

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

(Civil Jurisdiction)

Judicial Review Case No. 10 of

2012

**BETWEEN: THE UNION OF MODERATE PARTIS COMMITTEE
(INC.)**

Claimant

AND: THE MINISTER OF FINANCE

First Defendant

**AND: THE UNION OF MODERATE PARTIES FOR CHANGE
(UMPC) COMMITTEE ASSOCIATION (INC)**

Second Defendant

Hearing: *14 August 2012*
Before: *Justice Robert Spear*
In attendance: *Colin Leo for the claimant*
Justine Ngwele for the first defendant
Felix Laumae for second defendant

JUDGMENT OF THE COURT

Ex Tempore

1. The Republic of Vanuatu of Vanuatu was originally the second defendant in this proceeding. It is not appropriate for the Republic to remain a party. All counsel agreed that the Republic such be removed. The parties to this proceeding are as reflected above.
2. On 29 March 2012, the Registrar of Charitable Associations received an application by the executive committee of the organisation UMP for Change (UMPC) for registration as a charitable association under the Charitable Associations (Incorporation) Act [CAP 140]. On 11 April 2012, the Registrar notified UMPC that its application to register “*the charity under the name UPM for Change*” was refused. By way of explanation for his decision, the Registrar referred initially to the prohibition in s. 5(2) of the Act against the issue of a certificate of incorporation in a name which he considered resembled too closely the name of an already incorporated committee. As the Registrar had earlier registered UMP (clearly a reference to the claimant), the Registrar stated,

“The Registry is of the view that the name UMP for Change and UMP bear close resemblance and for this reason, your application to register the charity under the name UMP for Change is hereby refused”.
3. The Registrar went further and explained to UMPC that it had a right of appeal to the Minister of Finance against the decision.
4. The Minister of Finance almost immediately received a letter from the President of UMPC by way of appeal against the decision of the Registrar. The Minister considered the appeal on the papers provided to him by UMPC and on 16 April 2012 the Minister gave notice that the appeal was allowed. He directed the Registrar to incorporate UMPC in the name “UMP for Change”.
5. This claim challenges the legality of the Minister’s decision to allow the appeal and to direct that a certificate of incorporation issue in the name UMP for Change.

6. The parties can be conveniently referred to as UMP (Claimant) and UMPC (Third defendant) and that reference extends to the individuals behind each organisation.
7. There is one matter on which all the parties agree and that is that the Registrar of Charitable Associations is not the appropriate authority to determine rights of property in the name UMP or variants thereof. There is another proceeding (*UMP v. Salwai & Or CC 72/12*) in which the claim as to property in the name UMP is to be determined. That case is set for hearing on 28 August 2012.
8. Mr Laumae informed me that this morning that he had just filed an application for this proceeding to be stayed pending the outcome of the hearing of CC 72/12 on 28 August 2012. Mr Laumae's argument is that the decision in CC 72/12, and perhaps any appeal from it, will resolve all issues that arise by this particular case.
9. I have not seen the application for stay (*it was filed only at 9.30 am*). It has not yet made his way to the Court file. Be that as it may, I have had Mr Laumae explain the basis for the application which is as I have just recorded.
10. The application for the stay of this proceeding is declined. The proceedings are quite different in nature and one does not depend on the outcome of the other. Mr Laumae is quiet correct when he identifies and characterises this proceeding as one relating principally to process whereas the issues as to ownership of the name UMP arise to be considered later this month in the other case. There is no reason why this consideration of the legality of the Minister's decision, a quite different question, should not be dealt with now. Certainly, if UMPC and its backers succeed in the name ownership issue, it will be a relatively simple matter to unscramble any issue relating to the name of an incorporated charitable association.
11. Much of the evidence filed in this case addresses the history of the UMP and UMPC organisations. That history has no real bearing on the issues to be addressed in this case which are more to do with process.

