

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

Judicial Review
Case No. 24/2369 SC/JUDR

**BETWEEN: AEP LTD trading as VANUATU
ZOOLOGICAL of Narpow Point, Port Vila
Claimant**

**AND: The Director, FISHERIES DEPARTMENT
Port Vila
Defendant**

Before: Justice M A MacKenzie
Distribution: Claimant – Mr N Morrison
Defendant – Mr T Loughman

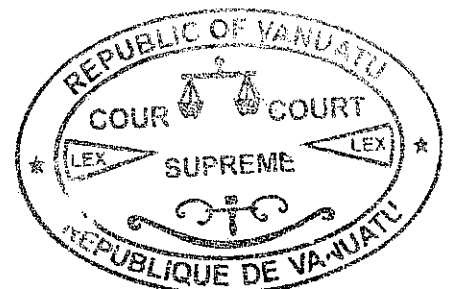
DECISION AS TO RULE 17.8 MATTERS

Introduction

1. On 2 August 2024, the Claimant filed a judicial review claim, seeking the following orders:
 - a. A Mandatory order, prohibiting order or quashing order declaring the decision and actions of the Defendant in relation to the Claimant on 8 May 2024 unlawful.
 - b. An order for costs.
2. The claim is disputed by the Defendant.

Rule 17.8 matters

3. Pursuant to rule 17.8 (3) of the CPR, the Court will not hear the claim unless satisfied as to all 4 matters set out in that rule:
 - a. The Claimant has an arguable case; and

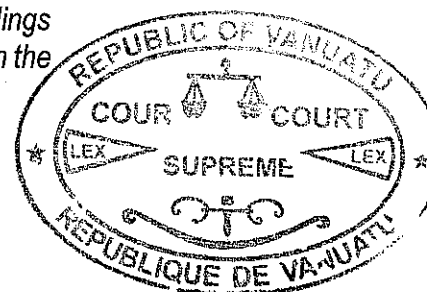


- b. The Claimant is directly affected by the decision; and
 - c. There has been no undue delay in making the claim; and
 - d. There is no other remedy that resolves the matter fully and directly.
4. The factors set out in rule 17.8(3) are conjunctive.
5. The Defendant accepts that:
 - a. The Claimant is directly affected by the decision; and
 - b. There has been no undue delay in making the claim.
6. There can be no dispute that the Claimant is directly affected by the decision to seize the turtles on 8 May 2024, as detailed below. The decision meant that the business was unable to operate. Further, there was no undue delay as the claim was filed approximately 3 months after the warrantless search and seizure.
7. The issues are:
 - a. Is the claim arguable?
 - b. Is there is no other remedy that resolves the matter fully and directly?

Consideration

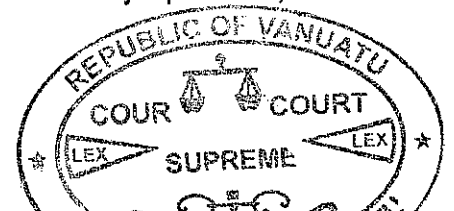
Is the claim arguable?

8. I will determine whether the claim is arguable with reference to the sworn statements, and the written submissions filed. The Defendant's counsel did not appear at the rule 17.8 conference. Mr Morrison and Mr Loughman had conferred however and proposed that the Court deal with the matter based on the submissions filed, without oral submissions.
9. In *Botleng v Verondali Land Tribunal* [2013] VUSC 133, the Court considered what is required to establish an arguable case at 12:
 12. *The Rule clearly places a persuasive burden on the claimants to satisfy the Court that they have "an arguable case" sufficient to require the defendants to respond to the case on its merits. It is not unlike an application for leave to issue judicial review proceedings under the "old" Civil Procedure Rules and is to be approached on the*



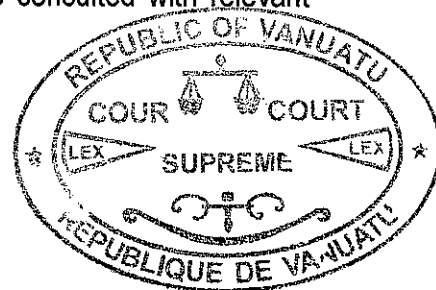
basis of the materials and any opposition that may be made to the application. At this preliminary stage the Court need not be satisfied, that the claim is fully justified, only, that there is a "prima facie" case raised on the materials worthy of further consideration at a hearing.

