

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

Judicial Review Case No. 16/3430 SC/JUDR

BETWEEN: ALBERT NALPINI
Applicant

AND: THE POLICE SERVICE COMMISSION
First Respondent

AND: PRESIDENT OF THE REPUBLIC OF VANUATU
Second Respondent

Date of Hearing: February 3rd and March 16th 2017

Submissions: March 21st and 23rd 2017

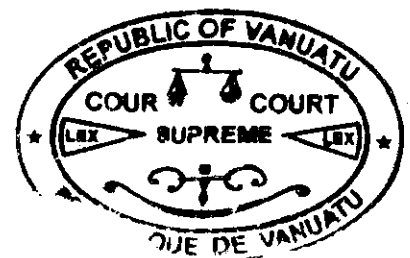
Date of Judgment: Tuesday April 18th 2017

Before: Justice JP Geoghegan

Appearance: Mr Less Napuati for the Applicant
Mrs Adeline Bani (SLO) for the Respondents

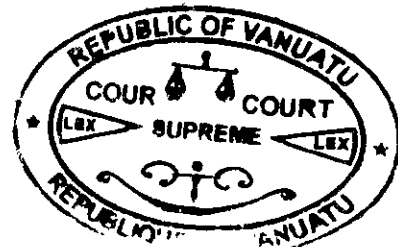
JUDGMENT

1. In these judicial review proceedings the claimant Mr Nalpini seeks various orders and declarations relating to his "non-appointment" as the Police Commissioner for Vanuatu.
2. Most of the factual background is agreed between the parties.
3. On April 6th 2016 the Police Service Commission ("PSC") advertised the position of the Police Commissioner for Vanuatu. A number of persons applied for the position including the claimant Mr Nalpini.



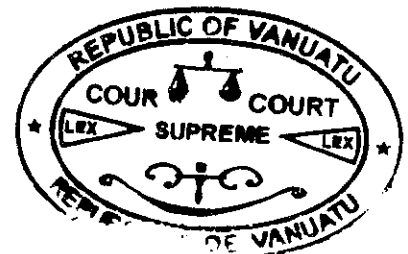
4. Once the applications had been received the Commission appointed a Panel for the purpose of scrutinizing the applications, shortlisting the applicants, interviewing the short listed applicants and recommending a strongest candidate to the Commission. That panel consisted of three persons.
5. The applicants for the position were shortlisted by the Panel in order of suitability and preference with the Acting Commissioner Mr Robsen Iavro being ranked as first preference and Mr Nalpini being ranked as second preference. Mrs Clera Seth was ranked as third preference. After the ranking processes had been completed the panel then interviewed the top three preferred candidates and as a result arrived at a recommendation for the Commission. Mr Iavro was recommended by the Panel as a "*strong recommended candidate*" while Mr Nalpini was recommended as an "*eligible candidate*".
6. The PSC met to consider the issue of appointment of a Police Commissioner on June 29th 2016. At that time the Panel's recommendations were presented to the Commission by its Secretary Mr Job Boe for its consideration. Included in the information provided to the Commission was the identity and rankings of all applicants. The Minutes of the Commission's meeting of June 29th record inter alia, as follows:-

"After much discussion, the Police Service Commission Board decided that Mr Albert Nalpini is the strongest candidate for the position and should be appointed the new Commissioner of Police. The Board also noted that Mr Robsen Iavro has recently been promoted for the position of Commander of the Vanuatu Mobile Force and has not even started to perform in this position but appointed as Acting Commissioner of Police so it is better for him to return to the VMF where he was originally recruited to serve".
7. On July 4th 2006 the Chairman of the PSC, Mr Api Marikembo together with the Secretary and another member of the PSC consulted the Minister of Internal Affairs and informed him of the decision of the Commission in recommending Mr Nalpini

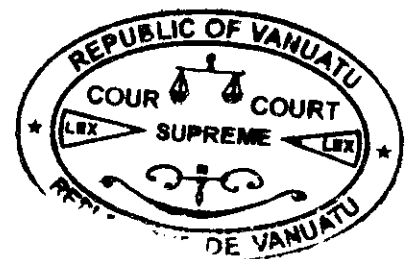


to be appointed as the new Commissioner. After that consultation and in accordance with usual practice Mr Marikembo then asked the Secretary of the PSC to arrange a meeting with the President for the signing of the necessary instruments of appointment.

