

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

Civil
Case No. 23/3062 SC/CIVL

BETWEEN: JOHN JEFFRED TIJIABANG
Claimant

AND: REPUBLIC OF VANUATU
Defendant

Before: Justice M A MacKenzie
Counsel: Mr Tijiabang – Mr R Willie
Defendant – Mr T Loughman

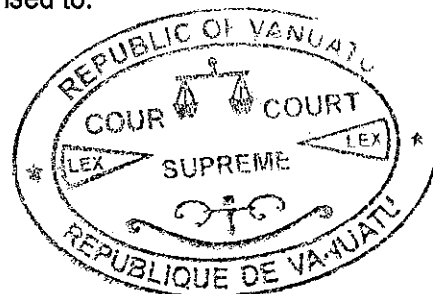
DECISION AS TO STRIKE OUT APPLICATION

The application

1. The Defendants seek an order striking out the claim. This is on the basis that Mr Tijiabang did not comply with directions made by the Court and that the claim has no basis as the pleadings are deficient as to what the cause of action is.
2. The application is opposed.
3. At the hearing, both counsel relied on their written submissions.

Background

4. In June 2023, Sergeant Manses of the Vanuatu Police Force ("VPF"), investigated criminal complaints against Mr Tijiabang relating to firearms. He visited Mr Tijiabang's premises several times to obtain statements but was unable to locate him. As police were unable to speak to Mr Tijiabang, a search warrant was obtained.
5. On 25 July 2023, a search warrant was issued by the Magistrate's Court. The search warrant was issued pursuant to section 55 of the Criminal Procedure Code [CAP 136] ("CPC"). Under the search warrant, Police were authorised to:



"...with such assistance as maybe necessary on any day between the hours of sunrise and sunset to enter and search the above premises the Mr Johnny Jeffrey Bong residences both at Sarakata area and at Aviaboe residence on Malo Island and to seize the evidence as listed on the application.

1 carrabin

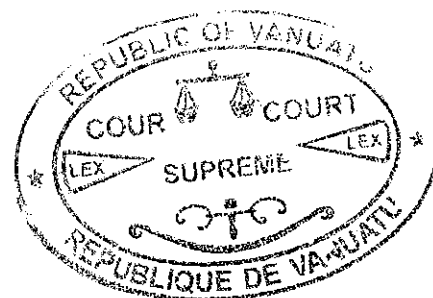
1 12 gauge shotgun

1 .22 rifle."

6. The search warrant was executed the same day, 25 July 2023. Mr Tijiabang was not present. To gain entry, a small lock on the front door was broken. Once inside, Police found a loaded firearm. Police also searched Mr Tijiabang's vehicle but did not find any firearms. The firearm found inside the house was taken to the police station.
7. It is not in dispute that Mr Tijiabang was in possession of a firearm that did not belong to him and is not a licenced firearms holder. Mr Tijiabang had borrowed a firearm from an associate, who was a licenced firearms holder. Mr Tijiabang used the firearm to kill cattle for his mother's funeral, and then locked it inside his room at the Malo Island property. He alleges that during the search Police negligently damaged the front door, two internal doors, and the door of his vehicle.

The claim

8. Mr Tijiabang asserts Police acted outside the scope of the search warrant because they damaged the front door and two internal doors of his house. Further, Police searched his vehicle and damaged one of the doors.
9. The claim is not well pleaded. The claim was initially filed on 9 November 2023. Mr Tijiabang alleged Police acted unlawfully because the search was carried out without a search warrant. Mr Tijiabang now accepts there was a search warrant and so, filed an application for leave to amend the claim, together with a draft amended claim.
10. The proposed amended claim asserts Police were negligent because they acted outside of the search warrant by damaging internal and exterior doors of Mr Tijiabang's property and a door of his vehicle.
11. A defence was filed. The Defendants allege that when Police executed the search warrant, they acted in good faith and employed the necessary required force and actions in the search. As such, the Defendants are indemnified from legal suit pursuant to section 40 of the Police Act [CAP105] ("the Police Act").



