

BETWEEN: Christopher Emelee
Applicant

AND: Republic of Vanuatu
Respondent

Date of Hearing: 9th April 2020
18th September 2020

Coram: Hon. Chief Justice Vincent Lunabek

Counsel: Marie NF Patterson for the Applicant
Samy Aron for the Respondent

Date of Judgment: 19th July 2024

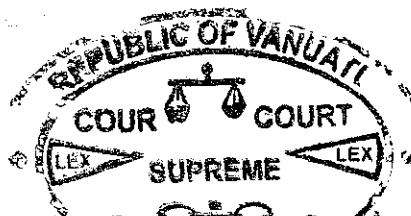
JUDGMENT

Introduction

1. By a constitutional petition issued on 21st November 2019, Mr Christopher Emelee (the petitioner) sought declarations and orders restraining the actions of a Parliamentary Committee purporting to be the Public Accounts Committee of Parliament (the PAC) and the actions of Mr Ephraim Kalsakau in convening that Committee for the purpose of progressing an inquiry into allegations against the petitioner (the inquiry). The petition was later amended with the leave of the Supreme Court on 2nd June 2020. Central to the claims made by the petitioner were allegations that his fundamental right and freedom recognised under Article 5(1) to protection of the law (Article 5(1)(d)) had been infringed by the inquiry activities being pursued by the PAC and Mr Ephraim Kalsakau.

Background

2. The petitioner at relevant times, was a Member of Parliament representing the Torres Constituency. He held the position of Minister of Infrastructure and Public Utilities. A parliamentary election was about to take place at the time and he was standing for re-election.



3. The inquiry which the PAC was pursuing concerned allegations which had been publicly made by the then leader of the opposition, Mr Alatoi Ishmael Kalsakau, and published in the local newspaper about alleged outstanding licence fees, outstanding Air Vanuatu tickets, and the acquisition of a government wharf. The allegations concerned the petitioner and a company known Tuna Fishing (Vanuatu) Co. Limited of which the petitioner was the director. On 26 August 2019 Mr Alatoi Ishmael Kalsakau wrote a letter of request to Mr Ephraim Kalsakau (his brother) addressed to him as Chairman of the PAC seeking an inquiry by the PAC into the allegations.
4. The petitioner deposed in sworn statements in support of his petition that he believed Mr Ephraim Kalsakau, purporting to act as Chairman of the PAC caused an inquiry by PAC to commence which then summonsed and heard witnesses, allowed for delegations to be made to the PAC, and allowed information gathered by it which should have been treated as confidential to be made available for publication in the social media.
5. Membership of the PAC which was progressing the inquiry included people who had come on to the PAC as the result of nominations made by the Deputy Leader of the Opposition, Mr Ronald Warsal. Those nominations included Mr Ephraim Kalsakau as proposed chairman and Mr Warsal himself, even though he had at an earlier time acted as the lawyer for the petitioner.
6. The petitioner sought relief from the Court as he believed the activities of the PAC were being conducted for political reasons and with the purpose of having his reputation and prospect of re-election at the forthcoming election damaged.

Issue

7. Notwithstanding a large volume of papers and submissions made for and against the petition the essential argument being advanced by the petitioner has at all times being that the activities of the PAC were illegal as there had never been any valid appointment of the members of the PAC or of the Chairperson position.

Law and Arguments

8. Article 23 of the Constitution provides:

"Parliament may establish committees and appoint members to them."

This essential power of appointment by Parliament is recognised in the Expenditure Review and Audit Act [CAP. 241]. Part 2 of the Act entitled PUBLIC ACCOUNTS COMMITTEE TO REVIEW PUBLIC EXPENDITURE recognises the Public Accounts Committee the establishment for which is provided for in the Standing Orders of Parliament. Section 4 provides that the committee is to have the functions, duties and powers conferred on it by the Act. Section 5 provides that the chairperson of the committee is to be a member of Parliament, and by s.5(2) is to be appointed by Parliament, save that under s.5(3) if Parliament is not in session and the position of



chairperson is vacant, the Speaker of Parliament may appoint a member of Parliament as the chairperson until the Parliament appoints the chairperson. Section 9 provides that in addition to the chairperson the PAC is to comprise no more than six other members who must be members of Parliament appointed by the Parliament.

9. By motion Number 8 of 2016 Parliament resolve to constitute:

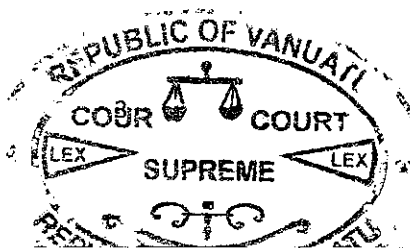
"A Parliament standing committee called the "COMMITTEE ON PUBLIC ACCOUNTS" consisting of:

- (a) Four (4) members appointed by the Hon. Prime Minister;*
- (b) Three (3) members appointed by the Leader of the opposition ...*

10. The petitioner contended that the PAC was not validly constituted as none of its purported members had been appointed by Parliament and neither had the chairperson been appointed by Parliament.