8. On July 4th the PSC also received a letter from Mr Iavro withdrawing his name for any further consideration for the position of Police Commissioner. He expressed the view in the letter that the PSC may not have confidence and trust in his ability to lead the Vanuatu Police Force and for that reason he would be tendering his immediate resignation as Acting Commissioner of Police.
9. Mr Henry Nin, the Assistant Private Secretary to the President gave evidence that on July 5th 2016, the Secretary of the PSC, Mr Boe emailed him and requested that a meeting be arranged on July 7th at around 10 or 11 am between the Commission and the President for the President to sign the instruments of removal of the Acting Commissioner of Police and appointment of the new Commissioner. He said that he responded by stating that he would try to arrange the proposed meeting but that on the morning of July 7th he received another email from the Secretary of the Commission requesting if the meeting could be postponed to 2 pm on the same day. At 9:20 am on July 7th Mr Nin advised Mr Boe that the President was absent from duty due to the death of a relative and that he would resume duties the following week. Mr Nin stated that he advised Mr Boe that he would inform him once the President was available. As it was, the President resumed his duties on July 11th. Mr Nin stated that that apart from that unsuccessful attempt to arrange a meeting between the Commission and the President no other arrangement was made to meet again on a different date. Mr Nin also stated that he had not personally informed the President about the meeting nor of the instruments to remove the Acting Commissioner of Police and to appoint the new Commissioner.
10. Mr Nin's evidence was not shaken in cross examination and I accept his evidence.

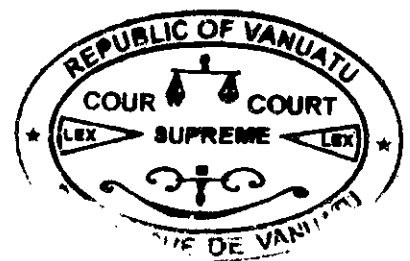


11. A further aspect of the matter was that around this time there was a meeting between the Minister of Internal Affairs, Mr Moah and the President. In a sworn statement Mr Moah stated that *"around or after 8 July 2016"* the President summoned Mr Moah to meet with him at the State House for reasons which were then unknown to Mr Moah according to his evidence. Mr Moah subsequently met with the President along with Mr Bethuel Solomon, the Chief Executive of the State Office. The purpose of that meeting related to issues surrounding the appointment and removal of Mr Marikembo as Chairman of the Commission. Mr Moah stated that he did not go further to discuss the appointment of the new Commissioner as he was aware that by operation of section 7A of the Police Act it was the duty of the Commission to advise the President on who is to be appointed as Commissioner of Police. As to the exact date of the meeting, Mr Moah was not asked about this.
12. During the course of cross examination Mr Moah confirmed that he had instructed the Commission to re-advertise the position for Police Commissioner. I asked Mr Moah whether he considered that it was possible for the PSC to have simply ratified the recommendation as opposed to re-advertising. He agreed that it was. In reply to my inquiries as to why that possibility was not discussed, the Minister stated that for good governance purposes it was appropriate to re-advertise. He confirmed that he had not thought about ratification of the previous decision.
13. Mr Bethuel Solomon confirmed that he had attended the meeting between the President and the Minister and confirmed also that the only issue for discussion was the position of Mr Marikembo as Chairman of the PSC. Mr Solomon acknowledged that the dates when people called to meet with the President were recorded in a book but that he could not remember when the meeting had taken place.
14. On July 12th Mr Marikembo's position as Chairman of the PSC was terminated by the Minister of Internal Affairs. The grounds for the purported termination were that Mr Marikembo had a prior criminal conviction which prevented him from being



eligible to act as chairman. The decision to terminate Mr Marikembo's appointment was met with an application by Mr Marikembo for judicial review. It is not disputed that prior to the hearing of this matter orders were made by consent in Mr Marikembo's proceedings pursuant to which the decision to terminate his position as Chairman of the PSC was declared to be unlawful. Those orders were made on November 18th 2016 and there is no dispute that at all relevant times the PSC was aware of them.

