

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

Civil Appeal
Case No. 18/989 CoA/CIVA

BETWEEN: **WALTERSAI AHELMHALAHLAH**
Appellant

AND: **REPUBLIC OF VANUATU**
First Respondent

AND: **FELIX STEPHEN DORRICK**
Second Respondent

AND: **JOHN OBED ALILEE**
Third Respondent

AND: **VINCENT LUNABEK**
Fourth Respondent

Coram: *Hon. Justice John von Doussa*
Hon. Justice Raynor Asher
Hon. Justice Oliver A. Saksak
Hon. Justice Dudley Aru
Hon. Justice Gus Andree Wiltens

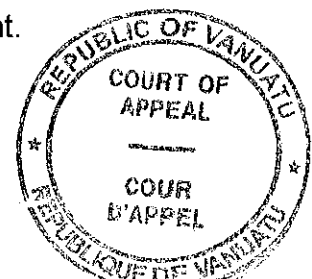
Counsel: *Appellant in person*
FJ Gilu the Solicitor General for the respondents

Date of Hearing: *Tuesday 24th April, 2018*

Date of Judgment: *Friday 27th April, 2018*

JUDGMENT

1. This is an application for leave to appeal. However, no leave was required as the appeal was filed in time. The parties have treated the application for leave as a valid notice of appeal and so do we.
2. The judgment appealed from is a decision of Doogue J of 16 March 2018. The claim that he heard in the Supreme Court was brought by the appellant Walter Hapsai Haphapat Ahelmalahlah, a former Magistrate, concerning first an allegedly defamatory letter about him written by the second respondent, the Chief Magistrate, to him while he was a sitting magistrate, and second his conviction and discharge for malicious damage and the events which followed leading to his ultimate resignation and the termination of his employment.



3. Doogue J upheld a claim in defamation against the Chief Magistrate Felix Dorrick but not against his alleged employer the first respondent, the Republic of Vanuatu. He dismissed the claims relating to the termination of the appellant's employment, including a claim for wrongful constructive dismissal directed against the third respondent, the Supreme Court Registrar John Alilee, which was coupled with claims of jurisdictional error and misleading or deceptive conduct. He also dismissed claims in negligence and other grounds against the fourth respondent, the Chief Justice. There were related claims of "*vicarious liability*" against the first respondent for failings by the second, third and fourth respondents which were also dismissed.

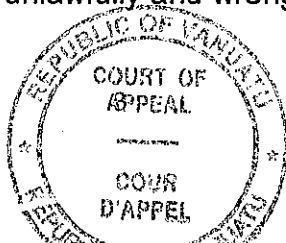
A brief history

4. In 2013 the Appellant Mr Ahemhalalah was a Magistrate sitting in Tanna. The second respondent Felix Dorrick who was Chief Magistrate, had received some complaints about the appellant's conduct. On 30 April 2013 he wrote to the Chief Justice, making certain allegations including a statement that Mr Ahemhalalah had been "harassing" some female students at the College d'Isangel. The Chief Magistrate went on to say that he would resign if no disciplinary action was taken. Importantly, the letter was copied to various persons including all Senior Magistrates and Magistrates. Ultimately there was no relevant follow up or action taken in relation to the complaint. This letter was the subject of the defamation and negligence claims.
5. Earlier, on 23 December 2012, there was an incident involving Mr Ahemhalalah unrelated to the events referred to in the letter, which ultimately led to his dismissal. Mr Ahemhalalah is the chief of a village in Malekula. A structure that was intended to be used as a fuel station was built by some of his relatives on or near his land. Mr Ahemhalalah took the view that it was on his land. On 12 December 2013 he took a chainsaw and made a number of significant cuts to the structure. He had a firearm with him. This followed an earlier directive from him to the builders of the structure that it must be removed. Mr Ahemhalalah was charged with malicious damage to property and trespass with a firearm.
6. After the events at Malekula the Judicial Service Commission (JSC) recommended to the President that he should suspend the appellant from duty on an interim basis. An instrument of suspension dated 22 January 2013 was served on the appellant.
7. On 25 March 2013, while the appellant was suspended, there was a defended hearing of the two charges in the Supreme Court before Spear J. The appellant was represented. After the case was part-heard, the appellant changed his plea to one of guilty on the malicious damage charge. The appellant had reflected on his evidence over the lunch break, and he had decided to concede that he did



