

**IN THE COURT OF APPEAL OF  
THE REPUBLIC OF VANUATU**  
(Civil Appellate Jurisdiction)

Civil Appeal  
Case No. 18/1726 CoA/CIVA

**BETWEEN:** PRIME MINISTER

First Appellant

**AND:** OFFICE OF THE GOVERNMENT CHIEF  
INFORMATION OFFICER

Second Appellant

**AND:** TELECOMMUNICATION & RADIO  
COMMUNICATION REGULATOR

Respondent

**AND:** CHIEF EXECUTIVE OFFICER OF THE  
UTILITIES REGULATORY AUTHORITY

Interested Party

**Coram:** Hon. Chief Justice Vincent Lunabek  
Hon. Justice Bruce Robertson  
Hon. Justice Daniel Fatiaki  
Hon. Justice David Chetwynd

**Counsel:** Mr S. Kalsakau for the Appellants  
Mr E. Brawn and Mr E. Nalyal for the Respondent

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

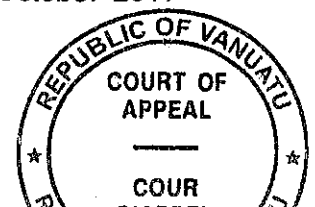
**Date of Decision:** 20<sup>th</sup> July 2018

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## JUDGMENT

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1. An appeal was filed against the decision of the Supreme Court dated 4<sup>th</sup> June 2018.
2. The factual background was set out by the Supreme Court judge in a way which is not in contention. He said (with our insertion in brackets):
  5. "On 20<sup>th</sup> November 2015 the then Prime Minister appointed the Claimant (Ms Baniala) as Regulator for a period of 3 years.
  6. On 19<sup>th</sup> October 2017 the First Respondent immediately suspended the Claimant (Ms Baniala) as Regulator.
  7. On 24<sup>th</sup> October 2017 the Claimant (Ms Baniala) responded to the Prime Minister's letter of 19<sup>th</sup> October 2017.
  8. On 25<sup>th</sup> October 2017 the Prime Minister revoked his letter of 19<sup>th</sup> October 2017 and gave 28 days notice to the Claimant (Ms Baniala).



9. On 2<sup>nd</sup> November 2017 the Claimant (Ms Baniala as Regulator) responded by letter to the Prime Minister's letter of 25<sup>th</sup> October 2017.
10. On 12<sup>th</sup> December 2017 the Prime Minister wrote a letter suspending the Claimant (Ms Baniala) for a period of 2 months pending an investigation.

3. There was a hearing before a Supreme Court judge on 15 January 2018 when orders were made as follows:

*"The Notices of Suspension issued by the Respondents and dated 25 October 2017 and 12 December 2017 (The Notices of Suspension) suspending the Applicant from her position as TRR, be stayed and of no further effect pending final hearing of the Applicant's judicial review claim;*

*The Respondents be restrained, pending final hearing of the Applicant's judicial review claim, from taking any action in reliance on the Notices of Suspension or grounds referred to therein;*

*The Respondents be restrained, pending final hearing of the Applicant's judicial review claim, from interfering with the independence of the Regulator as mandated by the TRR Act and her employment contract, or that seek to direct, control or pressure her as to how to perform her duties, functions and responsibilities as Regulator;*

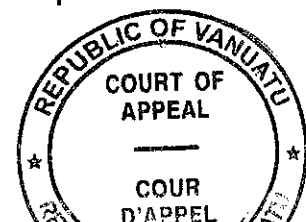
*The First Respondent's letter dated 12 December 2017 purporting in reliance on the Notices of Suspension and grounds therein, to appoint the CEO of the Utilities Regulatory Authority as Acting Regulator in place of the Applicant, be stayed and of no further effect pending final hearing of the applicant's judicial review claim."*