12. This Court, when exercising its jurisdiction in judicial review, must be careful not to intrude into the role of the decision-maker – in this case the Minister of Finance. The role of this Court is to examine the lawfulness or legality of the decision made. The Court will look at such matters as whether the decision maker had the power to make the decision in the first place, whether there was any procedural unfairness or a breach of natural justice, and whether the decision made was irrational or unreasonable having regard to the matters or the material properly before the decision-maker. It is important that the Court is so confined in its approach to the review of the administrative decisions to ensure that it does not unnecessarily intrude in to the decision making role that has been created by an Act of Parliament.
13. Mr Laumae and Mr Ngwele argue that the process that saw this appeal heard and determined by the Minister was unexceptional and that it should stand. I cannot accept that submission.
14. I have listened carefully to the argument from both Mr Ngwele and Mr Laumae but neither of them have come close to convincing me that the Minister proceeded with the appropriate and required degree of fairness to all those who could have been affected by his decision. Nor that the Minister had regard to all the material that he should have considered.
15. The evidence is that the President of UMPC, upon receiving the Registrar's letter of 11 April 2012 advising that UMPC's application for registration as a charitable association had been declined, then wrote directly to the Minister purportedly by way of appeal and enclosing substantial documentation relating particularly to the history to the UMP /UMPC organisations. The appeal asserted a right to ownership in the name UMP or variations and extensions of it. As mentioned already, it is accepted that it was not the function of the Registrar, nor by extension the Minister on appeal, to enter the issue of which organisation had the right to the name UMP.

16. It is simply fundamental to any appeal process that an appeal is heard by an independent tribunal with the lawful authority to determine the appeal, after notice of the appeal has been given to all those affected by the decision, and that all those who might be affected by the appeal have the opportunity to be heard on the appeal. The decision on appeal must demonstrably further the purpose and objects of the Act in question; in this case, the Charitable Associations (Incorporation) Act. The Minister did not even call for the Registrar's files much less give UMP the opportunity to be heard. The Minister did not provide any reasons for his decision.
17. Mr Laumae attempted to construct an argument that, while the word "*appeal*" appears in s. 3 of the Act (referring to the right of appeal against the refusal of the Registrar to grant a certificate of incorporation) what is really meant is that this was an opportunity to seek an administrative review of the Registrar's decision. I do not accept that submission. The word *appeal* is deliberately used in the Act and an appeal it must be. However, even if this provision simply provided for the decision of the Registrar to be administratively reviewed by the Minister, there would still be an obligation on the Minister to have regard to the interests of other parties who might be affected by any decision by the Minister and for the decision to be capable of being seen as furthering and conforming with the objects and purpose of the Act.
18. On this score alone, I consider that the decision of the Minister fell into error in relation to the process employed by the Minister when considering this appeal. No fault in this respect can be attached to UMPC.
19. The Minister should have called for the Registrar's file, he should have ensured that he was fully conversant with the reasons why the Registrar had made the decision he did, he should have ensured that UMP was given notice of the appeal and that it was given an opportunity to make representations, and his decision should have been capable of demonstrating that the Minister had had regard to the objects and purpose of the Act and its provisions – particularly the s 5(2) prohibition against incorporated charitable associations having similar names.

20. None of the material before me suggests that the Minister did any such thing.
21. Mr Laumae argued that the plain wording of s. 5(2) meant that the prohibition against the incorporation of charitable associations having similar names applies only to the Registrar and not to the Minister on appeal. I do not agree. Indeed, it opened up a closer examination of the scheme of the Act which caused a reconsideration of how the Registrar's decision should be viewed and what rights of appeal flowed from it.
22. The long title to the Act explains that it is, *To provide for the incorporation of committees of charitable associations and other purposes incidental thereto.*
23. Under s 2(1) of the Act, the committee of an association of any association established for *charitable purposes* (as defined in s 1) may apply to the Registrar for a certificate of incorporation¹ and, in that event, he is required to give reasons for his decision². However, if the Registrar is satisfied that the application complies with the requirements of the Act and that the association is established for the charitable purposes, he may grant such a certificate³. Accordingly, the Registrar is required to consider any application for incorporation under s. 2 in accordance with the requirements of the Act and particularly whether the association is established for charitable purposes. The Registrar is also empowered to refuse an application on the grounds that the objects of the association are discriminatory⁴.