15. Immediately upon the removal of Mr Marikembo, Mr Willie Vira was appointed as the new chairman. Rather than endorsing or ratifying the decision to appoint Mr Nalpini, a decision was made to re-advertise the position. It is clear from the evidence of Mr Vira that the reason for that was that the Minister had advised that that was the course to be adopted by the Commission. I was informed that applications have been called for and received but no further steps have been taken in the light of these proceedings. Mr Nalpini did not make an application and has taken the position that he was recommended by the Commission for the position of Police Commissioner of Vanuatu and that he should therefore be duly appointed.
16. Despite numerous requests by Mr Nalpini's counsel to the PSC that the PSC present the recommendation of Mr Nalpini to the President, the PSC has steadfastly declined to do so, insisting that the re-advertising process must go ahead. In his evidence, Mr Vira frankly acknowledged that the possibility of ratifying Mr Nalpini's recommendation has simply not been an option which has been considered by the PSC.
17. Mr Napuati was anxious to portray the difficulties experienced by the PSC in trying to arrange a meeting with the President as being indicative of some kind of deliberate attempt to impede the appointment of Mr Nalpini. Having heard the evidence however, I do not think that it supports such a conclusion. The evidence



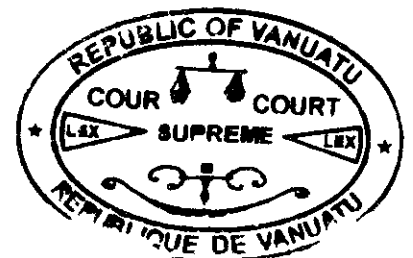
establishes that after the first attempt to meet with the President no further requests were made and matters were then simply overtaken by the removal of Mr Marikembo.

THE CLAIM

18. In his judicial review claim Mr Nalpini applies for the following orders:-
- 1) An order/declaration that the first respondent's decision on 29th June 2016 was a lawful decision.
 - 2) An order/declaration that the declared lawful decision is forwarded by the first respondent to the second respondent.
 - 3) An order that the second respondent is to reconsider the decision of the first respondent on 29th June 2016 and "gives a decision".
 - 4) That the decision of the first respondent is binding on the President.
 - 5) The process of appointing a new Police Commissioner be stayed until final determination of this case.

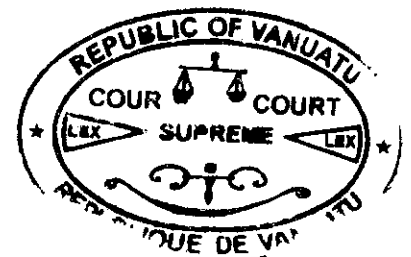
DISCUSSION

19. At the commencement of hearing counsel's submissions in respect of this matter I sought some clarification as to the decisions which were to be the subject of judicial review. I did so as I did not regard the judicial review claim filed on October 12th to accurately reflect the decisions actually under review and, in fairness to Mr Napuati who had filed the judicial review claim, that had been prior to the State conceding that Mr Marikembo's appointment was unlawful.
20. It appeared that the decisions the Court was being asked to review were the following:-
- a) The decision of the PSC not to send the recommendation for the appointment of Mr Nalpini to the President and to meet with the President in respect of that recommendation.



- b) The decision of the PSC to re-advertise.
- c) The alleged decision of the President not to make a decision in respect of the recommendation for Mr Nalpini's appointment after being informed or advised of that recommendation.
21. Given that these matters had been the focus of the hearing and that evidence was given in respect of them I wished to avoid a situation where, putting to one side the issue of time limits for claims, further proceedings could be issued on the basis of an alleged decision not considered by the Court in these proceedings. It would not be in the interests of the parties or indeed the community to allow that to occur.
22. After a brief adjournment to enable counsel to discuss the matter with their clients both Mr Napuati and Ms Bani confirmed that those decisions could be regarded for the purposes of these proceedings as the decisions under review.
23. Rule 17.2 of the Civil Procedure Rules No. 49 of 2002 defines "*decision*" as meaning:-
"A decision, an action or a failure to act in relation to the exercise of a public function or a non public function;".
24. The issues for consideration in a judicial review application are whether in making the decision the decision maker took into account factors that ought not to have been taken into account or failed to take into account factors that ought to have been taken into account or that the decision is so unreasonable that no reasonable decision maker would ever consider imposing it.
25. As to the issue of reasonableness, that was considered in the English case of Associated Provincial Picture Houses v. Wednesbury Corporation¹ where Lord Green said:

¹ [1948] 1KB223



"It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of a statutory discretion often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with the discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has had to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v. Poole Corporation [1926] Ch66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things ran into one another".

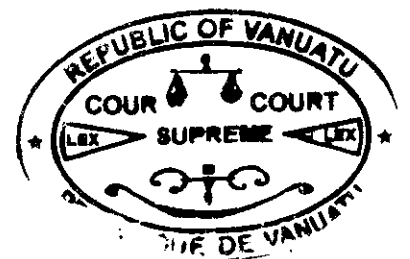
26. In considering the issue of the appointment of a Police Commissioner the starting point is section 7A (1) of the Police Act [Cap. 105] which provides:-

"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 for a period of five years and the person is eligible for re-appointment".

27. The interpretation of section 7A (1) was considered by Spear J in Bong v. President of the Republic of Vanuatu². At paragraph 58 of that decision, his Lordship stated:-

"The way that section 7A (1) is drafted suggests that the President is required to make the appointment in accordance with the advice of the Commission but only after the President also consults with the Minister. That is surely not what was intended by Parliament. It could provide a conflict between the advice of the

² [2012] VUSC 157

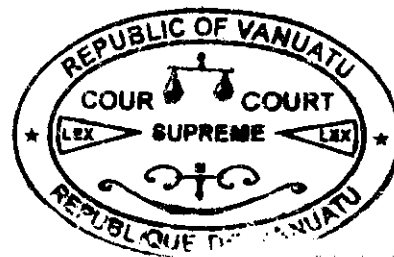


Commission and views of the Minister as to the appointment. That would not have been the intention of Parliament who would not wish to place the burden on the President of having to address such a conflict. The intention would surely have been for the Commission to consult with the Minister prior to advising the President on the appointment”.

28. With respect, I agree with that analysis of section 7A (1) and approach the interpretation of the section on that basis. In this case that process was followed as the Commission met with the Minister regarding the appointment. The clear and unequivocal evidence is that the Minister approved of the appointment, a position which he confirmed when he gave evidence during the course of this hearing.

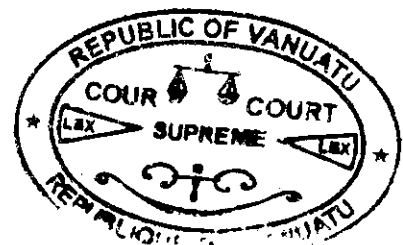
THE DECISION OF THE PRESIDENT

29. It is clear from the evidence that the President has not made a decision in respect of the recommendation of Mr Nalpini's appointment. What is also clear from the evidence is that Mr Marikembo had made unsuccessful attempts to meet with the President to discuss Mr Nalpini's appointment.
30. Mr Napuati for Mr Nalpini submits that section 7A (1) makes it mandatory for the President to appoint the Commissioner of Police. Therefore, once the President has been notified that the PSC has agreed on an appointment then the President has no choice but to confirm that appointment.
31. With respect, I do not agree with that analysis. Clearly the President is to receive advice from the Commission. While one might assume that in most cases the President would have little cause to disagree with the advice of the Commission I do not consider that section 7A (1) can be interpreted in a way which effectively deprives the President of any discretionary power at all and which effectively makes the process a "rubber stamping" exercise. In that regard I note that section 7A (1) does not employ the word "shall" but employs the words "is to" with



reference to the appointment to be made by the President. In my assessment section 7A (1) contemplates a situation where the PSC is not required only to advise the President of its choice and there may well be situations where it may be required by the President to explain the reasons for that choice. There may also be a situation where the President, for whatever reason, expresses concerns regarding the appointment which the PSC would then have to respond to.

