

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

Civil Case No. 1937 of 2016

**BETWEEN: WALTERSAI HAPSAI HAPHAPAT II
AHELMHALAHLAH**
Claimant

AND: REPUBLIC OF VANUATU
First Defendant

**AND: CHIEF MAGISTRATE OF THE REPUBLIC OF
VANUATU**
Second Defendant

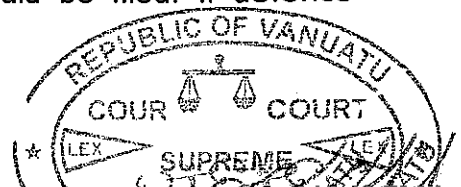
AND: REGISTRAR SUPREME COURT
Third Defendant

**AND: CHIEF JUSTICE OF THE REPUBLIC OF
VANUATU**
Fourth Defendant

Conference: 21st March 2017
Before: Justice Chetwynd
Counsel: Claimant in person
Mr Huri for the Defendants

Decision on Strike Out

1. On 17th June 2016 the Claimant filed a Claim in the Supreme Court. The Claim ran to some 10 pages. It was a verbose document with considerable narrative elements. On 8th August 2016 the Claimant made an application for default judgment. That was listed for hearing on 28th August. The Claimant appeared at that hearing as did Mr Huri from State Law Office. In a Minute published on 29th August I explained that default judgment was not appropriate at that time for two reasons. First, if a judgment was to be entered then it would have to be for damages to be assessed and not as requested by the Claimant for a fixed sum. Secondly, and more importantly, defence counsel was having difficulty obtaining detailed instructions about the claim because of the way it was presented. It was difficult to file a defence because counsel was unable to ascertain what it was the Claimant was claiming. The claim clearly needed to be re-drawn so that it complied with the Civil Procedure Rules and in particular Rule 4.2. I suggested the Claimant seek legal advice and assistance in re-drawing the claim. He could then submit the amended claim in draft form to defence counsel. If defence counsel felt the document was a fair one and could be properly defended then the amended claim could be filed. If defence



counsel did not agree the matter could come back before me on an application for leave to amend.

2. During the hearing the Claimant made it known that he was studying in New Zealand and would be returning there shortly. I agreed that it would be only fair to the Claimant if I set the date of the application for leave some way ahead. That would give the Claimant ample time to complete his studies and obtain legal advice ~~on his return to Port Vila. The Claimant is a former magistrate and had undergone~~ legal training but to be fair to him I treated him as a lay person rather than someone with a legal background. The date for the application for leave was therefore set in December 2016. The Claimant was told that if agreement on the amendment was possible then the leave application was unnecessary and either he or defence counsel could apply to vacate it.

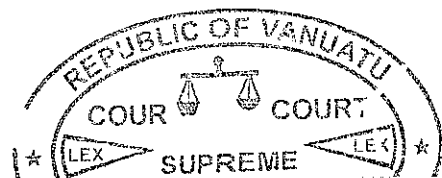
3. On 14th September 2016 the Claimant filed an amended claim. He had not obtained legal advice about it nor had he sent a copy in draft form to the State Law Office as I had suggested. The matter came back to Court on 12th December 2016.

4. In a Minute published on 12th December I explained that even though the Claimant had not done as I had suggested and even though there were still problems with the claim as amended I would mark the document lodged on 14th September as an Amended Claim filed on 12th December 2016. Counsel for the defendants indicated he would be applying to strike out the claim. I gave directions about a defence and supporting documents for the application to strike out and adjourned the case to 9th February 2017.

5. The case came back on 9th February 2017. I published a lengthy Minute on 10th February. I explained why I had not struck out the claim on the defendants' application. I confirmed the claim was still somewhat defective and that until he took advice from a qualified legal practitioner it was in danger of being struck out by the court. I had taken some time during the conference to go through the amended claim and explain to the Claimant where he had problems. I listed the case for 21st March 2017 to give the Claimant a final chance to sort out his pleadings. The Claimant was still insisting on pursuing applications for summary judgment and default judgment so those applications were listed for 21st March as well. The Claimant also wrote asking that I recuse myself. That application was listed for 21st March too.

