

BETWEEN: Letlet August
Claimant

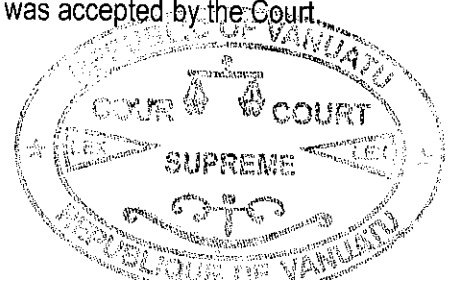
AND: Ombudsman of the
Republic of Vanuatu
Defendant

Date of Conference: 12 October 2021
Before: Justice G.A. Andrée Wiltens
In Attendance: Mr M. Hurley for the Claimant
Mr A. Godden for the Defendant
Date of Decision: 29 October 2021

Judgment

A. Introduction

1. By judgment of 23 September 2021 in Judicial Review Case No 21/2069, a Search Warrant issued to enable the Ombudsman to search Mr Letlet's home and two other properties, as well as his office at the Ministry of Finance and Economic Management, the premises of the Finance and Treasury Department and those of the Vanuatu National Provident Fund, and to seize and retain relevant material relating to an on-going Ombudsman's inquiry, was held to be lawful. The application was made on the basis that the Ombudsman had not followed the correct procedure in applying for the Search Warrant, as prescribed in the Ombudsman Act [Cap 252]. The challenge was not upheld and is the subject of an appeal to the Court of Appeal.
2. A further application for Judicial Review was subsequently filed, again seeking to set aside the fruits of the Search Warrant, but this time on the basis that it was unlawful in that the application was made to, and granted by, the Magistrate's Court as opposed to the Supreme Court. A CPR Rule 17.8 conference was held, following which the application was accepted by the Court.



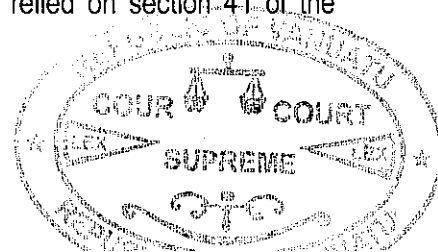
3. Counsel agreed the ultimate issue could be dealt with "on the papers" once final submissions by each had been filed. Those submissions have now been received; and accordingly, this is my decision and the reasons for arriving at my conclusions.
4. Although no evidence has been filed in this current application, I rely on the evidence filed in Judicial Review Case No 21/2069 to assist in my determinations. I do so on the basis that this proceeding is really a follow-on from the previous Judicial Review application, and both parties must have contemplated that the evidence was referable and applicable to both matters.

B. The Application

5. The sole point of the present application is that the Search Warrant obtained by the Ombudsman was issued from the Magistrate's Court, not the Supreme Court.
6. It was contended that the Ombudsman Act permits Search Warrants to be issued, pursuant to section 24(1) of the Ombudsman Act, only by the Supreme Court. This submission relied on the definition of "Court" in section 1 of the Ombudsman Act which specifies that Court means Supreme Court.
7. Accordingly, the Search Warrant issued by the Magistrate's Court was said to be unlawful.
8. The application sought the following remedies:
 - A declaration that the Search Warrant obtained by the Ombudsman was issued in breach of section 24(1) of the Ombudsman Act and was therefore unlawful;
 - A declaration that the entry, search, seizure and removal of Mr Letlet's documents, chattels and other materials pursuant to the Search Warrant was unlawful;
 - A declaration that the Ombudsman be restrained from carrying out any entry to Mr Letlet's premises, properties and/or his office unless the Ombudsman complies with section 24(1) of the Ombudsman Act; and
 - The Ombudsman be ordered to forthwith deliver up to Mr Letlet and/or return to the Ministry of Finance and Economic Management and the Department of Finance and Treasury and the Vanuatu National Provident Fund all property seized and removed.
9. The Claim further sought damages and interest as well as the costs of the proceeding.

C. Submissions

10. Mr Godden, in his final submissions, conceded that the Search Warrant should have been issued out of the Supreme Court.
11. Mr Godden contended that the Ombudsman had made "an honest mistake" and obtained and subsequently executed the Search Warrant "in good faith". He relied on section 41 of the Ombudsman Act to indemnify the Ombudsman and his staff.



