

BETWEEN: Glen Nicholson Mahina
Appellant

AND: The Minister of Internal Affairs
First Respondent

AND: The Acting Police Commissioner
Second Respondent

AND: Republic of Vanuatu
Third Respondent

Date of Hearing: 12 February 2021

Before: Chief Justice V. Lunabek
Justice J. Mansfield
Justice J. Hansen
Justice D. Aru
Justice G.A. Andrée Wiltens
Justice V. M. Trief

In Attendance: Mr C. Leo for the Appellant
Mr S. Aron for the Respondents

Date of Decision: 19 February 2021

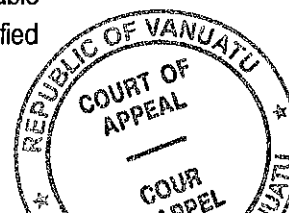
JUDGMENT

A. Introduction

1. This is an appeal against a Supreme Court decision to decline to judicially review a decision by the Minister of Internal Affairs ("the Minister") to interdict a serving senior Police Officer.

B. The Decision

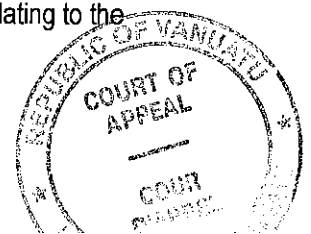
2. The primary judge undertook the required preliminary analysis set out in Rule 17.8 of the Civil Procedure Rules to ensure this was an appropriate matter for the Supreme Court. In doing so, he recorded the background to this matter as follows.
3. On 29 April 2020, the Police Service Commission ("PSC") had resolved that Mr Mahina was the best candidate for appointment as the Commissioner of Police, ahead of 5 other suitable applicants and a number of other candidates who were considered insufficiently qualified for the post.



4. As required pursuant Section 7A (1A) the Police Act, the PSC had then sought a consultation meeting with the Minister. That approach did not eventuate or elicit any response from the Minister. Accordingly, the PSC wrote a letter addressed to the Minister, dated 30 April 2020, appending a draft contract of employment for Mr Mahina as the Commissioner of Police. It was served on the Minister on 7 May 2020.
5. The Minister did not respond to the letter. Instead, the Minister sought certain amendments to the Police Act aimed at altering the appointments process, sought the termination of the then PSC Chairperson from his position on 5 May 2020, and later appointed a new PSC Chairperson – steps Mr Mahina complained of as “political interference” by the Minister in the appointments process.
6. On 8 May 2020, the PSC wrote to the Attorney General instructing that an Instrument of Appointment be prepared for signing by the President. That, however, did not occur.
7. On 29 June 2020, the Minister interdicted Mr Mahina from his duties as a Police Superintendent pending investigation and possible disciplinary proceedings, following a complaint from a member of the public made on 3 May 2020. That decision was challenged by way of the judicial review application with a view that the interdiction be cancelled and Mr Mahina be appointed as Commissioner of Police.
8. The primary judge considered the decision to interdict involved the proper exercise of the Minister’s powers under section 70 of the Police Act. The primary judge further held that the statutory requirement that the PSC consult with the Minister regarding the appointment of the new Commissioner of Police had not been met – in his view a face-to-face meeting was the minimum requirement to constitute consultation. The primary judge was further of the view that Mr Mahina’s recommendation as the PSC’s preferred candidate for appointment was ultra vires and illegal due to Mr Mahina’s background and experience not meeting the pre-requisites to be appointed.
9. Accordingly, the primary judge was not satisfied that the Rule 17.8 pre-conditions to a valid Supreme Court claim had been met. The primary judge did not consider Mr Mahina to have an arguable case, and due to his ineligibility to apply for the post he was not directly affected by the decision to interdict. Further, it was held that the claim had been unduly delayed; and that there were other alternate means to resolve the matter short of judicial review.
10. Accordingly, the primary judge struck out the application for judicial review and imposed costs of VT 150,000 against Mr Mahina.

C. The Appeal

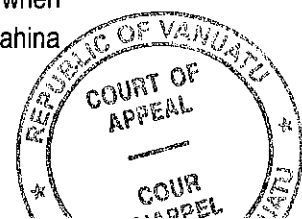
11. The appellant claims to have been denied natural justice in that a full hearing relating to the Rule 17.8 pre-conditions had not been held.



12. The main challenges to the primary judge's findings were: (i) to dispute as incorrect the finding that Mr Mahina was ineligible to be appointed Commissioner of Police; (ii) to question the finding that the Minister had power to interdict but had exercised his discretion in an acceptable manner; and (iii) to challenge the finding that consultation required face-to-face communication.
13. It was accepted that to succeed with the appeal, Mr Mahina had to demonstrate that each of those three findings was an error of fact and/or law. If any of those matters was in fact correct, then the challenge to the Rule 17.8 decision would fail.

