

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

Judicial Review Case No .485 of 2016

**BETWEEN: JOSHUA BONG, TEKOL MASTEVA, SAM  
ABRAHAM, ESLEY CHARLY, MALA  
ANFALO, KENNETH SIRO, JOHNNY K, ROY  
TOM SEULE, JOSHUA BONG ( JR)**  
*Claimants*

**AND: THE CORONER'S COURT OF VANUATU**  
*First Defendant*

**AND: REPUBLIC OF VANUATU**  
*Second Defendant*

*Coram: Mr. Justice Oliver A. Saksak*

*Counsel: Suling Stephens for the Claimants/ respondents  
Sammy Aron for the Defendants/ applicants*

*Date of Hearing: 10<sup>th</sup> May 2017*

*Date of Judgment: 29<sup>th</sup> May 2017*

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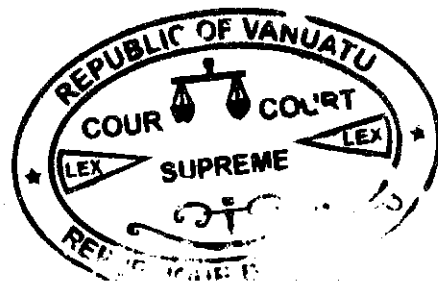
**DECISION**

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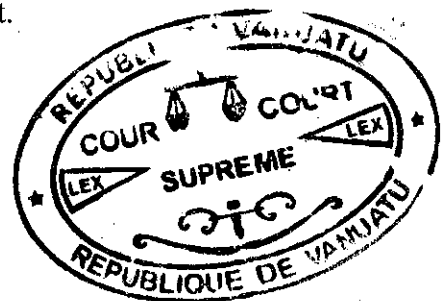
1. The defendant's application to strike out the claimant's claims is hereby allowed and the claims of the claimants are struck out in their entirety, with costs to the defendants.

**Reasons**

2. The following are the reasons for the Court's decisions-
  - a) The Court has inherent jurisdiction under section 65 of the Judicial Services and Court's Act [ CAP.270] ( the JSC Act) to strike out the claimants' claims at this stage of the proceeding.



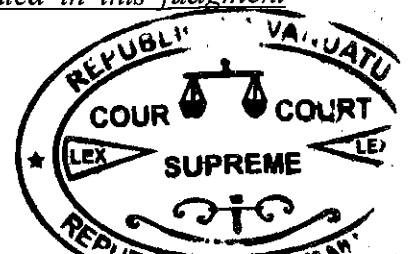
- b) The Claimants' claims and proceeding is an abuse of process and is a frivolous and vexatious litigation.
- c) The Coroner's Report ( the Report) dated 4<sup>th</sup> March 2010 on which the claimants found their claims was required by the Public Prosecutor pursuant to section 224 ( subsections 8, 9 and 10), and Sections 225, 226, and 227 of the Criminal Procedure Code Act [ CAP.136] ( the CPC Act) and as such the Report was sanctioned and recognized by law.
- d) The Report is an absolute privileged document
- e) The Parts of the Report which the claimants place reliance to bring defamatory actions against the defendants were all quashed by the Supreme Court in Judicial Review Case No. 71 of 2011 and as such they no longer have any effect on the claimants.
- f) The claimants have not established a cause of action to bring their proceeding against the defendants.
- g) The Coroner being a Judge of the Supreme Court is protected under section 55 of the JSC Act [CAP. 270].
- h) Even if as alleged, Section 226 of the CPC Act was breached by the actions of the Coroner, such breach does not confer a private law right of action against the coroner for expressing his opinions in the Report.



