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

Case No 17/2818 SC/CNST

BETWEEN: EILON MASS
Applicant

AND: THE GOVERNMENT OF THE REPUBLIC OF VANUATU and OTHERS
Respondents

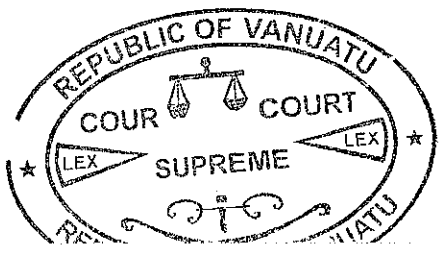
Hearing: ***25th October 2017***
Before: ***Justice Chetwynd***
Counsel: ***Mr Mass in person***
Mr Tabi for the Respondents

DECISION ON APPLICATION TO STRIKE OUT THE CONSTITUTIONAL PETITION

1. On 6th October 2017 Mr Mass filed an Urgent Constitutional Application. The respondent was the Republic of Vanuatu representing a number of persons and institutions. What is alleged by Mr Mass is that there was a massive conspiracy driven primarily by Ronan Harvey but involving almost everyone who holds public office in Vanuatu (including Judges of the Supreme Court, the Commissioner of Police, Public Prosecutors and others) lawyers in private practice and other members of the public. In the words of Mr Mass:

> *"The Conspiracy for those infringements* (of his constitutional rights) *has involved at least 48 Public Servants, Rona Harvey from overseas and the Mafia of Ronan Harvey which have included citizens and exparts* (sic expats) *in Vanuatu."*
>
> *"The Conspiracy has started on 13/12/13 and is still lasting until today..."*
>
> *"The Mafia have included at least 26 individuals..."*

2. The first question I had to resolve was whether I should recuse myself from hearing this matter. The reason being is the 37th claim detailed in the Urgent Application alleged a failure on my part to give Mr Mass a fair hearing within a reasonable amount of time in Criminal case 183 of 2014. I took the view that I could set aside that issue for consideration at some other time and deal with the other 40 claims set out in the Urgent Application by Mr Mass. The allegation was not that I had been part of the conspiracy, simply that I had not heard the case within a reasonable time.



3. Mr Mass himself has not raised the question of whether I should recuse myself from hearing the urgent application. Looking at the sworn statement in support of the urgent application the allegation is not so much that I did not hear Criminal case 183 of 2014 in a timely manner but rather I did not allow Mr Mass in that case to cross examine prosecution witnesses about the Conspiracy.

4. Following service of the proceedings on the State Law Office (9th October) a conference was fixed in accordance with Rule 2.5(3) of the Constitutional Proceedings Rules ("the Rules") for 25th October. The application was accompanied by 3 sworn statements by Mr Mass. The first was 365 pages in length and had attached to it a flash drive with further evidence. The second sworn statement consisted of 850 pages. The third was 305 pages in length. On 23rd October the respondents filed an application to strike out the constitutional application. That was served on Mr Mass the same day.

5. Both sides filed submissions in respect of the application to strike out. In accordance with Rule 2.8 (a) I heard the application to strike out on 25th October. I heard from Mr Mass and Mr Tabi for the Respondents. I reserved my decision on the application to strike out. I had to take some time to consider the sworn statements by Mr Mass.

6. On the 8th December before I could publish any decision Mr Mass filed an application for leave to amend the urgent constitutional application together with a further 8 sworn statements in support. That involved a statement of evidence and 7 books of exhibits. There are 30 pages of written evidence plus a copy of the Convention Relating to the Status of Stateless Persons. The books of evidence contain in excess of 2,680 pages. I have not been able to minutely study this massive amount of documentation considering the application being made is expressed as an urgent application.

7. It is quite possible the filing of the application to amend was consequent upon the Court of Appeal decision dated 17th November 2017 refusing Mr Mass leave to appeal out of time in the case involving him (trading as Raw for Beauty) and the Western Pacific Cattle Company Ltd (which company had as principle shareholder and director one Ronan Harvey).

