

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

CIVIL APPEAL CASE No. 31 OF 2013

BETWEEN: LUGANVILLE MUNICIPAL COUNCIL
First Appellants

AND MORRIS EMBOI, JAMES ULAS, JOHNNY WILLIE,
MORSEN JOEL, PEDROL LAPISAL, FRED JOSEPH
& IAN MANU
Second Appellants

AND: TREVOR MOLIVA, ELIZABETH TASSO, MAKE
KENNETH, PEDRO ANDREW, PETER PATTY & VUTI
FREDY
Respondents

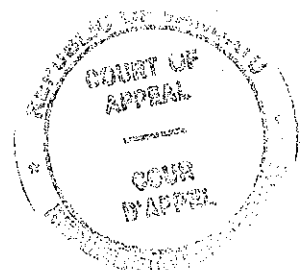
Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice Mary Sey

Counsel: Mr Felix Laumae for the Appellants
Mr Saling Stephens for the Respondents

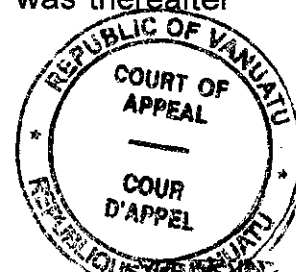
Date of hearing: 14th November 2013
Date of judgment: 22nd November 2013

JUDGMENT

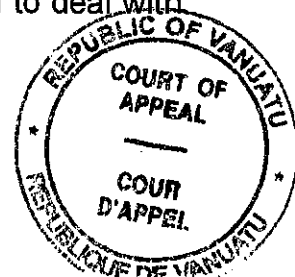
1. This appeal concerns the mid-term election of the mayor and deputy mayor of the Luganville Municipal Council ('LMC') that took place on 17 June 2013. It is common ground that the term of the mayor and deputy mayor was due to expire on 15 June 2013.
2. The life of a municipal council is 4 years. However, the term of a mayor and deputy mayor expires at the end of two years from the date of their election unless they resign earlier. (see: section 7(1) and regulation 27 of the Municipalities Act [Cap 126] and Regulations.)



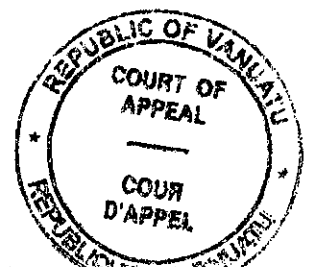
3. The following is a chronology of events leading up to the first appearance of the parties before the Supreme Court.
- 11 June 2013 the LMC Town Clerk issued a Notice to all LMC Councillors calling for the elections of a Mayor and deputy Mayor to take place on 17 June 2013 at 10.00am at the LMC Conference room.
 - 16 June 2013 by letter addressed to all LMC Councillor under the hand of the Mayor, Councillors were advised that the Town Clerk's earlier Notice calling for elections was not in accordance with Standing Orders and therefore "null and void". The Councillors were also advised that a new Notice for the election of a Mayor would be issued by the Mayor "in due course"
 - 16 June 2013 the Town Clerk responded to the Mayor's letter advising that the Notice calling the meeting to elect the new Mayor and deputy Mayor was legal and the Council meeting would proceed as notified;
 - 17 June 2013 lawyers acting for the incumbent Mayor wrote to the Town Clerk drawing his attention to LMC Standing Order No.7 of 1989 and advising that the meeting to elect a new Mayor and deputy Mayor "...should not proceed";
 - The same day the Town Clerk responded to counsel's letter reiterating that the Notice calling for the mayoral election was "in order" and the meeting would go ahead at 2.30pm that afternoon.
4. On the morning of 17 June 2013 thirteen (13) Councillors, attended the Council meeting to elect a new mayor and deputy. The meeting was chaired by the oldest councillor present who, after a few opening remarks, ruled that the Notice calling for the mayoral elections was not legal and the meeting was thereafter suspended.



