

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

Constitutional Case No. 4 of 2014

BETWEEN: MAURICE MICHEL
Applicant

AND: THE REPUBLIC OF VANUATU
First Respondent

AND: JOHNSON IOLU ABBIL
Second Respondent

AND: JOE NATUMAN
Third Respondent

AND: MR KANAM WILSON
Fourth Respondent

Coram: Judge Aru

Counsel: Mr. R. T. Kapapa for the Applicant
Mr. V. Trief for the Respondents

JUDGMENT

Background

1. The Applicant was appointed a member and chairman of the Public Service Commission ("the Commission") on 17 April 2014 by the President of the Republic of Vanuatu ("the President"). On 18 July 2014 he was removed by the President as a member and chairman of the Commission by instrument of removal order No 133 of 2014.
2. Following the removal, the President also on the 18 July 2014 appointed the Fourth Respondent as member and chairman of the Commission by instrument of appointment order No 134 of 2014.
3. Following his removal, the Applicant commenced these proceedings initially by filing an urgent ex parte application as well as the constitutional application on 24 July 2014. The ex parte application sought orders to stay orders 133 and 134 pending determination of the constitutional application. Having



heard the parties, the urgent ex parte application was dismissed on 31 July 2014 and the Applicant was allowed time to file an amended constitutional application which was filed on 29 July 2014. Three sworn statements deposed by the Applicant were also filed in support.

4. The Respondents filed a response on 22 August 2014. Three sworn statements were also filed in support deposed by Bakoa Kaltonga and Charity Bona Titiulu.

Relief sought

5. The relief sought by the Applicant can be summarized as follows:-
 - i). Enforcement of fundamental rights prescribed by Article 5 1) d) and Article 6 of the Constitution;
 - ii). Relief pursuant to Article 53 1) and 2) of the Constitution;
 - iii). A declaration that the decision of the Respondents dated 18 July 2014 removing the Applicant as chairman of the Commission is unconstitutional, unlawful and of no effect;
 - iv). A declaration that the decision of the Respondents dated 18 July 2014 in removing the Applicant as a member of the Commission is unconstitutional, unlawful and of no effect;
 - v). A declaration that the appointment of the Fourth Respondent as member and chairman of the Commission is unconstitutional, unlawful and of no effect.
 - vi). A declaration that the Applicant is the lawful member and chairman of the Commission pursuant to Article 59 (3) and (4) of the Constitution;
 - vii). Damages
 - viii). Costs

Grounds

6. Apart from legal arguments raised in the statement of the case, the main ground gleaned from paragraphs 10 to 12 of the constitutional application is that the Applicant was appointed chairman of the Commission by the President on 17 April 2014 for a period of one year.
7. He was appointed a member of the Commission in 2013 and has only served his one year term and the Respondents removed him by the removal order on 18 July 2014.

Type of Proceedings

8. As a preliminary matter, the Applicant submits that the basis of his Constitutional Application is firstly under Article 6 to enforce fundamental rights prescribed by Article 5 1) d) and secondly under Article



53 1) and 2) which is to enforce a provision of the Constitution which has been infringed in relation to him. It is a fundamental principle of law, that a person against whom allegations are made should know what the allegations are with precision so that they can decide how to respond to them. (**Roqara v Takau** [2001] VUCA 15).

9. As an Article 6 Application, the pleadings do not properly identify rights that have been, are being or are likely to be infringed and the facts giving rise to those infringements.(Article 6 1) and Rule 2.3 1) (a) to (f) of the Constitutional Procedure Rules).
10. The pleadings as they are make it apparent that the Applicant's chief complaint is about his removal pursuant to Article 59 1) and 2) of the Constitution .Therefore these proceedings can only be properly brought under Article 53 1) and 2).

Laws

11. Article 53 1) and 2) provide:-

"53. Application to Supreme Court regarding infringements of Constitution

- (1) Anyone who considers that a provision of the Constitution has been infringed in relation to him may, without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress.
- (2) The Supreme Court has jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution.

....."

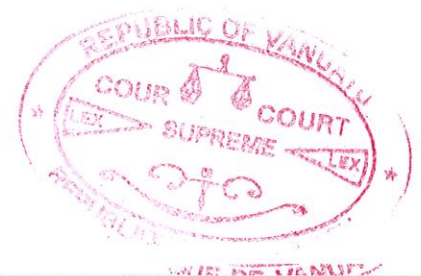
12. The Applicant asserts that he was validly appointed by the President as a member and chairman of the Commission pursuant to Article 59 1) and 2) on 17 April 2014. As a member, that appointment is for three years and as the chairman that appointment is for one year as from the date of appointment and he has yet to complete his term as member and chairman. Article 59 1) and 2) provide:-

"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.

