

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

**Judicial Review**  
**Case No. 20/1863 SC/CIVL**

**BETWEEN: Glen Nicholson Mahina**

**Claimant**

**AND: The Minister of Internal Affairs**

**First Defendant**

**AND: The Acting Police Commissioner**

**Second Defendant**

**AND: The Police Service Commission**

**Third Defendant**

**AND: Republic of Vanuatu**

**Fourth Defendant**

**Date:** *9<sup>th</sup> December 2020*  
**Date of Decision:** *17<sup>th</sup> December 2020*  
**Before:** *Justice Oliver.A.Saksak*  
**In Attendance:** *Mr Colin B Leo for Claimant*  
*Mr Tom Loughman for Defendants*

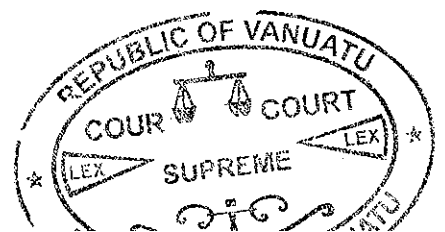
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**JUDGMENT**

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**Introduction and Background**

1. The claimant seeks judicial review of the decision of the Minister of Internal Affairs (First Defendant) made by letter dated 29<sup>th</sup> June 2020.
2. By the letter the First Defendant interdicted the claimant from official duties pursuant to section 70 (1) of the Police Act [Cap 105] ( the Act). The interdiction was made pending investigation and possible disciplinary proceeding.
3. The interdiction was made following an official complainant made by Eva Barron on 3<sup>rd</sup> May 2020. The conduct complained of was alleged to be a breach of section 54 of the Act.



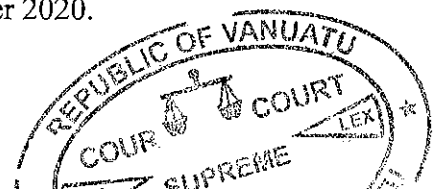
4. Earlier on 29<sup>th</sup> April 2020 the Police Service Commission had met and resolved that out of the six candidates shortlisted from 16<sup>th</sup> applications, the claimant had shown leadership quality and passion and was recommended as the best candidate for appointment as the new Commissioner of Police.
5. Following that recommendation the then chairperson of the Police Service Commission wrote to the Attorney General on 8<sup>th</sup> May 2020 instructing that an Instrument of Appointment be facilitated for signature by the President in accordance with section 7A (1) of the Act.
6. The Police Service Commission (the Commission) then sought to have consultation with the Minister regarding the recommendation. The consultation did not occur in person. The Commission then wrote a letter on 30<sup>th</sup> April 2020 attaching a draft contract with its terms and conditions.
7. The Minister did not respond but took other steps, such as moving for an amendment to the Police Act, and terminating the then chairperson of the Commission and appointing a new chairperson.
8. The claimant claims those decisions were made based on irrelevant considerations and therefore were ultra vires the powers of the Minister. As such the decisions should be called up and quashed as null and void.

### **Defence**

9. The defendants deny the claimant has an arguable case and say the claim is misconceived, and that it should be struck out with costs

### **Evidence**

10. The claimant relies on his sworn statements filed in support of his claim initially on 17<sup>th</sup> June 2020 and latter on 19<sup>th</sup> August 2020.
11. The defendants rely on the evidence by sworn statements of Robson Iavro dated 16<sup>th</sup> September 2020, of Job Boe dated 17<sup>th</sup> September 2020 and of the Minister dated 21<sup>st</sup> September 2020 in support of their defence filed on 15<sup>th</sup> September 2020.



## Process

12. Under Rule 17.8 of the Civil Procedure Rules No. 49 of 2002 ( the Rules) the Court has first to be satisfied after a defence is filed to a judicial review claim 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."*

13. In the event the criteria is not met by the claimant, the judge must decline to hear the claim and strike it out.

## Submissions

14. Counsel for the parties agreed initially on 21<sup>st</sup> October 2020 to a timetable order for the filing of written submissions. The claimant however filed written skeleton submissions initially on 28<sup>th</sup> September and filed submissions on 30<sup>th</sup> September 2020. Counsel had liberty to file supplementary submissions by 28<sup>th</sup> October 2020. He had not done so.

