

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

Civil  
Case No. 16/2719 SC/CIVL

**BETWEEN:** Frazer Tambe, George Songi, Wilson  
Abiut, Sylvain Taliban, Aru Maralau and  
Kalpat Steedman  
Claimants

**AND:** Commissioner of Police  
First Defendant

The Republic Of Vanuatu  
Second Defendant

*Date of TRIAL:* June 30th, 2017 at 9:00 AM

*Submissions:* June 30<sup>th</sup>, July 26<sup>th</sup> and August 3<sup>rd</sup>, 2017.

*Date of Judgment:* August 8<sup>th</sup> 2017.

*Before:* Justice Paul Geoghegan

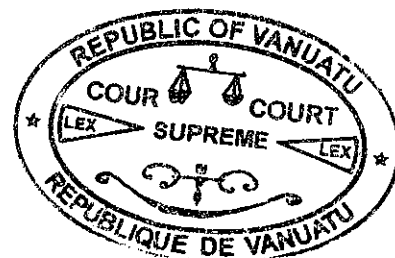
*In Attendance:* Counsel - Avock Godden for the Claimants

Counsel - Sakiusa Kalsakau (SLO) for the Defendants

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JUDGMENT

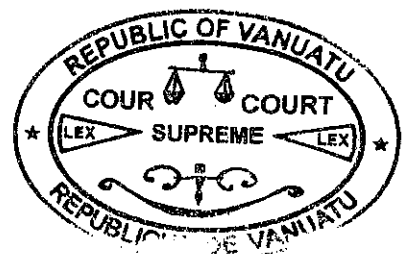
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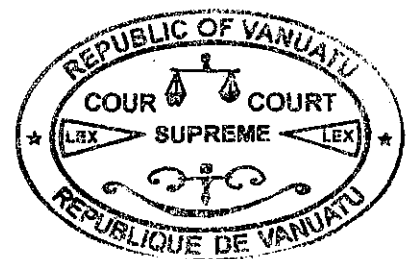
1. These proceedings involve a claim by the claimants that they were maliciously prosecuted by the defendants through the preferment of various charges against them in November 2014.
2. On November 17<sup>th</sup> 2014, a charge of conspiracy to pervert the course of justice was laid against Messrs Tambe, Songi, Abiut, Taliban and Maralau while charges of false imprisonment were laid against Messrs Taliban and Steedman and charges of soliciting the commission of the offence of false imprisonment laid against Messrs Maralau and Taliban.
3. In addition to the claimants, charges were also laid against Joshua Bong and Jackson Noal.
4. The charges were disposed of on July 8<sup>th</sup> 2015, when a nolle prosequi was entered in respect of all claimants at the request of the Public Prosecutor.
5. The claimants seek a declaration that they had been maliciously prosecuted, a declaration that there had been an abuse of legal process as the *"Public Prosecutor's appointment was at all material times unlawful"* and consequent damages of VT 4,500,00 each and, in addition, VT 1,000,000 each by way of punitive damages.

### **Background**

6. The charges which are the subject of this claim have their origins in a period of instability and conflict within the Vanuatu Police Force (*"VPF"*). All claimants were, at all relevant times, serving officers within the VPF.
7. In 2012 the Vanuatu Police Commissioner was Joshua Bong. His appointment as Commissioner was to expire at mid-night on September 30<sup>th</sup> 2012.



8. It seems clear that there were some concerns held regarding the performance of Commissioner Bong which resulted in the Commissioner taking leave and Deputy Commissioner Arthur Caulton Edmanley ("*Mr Caulton*") acting in his place.
9. In June 2012, Commissioner Bong made two criminal complaints against Mr Caulton and the Chairman of the Police Service Commission Mr Tony Ata. The complaints centred around Commissioner Bong believing that Mr Caulton and Mr Ata, among others, had been actively conspiring to remove Commissioner Bong from his post.
10. Commissioner Bong was suspended from his office as Commissioner of Police for three months commencing on June 17<sup>th</sup> 2012. At that time, he made a further complaint regarding the alleged activities of Mr Caulton and Mr Ata.
11. On September 18<sup>th</sup> 2012, Commissioner Bong resumed his duties as Police Commissioner. On September 29<sup>th</sup> 2012 the Commissioner then gave Mr Taliban what has been referred to as a "*snap order*" to arrest Mr Ata and Mr Caulton. They were arrested accordingly, along with others. On September 29<sup>th</sup> 2012, Commissioner Bong then appointed an investigating team to arrest and investigate certain senior police officers who were suspected at that time of conspiring to remove him from office. Those arrests were carried out and included the arrest of Mr Caulton
12. On October 6<sup>th</sup> 2012, Mr Caulton acting in his capacity as Deputy Commissioner suspended Mr Taliban in relation to his alleged involvement in the arrest of the Deputy Commissioner, the Commander of Police District South Superintendent Pierre Carlot, the former Chairman of the Police Service Commission Mr Tony Ata, Senior Inspector Ron Tamtam and the attempted arrest of Superintendent John Taleo and other Government officials such as the Minister of Internal Affairs