D. Discussion

14. In relation to the issue of whether natural justice had been denied, we note that Rule 17.8 (4) provides that the judge may consider the papers filed and hear argument. Mr Tari accepted that at the time of the primary judge's determination of the Rule 17.8 matters, all the necessary information was available to the Court. Accordingly we consider that the primary judge was well placed to deal with all the issues in the Rule 17.8 context. It is clearly not mandatory for a trial hearing. In these circumstances, we do not consider there has been a breach of natural justice. We are fortified in that view by the reasoning in *Kwirinavanua v Tariwer* [2016] VUCA 54 and also that in *Loparu v Sope* [2005] VUCA 4.
15. The Police Act specifies in section 7A (7) that a person may not be appointed as Commissioner "unless he or she must have served in a senior position in the Police Force in Vanuatu or in any other country for a period of 7 years or more". It is the role of the PSC to ensure that statutory requirement is met. There is no definition of "in a senior position". However, in the interpretation section of the Police Act, there is a meaning ascribed to "senior officer", which is stated to "mean any member of or above the rank of inspector".
16. Mr Leo for Mr Mahina attempted to persuade us that a rank involving the use of the term senior should be taken into account in evaluating service. Mr Aron from the State Law Office attempted to persuade us that only service at the rank higher than Inspector should be counted. We reject both those submissions outright.
17. Mr Mahina's 6 January 2020 application to be Commissioner set out what he described as his "wealth of policing experiences", which spanned 10 pages. In his sworn statement of 15 July 2020 filed in support of the Judicial Review application, Mr Mahina more concisely set out his relevant experience. In particular, it is apparent that he was a Police Constable as from 23 December 2000, promoted to Acting Police Inspector on 12 September 2013, promoted to Police Inspector on 1 February 2016, promoted to Senior Police Inspector on 11 June 2018, and promoted again to Police Superintendent on 21 May 2019.
18. Analysing that evidence, and including service at the acting rank of Police Inspector, it is clear that when applying for the post in January 2020, and even subsequently when recommended to be appointed in May 2020 or when interdicted in June 2020, Mr Mahina

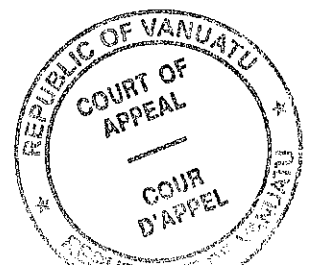


did not have the requisite service to be eligible to be appointed. The PSC vetting of his application was defective.

19. Section 7A (1) of the Police Act sets out that the President is to appoint a person in writing as the Commissioner of Police "*on the advice of the Commission after consultation with the Minister...*" Subsection (1A) prescribes that the Commission must consult with the Minister before an advice can be made to the President. While we accept there was an attempt by the PSC to engage in consultation with the Minister, it is clear that did not eventuate. We respectfully agree with the primary judge that writing a letter to the Minister is insufficient to meet the requirement of consultation. We make no comment whether a face-to-face is imperative, but we are satisfied that a letter is insufficient.
20. Finally, there was criticism of the Minister's interdiction. What was put forward to support this contention is that the Minister acted on the sole allegation of a member of the public without any investigation. The primary judge accepted what was done was an appropriate exercise of the Minister's discretion.
21. It is relevant in this context to take into account that the original complaint was made on 13 February 2019, the allegation being that while in charge of a criminal investigation, Mr Mahina had requested a loan from the complainant, promising to repay it in 9 days. The request was in the form of an e-mail, which was provided. The complainant recorded in a subsequent e-mail of 16 April 2020 her disappointment regarding the lack of progress with her case. The complainant repeated her allegations by e-mail on 3 May 2020 to the then Acting Commissioner who recommended on 11 May 2020 that the Minister take action on it. He did so after interviewing the complainant and obtaining the written exhibits. The Minister also interviewed the complainant on 29 June 2020. She was apparently consistent in her complaint regarding Mr Mahina.
22. On the face of that information, there was ample evidence for the Minister to interdict. We concur, respectfully, with the primary judge on that issue. The criticism of the interdiction is misplaced.
23. In our view Mr Leo has not demonstrated the primary judge to have erred on any of the three main aspects challenged.
24. The decision to dismiss the application pursuant to Rule 17.8 was therefore correct and is upheld by this Court.

E. Result

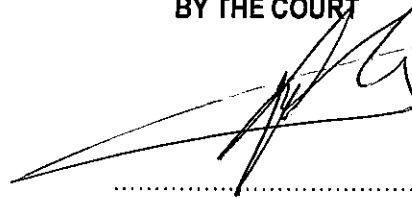
25. The appeal is disallowed.
26. Mr Mahina is to pay for the costs of the appeal, which we set at VT 25,000.



27. The costs are to be paid within 21 days. The costs awarded would have been higher had the State Law Office response to the appeal had been more appropriate. Statutory interpretation is a core function of the legal advisor to the Government, and the interpretation ascribed to "senior officer" in section 1 of the Police Act was simply disingenuous.

Dated at Port Vila this 19th day of February 2021

BY THE COURT



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Chief Justice V. Lunabek

