

BETWEEN: August Letlet and Luisa Lagiono Letlet

Claimants

AND: Ombudsman of the Republic of Vanuatu

Defendant

Dates of HEARING : 26th and 27th September 2022
Date of Decision: 11th October 2022
Before: Justice Oliver A Saksak
In Attendance: Mr Mark Hurley for the Claimants
Mrs Florence William Samuel for the Defendant

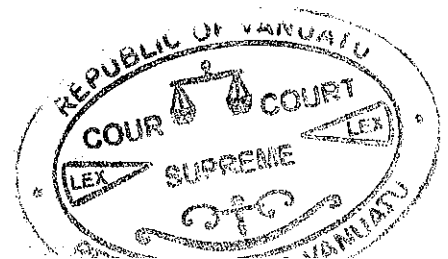
JUDGMENT

Introduction

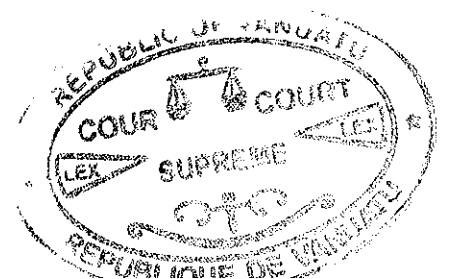
1. The claimants claims are for damages for trespass and conversion in the sum of VT 2 million to each of the claimants, for interest at 5% per annum from 18th December 2021, and for costs.

Background

2. On Saturday 5th June 2021 the agents of the Ombudsman had executed a search warrant at approximately 5:30 to 6:00am at the home and premises of the claimants at Bellevue Area comprised in Leasehold Title No. 12/0912/492.
3. The Ombudsman had made application for the search warrant to the Magistrates Court.
4. The claimants challenged the validity of the search warrant in Judicial Review Case No.21/2069. The Supreme Court on 23rd September 2021 held the search warrant issued by the Magistrates Court was lawful. Mr Letlet appealed against that first decision.
5. The claimant filed the Second Judicial Review application seeking to set aside the fruits of the search warrant on the basis of it being unlawful.



6. On 12th October 2021 a Judge of the Supreme Court held the search warrant issued by the Magistrates Court was unlawful and made declarations 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 were 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;
 - 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 the property seized and removed.
7. The Court of Appeal on 19th November 2021 allowed Mr Letlet's appeal and quashed the first decision of 23rd September 2021. The Court of Appeal uphold the Court's second decision of 12th October 2021 together with its declarations and orders.
8. The Court of Appeal quashed the costs orders of the Supreme Court and set costs at VT 175,000 to be paid by the Ombudsman to Mr Letlet.
9. The Court of Appeal also quashed the declinature of damages by the Judge in his second decision and ordered a hearing as to damages in this Court to afford Mr Letlet " a fair hearing on the damages point."
10. The Court of Appeal at [42] pointed to " two errors made by the Ombudsman in seeking the warrant, first the failure to give notice, and second the filing in the wrong Court."
11. That is the basis of the Claimants' claim.
12. The claimants alleged that the search and related activities at their home on 5th June 2021 had taken them by surprise and had caused them a lot of panic, worry and nervousness. Further that their children and family members were forced to move away to a nearby thatched roof house pondering the unfolding situation and have caused them to be unsettled and uncomfortable to date.



Evidence

13. The claimant's supported their allegations by sworn statements of Mr Letlet, Mrs Letlet and their eldest son Bertrand Letlet. They had the standard of proof on the balance of probabilities. Each of them were cross-examined by Mrs Samuel in relation to their statements.

The Defence Case

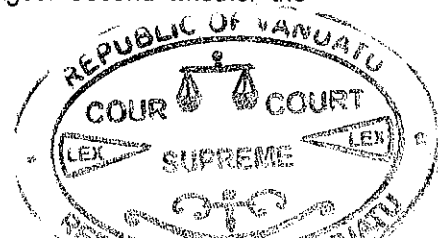
14. The defendant's case was first that its agents were acting upon a lawful search warrant which was applied for, obtained and executed in good faith, with good intentions and without negligence.
15. Second, that the Ombudsman Act does not provide for any breach that confers to the claimants a private law right of action sounding in damages.
16. Third, that the defendant is immuned under section 41 of the Ombudsman Act.