15. Counsel for the defendants sought an extension on 9<sup>th</sup> December. An extension was made to 14<sup>th</sup> December with a right of reply by 15<sup>th</sup> December 2020.

16. Mr Loughman filed written submissions on 14<sup>th</sup> December 2020. In brief the defendants maintain the claimant has no arguable case, that the claim is misconceived and that it should be dismissed with costs of VT 150.000.

## The Law

17. Rule 17.8 provides:

*" Court to be satisfied of claimant's case*

*17.8 (1) As soon as practicable after the defence has been filed and served, the judge must call a conference.*

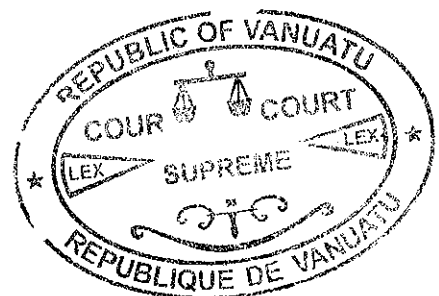
*(2) At the conference, the judge must consider the matters in subrule (3).*

*(3) 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.*

*(4) To be satisfied, the judge may at the conference:*

- (a) consider the papers filed in the proceeding; and*
- (b) hear argument from the parties.*



(5) If the judge is not satisfied about the matters in subrule (3), the judge must decline to hear the claim and strike it out."

18. Section 7A of the Police Act states:

**"PART 2A. - COMMISSIONER AND DEPUTY COMMISSIONER**

**7A. Appointment of Commissioner**

(1) The President is to appoint a person in writing as the Commissioner of Police on the advice of the Commission after consultation with the Minister for a period of 5 years and the person is eligible for reappointment.

(2) The Commission must review the appointment made under subsection (1) after 3 years from the date on which the appointment is made.

(3) If the Commission is satisfied with the performance of the Commissioner after reviewing his or her appointment under subsection (2), the Commission must advise him or her and the Minister of its decision.

(4) The Commissioner is to continue in office for the remaining period of his or her term after being informed of the decision of the Commission.

(5) However, if the Commission is not satisfied with the performance of the Commissioner after reviewing his or her appointment under subsection (2), the Commission must after consultation with the Minister advise the President to terminate the appointment.

(6) The Commission must, prior to making a recommendation to the President for the appointment of a person as the Commissioner, make appropriate enquiries as to the applicant's integrity and character.

(7) A person must not be appointed as the Commissioner under subsection (1) unless:

(a) the person is a citizen of Vanuatu; and

(b) has served in a senior position within the Force for a period of at least 7 years; and

(c) preferably has a tertiary qualification in the area of policing, military, management or Law.

(8) Subject to this Act and any other Act, the terms and conditions of appointment of the Commissioner, including salary, allowances and other entitlements are to be determined by the Commission after consultation with the Minister in a written form of agreement with the prior approval of the Council of Ministers.

(9) The Commissioner may resign from his or her office by giving 3 months notice in writing to the President.

(10) The Commissioner must give a copy of his or her resignation to the Minister and the Commission."

19. Section 70 of the Act states:

**"70. Interdiction from duty of senior officers**

(1) The Minister may, on the recommendation of the Commissioner and at any time, interdict from duty any senior officer pending –

(a) an inquiry under section 67(1) into any disciplinary offence of which he is charged; or

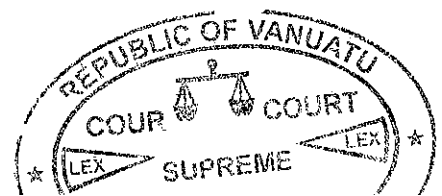
(b) a trial or inquiry into any offence under this or any other Act for the time being in force of which he is charged before a court.