13. To assess whether the claim is arguable, some background is necessary.
14. The Claimant owned and operated a business known as Vanuatu Zoological, Efate. The core business was turtle rescue and recovery. The Claimant received and cared for turtles, with the goal of the turtles being released back to the ocean. Tourists and schools would visit as well.
15. The Claimant deposes that the business was operated in close co-operation with the Tourism office and the Fisheries Department. From time to time, they were visited by the Fisheries Department, without any issue being raised.
16. However, in September/October 2023, the business was visited officers from the Fisheries Department. During that visit, the Claimant was advised they were in breach of a certain law and had 28 days to remove the turtles. Mr Patman said he took steps to seek clarification of this issue. These are detailed in an annexure to his sworn statement- and include contacting the Director of the Fisheries Department directly via email, visiting the Fisheries Department offices, in an attempt to meet with the Director, who was unavailable. He did though have a meeting with an enforcement agent, Mr Silas Yaka, and also Jayven Ham, head of research, and Feeongka Kathlo. There was a lengthy discussion, and Mr Patman says that he was told during that meeting that if he supplied them with updated operating procedures then "*everything would be ok*". On 8 November 2023, the Claimant provided a copy of their day-to-day operational report for the conservation centre to the Fisheries Department.
17. The Claimant asserts that there were no further communications from the Fisheries Department until 8 May 2024, when the business was visited by Fisheries officers, who removed the turtles without providing any official paperwork. Mr Patman says that he tried to delay the removal of the turtles by asking to speak to officials from the Fisheries Department to no avail. The turtles were removed, and the Claimant was issued with a fine of VT 1 million.
18. On 8 May 2024, the Fisheries Department conducted a joint operation with other agencies to release turtles held in two locations, including the Claimant's business. The purpose of the operation was to enforce s 59 of the Fisheries Regulation order No 28 of 2009 (the Fisheries Regulation Order) which governs the management and conservation of certain sea mammals, including turtles in Vanuatu.
19. Pursuant to s 59(1) of the Fisheries Regulation Order, a person must not be in possession of leatherback and hawksbill turtles. However, under s 59(2), an exemption may be applied for the purposes of carrying out customary practices,



educational/research purposes. It is common ground that the Claimant did not have an exemption. It is unclear why the Defendant, on the face of it, knowingly allowed the Claimant to operate for 5 years without an exemption.

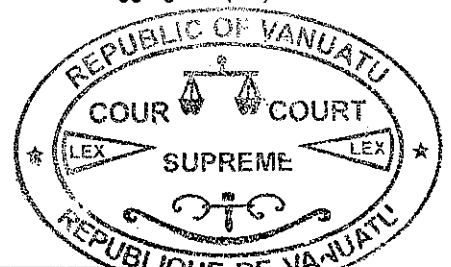
20. The Defendant's evidence shows that the Fisheries Department received a complaint about the Claimant's management of turtles in March 2020 from a veterinarian, Dr Christina Shaw. Mr Patman had sought her assistance as he was concerned about the health of the turtles. She asked for the issue to be urgently addressed by the authorities, due to her concern about Mr Patman's poor husbandry of the turtles and the poor conditions they were kept in. One matter that I note is that counsel for the Defendant has misquoted an aspect of Dr Shaw's evidence in the submissions. The Defendant submitted that at the time Dr Shaw visited the Claimant's business premises, she asked Mr Patman whether he had got approval from the Department of Tourism to engage in such business, and that his response was "no". That is not in fact Dr Shaw's evidence. What she said was that she contacted the Department of Tourism (as she was aware that keeping turtles in captivity is against Fisheries Regulations) before her visit to ask if Mr Patman had the relevant permits to keep turtles. They advised her that the business did not have a tourism permit for the activity. Dr Shaw's evidence does not disclose that she asked Mr Patman. While I appreciate that it is for the Claimant to establish a "prima facie" case, the Defendant's evidence does not at this stage address what, if any, steps the Fisheries Department took prior to 8 May 2024, given Dr Shaw's concerns.
21. The Defendant's position is that there is not an arguable case for a number of reasons:
- a. The Fisheries Regulation Order came into effect on 20 March 2009, well before the registration of the company in 2018.
 - b. The Claimant acted unlawfully because they had turtles in their possession, and had neither applied for, nor obtained an exemption.
 - c. Therefore, their actions in entering the premises and releasing the turtles was both lawful and reasonable, as the officers were exercising their powers under s 109(2)(d)(ii) of the Fisheries Act 2014. That section empowers an authorized officer to seize any fish or fish products believed to be possessed, without a warrant, if there are reasonable grounds to believe an offence against this Act is being or has been committed.
 - d. There was no requirement for notice to be given to the Claimant of the action to remove the turtles, because the Claimant was acting unlawfully.
 - e. It was the Claimant's obligation to be aware of what is required for a turtle conservation operation, and the business should have consulted with relevant authorities before establishing such a business.