Mr Andrew Wells and the first political advisor to the Ministry of Internal Affairs Mr Daniel Bule. The allegations against Mr Taliban were that:-

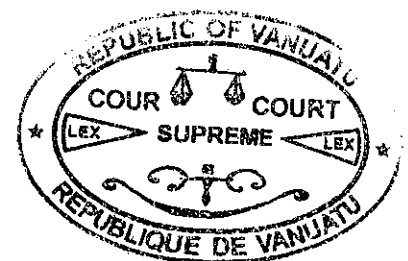
- a) *His actions were contrary to or in contempt of the "entire civil Court's decision concerning inciting mutiny, mutiny case in which you relied upon during the execution of the arrests".*
- b) *The arrests made were unlawful.*
- c) *Insubordination and a disrespectful attitude towards superior officers.*
- e) *Violation of Human Rights.*
- f) *Detention in police holding cells which was wrong and unlawful."*

13. The effect of the suspension was that Mr Taliban received 50% of his salary pending completion of investigations.

14. On December 4<sup>th</sup> 2012, the claimants, with the exception of Mr Maralau were arrested for reasons which are unclear but which were subsequently described by Spear J in the Supreme Court as "a reprisal response" to Commissioner Caulton's own arrest on September 29<sup>th</sup> 2012. They were held for periods of between 2 hours and 7 ½ hours and subsequently issued proceedings against the Commissioner of Police and the Republic of Vanuatu claiming damages for false imprisonment<sup>1</sup>. They were awarded damages and their circumstances were summarized by Spear J at paragraph 27 where he stated:-

*"There was absolutely no need for Commissioner Caulton to direct the arrest of any of the claimants. At that time, no complaint of criminal conduct had been made against any of the claimants and so there was no legitimate police investigation underway. The arrests and the detention of the claimants were determined actions clearly designed to punish the claimants and without any legitimate justification. Indeed, it can be observed that the claimants were, indeed, only carrying out orders from superior officers when they undertook the arrest on 29<sup>th</sup> September 2012. As such, it was reprehensible conduct on the part of a*

<sup>1</sup> See George v Sandy [2013] VUSC 180.



*Commissioner of Police to attempt to punish police officers in this way and a contumelious abuse of his authority”.*

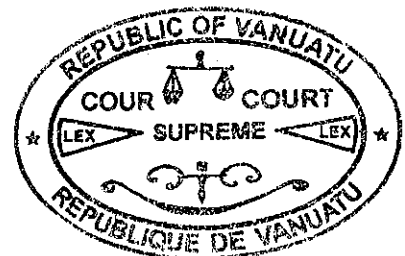
15. The claimants were subsequently reinstated to duty in April 2013.
16. On December 6<sup>th</sup> 2012 the President of the Republic of Vanuatu appointed Mr Caulton as the Commissioner of Police.
17. On February 20<sup>th</sup> 2014, Commissioner Caulton appointed an investigation team headed by Chief Inspector George Twomey to reinvestigate the affairs and conduct of former Commissioner Bong and the claimants in respect of allegations of mutiny. In a letter to Chief Inspector Twomey dated February 20<sup>th</sup> 2014, Commissioner Caulton wrote:-

*“I, pursuant to section 6 of the Police Act hereby appoint you as team leader and member of the investigation team into the alleged mutiny case including other related criminal charges against George Songi, Sylvain Taliban, Aru Maralau and other officers.*

*As you are aware of the need to satisfy the process and finalize the current incomplete case with respect of the charges mentioned above before the 9th of March 2014. You will be required to team up with the other officers with your team members to discuss, vet and establish the case against each accused person before the incoming Public Prosecutor determines whether or not to proceed with the case.*

