

BETWEEN : MAURICE MICHEL

Appellant

AND : THE PUBLIC SERVICE
COMMISSION

First Respondent

AND : THE MINISTER OF FINANCE

Second Respondent

AND : THE COMMISSIONER OF POLICE

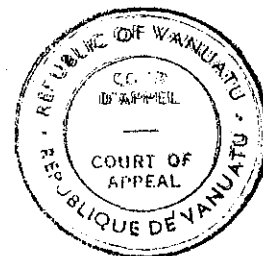
Third Respondent

Coram : Acting Chief Justice Vincent Lunabek
Justice Bruce Robertson
Justice John von Doussa
Justice Reggett Marum

Counsel : Mr Robert Sugden for the Appellant
Mr Jack Kilu for the Respondents

JUDGMENT

This is an appeal from a decision of the Supreme Court delivered on 30 April 1998 in Civil Case 137 of 1997. The Appellant appeals against that part of the judgment where the learned Judge-



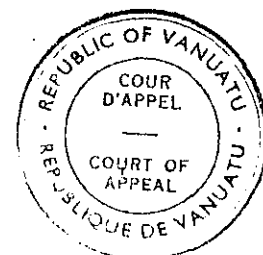
- (a) refused to make declarations and orders sought by the Appellant in his Originating Summons
- (b) made orders and declarations not sought by any parties to the action.

There is a cross appeal by the various Respondents in which they appeal against those parts of the judgment whereby it was held:-

- (1) That the Public Service Commission had no power to dismiss or terminate the Auditor General
- (2) That the Respondents pay the Appellant's costs of these proceedings.

The proceedings in the Supreme Court were commenced by Originating Summons filed on the 14th July 1997 and sought declarations as follows:

1. A Declaration that the decision of the First Respondent made on or about the 30th May, 1997 that its appointment in 1995, of the Appellant to the position of Auditor-General was illegal and void, is ultra vires and of no effect.
2. In the alternative, an Order of Certiorari, requiring the First Respondent's decision of about the 30th May 1997 that its appointment, in 1995, of the Appellant to the position of Auditor-General was illegal and void, be brought up and quashed on the grounds:-
 - (i) That its decision was ultra vires
 - (ii) That in reaching that decision the first Respondent denied the Appellant Natural Justice.
3. An Order of Mandamus requiring the Second Respondent to pay to the Appellant his salary and all other entitlements for the 15th July, 1997 and thereafter according to law.
4. An Order that the Third Respondent restore to the Respondent the keys to his office and the motor vehicle supplied to him for his use as Auditor-General and take no further steps to prevent him from carrying out his duties as Auditor-General.
5. An Order that the Second Respondent pay interest on any salary installment not paid at the time at which they should have been paid,



from the date upon which they should have been paid until payment at the rate of 12% per annum.

6. An Order that the respondents pay the Appellant's cost to be taxed or agreed.

The matter was originally listed for hearing in March. At the request of the Respondents it was adjourned and set down for the 24th April 1998. Immediately prior to that hearing there was filed in the Court an Affidavit sworn by Joseph Calo the Chairman of the Vanuatu Public Service Commission on the 20th April 1998. Mr Calo indicated that he had not been personally involved in any of the matters in the case but he was fully acquainted with all circumstances.

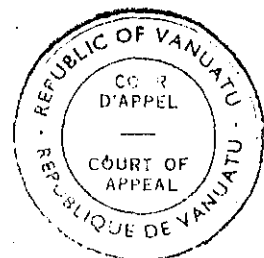
He raised a number of matters with regard to the circumstances of the appointment of Mr Michel to the Office of the Auditor-General and provided a catalogue of extraordinary acts and omissions with regard to various proceedings. The thrust of his evidence was that Mr Michel had never lawfully been appointed to the Office of the Auditor-General.

The evidence in support of the Originating Summons was an affidavit of the Appellant sworn on the 12th June 1997. He contended that by letter of 10th May 1995 he was appointed Auditor-General of Vanuatu, that he carried out his duties and been paid a salary on a continuing basis.