- f. That the Vanuatu Government, via the Fisheries Department have conducted awareness regarding the conservation of marine turtles since 2009.
22. The Claimant contends that there is an arguable case because the Defendant's decision to remove the turtles on 8 May 2024 was unreasonable and denied the Claimant natural justice. The Claimant submits that the manner in which the Defendant enforced was unjust in view of the history of the matter and particularly the fact that the Defendant knowingly allowed the Claimant's business to continue for 5 years and for many years prior to the Claimant purchased it. In making that submission, Mr Morrison relies on the caselaw cited in his written submissions regarding legitimate expectation.
23. I acknowledge that the starting point is that the Claimant did not have an exemption as required by s 59(2) of the Fisheries Regulation Order, and therefore the turtles were unlawfully in their possession. That meant that an authorised officer could seize the turtles without warrant if there were reasonable grounds to believe an offence was being committed, pursuant to s 109 of the Fisheries Act 2014. Further, there is merit in the Defendant's submission that the Claimant had an obligation to ensure awareness of, and compliance with, statutory requirements.
24. That said, there are some unusual aspects to the circumstances, as asserted by the Claimant. In assessing whether there is an arguable case, I am unable to make any findings as to whether the Claimant's outline of contact with the Fisheries Department is credible or not. But if it is, the Defendant's inaction is of concern, particularly in light of Dr Christina Shaw's complaint in early 2020. And as Mr Morrison notes, the Fisheries Department must have knowingly allowed the Claimant to continue to operate without an exemption. Further, Mr Patman says that in 2023, when he was advised that the Claimant was in breach of a certain law, he attempted to seek clarification, to no avail. The question of the Defendant's decision and actions on 8 May 2024 needs to be considered in that broader context, and not in isolation.
25. Having regard to the two authorities cited by Mr Morrison regarding legitimate expectation¹, a factor that can be considered in assessing whether there is an arguable case is the Claimant's asserted legitimate expectation that the Fisheries Department would communicate with him before taking enforcement action, as they did on 8 May 2024, given the history and attempts he had made to obtain clarification for the Fisheries Department.
26. Further, the Defendant is said to have knowingly allowed the business to continue for 5 years without an exemption. Arguably, that raises an issue of whether the Defendant acted fairly in taking the action they did. As the learned authors of *De Smith's Principles of Judicial Review*² note

¹ *R v North and east Devon Health Authority, ex parte Coughlan* [2001] QB 213 and *Pioneer Aggregates (UK) Ltd v Secretary of State for the environment* [1985] AC 132

² *Second Edition 2020 at 7-003*



"The term "natural justice" has largely been replaced by a general duty to act fairly, which is a key element of procedural propriety. On occasion, the term "due process" has also been invoked".

27. I accept then Mr Morrison's submission that there is an arguable or prima facie case, when the broader context is taken into account. It is arguable that the Defendant did not act fairly in deciding to act on 8 May 2024 without notice to the Claimant when the background detailed above is considered, and given that the Defendant knowingly allowed the business to continue and did not take steps earlier. Further, it is arguable that the Claimant had a legitimate expectation that the Defendant would not take further legal steps given the background and Mr Patman's attempts to communicate with the Fisheries Department following the visit in September/October 2023.

Is there no other remedy that resolves the matter fully and directly?

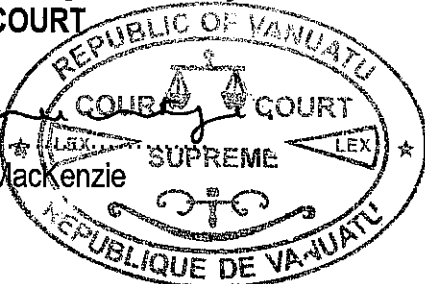
28. As counsel for the Defendant notes, the Claimant can seek an exemption under s 59(2). As such, the Defendant submits that is a remedy that resolves the matter fully and directly. Mr Morrison submits that there is no remedy that resolves the matter.
29. While the Claimant can seek an exemption, it will not have retrospective effect, so will not resolve the lawfulness or otherwise of the Defendant's decision to seize the turtles without warrant on 8 May 2024. There is then no other remedy that resolves the matter fully and directly.

Result

30. Therefore, having considered the rule 17.8(3) factors, there is an arguable case and the Court will hear the claim for the reasons set out above.
31. I allocate a **conference at 9 am 7 March 2025** to make directions for a trial on the merits.

**DATED at Port Vila this 25th day of February 2025
BY THE COURT**

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Justice M A Mackenzie

The seal of the Supreme Court of the Republic of Vanuatu is circular. It features a central emblem with a scale of justice and a sword. The text "REPUBLIC OF VANUATU" is written along the top inner edge, and "REPUBLIQUE DE VANUATU" along the bottom inner edge. In the center, the words "COURT SUPREME" are written, with "LEX" on either side of the central emblem.