11. The respondent through the Attorney General acting as the contradictor to the petition has strenuously denied the claims of the petitioner and continued to do so up until a hearing of the amended petition which occurred before me on 18th September 2020. The respondent's denials, and two unsuccessful strikes out applications brought before the hearing, contended that the PAC, its membership, and the Chairperson had been validly appointed under the motion No. 8 of 2016 resolution. Parliament had provided in the resolution for appointments to be made in the manner set out in the resolution, that is by nominations of members by the Prime Minister and the Leader of the Opposition respectively. Further, the respondent contended that the resolution permitted either the Prime Minister or the Leader of the opposition acting alone to change the membership of the PAC from time to time by changing the nominations they made, a process referred to at one point in the respondents' submissions as "adjustments" to the membership of the committee.

12. The concerns of the petitioner that the so-called appointments to membership of the PAC were not lawfully made were obviously made known by him to others and taken up by the Speaker of Parliament. On 10th October 2019 the Speaker wrote to the Director General and Director of Finance of the Ministry of Finance, to the Clerk of the Parliament, to the Finance Manager of Parliament with copies to all 51 members of Parliament pointing out that in his view the PAC had not been validly appointed. He sought urgent action to ensure that appointments were in future validly made by Parliament as required by the Constitution and in the meantime asked that the activities of the invalidly appointed PAC cease, including ceasing the improper public disclosure of confidential information. However, the petitioner complained in sworn evidence that the PAC without any of its members or the chairperson being appointed by Parliament continued to conduct the inquiry hearing and to publicly release confidential information through the months of September, October and November 2019.

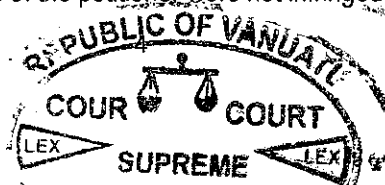


Oral decision – 18 September 2020

13. When the matter came on for trial before me on 18th September 2020 the merits of the arguments of both sides were considered. At the conclusion of argument, I indicated that I considered that the membership of the committee had not been validly appointed as actual appointments had to be made by Parliament. The Constitution expressly so provided. Nominations by the Prime Minister and the Leader of the Opposition, or by their delegates, were not appointments made by Parliament. I said that I considered that the PAC was a parliamentary committee, not a stand-alone committee created by the Expenditure Review and Audit Act. I considered that under the motion No.8 of 2016 resolution, members nominated by the Prime Minister and the Leader of the Opposition had also to be appointed by Parliament. This had not happened. I further decided that the investigation activities conducted by the PAC in the months of September, October and November 2019 were unconstitutional and confidential information had improperly been made available to journalists who reported the information in the social media. (At that time there was in force a restraining order against the newspaper and other publishers preventing the publication of information of the kind being aired in the investigation. The restraining orders had been made in other proceedings instituted by the petitioner).
14. I indicated to the parties that I upheld the petitioner's claims for relief and would adjourn the hearing to enable the parties to discuss what compensation order should be made in favour of the petitioner to vindicate the infringement of his rights.

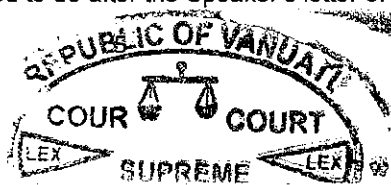
Further and New Arguments and Court Considerations

15. However, on 2nd October 2020 the respondent filed a memorandum inviting the Court to give more consideration to another argument apart from that mounted by the petitioner under Article 23 of the Constitution, and also to consider a new ground for dismissing the petition, namely the doctrine of "*de facto office*". Thus, even if the members of the PAC and its chairperson were not validly appointed, the inquiry should nonetheless be validated under that doctrine, the respondent argued.
16. Counsel for the petitioner immediately responded saying that the Court had in effect ruled on liability and the respondent's new argument should not be received. Nevertheless, detailed submissions in response were filed at Court along with further written submissions from both parties about the fore-shadowed compensation award, should the Court remain of the opinion that the petitioner had made out his case.
17. I have considered the new material advanced by the respondent in opposition to relief under the petition. I consider that this material, and new arguments advanced by the respondent, are without substance. I remain of the opinion previously expressed that the petitioner has established his case for the reasons I delivered orally on 18 September 2020.
18. In the new material advanced by the respondent it is argued that even accepting that the PAC was acting unlawfully the rights of the petitioner were not infringed. The respondent emphasises



the opening provisions of article 5(1). The individual rights and freedoms enumerated later in Article 5(1) are all subject to the "rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health". The respondent argues that there was a public interest in publicising through the PAC the matters under investigation. At the outset this argument overlooks entirely the petitioner's case that the PAC investigation was being conducted under the direction of members of the Opposition as a political exercise to embarrass the petitioner in his bid for re-election. The petitioner's allegations that the PAC was acting in the political interest of the Opposition and not in the public interest has not been answered by the respondent in the evidence it has placed before the Court. In my opinion the unanswered allegations that the PAC was motivated by political objectives is fatal to the respondent's argument. Further I do not consider the public interest in hearing information about allegations aired in the public media outweighs the importance of due process under the institutions of Parliament, and the proper exercise of the very wide powers of Parliament.