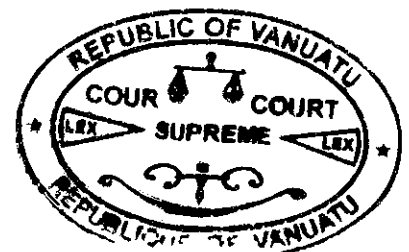
32. But even if Mr Napuati's analysis were correct there is no evidence that the President was aware that the PSC had agreed upon Mr Nalpini's appointment as the new Police Commissioner and that the purpose of the proposed appointment to see the President was to seek confirmation of Mr Nalpini's appointment.
33. In this case it is clear with reference to the claim against the President that the claim is not in respect of a decision, no decision having been made, but in respect of a *"failure to act in relation to the exercise of a public function"*. Regrettably however the evidence does not satisfy me that the President has failed to make a decision: A failure to make a decision must contemplate a situation where the decision maker has been requested to make a decision and, having been fully informed of the subject matter in respect of which a decision is required has simply neglected to make that decision or has otherwise failed or refused to make the decision. That is not the case here.
34. What the evidence establishes is that matters were overtaken by the unnecessary and unlawful termination of Mr Marikembo's position as Chairman. That set in train a chain of events resulting in the appointment of a new Chairman and the re-advertising of the Police Commissioner vacancy. While such steps were, in my assessment unnecessary, the evidence does not satisfy me that the President, having been fully appraised of the situation and the need for a decision, simply refused to take any necessary steps.
35. For these reasons, the claim against the President must fail.



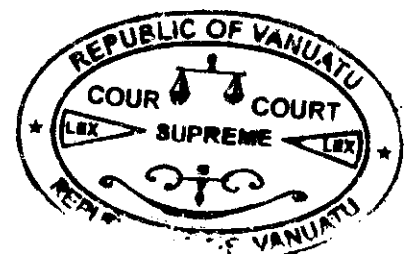
36. The real difficulty that has arisen in this case is the Commission's failure or refusal to present the recommendation of Mr Nalpini as Police Commissioner to the President. It is clear from the evidence that this is not a course of action which was ever contemplated by the new Chairman Mr Vira, who gave very clear evidence that a re-advertising of the position occurred as result of the directions of the Minister.

THE ACTIONS OF THE POLICE SERVICE COMMISSION

37. In her submissions Mrs Bani referred to the fact that prior to the consent orders which declared Mr Marikembo's removal to have been unlawful, the Government and the Commission were of the view that all decisions that the Commission made at the time Mr Marikembo was Chairman were unlawful because his appointment was unlawful. While that may be so, the essential point is that no consideration appears to have been given by the PSC to the situation created by the fact that Mr Marikembo's termination was subsequently accepted by the State to have been unlawful. Accordingly the PSC was confronted with a position where it was required to consider the fact that PSC's recommendation of Mr Nalpini was a lawful one.
38. Mrs Bani also submitted that upon the removal of Mr Marikembo the Commission believed that the process of recommendation from the Panel to the Commission *"was biased because of the internal unfairness process by the Commission when recommending the claimant"*.
39. The State's statement of defence to the amended judicial review claim which was filed on behalf of both the first and second defendants is eight pages long. At no point in that document is the issue of bias ever referred to. In addition, the amended statement of defence does not in any way allege or assert that the decision of the PSC to recommend Mr Nalpini was unlawful or in any way invalid because of alleged bias.

