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

Civil Appeal
Case No. 22/454 CoA/CIVA

BETWEEN: **Martin Iapatu representing himself and Community of Lautaliko, Noam Nisiko, Chief Willie Napuat, Willie Napuat Junior, Frank Matua, John Kalki, Lava Sam, Manu Jack, Tom Tavo, Joseph Iesul, Nakou Pitu, Tavo Numanse, Harry Kawiel, Jimmy Kawiel, Yelo Barnabas, Jimmy Nital, David Rauh, Yane Rachel, Kenneth Kawiel, Kapalu Netel, Sam Tomutu, Charley Nakoma, Willie Talai, Meriam Koniam, Liam Talai, Koniam Nuanapkai, Tes Tapase, Lui Harry, Sam Tapasei, Jack Iasu, Shem Tony, William Iasu, Naute Piak, Angela Kowas, Rema Naute, Jameson Naute, Kawas Naute, Naute Nauanapkai, Kapalu Friman, Nam Talai, Samson Talai, Talai Nauanapkai, Natik Nauanapkai, Siply Naies, Margaret Naies, Willie Naies Family, Charley Maktuan Family, Kafei Sunny, Rabang Sannie, Jerolyn Rowel, Lakin Iahan and Jack Rowel**
Appellants

AND: **Republic of Vanuatu**
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John Mansfield*** ***Hon. Justice Raynor Asher*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Edwin Goldsbrough***
Counsel:	*Molbaleh E for the Appellants* *Aron S for the Respondents*
Date of Hearing:	*9 May 2022*
Date of Judgment:	*13 May 2022*

JUDGMENT

1. Very shortly after the Tanna Island Court issued a judgment reviewing an earlier decision it had made, the present respondent to this appeal revived a 2016 action in the Supreme Court. The Tanna Island Court review decision was issued on 31 August 2018 and Civil Claim 3828 of 2016 was back before the Supreme Court on 3 September 2018. CC 3828 of 2016 had been sent back to the Supreme Court for

hearing by this Court in its decision of 17 November 2017 after a successful attack on summary judgment.

2. By 17 September 2018 the present respondent sought an urgent hearing and on 19 September 2018 made an oral application during a case conference that morning for eviction orders. Counsel was invited to draw up a draft order reflecting that oral application and before the day end that eviction order had been perfected.

3. Whilst the eviction order made on 19 September 2017 has already been set aside by this Court in a decision dated 16 November 2018, its effect lingers.

Background

4. This appeal is against a decision of the Supreme Court within which a claim for damages brought against the Republic of Vanuatu was heard. That claim had been brought by some of those who were evicted by the police in the execution of the order before that same order was set aside. That was a relatively short period between the making of the order (19 September 2018) and its setting aside (16 November 2018) but on 28 September the police had put the order into effect and evicted upwards of 300 people from the land.

5. The claim in the Supreme Court originally named two defendants but in the course of preparation for trial it was agreed that rather than the named defendants being the Republic of Vanuatu and the Commissioner of Police, only the Republic of Vanuatu should remain as defendant. The office of Commissioner of Police and the Vanuatu Police Force itself are established by statute and by virtue of the State Proceedings Act any claim should be brought naming the Republic as the defendant.

6. The notice and grounds of appeal in error reinstated both defendants. That should now be corrected in the documents within this appeal as it was corrected in the judgment now appealed to show only one defendant.

7. The grounds of appeal are nine in number but some are duplicated. Ground one, for example, asserts that the trial judge erred in fact and law by finding that the police executed the eviction order lawfully whereas Ground 8 asserts that the trial judge erred in fact and law by ruling that the Police executed the eviction order lawfully and goes on to assert that the consequent finding of no civil liability on the part of the police is in error.

Discussion

8. In essence, the appeal concerns not the manner in which this order was executed but the fact that it was executed at a time when all avenues of appeal had not yet been exhausted. Counsel for the appellants confirmed during the hearing of this appeal that

there is no complaint within this appeal, or at first instance, of the manner in which the order was executed. Thus, there is no issue of execution outside the scope of the order nor of it being executed by unauthorised personnel. The appeal, and the trial at first instance, are confined to the timing of execution. Quite simply, in the view of the appellants, the police should have waited.

9. As referred to earlier, the Vanuatu Police Force is a statutory creature. Its establishment, organisation, functions and duties are set out in the Police Act [Cap 105]. Also contained within that Act is an immunity provision, in section 40, which provides:-

> "No suit or other legal proceedings for damages shall be instituted in any court of law against the Minister or the Commissioner or any other member of the Force or any other person for or on account of or in respect of any act, matter or thing done or purported to be done or omitted to be done, in good faith, in the performance or exercise of any duty or power imposed or conferred by or under this Act; and the provisions of this section shall extend to the protection from liability as aforesaid of any person deputed by delegation under this Act or under any other law for the time being in force to perform or exercise any such duty or power aforesaid."

