

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

Civil  
Case No. 18/119 SC/CIVL

**BETWEEN: Marikembo Api Jack**  
*Claimant*

**AND: President of the Republic of Vanuatu**  
*First Defendant*

**AND: The Republic of Vanuatu**  
*Second Defendant*

**AND: The Minister of Internal Affairs**  
*Third Defendant*

**Before:** *Justice Aru*

**Counsel:** *Mr. R. Kapapa for the Claimant*  
*Ms. A. Bani for the Defendant*

**Date of Hearing :** *12<sup>th</sup> December 2018*

**Date of Judgment:** *26<sup>th</sup> April 2019*

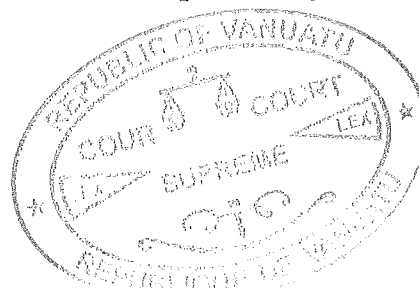
---

## JUDGMENT

---

### Introduction

1. Mr. Api Jack Marikempo was once the Chairperson of the Police Service Commission (PSC). He was appointed a member and also Chairperson of the PSC on the same day for a term of 4 years. After serving some two months into his term, Mr Marikempo was removed. He challenged his removal in Judicial Review Case No 2460 of 2016: Marikempo v the President of the Republic of Vanuatu (JR2460/16). The case was settled by consent with the parties agreeing that that Mr Marikempo's purported removal by the defendants was unlawful and that damages be assessed.
2. The Court dismissed the claim for damages sought in the JR proceedings .These proceedings were then filed.



### Pleadings

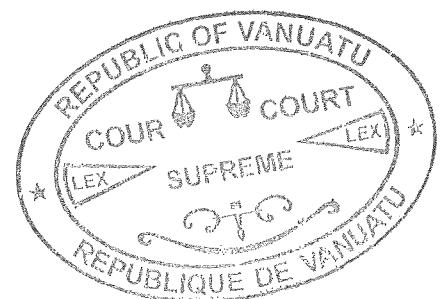
3. Mr Marikempo asserts in his claim that as a result of his unlawful termination he is entitled to compensation in the sum of VT 46,000,000 and an order for damages in the sum of VT 10,000,000 plus interest.
4. The defendants on the other hand say that the claimant was not entitled to anything as he was paid all his salaries up to the date of his removal. Even if he were to be able to claim for the remainder of the 4 years which he has not served his entitlements would not exceed VT 12,389,640.

### Background

5. On 16 May 2016 Mr Marikempo was appointed a member of the PSC by the President. On the same day, the Minister of Internal Affairs appointed him as Chairperson.
6. On 12 July 2016, Mr Marikempo was removed as a member of the PSC by the President. This effectively ended his appointment as the chairperson as well.
7. On 22 July 2016 Mr Marikempo filed JR 2460/16 to challenge his removal.
8. On 18 November 2016 the parties signed consent orders consenting that Mr Marikempo's removal was unlawful and that the remaining issue was damages. These orders were endorsed by the Court on the same date.
9. On 12 May 2017 Geoghegan J declined to award damages but said "it will be for Mr. Marikempo to determine whether other proceedings are now initiated in order to recover any loss of income and the form which they take."
10. On 22 January 2018 Mr Marikempo filed these proceedings.

### Issues

11. The main issue is whether Mr Marikempo is entitled to be paid salaries and other entitlements from the date of his removal to the end of his 4 year term. If the answer is yes, the second issue is what should be the total sum of entitlements payable to Mr Marikempo.



## Law

12. Section 9 and 9 B of the Police Act [CAP 105] as amended are of relevance as they provide for the appointment of members and chairperson of the PSC respectively.

*“9. Police Service Commission*

.....