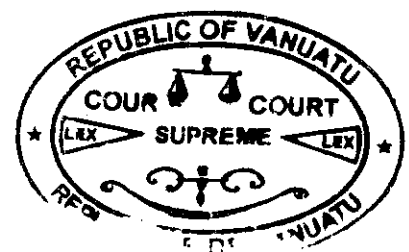


40. Mrs Bani referred in her submissions on the issue of bias to a sworn statement of the Secretary of the PSC Mr Job Boe where Mr Boe referred to the fact that after his presentation of the Panel's findings and before the Commission made its final decision in recommending Mr Nalpini, Mr Marikembo read out a written statement which related to the alleged weaknesses of the current Acting Commissioner. The statement which Mr Marikembo was read out was annexed to Mr Boe's statement. Mr Boe's reference to this matter occupies one paragraph of the 37 paragraph statement.
41. There is absolutely no evidence apart from the rather vague reference by Mr Boe to Mr Marikembo's statement which supports any submission that the Commission believed that the process of the recommendation of Mr Nalpini was biased. Accordingly I take no account of that matter.
42. Mrs Bani also submitted that the Supreme Court could not intervene and direct the PSC to present the recommendation to the President as doing so would be encroaching upon the independence of the Commission. Ms Bani based this submission on section 9 A (2) and (6) of the Police Act which provide as follows:-
- "9A (2) Subject to this Act, the Commission is to act independently on matters affecting members of the force, including relating to the appointment, resignation, compulsory retirement, discharge, dismissal and discipline of members.....*
- (6) Subject to this Act the Commission has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions."*
43. It is Mrs Bani's submission that any Court order directing the Commission to forward the same to the President would be an encroachment upon the



independence of the Commission and would therefore be in breach of section 9A (2) of the Police Act.

44. I do not accept that submission. The requirement that the PSC be an independent body does not mean that the Commission may operate outside or beyond the reach of the law. To accept such a submission would be to accept that the PSC is immune from judicial review. That simply cannot be the case. The PSC like any other similar body must act in accordance with the law and is subject to the laws of Vanuatu including the ability of the Supreme Court to entertain a judicial review in respect of the decisions made by the Commission. The requirement for independence is simply a requirement that the Commission act, in its decision making, without undue influence from outside sources. Those sources would include the Minister of Internal Affairs who in this case directed that a re-advertising of the position should take place. That decision is a decision which was not reached independently. The concept of independence does not place the Commission in a position where its decisions, once made, are not reviewable.
45. Mrs Bani also submitted that section 10 (3) of the Government Proceedings Act 2007 prevents the issuing of a mandatory order against the Republic of Vanuatu and therefore by definition, the Commission.
46. Section 10 of the Act provides that:-
- "10. Limitations and Immunities*
- (1) This act does not affect any immunity from, or limitation on, liability provided by any other act or law.*
- (2) This act does not make binding upon the Republic of Vanuatu any law that would not otherwise be binding.*
- (3) A mandatory injunction is not to be granted against the Republic of Vanuatu."*



47. Section 1 defines mandatory injunction as follows:-

"Mandatory injunction includes an order of a Court to do any act but does not include:-

- (a) an order in the nature of mandamus; and*
- (b) an order to do any act involving registration, de-registration, rectification or other alteration to any register."*

48. Section 1 defines the Republic of Vanuatu as follows:-

"Republic of Vanuatu refers to the Republic created by the Constitution".

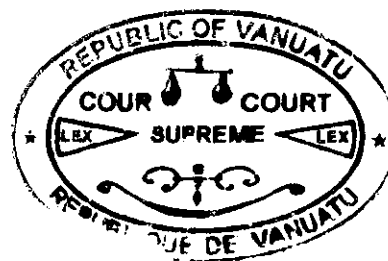
49. Mrs Bani submits that the Commission is under the direction of the executive Government hence is part of the State. Accordingly the Court has no jurisdiction to make a mandatory order against the Commission.

50. In support of that submission Mrs Bani referred to the Supreme Court decision in Cyclamen Ltd v. Port Vila Municipal Council³ which involved an application by a claimant for mandatory orders requiring the defendant to make a decision in respect of the claimant's building permit. Ms Bani referred to the following statement of Bulu J in that judgment where he stated:-

"In the circumstances, can the Court intervene?

The defendant's powers are discretionary powers. The purpose of a Writ of Mandamus, now called a mandatory order under the Civil Procedure Rules of 2002, is to compel a person or authority to whom it is directed to perform some act which herewith is under a legal duty to perform. However, where the person or authority is vested with a discretion, a mandatory order will not lie to compel the person or authority to exercise the discretion so as to attain any particular result. It will however, issue to compel the discretion to be exercised.

