

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

Civil
Case No. 23/336 CVL

BETWEEN: STEVE KIEL
Applicant

AND: THE ATTORNEY GENERAL
First Respondent

**AND: ERIC FESTA, JENNY REGENVANU,
JOSEPH LAGIOLA, TARSONG SHEM,
ANTHEA ARUKOLE, ALFRED NAMAS,
MARIE LOUISE MILNE, WILLIAM ARON,
ANDRIEN MELEPSIS, DAVIS NAMBARU and
MELANIE SHEM**
Second Respondents

AND: PORT VILA CITY COUNCIL
Third Respondent

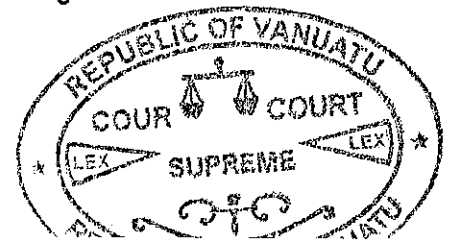
Date of Hearing: 7 and 9th June 2023
Before: Justice R.L.B Spear
Counsel: Mr E Nalyal for the Applicant
Mr F Gilu for the First Respondent
Mr S Kalsakau for the Second Respondents
Mr C Leo for the Third Respondent

Date of Decision: 13th June 2023

DECISION

**Decision delivered on 12th June 2023 recalled, certain typos corrected
(underlined) and re-issued**

1. On 7th June 2023, a conference pursuant to CPR 17.8 was convened to address the application for Judicial Review. The challenge is to the lawfulness of the decision of the Minister of Internal Affairs to amend Regulation 25A of the Municipal Council Elections Regulations No. 60 of 1982 by the Municipal Council Elections Regulations Order No. 52 of 2023.



2. However, before that conference commenced, there was an urgent application filed for the second respondents primarily seeking orders:-
 - a) That the applicant be punished for contempt of Court orders dated 29th May 2023;
 - b) That the applicant be ordered to convene a Council meeting by 3pm 7th June 2023 to debate the motion to remove the applicant as Lord Mayor;
3. At the hearing on 7th June 2023, Mr Kalsakau for the second respondents abandoned the first part of the application seeking the applicant to be committed for contempt. It was simply acknowledged that there was no order made that had been disobeyed by the applicant.
4. Mr Nalyal sought further time to be able to respond to the second order sought by Mr Kalsakau – that is, requiring the applicant to convene immediately a Council meeting. While I heard argument from Mr Kalsakau on that matter, it seemed appropriate that I allow Mr Nalyal time to consider a response given that the application by Mr Kalsakau was filed only that morning. Mr Nalyal's response was deferred for consideration at a continuation of this hearing on 9th June 2023 at 9am.

The CPR 17.8 conference

5. Once a defence has been filed to an application for judicial review, a conference is required to be convened pursuant to CPR 17.8:

"17.8 Court to be satisfied of claimant's case

(1) As soon as practicable after the defence has been filed and served, the judge must call a conference.

(2) At the conference, the judge must consider the matters in sub rule (3).

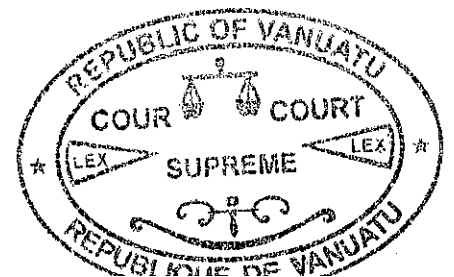
(3) The judge will not hear the claim unless he or she is satisfied that:

- (a) the claimant has an arguable case; and*
- (b) the claimant is directly affected by the enactment or decision; and*
- (c) there has been no undue delay in making the claim; and*
- (d) there is no other remedy that resolves the matter fully and directly.*

(4) To be satisfied, the judge may at the conference:

- (a) consider the papers filed in the proceeding; and*
- (b) hear argument from the parties.*

(5) If the judge is not satisfied about the matters in sub rule (3), the judge must decline to hear the claim and strike it out."