8. Both the original and the amended urgent Constitutional applications contain claims that the rights infringed are those contained in Article 5(1) (a - k), Article 5(2) (a - g), Articles 55, 57(1), 66(1) (a – d) and 66 (2).

9. Working backwards, Article 66 relates to the leadership code. Article 66(2) specifies, in relation to the conduct of leaders, particulars of what constitutes a breach of the code. It is difficult to see how this can be a right guaranteed to Mr Mass. It is also not clear from the application how this is an infringement of the Constitution in relation to Mr Mass.

10. It is also very difficult to see what provision in Article 57 of the Constitution has been infringed in relation to Mr Mass. The Article deals with the Public Service and the allegiance, appointment, security of tenure etc of public servants. This has nothing to do with Mr Mass.

11. Article 55 refers to the Public Prosecutor. In particular it says the Public Prosecutor shall not be subject to the direction or control of any person or body in the exercise of his functions. Mr Mass does not say how or why there has been an infringement of the provisions of Article 55 of the Constitution in relation to him.

12. When looking at the fundamental rights set out in Article 5 Mr Mass says all of his fundamental rights have been breached. So far as Article 5 (1) is concerned, there is no evidence that Mr Mass's right to life has been breached (Art 5 (1) (a)), he is still alive. Mr Mass has produced no cogent evidence of attempts on his life or threats to it.

13. It is true that he has been incarcerated (Art 5(1)(b)) but that followed trials and hearings before the courts. The proviso in Article 5(1) would apply because all the fundamental rights are, *"...subject to any restrictions imposed by law..."*.Mr Mass has been convicted and subsequently been successful in appeals and released. He has been afforded the protection of the law and has been able to pursue his cases to the Court of Appeal.

14. Mr Mass has produced no evidence or information nor is there anything more than a vague generalisation that he has been subject to inhuman treatment and /or forced labour.

15. Nor is there is no indication that Mr Mass has suffered from any restriction or infringement of his right to freedom of conscience and worship.

16. Mr Mass makes no allegation that his freedom of expression has been infringed.

17. Apart from the time he was legally held in custody there is no evidence that Mr Mass's fundamental right to freedom of assembly and association has been infringed.

18. Again, apart from times he has spent in custody and or subject to bail conditions Mr Mass has not suffered any infringement to his freedom of movement. There is a vague and obtuse reference to his passport and the suggestion that because his Israeli passport expired he was somehow rendered stateless. Mr Mass's nationality does not depend on his passport, his passport is evidence or proof of his nationality.

19. Mr Mass has been able to start legal proceedings about his property. His complaint seems to be he did not win or has not won his civil claims. The loss of a civil claim to property is not an unjust deprivation of that property. Mr Mass has been able to argue his case about ownership, without restriction, up to and including the highest Court in the land. He was not successful in his appeal and as the Court of Appeal said in the Raw for Beauty case [1] there was good reason why that was so:

> *"The various allegations made about the identities sought to be joined are vague generalisations, and as the primary judge correctly observed based on opinion and are not presented in a way that could be admissible in evidence."*

The Supreme Court Judge had refused Mr Mass's leave to add 11 new parties to the case and on appeal the Court of Appeal agreed the Judge was right to do so. The Court of Appeal even considered 3 other related applications and in the judgment told Mr Mass what he must do. Mr Mass may not be in possession of some of his property but there has been no impediment to his pursuing his claims in the Courts.

20. There can be no doubt that Mr Mass has been given equal treatment under the law in the courts. There is no doubt he has been the recipient of the protection of the law. Mr Mass has been able to access the courts whenever he wanted. He may not have had his applications heard or his cases dealt with when he wanted them to be heard and/or concluded. He may be unhappy about some of the decisions he has been subject to, but he cannot say he has not been allowed access to the courts or that the judiciary have not considered his cases fairly. He has had fair hearings and the judges and judicial officers have acted independently and impartially. He has been entitled to counsel but often has chosen to represent himself. There is no suggestion that in their dealings with him any judicial officer ignored or reversed the presumption of innocence. There is no suggestion that Mr Mass did not understand the proceedings because of language. He does not say he was excluded from any Court. He has never been tried for let alone convicted of an offence not known to the law. Mr Mass does not argue that he was punished with a greater penalty than which existed at the time of any commission of any alleged offence. There is no evidence that Mr Mass has been tried for the same offence for which he had previously been pardoned, convicted or acquitted except after due process of the law, in other words after conviction, successful appeal and re-trial ordered by the appellate Court.