*I trust with confidence that you will execute the given tasks without any difficulty”.*

18. An investigation was duly undertaken and a brief containing a substantial number of witness statements was then handed over to the Public Prosecutor’s Office for a determination as to whether or not charges should be laid. The



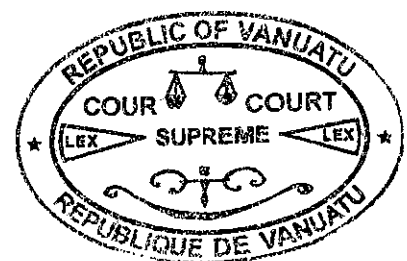
allegations involved allegations against 15 police officers which included the claimants.

19. On August 11<sup>th</sup> 2014, Mr Christopher Griggs, a barrister from New Zealand, was appointed as a State Prosecutor by the then Acting Public Prosecutor Mr Leon Malantugun for the purposes of prosecuting the case.
20. The reasons for that appointment were referred to in a sworn statement by the current Public Prosecutor, Mr Josiah Naigulevu. Mr Naigulevu referred to the fact that such appointments were not unusual or extraordinary and served the purpose of ensuring that a particular case is prosecuted in an effective manner. Mr Naigulevu referred to such a course being taken where for one reason or another an Assistant Public Prosecutor in the office of the Public Prosecutor cannot be engaged. The reason for such an appointment might include the complexity of the case, a desire of the instructing entity to utilize its own legal resources or a sense that counsel from outside the Public Prosecutor's office will be suited to prosecute a sensitive case.<sup>2</sup>
21. Mr Griggs subjected the brief provided by the police to what appears to have been a very thorough examination and provided the Acting Public Prosecutor with a 21 page legal opinion dated October 2<sup>nd</sup> 2014<sup>3</sup>.
22. Mr Griggs' opinion records that the CID prosecution file contained allegations of inciting mutiny under section 60 of the Penal Code [Cap. 135] and mutiny under section 46 of the Police Act [Cap. 105] against a total of 15 individuals including the claimants. Mr Griggs' opinion then covers very considerable detail examining the circumstances around the events providing the basis for the

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<sup>2</sup> See paragraph 7 Sworn Statement of Josiah Naigulevu dated 17 February 2017

<sup>3</sup> See exhibit J "JN3" Statement of Josiah Naigulevu dated 17 February 2017



allegations together with a significant amount of documentation all of which was set out in an appendix to the opinion.

23. At page 12 of his opinion Mr Grigg states the following:-

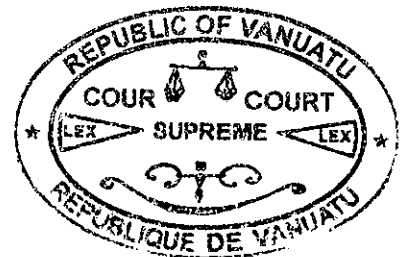
*"In my view, the evidence in this matter relating to events prior to 30 September 2012 discloses the following offences:-*

- a) *Conspiracy to pervert the course of justice contrary to section 79 (a) of the Penal Code (Joshua Bong, Aru Maralau, Jackson Noal Katenga, George Songi, Frazer Tambe, Wilson Abiu and Sylvain Taliban);*
- b) *False imprisonment contrary to section 118 of the Penal Code (Sylvain Taliban and Kalpat Steedman);*
- c) *Soliciting the events of false imprisonment contrary to sections 35 and 118 of the Penal Code (Joshua Bong, Aru Maralau and Sylvain Taliban)."*

24. Mr Griggs then goes on to examine the elements of the offences and the evidence which, in his opinion, supported the filing of the charges. Mr Griggs also referred to the public interest aspect of the matter which, in his opinion, also supported the laying of charges.

25. Mr Griggs also considered the possibility of alleged offences after September 30<sup>th</sup> 2012 and in particular whether charges of false imprisonment and inciting to mutiny could be laid. Mr Griggs expressed the view that there was insufficient evidence to warrant the laying of charges in respect of that matter as there was no reasonable prospect of a conviction.

26. My assessment of Mr Griggs' opinion is that it constituted a careful examination of the factual and legal factors relating to the alleged offences.



