

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

**Civil Appeal**  
**Case No. 15/667 CoA/CIVA**

**BETWEEN:** **VAKE RAKAU AS ACTING  
COMMISSIONER OF POLICE**  
Appellant

**AND:** **PETER BONG  
ALAN CARLOT  
KEVIN ABEL**  
First Respondent

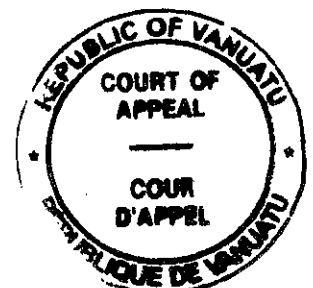
**AND:** **AIRPORT VANUATU LTD**  
Second Respondent

*Date of Hearing:* **Friday 8<sup>th</sup> April 2016**

*Date of Judgment:* **Friday 15<sup>th</sup> April 2016 @ 4:00pm**

*Coram:* **Hon. Chief Justice Vincent Lunabek**  
**Hon Justice John von Doussa**  
**Hon Justice Ronald Young**  
**Hon. Justice Daniel Fatiaki**  
**Hon. Justice Dudley Aru**  
**Hon. Justice Mary Sey**  
**Hon. Justice David Chetwynd**  
**Hon. Justice Paul Geoghegan**

*Counsel:* **Kent Ture Tari for Appellant**  
**Felix Laumae for First Respondents**  
**Daniel Yawha for Second Respondents**



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## JUDGMENT

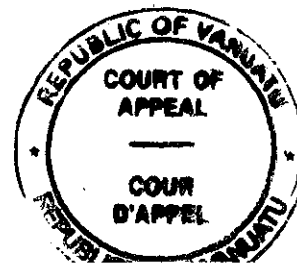
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### Introduction

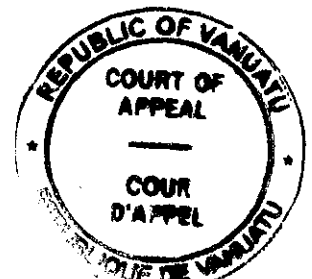
1. This case concerns the adequacy of service and notice given of Judicial Review proceedings to the Acting Police Commissioner and the State Law Office. Judgment was given in the Supreme Court without active participation by the Acting Police Commissioner. Significant orders were made by the Supreme Court which stopped a criminal investigation by the Police and required them to return documents seized pursuant to a warrant granted by a Court.
2. The appellants sole ground of appeal is that the proceedings were not properly served and the process undertaken by the Judge leading to the hearing of the proceedings was in error. The appellant submitted the appeal should be allowed and the orders of the Supreme Court rescinded.
3. At the conclusion of the appeal hearing we advised Counsel we proposed to allow the appeal and to rescind the declaration and orders made by the Supreme Court. We also made orders operative immediately that the documents seized by the police pursuant to the warrant (which as a result of the Supreme Court case had been returned to Airports Vanuatu Limited ( AVL)) be forthwith surrendered to the Registrar of the Supreme Court Vanuatu. We made an order giving leave to all parties to copy these documents. Finally we made an order that costs be in the cause. On further consideration the leave should have been granted only to AVL to inspect and copy these documents. The order will be amended accordingly.
4. We now give our reasons for allowing the appeal.

### Background Facts

5. On 14<sup>th</sup> October 2015 the respondents filed Judicial Review proceedings that were intended to prevent Airports Vanuatu Ltd from making a criminal complaint to the police and prevent the police investigating and charging the first respondents arising from a dispute about their actions when employees of AVL.



6. On the 14<sup>th</sup> October 2015 the then acting Police Commissioner Mr Vake Rakau was served with the Judicial Review application and sworn statement of Mr Peter Bong, in support. The first respondents also filed an application to shorten the time for filing a defence and for an order the Judicial Review claim be heard on an urgent basis. These applications were also served on Mr Rakau.
7. Mr Rakau took no action as a result of receiving these documents. Mr Nalpini is the Senior legal officer to the Commissioner of Police. He received the documents on the Commissioner's behalf. He said he thought these documents would also be served on the State Law Office and so the Commissioner took no further steps.
8. After 14<sup>th</sup> October it seems Counsel for the first respondents were pressing the Court to allocate an urgent hearing date. The outstanding applications were then for shortening of time and an urgent hearing date.
9. On 3<sup>rd</sup> November the Court signed off a document "Notice of Urgent Hearing". It advised that the Judicial Review case was "listed" at 9:00am Wednesday 4<sup>th</sup> November. According to the notice the parties to be served were, the solicitors for the first and second respondents and "State Law Office for Commissioner".
10. The State Law Office received this Notice of Hearing on 4<sup>th</sup> November the day of the hearing. They were first advised of the hearing by Email shortly before the 9:00am hearing on 4<sup>th</sup> November. This was the first the State Law Office knew about these proceedings. Mr Rakau was not served with the Notice of Urgent Hearing.
11. No order as to shortening time or for an urgent hearing of the substantive claim had been made prior to 4<sup>th</sup> November.
12. Mr Tari of the State Law Office appeared at 9:00am on 4<sup>th</sup> November in the Supreme Court. He advised the Judge he had no file and no instructions from the Acting Commissioner.