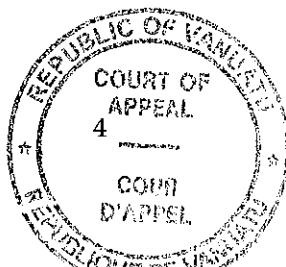
not have the right to chain saw the structure. He asked to be re-arraigned on the malicious damage charge, and pleaded guilty to that charge. He made a public apology in Court to those assembled, and indicated he was prepared to pay compensation and undertake a custom reconciliation ceremony.

8. On the basis then of a plea of guilty to the one charge of malicious damage, Spear J dismissed the charge of trespass with a firearm. In a written decision (4/2013), which fully detailed the events of that day, when he sentenced the appellant Spear J discharged him without conviction, but on the condition that he pay compensation of VT5,000 and that he undergo a custom reconciliation ceremony. The judge recorded at [8]: "of importance is that the Defendant admitted that on 23 December 2012 he *"chopped down an incomplete house with a chainsaw"* and that *"at the time of the incident (he) had in his possession a rifle.22"*.
9. Following the hearing in the Supreme Court where he was discharged without conviction but had admitted wrong doing, the JSC on 26 April issued charges against the appellant based on the events relating to the malicious damage charge. The JSC charges were due to be heard on 11 May 2013. On 3rd May 2013 the appellant says that at the request of the Chief Justice he met with him at his private residence. There was a discussion which we traverse later in this judgment.
10. The appellant on 6th May 2013 then gave three months notice on writing of his resignation. After his notice of resignation he was still paid through to November 2013 when the payment stopped.
11. It should be stated that the Chief Justice who is ex officio a member of the JSC, decided that as the uncle of the appellant he should not be involved in any matters concerning the appellant and the JSC. While he ensured that the JSC was informed of the allegations against the appellant, the Chief Justice abstained from dealing with his case before the JSC.
12. These were the events leading to the causes of action in the pleading of unjustified dismissal, constructive dismissal and negligence. Both pleadings and the submissions we have received on appeal cover a wide range, and it is difficult to discern the key points of the various causes of action. Like the primary judge, we consider first it best to consider the claims arising from the letter of 30th April 2013, and second the events relating to the termination of the appellant's employment.
13. Much of the appellant's case shows an inability to fully appreciate the meaning of the discharge ordered by Spear J. It was not an exoneration, and indeed confirmed that he had acted unlawfully and wrongly.



The grounds of appeal relating to the letter

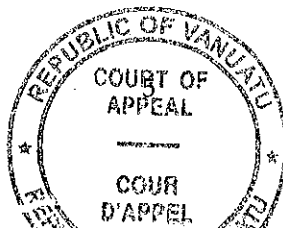
14. The defamation claim against the Chief Magistrate succeeded. The letter was found to be defamatory, and the fact that it was distributed to so many people meant that there was no defence of privilege available. The letter, making as it did allegations of inappropriate behaviour to female students, was on its face plainly defamatory. That decision has not been challenged by the respondents. The amount awarded in damages against the Chief Magistrate was VT1,500,000. That figure is not challenged by the appellant, and it is also not challenged by the respondents who have not cross-appealed.
15. What is challenged by the appellant is the Primary Judge's decision not to make the First Respondent, the Republic of Vanuatu jointly and severally liable for the sum awarded, by virtue of the doctrine of vicarious liability. The primary judge did not do so because of failings of proof by the appellant, observing at [58] that it would seem just and fair that the Republic was liable for the damages and paid them, rather than that responsibility resting on the Chief Magistrate. Nevertheless, he could not on the material before him, make such an order.
16. We consider that the Chief Magistrate was acting in the course of his duties when he circulated the defamatory letter. Fortunately, we do not need to go further and analyse the Republic's responsibility, as the Republic through its counsel the Solicitor General has responsibly accepted that the appeal must be allowed on this point. He accepts that the Republic should be liable for the damages awarded against the Chief Magistrate. Given that we agree with this concession, the appeal will be allowed on the issue. We hold that the Republic as first respondent is jointly and severally liable with the second respondent the Chief Magistrate, for the defamation damages of VT1,500,000.
17. We record that the appellant in his submissions referred to an alleged arithmetical error in the judge's calculations, but since he conceded that he did not dispute the amount awarded, we do not have to consider that further.
18. This means that the appellant has in essence succeeded on this aspect of his appeal. The Republic is liable for damages with the Chief Magistrate. We emphasise that this does not entitle the appellant to any more money; it just means that he can now recover that single amount from either of the two parties, (although we would expect the Republic to pay it).
19. We now turn to the appellant's submissions as they relate to his dismissal.