6. The background to this case should now be set out. It will be helpful to follow the "order" of allegations in the Amended Claim although the details have become distinctly tangled and intertwined. It is convenient to start with events of 23rd December 2012 and the consequences of those events. They are described in the case of *PP v Ahelmalahlah*¹. In that case Spear J said:-

¹ *Public Prosecutor v Ahelmalahlah* [2013] VUSC 49; Criminal Case 4 of 2013 (25 March 2013)



4. *The defendant is the chief of this particular village on Malekula.*
5. *Almost exactly 2 years ago, the complainant Robin Samuel with assistance from other family members started to build a shed in the village that was intended to be used as a fuel station by the complainant. It would appear that because of financial difficulties, the structure was never completed.*
6. *On 23 December 2012, the defendant took a chainsaw and made a number of significant cuts into the structure effectively disabling it. This action had followed an earlier directive given by the defendant to the complainant (through a relative) that the structure had to be removed which advice was been complied with.*
7. *The complainant, in his evidence, is adamant that the structure had been erected on his land and indeed land that had been occupied by his family for generations. It appeared, however, that there had not been a lawful declaration of custom ownership by either a Land Tribunal or an Island Court and that custom ownership of the land has yet to be finalised.*
8. *At the commencement of the trial, an agreed statement of facts was presented under section 84 of the Criminal Procedure Code. Of importance is that the defendant admitted that on 23 December 2012 he "chopped down an incomplete house with a chainsaw" and that "at the time of the incident (he) had in his possession a rifle .22."*
9. *The difficulty with count 1 relates to the concept of trespass within a village and particularly in respect of the chief of that village. The particular area where the partially built shed is situated would have been freely accessible by all members of the village. In legal terms, they would have enjoyed a license to be able to enter onto that land and that license would continue until it was revoked. While there is some authority that a license does not permit entry on to a land if the purpose for entry is illegal, Mr Takau agreed that it would be difficult to advance that particular principle in this case.*
10. *In relation to count 2, the charge of Malicious Damage, the issue quickly became identified as whether a chief of a village had the right to order the removal of a building that could not be considered as having been "owned" by him. The first two witnesses were adamant that they did not consider that in custom their chief had that right. Over the lunch break, the defendant reflected on the evidence and the issue which had become the focal point of the case and conceded that he did not have that right.*
11. *When the Court convened after lunch, the defendant asked to be re-arraigned on count 2 and he pleaded guilty to the charge. He also made a public apology in Court to those assembled and he indicated that he was prepared to pay compensation and undertake a custom reconciliation ceremony.*
12. *Having heard from counsel on the question of disposition in respect of count 2, I indicated that I considered that the consequences of a conviction would outweigh the criminality of the action particularly bearing in mind the relationship between the parties in this small community, the public apology,*



the offer to pay compensation and a preparedness to undergo a custom reconciliation ceremony.

13. *Accordingly, in respect of count 2, the defendant is discharged without conviction but on the condition that he pays compensation to the complainant of Vt 5,000 and that he undergoes a custom reconciliation ceremony all within 21 days.*

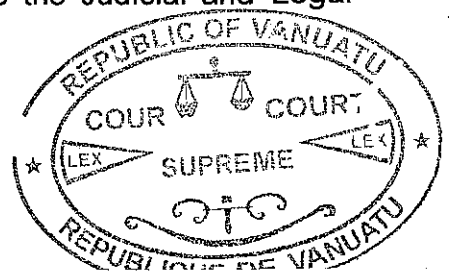
14. *In respect of count 1, Mr Takau conceded that this charge had no prospect of success and he offered no further evidence on that charge beyond that taken from the complainant, the other Mr Samuel and by the admitted facts. A verdict of Not Guilty is accordingly recorded and the defendant is discharged on that count.*

7. According to the Defence filed, upon the Claimant being charged with the two criminal offences the Judicial Service Commission decided to make a recommendation to His Excellency the President to suspend him from his office of magistrate. That was apparently in January 2013. Following the case before Justice Spear the Judicial Service Commission advised His Excellency to extend the suspension. This is apparent from documents the Claimant has annexed to various sworn statements and in particular annexure 2 to the sworn statement dated and filed on 14th September 2016.

8. Another important element in this case now becomes relevant. Again according to the sworn statement referred to above the Claimant was given (together with other documents) a copy of a letter written by the Chief Magistrate. The letter is dated 20th June 2012. It is annexed to several sworn statements. It was apparently put before the Judicial Service Commission along with details about the criminal case. The criminal charges and the Chief Magistrate's comments seemingly form the basis for the "disciplinary proceedings" referred to in the Instrument of Extension of Suspension of Magistrate dated 15th April 2013.