13. The Judge's note from the 4<sup>th</sup> November hearing records

Mr Tari saying:

*" I cannot assist the Court as I am not instructed. Because of the urgency we leave it to the Court to deal with it. We have not been instructed by the Commissioner of Police".*

14. Mr Laumae for the respondents advised the Judge that the Commissioner was the appropriate defendant rather than the Republic as these were Judicial Review proceedings. He said the Commissioner of Police should have instructed the State Law Office to act but had not done so.

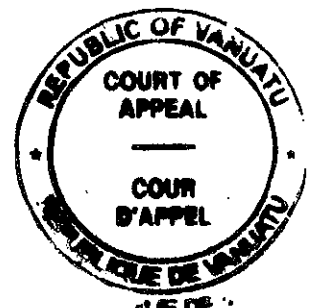
15. After further submissions from Mr Laumae on urgency the Judge noted:

1. *Satisfy as to urgency of matter*
2. *Application for shortening time is allowed. Time is therefore approved.*
3. *Rule 17.8 (3) (a) ( b) ( c) (d) are satisfied.*

16. The Judge then proceeded to hear the substantive case and made the orders sought. The declarations were:

1. *The Airports Vanuatu Limited (AVL) as First Defendant is estopped by law from lodging any criminal complaint to the police against the claimants or any of them for allegations the subject of judgments in Judicial Review Case No. 16 of 2014, Court of Appeal Case No. 46 of 2014, Supreme Court Civil Case No. 284 of 2014, Supreme Court Civil Case No. 294 of 2014 and the Deed of Release dated 5<sup>th</sup> November 2014.*
2. *The Commissioner of Police, Mr Vake Rakau as Second Defendant has no standing whatsoever in law to initiate in his own right investigations in matters concerning the First Defendant as a local incorporated company and/or the claimants.*

And the orders made were:

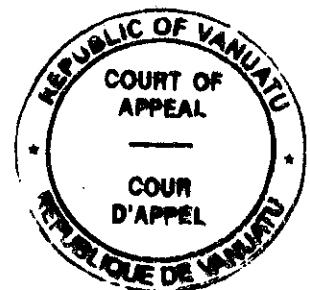


- (i) *The AVL and the Commissioner of Police and/or anyone working under their supervision and/or direction be restrained from investigation and charging the claimants or any of them for allegations made against them by the First Defendant which was the subject matter of Judicial Review Case No. 16 of 2014, Court of Appeal Case No. 46 of 2014, Supreme Court Civil Cases No. 284 and No. 294 of 2014 and the Deed of Release dated 5<sup>th</sup> November 2014.*
- (ii) *All the Files and Documents belonging to AVL ( First Defendant) seized by the Police under the search warrant issued by the Magistrate Court on 2<sup>nd</sup> October, 2015 be returned forthwith by the Police Commissioner to AVL.*

*The Police Commissioner Mr Vake Rakau shall pay the claimant's costs of this proceeding personally. Costs are allowed on the standard basis as agreed or be taxed by the Master.*

#### **The State Proceedings Act and the Civil Procedure Rules**

17. We are satisfied that the State Proceedings Act and the Civil Procedure Rules as to service and notification of the proceedings were not complied with and the procedure to hearing was sufficiently unorthodox to require these proceedings to be reheard.
18. The first issue relates to service and notification obligation in these proceedings.
19. We are satisfied that the law governing the service of this judicial review claim is governed by the State Proceedings Act and the Civil Procedure Code.
20. The State Proceedings Act 2007 (as amended by No. 4 of 2010) is described in the introduction as "An Act to regulate the institution and conduct of civil proceedings in which the State is a party to or may be interested and for related proposes."
21. At section (1) the definition of "State" is said to include..... "for the proposes of this Act a Constitutional or a Statutory Entity,"