*(2) The Commission consists of 6 members appointed in writing by the President for 4 years.*

.....”

13. Section 9B provides:-

*“9B. Chairperson and Deputy Chairperson of the Commission*

*(1) The Minister is to appoint a Chairperson of the Commission after consultation with the Prime Minister from amongst the members of the Commission for a term of 4 years.*

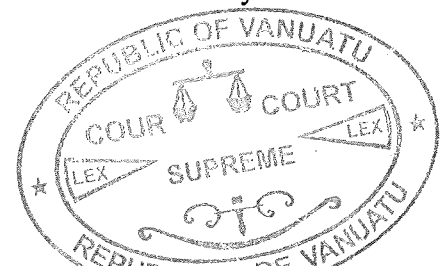
*(2) The Chairperson is the chief executive officer of the Commission on a full time basis.*

*(3) The Chairperson holds office for the period of his or her appointment unless he or she is removed in writing by the Minister after consultation with the Prime Minister.*

.....”

## Submissions

14. At the submissions hearing on 12 December 2018, Mr Kapapa submitted that the second relief sought in the claim regarding damages for stress and humiliation and the claim for interest is abandoned and not being pursued. It was also submitted that as the defendants have acknowledged that the termination was unlawful, they should pay the balance of Mr Marikempo’s salaries and entitlements for the remaining period of his 4 year appointment. This being calculated to be VT14, 435, 384.
15. Mr. Kapapa relies on Vanuatu Maritime Authority v. Timbacci [2005] VUCA 19 to support his submissions. It was argued that his client is entitled to damages for wrongful dismissal for the term of 4 years. That s.15 of the Employment Act [CAP 160] does not apply as the PSC Act specifically provides that the term of appointment is 4 years.
16. Ms Bani for the defendants submitted that the claimant has not served the full term of his appointment therefore is not entitled to be paid for the balance of his 4 year term.

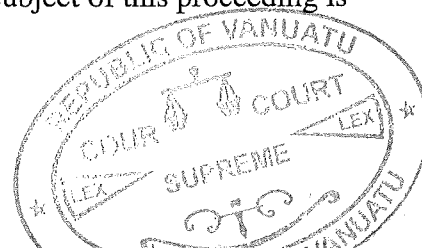


She submits that Mr Marikempo has been paid all his entitlements for the period he served as chairperson of the PSC.

17. It was also submitted that the Police Act does not provide for aggrieved individuals like the claimant to claim recovery of their wages. The removal was done in good faith therefore the defendants are protected by s.40 of the Act. Ms. Bani further submitted that the claimant cannot recover wages after his removal as he did not provide any service to warrant such payment. She relies on Robertson v. LMC [2001] VUCA 14 for this submission.
18. The defendants made an alternative submission that if the Court were to find that Mr Marikempo was entitled to wages for the balance of his term, then any amount must be restricted to a period less than 3 years 10 months 5 days. The period from the date of removal to the end of his 4 year term is roughly 3 years and 10 months. It was submitted that the claimant failed to mitigate his losses by obtaining alternative employment immediately following his removal therefore any entitlement must take this into account. It was submitted that no evidence was provided by the claimant that he attempted to mitigate his losses within a period of 6 months after his removal.
19. Therefore it was submitted that any claim be restricted to 6 months which they calculate to be VT 1,620,000 the breakdown being: VT 235,000 monthly salary x 6 plus VT 35,000 monthly housing allowance x 6).