Approach to a strike out application

12. The jurisdiction to strike out a proceeding should be exercised sparingly, and only in clear cases where the Court is satisfied that it has both the material and the assistance from the parties to reach a definite conclusion.
13. The relevant principles are discussed by the Court of Appeal in *Hocten v Wang* [2021] VUCA 53. The Court of Appeal said (at paragraphs 11-13);

*"11. There is no jurisdiction to strike out a Claim in the Civil Procedure Rules, apart from a narrow provision in rule 9.10. However, pursuant to s 28(1)(b) and s 65(1) of the Judicial Services and Courts Act [Cap 270], the Supreme Court has jurisdiction to administer justice in Vanuatu, and such inherent powers as are necessary to carry out its functions. Rules 1.2 and 1.7 of the Civil Procedure Rules give the Supreme Court wide powers to make such directions as are necessary to ensure that matters are determined in accordance with natural justice. The jurisdiction to strike out is essential and must exist to enable the Supreme Court to carry out its business efficiently, so that hopeless or vexatious claims, causing unreasonable costs, do not prevent the Court from hearing proper claims. Such jurisdiction was recognised by this Court in *Noel v Champagne Beach Working Committee* [2006] VUCA 18.*

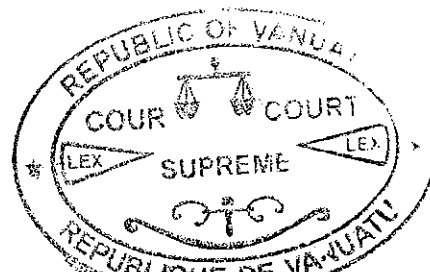
*12. The basis for striking out a proceeding is recognised in jurisdictions throughout the Pacific; see the New Zealand High Court Rules, r15.1, and *McNeely v Vaai* [2019 WSCA 12. A pleading will be struck out:*

- a) if there is no reasonably arguable cause of action;*
- b) the claim is frivolous or vexatious;*
- c) it is otherwise an abuse of the process of the court.*

13. The jurisdiction should be exercised sparingly, and only in clear cases where the Court is satisfied that it has both the material and the assistance from the parties required to reach a definite conclusion. A claim should only be struck out when despite this material and assistance, and the chance to amend the pleadings to reflect that material, it cannot possibly succeed".

14. Striking out any statement of a case have been described by the Supreme Court as a "draconian remedy". In *Hungtali v Kalo* [2024] VUSC 136, Hastings J said at paragraph 15;

*"Striking out any statement of a case is a "draconian remedy" (*Asiansky Television plc v Bayer Rosen* [2001] EWCA Civ 1792). Although striking out*



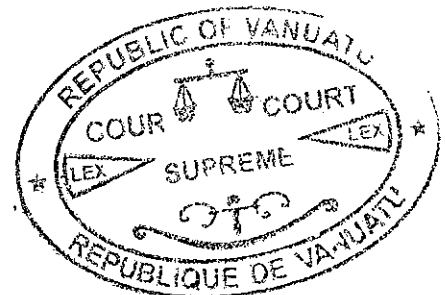
a claim is not inherently contrary to the Constitution's guarantee of protection of the law, and equal treatment under the law or administrative action, in Article 5, the Court must nevertheless be cautious to ensure its exercise of discretion to strike out a claim does not violate those guarantees. A claim will not be suitable for striking out if it raises a serious factual issue which can only be properly determined by hearing oral evidence (Bridgeman v McAlpine-Brown [2000] LTL January 19, CA). Nor should a claim be struck out unless the Court is certain that the claim is bound to fail (Hughes v Colin Richards & Co [2004 EWCA Civ 266]). In short, if a pleading raises a serious contested issue, then it should not be struck out and the issue should be determined after trial".

15. Disputed issues of fact should be decided at trial not on an application to strike out which is normally dealt with on the basis that the facts pleaded in the claim can be proven: *Iririki Island Holdings v Ascension Limited* [2007] VUCA 13.
16. In *Gouras v NACA Ltd* [2020] VUCA 53, the Court of Appeal made the following observation about disputed facts in the context of an interlocutory application at 22:

"The outcome of interlocutory applications such as the present will rarely be successful when there are matters of disputed fact. The admissibility of certain evidence and the weight to be given to certain evidence are matters for trial. Parties and counsel cannot expect the Court on such applications to hear a 'mini-trial' or to make a decision based on contested factual material..."

Submissions

17. Mr Loughman contends there are two bases to strike out the claim:
 - a. Mr Tijiabang's failure to progress the claim due to non-compliance with timetabling directions.
 - b. There is no reasonable cause of action against the Defendants as pleaded in the proposed amended claim. This is because the Defendants' actions were lawfully carried out in accordance with ss 5, 6 and 57 (1)(2) of the CPC and s 40 of the Police Act.
18. The Defendants contend that ss 5, 6 and 57 (1)(2) of the CPC give Police wide powers to break open doors and windows for the purposes of undertaking a search. Further, that pursuant to s 40 of the Police Act, the Police Officers acted in good faith in executing the search warrant.



