

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

**Constitutional
Case No. 19/915 SC/CNST**

BETWEEN: JAMES JIMMY

Applicant

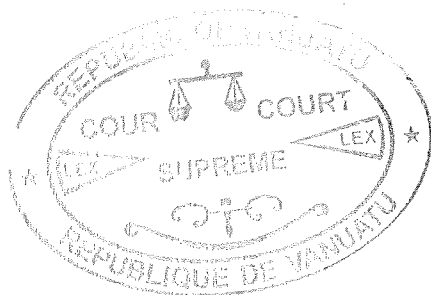
AND: REPUBLIC OF VANUATU

Respondent

Date: 25th day of October, 2019 at 9:00 AM
Before: Chief Justice Lunabek
Counsel: Mr. Willie Kapalu for the Applicant
Ms. Adeline Bani for the Respondent

RULING

1. A first conference hearing was conducted on 25 October 2019 at 9.00am o'clock pursuant to Rule 2.8 of the Constitutional Procedures Rules 2003.
2. After hearing, I struck out the constitutional application on the basis that it does not disclose a constitutional foundation warranting for a substantive hearing to be managed and heard.
3. I also order costs of 15, 000 vatu in favour of the Respondent against the Applicant.
4. I now provide brief reasons of that decision.
5. The applicant has filed a constitutional application against the Vanuatu Government ("The Republic of Vanuatu") on 18 April 2019. The application is seeking redress under Articles 6(1) and 53 (1) of the Constitution.



6. The applicant has alleged that the following constitutional rights provided in the constitution has been infringed in relation to him:

- Article 5 (1) (d): protection of the law;
- Article 5 (2) (a)(b): Protection of the law shall include the following:-
 - a) everyone charged with an offence shall have a fair hearing within a reasonable time, by an independent and impartial court and be afforded a lawyer if it is a serious offence.
 - b) a person shall not be tried in his absence without his consent unless he makes it impossible for the court to proceed in his presence.

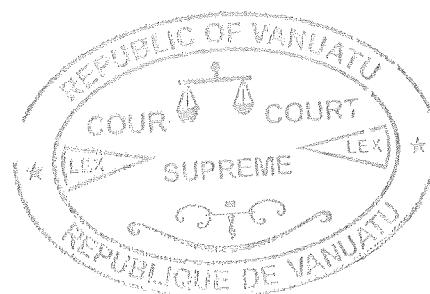
7. The applicant has alleged that the factual basis of the infringement of his rights was the issuance of a domestic violence protection order by the Magistrate's Court at Isangel, Tanna on 13th March 2018. The said order, among other matters, directed the police to remove the iron sheet and other items listed in the order that belonged to the applicant.

8. It is said the applicant was not a party to the proceedings but his properties were subject to the order. He was denied his right to be heard.

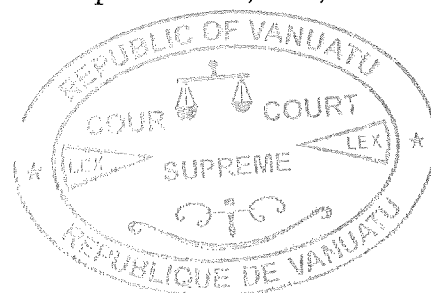
9. On 20th March 2018, the Respondent through police officers namely, Peter Rex and Jack Rolland who are stationed at Isangel, Tanna, executed the said orders of the Magistrate's Court by removing the properties and items mentioned in the orders.

10. It is said the applicant did not receive a copy of the protection order because he was in Port Vila and learned through his relatives of the execution of the said order.

11. The applicant said that the iron roof was removed from his house by the Respondent through the actions of the police officers and caused damage to the building without his permission and it was done unlawfully since he is not a party to the proceeding.



12. The applicant said he suffered from the action of the Respondent, these actions infringed his rights of protection of the law, natural justice (“fair hearing”). He suffered damages and claimed VT10,000,000 against the Respondent.
13. Following sworn statements were filed in support of the application:-
- Sworn statement of James Jimmy filed 18/04/2019;
 - Sworn statement of Jimmy Kawiel filed 18/04/2019;
 - Sworn statement of Lily Harry filed 18/04/2019;
 - Sworn statement of Rodney Kaukare filed 18/04/2019.
14. The sworn statements showed that on 13 March 2018, a Domestic Violence Protection Order was issued in favour of one Susan Jimmy of Fetuquai Village, Middle Bush Tanna and her three children (Joe James of 9 years, Niere James of 5 years, Jimmy James of 3 years). The Magistrate’s Court made restraining orders against Jimmy Kawiel, Rosa Jimmy and Lilly Harry, amongst other matters, not to assault, insult, and abuse the complainant, Susan Jimmy and her three children. The sworn statements indicated that the iron sheets and other items belonged to the applicant.
15. The Respondent’s counsel filed an application to strike out the constitutional application on the basis of the inherent jurisdiction of the Court [See Rule 2.3(1)] of the Constitutional Procedures Rules 2003 and the case of Bernard v. Republic of Vanuatu [2007] VUSC 68; Constitutional Case No. 01 of 2007.
16. The application to strike out was also advanced on the basis that there were and are other available procedural avenues which the Applicant can exhaust to address his allegations, such as apply to be a party to the proceeding or appeal the order of the Magistrate’s Court rather than filing a Constitutional Application (See Nari v. Republic of Vanuatu [2015] VUSC 132; Constitutional Case No. 05 of 2015).
17. The application of striking out says that the constitutional application does not disclose an arguable infringement, it is misconceived and an abuse of process and, thus, must be struck out.