He then referred to a letter of 30 May 1997 which was in the following terms:-

"Re : YOUR DISMISSAL AS THE AUDITOR GENERAL

1. *The Public Service Commission met on 6th May 1997, to consider your case which had also been the subject of investigations by the Ombudsman's Office.*
2. *Following the Ombudsman's report and findings, the Commission has taken time to deliberate over your case.*
3. *After careful considerations and deliberations, the Commission has found that your purported appointment as the Auditor General had been*



illegal from the start in breach of the Constitution, procedures and the laws of this country.

4. *The Commission hereby advises you that as from the date of this letter, your will cease to hold the post of Auditor General. You are no longer deemed to be employed by the Government as the Auditor General and all benefits and entitlements accorded to you in that capacity cease accordingly.*
5. *You are required to return all Government properties and assets to the Government.*
6. *As your purported appointment was illegal from the beginning you are not entitled to claim any entitlements.*
7. *The Commission takes this opportunity to thank you for your services and your contributions to the development of this country. The Commission regrets any inconveniences caused and wishes you all the best in your future career.*

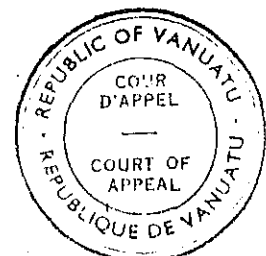
Yours faithfully,

*Mr Joseph Calo
Chairman
Public Service Commission"*

Mr Michel's contention was that first those who have the lawful power to terminate the appointment of the Auditor General had not done so and in any event the Public Service Commission had acted in breach of the principles of natural justice.

Counsel for the Appellant before the Supreme Court vigorously objected to the admissibility of the evidence from Mr Calo on the basis that it was irrelevant to the questions which were proposed on the Originating Summons.

The Judge held the affidavit was to be read in evidence to show "which was and is the appropriate authority to appoint and/or dismiss the Plaintiff from the position of Auditor General".



As a result of that ruling the learned Judge was of the view that there were three issues to be determined on the evidence presented and the submissions made to him. First, whether or not the Appellant was appointed; Secondly, whether the First Respondent was the appropriate authority to dismiss the Appellant and Thirdly, whether or not the First Respondent provided natural justice to the Appellant.

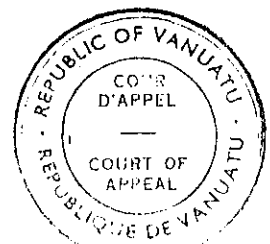
Hindsight often provides enormous benefits, but we are satisfied with the advantage of it that once the Judge determined to permit substantial parts of the affidavit of Mr Calo to be accepted in evidence, he should then have exercised the powers under Order 58 r.5 and required that the total issues be dealt with by way of pleadings and evidence. As it was the Appellant had no opportunity to present his side of the story. Whether it would have made any difference is an open question but clearly on the basis of the Originating Summons there were only two issues and the lawfulness of his appointment was not properly placed in issue.

Whatever might be said about the documentation that was attached to Mr Calo's affidavit, there were additional issues which could not be ignored. Mr Michel had in fact been operating as the Auditor General and receiving remuneration accordingly for a period of some two years. In our judgment the Court could not simply receive evidential material about an issue which was not raised on the Originating Summons and then determine the proceedings on the basis thereof.

The Judge having identified the three issues which he determined needed consideration. His Honour proceeded at some length to decide the first point.

The Judge undertook in great detail an exhaustive investigation of the material which was before him about the appointment. He reached the view that the appointment had not been validly made and held that such an enquiry was a necessary first step. He held that the Appellant had not sufficiently objected to this course of action and had not sought an adjournment to call other evidence. Therefore he held the Court was entitled to determine itself that it would deal with this issue which it considered to be fundamental.