The dismissal grounds of appeal

The Resignation

20. Magistrates are appointed by the President of the Republic on the recommendation of the Judicial Services Commission (JSC), acting under s 47(2) of the Constitution. The Judicial Services Act creates the JSC, the objects of which are to promote and protect the independence of the judiciary, to promote the rule of law, and to "*promote and monitor generally the performance and accountability of the Judicial Service*" (s.3). Its functions include ensuring that "*the appointment, promotion, transfer and discharge of, and disciplinary steps against, judicial officers and court personnel takes place without favour or prejudice*" (s.4(1)(a)(ii)).
21. The Commission may recommend to the President that a magistrate be suspended or removed for various types of conduct, set out in s.23(4). A magistrate may be allowed to vacate his office in certain defined circumstances (ss.23(6) and (7)).
22. We have already referred to the JSC's suspension of the appellant in January 2013. Unsurprisingly after his Court appearance and admission of the charge of Malicious Damage on 25 March 2014, disciplinary steps were taken culminating in the laying of formal charges by the JSC.
23. On 26 April 2013, the JSC sent a notice to the appellant that following complaint it charged him with misconduct in relation to the Malicious Damage incident. The notice gave particulars of what had happened when the case had been heard before Spear J, and gave him an opportunity to respond to the charges in writing before 10 May 2013. The JSC would convene a meeting on 11 May 2013.
24. As we have outlined, the Chief Justice has decided that he could not be involved in any way in the considerations of the JSC concerning the appellant. However, he was able to meet with him as Chief Justice in charge of the judiciary, and that meeting took place on 3 May 2013.
25. The appellant submits that the Chief Justice placed unfair and unreasonable pressure on him to resign at the meeting, and that that pressure amounted to constructive dismissal and negligence, and that this led to his resignation by his handwritten letter of 6 May 2013. In that letter of 6 May the appellant gave notice that his resignation would be effective on 6 August 2013, and that he wished to



receive his back pay and remuneration allowance. He gave his thanks for the "understanding and cooperation in the matter".

26. The Primary Judge considered the evidence he had heard concerning the meeting between the appellant and the Chief Justice. He observed:

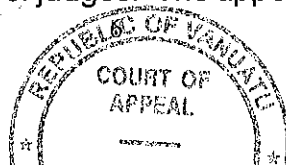
"[118] This then gives rise to the question of whether the advice which the fourth defendant provided was something that a careful Chief Justice in his position would not have given. I am unable to agree that the duty is breached in this way. The fourth defendant was not wrong (to) forecast that there was a good probability that the claimant would be dismissed if the matter went to the JSC. Nor was he wrong in suggesting that there would be a stigma associated with the claimant if he was dismissed by the JSC. He cannot therefore have breached his (argued) duty to (give) careful advice.

[119] I come to the conclusions concerning the potential risk of dismissal for the following reasons. The fact that the claimant had shown himself capable of taking ... the law into his own hands by cutting down the structure that he did and at the same time to carry with (him) a firearm strongly suggests that he did not have a sufficient understanding of his responsibilities as a magistrate. In my assessment, it would not have been misleading for the fourth defendant in this context of this case to tell the claimant, in effect, that his best interests would be served by resigning".

27. The appellant alleges that the primary judge erred when he dismissed his claims for constructive dismissal and negligence arising out of this meeting and the actions of the Chief Justice. An issue does arise, not addressed by the appellant, whether at the meeting the Chief Justice put pressure on the appellant because of his intention to complain against the Chief Magistrate. There is a confusion in what the appellant says as he claims he was threatened with termination if he complained but also told that he must resign. In the end we accept this summary by the primary judge.

