

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Constitutional Case No. 1 of 2012



IN THE MATTER OF: TRIDENT HOLDINGS LIMITED

IN THE MATTER OF: THE REPUBLIC OF VANUATU

Coram: Judge Aru

Counsel: Mr. L. Napuati for the Applicant
Mr. J. Ngwele & Mr. K. Nathan for the Respondent

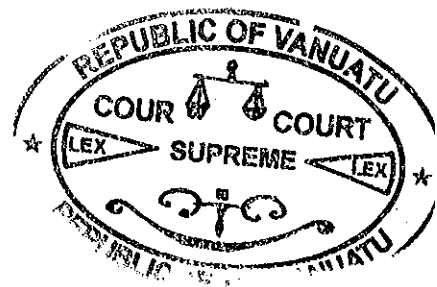
JUDGMENT

Background

1. This is a Constitutional Application made by a Company, Trident Holdings Limited pursuant to Article 6 and Article 53(2) of the Constitution for the enforcement of its rights.

Constitutional Application and Relief Sought

2. The Applicant filed its Application on 9 January 2012 with a sworn statement of urgency. It also filed two sworn statements from Candice Griffin, two sworn statements from Less Napuati, Counsel for the Applicant and a sworn statement each from Chantal Gauchet, Jerome H G Brandt, Guy Bernard and Gregory A Calcino. Three written submissions were also filed. The following relief was sought:
 - 1) *An Order for the Marine Division of the Department of Ports and Harbor to survey and register the F/V "Serenity" in accordance with the enactments of the Shipping Act [CAP 53].*
 - 2) *An Order for the Department of Customs to provide the Applicant's Customs Agent with a manifest number and subsequently to cause the importation of the F/V "Serenity" in accordance with the applicable law.*



- 3) *An order for the department of Fisheries to grant the F/V "Serenity" with a local fishing licence as prescribed in schedule 10 of the Fisheries Act [CAP 351] as soon as the vessel is registered by the marine Division and cleared by the Department of Customs.*
- 4) *An Order for the Respondent to pay just compensation to the Applicant for the losses and damages suffered and continues to suffer. The quantum of such compensation being established on the evidence to be provided by the Applicant.*
- 5) *Costs*
- 6) *Such Orders as the court deems fit.*

Response to the Constitutional Application

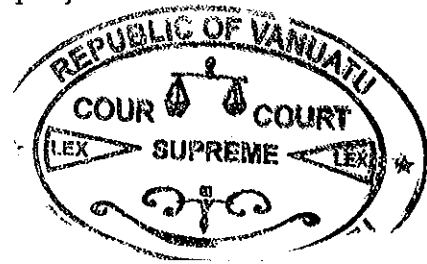
3. The Respondent filed a Response which opposed the granting of any relief to the Applicant. Also filed were sworn statements in support from Hendry Worek, the Principal Licensing Officer, Ben Wotu Leeshi, the Director of Customs and Stanley Trief and Willie Silen.

Issues

4. Initially the Application complained of the decision and actions of the Department of Customs and the Principal Licensing Officer, Ports and harbor but before the hearing of submissions it was agreed by both Counsels that the only issue for determination is whether the decision and actions of the Principal Licensing Officer infringed upon the rights of the Applicant under Article 5 1) (d) and (k) of the Constitution.

Facts

5. In brief, the facts are that the F/V "Serenity" was formally an Australian owned fishing vessel which was purchased by the Applicant in Brisbane on 8 November 2011.
6. On 10 November 2011 the F/V "Serenity" was confirmed by an Australian surveyor after inspection that it was seaworthy and compliant to Queensland commercial regulations.
7. On the same date a provisional certificate of registration was issued for a sole voyage from Australia to Vanuatu by Guy Bernard , Deputy Commissioner



pursuant to section 8 (1) of the Maritime Act [CAP 131] . This certificate was to expire on 30 December 2011.

8. On the 14 November 2011, the F/V "Serenity" was cleared by the Australian authorities for its voyage to Vanuatu.
9. On the 16 November 2011 the Applicant lodged an Application for registration of F/V "Serenity" with the Department of Ports and Harbors in Port Vila.
10. On the 22 February 2012 the Applicant was served with the Principal Licensing Officer's decision rejecting the Application for registration. The decision is dated 13 January 2012.