....."

13. Once appointed unless the person dies or resigns he can only be removed pursuant to criteria specified under the Constitution and the Public Service Act [CAP 246] as amended. Firstly Article 59 3) and 4) provide:-



"....

- (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."

14. Secondly, section 9 of the Public Service Act provides:-

"9. Qualifications of members of the Commission

No person will be appointed or continue to hold office as a member of the Commission under Article 59 of the Constitution unless that person has: -

- (a) wide and detailed knowledge or experience in public employment issues, management and policy; and
- (b) public confidence and standing in the community and is of good character."

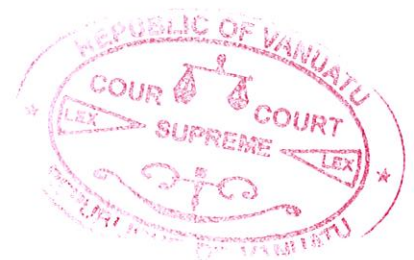
15. Furthermore, s 9 B of the Public Service (Amendment) Act No 1 of 2011 provides:-

"9B Resignation and removal of members

- (1) A member may resign from the Commission by giving 14 days notice in writing to the President.
- (2) The President after consultation with the Minister may remove a member if he or she is satisfied that the member:
 - (a) has been absent from 3 consecutive meetings of the Commission without valid reason and without the consent of the Chairman; or
 - (b) becomes bankrupt; or
 - (c) is incapacitated by physical or mental illness; or
 - (d) has been convicted by a Court for a criminal offence that carries a sentence of 1 year or more; or
 - (e) has performed unsatisfactorily or ineffectively for a significant period of time."

Evidence

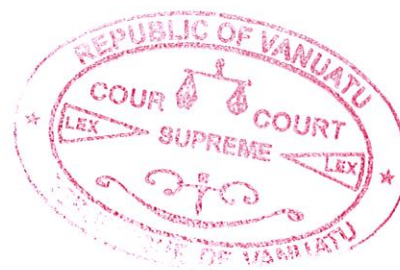
16. In summary, the evidence deposed by the Applicant in his sworn statements is that he was reappointed for a second term on 17 April 2014 as member and chairman of the Commission by the President. Sometimes in June 2014 he was summoned to attend a meeting at the Prime Minister's office where he was queried by the Minister of lands as to why a certain public servant within the lands department was not removed from office. That the Minister of lands pressured a Commission staff member not to execute the Commission decision and then pressured the then Prime Minister Moana Carcasses to force the Commission to review its decision and dismiss the public servant concerned.



17. That during the retreat of members of the Commission he received his removal notice. He says that to date, he was not aware or told the reasons for his removal and was surprise to read it in the papers before being served with a copy of the removal order. That his removal has caused him to lose all his benefits and entitlements.
18. That following his removal, he has now returned the office keys and denies any knowledge of damage to the Commission vehicle. Furthermore he deposes that he has not held nor exercised any position of responsibility with the Green Confederation party. The Applicant was cross examined on his evidence.
19. Bakoa Kaltonga for the Respondents deposes that he is the private secretary to the Prime Minister and has held this position since July 2014. He confirms that sometimes in July 2014, Prime Minister Joe Natuman consulted the President about the membership and chairmanship of the Commission which resulted in the President signing orders 133 and 134 of 2014.
20. That in July 2014 he communicated the Prime Minister's views to the President that there were circumstances which disqualified the Applicant from appointment as a member and chairman of the Commission. That firstly the Applicant was a close political associate of the President of the Green Confederation political party and served under him as first political advisor in the Ministry of Finance and Ministry of Internal Affairs from 2012 to 2013. Secondly that the Applicant was convicted of a criminal offence involving incest with a minor and thirdly that due to his conviction, he did not have public confidence and standing in the community and was not of good character.
21. Lastly that the position of chairman of the Commission was politicized due to the Applicant's close association with the Green Confederation party when six months after serving as first political advisor he was appointed chairman of the Commission. Mr. Kaltonga was cross examined on his evidence.
22. Charity Bona Titiulu's evidence in summary is that she is the Acting Secretary of the Commission and on 11 August 2014 a letter demanding the return of office keys and a laptop was sent to the Applicant. She details some costs incurred by the Commission as a result of the Applicant's actions. These being replacing a laptop lost by the Applicant , repairs to the Commission vehicle RV 19 and stating that any award of damages must be set of against the losses incurred by the Commission. Mrs.Titiulu was also cross examined on her evidence.