³ [2003] VUSC 97

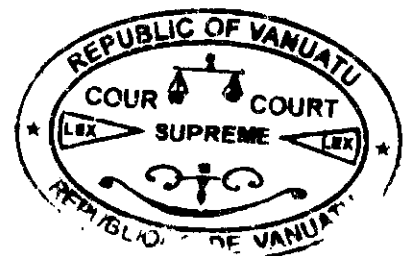


Mandamus however, will only issue to command the performance of a duty when the Court is in a position to see that its command is being carried out. In the present case the Court is not satisfied that if mandamus or mandatory orders are granted that the defendant can perform the duty being asked of it to be performed at the time suggested that is on or before 12 December 2003. The exercise of that duty is subject to views or decisions of other entities which the defendant has no control or so whatsoever. That is not contested before this Court."

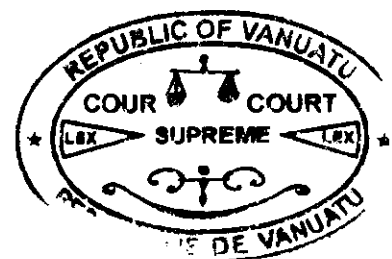
51. With respect to Mrs Bani's submissions Cyclamen Ltd has no application to this particular case. I agree however that this Court cannot require the PSC to exercise its discretion in any particular way. The Court can however review any decision of the PSC where it is alleged that the PSC has taken into account irrelevant factors or has not taken into account relevant factors in exercising that discretion. That is what the Court is being asked to do in this case.

52. In addition a mandatory injunction issued against the PSC is not a mandatory injunction issued against the Republic. To interpret the Act in the way that Ms Bani suggests would be to effectively confer an immunity on Government bodies or agencies from meaningful judicial review.

53. This case is not about the Court selecting a Police Commissioner. That is clearly not the Court's function. That is the function of the Commission. Here however, the issue is whether or not the actions of the PSC in refusing to present the recommendation to the President is a decision susceptible to judicial review. For the reasons referred to I conclude that it is.



54. In this particular case the PSC made a decision to proceed to re-advertise the position having been directed to do so by the Minister, an action which itself was contrary to the requirement of the Commission to act in an independent manner. It appears clear that the PSC did not take into account the requirement that it act independently when it accepted, without question, the Minister's direction.
55. In addition, the evidence clearly establishes that in its continuing decision to proceed with a re-advertising process and to refuse to present the recommendation of the Commission to the President the PSC has failed to take into account a clearly relevant matter, that matter being the lawfulness of its existing decision to recommend Mr Nalpini for appointment as the Police Commissioner. This failure or refusal to do so has resulted in a clear error on the part of the Commission. The PSC was not entitled, once it was aware that it had been accepted Mr Marikembo's termination was unlawful, to simply ignore the implications of that decision in respect of its processes in the appointment of a Police Commissioner.
56. For these reasons I consider the decisions made by the PSC to be wrong and that the court should intervene in respect of those decisions. I do not think this is a situation where the PSC can be simply asked to "start again". Given my conclusions regarding the previous decision to recommend Mr Nalpini, I consider that the PSC should be bound by that decision and that the recommendation should be presented to the President as required by the legislation. It is then for the President to receive the advice of the PSC regarding the matter, again as required by the legislation. What happens from there is a matter for the President.
57. Accordingly I make the following orders:-
- a) An order quashing the decision of the PSC to continue with re-advertising of the position for appointment of a Police Commissioner.



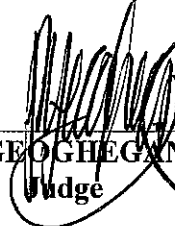
- b) A mandatory order requiring the Police Service Commission to present its recommendation of June 29th 2017 to the President pursuant to section 7A (1) of the Police Act.

58. In the circumstances Mr Nalpini has been successful in his application for judicial review and is entitled to costs.

59. Costs are awarded to the claimant on a standard basis to be agreed between the parties within 21 days failing which they are to be taxed.

Dated at Port Vila, this 18th day of April, 2017

BY THE COURT


JP GEOGHEGAN
Judge