21. The only possible infringement of Mr Mass's fundamental rights must relate to equal treatment under administrative action. This appears to be Mr Mass's complaint. He says because, for example the police commissioner, did not do what he wanted him to do then he was subjected to unequal treatment, to unequal administrative action. This is the recurrent theme throughout the documentary "evidence" produced by Mr Mass. He complains that the Public Prosecutor did not do as he (Mass) instructed him to do. He says the same thing about The Chief Registrar of the Supreme Court, the Minister of Internal Affairs, even the Prime Minister. He says this about the

[1] *Mass v Western Pacific Cattle Company* [2017] VUCA 42; Civil Appeal Case 2722 of 2017 (17 November 2017)

48 Public servants referred to in paragraph 1 above. Not only that, Mr Mass says that these 48 Public Servants conspired with 26 members of the Ronan Harvey Mafia.

22. This is in terms almost identical to the grounds Mr Mass put forward in the *Raw Beauty* case for the joining of additional parties. This was considered by the Court of Appeal which dealt with it thus:

> *"In short the applicant alleges that each of these identities has played some role in one or more of several alleged schemes, or "conspiracies" that have, since the issue of the applicant's original claim in 2014 had the effect of delaying trial of the claim so that in the meantime the respondent has been stripped of its assets, which are now beyond reach, so that the applicant is completely denied the potential fruits of his claim. The intended purpose of the joinder of the new identities is to claim damages from them for putting the potential fruits of the applicant's claim against the respondent beyond reach.*
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> *The role of Ronan Harvey in events since the issue of the original claim is as the effective controller and shareholder of the respondent. Mr. Griffin is alleged, since the commencement of the claim, to have become a minority shareholder in the respondent and to have acted as manager and managing director of it during the period when the Velit Bay property was sold.*
>
> *The applicant seeks to join the Government of the Republic of Vanuatu on the basis that it is responsible for the Department of Police, VIPA and Immigration, each of which has been corruptly involved in the alleged conspiracies.*
>
> *Mr. Morrison and Mr. Blake are lawyers. Mr. Morrison acted for the respondent for a time after the original claim was filed. He was involved in various transactions relating to the sale of Velit Bay and various proceedings taken against the applicant by the Police and Immigration and in relation to the applicant's attempt to take possession of the coconut oil machinery. Mr. Blake represented VWGI in the purchase of the Velit Bay property. Ms. Tavoa acted for Mr. Harvey since the original claim was filed, and more recently was the lawyer on the record for the respondent. VWGI was the purchaser of the Velit Bay property and the applicant for an investor's licence sought from VIPA to enable the purchase to take place. First National Real Estate is an estate agent that had a part in the sale of the Velit Bay property."*

23. As has already been indicated the Appeal Judges dealt with the arguments raised by saying:

> "T*he various allegations made about the identities sought to be joined are vague generalisations, and as the primary judge correctly observed based on opinion and are not presented in a way that could be admissible in evidence."*

The same allegations are being raised in this matter and whilst they may be more detailed in the 11 bundles or sworn statements as Mr Mass refers to them, produced in this case they are still nonetheless vague generalisations. They no doubt add up to

a potent statement about Mr Mass's unhappiness in the way he has been treated, but they do not show that the treatment meted out to him was any different to what others might have experienced. The allegations are so vague and generalised they do not establish Mr Mass was subjected to unequal administrative action. Just because Mr Mass is unhappy about the way he has been treated does not mean his fundamental rights have been infringed. His "unhappiness" is not the only consideration.