## The Facts

3. On 29<sup>th</sup> March 2009 at or about 4:50pm the deceased John Bule was found dead as a result of complications of injuries to his head, chest, abdomen, right and left upper limbs, right and left lower limbs and back. The deceased sustained fractures to his left tibia and fibula, left ulna, his 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> metacarpal bones of his left hand and to his right patella or kneecap. These injuries were sustained in an interrogation room at the Vanuatu Mobile Force ( VMF) Cooks Baracks at or about 1:00pm on 29<sup>th</sup> March 2009. The other relevant facts and chronology are contained at paragraph 9 Bullet Points 1-10 in the Judgment of Fatiaki J in Civil Case No.71 of 2011 issued on 18<sup>th</sup> May 2012.
4. The Coroner was appointed by the Chief Justice under section 223 (1) of the CPC Act to hold an inquest into the death of the deceased. The principal purpose of such an inquest was to establish as far as possible the death of the deceased and the circumstances connected therewith. At the end of the inquest the Coroner issued his Report on the 4<sup>th</sup> March 2010 which consists of about 38 pages. These contained the Coroner's findings, opinions and recommendations.
5. On 26<sup>th</sup> April 2011 the claimant issued Judicial Review Application as Civil Case 71 of 2011 seeking an order to quash the entire Report for errors of law and failures to accord the claimants natural justice.
6. The Court in Civil Case 71 of 2011 concluded in [ 69] as follows:-

*“..... I declare that the Coroner's findings, criticisms and recommendations concerning the claimant as highlighted in this judgment*



were ultra vires and in breach of natural justice and are accordingly quashed.

I further order that the following excerpts in the Coroner's Report be regarded as wholly expunged from the Report:

- a. *Para.5 of Clause 5.3.1 entitled: the evidence of the VMF / VPF Commanders,*
- b. *The Whole of Recommendation 2,*
- c. *Para.2 of Recommendation 3,*
- d. *The head and all paragraphs other than the last paragraph in Recommendation 9,*
- e. *The heading and all paragraphs other than the last paragraph in Recommendation 10,"*

(My emphasis)

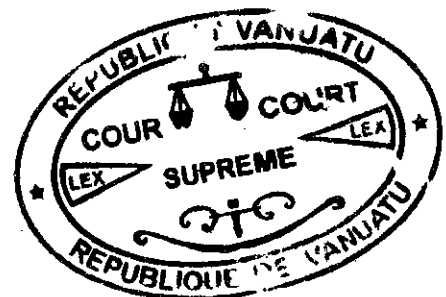
7. The Judgment in Civil Case 71 of 2011 was published on 18<sup>th</sup> May 2012. The claimant in this proceeding is the Commissioner of Police.

8. On 29<sup>th</sup> February 2016 the Claimants namely Joshua Bong, Tekol Mastea, Sam Abraham, Esley Charley, Mala Anfalo, Kenneth Siro, Johnny K, Roy Tom Seule and Joshua Bong (Jr) filed their original claim. They filed their Amended claims on 18<sup>th</sup> December 2016.

### **The Law**

9. Section 223 of the CPC Act States provides:-

"Senior Magistrate empowered to hold inquest.



a) Any Senior Magistrate, and any person specifically empowered in that behalf by the Chief Justice shall be empowered to hold inquests. ( my emphasis).

b) For the purposes of this part the word "Coroner" shall mean either a Senior Magistrate or a person specifically empowered to hold inquests." ( My emphasis).

10. Section 224 of the CPC Act provides for investigation in case of violent death.

Subsection (8) states-

*"the Public Prosecutor may require a Coroner to hold a inquest into the cause of death and the circumstances connected therewith."*

Subsection (9) states-

*"Such Coroner shall hold inquest as far as possible in conformity with the procedure laid down by law for the holding of commissions of inquiry."*

11. Subsection 225 of the CPC Act provides for finding as follows-

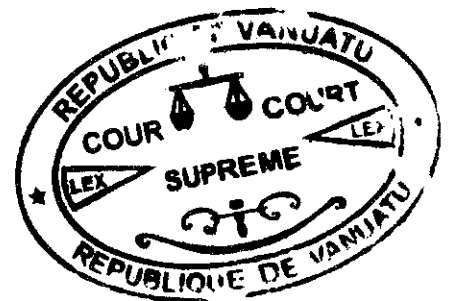
*" When the Coroner has heard evidence tendered by or on behalf of the Public Prosecutor he shall give his findings as to the cause of death."*

12. Section 226 provides-

*" Court not to express any opinion on the evidence. The Coroner shall not express any opinion as to the guilt or innocence or otherwise of any person who may have been called to give evidence at the inquest, even if that person has not volunteered to give evidence therein."*

