of no effect.
  - b) An order/declaration that Mr Marikembo was the lawful chairman of the Police Service Commission and member "as pursuant to the law";
  - c) An order/declaration that a Minute of the Police Service Commission dated June 29<sup>th</sup> 2016 was a "lawful decision of the Police Service Commission";
  - d) An order/declaration that any purported appointment of the Chairman of member of the Police Service Commission in replacement of Mr Marikembo was unlawful, void and of no effect;
  - e) Costs;
  - f) Such further or other orders, relief or remedies as the Court shall deem fit.
4. Mr Marikembo's application was opposed by the respondents who filed a statement of defence.
5. On November 18<sup>th</sup> 2016 orders were made in the Supreme Court by consent between the parties declaring Mr Marikembo's termination as a member of and chairman of the Police Service Commission to be unlawful. The consent orders also recorded the following:-
- "2) The remaining issue is damages in which the claimant and defendants will make submissions on the assessment of the quantum.*
- 3) Upon the hearing of the assessment of the quantum, the proceeding is hereby discontinued."*
6. Mr Marikembo now seeks orders from the Court as follows:-

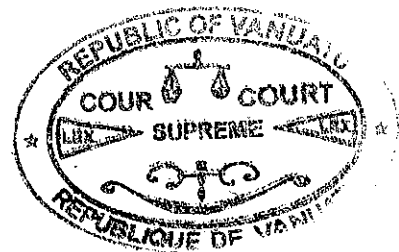


- a) Damages in the sum of Vt 12, 389, 640 for loss of wages as a result of his unlawful termination of employment;
  - b) Damages in the sum of Vt 300,0000 for "other monetary losses".
  - c) Damages in the sum of Vt 1,500,000 for "damages to reputations (sic)".
  - d) Costs.
  - e) Any further order the Court sees fit.
7. Accordingly the issue for determination is whether or not the Court can or should, in the circumstances, make an order for damages and if so for what sum?
  8. For Mr Marikembo, Mr Kapapa referred to the purpose of judicial review and the fact that it is not for the Court to examine and rule on the merits of any decision but for the Court simply to be concerned only with the legality or lawfulness of the decision by considering such matters as whether the decision maker was lawfully entitled to make it. See Sanma Local Government Council v. Wells<sup>1</sup>.
  9. Mr Kapapa acknowledged that the granting of a remedy in a judicial review proceeding is discretionary but that the Court could grant damages as a remedy in judicial review in limited circumstances. He submitted that an award of damages was available not only because of an improper decision but also because a private law cause of action as a breach of statutory duty was available to a claimant. In that regard Mr Kapapa referred to the decision in X (minors) v. Bedfordshire County Council<sup>2</sup> where at page 730 Lord Browne-Wilkinson stated:-

*"The question is whether, if Parliament has imposed a statutory duty on an authority to carry out a particular function, the plaintiff who has suffered damage in consequence of the authorities performance or non-performance of that function has a right of action and damages against the authority. It is important to distinguish such actions to recover damages, based on a private law course of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review".*

<sup>1</sup> [2012] VUSC 27

<sup>2</sup> [1995] 2AC633



10. Mr Kapapa also submitted that in this case the Court has found that the defendant's decision to dismiss the claimant was unlawful and in such circumstances an award of damages would be appropriate.

11. With respect to that submission, I do not accept it. In this case the respondent had accepted that its action in terminating Mr Marikembo's appointment was unlawful. The order made was as a result of an agreement between the parties rather than a finding by the Court made after trial. In addition while the consent order refers to "assessment of quantum" that cannot, in and of itself, constitute a finding by the Court that an award of damages is considered in this case to be appropriate. At best the consent order is merely confirmation of the parties' agreement that the next step in the proceedings would be to enable the parties to make submissions on that issue and for the Court to determine it.

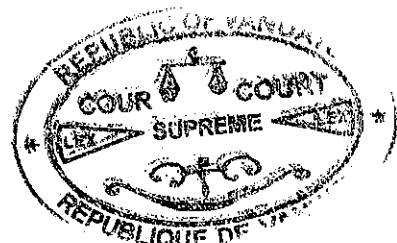
12. On behalf of the State Mrs Bani referred to rules 17.4 and 17.9 of the Civil Procedure Rules which provide as follows:-

*"17.4 (1) A person claiming judicial review may file a claim claiming:-*

- a) A declaration about an enactment; or*
- b) A mandatory order, a prohibiting order or a quashing order about a decision.*

*17.9 (1) After hearing a claim, the Court may make any of the following orders:-*

- a) An order declaring that the enactment being challenged is of no effect;*
- b) A mandatory order, requiring the person named in the order to take the actions stated in the order;*
- c) A prohibiting order, prohibiting the person named in the order from taking the action stated in the order;*
- d) A quashing order, that the decision is quashed."*