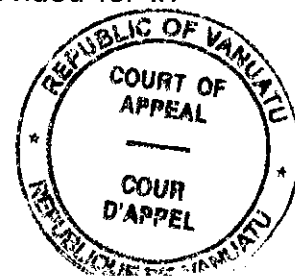
5. After suspending the meeting the chairperson and five (5) other councillors left the meeting room leaving behind seven (7) councillors, the Town Clerk and an Official from the Electoral Office who was in attendance.
6. The Town Clerk sought advice from the State Law Office and the meeting went into recess until 2.30pm.
7. When the meeting resumed at 2.30pm there were seven (7) councillors present. The other six (6) councillors who had earlier left the meeting did not return. The meeting proceeded to elect a new Mayor and deputy Mayor for the Luganville Municipal Council.
 - 28 June 2013 the 6 disaffected Councillors issued an urgent application with a sworn statement in support for judicial review naming the LMC as the 1st Defendant, and 7 named councillors as 2nd Defendants.
 - 03 July 2013 the Mayor and deputy Mayor elected on 17 June filed a response opposing the application, supported by a sworn statement from the Town Clerk.
 - 01 August 2013 a Notice of Conference was issued by the Supreme Court judge listing the matter for a first conference on Monday 30 September 2013 at 10.30am.
 - 30 September 2013 at the first conference before Spear .J, the appellants were represented by Mr Eric Csiba appearing on behalf of Mr James Tari who was away in Santo at the time and Mr Saling Stephens appeared for the respondents.
8. An issue was raised before us which has not been considered at any time in the Supreme Court namely whether the Supreme Court had jurisdiction to deal with the matter at all.



9. The Municipal Council Election Regulations provide for the manner in which Election Petitions are to be dealt with. Regulation 34 provides that the validity of any election to a municipal council may be questioned by a petition under those Rules and not otherwise. Further Rule 24 provides that challenge to the election of a mayor or deputy mayor likewise is to be challenged in that way.
10. The period allowed for such challenge is restricted.
11. This question of where the dispute should be heard was not raised by any counsel until the matter was in the Court of Appeal. It confirms what was initially being challenged on appeal was the fact that there had been a refusal to grant an adjournment, the substance of the consent orders made and issues about who had the power to call a meeting.
12. As will emerge from our discussion below we are not satisfied that the dispute which was raised was a matter which fell within the requirements for an election petition. The parties having chosen to commence the matter in the Supreme Court, and no challenge or complaint having being raised over many months, we consider that we should deal with the situation. The alternative is to say that it should have been an election petition which is now out of time and that will leave the Luganville Municipal Council in ongoing chaos. In addition, regulation 41 of the Municipal Council Election Regulations sets out the grounds on which an election petition may rely. Those grounds do not cover, and so do not exclude, review by the Court of the processes and issues which require consideration in this case.
13. There is no dispute that there was a request to the Supreme Court Judge for an adjournment on 30 September. Such an order is within the judge's discretion and can only be over turned on appeal if it can be shown to be unreasonable or based on irrelevant matters or had failed to take into account relevant factors. The unavailability or personal difficulties of counsel are but one inconclusive factor to be considered.



14. Bearing in mind what was recently said by this Court in *Dumdum v. East Malo Land Tribunal* [2011] VUCA 32, we consider the following factors in the case, collectively justify the judge's refusal of the adjournment application:
- (1) The application for judicial review was filed on 28 June 2013 and sought urgent relief and an expedited hearing. Both applications were supported by sworn statements;
 - (2) The applications and sworn statements were served on the Town Clerk of the LMC on 29 June 2013;
 - (3) The LMC filed its response on 18 July 2013 with a sworn statement of the town clerk; and
 - (4) On 01 August 2013 the Court issued a Notice of Conference listing the matter on Monday 30 September 2013 at 10.30am;
15. Plainly counsel for the LMC had more than ample notice and opportunity (2 months) in which to arrange his affairs to ensure his personal attendance on 30 September 2013. The sworn statement of counsel who actually appeared on 30 September 2013 speaks volumes of the lack of concern or urgency on the part of his principal who had carriage of the matter. Indeed, the minimal instructions provided to counsel is based on a mis-reading of the Rules.
16. This was a first conference fixture for the application but we disagree with the suggestion that Rule 6.4 of the Civil Procedure Rules applies to a judicial review application under Part 17 of the Rules which sets out the relevant procedure and steps. In this regard Rule 17.3 provides that the rest of the Civil Procedure Rules apply to a claim for judicial review subject to the express rules provided for in



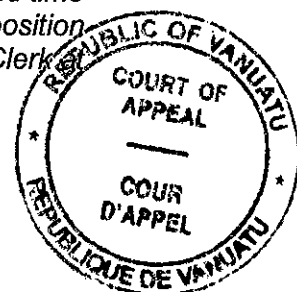
Part 17; and, more specifically, Rule 17.8 sets out what is to occur at the (first) conference called by the judge in an application for judicial review.