Defendant's Evidence

17. The defendant relied on the evidence of George Twomey, Ronnie Boe, Risa Fred, Darval Simon, Cook Thompson and Mr Hamilson Bulu, the Ombudsman himself. Except for Cook Thompson who was unavailable due to a call to duty on Tanna during the trial hearing, the other five witnesses were cross-examined by Mr Hurley in relation to their respective sworn statements filed in this proceeding and in the Judicial Review proceedings. Cook Thompson's sworn statement was admitted into evidence without cross-examination and subject to the specific objections raised by Mr Hurley. Their sworn statements were objected to in certain parts and subject to those specific objections which were allowed, large portions of those statements were admitted into evidence for the defendant.

The Issues

18. There were three issues for determination raised by the claimants first, whether the claimants were entitled to damages for trespass and conversion? Second, whether section 41 of the Ombudsman Act provides immunity in the circumstances of this case. And third, the amount of damages to be awarded.
19. The defendants raised three issues also first, whether the actions of the agents of the defendant were unlawful amounting to trespass and conversion to attract damages. Second whether the



Ombudsman Act gives the claimants a private law right of action to claim damages when there is a breach of section 22 and 24 of the Act. And third, whether the defendant's actions of applying for, obtaining and executing the search warrant were of bad faith and negligent so that there is no protection under section 41 of the Act.

Relevant Legal Provisions

20. Section 1 of the Act defines: "Court means the Supreme Court".

21. Section 21 of the Act provides :

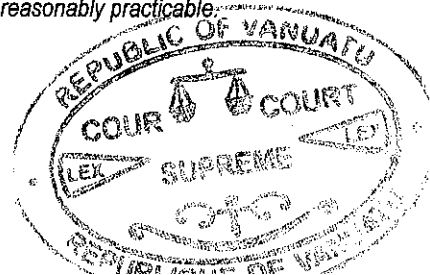
"21. Procedures of the Ombudsman

- (1) *Subject to subsection (2), before commencing an enquiry into the conduct of a government agency, or a leader, the Ombudsman must give written notice to the person in charge of the government agency, or the leader, as the case requires, of his or her intention to make an enquiry.*
- (2) *The Ombudsman does not have to give notice if the Ombudsman has reasonable grounds for believing that to do so will interfere with his or her enquiry.*
- (2) *Subject to subsection (4), the Ombudsman, when enquiring into the conduct of a government agency, or a leader, is not required to hold any hearing and a person is not entitled as of right to be heard by the Ombudsman.*
- (3) *The Ombudsman must not make a report that is adverse to a government agency or a leader unless, before completing the relevant enquiry, the Ombudsman has given the person in charge of the government agency, or the leader, as the case requires, an opportunity to comment, either orally or in writing, on the subject of the enquiry.*
- (4) *Subject to subsection (6), if an Ombudsman's report is adverse to a government agency, or a leader, the Ombudsman must include in the report the substance of any statement that the person in charge of the government agency, or the leader, as the case requires, may have made in explanation of or opposition to the Ombudsman's conclusions.*
- (5) *If the person in charge of the government agency, or the leader, as the case requires, agrees that it is not necessary for the Ombudsman to comply with subsection (5), the Ombudsman does not have to comply with the subsection."*

