

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

Civil
Case No. 21/2221 SC/CIVL

BETWEEN: Andrew Fraser
Applicant

AND: Vanuatu Police Force
First Respondent

AND: Public Prosecutor
Second Respondent

AND: Mr Kishor Kumar
Third Respondent

AND: Mrs Rozleen Kumar
Fourth Respondent

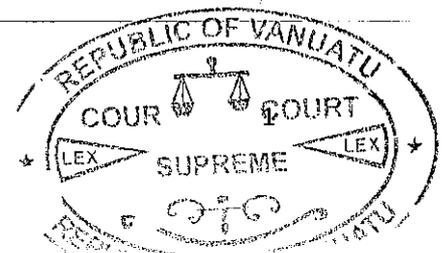
AND: Mrs Leah Philips
Fifth Respondent

Date of Hearing: 25 August 2021
Before: Justice V.M. Trief
In Attendance: Applicant – in person, via video link from Luganville Court House
First and Second Respondents – Mr L. Huri & Mr J. Wells
Third and Fourth Respondents – in person, via video link from Luganville Court House
Fifth Respondent – Mrs M.P. Vire, via video link from Luganville Court House
Date of Decision: 13 September 2021

DECISION AS TO APPLICANT'S INTERLOCUTORY APPLICATIONS

A. Introduction

1. The Applicant Andrew Fraser filed interlocutory applications including a motion to set aside late submissions, preliminary motions for the Attorney General and several witnesses to show cause why they should not be held in contempt of Court, motions to summons the Attorney General and several witnesses to give evidence and produce documents, and an Emergency Verified Petition for Preliminary Injunction. The applications were opposed.



2. Having heard the parties and considered the documents, I now set out my decision in relation to the applications.

B. Preliminary Matter

3. On 3 September 2021, Mr Fraser filed a Motion to Withdraw Earlier Motions against the Attorney General. Those motions had already been heard on 25 August 2021. This is my decision in relation to them. The time to withdraw the motions was at the hearing. Having been heard, they cannot now be withdrawn. I declare therefore that the document, 'Motion to Withdraw Earlier Motions' is ineffectual; it has no effect in this matter.

C. Motion to Set Aside Late Submissions

4. At the commencement of the hearing, Mr Fraser withdrew his Motion to Set Aside Late Submissions which was filed on 17 August 2021.

D. Preliminary motions for the Attorney General and witnesses to show cause why they should not be held in contempt of Court

5. On 17 August 2021, Mr Fraser filed:

- a. Motion to show cause why Respondent Arnold Kiel Loughman should not be held in Contempt of Court;
- b. Preliminary Motion to show cause why Witness Arnold Tari should not be held in Contempt of Court;
- c. Preliminary Motion to show cause why Witness Denson Damien Boe should not be held in Contempt of Court; and
- d. Preliminary Motion to show cause why Witness Laiza Quai should not be held in Contempt of Court.

6. The grounds for these motions were as follows:

- a) That the Orders dated 23 July 2021 required the Respondents to file and serve submissions in response to the Petition by 4pm on 12 August 2021 however they were not served until 4.57pm on 13 August 2021. This gave Mr Fraser less time to prepare; and
- b) That the Attorney General on behalf of the First and Second Respondents in his submissions and the First and Second Respondents' witnesses Arnold Tari, Denson Damien Boe and Laiza Quai in their sworn statements made false statements which should be considered an act of contempt of Court pursuant to rule 18.14(1) of the *Civil Procedure Rules* (the 'CPR') and section 74(1) and (2) of the *Penal Code* [CAP. 135].