12. Section 41 of the Ombudsman Act reads:

41. Immunities

- (1) Neither the Ombudsman nor an officer or employee of the Ombudsman is liable for any act or omission done or ordered to be done or made in good faith and without negligence under or for the purposes of the Constitution or this Act.
- (2) Neither criminal nor civil proceedings are to be issued against the Ombudsman, or an officer or employee of the Ombudsman, for anything done, said or omitted by the Ombudsman, or the officer or employee, under or for the purposes of the Constitution or this Act.
- (3) However, subsection (2) does not apply if it is shown that the Ombudsman, or the officer or employee, acted in bad faith.

13. I noted that Mr Godden did not address the relief sought in the Claim, other than his reliance on section 41. In relation to that, he submitted the section precluded any award of damages being made.

14. Mr Hurley did not address section 41 of the Ombudsman Act in his submissions.

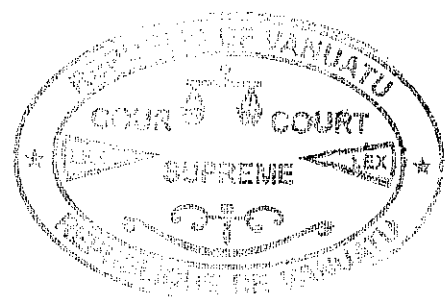
15. He also did not elaborate on the question of damages, other than to seek the relief outlined in the Claim.

D. Discussion

16. In Judicial Review Case No 21/2069, Mr Letlet, his wife and their eldest son related what had occurred during the execution of the Search Warrant. Each was traumatised at the time, and subsequently, by the experience which they detailed in their sworn statements. If their evidence is accepted, the manner of the execution of the Warrant was more than heavy-handed. However, what they alleged had occurred was countered by the evidence of Mr Twomey, an experienced investigator well versed in executing Search Warrants, who stated that the execution of the Warrant in this case had occurred in an unexceptional and routine fashion. He further made certain allegations regarding the behaviour of Mr Letlet, which exhibited reluctance and resistance.

17. In my assessment of this aspect, it is important to see what occurred from both perspectives. Mr Twomey has abundant experience in executing Search Warrants; Mr Letlet has not had to endure the process previously. Accordingly, they perceive the matter from wholly different perspectives. That explains the differences between their accounts. I am also of the view, despite the lack of cross-examination to assist, that Mr Letlet has somewhat embellished his account to the point where it is unsafe to rely on the more graphic nature of his, and his family members', evidence.

18. The evidence of Mr Csiba and Mr Boe, also filed in the earlier litigation on behalf of the Ombudsman, did not assist in this regard.



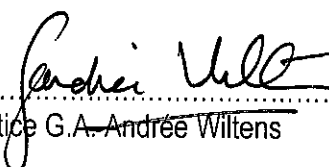
19. The Ombudsman also produced a sworn statement in Judicial Review Case No 21/2069, appending the application for the issuance of the Search Warrant and other supporting material which had been presented to the Magistrate's Court. I noted that there was no challenge to that material meeting the requisite test before a Search Warrant could be lawfully issued.
20. Nowhere in the material before the Court is there evidence of *mala fides* on the part of the Ombudsman, nor is that alleged.
21. I accept that the application for the Search Warrant to the Magistrate's Court was an honest mistake. Accordingly, the Search Warrant was issued unlawfully.
22. I accept also that the execution of the Warrant was done with some urgency, robustness and determination, rather than in a heavy-handed unacceptable manner.
23. I consider Mr Godden's submissions relating to section 41 of the Ombudsman Act to be correct. Only if an applicant can establish that the Ombudsman or his appointed members of staff acted in bad faith is it open to the Court to award damages.

E. Result

24. I consider it appropriate therefore to grant relief as follows:
 - A declaration that the Search Warrant obtained by the Ombudsman was issued in breach of section 24(1) of the Ombudsman Act and was therefore unlawful;
 - A declaration that the entry, search, seizure and removal of Mr Letlet's documents, chattels and other materials pursuant to the Search Warrant was unlawful;
 - The Ombudsman is ordered to forthwith return to source all property seized and removed pursuant to the Search Warrant.
25. I see no efficacy in making the restraining order sought. The Ombudsman is precluded from acting in that fashion by law; a declaration is unwarranted. Further, I decline to award damages, as section 41 of the Ombudsman Act, in this instance, fully indemnifies the Ombudsman and his staff.
26. Both parties sought costs, without any elaboration. Costs are to follow the event. The Ombudsman must pay Mr Letlet's costs as agreed or taxed. Once settled the costs are to be paid within 21 days.

Dated at Port Vila this 29th day of October 2021

BY THE COURT


Justice G.A. Andrée Wiltens