19. The respondent also argues that the petition was an abuse of process as the petitioner could have challenged the validity of the appointments of members of the PAC by Judicial Review. This submission is without merit. There was a claim in the petition for compensation for infringement of a fundamental right. Judicial review is not an avenue for seeking compensation for such a breach. Moreover, Article 6(1) of the Constitution is clear: anyone who considers that any of their rights guaranteed by the Constitution has been infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right. The petitioner has exercised that right, and is not to be criticised for having done so.
20. Further, the respondent has made from the stand previously taken by it up to the hearing on 18th September 2020 and now says in its last written submissions that the petitioner's proceedings have had a beneficial public interest outcome as they have "identified an error of law of great significance in relation to the appointment of Parliamentary Committees", namely that the membership of such committees must be made by Parliament and not by a single member of Parliament as was the case under the practice previously adopted. The respondent has not explained how this beneficial result lessens the entitlement of the respondent to a compensation order. I do not think it does. Rather it indicates a reason why the situation in which the respondent was placed under the previous practice should attract a monetary judgment that marks the previous practice with disapproval.
21. Finally, the Court is asked to apply the doctrine of de facto office, a doctrine which the Court of Appeal in this Republic has applied in *Leymang v Ombudsman* [1997] VUCA 9 and *Kilman v Natapei* [2011] VUCA 2024. Fundamental to the application of the doctrine in those cases, and others elsewhere from which passages are cited by the respondent in its submissions, is the fact that the office holder who was acting without lawful authority was acting in good faith unaware of the defect which affected the office being exercised. Here, all the members of Parliament including those purporting to act as members of the PAC had been given chapter and verse detail of the constitutional and statutory requirements for the need for appointment by Parliament, but the PAC here chose to press on notwithstanding the challenge to the validity of what they were doing. There can be no room for the application of the doctrine in these circumstances. The validity of whatever they preceded to do after the Speaker's letter of 10th October 2019 turns on



whether in law their appointments were valid or whether they were not. The Court has determined that they were not.

Relief

22. In *Republic of Vanuatu v Bernard* [2016] VUCA 4 the Court pointed out that a monetary award for an infringement of a fundamental right or freedom is an award made under public law compensation principles, not common law damages, and the focus of the claim must be on the breach of rights, not personal injury [at 20]. The Court went on to hold:

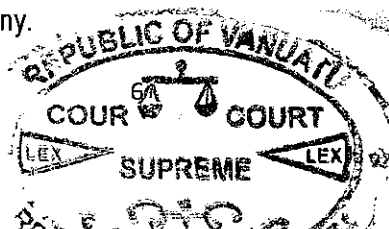
34. *In assessing compensation to be paid for an established breach of a constitutional right consideration of the nature of the wrongdoing that attracts the right to compensation must be of central importance. The more serious the malice or knowing conduct that renders the breach sufficiently serious to warrant compensation, the greater will be the need to make an award that adequately demonstrates that seriousness and will demonstrate the need for respect of the fundamental right or rights that have been infringed.*

35. *As a starting point compensation should make good actual pecuniary losses suffered by the victim, like special damages in a common law action make good out-of-pocket expenses. If personal injury or damage to business or reputation of the kind which attracts general damages in a common law assessment is suffered compensation for that should be recognized, and again common law principles may provide by analogy a useful guide.*

36. *But beyond compensation for those items, common law principles as to punitive damages are likely to be of little assistance. Depending on the flagrancy of the conduct constituting the breach of the constitutional right the compensatory award may be lower than would be an award at common law, or might be much higher.*

23. The petitioner contends that there should be an award in the order of VT2.5 to 3.5 million to mark the seriousness of the infringement of the petitioner's right to protection of the law brought about by the deliberate pursuit for political ends by the PAC investigation, particularly in the months of September, October, and November 2019 when the PAC was well aware of the challenge to its validity, and for the blatant flaunting of confidentiality which should have attached to the information it was receiving.

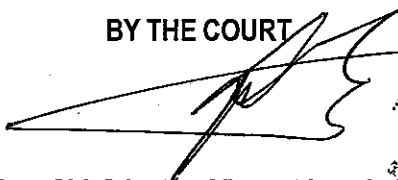
24. The respondent on the other hand argues that if all its attempts to resist an adverse finding fail an award should be low and not more than VT300,000. The respondent points out that the petitioner ultimately retained his Parliamentary seat, and has adduced no evidence of actual financial loss. The respondent also argues that the allegations advanced by the PAC concerned a company not the petitioner. I think this is a distinction without a difference as the petitioner was the director of the Company, and the allegations the subject of the inquiry directly concerned the petitioner as well as the company.



25. I consider there needs to be a substantial award of compensation to stress the seriousness of the infringement of the petitioner's right to protection of the law. I fixed the compensation at VT 2.5 million. The judgment will carry interest at a rate of 5% from the date of the Petition, 21st November 2019 until payment.
26. The respondent must pay the petitioner his costs of this proceedings on the standard rate to be agreed or taxed.

Dated at Port Vila, this 19th day of July 2024.

BY THE COURT



Hon. Chief Justice Vincent Lunabek