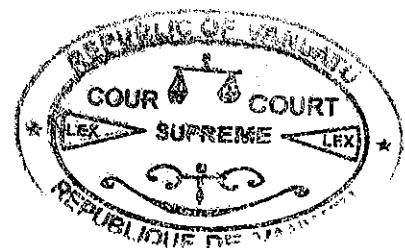


13. Mrs Bani submitted that in a judicial review claim the Court is limited to the remedies described in rule 17.9 and that claims for remedies of any other kind must be commenced, separately, by general claim in accordance with part 2 of the Civil Procedure Rules. Mrs Bani submitted that a reading of the rules applicable to judicial review claims make it clear that it was not intended that damages would be an available remedy in proceedings of this kind.
14. I have reached the view in this case having considered the submissions of counsel and the authorities referred to me that it is simply not appropriate for the Court to effectively deal with this application for judicial review as though it were a claim for unjustified termination of an employment contract.
15. Firstly, as a matter of general principle an application for judicial review is an application which contemplates very specific relief relating to the act or decision complained of. The focus of the proceedings is on the lawfulness or unlawfulness of the decision complained of rather than the damages flowing from it. While it may be possible for a Court to deal in tandem or consecutively with a judicial review claim and a separate claim for damages, there must be caution around this given the quite different characteristics of the different proceedings. That was recognized by the New Zealand Court of Appeal in Minister of Energy v. Petrocorp Exploration Ltd<sup>3</sup> and Commerce Commission v. Powerco Ltd<sup>4</sup> where the Court observed that a judicial review is supposed to be a *"simple, untechnical and prompt procedure"*.
16. The New Zealand Court of Appeal considered the issue of a claim for damages being part of a judicial review proceeding further in Attorney General v. Dot Com<sup>5</sup> where, while declining to lay down an absolute rule that a claim for damages can never be added to a judicial review proceeding the Court observed at para 41 that:-

<sup>3</sup> [1989] 1NZLR 348 (ca) at 353

<sup>4</sup> CA 123/06, 9 November 2006 at [40]

<sup>5</sup> [2013] NZ CA 43



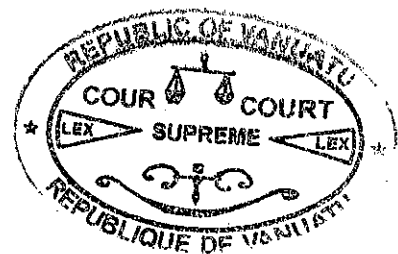
*"It will not usually be appropriate for review proceedings to expand to include claims for compensation".*

17. As to the circumstances in which a claim for damages can be added to a judicial review claim, the Court observed at paragraph [48] that:-

*"In essence, we consider that the objective of dealing with judicial review proceedings in the way that is most convenient and expeditious will provide reason for a High Court Judge to be cautious about allowing the expansion of a judicial review claim by the addition of a claim for damages. We endorse what this Court said in Orloy v. New Zealand Law Society in that regard, and stress that it is the expedition of the application for judicial review that must be the focus".*

18. In this case the pleadings make no reference at all to a claim for damages. Indeed the appropriate course I would suggest, would have been for Mr Marikembo to file a civil claim based on a breach of contract or for unlawful termination of employment under the provisions of the Employment Act. Instead, Mr Marikembo sought orders or declarations regarding the decision made on July 12<sup>th</sup> 2016 to terminate his appointment. Once he had obtained a concession from the respondent that the termination of his employment was unlawful it was then for him to pursue any other orders sought by him in addition to those set out in rule 17.9. The fact that he did not do so meant that the consent order entered into between the parties effectively brought the judicial review proceedings to an end.

19. While Mr Marikembo may well have suffered loss as a result of the unlawful termination of his employment, there is an onus on him to set out his position clearly and to address, if damages are sought, issues such as an obligation to mitigate any loss. There is also a need to examine the terms of the employment contract between the parties as they provide a basis upon which an award of damages may be made. All of these issues are issues which should be dealt with in proceedings other than judicial review proceedings. To require the Court to resolve both issues on the basis of the



pleadings filed on behalf of Mr Marikembo is simply to invite chaos and confusion and runs contrary to the principles underlying the Court's approach to judicial review.

20. For these reasons I decline to award any damages to Mr Marikembo and given the circumstances as described in this judgment I consider these proceedings now to be at an end. It will be for Mr Marikembo to determine whether other proceedings are now initiated in order to recover any loss of income and the form which they take.
21. Because Mr Marikembo has been substantially successful in respect of the central issue underlying the judicial review application he is entitled to costs with costs to be agreed between the parties within 21 days of the date of this judgment failing which they are to be taxed.

**Dated at Port Vila, this 12<sup>th</sup> day of May, 2017**

**BY THE COURT**