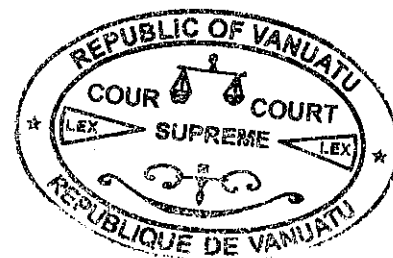
27. Mr Griggs also provided, as part of his opinion, draft provisional charges in the event that the Public Prosecutor deciding that the laying of charges was appropriate<sup>4</sup>.
28. In preparing and providing his opinion Mr Griggs expressly referred to the fact that he recognized that the prosecution policy issued by the Public Prosecutor in September 2003 was binding on him pursuant to section 11 of the Public Prosecutor Act.
29. I would agree with the description of Mr Griggs' opinion by Mr Naigulevu in his evidence as "*objective and comprehensive*" and "*one that took into account all material admissible evidence*".
30. On November 17<sup>th</sup> 2014, a charge containing 9 counts was preferred in the Magistrates' Court against the claimants and two other persons.
31. The charges were subsequently the subject of the entry of a nolle prosequi on July 8<sup>th</sup> 2015 by the then Acting Public Prosecutor Mr John Timakata who, by that time, had replaced Mr Malantugun.

### **Discussion**

32. Although this trial had been set down for a one day hearing it was agreed by counsel that the matter could be dealt with solely on the basis of the evidence filed and counsels submissions and that there would be no cross-examination of any witnesses. It has accordingly proceeded on that basis.
33. In a memorandum of agreed facts and issues provided to the Court on June 30<sup>th</sup> 2017 the issues were recorded as follows:-

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<sup>4</sup> See Griggs' opinion page 20 and annex b page 24.





- a) Whether or not the claimants were maliciously prosecuted?
- b) Whether or not the claimant's reputations were tarnished as a result of the widespread media coverage?
- c) Whether or not the claimants were illegally prosecuted?
- d) Whether or not the claimants are entitled to damages?

34. The test for malicious prosecution was set out by the Court of Appeal in Republic of Vanuatu v. Patenvanu [2015] VUCA 9 at paragraphs 12 to 14 where the Court stated:-

"10. *Establishing the tort of malicious prosecution is no easy task. The... authors of Salmond and Heuston on the law of torts (21<sup>st</sup> edition, 1996) state at paragraph 19.4:-*

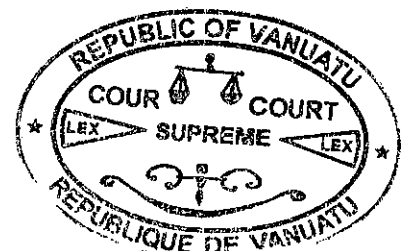
*"In order that an action shall lie for malicious prosecution..... the following conditions must be fulfilled:-*

- (1) *The proceedings must have been instituted or continued by the defendant;*
- (2) *He must have acted without reasonable and probable cause;*
- (3) *He must have acted maliciously;*
- (4) *The proceedings must have been unsuccessful - that is to say must have terminated in favour of the plaintiff now suing."*

32. The Court also observed that :-

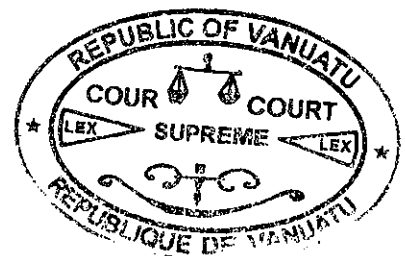
*"Self-evidently, the effect of the second and third of those cumulative requirements is that even if the prosecutor lays a charge without reasonable and probable course to do so, there is no malicious prosecution unless it is also proved that he or she acted maliciously. Further, even if it were proved that the prosecutor acted maliciously, there is no malicious prosecution if (unlikely as this may be) there was nevertheless reasonable and probable course (sic).*

*Accordingly, as the lenient (sic) authors of Salmond and Heuston observed at page 397:*

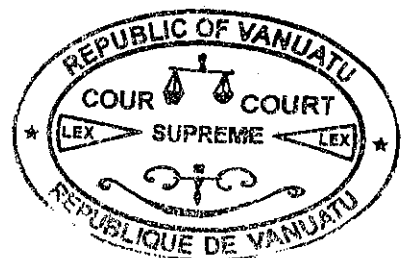


*"Malice and absence of reasonable and probable course (sic) must unite in order to produce liability. So long as legal process is honestly used for its proper purpose, mere negligence or want of sound judgment and the use of it creates no liability; and, conversely, if there are reasonable grounds for the proceedings (for example the probable guilt of an accused person) no impropriety of motive on the part of the person instituting the proceedings is in itself any ground of liability. Therefore it is necessary to distinguish between honesty of belief and honesty of motive; the former is relevant to the question of reasonable and probable course, the latter to the question of malice."*