22. Section 22 of the Act states:

22. Evidence

- (1) *The Ombudsman must, if possible, obtain evidence and information by informal request, seeking the cooperation of those concerned.*
- (2) *The Ombudsman may issue a notice in writing in the form contained in the Schedule to any person:*
 - (a) *to appear before the Ombudsman for examination by him or her; or*
 - (b) *to furnish any information or documentary evidence to the Ombudsman needed for an enquiry.*
- (3) *If a person is required to appear before the Ombudsman for examination in accordance with subsection (2), he or she may request that:*
 - (a) *a tape recording be made of the examination; and*
 - (b) *the person's legal representative or another person be present during the examination.*
- (4) *The Ombudsman must comply with a request under subsection (3).*
- (5) *If an examination of a person has been tape recorded, the person may request a copy of the recording from the Ombudsman. The Ombudsman must comply with the request as soon as reasonably practicable.*



- (6) The Ombudsman may administer an oath or affirmation to a person appearing as a witness before him or her, and may examine the witness on oath or affirmation.
- (7) No statement made by, or answer given to, a person in the course of any enquiry by, or any proceedings before, the Ombudsman is admissible in evidence against that person or any other person in any court, enquiry or other proceedings, except on the trial of that person for perjury, or in proceedings under Part 6 of the Leadership Code [Cap. 240].
- (8) No evidence in respect of proceedings before the Ombudsman is to be given against any person, including the person under enquiry, except in relation to proceedings under Part 7 of this Act or Part 6 of the Leadership Code [Cap. 240].
- (9) If a person is required by the Ombudsman to appear before him or her for the purpose of this section, the person is entitled, on request, to reimbursement of reasonable travel costs (calculated on the basis of what public transport would cost for the trip) and such other expenses as are prescribed by the regulations.
- (10) A person required to supply documents to the Ombudsman is entitled, on request, to be reimbursed for reasonable photocopying charges incurred by the person.

23. Section 23 of the Act states:

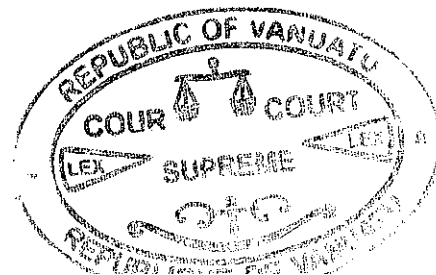
"23. Failure to comply with notice

- (1) If a person who has been served with a notice under section 22:
 - (a) fails or refuses to appear before the Ombudsman; or
 - (b) fails or refuses to furnish any information or documentary evidence to the Ombudsman;
 the Ombudsman may apply to the Court for the person to be summoned to appear before the Court or to furnish to the Court the information or documentary evidence requested in the notice.
- (2) The Court may, at any time after issuing a summons to a person who has failed to comply with a notice under section 22, order the person to pay a fine not exceeding VT 100,000."

24. Section 24 of the Act states:

"24. Power to enter premises etc.

- (1) If the Court is satisfied by information on oath that:
 - (a) a person served with a notice to provide documentary evidence under section 22 has:
 - (i) failed or refused to provide the documents; or
 - (ii) failed or refused to provide all relevant documents in his or her possession or control; and
 - (b) there are reasonable grounds for suspecting that documents needed for an Ombudsman's enquiry will be destroyed or otherwise become unobtainable unless a search warrant is issued to the Ombudsman;
 the Court may issue a search warrant to the Ombudsman for premises at which such documents are located or at which it is likely that such documents are located.
- (2) The Ombudsman or an officer authorized by him or her has at any time the right:
 - (a) to enter and inspect any premises for which a warrant has been issued; and
 - (b) to call for and examine any document needed for his or her enquiries which is kept on the premises; and
 - (c) if necessary, to seize, retain and remove any such document, or take extracts from, or make copies of, any such document.
- (3) The occupier of the premises for which a warrant has been issued must provide the Ombudsman or person authorized by him or her, as the case may be, with all reasonable facilities and assistance for the effective exercise of his or her powers under this section.
- (4) A person is guilty of an offence if:



- (a) *the person obstructs the Ombudsman or his or her officer in the exercise of his or her powers under this section; or*
- (b) *the person fails to provide the Ombudsman or his or her officer with all reasonable facilities and assistance as required by subsection (3).*

Penalty: VT 100,000 or imprisonment for 6 months or both.