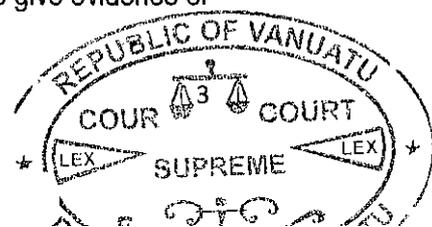
7. In response, Mr Huri accepted that the submissions were filed 1 day late. He submitted that rule 18.14(1) of the CPR relates to persistent non-compliance with the Court's Orders. He submitted that the First and Second Respondents were 1 day late on



1 occasion – there has not been any persistent non-compliance with Orders. Further, the Orders dated 23 July 2021 required Mr Fraser to file a sworn statement in support of his Petition and serve it on the First and Second Respondents by 4pm on 26 July 2021. Mr Fraser filed his sworn statement on 26 July 2021 but without the attachments. The attachments were not filed until 2 August 2021 by way of 'Articals of Evidence' and Sworn statement in support of Articals of Evidence. That was 7 days late yet the First and Second Respondents have not taken issue with that therefore there was no reason why an instance of a day's delay should be held as contempt of Court.

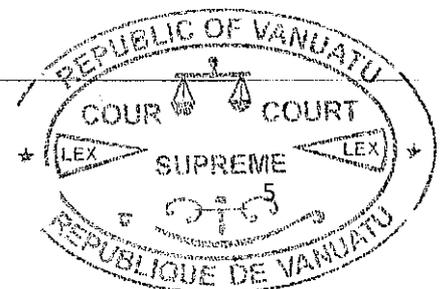
8. I agree with Mr Huri's submissions. There simply has not been such non-compliance with the Court's Orders to merit showing cause in relation to contempt of Court. Further, the Orders were directed at the First and Second Respondents, named parties to this proceeding. If needed, they are the persons who would need to show cause. The Attorney General Arnold Kiel Loughman is their lawyer. The Orders were not directed to him. He need not show cause. The Orders were also not directed at the witnesses Mr Tari, Mr Boe and Ms Quai. They too would not need to show cause.
9. As to the ground that the Attorney General and the named witnesses made false statements in their submissions and sworn statements, as I explained to Mr Fraser at the hearing, Arnold Kiel Loughman is Vanuatu's Attorney General therefore signed the First and Second Respondents' submissions. Mr Huri and Mr Wells are legal officers employed by the Attorney General. The submissions contained the legal arguments the State wished to make. The other parties were given the opportunity to file submissions in response. Submissions must have an evidential basis, evidence being set out in sworn statements. It is not for me to determine whether the Attorney General's submissions are false or not; they are legal arguments.
10. Mr Fraser also submitted that Mr Tari, Mr Boe and Ms Quai made sworn statements that contained false statements. As I explained to Mr Fraser at the hearing, any disputed matters of fact are a matter for trial. I cannot determine them at the hearing of an interlocutory application.
11. Further and of grave concern is that the statements that Mr Fraser submitted were false were made in relation to criminal proceedings. It would be an abuse of process to use the current civil proceedings to attack the subject matter of pending criminal proceedings. For that reason alone, I will not give any regard to the alleged falsity of statements made.
12. There is no merit in the grounds for the Motions. The Motions are declined and dismissed.
- E. Motions to summons the Attorney General and witnesses to give evidence and produce documents
13. On 17 August 2021, Mr Fraser filed:

- a) Motion to summons Respondent Arnold Kiel Loughman to give evidence or produce documents;