The Law

CONSTITUTION OF THE REPUBLIC OF VANUATU

11. Under the Constitution Article 5 1) (d) and (k) provide as follows:

"(1) The Republic of Vanuatu recognizes, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health –

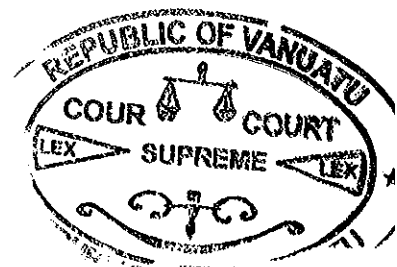
.....
(d) *protection of the law;*

.....
(k) *equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas."*

12. Article 6 provides as follows:

"(1) Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.

(2) The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right".



13. Article 53 provides as follows:

“(1) Anyone who considers that a provision of the Constitution has been infringed in relation to him may, without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress.

“(2) The Supreme Court has jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution.”

SHIPPING ACT [CAP 53].

14. Under the Shipping Act [CAP 53] the term “Vessel” is defined to include any fishing vessel.

15. Part 4 of the Act provides for Safety Certificates and sections 18 and 19 provide as follows –

“PART 4 – SAFETY CERTIFICATES

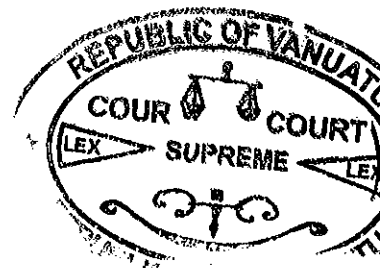
18. Penalty, for proceeding on voyage when no valid safety certificate

(1) If any vessel engaged in trade or passenger traffic, whatever its means of propulsion, proceeds upon any voyage or excursion, unless there is subsisting a valid and unexpired safety certificate issued in respect of that vessel under section 25, or by any other competent authority acceptable to the Principal Licensing Officer, the owner, master or bosun of such vessel shall be guilty of an offence and on conviction thereof shall be liable to a fine not exceeding VT 100,000 or to a sentence of imprisonment not exceeding 1 year, or to both such fine and imprisonment.

(2) If upon demand therefor by any licensing officer the owner, master or bosun of any vessel engaged in trade or passenger traffic fails without reasonable cause or excuse to produce to such licensing officer the safety certificate of such vessel and the certificates of competency of the officers, engineers or mechanics of the vessel, he shall be guilty of an offence and on conviction thereof shall be liable to a fine not exceeding VT 25,000 or to a sentence of imprisonment not exceeding 2 months, or to both such fine and imprisonment.

“19. Application for survey

The owner of a vessel shall make application for a survey in the form prescribed in Schedule 8 which together with the fee prescribed in Schedule 9 shall be lodged with the Principal Licensing Officer not less than 2 months prior to the date on which a safety certificate is desired to become effective.”



SHIPPING REGULATIONS ORDER NO 6 OF 1999 ("Order No 6 of 1999")

16. Under Order No 6 of 1999 , section 1 provides for the Registration or Licensing of Vessels and section 1.1 (a) provides inter alia as follows –

“Every vessel other than a foreign registered vessel, operated within Vanuatu’s economic zone which is:

- a) *a fishing vessel of over 8 meters in length and engaged in commercial fishing which is not registered under a foreign flag or*

.....

.....

must be registered pursuant to section 2.”

17. Section 2 (1) provides for the Issuance of Certificate of Registration and provides as follows –

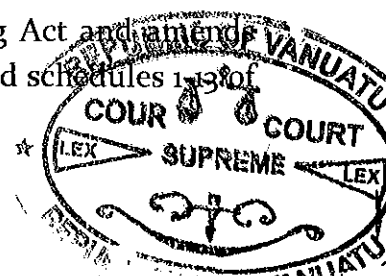
“ (1) Upon receipt of a written application in the Form set out in schedule 14 from an owner of a vessel required to be registered under regulation 1.3 or on a voluntary basis under 1.2 and upon payment of the prescribed fee , the Principal Licensing Officer may issue a certificate of registration for the vessel provided that the owner furnishes proof satisfactory to the Principal Licensing Officer :

- a) *as to ownership of the vessel*
b) *any foreign marine document for the vessel has been surrendered with the consent of the government that has issued it, or that has legally been cancelled;*
c) *the vessel is in a seaworthy condition;*
d) *the registration fee has been paid*
e) *that the registered owner has and continues to hold public liability, pollution cleanup , and wreck removal insurance cover for amounts appropriate to the size of the vessel;*
f) *that all requirements contained in schedule 14 have been complied with .”*

18. Schedule 8 of the Order provides for the Application for the Survey of a vessel and that is made pursuant section 19 of the Act and Schedule 9 provides for Survey Fees also pursuant to section 19.