(2) A senior officer who is interdicted shall, for the period of such interdiction, cease to exercise the powers, privileges and benefits of his office but shall continue subject to the same responsibilities, discipline and penalties and to the same authority as if he had not been interdicted.

(3) A senior officer who is interdicted shall receive such proportion of his pay not being less than half as the Minister may decide. Upon termination of the interdiction, such outstanding proportion shall be –

(a) paid in full to the member if he is found not to have committed the offence for which he was interdicted, or any other offence arising out of the same set of facts; or

(b) paid in full or part to the member or otherwise disposed of at the discretion of the Minister if such member was found to have committed the offence for which he was interdicted or any other offence arising out of the same set of facts."



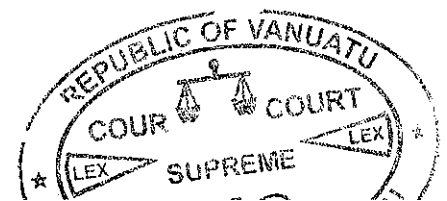
20. Section 54 of the Act states:

**"54. Accepting gifts**

*It shall be an offence against discipline for any member to accept any gift of money or moneys-worth offered as payment for any service rendered or promised."*

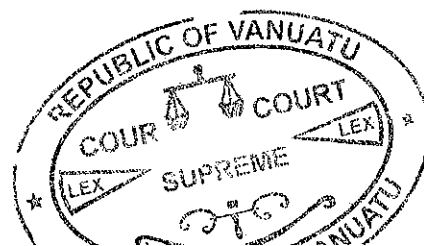
**Discussion**

21. Whether or not the claimant has met the four criteria in Rule 17.8 (3) must be determined in light of the defence of the defendants, together with any supporting evidence by both the claimant and the defendants, and applying the relevant legal provisions.
22. First the claimant challenges his interdiction made on 21<sup>st</sup> June 2020. The evidence is clear. A complaint was received on 3<sup>rd</sup> May 2020 from Eva Barron which alleges a breach of section 54 of the Police Act. The interdiction was made under section 70 (1) of the Act.
23. I find nothing wrong with the exercise of that Ministerial power.
24. Second, the lack of consultation. The evidence is clear. There was no face-to-face consultation with the Minister about the recommended appointment for the claimant as the new Police Commissioner. The written letter of 30<sup>th</sup> April 2020 is not sufficient in my considered view.
25. The letter of instruction written to the Attorney General on 8<sup>th</sup> May 2020 seeking Instruments of Appointments to be prepared was a letter done without prior "consultation" as required by section 7A (1) of the Act. Instruments of appointments could only be legally requested after consultation with and after approval and endorsement by the Minister, absent which the letter was illegally made by the Commission and could not be relied on by the claimant to support his case and claim.
26. The evidence by Job Boe annexed as "JB4" to his sworn statement shows a table recording the scores by four Directors General of the Ministry of Internal Affairs, Prime Minister, Foreign Affairs Ministry and Finance Ministry. Out of the 16 applications the claimant was third, scoring a total of 187 representing 46.75% on an



average. Only two applicants scored higher than he: Robson Iavro with 225 presenting 56.5% on average and Karlshem Bongran scoring 233 representing 58.25% on average.