35. In this case the State accepts that elements (1) and (4) are met and that it was the defendant who instituted the criminal proceedings and that the proceedings were unsuccessful given the nolle prosequi entered on July 8<sup>th</sup> 2015.
36. Accordingly, in this case the focus falls upon whether or not it could be said that the Republic through the office of Public Prosecutor acted without reasonable and probable cause and whether it could also be said that the Public Prosecutor acted maliciously. In this regard, I refer to the first defendant and conclude that it is not possible for the first defendant to be found to have prosecuted the claimants maliciously as the first defendant was not responsible for laying the charges. While the first defendant certainly instructed an investigation team to undertake an investigation of the claimant's actions that brief was then provided to the Public Prosecutor for analysis and a decision as to whether or not the prosecution could be laid. There was no evidence of any kind suggesting improper pressure being placed on the Public Prosecutor and in those circumstances an allegation of malicious prosecution cannot be sustained against the Commissioner of Police.



37. In his submissions, Mr Godden referred to a number of matters which he submitted supported the claimant's case. Firstly, he submitted that the claimants were merely following the orders and directions of the Commissioner of Police, something which they were required to do by law and specifically, pursuant to the oath taken by each of them under section 17 of the Police Act. Accordingly they were being investigated and subsequently prosecuted for simply adhering to, carrying out or obeying the command and order of a superior officer.
38. As to this point, the claimants were not being prosecuted for following orders. They were being prosecuted for the offences set out in paragraph [2] herein. While, in the course of defending the charges, the claimants would no doubt have incorporated the duty to obey orders as part of their defence, the Public Prosecutor was actually alleging that they were part of a conspiracy and had been responsible for unlawful acts. That would have been a question for argument and determination at trial. Their proposed defence is of no assistance in determining whether or not the prosecution was malicious.
39. Secondly, Mr Godden submitted that the claimants were being investigated for the same matters which were had resulted in their being subject to unlawful arrests. Those arrests are referred to in paragraph [14] herein. It was submitted by Mr Godden that during the second round of investigations the claimants "*were not cautioned instead they were summon (sic) to appear before the Court on 2 December 2014, and were bailed.*" It was submitted that the claimants were not informed of any charges laid against them until being summoned to appear in court and that they were not cautioned by the investigators. Mr Godden submitted that the investigators "*had abused the process made by the defendant that infringed their rights and; contrary to the interests of justice and; is in breach of their Constitutional rights under (Articles 5(1)(k), 6(1),6(2),16(1) and 47(1) ).*"
40. This is a very broad submission which is hard to understand. The previous case determined by Spear J. focused on the issue of the lawfulness of the claimants



arrests. There is no bar to any re-investigation of matters surrounding those events. As to the reference to the claimants not being cautioned by the investigators there was simply no need for any such caution. Mr Griggs conducted his review on the basis of the information which was already on the police file. There was no abuse of process in those circumstances as the Public Prosecutor was entitled to act on the information which he had, and clearly did so. The reference to various articles of the Constitution is irrelevant to the determination of whether or not this prosecution was malicious. There is simply no force to Mr Godden's submissions in this regard.

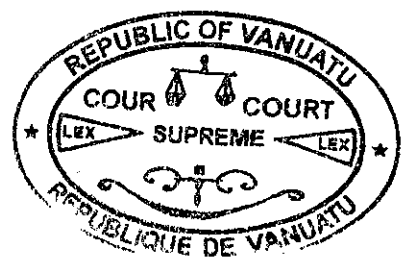
41. Mr Godden also made a submission based on the alleged reasons for the decision to apply for a nolle prosequi in respect of the charges against the claimants. He referred to the evidence of the current Public Prosecutor, Mr Naigeleву<sup>5</sup> that :