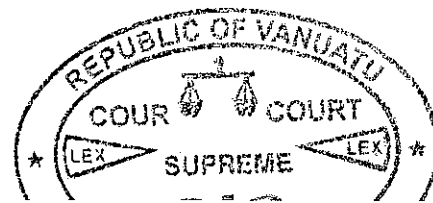


6. This conference took place on 7th June 2023. The two issues that arose relate to rule 17.8(3)(a) and (b). It is clear that there has been no undue delay in making the claim and that there is no other remedy that would resolve this matter fully and directly.
7. The first issue to be considered is where there is an arguable case. The Solicitor General, Mr Gilu, joined in support of Mr Kalsakau's argument that there is no arguable case. Furthermore, nor was the claimant directly affected by the decision in question.
8. Mr Leo for the City Council adopted a neutral position.
9. There is some background to this matter that needs to be explained.

Background

10. This proceeding was commenced by an urgent ex parte application filed by the applicant who is the Lord Mayor of the Port Vila City Council. That application was filed on 18th April 2023. It sought an order that the second respondents, 11 members of the 16-member City Council, be restrained from holding a meeting on 20th April 2023 to remove the applicant as Lord Mayor. I dealt with that urgent ex parte application on 19th April 2023 having regard to the sworn statement of the applicant filed in support and after hearing from Mr Nalyal for the applicant. I considered that there was a seriously arguable case for the applicant that justified urgent interim leave to be granted. The order made was that the second respondents, both individually and collectively, were prohibited from voting on any motion removing the applicant as Lord Mayor of the Port Vila City Council except in strict compliance with Reg. 25A(2) of the Municipal Council Elections Regulations No.60 of 1982 or until further order of the Court.
11. I also gave directions requiring the third respondent to be joined as a party to this proceeding and directing service.
12. A conference for the parties was then directed to be convened on Monday 24th April 2023.
13. By the time of the conference on 24th April 2023, the claimant had commenced a claim for judicial review seeking a declaration that the Municipal Council Elections Regulation (Amendment) Order No.52 of 23 was unlawful. As this was a case that required urgent attention, it was listed for an initial hearing on 29th May 2023.
14. At the hearing on 29th May 2023, it became apparent that I had misread the Order in question. I said this at paragraph 3 of the Minute issued that day:

"3. It clear that, however, in the haste to address the urgent ex parte application, I overlooked or misread the 2003 amendment. As will be clear from the order I made I understood that the 2003 amendment simply removed the words "subject to sub-clause (2)" from sub-clause (1). I did not notice that that paragraph 2 in the schedule to that amendment order also repealed sub-clause 25A(2). That was my mistake for which I accept responsibility and I apologise to anyone who has been inconvenienced as a consequence."



15. I stated further that if I had not overlooked or misread the effect of the 2003 amendment, I would not have made that interim order particularly if I had appreciated that the amendment to Reg. 25A removed paragraph 2 in its entirety. I discharged the interim order made. Unfortunately, the damage had been done as the second respondents lost their opportunity to have their motion for the removal of the Lord Mayor argued at that April meeting.
16. It was then agreed that the next step of the proceeding would be a rule 17.8 conference and directions were given for the filing of documentation to assist the Court in that respect.

The case for the Applicant

17. In 2021, the Municipal Council Elections Regulations were amended by the inclusion of a new Reg. 25A¹. That was in these terms:

"25A Removal of a Mayor by the Council

- (1) Subject to subsection (2), the council may pass a motion to remove a mayor if supported by a simple majority of the members of the Council.*
 - (2) The motion to remove the mayor must not be made unless the Council is unable to achieve the required quorum for 3 consecutive sittings during a meeting of the Council.*
 - (3) If a mayor is removed under subclause (1), the Council must elect the mayor in accordance with the procedure under clause 19."*
18. On 29th March 2023 the Minister of Internal Affairs made an order amending Reg. 25A². That amendment was expressed in the following manner:

- 1. Subclause 25A(1)**
Delete "Subject to subclause (2), the", substitute "The"
- 2. Subclause 25A(2)**
Repeal the subclause"

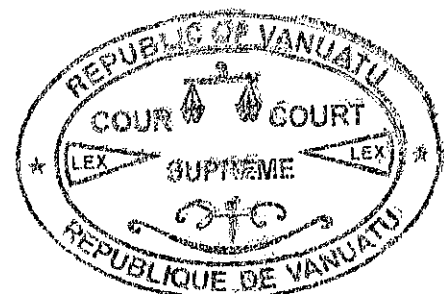
19. It is the second part to the 2023 amendment that, somehow, I managed to overlook.
20. Is there an arguable case that the decision of the Minister to make the 2023 amendment order was unlawful having regard, in general, to the Wednesday principle? That is, (as applicable here) whether the decision to make such an order was so unreasonable that no reasonable person in the position of the Minister would have made it.

