

**IN THE COURT OF APPEAL OF  
THE REPUBLIC OF VANUATU**  
*(Civil Appellate Jurisdiction)*

Civil Appeal Case No. 39 of 2014

**BETWEEN: MAURICE MICHEL**  
Appellant

**AND: PRESIDENT OF THE REPUBLIC OF VANUATU**  
First Respondent

**AND: PRIME MINISTER OF THE REPUBLIC OF  
VANUATU**  
Second Respondent

**AND: REPUBLIC OF VANUATU**  
Third Respondent

**AND: WILSON KANAM**  
Fourth Respondent

**Coram:** *Hon. Justice John von Doussa  
Hon. Justice Ronald Young  
Hon. Justice Daniel Fatiaki  
Hon. Justice Oliver Saksak  
Hon. Justice Mary Sey  
Hon. Justice Stephen Harrop*

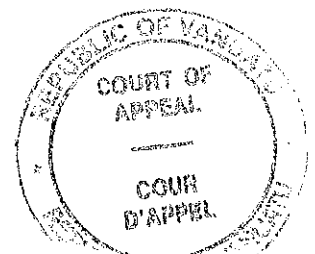
**Counsel:** *Mr. Robert Sugden for the Appellant  
Mrs. Viran Trief for the Respondents*

**Date of Hearing:** 4<sup>th</sup> May 2015

**Date of Judgment:** 8<sup>th</sup> May 2015

**JUDGMENT**

1. This is an appeal against a judgment of the Supreme Court (Aru J) upholding the appellant's removal as a member and chairman of the Public Service Commission by an instrument signed by the President on 18 July 2014.
2. The appellant challenged his removal by way of an urgent constitutional application which sought enforcement of his fundamental rights as prescribed in Article 5 (1) (d) of the Constitution. He also sought relief pursuant to Article 53 on the basis that his removal was unconstitutional, unlawful and of no effect. Specifically, the appellant complained that he was denied natural justice

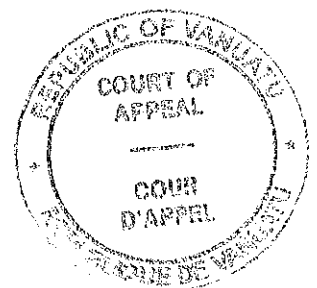


in his removal which, additionally, was in breach of Article 59 of the Constitution.

3. The respondent denied that the appellant was entitled to any relief. Specifically reference was made to the provisions of Articles 59 (3) and 59 (4) and Section 9B (2) (d) of the Public Service Act [CAP. 246] as justifying the appellant's removal.
4. In the judgment of the Supreme Court delivered on 10 September 2014, dismissing the appellant's Constitutional application, the judge first considered the appellant's application under Article 6 and summarily dealt with it on the basis that the pleadings failed to properly identify the particular right(s) in Article 5 that the appellant claimed had been infringed by his removal. He had also failed to plead the facts giving rise to the alleged infringement. The judge accepted however that the claim was properly brought under Article 53 as the appellant's chief complaint concerned his removal in breach of the Constitution.
5. After setting out the provisions of Article 59 of the Constitution and section 9 of the Public Service Act and Section 9B of the Public Service (Amendment) Act and after dealing with the evidence led in the case, the Court said:-

*"26. It was further submitted by the applicant that no reasons were given for his removal. This was conceded by the respondent that no reasons are stated on the face of the removal document. They submit that this is not a situation where the applicant has to answer a case against him as the constitution provides that where a disqualification circumstance arises, then the member of the commission shall cease to be a member.*

*27. I accept this submission. The only issue therefore which I have to determine is whether the criteria for disqualification are met (Mahe v. President of the Republic of Vanuatu [2005] VUSC 105)."*



6. The judgment next deals with and dismisses three separate disqualifying circumstances raised against the appellant's appointment and then turns its attention to evidence that the appellant had been convicted in 1992 for indecent assault for which he was sentenced to 6 months imprisonment. The judgment sets out the provisions of section 9B of the Public Service (Amendment) Act which empowers the President after consultation with the Prime Minister to remove a member of the Public Service Commission who has been convicted by a Court of a criminal offence that carries a sentence of 1 year imprisonment or more.