4. There were various other steps between the parties until the substantive hearing on the 24<sup>th</sup> and 25<sup>th</sup> May which resulted in the judgment of 4<sup>th</sup> June 2018 where the following orders were made:

- a. *The letter dated 25<sup>th</sup> October 2017 is hereby declared unlawful and is hereby quashed.*
- b. *The letter dated 12<sup>th</sup> December 2017 is hereby declared unlawful and is hereby quashed.*
- c. *The appointment of the CEO as "acting" Regulator during the period of the Claimant's suspension is hereby declared unlawful and is hereby quashed.*
- d. *The First and Second Respondents be hereby restrained from interfering with the independence of the Claimant as Regulator as mandated by the TRR Act and her Employment Contract, or to direct, control or pressure her as to how to perform her duties, functions, powers and responsibilities as Regulator.*
- e. *The First and Second Respondents shall pay the Claimant's costs of and incidental to this action on the standard basis as agreed or taxed.*

In effect, the claimant Ms Baniala was reinstated into her position as the Regulator.

5. The 3 year contract of the current holder of the Regulator's office will expire on the 20<sup>th</sup> November 2018.



6. The court was anxious to understand what each party was endeavouring to achieve with regard to the hearing of this appeal.
7. Ms Dalsie Baniala is in post as the Telecommunication and Radiocommunication Regulator.
8. The Prime Minister has rights under the Telecommunication and Radiocommunication Regulation Act No. 30 of 2009.
9. We were advised by counsel for the appellants that there was a challenge to be advanced on the appeal against orders (a), (d) and (e).
10. After a sustained dialogue between counsel and the Bench it was apparent that the challenge to order (a) was only of historical interest. It had no actual effect or consequence on anything which was happening now or could happen in the future. The issue was not pursued.
11. It was contended by the appellants that order (d) placed unreasonable and unacceptable fetters upon the first appellant and created uncertainty and ambiguity.
12. After a lengthy dialogue the parties mutually agreed that (d) could be amended to read:

*"(d) The First and Second Respondents be hereby restrained except as provided by law from interfering with the independence of the Claimant Ms Baniala as Regulator as mandated by the TRR Act and her Employment Contract by directing her as to how to perform her duties, functions, powers and responsibilities as Regulator."*
13. It meant that the only live issue left in respect of the appeal was the order which had been made as to costs.
14. There was a somewhat arid interchange to whether there was some arrangements whereby the question of costs would be considered at a later date. We make no finding about that. Having reviewed the file and the total circumstances we cannot see how on any assessment of the history, costs would not follow the event in the normal way. What was described as an offer which had been made would never have disposed of the matter and the simple reality is that the Regulator had to take court action to preserve her position and to challenge the unlawfulness of various acts and changes which had been made to suspend or remove her.
15. There is no basis upon which we could consider interfering with the judge's exercise of discretion as to an appropriate costs order.
16. The final issue before us is the question of costs in respect of this appeal.
17. In a technical sense because of the agreed amendment the appeal must be allowed but, in reality, the appellants were not really successful before this court on the wholesale revision they sought. The matter has in our judgment been

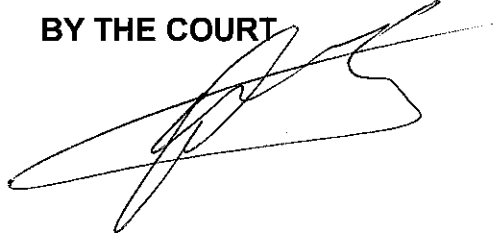


misconceived and blown out of all proportion to the real dispute between the parties. Under the Act and the contract there are rights and responsibilities which will persist until November when the term of the incumbent comes to an end.

18. In those circumstances the justice of the matter is that the respondent is entitled to half normal costs in respect of the appeal.

**DATED at Port Vila, this 20<sup>th</sup> day of July, 2018.**

**BY THE COURT**



**Hon. Vincent LUNABEK**  
**Chief Justice.**

