

IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU

Appeal Civil Case No. 5 of 1998

(Civil Jurisdiction)

BETWEEN: THE HONOURABLE JUSTICE
TOMPKINS

Appellant

AND: ANDRE FRANCOIS

Respondent

Coram: Mr. Justice J. Bruce Robertson
Mr. Justice John von Doussa
Mr. Justice Daniel Fatiaki

Counsel: Mr. Jack Kilu for the Appellant
Mr. Roger de Robillard for the Respondent

Hearing: 6th October 1999

MINUTE

To understand why this matter is listed before the Court of Appeal today, it is necessary to refer to its history.

On 5 September 1998, the respondent, Mr. Francois, filed a Constitutional Petition against the Honorable Justice Tompkins and the Honorable Acting Chief Justice Lunabek.

On 9 September 1998, the Attorney General by Notice of Motion applied to have the proceedings struck out against each of the named respondents. On 12 November 1998, the Honorable Justice Marum delivered Reasons in relation to the hearing that had occurred on that Notice of Motion. It is plain from those Reasons that the proceedings against the Acting Chief Justice were struck out. It

is not clear from the Reasons what the learned judge intended in relation Justice Tompkins. The reasons do not include either an order that the petition against the judge be struck out, or an order that the petition against him not be struck out.

The Attorney General, taking the view that the petition against Justice Tompkins may not have been struck out as a result of the interlocutory judgement of Justice Marum, sought to appeal to the Court Appeal, before which the matter was listed on 22 April 1999. On that occasion the Court of Appeal decided not to hear the appeal. The Court of Appeal observed on page one of the Minute that it issued at the time that the petition against the Acting Chief Justice was struck out, but it was far from clear what was actually decided in respect of Justice Tompkins. Findings consistent with the matter being struck out were made, but no final conclusion was recorded.

The Court of Appeal indicated in the Minute that because there had been an attempt to join two members of the Court of Appeal as parties to the proceedings, it would be inappropriate for the Court as then constituted to hear the substance of any actual appeal. However, as there was no decision apparent in relation Justice Tompkins on the face of the Reasons, which had been given by Justice Marum, the Court adjourned the appeal, and intended that the matter go back to Justice Marum to complete his decision on the Notice of Motion. The Court of Appeal intended that the Judge would express a firm conclusion as whether he was or was not striking out the petition against Justice Tompkins. When such a decision is made there will be something from which an appeal will lie, and a dissatisfied party can then proceed with an appeal before the Court of Appeal. If there is a decision and if the matter comes back to the Court of Appeal, it may be necessary at that time for members of the Bench as presently constituted to consider whether they will sit.

The matter has come on again today because when the matter was brought on by summons filed on the 5th May 1999 before Justice Marum, His Honour appears to have been unclear as to what was required of him. He delivered reasons, apparently orally first, but later recorded in writing, in which he states two conclusions:

- 1- It is not proper to allow myself the right to go back to my judgment to 12th November 1998 and continue as requested by the applicant/respondent, (that is by the Attorney General);
- 2- It is proper that the matter to be continued within the Court of Appeal and if there were any errors by this Court in its decision of 12th November 1998, then the Court of Appeal can make its findings and where possible this Court can be directed, if the Court of Appeal so wanted to how to proceed with this matter now pending before this Court or to dispose of the matter in whatever ways it decides.

Again it is not entirely clear what His Honor intended, but we construe what he has said as meaning that he is seeking a direction from the Court of Appeal as to whether he is to continue with the hearing of the original Notice of Motion to strike out the petition against Justice Tompkins or whether the Court of Appeal itself will deal with that issue.

This Court today finds itself in the same position as in April 1999. There is no clear decision, one way or the other, on the original application by the Attorney General to have the proceedings against Justice Tompkins struck out.

It is necessary that the Appeal to this Court be again adjourned, this time with a plain direction to Justice Marum that the Court requires him to complete the hearing of the Notice of Motion that was originally taken out by the Attorney

General, and to decide in plain language, "yes" or "no", whether the petition against Mr. Justice Tompkins is struck out. For this purpose, we see no reason for Justice Marum to receive further oral submissions from the parties. The matter has already been argued before him twice.

We make it clear that we are not embarking upon the hearing of any appeal today. What we are doing is sending the matter back to the trial judge for him to make a decision that is capable of being the subject of an appeal if the dissatisfied party decides to take that course.

We should record that today Mr. de Robillard has made submissions to this Court about its constitution. First he asked the Court to disqualify itself for apparent bias. When asked to give particulars of the apparent bias, he referred to the fact that on a number of occasions two members of the Court have sat in other matters concerning Mr. Francois and have given decisions which were unfavorable to him. No rational person knowing the full circumstances of the cases in question would believe a judge would be biased to sit again in the ordinary course of judicial duties on a matter that concerns a party against whom an adverse decision has previously been given. It is not for that reason that two members of this Court have indicated that they will not sit on an appeal in this matter. The reason why the judges have stated in the Minute previously issued that they would not sit is because an application had been made to join them in the proceedings the subject to the appeal.

Complaint is also made that this Court issued a "Minute" on the previous occasion, which it is said is irregular. That, with respect to counsel who made the submission, is ridiculous. Minutes of these kinds are issued by Courts throughout the world to record what happened when something short of a judgement is delivered.

It is also submitted by counsel for Mr. Francois that the Attorney General or counsel instructed by him, has no standing in this jurisdiction to appear for a judge. We reject that submission. Attornies General throughout the Westminster systems of government appear for judges. But more importantly, in any particular case, that is the matter for the Attorney General to decide, not for other parties in a case to complain about.

The matter, therefore, is sent back to Justice Marum.

BY ORDER OF THE COURT

DATED AT PORT VILA this 6th Day of October 1999

.....
J. Bruce ROBERTSON

Judge

.....
John von DOUSSA

Judge

.....
Daniel FATIAKI

Judge