*"17. On 3 June 2015, the Acting Public Prosecutor John Timakata entered a nolle prosequi in the Magistrates Court effectively terminating the case. The basis of his decision was expressed in a two page opinion. The nub of his decision was that in his assessment, the independence of the Office of the Public Prosecution had been compromised by the circumstances leading to the decision of former Acting Public Prosecutor Maluntagun to appoint Christopher Griggs and institute criminal proceedings, and the uncertainty surrounding the funding of Grigg's services. In his view, the collective circumstances had led him to a view that the public interest did not require that the case be prosecuted."*

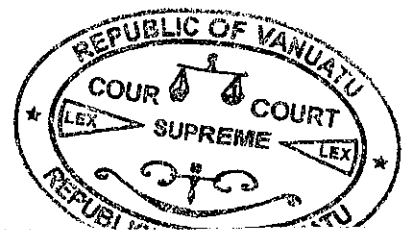
42. Mr Godden submitted that the only inference which can be drawn from such a situation is that the claimants had been *"victimised by interest (sic) which are not known to them"* and that the office of Public Prosecutor *"cannot itself form conflicting legal views on a case before prosecution"*.

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<sup>5</sup> See sworn statement of Josaia Naiguleву dated 17 February 2017



43. With respect to Mr Godden's submissions I am simply not sure what is meant by the reference to the claimants being victimized by an interest unknown to them. What is clear is that these events covered the tenure of two different Public Prosecutors who each clearly took a different view of the criminal proceedings. There is nothing untoward or irregular, in itself, in such an event, and it is simply not capable of the type of sinister inference which Mr Godden suggests should be drawn. There is nothing in those submissions which supports a finding of malice.
44. The difficulty for any claimant in proving that a prosecutor has acted without reasonable and probable cause was referred to by the Court of Appeal in Patunvanu where it observed that:-
- "12.....The burden of proving the absence of [reasonable and probable cause (sic)] is on the claimant who, as Salmond and Heuston observe "thus undertakes the notoriously difficult task of proving a negative.*
13. *As the lenient(sic) authors go on to say:-*
- "Reasonable and probable cause (sic) means a genuine belief based on reasonable grounds, that the proceedings are justified..... The defendant is not required to believe that the accused is guilty; it is enough if he believes there is reasonable and probable cause(sic) for a prosecution. He need only be satisfied that there is a proper case to lay before the Court".*
45. At this point I conclude that the claimants meet an insurmountable hurdle, as I am of the view that reasonable and probable cause was established by the careful and thorough report undertaken by Mr Griggs who analyzed the evidence and concluded that it was sufficient to justify a prosecution. Mr Griggs' opinion did not need to be correct and, if the matter had proceeded to trial, may have been found not to be. But it could not be said that it failed to establish reasonable and probable cause for the commencement of a prosecution. Indeed, in all of the circumstances, the appointment of Mr Griggs and the enquiry undertaken by him could be seen as reflecting a concern on the part of the Public



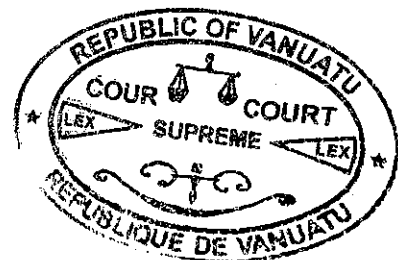
Prosecutor that the circumstances of this particular case needed serious and careful consideration of a type which required assistance from an expert who might be seen as having no ties to Vanuatu and accordingly free from speculation as to the motive for bringing any prosecution.

46. For these reasons the claim of malicious prosecution fails. I would add also however, that there is no evidence which would or could justify a finding that the Public Prosecutor acted maliciously in the laying of the charges. Accordingly, even if the claimants were successful in establishing that the defendants acted without reasonable and proper cause they would have been unable to establish malice.
47. As to the issue of whether or not the claimants were "*illegally prosecuted*" it raises the issue as to whether or not the prosecution was in some way unlawful, and if so whether or not damages should be awarded.
48. It will be self-evident from the preceding paragraphs of this judgment that the Public Prosecutor acted with reasonable and probable cause and in that sense it could not be said that there was anything unlawful about the prosecution. The submissions of the claimants in this regard really turn on the fact that in Bong v Maluntagun<sup>6</sup>, Aru J held that the appointment of Christopher Griggs was unlawful and that the work that he carried out was unlawful. That judgment was the subject of a ruling in the Court of Appeal<sup>7</sup> which, by consent amended the orders of Aru J to record that the appointment of Mr Griggs was quashed. Accordingly there was no determination that the work undertaken by Mr Griggs was unlawful. Although he does not specifically say so, Mr Godden submits that the fact that Mr Griggs was not eligible to be appointed as a prosecutor means