21. Mr Nalyal's argument in this respect was along these lines:

- a) That no issue was taken that the Minister was entitled to make an order amending these regulations – he had the statutory authority to do so;

¹ Municipal Council Regulations (Amendment) Order No.173 of 2001

² Municipal Council Regulations (Amendment) Order No.52 of 2023



- b) However, the Minister was motivated by *male fides*. In this respect Mr Nalyal pointed to the evidence about a level of animus reported to have been expressed by the Minister about the applicant as Lord Mayor. Furthermore, that the Minister had placed pressure on the Councillors (the second respondents) by indicating that, in his position as Minister, he would not support the Council unless the Councillors removed the applicant as Lord Mayor.
- c) That the Minister could not have taken into account that a Lord Mayor is elected for a term of 2 years pursuant to clause 27 of the Regulations; and
- d) That the Minister did not undertake appropriate consultation before making the decision to amend clause 25A. In this respect, Mr Nalyal was unable to identify exactly who should have been consulted.

22. A rule 17.8 conference is not a time to address the credibility of the witnesses being those who have made sworn statements filed in the case. Accordingly, the Court is required to work primarily on the basis that the allegations made by the various witnesses are credible unless it is patently obvious that they are not.

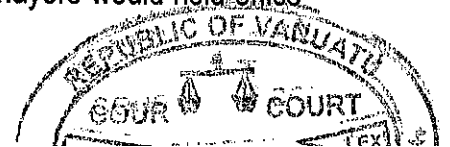
The response for the State

23. Mr Gilu for the State spent time taking the Court through the structure of the Municipalities Act [CAP 126] (the M Act). In summary:

- a. Section 3 provided for the establishment of municipal councils by order of the Minister (of Internal Affairs)
- b. Section 4 provided that the Minister may by order:
 - i. s.4(a) - prescribe the composition of a council and the number of councillors
 - ii. s. 4(d) - provide for the election of a mayor who shall be chairman of the council
 - iii. s. 4(f) – prescribe the terms and conditions of office of councillors including the mayor and the deputy mayor.
- c. Section 70 provides:

“The Minister may by Order make regulations not inconsistent with this Act, for and in respect of matters necessary for the better carrying out of the provisions of this Act”

24. The relevant Minister of the time by order made the Municipal Council Elections Regulations No. 60 of 1982. Initially, Reg 27 provided that All mayors would hold office



for one year from the date of their election or earlier dissolution of the Council. That was made subject to Reg. 25 that allowed a mayor to retire before the end of that mayor's term of office. Regulation 27 was subsequently amended to provide for a term of 2 years.

25. The regulations were further amended in 2021 as mentioned with the new Reg.25A³ that provided for a mayor to be removed by a simple majority of the councillors. That was made subject to 25A(2) that restricted the removal process.

"25A(2) The motion to remove the mayor must not be made unless the Council is unable to achieve the required quorum for 3 consecutive sittings during a meeting of the Council"

26. It was para. 25A(2) that was removed by the 2023 amendment. That entitled the Council to vote on a motion to remove the mayor with the only restriction being that it had to be at a Council meeting. The motion would pass by a simple majority of the Councillors – that is, at least 9 of the 16 Councillors.
27. Mr Gilu then referred to the case of *Port Vila Municipal Council v Attorney General [2005] VUSC 147*, a decision of Lunabeck CJ and which involved a challenge to decisions / directives of the Minister to the recovery of money paid to Councillors. The learned Chief Justice determined that it was for the Claimant / Applicant to establish that the directives of the Minister were so unreasonable that no reasonable person could have made them – that is, the *Wednesday*⁴ test for reasonableness. I see no reason to depart from this test nor did Mr Nalyal or Mr Kalsakau attempt to persuade me to do so.
28. Mr Gilu argued that there was no duty or other responsibility on the Minister to consult either the applicant or anyone else when making such orders as are in challenge in this case. Mr Gilu did note, however, that it is was the second respondent councillors who wrote to the Minister recommending the amendment however, that still did not place any duty or responsibility on the Minister to consult the Applicant / Mayor.
29. Finally, Mr Gilu submitted that the assertions by the Applicant / mayor that the amendment was politically motivated and an abuse of power is unfounded and could not be sustained.