9. The letter detailed unauthorised absences from the Claimant's post as magistrate on Tanna which were raised in January 2012 and fresh information about the Claimant leaving his post on 19th June 2012. There were other unexplained or unauthorised absences from work in early June 2012. The letter then goes on to say the writer had "...received complaints from the Principal of College d'Isangel, in Tanna reporting that his office has received complaints from parents and students alleging Magistrate Waltersai has been seen harassing some of their female students". Those comments form the backbone of the claim.

10. On 28th April the Claimant went to Port Vila police station where he made a statement and lodged a complaint that the Chief Magistrate had committed an offence in criminally defaming him. This became known to the Judicial and Legal Service Commission and to the Chief Justice.



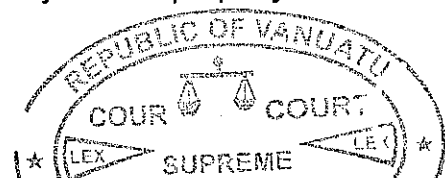
11. According to the Claimant he received a message from the Chief Justice to stop the prosecution of the Chief Magistrate. The Claimant then met with the Chief Justice. The Chief Justice is said to have told the Claimant to stop the prosecution and proffer his resignation as a magistrate. The Claimant gives several versions of the conversation with the Chief Justice but the general tenor is that he was advised that if he (the Claimant) did not stop the prosecution and resign, his career in the magistracy would be over and he would be unlikely to be able to practice law in Vanuatu. ~~As a result of that conversation the Claimant did tender a letter of resignation.~~

12. Those are the bare bones of the facts on which the Claimant seeks to rely. They appear in his claim in this way. At paragraph 4 he makes the claim that the then President "suspended the Claimant on a false allegation that was never investigated and proved". The Claimant's own evidence is that he was suspended initially because of the criminal proceedings against him. The Claim is structured in such a way as to allege it was the Chief Magistrate's "defamation" that caused his suspension. As set out above, the charges were dealt with by the Supreme Court sitting at Lakatoro. ~~The Claimant even suggests that hearing was "part of the plan" to get rid of him. He denigrates Spear J's decision set out above saying it is all part of the conspiracy to remove him from office.~~

13. Paragraphs 5 to 14 of the claim deal with an alleged defamation of the Claimant by the Chief Magistrate in the letter of 20th June 2012. The Claimant amplifies his allegations saying that the letter damaged his reputation, destroyed his career and caused him damage. The Claimant spends some 20 paragraphs of the claim alleging defamation and repeating claims for damages including exemplary damages.

14. At paragraph 26 the Claimant raises allegations against the Chief Magistrate and the Registrar of the Supreme Court that they made an illegal decision to dismiss him. It is difficult to follow the thread of the Claimant's argument but it seems to rely on the "defamation" by the Second Defendant (the Chief Magistrate) and is tied in with the allegation that the Chief Justice (the Fourth Defendant) forced him to resign so that his was a constructive dismissal. If reference is made to the various sworn statements the suggestion becomes linked to the letter written by the Registrar of the Supreme Court as Secretary to the Judicial Service Commission acknowledging the letter of resignation and confirming the effective date of resignation. The sworn statements seem to allege the Registrar had no authority to do that and that the decision to accept the resignation wasn't a decision of the Judicial Service Commission.

15. At paragraph 30 the Claimant alleges negligence on the part of the Chief Magistrate, the Registrar of the Supreme Court and the Chief Justice. The negligence alleged is that they did not obey the law, that they did not properly check



the law, that they failed to enforce, interpret, follow and act upon the law, that they owed the Claimant a duty of care and that they breached that duty of care and were careless or negligent. As a result the Claimant seeks damages. The final page of the Claim particularises the damages sought.