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<sup>6</sup> [2016] VUSC 6

<sup>7</sup> [2017] VUSC 10



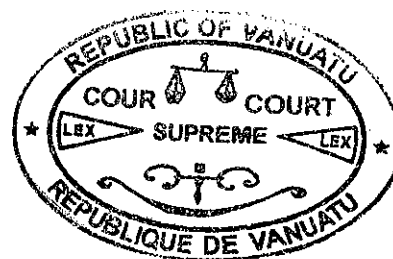
that the prosecution must have been "illegal". In this regard Mr Godden relies on the Court of Appeal decision in Leymang v Ombudsman<sup>8</sup>.

49. I consider that the application of the principles referred to in Leymang operate against the argument being advanced by Mr Godden.
50. Leymang considered the application of the common law rule referred to as the doctrine of de facto office which is a rule that accords validity to the exercise of powers and functions by a person in public office despite a defect or irregularity in the manner of appointment of that person such that the appointment was not a valid one.
51. In Bong v Maluntagun, Aru J. referred to various defects surrounding the appointment of Mr Griggs. They consisted of assertions that Mr Griggs was not a person registered as a legal practitioner in Vanuatu under the Legal Practitioners Act, that he did not hold a work permit and that his appointment may have been the result of improper pressure placed upon the Public Prosecutor by members of the Vanuatu Police Force. It would appear from the judgment that the issue of improper pressure was the principal factor in the decision to quash Mr Griggs appointment.
52. That being so however I do not agree with Mr Godden that such a position renders the prosecution of the claimants illegal or unlawful.
53. I am of the view that the doctrine of de facto office does not actually apply in this case. That is because the decision to prosecute the claimants was a decision taken by the Public Prosecutor and not by Mr Griggs. While the document intituled "*Preferment of Formal Charges Under Section 35(2) of the Criminal Procedure Code [Cap 136]*" dated November 17<sup>th</sup> 2014<sup>9</sup> was signed by Mr Briggs it was signed "*For the Public Prosecutor*".

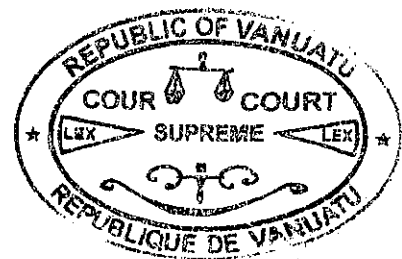
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<sup>8</sup> [1997] VUCA 10

<sup>9</sup> See sworn statement of Songi George dated 8 November 2016, Exhibit "SC 13"



54. It is the function of the Public Prosecutor pursuant to section 8(1) (b) of the Public Prosecutor Act [Cap 293] to "*institute, prepare and conduct on behalf of the State, prosecutions for offences in any court.*" Pursuant to section 24 of the Act a State Prosecutor is required to perform their functions in accordance with the directions of the Public Prosecutor who also has control of the day to day management of a State Prosecutor.
55. It is clear that the responsibility for all prosecutions rests with the Public Prosecutor. For that reason I consider that the prosecution was one taken by the Public Prosecutor and that accordingly the issues regarding Mr Griggs appointment are irrelevant to a consideration of whether the prosecution of the claimants was illegal or otherwise unlawful.
56. If I am wrong in this view then I consider that the doctrine of de facto office applies to Mr Griggs and that while his appointment may not have been valid that does not have the effect of rendering the prosecution illegal or otherwise unlawful.
57. I consider that the issue regarding the claimants' reputation and the award of damages can only flow from a finding that the claimants were maliciously, or otherwise unlawfully prosecuted. The tarnishing of the claimant's reputations does not constitute a separate cause of action and is really part of an overall assessment which the Court would undertake as to the appropriate award of damages which might flow from a finding of malicious prosecution. In that regard, issues such as loss of reputation may be seen as issues justifying an increase in an award of damages for malicious prosecution.
58. Accordingly there is no need to consider the issue of damages.
59. For the reasons set out in this judgment I dismiss the claimants claim.





60. Given that the defendants have been successful they are entitled to costs on a standard basis to be agreed failing which they are to be taxed.

DATED at Port Vila this 8<sup>th</sup> day of August, 2017

BY THE COURT

.....  
James Paul Geoghegan  
Judge