19. Mr Willie submits that the basis of the claim is the tort of negligence based on the assertion that the Police Officers acted outside of their duty of care in respect of a search warrant which resulted in damage to Mr Tijiabang's house and vehicle. Mr Willie submits that the Defendants have failed to comply with sections 5, 6 and 57 (1) of the CPC.
20. Further, Mr Willie submits there are disputed facts which can only be determined through a trial and as such will be premature to dispose of the claim at this point.

Discussion

21. While Mr Willie was tardy in terms of compliance with the timetabling directions, that is not a basis to strike out the claim at this point. As was said in *Dinh v Polar Holdings Ltd* [2006] VUCA 24, the Court of Appeal affirmed observations previously made in *Fujitsu (NZ) v International Business Solutions Limited and others* [1998] VUCA 13 that "...the Rules of Court are intended to further the interest of fairness and justice, and they must be applied with common sense in a realistic way to ensure that the purpose, not just the letter, of the Rules is achieved". That said, the Court does not condone non-compliance with timetabling directions.
22. In this case, Sergeant Manses obtained a search warrant, which was issued pursuant to s 55 of the CPC. Section 56 of the CPC provides for execution of a search warrant and provides:

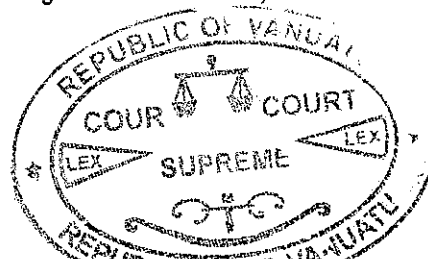
56. EXECUTION OF SEARCH WARRANT

Every search warrant may be issued on any day including Sunday or public holiday and may be executed on any day between the hours of sunrise and sunset but the judicial officer may, by the warrant, in his discretion, authorise the police officer or other person to whom it is addressed to execute it at any hour.

23. A search warrant may be issued on any day and maybe executed any day between the hours of sunrise and sunset. There is no suggestion here that the search was executed outside of the hours of sunrise and sunset.
24. Because Mr Tijiabang was not present, Police were entitled to break any outer or inner door or window of the premises in order to gain entry. This is by virtue of ss 57(1) and (2) and sections 5 and 6 of the CPC, which provide:

57. Person in charge of closed place to allow entry

(1) Whenever any building or other place liable to search is closed, any person residing in or being in charge of such building or place, shall on demand of the police officer or other person executing a search warrant,



and on production of the warrant, allow him free entry thereto and exit therefrom and afford all reasonable facilities for a search therein.

(2) If entry to, or exit from, such building or other place cannot be obtained, the police officer or other person executing the search warrant may proceed in the manner prescribed by section 5 or 6.

5. Search of place entered by person sought to be arrested

(1) If a person acting under a warrant of arrest, or a police officer having authority to arrest has reason to believe that the person to be arrested has entered into or is within any place, the person residing in or being in charge of such place shall, on demand of such person acting as aforesaid or such police officer, allow him free entry thereto and afford all reasonable facilities for a search therein.

(2) If entry cannot be obtained under subsection (1) it shall be lawful in any case for a person acting under a warrant, and in any case in which a warrant may issue but cannot be obtained without affording the person to be arrested an opportunity to escape, for a police officer to enter such place and search therein, and, in order to effect an entrance into such place, to break open any outer or inner door or window of that place, whether being that of the person to be arrested or of any other person, if after notification of his authority and purpose, and demand of admission duly made, he cannot otherwise obtain admission.

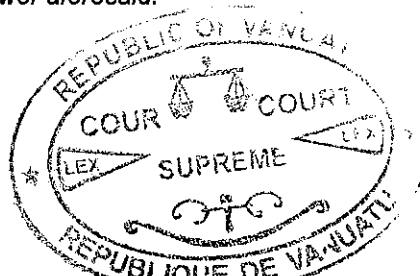
6. Power to break open doors and windows for purposes of liberation

Any police officer or other person authorised to make an arrest may break open any outer or inner door or window of any place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.

25. As long as the Police Officers acted in good faith, the Defendants are protected from liability pursuant to section 40 of the Police Act. Section 40 says:

40. Non - liability for act done in good faith

No suit or other proceedings for damages shall be instituted in any court of law against the Minister or the Commissioner or the Commission or any other member of the Force or any other person for or on account of or in respect of any fact, matter or thing done or purported to be done or omitted to be done, in good faith, in the performance or exercise of any duty or power imposed or conferred by or under this Act; and the provisions of this section shall extend to the protection from liability as aforesaid of any person deputed by delegation under this Act or under any other law for the time in force to perform or exercise any such duty or power aforesaid.