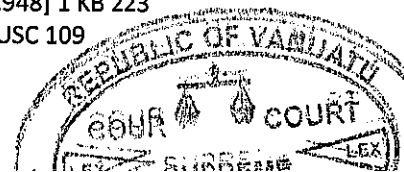
The response for the Second Respondents

30. Mr Kalsakau put the issues quite neatly in his submission that there was no express statutory requirement that the Minister must consult anyone when exercising the Minister's statutory powers under ss 4 and 70 of the Municipalities Act [CAP 126]. In this respect, Mr Kalsakau draw parallels with the decisions of Parliament and relied on a decision of his Lordship Lunabeck CJ that there was no requirement for Parliament to consult before enacting a bill⁵.

³ Para 17 above

⁴ *Associated Provincial Picture Houses Ltd v Wednesday Corporation* [1947]EWCA Civ 1; [1948] 1 KB 223

⁵ *Government of the Republic of Vanuatu v President of the Republic of Vanuatu* [2012] VUSC 109



31. That case, of course, was by way of a Constitution Petition – an inquiry whether there was a requirement by the Constitution for Parliament to consult – and of course the decisions of Parliament are not subject to judicial review and thus the Wednesday principle requiring reasonableness.
32. Mr Kalsakau then turned to the allegation that the Minister's decision was unreasonable as it was motivated politically and with male fides.
33. In this respect Mr Kalsakau referred to a number of authorities that he contended demonstrated that this Court must not allow an enquiry into the motives of a Minister again by referring to Constitution challenges to the decisions of Parliament. Mr Kalsakau relied in particular a decision of His Lordship Lunabek CJ in a 1998 case⁶. That was a case involving a challenge to the decision of Parliament to repeal the Ombudsman Act No.14 of 1995. The learned Chief Justice said this:

"This Court may not, in passing upon the validity of an Act or proposed law, enquire into the motives of Parliament because the validity of legislation or a proposed law is not to be determined by the motives or the "ultimate end" of a statute or proposed law."

34. In the course of that judgment, His Lordship also referred to an earlier decision of his Lordship d'Imecourt CJ to a similar end⁷:

"In the cause of interpreting the constitutionality of these present Bills, there is no question of entering into an inquiry as to whether or not the proposed Acts are in fact 'for the peace, order and good Government of Vanuatu', that must be a question in the sole discretion of Parliament."

35. Further reference was made to a decision of the High Court of Australia in *Barger*⁸. In that case, all justices of the High Court of Australia agreed that when a legislative power was granted, neither the indirect effect of its exercise nor the motive or object of the legislative in exercising it were relevant to the question of the validity of its exercise in a particular given case.
36. While those cases related to the decisions of Parliament, Mr Kalsakau argued that the same approach must apply to decisions authorised by subsidiary legislation.

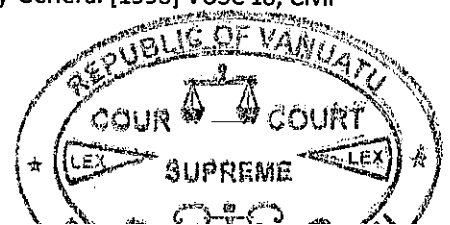
Discussion

37. I do not agree that the cases relating to decisions of Parliament apply also to decisions of those empowered to make certain decisions pursuant to statutory authority. As I have already mentioned, Parliament is not subject to the scrutiny by this Court as to whether its decisions are unreasonable in the *Wednesday* sense. However, Ministers (and others) exercising the power of decision making pursuant to statutory authority are subject to the scrutiny of this Court in that way. Be that as it may, it would require a clear case to

⁶ In re the President's Referral, President of the Republic of Vanuatu v Attorney-General [1998] VUSC 18; Civil Case 169 of 1997 (5 June 1998)

⁷ President of the Republic of Vanuatu v. Attorney General (1993) V.L.R. 59

⁸ R. v. Barger [1908] HCA 43; (1908) 6 C.L.R. 41



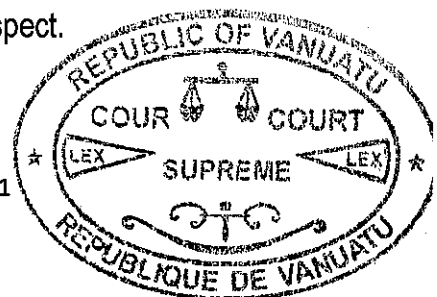
encourage this Court to allow an inquiry into whether a Minister had been motivated by an improper purpose or male fides.