Discussions

23. The Applicant's case is that a "provision of the Constitution has been infringed in relation to him" and seeks redress pursuant to Article 53.



24. As earlier stated, the Applicant is restricted to what he pleads in his statement of the case and cannot now raise new matters in his evidence and submissions. He gave evidence of interference with the Commission by the Minister of lands but that has never been pleaded in his statement of the case as a fact.
25. In the same manner, the Applicant seeks to rely on Article 60 (4) and similar provisions in the Public Service Act (s 8, s 37, s 38 and s 46) and the Government Act [CAP 243] but these provisions relate to the independence of the Commission not an individual member.
26. It was further submitted by the Applicant that no reasons were given for his removal. This was conceded by the Respondents 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 a 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).

Disqualifying circumstances

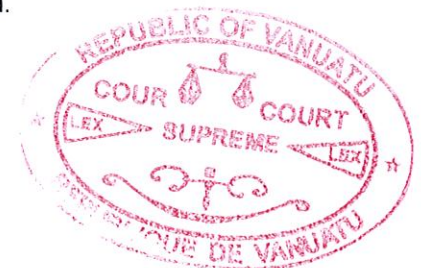
28. The first disqualifying circumstance is a person is disqualified from being a member of the Commission if he is a member of Parliament, the National Council of Chiefs or a Local Government Council or if he exercises a position of responsibility within a political party. (Article 59 (3)).
29. The second is if the person does not have a wide and detailed knowledge or experience in public employment issues, management and policy and public confidence and standing in the community and is not of good character. (s 9 Public Service Act).
30. Thirdly if the member has been absent from three consecutive meetings of the Commission without valid reason and without the consent of the Chairman or becomes bankrupt or is incapacitated by physical or mental illness or has been convicted by a court for a criminal offence that carries a sentence of 1 year or more or has performed unsatisfactorily for a significant period of time. (s 9B Public Service (Amendment) Act).
31. Article 59 4) provides :-

"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."

(emphasis mine)



32. The gist of the Applicant's submissions is that the disqualification criteria was not met to warrant his removal. The Respondents on the other hand submit that the evidence shows that the Applicant was convicted of an offence against morality which offence is punishable on conviction to a term of imprisonment for 7 years. Furthermore, that the Applicant was a close associate of the President of the Green Confederation party and had held political advisor positions prior to being appointed a member and chairman of the Commission which was effected by the President of Green Confederation party.
33. Having heard the evidence, I am not satisfied the evidence led by the Respondents establishes that the Applicant exercises a position of responsibility within a political party. Being a first political advisor in a ministry is not the same as exercising a position of responsibility within a political party. The former is a position created under Part 4 the Government Act [CAP 243] to serve the Government.
34. Similarly, I am not satisfied that evidence establishes that the Applicant does not have standing in the community.
35. Lastly, the Respondents rely on the evidence of Bakoa Kaltonga that the Applicant was convicted for an offence that carries a sentence of 1 year or more. In his further sworn statement he deposes that from the records of the Vanuatu Police, the Applicant was convicted in 1992 of indecent assault. Annexed to his sworn statement as Annexure "BK2" is certification from the Vanuatu Police Force Criminal Records Office that the Applicant was charged and convicted for the offence of Indecent Assault and was sentenced on 5 February 1992 to 6 months imprisonment.
36. Section 98 of the Penal Code [CAP 135] as it was then provides:-
- "98. **Indecent assault**
- (1) No person shall commit any act of indecency with any other person under the age of 13 years.
Penalty: Imprisonment for 10 years.
- (2) No person shall indecently and forcibly assault any other person not under the age of 13 years.
Penalty: Imprisonment for 7 years."
37. Section 9B 1) d) of the Public Service (Amendment) Act makes it quite clear that the President after consultation with the Minister (Prime Minister, as Minister responsible) may remove a member if he is satisfied that the member "*has been convicted by a court for a criminal offence that carries a sentence of 1 year or more*". The offence of Indecent Assault carries a maximum sentence of 10 years imprisonment if the act of indecency is committed with a person under 13 years and 7 years imprisonment if a person over 13 years is indecently and forcibly assaulted.



Conclusion

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.

DATED at Port Vila, at 19 day of September, 2014

BY THE COURT

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D. ARU
Judge