1. Interpretation

In this Act, unless the context otherwise requires –

...

"charitable purposes" includes objects of a religious, educational, cultural, scientific or sporting nature or for general social welfare and any other object the main purpose of which is not financial profit which the Minister declares to be charitable for the purposes of this Act;

...

2. Incorporation of Committee of charitable association

¹ s 2(2)

² s 3(1)

³ s 2(2)

⁴ s 3(2)

(1) The Committee, having not less than six members, of any association established for charitable purposes may apply to the Registrar for a certificate of incorporation of the committee as a corporate body.

(2) The Registrar shall either refuse to grant a certificate or if he is satisfied that the application complies with the requirements of this Act and the association is established for charitable purposes grant a certificate.

(3) When granting a certificate the Registrar may attach such conditions in addition to any that may be attached under section 3(4) as he may consider necessary for the proper functioning and welfare of the association.

*(4) On the date set out in the certificate of incorporation a committee shall become a body corporate and may sue and be sued and do and suffer to be done all that corporate bodies may do and suffer to be done.
(Emphasis mine)*

24. If, however, the Registrar refuses to grant a certificate of incorporation, the aggrieved association has a right of appeal by s 3(3) against the Registrar's decision to the Minister.

3. Appeals from refusal of grant of incorporation

(1) When refusing to grant a certificate of incorporation the Registrar shall give reasons for such refusal in writing to the applicant committee.

(2) The Registrar may refuse to grant a certificate for the reason that the objects of the association discriminate against any person, group of persons or class of persons.

(3) A committee which has been refused a certificate of incorporation may appeal in writing to the Minister within 14 days of receiving notification of the reasons for refusal from the Registrar.

(4) The Minister may either refuse the appeal or order the Registrar to grant a certificate of incorporation to the Committee subject to such conditions, if any, as he may consider appropriate.

(5) The decision of the Minister shall be final and may not be questioned in a Court except on a point of law.

25. Mr Laumae and Mr Ngwele both argued that s. 3 (4) simply provides the Minister with a procedure that permits him to consider the appeal and either refuse it or order the

Registrar to grant a certificate of incorporation subject to such conditions if any as he might consider appropriate. That is, that there is no need for a formal appeal process beyond simply an administrative review by the Minister of the Registrar's decision. In this case, of course, the Minister only saw the appeal from Mr Bulekone and there is no evidence that he had regard to any of the material on which the Registrar based his decision. The Minister's decision on the appeal is silent as to reasons. Even his evidence is unhelpful in this respect,

9 As Minister responsible, I have considered the appeal from the Third Respondent and the supporting documents attached. I am satisfied that the legal and procedural formalities required under the Act have been met by the Third Respondent and to that end I have granted their appeal.

26. How could the Minister avoid the clash between the names UMP and UMPC if he had properly had regard to s 5(2) when considering the appeal? The resemblance between the two names is such that the Registrar could not have legitimately avoided making his decision to decline incorporation in the name UMPC.

27. Section 5(2) provides that the Registrar is not to issue a certificate of incorporation in a name that is undesirable or resembles too close to the name of an already incorporated committee. Of course, that is exactly what the Registrar said motivated him to decline the application.

5. Certificate of incorporation

(1) A certificate of incorporation hereunder shall be in the form set out in Schedule 2 and such certificate bearing the seal and signature of the Registrar shall be conclusive evidence of the incorporation of the committee named therein and the date thereof.

(2) The Registrar shall not issue a certificate of incorporation in a name he considers undesirable or resembles too closely the name of any already incorporated committee or other body whether incorporated or not.