26. The effect of provisions comparable to s 40 of the Police Act has been considered by the Court of Appeal in *Republic of Vanuatu v Toro* [2016] VUCA 27 and *Ombudsman of the Republic of Vanuatu v Letlet* [2023] VUCA 1.
27. In *Republic of Vanuatu v Toro*, the Court of Appeal considered s 9 of the Land Leases Act, which is similar to s 40 of the Police Act. The Court held it was an affirmative defence which needed to be asserted and proved.¹ In *Letlet*, the Court considered the Ombudsman Act. In the context of a similar provision, the Court said that it could be raised as a defence to the action and the Ombudsman would have the onus of showing that the act in question was done in good faith and without negligence.²
28. Having regard to both *Toro* and *Letlet*, it is for the Defendants prove good faith, as it has been pleaded in the defence.
29. Counsel did not provide the Court with any authorities which might assist with respect to liability (or otherwise) for damage caused to property during execution of a search warrant. In New Zealand, it is settled law that a search that is lawful may nevertheless be unreasonable due to the manner in which it is carried out. Lawfulness and reasonableness are distinct concepts.³ What I understand Mr Tijiabang to be asserting in the proposed amended claim is that the search was unreasonable, because Police caused damage to his property in gaining entry to his house and vehicle.
30. I consider that both the claim and Mr Tijiabang's sworn statement are inadequate. However, as was held in *Hocten v Wang* (at paragraph 18):

"...Claims should only be struck out if even on the best pleadings possible following amendment the Claim is not reasonably arguable".

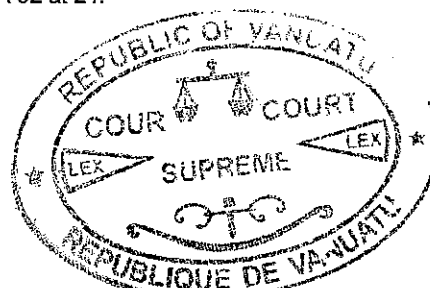
31. Whether or not the search was unreasonable is a reasonably arguable cause of action. The Defendants, as entitled, have raised the good faith defence relying on s 40 of the Police Act. There will need to be factual findings. On a strike out application, the Court must proceed on the basis that the facts pleaded in the claim can be proven.⁴ Mr Tijiabang alleges Police caused damage to the front door, two internal doors and the door of his vehicle. Sergeant Manses' evidence is that Police broke a lock on the exterior door to gain entry to the property, but his sworn statement is silent as to whether Police were required to force entry once inside the property. The photos annexed to Mr

¹ Section 9 of the Land Leases Act provides "the director shall not, nor shall any other officer of the Lands Records Office be liable to any action of proceedings for or in respect of any act or matter done or omitted to be done in good faith and the exercise or intended exercise of his powers under this act of any order made thereunder".

² Section 41 (1) of the Ombudsman Act provides that the Ombudsman and his Officers have immunity from certain respect of acts or admissions done or made 'in good faith and without negligence'.

³ *R v Laugalis* (1993) 10 CRNZ 350 at 8 and *R v Williams* [2007] NZCA 52 at 24.

⁴ *Iririki Island Holdings v Ascension Limited* [2007] VUCA 13.



Tijjabang's sworn statement are of poor quality, but the damage does not appear to be significant.

32. On balance, I decline to strike out the claim. Firstly, the non-compliance is difficult to understand, but not at the point to warrant the claim being struck out. Secondly, there is a reasonably arguable cause of action which is that Police acted unreasonably when executing the search warrant.
33. While poorly pleaded, the claim is capable of amendment, and I will make directions to that effect. Police have raised the good faith defence pursuant to s 40 of the Police Act, and assert they were entitled to use force to gain entry and execute the search warrant. The evidence will need to be tested, and in particular whether Police did or did not damage interior doors, and the extent of the damage. Whether or not the claim ultimately has any merit is for a trial.

Orders and directions

34. I make the following Orders and directions
 - a. The strike out application is refused for the reasons given.
 - b. Mr Tijjabang is to file and serve an amended claim by 21 October 2025.
 - c. The Defendants are to file and serve an amended defence and any sworn statements in support by 11 November 2025.
 - d. The Claimant has liberty to file reply statements by 25 November 2025.
 - e. There is a pre-trial conference on 9 December 2025 at 8.30am.

**DATED at Port Vila this 30th day of September 2025
BY THE COURT**

Mackenzie
Justice M A MacKenzie