27. Despite those scores, the Commission recommended the claimant for the position of the new Police Commissioner on 29<sup>th</sup> April 2020. The Commission under Agenda 4 of their Minutes (annexure JB5) decided the two officers were still quite young with bright future and decided the claimant as the suitable candidate, showing leadership quality and passion.
28. No doubt the Commission had considered the claimant's background, education and training (annexed as JB 2) to the statement of Job Boe dated 17<sup>th</sup> September 2020 when it made its decision on 29<sup>th</sup> April 2020 in favour of appointing the claimant as the new Police Commissioner.
29. Despite those background history, section 7A (7) of the Act states clearly that a person must not be appointed as the Commissioner under subsection (1) unless he is a citizen of Vanuatu, has served in a senior position within the force for a period of at least 7 years and must have a tertiary qualification in the area of policing, military, management or law.
30. It is not immediately apparent in the Commission's Minute of 29 April 2020 that the Commission considered section 7A (7). The absence of it in the Minute indicates or implies no consideration was made of this provision by the Commission.
31. A senior position is categorised as a rank above Inspector. The defendants submit the claimant occupied the rank of Inspector for 2 years from 2016 to 2018. He was promoted on 21<sup>st</sup> May 2019 to the senior position of Police Superintendent.
32. The Advertisement Notice (Annexure JB1) was issued sometimes in 2019 with a closing date being 30 December 2019. From 21 May 2019 to 29 April 2020 when the Commission took its decision the claimant had occupied a senior position for only less than 12 months.



33. The decision falls far short of the legal requirement of section 7A (7) (b) and (c) of the Police Act. The recommendation must therefore be ultra-vires, illegal and is hereby declared null and void and of no legal effect.

34. That therefore brings me back to Rule 17.8 (3) to answer-

(a) Does the claimant have an arguable case? **The answer is “no”**

(b) Is he directly affected by the decision of interdiction? And that he was not appointed as recommended? **The answer is “No”.**

(c) Has there been undue delay in making the claim?

**The answer is “yes”.** There was a delay of more than 3 months from 29<sup>th</sup> Aril 2020 when his recommendation was made by the Commission. That is his main complaint. His interdiction was made on 29<sup>th</sup> June 2020. He filed an urgent JR on 16<sup>th</sup> July 2020, some 17 days later. He filed an amended claim on 19<sup>th</sup> August 2020 almost 2 months later. He headed his proceeding as **“urgent”**. A lapsed period of 2-3 months is not and cannot be urgent in my view. A delay of 17 days even in what the claimant saw as urgent is still undue delay.

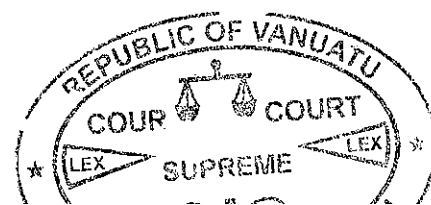
(d) Finally whether there is no other remedy to resolve the matter fully and directly?

The answer is **“yes, there are”**. The first remedy for the claimant is simply to have withdrawn his application and avoided all these hazzles. In the Advertisement Notice (Annexure JB1) at the very forefront is, under Selection Criteria the requirement for Qualification/ Experience. It states:

*“ – A degree in Public Administration and Management, or related field in lieu with applied relevant Police work and sound Leadership and Management experience. In addition, a degree in Law would be an advantage.*

*He or she must have served in a senior strategic position, preferably in the position of Lieutenant Colonel, or above, or equivalent to a Deputy Commissioner in the Vanuatu Police Force or in any other country, for a period of 7 years or more”*

35. That is the legal requirement under section 7A (7) (b) and (c). The claimant knew this but he proceeded to apply and maintained his position. He misled the Commission in doing so. He therefore has become the author of his own problems that he now seeks a review of.



36. The other remedy is for the claimant to await the finality of his interdiction and/or any disciplinary proceeding and then issue a proceeding thereafter.

### **Conclusion**

37. I accept the defendant's submissions that the claimant's claim is misconceived. And I accept that the claimant has failed to meet all the four criteria in Rule 18.7 (3) of the Rules.

38. I reject the submissions made by Mr Leo on the claimant's behalf.

39. I therefore decline to hear the claimant's claim and hereby dismiss it in its entirety at this point.

### **Costs**

40. I accept the defendants' claim for costs. I accept the sum of VT 150.000 as reasonable in the circumstances of this case.

41. I order the claimant pay VT 150.000 to the State Law office within 28 days from the date of this judgment.

**DATED at Port Vila this 17<sup>th</sup> day of December 2020**

**BY THE COURT**

  
**OLIVER.A.SAKSAK**

**Judge**

