

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

Judicial Case No.2460 of 2016

**IN THE MATTER OF THE POLICE SERVICE COMMISSION AND THE
POLICE ACT CAP 105**

BETWEEN: API JACK MARIKEMBO
Applicant

AND: PRESIDENT OF THE REPUBLIC OF VANUATU
First Respondent

AND: THE REPUBLIC OF VANUATU
Second Respondent

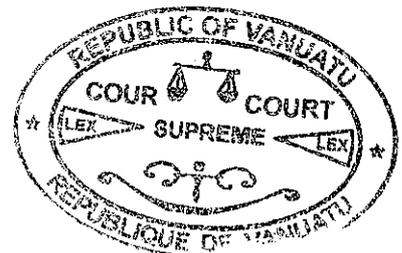
AND: MINISTER OF INTERNAL AFFAIRS
Third Respondent

Hearing: *Tuesday October 11th 2016 at 9 am*
Judgment: *Wednesday October 12th 2016*
Before: *Justice JP Geoghegan*
Appearances: *Mr Kapapa for the Applicant*
Ms Bani (SLO) for the Respondents
Mr Napuati for Mr Nalpini (Applicant to be joined to proceedings)

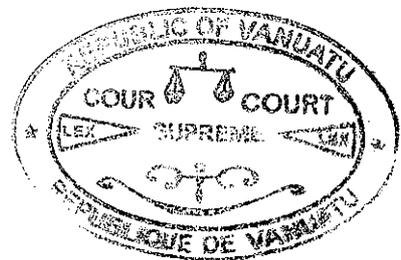
RESERVE JUDGMENT

1. This judgment is to determine two issues namely:-
 - 1) Should Mr Albert Nalpini be joined to the proceedings as a claimant; and
 - 2) Should an order be made preventing the appointment of a Police Commissioner until the substantive proceedings have been determined.

2. To appreciate the context of Mr Nalpini's application there needs to be some reference to the background of this matter.



3. The proceedings to which Mr Nalpini seeks to be joined consist of a judicial review claim by Mr Marikembo arising from his removal on July 12th 2016 as the Chairman of the Police Services Commission.
4. The reason for the removal was that in 2002, Mr Marikembo, along with others was convicted of mutiny, incitement to mutiny, kidnapping and false imprisonment in respect of which he was sentenced to a term of two years imprisonment suspended for a period of two years. The State alleges that Mr Marikembo was interviewed for the position by the Minister of Internal Affairs and that during the course of that interview he advised the Minister that he had ben pardoned in respect of that offending when in fact he had not.
5. The State says that Mr Marikembo's criminal conviction disqualified him from being eligible for the position as Chairman of the Police Service's Commission and accordingly his removal was proper and lawful.
6. Mr Marikembo in turn asserts that his criminal conviction was effectively removed for all relevant purposes by virtue of section 50 8 Z G of the Penal Code that provides that:-
"(1) Rehabilitation by lapse of time omits a conviction for any criminal offence".
7. There is no dispute that just prior to Mr Marikembo's removal, the Police Service Commission, which had been considering applicants for the position of Police Commissioner, had met and determined that Mr Albert Nalpini was the strongest candidate for the position. That decision was made on June 29th 2016.
8. In July the Minister met with Mr Marikembo and informed him that he would be removed from his position as a member and Chairman of the Police Service's Commission and it was resolved that a newly constituted Police Service Commission would have to reconsider the matter of the appointment of a new Police Commissioner. A new chairman has been appointed and I am informed by counsel that applications for the position of Police Commissioner have closed. Presumably they will now be considered in the usual fashion.



9. Mr Marikembo seeks a number of declarations and/or orders from the Court as follows

- 1) A declaration that the decision of the respondents on July 12th 2016 removing Mr Marikembo as a member and chairman of the Police Service Commission was unlawful, null and void and of no effect.
- 2) An order/declaration that Mr Marikembo is a lawful member and Chairman of the Police Service Commission.
- 3) An order/declaration that the Minute of June 29th 2016 (recommending Mr Nalpini as Police Commissioner) was a lawful decision of the Police Service Commission.
- 4) An order/declaration that any purported appointment of a Chairman or member of the Police Service Commission in replacement of Mr Marikembo is unlawful, void and of no effect.

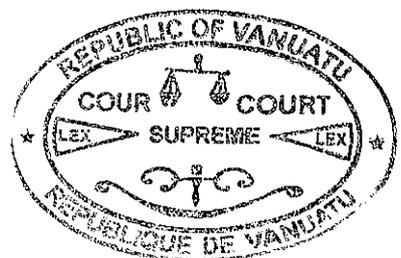
10. Mr Nalpini filed an urgent application to be made a party to the proceeding on September 9th, 2016. That application is made pursuant to rule 3.2 of the Civil Procedure Rules which provides that:-

"(1) The Court may order that a person becomes a party to a proceeding if the person's presence as a party is necessary to enable the Court to make a decision fairly and effectively in the proceedings".

"(4) A person affected by a proceeding may apply to the Court for an order that the person be made a party to the proceeding".

11. Mr Nalpini's application is expressed to be on the grounds that his presence is necessary so that the Court may make a fair and effective decision and also that he has an interest in the proceeding.

12. While the cases of Mr Marikembo and Mr Nalpini arise from the same set of facts they are not similar cases. Mr Marikembo seeks to challenge his removal as Chairman of the Commission and central to that is the issue of his conviction for a criminal offence and the impact of that upon his appointment.