SHIPPING AMENDMENT ORDER NO. 18 OF 2004 ("Order No 18 of 2004")

19. Order No 18 of 2004 amends certain schedules to the Shipping Act and amends Shipping Regulation Order No 6 of 1999 by repealing clause 4 and schedules 1, 3 of



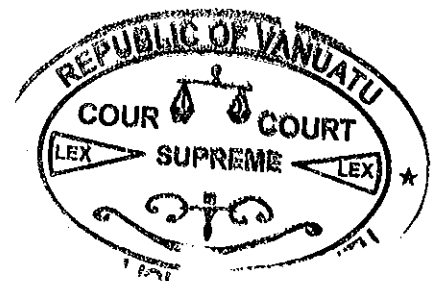
that Order. Schedules 8 and 9 of Order No 6 were not repealed and remained in force.

Application of the Law

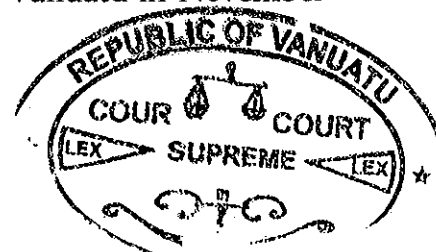
20. I deal firstly with a couple of preliminary matters, this constitutional application is brought by a Company. On the question of its standing to bring such an application, the Court was referred by the Applicant to the opinion of the Chief Justice expressed in *Vanuatu Copra and Cocoa Exporters Limited v Republic of Vanuatu* [2006] VUSC 74 in allowing the Applicant Company to be heard on its Application where he stated that –

“ I am of the opinion that the expression ‘all persons’ in Article 5 (1) of the Constitution includes artificial legal persons”

21. I concur with the opinion of the Chief Justice. Secondly, following the agreement of Counsels at the start of the hearing that the only issue for determination was whether the decision and actions of the Principal Licensing Officer infringed upon the rights of the Applicant under Article 5 1) (d) and (k) of the Constitution, the Application is therefore deemed to be made pursuant to Article 6 alone and not Article 53.
22. The first limb of the Applicant’s submissions is that its rights were denied by the Respondent in that although it had met all the requirements for applying for registration, its application was rejected by the Principal Licensing Officer. I must state at the outset that when the F/S “Serenity” left Australia and entered Vanuatu waters, it entered the jurisdiction of a sovereign state with its own set of laws. It must be understood that compliance with Australian laws does not mean that one has complied with all the legal requirements for the purposes of the Republic of Vanuatu.
23. The Shipping Act [CAP 53] and the regulations made pursuant to it are laws applicable in Vanuatu for the control and safety of Vanuatu vessels. The Act defines a vessel to include any fishing vessel. Therefore the Application to register the F/S “Serenity” must comply with the Act.
24. The Respondent does not dispute the fact that an Application for registration was made but argues that the Act was not fully complied with by the Applicant when it lodged its Application which was why the Application was rejected.