24. For example the Court of Appeal considered a similar situation in the case of *Awa v Colmar* [2]. The appellant in that case argued an order for security for costs infringed his constitutional rights because it denied him the right to a fair hearing. The Court of Appeal held:

> *"The argument that the Order breached Mr Awa's constitutional right to the protection of the law is misconceived. The Order did impose a condition on Mr Awa's right to have a trial of the issues raised by the amended Statement of Claim but such a condition is not inconsistent with the constitutional right to protection of the law where the condition is imposed in accordance with law. The constitutional right to protection of the law provided for in Article 6(d) of the Constitution is subject to the overriding limitation imposed by Article 6 that the fundamental rights enshrined in Article 6 are "subject to respect for the rights and freedoms of others and the legitimate public interest in defence, safety, public order, welfare and health". The power of the Court to order security for costs is a power intended to protect the rights of the other parties to the litigation. The discretion to award security for costs recognised by the Rules of Court is a discretion to be exercised fairly having regard to the competing interests of the parties in a case. So long as the discretion is properly exercised having regard to those interests, the order will not be inconsistent with the right to protection of the law."*

25. In arriving at a decision in this matter it is also necessary to look at "remedies" being pursued by Mr Mass. They are set out in paragraph C of the urgent Constitutional application. The remedies sought in the first amended urgent Constitutional application are more extensive. Mr Mass is seeking damages, interest, and an order that he is not deported until such time as the Constitutional application has been heard. It is difficult to understand how the Court can make the order about deportation in the terms Mr Mass wants. The argument is not that the processes for deportation have not been followed properly, Mr Mass is applying for a stay pending the hearing of the case. Mr mass does not produce any argument as to why he should not be deported. Even if he was that would not prevent any application being heard or his return to appear in Court.

26. The more extensive remedies sought in the amended urgent application seek orders instructing the Government to take positive action. What can be done is perhaps best illustrated by the Court of Appeal case of *ROV v Benard* [3]. The Court in that case explained:

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[2] *Awa v Colmar* [2009] VUCA 37; Civil Appeal Case 07 of 2009 (16 July 2009)

[3] *Republic of Vanuatu v Benard* [2016] VUCA 4; Civil Appeal Case 666 of 2015 (15 April 2016)

"The learned Chief Justice did not award any damages in Willie's case because he found that (a) no torts had been committed, (b) no malice in the sense of spite or a desire to injure for improper reasons was established, (c) the Police Commissioner did not know he did not have the power to take the action he took and (d) it was not established the Commissioner acted in bad faith.

In laukas v. Republic [2015] VUSC 131; Constitutional Case 5 of 2008 (27 September 2015) Chief Justice Lunabek made the following statement with respect to claims made under Article 6:

""The Constitution of Vanuatu empowers the Supreme Court to enforce rights guaranteed in it. In this case, it is my judgment that, if the Applicant proves the breaches of his constitutional rights as alleged, the Court could award monetary compensation pursuant to Articles 6 and 53 of the Constitution. If this remedy is awarded, it is not a remedy in tort, but one in public law based on strict liability for the contravention of fundamental rights to which the principle of sovereign immunity, does not apply. Article 5 of the Constitution is concerned with public law, not private law and so the remedy sought therefor is one of public law, not in tort. The leading case is Maharaj v. Attorney General of Trinidad and Tobago already mentioned.""

What follows from the cases of Willie and laukas is that two quite separate avenues for relief may lie for administrative action in breach of fundamental rights guaranteed by Article 5. In an appropriate case it could be open to a person to pursue both avenues of remedy, but double compensation will not be allowed.

One avenue is to pursue common law rights for damages for a recognized tort including for misfeasance in public office. If successful the remedy will be damages assessed on common law principles that include special damages for proved out of pocket expenses and other monetary losses, general damages for personal injury or damage to business or reputation, and for serious and contemptuous wrongs, punitive damages as well.

The other avenue is to seek public law relief under Articles 6 and 53(2) of the Constitution for a breach of the constitutional rights guaranteed under Article 5. Strict liability attaches to such a breach: laukas v. Republic. But not every breach will attract an award of compensation. A person whose constitutional rights have been infringed is entitled to a declaration to that effect unless the breach is merely a trivial one, but an additional compensatory award will only be made where it is established by evidence that the breach was the result of malice, conscious abuse or knowing disregard of the person's rights.