- b) Motion to summons Witness Denson Damien Boe to give evidence and produce documents; and
 - c) Motion to summons Witness Laiza Quai to give evidence and produce documents;
14. These Motions were made pursuant to rule 11.5(2) of the CPR seeking that documents referred to in the Attorney General's submissions and Mr Boe and Ms Quai's sworn statements be produced. Mr Fraser submitted that until they were, those submissions and sworn statements should not be used to oppose his Petition seeking a preliminary injunction.
15. Rule 11.5(2) of the CPR provides:
- 11.5 ...
- (2) Documents referred to in a sworn statement must be:
 - (a) attached to the statement; and
 - (b) identified by the initials of the person making the statement and numbered sequentially.
16. It is ironic that Mr Fraser points to rule 11.5(2) when he has not yet complied with that rule in this matter (see para. 19 below).
17. More significantly, the matters for which Mr Fraser seeks evidence or the production of documents for relate to extant criminal proceedings. As I stated to Mr Fraser at the hearing, I cannot decide in the present civil proceedings matters to do with criminal proceedings as that would constitute abuse of process. Further and as already stated above, disputed matters of fact are a matter for trial on a Claim. No Claim has been filed yet.
18. There is no merit in the grounds for the Motions. The Motions are declined and dismissed.
- F. Emergency Verified Petition for Preliminary Injunction
19. I previously ordered that the Applicant's document entitled, 'Articals of Evidence' and the Sworn statement in support of the Articals of Evidence, both filed on 2 August 2021, are taken to be the attachments to the Sworn statement of in support of Verified Petition for Preliminary Injunction filed on 26 July 2021. I also put Mr Fraser on notice that from then on, all attachments to a sworn statement needed to be printed out and attached to the sworn statement and not provided by way of separate filed documents. That is what rule 11.5(2) of the CPR requires.
20. Mr Fraser filed the following in relation to his Emergency Verified Petition for Preliminary Injunction:
- a) ~~Emergency Verified Petition for Preliminary Injunction filed on 8 July 2021;~~
 - b) Memorandum in support of Preliminary Injunction filed on 8 July 2021;

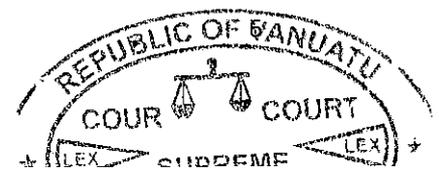
- a) Emergency Verified Petition for Preliminary Injunction filed on 8 July 2021;
 - b) Memorandum in support of Preliminary Injunction filed on 8 July 2021;
 - c) Undertaking for Damages filed on 8 July 2021;
 - d) Sworn statement in support filed on 26 July 2021; and
 - e) Attachments to that sworn statement set out in:
 - i. Document titled, 'Articals of Evidence' filed on 2 August 2021; and
 - ii. Sworn statement in support of the Articals of Evidence filed on 2 August 2021.
21. On 17 August 2021, Mr Fraser filed:
- a) Document titled, 'Articals of Evidence';
 - b) Sworn statement in support of Articals of Evidence;
22. The 17 August 2021 documents contained the same information as in the same-named documents filed on 2 August 2021, but with slightly more elaboration. They were unnecessarily duplicitous.
23. Mr Fraser seeks a preliminary injunction as a result of the alleged threat by Mr Kumar on 24 March 2020 to cause him harm and as a result from the alleged assault on 2 April 2020 by Police officers including Corp. Cliffson Tangwa and that Ms Quai was complicit to the assault as she was there but did nothing to stop it. He seeks a temporary injunction restraining the Vanuatu Police Force from entering his place of residence, from arresting him or going within 10 metres of him, and from threatening or assaulting him without a Court order. Mr Fraser also seeks restraint of Mrs Kumar and Mrs Philips to prevent their calling the Police again to assault him and otherwise supporting assault by the Police.
24. Mr Fraser stated that although he has not yet filed a Claim, it would be a complaint about police brutality. He stated in his Memorandum filed on 18 August 2021 that he has not yet filed a claim for malicious prosecution because the cause of action for such claim would not arise until after the criminal case had been successfully struck out. Mr Fraser removed all references in his Petition to malicious prosecution; I recorded that.
25. In response, on 13 August 2021, the First and Second Respondents the Vanuatu Police Force and Public Prosecutor filed:
- a) First and Second Respondents' Response to the Petition; and
 - b) Sworn statement of Arnold Tari;
 - c) Sworn statement of Denson Damien Boe; and
 - d) Sworn statement of Laiza Quai.