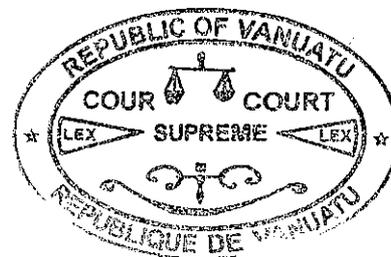
13. Mr Nalpini on the other hand, effectively seeks to review a non-decision by the President who has not executed an instrument of appointment appointing Mr Nalpini as the Police Commissioner. In that regard, Mr Nalpini relies upon the definition of "decisions" as set out in rule 17.2 of the Civil Procedure Rules which defines a decision as:-

"An action or a failure to act in relation to the exercise of a public or a non-public function."

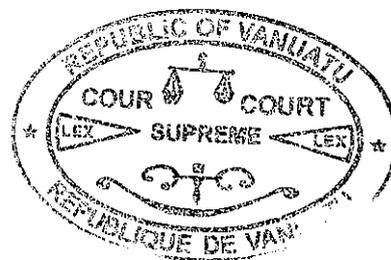
14. In considering the claim of Mr Marikembo it could not be said that the involvement of Mr Nalpini is required to determine that claim fairly and effectively. The reality is that there is no evidence which Mr Nalpini could give which would have an impact on the outcome of Mr Marikembo's case. While Mr Nalpini has an understandable interest in the outcome of the case his presence as a party is not required to determine it.

15. Whether or not Mr Nalpini is affected by the proceeding depends, of course upon the outcome. If Marikembo is unsuccessful Mr Nalpini will not have a case of any kind. If Mr Marikembo is successful then arguably Mr Nalpini may have a case although that in itself is unclear at this time as Mr Nalpini would then be arguing that the reviewable decision is the failure by the President to take action in respect of Mr Nalpini's appointment as Police Commissioner. The obvious counter argument would be that the President was merely overtaken by events surrounding Mr Marikembo's removal and that in the circumstances he was not in a position to make any decision in respect of appointment of the Police Commissioner.

16. While there would normally be clear advantages in having both cases dealt with at the same time given that they arise from the same factual background and therefore could be joined pursuant to rule 3.3, no judicial review claim has yet been filed by Mr Nalpini. In addition, it is clear to me that in his case evidence will need to be given by the President relating to his alleged non-action in not signing an instrument of appointment. That is significant in this case as Mr Marikembo's application for judicial review has been set down for a substantive hearing on October 19th.



17. Taking into account those matters I am not prepared to make an order joining Mr Nalpini as a party to the proceedings. His cause of action has not been defined by pleadings, it appears very likely that the evidence required in Mr Nalpini's case will be different from that required in Mr Marikembo's case and there is insufficient time for the evidence necessary in Mr Nalpini's case to be filed prior to October 19th.
18. Accordingly Mr Nalpini's application to be made a party to the proceedings is declined. I can indicate however that if all of the evidence necessary in Mr Nalpini's case had been before the Court I would have been prepared to make an order consolidating the proceedings issued by Mr Marikembo and Mr Nalpini.
19. I turn then to consider whether or not an order should be made preventing the Police Services Commission from appointing a Police Commissioner in the interim.
20. In this regard Ms Bani submits on behalf of the State that sections 1 and 10 (3) of the State Proceeding Act prohibit the granting of a mandatory injunction against the State.
21. Section 10 (3) simply provides that :-
"A mandatory injunction is not to be granted against the State".
22. Section 1 provides the definition of a mandatory injunction as follows:-
"Mandatory injunction includes an order of a Court to do any act but does not include:-
a) *An order in the nature of mandamus; and*
b) *An order to do any act involving registration, de-registration, rectification or other alteration to any register".*
23. Essentially, a mandatory injunction is a positive order to do some act rather than a negative order to refrain from doing it. It will be immediately apparent therefore that an order restricting the Police Service Commission from appointing a Police Commissioner is an order requiring the Commission to refrain from taking an action rather than a direction that it undertake an action. For that reason I am of the view that



those sections of the State Proceedings Act do not apply to the relief being sought by Mr Nalpini.

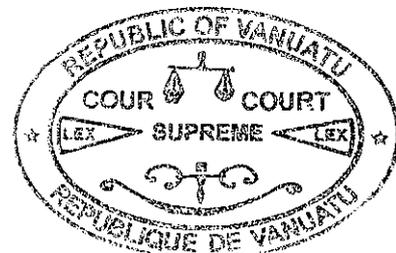
24. While Mr Nalpini could be said to have an arguable case, there must also be significant doubts regarding the court granting an order requiring the President to sign an instrument of appointment appointing Mr Nalpini as the Police Commissioner. In any event, I do not consider that the balance of convenience favours the granting of an order of the kind sought by Mr Nalpini. The principal reasons for this are as follows:-

- a) It would appear that Mr Nalpini has known since July 12th of the fact that the position would be re-advertised but did not file an application until September 9th. Even then, the application filed was intitled as an urgent application to be made a party to the proceeding rather than an urgent application for an order staying the appointment of another Police Commissioner. That delay must count against Mr Nalpini.
- b) Mr Nalpini has not been prevented from filing a further application to be reconsidered by the newly appointed Police Service's Commission. There is no evidence as to whether he has filed such an application, however that is not the point. He has had the opportunity to do so.
- c) There will be an inevitable delay in dealing with Mr Nalpini's application. In this regard it needs to be noted that although he has filed an urgent application to be made a party to the proceedings, no formal judicial review claim has been filed. The prospective delay weighs against the granting of an order preventing the appointment of a new Police Commissioner.

25. For these reasons I decline to make an order preventing the Police Services Commission from appointing a new Police Commissioner.

26. Given the result of these proceedings the State are entitled to costs and costs are to be agreed within 21 days failing which they are to be taxed.

Dated at Port Vila, this 12th day of October, 2016



BY THE COURT