7. In his conclusion the judge said:-

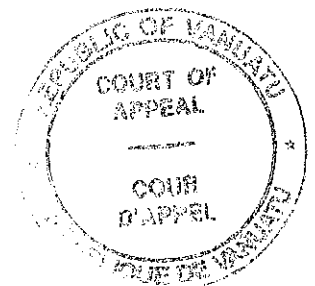
*"38. Having considered the evidence, I am satisfied that the applicant has been convicted for an offence that carries a sentence of 1 year or more. This evidence was unchallenged by the Applicant and was conceded that he was convicted and sentenced to 6 months imprisonment.*

*39. Pursuant Article 59 (4) the Applicant ceases to be a member of the Commission.*

*40. The constitutional application is dismissed and the Respondents are entitled to costs on a standard basis to be taxed failing agreement."*

8. On 16 October 2014 the appellant filed a notice and grounds of appeal which were subsequently amended in March 2015 to alleged that the trial judge erred:

- (i) In law in ruling that the appellant's claim that his fundamental right to protection of the law pursuant to Article 5 (1) (d) of the Constitution was not available to him on the pleaded facts.
- (ii) In law in failing to hold that protection of the law included the requirement for Constitutional decision makers to afford natural justice to those materially by their decision.



- (iii) In law in accepting evidence of the Claimant's 1992 conviction and/ or acting on the basis of that evidence when to do so was contrary to sections 58 ZG and 58 ZH of the Criminal Procedure Code and the Rehabilitation of Offenders Act 197 (UK).
- (iv) In law in holding that the President's decisions to dismiss the Appellant could be justified for the purposes of Article 59(4) if the Constitution (on) the basis of the aforesaid criminal conviction.
- (v) In law in failing to hold that Article 59(4) only relates to circumstances that arise **after** the appointment of the member and therefore cannot relate to a criminal conviction of many years previously.

9. Although the appellant's submissions addresses all grounds raised, we consider it convenient to address the last 3 grounds first. These deal with Article 59 of the Constitution and the provisions of section 58 ZG and 58 ZH of the Penal Code (Cap 136) which latter provisions were neither raised in the pleadings before the Supreme Court nor in the judgment appealed against.

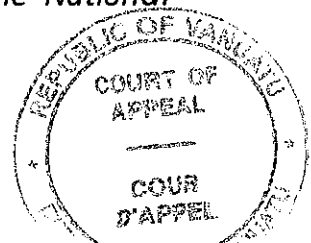
10. The power to appoint the members and Chairman of the Public Service Commission is contained in Article 59 of the Constitution which provides:-

***"59. Membership of Public Service Commission***

*(1) The Public Service Commission shall be composed of five members appointed for 3 years by the President of the Republic after consultation with the Prime Minister.*

*(2) The President of the Republic shall appoint every year, from among the members of the Commission, a chairman who shall be responsible for organising its proceedings.*

*(3) A person shall be disqualified for appointment as a member of the Commission if he is a member of Parliament, the National*



*Council of Chiefs or a Local Government Council or if he exercises a position of responsibility within a political party.*

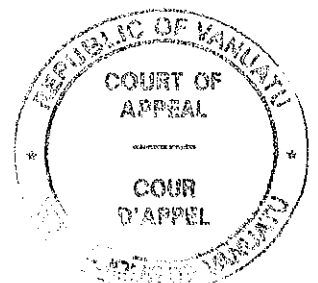
*(4) A person shall cease to be a member of the Commission if circumstances arise that, if he were not a member, would disqualify him for appointment as such."*

11. Of some importance to the outcome of this appeal is the meaning and effect of Article 59 (4). The appellant submits that the disqualifying circumstances envisaged by the paragraph must occur or arise during the term of a member of the Public Service Commission after his/her appointment by the President and his counsel forcefully submits that the appellant's conviction in 1992 was manifestly not a relevant disqualifying circumstance that arose after the appellant's appointment. The respondent on the other hand, submits that such a construction would impose an unnecessary qualification on the spirit and intention of Article 59.