"[85] The picture that I obtained was that the Chief Justice had formed the view that following the admission of criminal acts on the part of the claimant and the proceedings that followed the Malekula incident, it was inevitable that the claimant would have to vacate the office of Magistrate. Further, the Chief Justice seems to have been perplexed by the failure of the magistrate to understand that just because he had been given a discharge without conviction by the judge who presided at the hearing did not mean that he was thereby immune from disciplinary charges. As the 4th defendant said when he gave evidence before me, and correctly, as I see it, the decision that the judge made in the criminal proceedings was limited in its effect to those proceedings and was in no way dispositive of any future disciplinary proceedings."

28. The Chief Justice has the responsibility of ensuring that the rule of law is maintained in Vanuatu. The maintenance of high standards of conduct in the judiciary is an essential part of this. The community must have respect for the authority and good character of judges. The appellant's conduct in the malicious

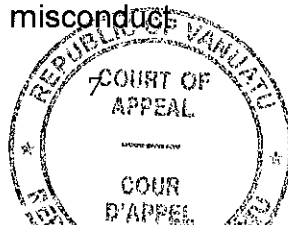


damage incident had brought the judiciary into disrepute, and the Chief Justice was making this plain. It was very much in the appellant's personal interest that he understood his true position, and what was likely to happen if he stayed on. While the Chief Justice was firm in his advice, we see no sign of unfair pressure.

29. The appellant plainly does not understand the effect of his involvement in the malicious damage incident on his ability to hold judicial office, and it drives him in this appeal. We agree with the comment by the primary judge that he does not understand that the lenient way in which his guilt was recognised, does not mean that his conduct could not be still assessed by the JSC, and assessed as misconduct.

Constructive dismissal

30. The appellant chose to resign some days after he met with the Chief Justice. He was not actually dismissed. He resigned, and after some consideration. Nevertheless, he seeks to rely on there being a constructive dismissal arising from the actions of the respondents.
31. Constructive dismissal is a doctrine developed on the basis of an employment relationship governed by an employment contract; *Western Excavating (EEC) Ltd v Sharp* [1978] OB 761 at 769. But this was not an ordinary employment situation. We have outlined the statutory basis for the Magistrate's appointment. He was appointed by the President on the recommendation of the JSC, and his terms of employment and actions are governed by the JSC. There was no contract in the usual sense. However, we do not need to determine whether constructive dismissal is available in such circumstance, as it is quite clear that there was on the facts no constructive dismissal arising out of the conduct of the Chief Justice.
32. This is because at the heart of the doctrine of constructive dismissal is the concept of repudiation of contract; conduct which shows the employer no longer intends to be bound by one or more of the essential terms of the contract; *Western Excavating (EEC) Ltd v Sharp* [1978] OB 761 at 769. The conduct of the Chief Justice was not of this type. He was not acting as a member of the JSC, or on its behalf. He was accepting the appellant's appointment, and his participation in the investigation into the complaints. He was not taking any action that prevented the appellant performing his duties. He was however giving his views as he was obliged to do, on the position of the appellant. That was not constructive dismissal.
33. It was also not negligence. The Chief Justice owed no duty of care to the appellant. He was not meeting him to give advice. He was meeting him as his judicial superior, to discuss his misconduct.



34. Moreover, there was no act of negligence. As we have indicated, the Chief Justice did not mislead the appellant in any way. Looking at the appellant's position objectively, the advice the appellant received from the Chief Justice was good advice, as his involvement in the malicious damage incident with the firearm meant that he was almost certainly going to be found guilty of the charges laid by the JSC. The appellant may now regret his decision to resign, but he can point to no error by the Chief Justice.
35. We must also reject the ultra vires argument. This doctrine arises primarily in the area of administrative law, which does not arise here. In any event, the appellant has not pointed to any unlawful or unauthorised acts by the respondents.