25. Section 41 of the Act states:

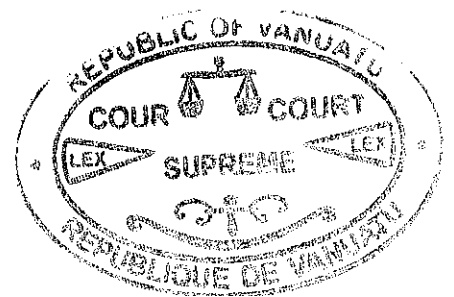
"PART 5 – IMMUNITIES

41. Immunities

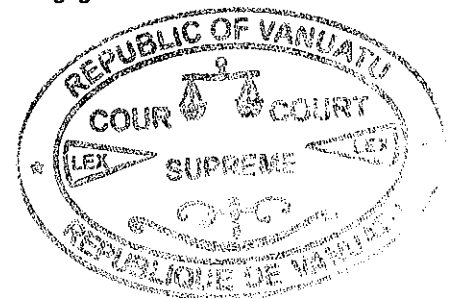
- (1) *Neither the Ombudsman nor an officer or employee of the Ombudsman is liable for any act or omission done or ordered to be done or made in good faith and without negligence under or for the purposes of the Constitution or this Act.*
- (2) *Neither criminal nor civil proceedings are to be issued 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."*

Discussion

- 26. I will consider all six issues raised together as they are inter-related. In doing so I have considered the written and oral submissions made by both Mr Hurley and Mrs Samuel.
- 27. The execution of the unlawful search warrant issued by the Magistrates Court on Saturday 5th June 2021 gave right to the claimants' claims for damages for trespass and conversion. First the search warrant was unlawful in that the application therefor was made to the wrong Court. Section 1 of the Ombudsman Act defines clearly that "Court" referred to in Section 24 of the Act means "*the Supreme Court.*" That should not have been a mystery to the defendant. And secondly, the search warrant was unlawful because there was no prior notice served on the claimant pursuant to section 22 of the Act. Section 21(1) of the Act also requires a notice must be given to a government agency or leader. Mr Letlet is a Director General and leader. He should have been served with a written notice.
- 28. The obvious effect is that the search warrant was not authorized by law and therefore it was void from the beginning. Consequently all the actions that followed or were done by the agents of the defendant on Saturday 5th June 2021 at the claimant's gate and house and following on 6th and 7th June 2021 were not lawfully authorized. All those actions amounted to trespass and conversion entitling the claimants to damages.



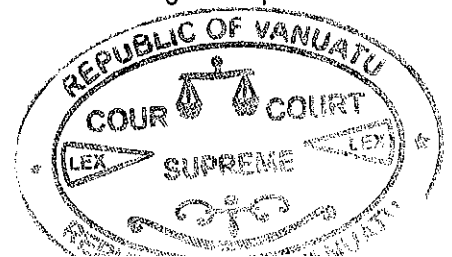
29. The defendant argued otherwise relying on cases of Iapatu and others v Republic [2022] VUCA and Ayamisesa CAC 35 of 2012 and in Re: de Robillard [1997] VUCA 1. All these cases were distinguished in that the orders challenged on appeal were orders issued by the Supreme Court under different facts and circumstances. Here, it was an order sought and issued by the Magistrates Court which is contrary to what the Ombudsman Act clearly defines that the “**Court**” means the Supreme Court.
30. I therefore reject the submissions of the defendant on this issue.
31. The defendants rely on the evidence of George Twomey, Ronnie Boe, Daval Simon, Risa Fred and Cook Thompson to show that the execution of the search warrant was done in a proper fashion. That may well have been, but with the warrant being unlawful from the beginning there was no authority to be at the claimants’ gate in the early hours of Saturday 5th June 2021. There was no authority for Sgt Cook to stand on top of the vehicle to look into and to call over the gate and fence. All those actions amounted to trespass.
32. Then it was their evidence that Mr Letlet had opened the gate and allowed them entry into his property and house after he had signed the warrant. The warrant was unlawful but the agents of the defendant had converted it and presented it to Mr Letlet to appear to him to be a lawful warrant, when it was in fact and in law unlawful. There was conversion on the part of the agents of the defendant acting for and on behalf of the Ombudsman.
33. Next the Republic argued and submitted that the Ombudsman Act does not give a private law right to the claimants to found their claim for damages for trespass under section 22 and 24 of the Act.
34. If that argument is correct, subsection 1 of section 21 of the Act would not make a qualification that requires a mandatory duty to give notice to a person in charge of a government agency. Furthermore there would be no need for an opportunity for comment or natural justice to occur as required in subsections (4) and indeed (5).
35. Furthermore section 41 of the Act which provides for immunities to the Ombudsman and his officers or employees. Subsection (3) is specific that there is no immunity if actions of the Ombudsman or his agents or employees are done in bad faith or with negligence.