With the greatest of respect to the learned Judge (and fully recognizing the pragmatism which permeated this approach) we are of the view that this



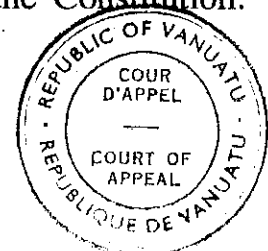
conclusion is unsustainable. There was an Order 58 application. There was no formal cross claim. Therefore the only issue which the Court was invited to consider were the two questions which were proposed by the Appellant. It is fundamental in any civil proceeding that the parties themselves, by their pleadings (or in a case of an Originating Summons, the identification of questions which require interpretation,) determine those matters upon which the adjudication is to occur.

As is previously noted the Court always had the power, (if it was of the view that there were other issues which ought to be determined such as those the Respondents were asking the Court to consider) to have directed that the matter be dealt with by an alternative process. The Court, however, was seized only of the question under Order 58. It did not, as a result of that process, have the authority right or responsibility to endeavor to answer other questions no matter what the Court's view may have been as to their relevance or effect.

The learned Judge next turned to consider the issue which had been proposed the Originating Summons namely whether the dismissal was lawful. The Judge accepted and we confirm that section 2(2) of the Audit of Public Accounts Act contains clear and unambiguous provisions. Only Parliament may remove the Auditor General for cause by resolution. There is no evidence of that having occurred. The Court also accepts the submission that Article 57(7) does not apply to the Office of the Auditor General and further that section 21 of the Interpretation Act does not apply to the Auditor General.

There is specific legislation dealing with this important and independent office. Provisions of general application cannot override this specific arrangement which Parliament has made with respect to that position. Parliament was directed under Article 25(4) of the Constitution to provide for the Office of Auditor General. It has done so. The general provisions relating to public servants in the Constitution do not prevail over this. We are not satisfied that it is proper to consider the Auditor General as a public servant. He or she holds an important Constitutional role about which independence and security of tenure are fundamental hall marks.

Chapter 9 of the Constitution deals with various issues of Administration the first of which is the Public Service. It then deals with the Ombudsman. The Auditor General arises under a different Chapter of the Constitution. We



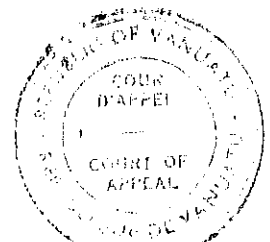
reject the submission that because the Auditor General is appointed by the Public Service Commission the holder of the office is a public servant or governed by the provision which apply to Public Servants. The specific provision in Article 25(4) and the legislative framework made pursuant to that obligation indicate a contrary view. The Public Service Commission is the vehicle adopted by the Constitution to make an appointment but once an appointment has been made the Commission has no further involvement. The applicable law is in the Audit of Public Accounts Act. The various provisions in Article 57 of the Constitution are not relevant to the Auditor General. Article 57(7) is not applicable nor are the various provisions in Article 60. We accept that the Auditor General is not in the list of exclusion in Article 60(3) but that is because the Auditor general is not a public servant for the purposes of this part of the Constitution.

The third issue related to the trial Judge refraining from making a decision about natural justice on the basis that as there was never an appointment by the Public Service Commission it was unnecessary to consider the issue. The Judge found that there could not be a dismissal from an appointment that was never held. We view the matter somewhat differently. This issue is of no relevance because the purported dismissal by the Public Service Commission could have no lawful force or effect. The Public Service Commission lacked the authority to carry out such a dismissal. We agree that it is unnecessary to consider this issue because it is only Parliament which could have dismissed the Auditor General. Therefore an enquiry into what the Public Service Commission did is not useful or relevant.

The learned Judge went on to consider consequential issues and the problems which arose from the answering of the questions which he had considered. He reached the view that none of the issues raised by the Originating Summons should be answered because the answers were not relevant or necessary. Likewise he refused to respond to the declarations and orders sought by the Respondents in their submissions.

- He made various suggestions and recommendations on the basis that the Office of the Auditor General had in fact remained vacant since 10 May 1995 and noted steps which should now be taken with regard thereto.