28. Mr Ngwele accepts that the only reason why the application was not granted by the Registrar was because of the Registrar's concern that the name UMP for Change too

closely resembled the name of UMP and the prohibition by s. 5 (2) meant that he could not issue that certificate. That is exactly what the Registrar said in his letter to UMP for Change on 11 April 2012.

29. The Act is not entirely clear on this point but I consider that the scheme of the Act can be extracted and identified providing that the Act is read as a whole rather than simply focusing on individual sections or subsections.
30. The incorporation of a committee of charitable association is governed particularly by s. 2 and s 3(1) & (2). The Registrar is required to have regard to the objects of the applicant association and, in particular, determine whether its objects are in accordance with the definition of *charitable purpose*. Section 2 makes no mention of the name of the association.
31. Section 5(2) then arises to prohibit the Registrar from granting a certificate (as against incorporation) with a name that too closely resembles the name of another relevant body.
32. Sub-sections 3(3) & (4) then govern for an appeal from a refusal by the Registrar to grant a certificate of incorporation.
33. I do not consider that the right to appeal extends to a decision by the Registrar in respect of the name of the association. The appeal appears to be confined to a decision by the Registrar as to whether the applicant association should be incorporated or not. That is, the consideration by the Registrar as to whether the applicant association has been established for charitable purposes and whether its objects, *discriminate against any person, group of persons or class of persons*⁵. It is surely not accidental that the prohibition by s 5(2) appears after both the incorporation and the appeal provisions.
34. Accordingly, the decision of the Registrar should be viewed more correctly that while UMPC otherwise qualified for incorporation as a charitable association, the name it chose

⁵ s 3(2)

was unacceptable as UMP for Change too closely resembled an existing incorporated body; namely, UMP.

35. This construction of the Act appears to find some support because it is the Registrar who has knowledge of all other bodies that are either incorporated under this Act or which may be known to the Registrar. This will not necessarily be a matter before the Minister particularly if the Minister does not see a report from the Registrar when considering an appeal.

36. Accordingly, I find that the right of appeal to the Minister under s 3(3) is confined to the issue as to whether the applicant association is one that should be incorporated as a charitable association or not. It does not extend to the name of the association as that is left for the Registrar to deal with in accordance with the prohibition placed on the Registrar by s.5(2).

37. The Registrar unfortunately misled UMPC in the penultimate paragraph of his letter of 11 April 2012. The Registrar indicated that there was a right of appeal against his decision. What the Registrar should have said at that time is that UMPC qualified for incorporation as a charitable association but that he was prohibited from granting a certificate of incorporation in the name UMP for Change as that name too closely resembled UMP.

38. It follows therefore that the claim must succeed. It does so for these reasons:

- a. The appeal process was flawed procedurally and it was unfair. Not only did the Minister not have regard to the material on which the Registrar made his decision, but UMP should have had the opportunity to be heard on the appeal. Additionally, the Minister did not give sufficient or appropriate consideration to the prohibition arising by s 5(2) or, if he gave any consideration to that prohibition, he does not explain how he rationalised his decision in this respect.
- b. In any event, there was no right of appeal against the decision of the Registrar to refuse to issue a certificate of incorporation in the name UMP for Change.

39. It is important to emphasize again that this decision does not, in any way, determine any ownership issue in respect of the name UMP or variations thereof. That will be a matter for the other case which goes to trial later this month.
40. The decision of the Minister of 16 April 2012 to allow the appeal and to direct the Registrar to issue a certificate of incorporation to the third respondent in the name *UMP for Change* is accordingly quashed.
41. This leaves UMPC's application still before the Registrar and on the understood basis that the Registrar will register that association as a charitable association and issue a certificate of incorporation once it nominates a name for the association that the Registrar finds acceptable.
42. The claimant is entitled to its costs which will be shared equally between the first and second defendants on a standard basis to be agreed or taxed. The Republic actively defended this claim rather than taking the usual approach of assisting the Court as best it could and indicating that it would abide the decision.

BY THE COURT

A handwritten signature in black ink, appearing to read "Alfred J.", written in a cursive style.