26. Also in response, on 17 August 2021, the Third Respondent Mr Kishor Kumar, the Fourth Respondent Mrs Rozleen Kumar and the Fifth Respondent Mrs Leah Philips filed:
- a) Response of Third Respondent to the Petition;
 - b) Response of Fourth Respondent to the Petition;
 - c) Response of Fifth Respondent to the Petition;
 - d) Sworn statement of Kishor Kumar to support the Third Respondent;
 - e) Sworn statement of Rozleen Kumar to support the Response of the Fourth Respondent; and
 - f) Sworn statement of Leah Philips to support the Response of the Fifth Respondent.
27. With the leave of the Court, Mr Kumar on 23 August 2021 filed Sworn statement No. 3 of Kishor Kumar to support Sworn Statement Page 4 Point Number 9. I had granted that leave as Mr Kumar had stated in his sworn statement filed on 17 August 2021, "Please find attached photos and a audio recording..." but then omitted to attach those. He did so in his sworn statement filed on 23 August 2021.
28. On 18 August 2021, Mr Fraser filed a Memorandum containing his submissions.
29. Having heard counsel and the parties, and having considered the documents filed, and being satisfied of the following:
- a) That Mr Fraser has a serious question to be tried in relation to alleged assault by the Police, which is to be raised by way of Claim filed (r. 7.5(1)(a), CPR);
 - b) That Mr Fraser would not be seriously disadvantaged if the order is not granted (r. 7.5(1)(b), CPR) as the alleged threat to cause harm and the alleged assault occurred over a year ago in March and April 2020 respectively. I accept Mr Huri's submission that there is no evidence of ongoing assault by the Police so that restraining orders must be made; and
 - c) I do not consider that if the evidence brought by Mr Fraser remains as it is, that he is likely to succeed (r. 7.5(3)(a), CPR) as the incidents complained are the subject of extant criminal proceedings and/or are connected to those criminal proceedings.
30. In the circumstances, I decline to exercise my discretion to grant the preliminary injunction sought. The Emergency Verified Petition for Preliminary Injunction is **declined and dismissed**.

G. Result and Decision

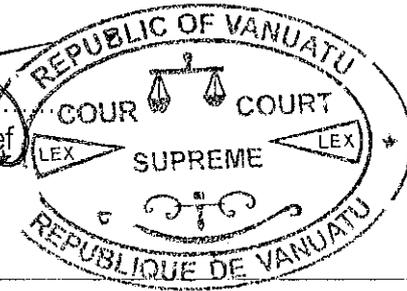
31. The Applicant withdrew his Motion to Set Aside Late Submissions that was filed on 17 August 2021.



32. There is no merit in the grounds for the following Motions filed on 17 August 2021 hence those Motions are **declined and dismissed**:
- a) Motion to show cause why Respondent Arnold Kiel Loughman should not be held in Contempt of Court;
 - b) Preliminar Motion to show cause why Witness Arnold Tari should not be held in Contempt of Court;
 - c) Preliminar Motion to show cause why Witness Denson Damien Boe should not be held in Contempt of Court; and
 - d) Preliminar Motion to show cause why Witness Laiza Quai should not be held in Contempt of Court.
33. There is likewise no merit in the grounds for the following Motions filed on 17 August 2021 and those Motions too are **declined and dismissed**:
- a) Motion to summons Respondent Arnold Kiel Loughman to give evidence or produce documents;
 - b) Motion to summons Witness Denson Damien Boe to give evidence and produce documents; and
 - c) Motion to summons Witness Laiza Quai to give evidence and produce documents.
34. The Emergency Verified Petition for Preliminary Injunction which was filed on 8 July 2021 is **declined and dismissed**.
35. Costs follow the event. The Applicant is to pay **by 4pm on 13 November 2021** the Respondents' costs of the Motions and Petition summarily assessed as follows:
- a) The First and Second Respondents' costs of VT75,000; and
 - b) The Fifth Respondent's costs of VT25,000.
36. The Claimant is to file and serve Claim **by 4pm on 13 December 2021**.

**DATED at Port Vila this 13th day of September 2021
BY THE COURT**

VM Trief
Justice Viran Molisa Trief



The seal of the Supreme Court of Vanuatu is circular. It features a central emblem with a scale of justice and a book. The text 'REPUBLIC OF VANUATU' is written along the top inner edge, and 'REPUBLIQUE DE VANUATU' along the bottom inner edge. In the center, the words 'COUR' and 'COURT' are positioned on either side of the scale, with 'SUPREME' below them. The word 'LEX' appears in two small boxes on either side of the central text.