Regrettably, we are of the view that the outstanding dispute cannot be determined upon this basis. An informal request contained within submissions filed in the Court with regard to one issue is no way to place



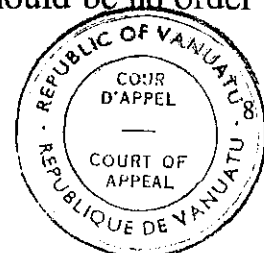
another issue before the Court. We are of the view that the orders made in the Supreme Court must be set aside and the case remitted to that Court for further consideration.

In our view, if the matter is to be pursued, it is essential that the entire matter should have pleadings with the various claims, counterclaims and competing issues being dealt with in a conventional manner. If there is to be an effective challenge to the appointment of Mr Michel that is not determined by the Ombudsman. She can report (as she did) but that is not the process which effects a change. The Public Service Commission similarly lacks the power or authority to reach a conclusion about the force, effect and consequences of its own acts and omissions. These are issues for the Court when they are put before a Judge in accordance with the standard practice and procedure.

We offer a word of caution. At the end of the day the relief sought by Mr Michel is discretionary. We are advised from the bar and understand that formal evidence is available that there is now another holder of the Office of Auditor General in this Republic. It is difficult to apprehend circumstances in which the Court could reach the view (whatever may be the final conclusion about the appointment process) that Mr Michel should be reintroduced into that position. If he has suffered loss then one would suspect that he would have to be compensated by way of monetary relief.

We regret further delay in resolving this problem but there are important legal issues about the removal from office of the holder of the position of Auditor General. Like the Office of Ombudsman, and to an even greater extent the holders of judicial office, there are clear and specific provisions as to how removal can be achieved. There can be no circumstances in which there is any justification for the strict requirements thereof to be ignored. In the Constitution, and through Parliament fundamental safeguards are provided because the independence of these offices must be preserved at all costs.

At the hearing in the Supreme Court there was an order for costs in favour of Mr Michel. That was subject of specific appeal in this Court. It may have been better if Mr Michel had initially placed before the Court all the outstanding areas of dispute. He was however successful on the core issue of dismissal from office. There is no substance in the Respondents' submission that because the Judge had a preliminary view that there should be no order

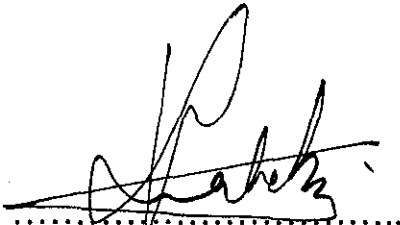


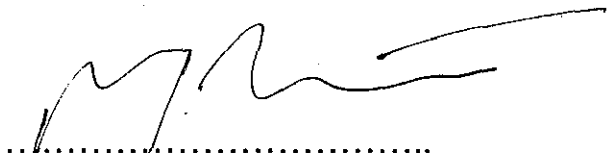
as to costs, he was prevented from reaching a different final assessment. He heard counsel on the point and made a finding.

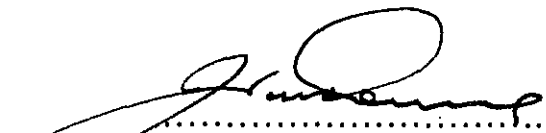
In allowing the appeal we discharge all orders which were made excluding the order as to costs. We also allow the appellant his costs against the Respondent in this Court. In both hearings there have been clear and unequivocal findings that the purported dismissal of this man from his office other than in terms of the requirements of the law by a resolution in Parliament cannot be sustained. That is the fundamental issue which has been confirmed in both proceedings. The Respondents must accordingly compensate the Appellant for his costs in both the Supreme Court and the Court of Appeal.

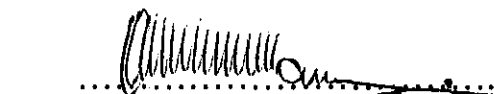
DATED AT PORT-VILA, this ²²..... DAY of OCTOBER 1998

BY THE COURT


.....
Vincent LUNABEK J.


.....
J. Bruce ROBERTSON J.


.....
John von DOUSSA J.


.....
~~Reggett~~ MARUM J. MBE