12. We do not consider the appellant's construction to be supported by the plain and ordinary words of Article 59 (4). At the outset we note that there is no express power given to the President in Article 59 to remove a sitting member or Chairman of the Commission. In our view the combined use of the word "cease" and the phrase "... if he were not a member, ...", plainly refers to a person who has been appointed and is already a member of the Public Service Commission. We further note that Article 59 (3) identifies four relevant circumstances that disqualify a person from appointment as a member of the Public Service Commission. Additionally, section 9 of the Public Service Act (Cap 246) introduces several qualifying factors affecting the appointment or continuation in office of a member of the Public Service Commission namely, the member or person has:-

*"(a) ...(not relevant) ... and*

*(b) Public confidence and standing in the community and is of good character."*



13. The word "arise" is an elastic term that encompasses the situation where a disqualifying circumstance only comes to light or becomes known after a member's appointment. In such an event, having regard to the purpose of Article 59 (4) to ensure that the Public Service Commission is composed of persons of the highest integrity and standing, we reject the appellant's submission that limits the disqualifying circumstance to events or behaviour that occur only after appointment.

14. This case however is not concerned with the appointment of a member, rather, it concerns the removal of a member and Chairman of the Public Service Commission. In this regard, the relevant provision is section 9B(2) of the Public Service (Amendment) Act which provides:

*"The President after consulting with the Minister may remove a member if he or she is satisfied that the member:*

*(a) .....(not relevant)...; or*

*(b) .....(not relevant)...; or*

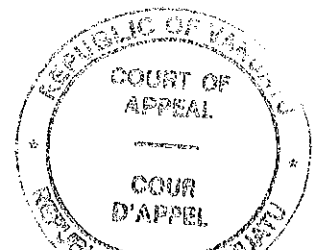
*(c) .....(not relevant)...; or*

*(d) **Has been convicted by a Court for a criminal offence that carries a sentence of 1 year or more;***

*(e) .....(not relevant)....*

15. In the present case the judge concluded and it is common ground that the appellant's removal was based on paragraph (d). It is also common ground that the appellant's conviction for indecent assault occurred in 1992 and he was sentenced to and served 6 months imprisonment. The offence of indecent assault contrary to section 98 of the Penal Code (Cap 135) is a criminal offence punishable by imprisonment for 7 years. It is plainly a conviction within the four corners of paragraph (d) and although 22 years old, absent a successful appeal against conviction, or, a Presidential pardon, or, some other similar exemption, the appellant's conviction provides a proper ground for his removal by the President.

16. We say "absent" because the appellant submits that pursuant to the provisions of section 58 ZG and 58 ZH of the Penal Code (Amendment) Act 25 of 2006 the



appellant who was convicted of a criminal offence and sentenced to 6 months imprisonment in 1992 must be considered a rehabilitated person after the lapse of 5 years from the date of expiry of his sentence.

17. The wording of the relevant predecessor provision, namely sections 57 and 58 of the Penal Code in 1997/1998 was:-

*“(1) Rehabilitation by lapse of time shall expunge a conviction for any criminal offence.”*

18. This wording was changed slightly in 2006 when the Penal Code was amended by the Penal Code (Amendment) Act and section 57 was replaced by section 58 ZG which reads:-

*“(1) Rehabilitation by lapse of time omits a conviction for any criminal offence.”*

19. Although the more familiar expression “*shall expunge*” was replaced by the uncommon word “*omits*” in the Penal Code (Amendment) Act we do not consider that alters the meaning and purpose of the section which is undoubtedly directed at old convictions where a convicted person has remained out of trouble for a specified number of years. Plainly it is meant to give a convicted person a second chance by wiping his slate clean so to speak, and provides a real incentive and reward for a convicted person to reform himself. Such a person in the words of section 58ZH “... *shall be as of right rehabilitated ...*” by lapse of time.