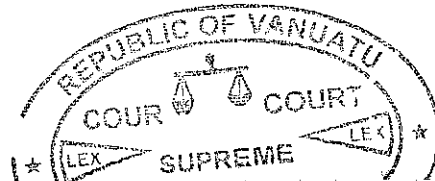
16. The damages include, general damages for libel and defamation (100 million vatu); Compensatory damages for libel and defamation (10 million vatu); aggravating ~~(sic) damages for libel and defamation (10 million vatu); exemplary/punitive damages~~ for libel and defamation; compensatory damages for unjustified constructive dismissal (20 million vatu); general damages for negligent (sic) (100 million vatu); exemplary or punitive damages for negligent actions (20 million vatu); aggravated damages for negligent cost ((20 million vatu); general damages for humiliation, injury to emotional state, distress, stress and anxious for defamation, dismissal and negligent costs(30 million vatu); severance allowance; interest at 10 percent per year; costs on full solicitor and client or indemnity basis; an order that the First respondent be held responsible for all the costs in this matter on the behave (sic) of the four defendants and finally any other order the Court deems just and proper.

17. When discussing this claim with the Claimant in conference it has been put to him that he has not taken into account the question of qualified privilege of the Chief Magistrate. The duties' of Chief Magistrate must, as a matter of common sense, include the writing of reports and notifications to the Chief Justice and Judicial Service Commission about subordinate judicial officers and members of staff. Those reports and notifications would, as a matter of law, generally attract qualified privilege. The Claimant does not accept that view of the law and says qualified privilege only attaches to "judicial proceedings". In a further effort to assist I would suggest the Claimant refers to cases such as *Harrison v Bush* (1856) SE & B 344, *Pullman v Hill & Co* [1891] 1 QB 524 and *Watt v Longsdon* [1930]1 KB 130. These cases show that qualified privilege exists where there is a duty to communicate information believed to be true to a person who has a material interest in receiving the information.

18. It has been put to him that he clearly was not dismissed, he resigned. If, as he says in his sworn statements, he has applied for jobs and has been asked why he was dismissed he is entitled to say he resigned. If he has told prospective employers that he was dismissed he cannot hold any of the defendants to account for any loss that then ensues.

19. He has been told that his claim for damages is hopelessly misconceived. He does not accept that and continues to make applications for default or summary judgment.

20. He does not accept there is a link between the Chief Justice's intervention and the complaint he lodged against the Chief Magistrate for criminal defamation. He



does not accept that the Judicial Service Commission has the right to advise His Excellency the President about behaviour which might not be acceptable from a judicial officer and that His Excellency has the right to suspend a judicial officer from duty in an appropriate case.

21. There is no doubt that a court can strike out a proceeding on the grounds that there is no reasonable cause of action or that it is frivolous, vexatious or an abuse of process. ~~That is clearly set out in Noel v Champagne Beach Working Committee²~~ which in turn cites the *Kalses v La Manganese de Vate Ltd*³ case. (Note - the citation for the *Kalses* case in the *Noel* case is wrong. The Correct citation is as set out below.)

22. As the Court says in *Noel* :-

"However it has always been recognised that the jurisdiction should be exercised sparingly and only in a clear case where the Court is satisfied it has the requisite material; the Claimant's case must be so clearly untenable that it cannot possibly succeed"

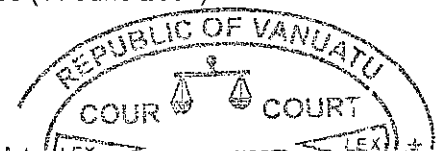
23. There is an added edge to this case. The claim is against the Republic but it is also against the Chief Justice and other senior judicial officers. It will be difficult, probably impossible, to avoid the accusation that by striking out the proceedings the Court is simply looking after its own. The personal circumstances of the Claimant have also to be considered. He is a qualified lawyer but he is clearly out of his depth in this matter. The pleadings are still defective. The claim for damages is hopelessly misconceived. The claim for negligent breach of some supposed duty of care cannot succeed, the evidence adduced by the Claimant does not support his case and the whole edifice is premised on the barest of reliable facts. I fully appreciate that none of the evidence adduced has been tested in cross examination but much of what the Claimant says in sworn statements and pleadings is clearly contradictory and/or just plain illogical. Most, if not all of what the Claimant seeks to rely on in his case is not evidenced in alleged or even established facts.