25. Section 18 makes it an offence for any vessel to proceeding on a voyage with no valid safety certificate.
26. Section 19 of the Shipping Act makes it quite clear that it is mandatory that *“the owner of a vessel shall make Application for a survey in the form prescribed in schedule 8 which together with the prescribed fee in schedule 9 shall be lodged with the Principle License Officer not more than 2 months prior to the date on which a safety certificate is desired to become effective.”*
27. Order No 18 of 2004 did not repeal schedules 8 and 9 of Order 6 of 1999 which means that these requirements were part of Order No 6 of 1999 at the time the Applicant applied for registration.
28. There is no evidence that the Applicant ever made an application pursuant to schedule 8 and similarly there is no evidence that fees prescribed by schedule 9 were lodged with the Principal Licensing Officer within the timeframe stipulated by section 19. The only Applications made were those specified in the letter of 15th November 2011 which is at Annexure “CG13” of Candice Griffin’s sworn statement.
29. This non compliance was pointed out by the Principal Licensing Officer in his response of 13 January 2012 rejecting the Applicant’s application for registration.
30. In determining whether the Applicant was denied his rights I adopt the principle or the test in the Canadian case of *R v Morin [1992]1 SCR 771 at 787* which is *persuasive authority*, where the Court said –
- “the general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interest which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay.”*
31. In applying this test, I am satisfied that Applicant’s rights were not denied. Firstly I accept that a response was given. There was some delay but a response was given to Applicant’s application which was rejected on the basis that the Applicant did not fully comply with the requirements of the Act.
32. The second limb of the Applicant’s submissions is that the delay of 3 months during a cyclone season infringes upon the Applicants rights to protection of the law under Article 5 (1) d). I must say I find little merit in that argument as it was the Applicant which decided to bring the F/V “Serenity” to Vanuatu in November



which is common knowledge that that is the beginning of the cyclone season in Vanuatu. This is acknowledged by Candice Griffin in her sworn statement of 9 February 2012 at Annexure "CG 20". The argument in itself would seem to suggest that in a cyclone season the Principal Licensing Officer should issue the certificate of registration immediately upon receipt of the application. That would be contrary to the Shipping Act which sets out the requirements to be met before any certificate is issued be it during a cyclone season or otherwise .

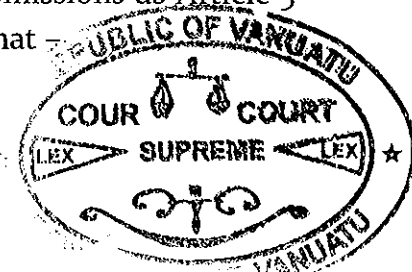
33. I was referred to the decision of Bulu J in *Public Prosecutor v. Bernard & Ors [2005] VUSC 153* by the Respondent on the issue of delay. The circumstances of that case are different. On the issue of delay it was said that "*a delay of two months in the circumstances of that case between conclusion of the hearing and verdict was the most that could have been reasonable justified.*" In this case the Principal Licensing Officer is vested with discretion to issue certificates as is apparent from section 2 of the Shipping Act which inter alia states that "*...the Principal Licensing Officer may grant licenses and certificates under the provisions of the Act..*" which means that he has to ensure that the requirements of the Shipping Act are complied with before issuing any such certificates. The issuing of certificates is not mandatory upon receipt of the application.

34. In *re the Constitution , Chan v Jimmy No 2 [1997] VUSC 36*, the Court applied the principle laid down in *Browley LBC v Greater London Council (1983) 1 AC 768* where it said –

"A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so – he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must by the use of his reason, ascertain and following the course which reason directs. He must act reasonably."

35. In that respect, I am satisfied that the delay of two to three months is reasonably justified. A response was given and I am not satisfied that the Applicant was not treated unjustly.

36. The third and final limb of the Applicant's submissions is that the its rights under Article 5(1) d) and k) were infringed by the Respondent. Counsel for the Respondent submitted that such rights are subject to respect for the rights and freedoms of others and to the legitimate public interest in defence , safety, public order welfare and health . I agree with the Respondent's submissions as Article 5 (1) is clear and there is nothing ambiguous about it. It states that –



"The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health -

(emphasis mine)

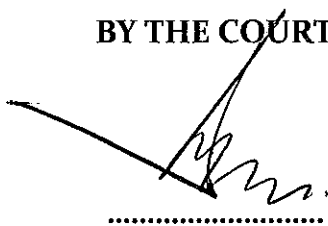
37. The Applicant's non compliance with section 19 of the Shipping Act meant that the F/V "Serenity" had no safety certificate and section 18 makes it an offence for any vessel which in this case is a fishing vessel to proceed on any voyage without a safety certificate .This failure by the Applicant outweighs the Applicants right to claim its right to protection of the law as it directly impinges upon the "legitimate public interest in safety."

Conclusion

38. In conclusion, the Applicant's Application as a Constitutional Application is misconceived as it has not established that it's rights under the Constitution have been infringed. The Constitutional Application is dismissed and the Respondent is entitled to its costs to be taxed failing agreement.

DATED at Port Vila this 16th day of July, 2012.

BY THE COURT



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D. ARU
Judge