### Discussion

20. Mr Marikempo was validly appointed on 16 May 2016 as a member of the PSC by the President. The term of appointment of a member is 4 years (s 9(2)). On the same date, he was validly appointed Chairperson of the PSC by the Minister of Internal Affairs. The term of appointment of a chairperson is also 4 years (s. 9B (1)). As chairperson, Mr Marikempo was the Chief Executive Officer of the Commission on a full time basis. (s. 9B (2)). He accepted the appointment. There is no evidence of a written contract of employment apart from his appointment letters. Notwithstanding that, it is clear from the evidence before me that the parties intended to have a legally binding relationship. All the elements of a legally binding contract of employment were met. Most telling is the offer of appointment and acceptance by Mr Marikempo and payment of salaries as consideration for the work performed. This is confirmed by Esther Muluane in her sworn statement in support of the defence at paragraph 12.
21. When the appointment was terminated somewhat prematurely, Mr Marikempo challenged the termination in JR2460/16. The defendants by consent admitted and accepted that the termination of Mr Marikempo as a member and chairperson of the PSC was unlawful. The only remaining issue which is the subject of this proceeding is



whether Mr Marikempo is entitled to any payment for his unlawful termination of employment.

22. The defendants rely on remarks made by the Court in passing in *Robertson's* case, a 2005 decision of the Court of Appeal that an employee cannot claim what he has not worked for. What the Court went further to say is :

*"An employee who is wrongfully dismissed cannot recover wages after the date of dismissal. The employee may have other remedies based on breach of contract ."*

*(emphasis added)*

23. Later in *Timbacci's* case , the Court said:

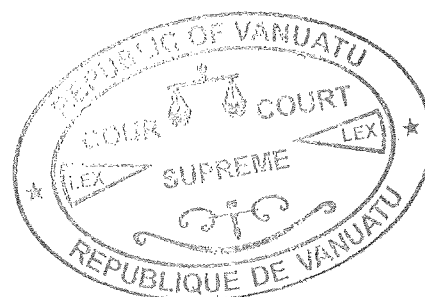
"The legal principles that guide a Court in the assessment of damages for wrongful dismissal are not in doubt and are conveniently summarized in paragraphs 933 & 934 of *McGregor on Damages* (13th Edition) at page 635. It reads:-

*"The measure of damages for wrongful dismissal is prima facie the amount that the (Respondent) would have earned had the employment continued according to contract, subject to a deduction in respect of any amount accruing from any other employment which the (Respondent) in minimizing damages either had obtained or reasonably could have obtained. The rule has crystallized anomalously in this form. It is not the general rule of the contract price less the market value of the (Respondent's) services that applies; instead the prima facie measure of damages is the contract price, which is all the (Respondent) need show. This is then subject to mitigation by the (Respondent) who is obliged to place his services on the market, but the onus here is on the (Appellant) to show that the (Respondent) has or should have obtained an alternative employment.*

*Basically, the amount that the (Respondent) would have earned under the contract is the salary or the wages that the (Appellant) had agreed to pay". (Para 934).*

*(emphasis added)*

24. Taking into consideration what the Court of Appeal said in the above cases, I am firmly of the view that Mr Marikempo is not entitled to claim wages for the balance of his term. He is only entitled to a measure of damages for his wrongful dismissal .For the 3 years and 10 months, Mr Marikempo would have earned roughly VT 12, 420,000 based on the calculations used by the defendants at paragraph 56 of their submissions.



25. In his sworn statement filed in support of the claim, Mr Marikempo says that he is a church elder and community leader and his reputation suffered as a result of the negative publicity surrounding his termination. As a result, he suffered stress and did not sleep well. This part of the claim has been abandoned and I accept that.
26. Furthermore, the evidence is lacking and does not show that Mr Marikempo attempted to mitigate his losses by finding alternative employment following his removal. On the other hand, I reject the defendants' submissions that any claim for damages be restricted to 6 months. 12 months would in my view be appropriate given that Mr Marikempo had only served 2 months of his term when the appointment was terminated unlawfully.

Result

27. Accordingly I enter judgment in favour of the claimant in the sum of VT 3,240,000 (VT 235,000 monthly salary x 12 months plus VT 35,000 monthly housing allowance x 12).
28. The claimant is also entitled to costs on a standard basis to be agreed or taxed.

**DATED at Port Vila this 26<sup>th</sup> day of April, 2019**  
**BY THE COURT**