13. Section 55 of the JSC Act states-

*" Protection of Judges, magistrates and other officers*



1. Subsection (2) applies to person who is a judicial officer, or an officer of the Court of Appeal, the Supreme Court or the Magistrate's Court who is acting in a judicial capacity.
2. The person is not liable to be sued in any Court for any act done, or ordered to be done, by the person:
  - a) Acted in good faith in doing or ordering the act, and
  - b) Believed that he or she had the jurisdiction to do or order the act,

*Whether or not the act was within the limits of his or her jurisdiction.*

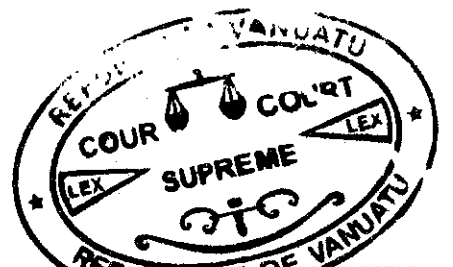
3. *Subsection (4) applies to a person who:*
  - a) *Is an officer of the Court of Appeal, the Supreme Court or the Magistrate Court or,*
  - b) *Has been appointed to execute the warrants or orders of a judge, or any other person who is acting in a judicial capacity.*
4. *The person is not liable to be sued in any Court for the execution of any warrant or order if the warrant or order on its face appears to have been issued by another person with the jurisdiction to do so."*

*( My emphasis)*

14. Section 65 of the JSC Act provides for-

*" Inherent powers of Supreme Court and Court of Appeal and custom,*

- I. *The Supreme Court and the Court of Appeal have such inherent powers as are necessary to carry out their functions. The powers are subject to:*
  - a) *The constitution, and*
  - b) *Any other written law, and*
  - c) *The limitations of each Court's jurisdiction."*



## Discussions

15. First the issue of inherent jurisdiction. The State relied on the Court of Appeal Case of Ebbage .v. Ebbage [ 2001] VUCA 7. Mr Stephens on the other hand argued that the application should have been made under Rule 7.2 of the Civil Procedure Rules No.49 of 2002 (the CPR) which required a sworn statement to be filed in support. Mr Stephens argued the statement filed by the Chief Registrar is insufficient and should be disregarded by the Court.

16. On this first issue the Court agrees with the State's submission that the Court has inherent jurisdiction to entertain the defendants' application for a strike out at this stage of the proceeding. The procedures required are of course those required by rule 7.2 rule 7.3 and rule 7.4. Further rule 9.10 also becomes necessary for consideration when such an application is made. And Ebbage case is clear authority that the Court has inherent jurisdiction as well as statute, section 65 of the JSC Act. [ CAP.270]. The defendants could not file the application under rule 7.2 because they are not seeking an interlocutory order. Rule 7.1 defines what an interlocutory order is. Basically and essentially the defendants seek a strike out under rule 9.10 and they are asking the Court to invoke its inherent jurisdiction in order to achieve this. In my view they are perfectly entitled to do that. And as regards the Chief Registrar's sworn statement, the arguments and submissions by Mr Stephens are untenable. The Chief Registrar's evidence is as to his knowledge of the records of proceedings before the Court and no more. There is no conflict of interest.

17. Second, the issue of absolute privilege. The defendants rely on sections 224, 225, 226, and 227 of the CPC Act to submit that the Report was privileged document.

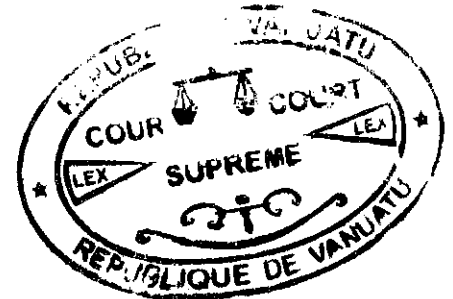


Mr Stephens argued to the contrary submitting that the Coroner had made the inquest as an administrative tribunal and not as a judicial tribunal. I do not agree with that submission and I reject it. Section 226 of the CPC Act refers to the Coroner as the “**Court**”. In this inquest the coroner was a Supreme Court Judge. He was specifically empowered as such by the Chief Justice under section 223 of the CPC Act. As a Judge section 55 of the JSC Act provides him protection from suit unless the claimants can show by relevant and admissible evidence that the judge acted in bad faith or that he did not have the jurisdiction to do so.