36. In my considered opinion any Act of Parliament that provides immunities to persons responsible for implementing the provisions if that Act is an express intention of Parliament that confers a private law right. In this case it is obvious that Ombudsman Act does envisage a private law right to the claimants to bring an action for damages against the Ombudsman in their circumstances,
37. That brings me to section 41 of the Act. The defendant submitted the Ombudsman and his agents are immuned from damages because their actions were done in good faith and without negligence.
38. The failure or omission to apply to the Supreme Court for the search warrant and the failure to give notice to the claimant under sections 21 and 22 of the Act rendered the search warrant issued and acted upon to be unlawful. The failure and/or omissions was a negligent act or omission.
39. Although this is not criminal action, the principle that "*ignorance of the law or fact*" is no defence to any criminal charge should equally apply to civil law. To ignore a law or fact and say it was an "*honest mistake*", is it excusable? I do not think so. To excuse such action would be to open the door to other unjustified actions.
40. The evidence in support of the defence case was contradictory and inconsistent in certain respects. For instances the height of the claimant's gate being 4 meters was an exaggeration. The defence witnesses sworn statements were almost identical in many respects showing that they had indeed discussed their sworn statements prior to deposing them. Risa Fred denied seeing the claimants' children playing football. Darval Simon said in his statement he too banged on the claimants' gate and yet the witnesses denied or all said only George Twomey had done the banging.
41. Those inconsistencies affect the credibility of the defence witnesses. The Court therefore prefers the evidence of the claimants as credible.

Conclusion

42. For the foregoing reasons I now answer the issues raised specifically as follows:-
- a) Are the claimants entitled to damages for trespass and conversion? The answer is "yes"
 - b) Is the Defendant entitled to immunity from such damage by reason of section 41 of the Act? The answer is "No".
 - c) Whether the actions of the agents of the defendant were unlawful amounting to trespass and conversion to attract damages. The answer is "yes".



- d) Whether the Ombudsman Act gives a private law right to the claimants to sue for damages for breaches of sections 22 and 24 of the Act. The answer is " Yes".
- e) Whether the defendant's actions of applying for, obtaining and executing the search warrant were of bad faith and negligent actions? The answer is " Yes".

43. The final issue is how much should be awarded to the claimants. They claimed for VT 2 million each plus interest of 5% per annum and costs.

44. It was part of the evidence that the unlawful search warrant was executed up until 7th June 2021. Investigations were extended to the office of Mr Letlet as well. It extended over three days. Taking that time into consideration, the VT 2 million claimed for each claimant seem to me to be more than a reasonable sum to be claimed as damages.

Result


45. In the circumstances I give judgment for the claimants and award the sum of VT 2 million to each of them as claimed.

46. In addition, I award an interest of 5% per annum on the total sum of damages of VT 4 million from 18th December 2021 until settlement.

47. Finally, I order that the defendant pays the claimants' costs of and incidental to this action on the standard basis as agreed or be taxed, and once settled, to be paid within 28 days.

DATED at Port Vila this 11TH day of October, 2022

BY THE COURT


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Oliver Saksak
Judge