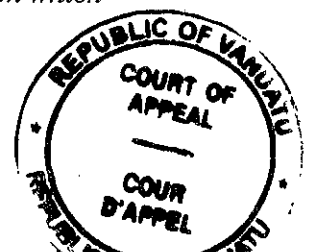
22. We are satisfied the Police Commissioner comes within the definition of the State as Statutory Entity. The Police and the Commissioner of Police are Statutory Entities by virtue of the Police Act CAP 105. Section 2 establishes the Police Force and Section 3 the Police Commissioner and other officers of the service. Section 10 provides the appointment of the Commissioner is by the President on the advice of the Police Service Commission.
23. The State Proceedings Act authorises civil proceedings against the State (S.3) with jurisdiction to the Courts given as if the proceedings were between private individuals (S.4).
24. Ordinarily proceedings against the State will be brought against the "Republic of Vanuatu" (S.5 (1)). However where, as here, there are judicial review proceedings then the defendant named must include (Section 5(2)(a)) *"the person who appears to be most directly responsible for matters giving rise to the proceeding, by the persons designation and where such person is an individual, also by his or her name."*
25. The first respondent therefore correctly named Mr Rakau, the Police Commissioner, as a defendant.
26. We note S.5 (2) (b) provides where a declaration about an enactment is sought then the Attorney General must also be a defendant. We will return to this aspect later in the judgment.
27. Section 6 of the Act provides

***" Notification of intention to institute proceedings***

(1) *No proceeding against the State, other than an urgent proceeding, is to be instituted under section 3 unless the party intending to do so first gives written notice to the State Law Office of such intention.*

(2) *The notice must:*

(a) *include reasonable particulars of the factual circumstances upon which the proposed proceedings will be based; and*



(b) *be given not less than 14 days and no more than 6 months prior to the institution of proceedings.*”

28. Finally Section 7 provides

***“Application of Rules of Court***

*A proceeding instituted under section 3 is to be instituted and conducted in accordance with any applicable Rules of Court and, if none, as nearly as possible according to such rules as would be applicable in similar proceedings between individuals.”*

29. Part 17 of the Code of Civil Procedure provides for rules governing judicial review applications.

30. Rule 17.4 (1) (a) and subrule (2) provide

***“Claim for judicial review***

**17.4 (1)** *A person claiming judicial review may file a claim claiming:*

- (a) a declaration about an enactment; or*
- (b) a mandatory order, a prohibiting order or a quashing order about a decision.*

**(2)** *The claim must name as defendant:*

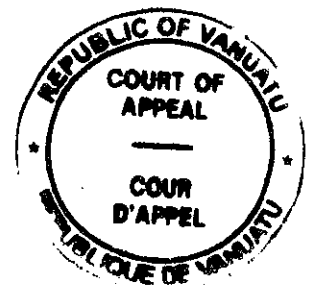
- (a) for a declaration, the Attorney General; and*
- (b) for an order about a decision, the person who made or should have made the decision.”*

31. R17.6 deals with service. It provides

***“Serving claim***

**17.6 (1)** *The claim and sworn statement must be served on the defendant within 28 days of filing.*

**(2)** *The claim and sworn statement must also be served:*



- (a) on any other person who is directly affected by the claim, within 28 days of filing; and
- (b) on any other person the court orders to be included as a party, within 28 days of the order.”

32. Rule 17.5 requires a defendant to file a response within 14 days of service. We note in this case a response was therefore required by 28<sup>th</sup> October 2015 ( 14 days after the 14 October service) well prior to the hearing to shorten time to respond.

33. R17.8 provides for a first conference “ after the defence has been filed and served and Rule 17.8 (3) provides

*“Court to be satisfied of claimant’s case*

**17.8**

- (3) *The judge will not hear the claim unless he or she is satisfied that:*
- (a) *the claimant has an arguable case; and*
  - (b) *the claimant is directly affected by the enactment or decision; and*
  - (c) *there has been no undue delay in making the claim; and*
  - (d) *there is no other remedy that resolves the matter fully and directly.”*

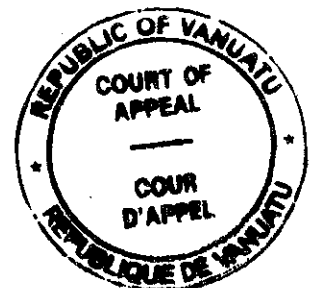
34. There are no rules in Part 17 which govern the circumstances where the defendant takes no action in relation to a judicial review claim. Nor are there general civil rules of assistance about the conduct of litigation where the defendant takes no action in a judicial review case. Part 9 of the Rules provide for judgment by default where the claim is for a fixed amount or where there is a claim for damage. There is no particular rule about service where such judgment is sought except R9.3 (6). Rule 9.3 permits judgment on liability if no defence has been filed but where a hearing as to damages is required, then the defendant must be notified of the hearing date even though the defendant has not filed a defence.

**Discussion**

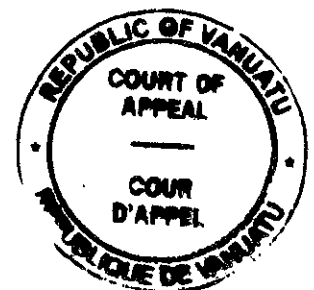
35. To return to the issues in this case.