38. The allegation here is that the Minister has indicated a personal view of the Applicant / Mayor but that at best might raise the possibility that the Minister may have been motivated to make the amendment by an improper purpose or male fides. However, that allegation needs to be placed alongside the fact that the Second Respondent / Councillors wrote to the Minister seeking his assistance in this respect.
39. While the Minister may not hold the Applicant in high regard, it is also clear that, at least earlier this year, a majority of the Second Respondent Councillors also had that view and sought to remove the Lord Mayor. Accordingly, the evidence advanced for the Applicant is also perfectly capable of being considered as the reasonable response of the Minister with responsibility for municipal councils. Of course, this decision to amend Reg. 25A applies nationally across all municipal councils and not just the PVCC.
40. Additionally, when regard is had to Reg. 25A prior to amendment, and sub-clause (2) in particular, it also is clear that this could be misused to enable an unpopular mayor to cling to power by delaying or denying councillors the chance to vote on a motion for the mayor's removal. Again, it is noted that the PVCC has not met as a Council since February 2023. Accordingly, it is also perfectly capable of argument that the 2021 amendment has not enabled the democratic outcome it might have sought to achieve and that the 2023 amendment has provided an appropriate procedure to achieve that outcome.
41. A mayor of a municipal council should have the confidence of his or her councillors otherwise there is a real risk that the municipal council may not be able to provide the good governance of the municipality that is required of them by the community that elected them.
42. The fact that Reg. 27 provides for a term of 2 years for a mayor once elected does not mean that such a provision cannot be made subject to a provision that entitles a majority of the council to remove that mayor. It is not necessary that Reg. 27 be expressly made subject to (in this case) Reg 25A.
43. Certainly, a strong case alleging male fides on the part of a statutory decision maker may well justify scrutiny by this Court. The Privy Council in the Mercury Energy case⁹ stated,

"Decision-makers can expect no quarter if they are actuated by corruption, fraud or bad faith, or are guilty of public misfeasance. Male fides is the apogee of abuse of power"

44. The evidence in this case does not warrant further inquiry in that respect.

⁹ Mercury Energy Ltd v Electricity Corp of New Zealand Ltd [1994] 2 NZLR 383 (PC) at 391



45. I also agree entirely with Mr Gilu and Mr Kalsakau that there is no duty or responsibility on a Minister, in this context, to consult anyone when exercising a power that has been bestowed on that Minister by statute unless the empowering provision requires such consultation. If that were not the case, how could the category or categories of those required to be consulted be ascertained with any certainty.

Conclusion

46. I am accordingly not satisfied that the claimant has an arguable case. This claim is accordingly struck out – CPR 17.8 (5).

47. There is one final matter that requires attention. The second respondents sought an order that the PVCC meet to address the motion for the removal of the Lord Mayor. I do not have the power to intervene in the workings of the PVCC in that way unless there has been a refusal to convene a Council meeting notwithstanding compliance with the relevant regulations and standing orders.

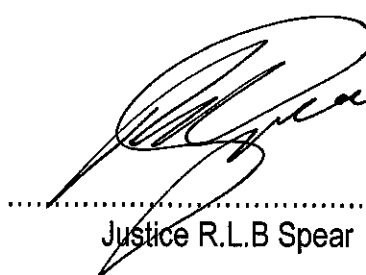
48. Costs will follow the event and to be taxed by the Deputy Master if not agreed.

49. I urge the parties to address the issues that have created this impasse. As I explained to the parties at the conference last Friday, the Lord Mayor has a clear leadership role within the Council, but it can only result in dysfunction if a majority of the Council does not have confidence in the Lord Mayor. An issue such as confidence in this context needs to be debated and resolved for the benefit of all those who have elected these councillors to govern this city.

50. It is important that all the parties put aside their personal differences and work lawfully towards a resolution of this impasse. Given that the Council has not met since February 2023, to any reasonable independent observer that would be seen as an appalling state of affairs.

Dated at Port Vila this 13th day of June 2023

BY THE COURT


Justice R.L.B Spear