It follows that not every breach of a constitutional right will attract compensation. Errors frequently occur in the day to day functioning of government departments. Mistakes can be made unwittingly by public servants, perhaps in ignorance of proper procedures or the law. Such mistakes may constitute a breach of Article 5 rights, but will not attract an award of compensation unless malice, conscious abuse, or knowingly disregard of the person's rights is proved."

27. It seems clear that the remedies being sought by Mr Mass in the first amended application set out what he considers the administrative action in breach of his fundamental rights consisted of. In other words, if the Republic had done x and/or y then there would have been no breach. However, what he wants by way of a remedy in respect of the alleged breaches cannot be put into a declaration.

28. In all the circumstances I do not consider the Constitutional Application is the appropriate course of action. The evidence that Mr Mass wants the Court to consider consists of vague generalisations. Even if that were not the case it is difficult to understand what declarations could be made. Certainly not the orders that are sought in the First Amended Application. If Mr Mass is seeking damages then he must bear in mind what has been said by both the Honourable Chief Justice and the Court of Appeal as is set out above.

29. I also bear in mind the comments of the Court of Appeal in In *Picchi v Attorney General* [4]:

> *"Breaches of constitutional rights must be based on reality and not on some theoretical or assumed scenario".*

There is much that is assumed or is theoretical in Mr Mass's application.

30. Further comments from the *Picchi* case also come to mind. They concern the parties in a Constitutional petition. The Court of Appeal approved the comments of the Primary Judge in *Piccchi* when it said of parties:

> *"This is the framework which Parliament has laid down to apply in respect to the hearing of any constitutional petition. The Section contemplates the involvement of those whose actions are complained of. We respectfully adopt and accept the reasoning of the primary Judge when he said:*
>
> *"What therefore does "party or parties whose actions are complained of" mean? As the only respondent can be the State acting through one if its arms and represented by the Attorney General it should have been simply stated in Section 218 that the petition be served upon the Attorney General. There was no need to mention "parties". The Attorney General, once served, will perforce contact the persons whose actions are complained of in order to prepare the case for Court. Unless the State is a 'party' within the confines of Section 218 then there is no provision for service of the petition upon the State. That would be absurd, unless it is to be presumed service would in any event take place upon the State and that Section 218 is a provision to ensure those whose actions are specifically complained of are brought before the Supreme Court for the purposes of the enquiry. Would they then become a 'party' as opposed*

[4] *Picchi v Attorney General* [2001] VUCA 12; CAC No. 20 of 2001 (1 November 2001)

to a person whose actions are complained of, and as represented by the Attorney General for the State?

There does not appear to be an interpretation and a course of action which renders consistent the provisions of Section 218 within itself and with the Constitution. The Constitution of course provides the only respondent is the State. The Attorney General as its representative must be served with the petition. As a matter of statutory interpretation 'party' in Section 218 must mean the State. Within that broad term 'party' are other parties, namely those specifically whose actions are complained of, in this case the former Chief Justice, the former Commissioner of Police and the former Public Prosecutor. The purpose of the statutory provisions is, in my judgment, to ensure that the specific persons whose actions are complained of are before the Court for the purposes of the enquiry and if necessary, the making of any Orders and award of compensation."

That begs the question on how to deal with the 26 others referred to by Mr Mass. If he is going to seek compensation from them or some declaration against them how is that going to be possible in the present framework for dealing with Constitutional petitions ?

31. For all the reasons set out above the urgent Constitutional application is struck out. The applications for leave to amend and for leave to adduce additional evidence in the form of sworn statements are refused. The effectively brings the matter to an end.

32. So far as costs are concerned, there is no reason why the general rule is not followed, namely costs of the successful party are met by the unsuccessful party. The Applicant will pay the respondent's costs, those costs to be taxed on a standard basis if not agreed.

DATED at Port Vila this 26th day of January 2018.

BY THE COURT

D. CHETWYND
Judge

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