36. We are satisfied the respondents were obliged by S.6 of the State Proceedings Act to give written notice of its intention to bring these proceedings to the State Law Office. For the reasons we have identified it is clear the Commissioner of Police is a Statutory Entity. The office is therefore within the definition of the "State" and the obligations of notification in Section 6 are triggered.
37. We note the respondents did not argue they were excused from notification of the State Law Office because these were "urgent proceedings" The definition of "urgent proceedings" in section 1 of the Act does not apply. It requires either a claim for habeas corpus or an application for urgent interim relief.
38. We received no submissions on the possible consequences of a failure to comply with Section 6. In this case we are satisfied the failure to notify the State Law Office compromised the rest of these proceedings. The Commissioner believed the State Law Office had been served and would deal with the matter. However the State Law Office knew nothing of the proceedings until the date of hearing 4<sup>th</sup> November. If the respondents had adopted the correct procedure then the State Law Office would in all probability have been properly instructed and would have filed a response to the review application and would have been able to fully participate in any substantive hearing.
39. As it is the State Law Office faced a very difficult situation on 4<sup>th</sup> November. It should have asked the Judge for an adjournment. However the State Law Office was only in this position because of the first respondents' failure to give proper notice (S6). Given that conclusion we consider the judgment has been obtained irregularly and the appeal must be allowed. There were also other flaws in the process.
40. Rule 17.4 only permits a declaration about an enactment and where that is sought (S.5(2)(b) State Proceedings Act) the Attorney General must be a party to the proceedings. Here declarations were sought by the first respondents although they did not appear to relate to any "enactment". Seeking such declaration as sought here may therefore be prohibited. In any event the Attorney General was not served.



41. As we have observed, there are no direct rules about the obligation to serve a defendant with a hearing date in judicial review proceedings where no action has been taken by the defendant.
42. We are satisfied that Mr Rakau should have been served with the hearing date of 4<sup>th</sup> November. Rule 1.7 provides that where there is no relevant Rule ( as here) the Judge must give whatever directions necessary to ensure the matter is dealt with “ according to substantial justice”.
43. As we have noted where a defendant has taken no steps in a damages claim the Court is still obliged to notify the defendant of the hearing to determine the quantum of damages (R9.3 (6)). Applying that principal and the substantial justice approach (R1.6) we are satisfied Mr Rakau should have been served with the date of hearing for 4<sup>th</sup> November. He was not. (note: R 9.2(6) and (7) requires service of a money default judgment before execution can start).
44. The Orders being sought were self-evidently of significant importance. They were designed to stop a citizen complaining to the police about an alleged crime, stop the police from investigating an alleged crime and to over rule the effect of a search warrant granted by a Court. In terms of Rule 17.6 (2) (a) the State was an interested party and should have been served with the proceedings.
45. When the Supreme Court Notice of Urgent Hearing of 3<sup>rd</sup> November was sent to the parties there remained two unresolved interlocutory applications (although the shortening of time application had been made unnecessary by the expiry of the standard response time of 14 days).
46. However it was not obvious from the notice of hearing to the parties of 3<sup>rd</sup> November exactly what was going to be heard by the Court on the 4<sup>th</sup> . Given the outstanding interlocutory applications it was reasonable to assume these only were to be heard on 4<sup>th</sup> November. If there was to be an urgent hearing of the substantive application the notice of hearing should have made that clear to all parties.




47. The judge's notes make it clear that he first considered whether there should be an urgent hearing of the substantive case. He concluded an urgent hearing was justified. However we consider he fell into error when he immediately heard the substantive case. He knew the State Law Office had no instructions and therefore the Police Commissioner could not effectively oppose. AVL were not opposing the orders. The better course would have been to grant interim orders to protect the position of the respondents in the meantime and arrange for a full response from the commissioner in due course.

**Result**

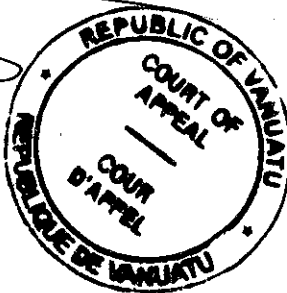
48. For the reasons given the appeal is allowed. The declarations and orders made by the Supreme Court are set aside. We record that this Court made an order on 8<sup>th</sup> April when we heard the appeal that the documents seized by the police under warrant and now in the possession of AVL will forthwith be surrendered to the Registrar of the Supreme Court at Vila. We give leave to AVL to inspect and to obtain copies of any of those documents surrendered to the Registrar. Costs will be in the cause.

**DATED at Port Vila this 15<sup>th</sup> day of April, 2016.**

**FOR THE COURT**



**Vincent Lunabek**  
Chief Justice



The seal is circular with the text "REPUBLIC OF VANUATU" at the top and "COURT OF APPEAL" in the center. Below "COURT OF APPEAL" is a horizontal line, and below that is "COUR D'APPEL". At the bottom of the seal, it says "REPUBLIC DE VANUATU".