18. Mr. W.Kapalu, on behalf of the Applicant, conceded that the Applicant did not apply to be joined as a party in the domestic violence case or did not appeal against the domestic violence protection orders made by the Magistrate's Court on 13 March 2018.
19. It is clear that the orders of the Magistrate's Court dated 13 March 2018 directing the complainant to remove the iron sheets of the house at Lowanmil village to Fetuquai Village to use them to build a house in which she and her three (3) children could be save in, is not challenged. What were challenged were orders directing the police to assist the complainant in the removal of the iron sheets and other property items mentioned in these orders.
20. Orders 4, 5 and 6 of the Orders of 13 March 2018, are set out below:-

"KOT I ODAREM TU SE:

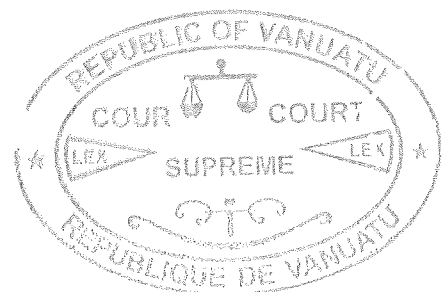
4. Klemen I save go rimuvum of kappa blong haos long Lowanmil vilij iko long Fetuquai vilij blong mekem haos blong klemem wetem ol trifala pikinini blong hem, Joe James (9 yia), Niere James (5 yia) mo Jimmy James (3 yia).

5. Eni Polis ofisa I mas stap wetem klemen taem hemi go rimuvum ol kappa blong haos blong Lowanmil vilij.

6. Eni Polis ofisa I mas assistem klemen blong remuvum eni long ol belonging ia:-

- a. 2 x tampolin*
- b. 1 x spade*
- c. 1 x axe*
- d. 1 x knife*
- e. 10 x plastic containers blong wota*
- f. glass louvers mo frame*
- g. 1 x box nails*
- h. 7 x packets nail*
- i. music speakers*
- j. 1 x grass cutter."*

21. Orders 5 and 6 of the orders dated 13 March 2018 were the consequential orders to execute order 4 which was the principal order of the orders relating to properties.



22. Orders 4, 5 and 6 of the orders dated 13 March 2018 were made within the meaning of property under Section 6 of the Family Protection Act 2008 which says:

"6. Meaning of Property

Property of a person means property that:

(a) the person owns; or

(b) the person does not own, but:

(i) is used and enjoyed by the person; or

(ii) is available for the person's use or enjoyment; or

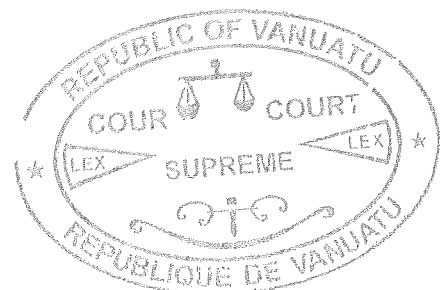
(iii) is in the person's care or custody."

23. In the present case, although the applicant did not apply to be joined as a party in the Domestic Violence case in the Magistrate's Court nor did appeal against the orders of the Magistrate's Court dated 13 March 2018, but has, "...independently of any other possible legal remedy, apply to the Supreme Court to enforce..." the breaches of his rights by filing this constitutional application with sworn statements in support.

24. The sworn statements did not show that the house property (including iron sheet) and other property items were not used and enjoyed by Susan Jimmy and her three children; they did not show that they were not available for Susan Jimmy and her three children's use or enjoyment; or they did not show that the said properties were not in Susan Jimmy and her three children's care or custody.

25. The Applicant, therefore, has failed to establish how the action of the police officers in executing the Magistrate's Court Domestic Violence Order ("Order") infringed his rights under Article 5(1)(d); 5(2)(d)(e).

26. I consider that the application does not disclose a foundation for infringement of constitutional rights as alleged. It is misconceived and an abuse of Court process. It must, therefore, be struck out (see also *Francois v. Ozols & Ors* [1998] VUCA 5; Civil Appeal Case 15 of 1996 (25 June 1998)).



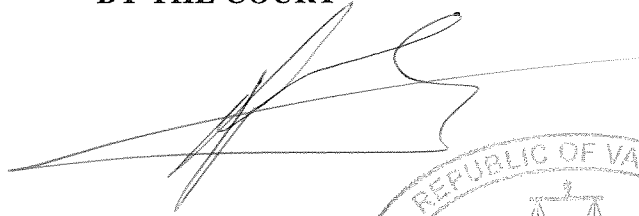
27. The Court makes the following orders:

ORDERS

1. The constitutional application is struck out.
2. The Applicant shall pay the costs of the Respondent in Vatu 15,000 and such costs of VT15,000 Vatu shall be paid within 30 days.

DATED at Port Vila this 25th day of October, 2019.

BY THE COURT



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Vincent Lunabek
Chief Justice