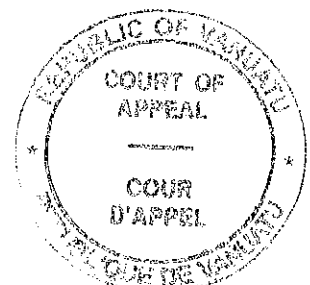
20. In both provisions section 57 and section 58ZH it is the conviction for the criminal offence that is expunged or omitted. Moreover rehabilitation is attained or achieved by “*lapse of time*” provided the offender is not convicted again within the relevant period enumerated in section 58ZH.

21. In the absence of any limitation, qualification, exception, or exclusion of the provisions of section 57 or section 58ZH we are satisfied that the provisions apply “*as of right*” for all purposes. This means in the present context, that at the date of his removal as a member of the Public Service Commission including



his chairmanship, the appellant had a vested right to be considered a rehabilitated person whose conviction had been expunged by the lapse of time. It could not therefore be a ground for his removal.

22. In light of the foregoing we consider no valid ground existed for the removal of the appellant on 17 July 2014. The appeal is accordingly allowed.
23. That is sufficient to dispose of this appeal but in deference to the submissions made on grounds (i) and (ii) we set out our view briefly.
24. The undisputed facts in support of these grounds of appeal are that the appellant was removed from office without being given an opportunity to be heard and no reasons were given for his removal. Although no specific aspect of Article 5(1) of the Constitution was specified in the original application, grounds (5) (6) and (7) refer to deprivation of the "*protection of the law*" and of "*natural justice*" in his removal.
25. Article 5(1)(d) of the Constitution recognizes that all persons to which the Article applies are entitled as a fundamental right to the "*protection of the law*". The appellant was entitled to that right which refers to a system of law which incorporates the fundamental rules of natural justice that part and parcel of the common law: Attorney General v. Timakata [1993] VUCA 2; Boulekone v. Timakata [1986] VUSC 13.
26. However, to accept as we do, that the appellant was entitled to natural justice, or in today's description of the principle, to procedural fairness does not answer the question whether he was entitled to be heard by the President before he was removed from office as chairman and member of the Public Service Commission. The content of natural justice or procedural fairness will depend on all the circumstances of the particular case and will include the nature of the inquiry, the rules or statute under which the decision maker is acting, and the subject matter; Kioa v. West (1985) 159 CLR 550 at 584 – 5; Durayappah v. Fernando (9167) 2 AC 330 at 349.

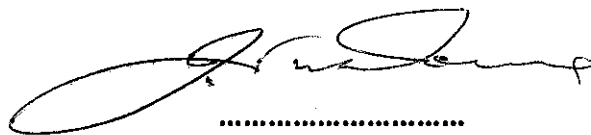




27. In this case the removal of the appellant from office was in consequence of the constitutional requirement in Article 59(4) that a person shall cease to be a member of the Commission if disqualifying circumstances arise. The cessation of membership is automatic, no intervening exercise of discretionary decision-making on the part of the President is required. The fact of the conviction brought about disqualification from office, not a decision by the President. The President was merely completing the formality of the appellant's removal. In these circumstances we do not consider the President was required to give the appellant a hearing before he was removed from office. Assuming that the appellant's conviction had not been expunged and remained a disqualification from office, there was simply nothing that the appellant could have said to alter the situation.
28. On the eve of the date given for delivery of this judgment the parties signed a Consent Memorandum agreeing to a compensation figure of VT2, 240, 150. We adopt that agreed figure and award the appellant judgment in the sum of VT2, 240, 150.
29. The appellant is entitled to his costs in the Supreme Court to date, and in this Court, on the standard scale which we summarily fix at VT270, 000.

**DATED at Port Vila this 8<sup>th</sup> day of May 2015.**

**FOR THE COURT**



.....  
**Hon. John von Doussa**  
**Justice of the Court of Appeal**