10. It is thus accepted on this appeal that the claim could not succeed unless there is evidence of the absence of good faith on the part of those executing the order of the court. The appellant submits that in choosing not to wait until all avenues of appeal had been exhausted, the police action demonstrated bad faith. It was further submitted that there was no reason for the police not to wait, that there was no hurry, and that the police could have ameliorated their action by giving advance notice to those affected. Counsel for the appellant does not suggest that there is any other evidence on this point than that.

11. Nor is it sought to challenge or distinguish the rule set out in Rule 26 of the Court of Appeal Rule 1973 which provides that:-

> *"Stay of proceedings or execution.*
>
> *26. (1) Except so far as the Court of Appeal or a judge thereof, or a judge of the High Court, or in the case of the Gilbert and Ellice Islands Colony the Senior Magistrate thereof, may direct –*
>
> *(a) an appeal shall not operate as a stay of execution or of any proceedings pursuant to any decision of the High Court; and*
>
> *(b) no intermediate act or proceeding shall be invalidated by an appeal."*

12. Given that the appellants sought, on more than one occasion, a stay of execution, it is clear that they were aware of both the availability of such a remedy and its effect. No appeal has been brought against the initial decision not to stay execution, firstly made on 21 September 2018 and thereafter on reconsideration. Whilst counsel for the

appellant sought an order of stay from the trial judge before filing an appeal against the making of the order, the second application to that same judge, for reconsideration of his original refusal, was made after an appeal had been filed. One wonders whether, at that stage, the application for stay would not better have been addressed to the Court of Appeal which, by that time, had been seized of the matter.

13. Counsel for the appellants, when questioned on his submissions, summarised his argument with both conciseness and clarity. "They should have waited, otherwise they were acting in bad faith". This Court is grateful for that clarity.

14. He went on to say that everything was done very quickly at this time and that the police did not appear to care if the order was going to be set aside on appeal or not.

15. At trial, the judge determined that the action of the Vanuatu Police Force in executing the order of the Supreme Court as it did was lawful and that the claimant had not shown a lack of good faith on the part of the police. That finding, given the basis for it having been made, simply that the police should have waited, is unsurprising. It is equally unsurprising that this Court cannot find any evidence within the material filed on this appeal, going towards showing a lack of good faith. That is because the appellants assert nothing other than what they regard as an obligation to wait, unsupported by any law or authority.

16. It is accepted that the time allowed to appeal against the decision to refuse a stay of execution had not expired. It is accepted that an appeal against the making of the eviction order had been filed but not determined before its execution. However, in the absence of an order staying the execution of the eviction order, it remained in force and could be executed at any time before it was set aside. To impose an additional requirement, not set out in legislation or rules of court that a party to an order must await enforcement until after the time provided for an appeal to be lodged has expired and then to await the decision of the appellate court is, in our view, improper.

17. The safeguards against improper enforcement action are threefold. At the application stage, an applicant is required to provide an undertaking against damages. A person who suffers damage may act on the undertaking. A stay of execution may be sought from the trial court. Once an appeal has been filed, the Court of Appeal itself may, if asked, grant a stay of execution. Thus, it is not evidence of a lack of good faith simply to say that the police should have waited.

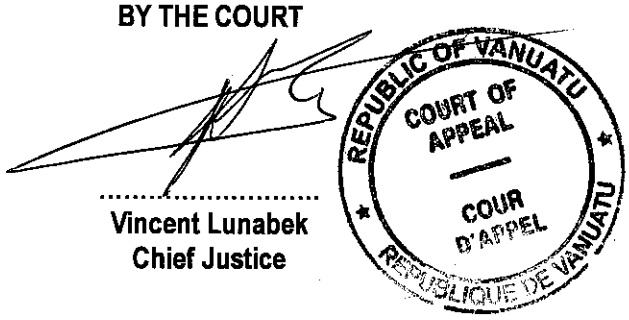
18. Finally, the trial judge ordered costs of the defendant to be paid by the claimants. The application for costs made by the defendant was for VT300,000 which the trial judge considered too high. She reduced the amount down to VT250,000 noting that this would amount to VT5000 per claimant or thereabouts. She made the order for that amount. We cannot see any error in that approach, and whilst the order for costs is raised in the notice and grounds of appeal, it is not the subject of any submissions on the hearing of this appeal.

Decision

19. In the event this appeal is dismissed. The appellants are ordered to pay the respondents costs of and incidental to this appeal of VT100,000. We note that the costs ordered to be paid of VT250,000 remain outstanding. Given the circumstances of the appellants we consider that any approach to the Supreme Court to allow further time to pay either order for costs could perhaps be met with a degree of sympathy.

DATED at Port Vila this 13th day of May, 2022

BY THE COURT



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Vincent Lunabek
Chief Justice