24. What the Claimant can establish is :-

- I) He was charged with two criminal offences in late 2012 or early 2013;
- II) He was suspended from office as a result of being charged;
- III) He was tried before the Supreme Court and based on admissions made by him was found not guilty on one count and discharged without conviction but subject to conditions on a second count ;

² *Noel v Champagne Beach Working Committee* [2006] VUCA; CAC 24-06 (6 October 2006)

³ *Kalses v Le Manganese de Vate Ltd* [2004] VUCA 8 Civil Appeal 34 of 2003 (11 June 2004)



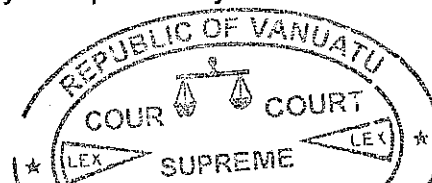
- IV) In June 2012 the Chief Magistrate had written to the Chief Justice about the Claimant's behaviour;
- V) Following the criminal case the Judicial Service Commission recommended his suspension from office be extended so all allegations of misconduct could be investigated;
- VI) As a result of being given a copy of the letter from the Chief Magistrate detailing some of the allegations against him the Claimant lodged a criminal complaint against the Chief Magistrate;
- VII) As a result of his making that formal criminal complaint he was invited by the Chief Justice to consider his position and his future as a lawyer and/or magistrate;
- VIII) As a result of what the Chief Justice said to him he resigned;
- IX) The Registrar of the Supreme Court as secretary of and at the direction of the Judicial Service Commission wrote to the Claimant acknowledging and accepting his resignation.

25. The Amended Claim is not formulated in such a way as to properly plead what it is the Claimant alleges or can establish. He has been given several opportunities to seek professional advice about re-drawing his claim but has not done so.

26. As I said in a previous minute, treating the Claimant as a lay person without legal training is all well and good but as in reality he is a qualified lawyer, continuing to do so prejudices the rights of the defendants. It is a constant cry that judges hear from Claimants that the claim must be heard, "in the interests of justice". That phrase is often advanced in support of an argument that completely ignores the rights of all the parties in a case. The interests of justice cover the rights and obligations of all parties in proceedings not just the claimant and not just the defendant.

27. In reality the proceedings should be struck out. Much of what is pleaded is vexatious or frivolous. There is a semblance of a claim regarding defamation but it is not properly pleaded. Even if it were properly pleaded it would undoubtedly be met by a qualified privilege defence. There is a semblance of a case involving constructive dismissal but it is not properly pleaded. Even if it were properly pleaded it would no doubt be met by a detailed defence and at the very least a claim that the Claimant had contributed substantially to his dismissal.

28. However, given that it cannot be said at this time that if re-drawn the claim is clearly untenable it would be wrong to strike out the proceedings at this time. The Claimant is given one final chance to put his case in order. He has demonstrated that although he has legal training he is not capable of properly drawing up pleadings. He should therefore obtain professional advice. I do not accept that he cannot do so because all of the legal practitioners in Vanuatu are "afraid" to get involved. The legal profession in Vanuatu is generally very independently minded



and willing to take on cases, even those claiming some wrong doing on the part of the judiciary. That attitude can be seen every session of the Court of Appeal where counsel challenge decisions of judges. If the Claimant does not have the wherewithal to pay legal fees he can approach the Public Solicitors office. If he chooses not to obtain independent professional legal advice then he must bear the consequences.

29. The Claimant is granted leave to further amend his claim. He must do so and ~~file and serve his Further Amended Claim by close of business on 5th May 2017.~~ The Defendants shall file and serve a Defence to the Further Amended Claim by close of business on 2nd June 2017. The case will be listed for a conference in Chambers on Thursday 15th June 2017. If the Claimant does not file and serve a Further Amended Claim by 5th May, or at all, he will be required to show cause why the proceedings should not be struck out.

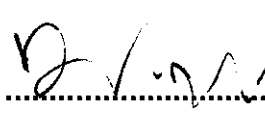
30. For the sake of completeness, I will not recuse myself from this matter. The Claimant does not allege any bias except to say I appear to change my mind and that I act like a defendant. All I have done is point out to the Claimant the problems with his case. It would be remiss of me not to do so. I have treated him as a lay litigant whereas in reality he is a qualified lawyer.

31. I refuse the application for default or summary judgment for the same reasons I refused previous applications and as set out earlier in this decision.

32. Costs are reserved.

DATED at Port Vila, this 6th day of April 2017

BY THE COURT


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D. CHETWYND
Judge