17. A cursory examination of Rule 17.8 shows that the (first) conference in a judicial review application is much more than a conference in an ordinary claim "to enable the Court to actively manage the proceeding", and, whilst it may include the matters set out in Rule 6.4, its primary purpose is to enable the judge to consider whether or not the application ought to proceed to a hearing or be struck out altogether.
18. We are not persuaded that the judge fell into error in refusing the adjournment application. This was an urgent matter. The parties had waited for 8 weeks for a first conference. Action was required then not later. This ground is dismissed.
19. The second issue was whether there was a consent order made in the Court after the adjournment had been refused.
20. The minutes of the conference relevantly records:

"5. Counsel agree that it is important that the Lord Mayor and Deputy Lord Mayor have the support of the majority of the members of the Luganville Municipal Council. While it can be argued whether there were some irregularities in respect of the election of Mr Emboi as Lord Mayor, it is more important to ensure that the Luganville Municipal Council has a Lord Mayor and a Deputy Lord Mayor that enjoy the continuing support of the Council as a whole. To that end, the process that led up to the election of the current Lord Mayor and Deputy Lord Mayor does not need to be subject to judicial scrutiny. The sensible approach is for there simply to be another council meeting at which the positions of both Lord Mayor and Deputy Lord Mayor are to be considered afresh. To that end, this case will be resolved in accordance with the consent orders appearing below:-

CONSENT ORDERS

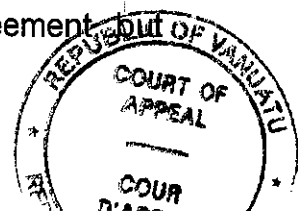
- a) *The Luganville Municipal Council will meet within 30 days to elect the Lord Mayor and the Deputy Lord Mayor who will occupy those respective offices from the time of that election,*
- b) *The Town Clerk of the Luganville Municipal Council is responsible for giving all counselors at least 14 days written notice of the date and time of that meeting. Furthermore, requiring all nominations for the position of Lord Mayor and Deputy Lord Mayor to be filed with the Town Clerk*



least 2 working days prior to the date of the meeting for the new elections;

- c) *The Lord Mayor and Deputy Lord Mayor elected on 17 June 2013 will continue to hold office until the meeting at which the fresh elections will take place in accordance with these orders. However, they will not act in any way to obstruct the fresh elections."*

- 21. We have listened to the submissions which have been made on this point and have read with care the affidavit filed by Mr. Eric Csiba. We are not persuaded that the onus on a party seeking to challenge a consent order has been met. The counsel who appeared at the conference accepted the common sense, wisdom and efficacy of what was being suggested and an arrangement was put in place.
- 22. What is now needed as it was on the 30th September is a robust and workable solution to a problem which has arisen. The fact that the Town Clerk called the meeting which was to occur after the terms of the existing Mayor and Deputy Mayor expired, when the Mayor who under the Standing Orders may have had the primary obligation but was doing nothing, can only be seen as a sensible move. To take the semantic approach as advanced by the Appellants, would mean that there would be no meeting until three days after the term of a former Mayor and Deputy Mayor has expired. The Council would be for a period without proper leadership. We are not prepared to demand such an approach. We are satisfied that counsel present before the Supreme Court Judge was accepting the common sense of what was being contemplated and was a willing party to it.
- 23. Time has now passed but the need for a meeting remains. It should be called immediately for the election of a Mayor and Deputy Mayor. We are not satisfied that it is necessary or appropriate to leave the Mayor and Deputy Mayor elected in the circumstances described to continue in office. It will only lead to further chaos in The Luganville Municipal Council. Once, that meeting has been called and is about to occur the existing Mayor and Deputy Mayor in the interests of their community and in the interest of stability and good governance will need to formally resign. That is the effect of the consent arrangement entered into on 30 September 2013. The Court has ample powers to enforce that agreement.

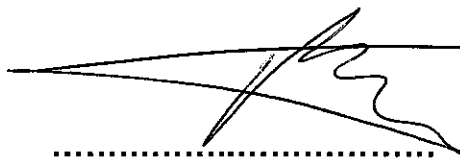


that should not be necessary. The Council will decide who their leadership will be for the next two year period or however long it will be because of the time which elapsed since June.

24. Strict adherence to the law and relevant regulations will best achieve a just result but when there has been a thoroughly unsatisfactory situation which has developed, the Court should not intervene to remove a sensible and robust arrangement which was agreed to and which made total sense and ensured fairness for everybody involved.
25. The appeal is accordingly dismissed subject only to the consent order now being amended to require the calling of a meeting before the end of November 2013 for the election of the Mayor and Deputy Mayor.
26. We make no orders as to costs in respect of this matter. The Luganville Municipal Council should not be expected to meet any of the costs of the councilors arguing over a matter of this sort. The councilors should personally be responsible for the costs incurred on each side.

DATED at Port-Vila this 22nd day of November 2013

FOR THE COURT



Vincent LUNABEK
Chief Justice