18. In this case the claimants have the onus of proof. Since filing their original claims in February 2016 they filed only one sworn statement by Joshua Bong in support. They however amended their claims in December 2016, some 10 months later. Since then the claimants have not filed any further or additional evidence in support of their amended claims. At a conference held on 8<sup>th</sup> December 2016 both Mr Stephens and Mr Aron were present in Court. The Court granted leave to the claimants to file their amended claims and to file sworn statements in support within 21 days. The Claimants have failed to comply with that direction to date. And some 5 months have lapsed.

19. Rule 9.10 of the CPR provides for striking out-

1. “ (1) *This rule applies if the claimant does not:*
  - a) *Take the steps in a proceeding that are required by these Rules to ensure the proceeding continues, or*
  - b) *Comply with an order of the Court made during a proceeding.”*





The application by the defendant is an application to end this proceeding early. As such it is an application made under Part 9 of the Rules. It is perfectly a legitimate application.

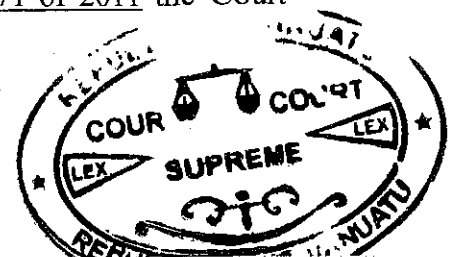
20. The cases of Royal Acquarium.v.Parkinson [1892] 1 QB43, and, and O'Conner .v. Waldron (1935) AC 76 submitted by Mr Stephens in support of his submissions do not assist the claimants.

21. Third, the issue of locus standi. The State argues the claimants have no locus standi. Mr Stephens argues to the contrary.

In Civil Case 71 of 2011 there was only one claimant named as the Commissioner of Police. Joshua Bong occupied this post at the time. In the current proceeding No.485 of 2016 the Commissioner of Police is not the Claimant. Joshua Bong sues in his personal capacity as well as the other 8 named claimants. The issue in my view is not whether the claimants have standing, rather it is whether they have or have established a cause of action to found a claim against the defendants.

22. The claimants found their claims on the Report. But the excerpts in the Coroner's Report on which they seek to rely have been "wholly expunged" from the Report by the Court at paragraph 69 of the judgment. The term "expunge" is defined in Black's Law Dictionary 7<sup>th</sup> Edition mean " to erase or destroy". The effect in law is that those parts of the Report do no longer exist. As such the claimants have no cause of action.

23. The claimants' action or proceeding is an abuse of process. It is frivolous and vexatious because there is no cause of action. In Civil Case 71 of 2011 the Court



found there was a breach of natural justice. The claimants could simply have filed their claims for damages for that breach. Instead they went further to claim for defamation and loss of reputation based on statements which have been “expunged”. As such they no longer exist. And further to date, the claimants have no evidence in support of all their claims. Their claims ought and should be brought to an early end at this point to avoid further unnecessary legal costs to all parties.

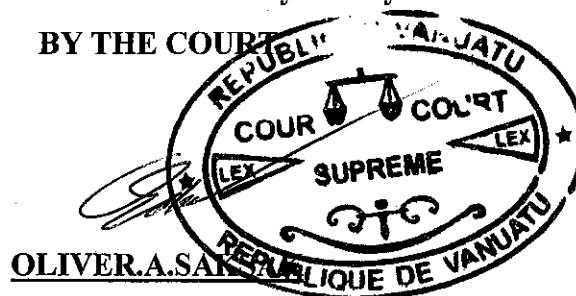
24. Finally the issue whether the breach found by the judge in Civil Case 71 of 2011 give rise to a private law right of action against the coroner? I accept the defendants’ submissions on this issue and reject the claimants’ submissions as untenable.

**Costs**

25. The defendants have been put to unnecessary costs and are entitled to their costs of the application and to the costs of and incidental to the claimants’ action. The costs are fixed at VT 200,000 payable by the claimants within the next 28 days from the date hereof.

**DATED at Port Vila this 29<sup>th</sup> day of May 2017**

**BY THE COURT**



**OLIVER.A.SAN**

**Judge**