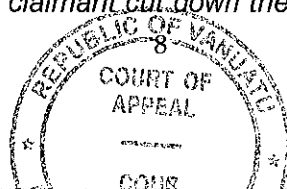
Claims against the Third Respondent, the Registrar

36. The claims against the Registrar are based on an ultra vires termination of the appellant's employment, and for negligence. However the factual matter that he appears to focus on is a discussion the registrar had with the office accountant which resulted in the appellant's salary payments being stopped. He appears to blame him for putting in train the administrative consequences which led to the final cessation of his employment and his salary. He appears to think that the Registrar should have given a right of hearing and other rights of a natural justice type.
37. This action was plainly misconceived. As the primary judge pointed out the appellant had resigned long before November 2013 and indeed the period of notice that he given had also long expired. So in mid-November it was far beyond the power of any of the respondents to dismiss the appellant. His employment was at an end. No issue of negligence or ultra vires could arise. Moreover there is no evidence of any action on the part of the Registrar that could be criticised, as he was simply carrying out an entirely orthodox administrative act in directing the payments and directing that the salary payments end.

Faulty approach by primary judge

38. The appellant alleged that the primary judge erred in law by allowing his mind to be clouded by the Appellant's criminal proceedings, and the judgment of Spear J. In oral submissions he took particular exception to paragraph [70], in particular the second sentence:

"I conclude on the balance of probabilities the claimant admitted at the hearing in March 2013 that he had committed a criminal act. That is to say, I consider that it is established that the claimant cut down the structure without the consent of the



owners in circumstances where he had in his possession a firearm. These events plainly gave rise to questions about whether the conduct of the claimant that would of an acceptable standard given that he was a magistrate”.

39. As we have already indicated, we entirely agree with this conclusion of the primary judge, and we reject the criticism. The appellant had himself established that he had cut down the structure and had possession of the firearm, because he had admitted that in open Court, and apologised for it. In his submissions, he makes some attempt to explain away his admission, but what he says with respect makes no sense. He is stuck with what he publicly admitted for the purposes of the actions of the respondents when faced with those admissions.
40. This criticism of the judge is another symptom of the appellant's failure to realise that he was not at all vindicated by the judgment of Spear J. To the contrary, his unlawful act was established, and confirmed by his own public apology, payment of compensation, and participation in a reconciliation ceremony.

Conclusion on termination

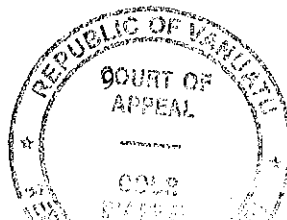
41. In his submissions the appellant consistently ignored his bad behaviour, his own admission of that bad behaviour, and the effects of that bad behaviour on his ability to maintain the confidence of the public and his colleagues in him as a judicial officer. He was suspended for the good reason of the admitted misconduct of the malicious damage incident, and he was not subjected to unfair pressure when he resigned. There was no negligence or other misconduct by the third or fourth respondents. The primary judge correctly dismissed these claims.

Result

42. The appeal is allowed, and the first respondent as well as the second respondent is jointly and severally liable for the defamation damages of VT1,500,000 ordered against the second respondent.
43. The appeal is otherwise dismissed.

Costs

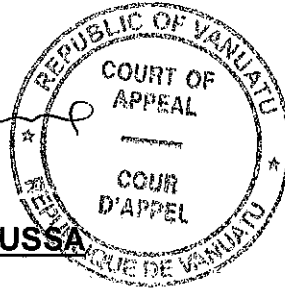
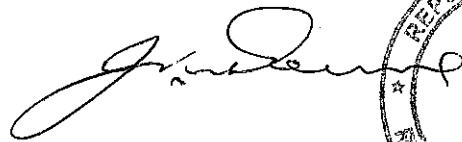
44. The respondents have succeeded, save for the defamation damages being extended to the first respondent. The respondents did not contest that. It follows that the respondents have been successful in this appeal.



45. Therefore the appellant is to pay the respondents costs in the amount sought by the respondents of VT75,000, which we consider a fair sum in the circumstances.
46. We do not interfere with the Supreme Court costs order, which left costs where they fell.

DATED at Port Vila, this 27th day of April, 2018.

BY THE COURT



Hon. John von DOUSSA
Judge.