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

Civil Appeal
Case No. 18/373 CoA/CIVA

BETWEEN: EILON MASS
Appellant

AND: THE GOVERNMENT OF THE REPUBLIC OF VANUATU REPRESENTED BY THE COMMISSIONER OF POLICE and OTHERS
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Raynor Asher*** ***Hon. Justice Oliver A. Saksak*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Gus Andrée Wiltens***
Counsel:	*Appellant in person* *Mr H. Tabi for the Respondent*
Date of Hearing:	*Friday 20th April, 2018*
Date of Judgment:	*Friday 27th April, 2018*

JUDGMENT

Introduction

1. This is an appeal against an order of the Supreme Court which struck out an "*urgent constitutional petition*" which the appellant filed on 6th October, 2017. The order also refused leave to amend the petition as filed and refused leave to adduce additional evidence in the form of sworn statements. The applications to amend and for leave were filed after the court had heard argument on the respondent's application to strike out the petition. The strike out application had been filed very soon after the petition was lodged. The Supreme Court nevertheless took into account the amendments proposed to the petition and concluded that even with the proposed amendments it should be struck out.

2. The arguments advanced by the respondent in support of the strike out application included that the petition was not pleaded in accordance with Rules 2.2(1) and 2.3 of the Constitutional Petitions Rules (the Rules) and in particular did not specify which Article of the Constitution was being relied upon. Further the petition sought orders by way of relief which were not of the type appropriate to address breaches of constitutional rights, and did not plead or identify facts that constituted breaches of particular provisions of the Constitution. Rather it

contained a complex and confused chronology of documents that did not meet the requirements of Rule 2.3(e). The petition also alleged breaches of constitutional rights by many individuals who were not in any sense officials or agents of the government.

3. Rules 2.2 and 2.3 of the Constitutional Procedural Rules 2003 provide:

"*Starting proceedings*

2.2 (1) A proceeding under Article 6 or 53(1) is started by filing a Constitutional Application in the office of the Supreme Court anywhere in Vanuatu.

(2) A Constitutional Application filed by the person seeking redress must as far as possible be in Form 1, but is valid no matter how informally made. A Constitutional Application filed by a legal practitioner must be in Form 1.

(3) In a case of extreme urgency a Constitutional Application may be made orally, as long as it is put into writing, in accordance with Form 1, as soon as possible.

What a Constitutional Application must contain

2.3 (1) A written Constitutional Application must set out:

(a) the rights that have been infringed, are being infringed or provisions for which redress is sought; and

(b) the Article of the Constitution that confers those rights or sets out those provisions; and

(c) the person or body that infringed those rights or provisions; and

(d) the way those rights or provisions have been infringed; and

(e) the facts on which the application is based; and

(f) the remedies applied for by the Application to enforce those rights or seek redress

(2) The Application must have with it:

(a) a sworn statement by the applicant in support of the Application, setting out details of the evidence the applicant relies on; and

(b) any other sworn statements that supports the Application.

... (not relevant)".

4. The appellant, particularly in support of his application to amend the original application stressed that under Rule 2.2(2) an application "*is valid no matter how*

informally made" and that Article 6 of the Constitution allows an applicant to apply to the Supreme Court "*independently of any other possible remedy*" to enforce the fundamental rights and freedoms guaranteed by the Constitution, a point further confirmed by Article 53(1) under which an applicant may "*without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress*". These are important provisions in aid of the enforcement the guaranteed constitutional rights, to which we return later in this judgment.

The Nature of the Application

5. First it is appropriate to outline the nature of the allegations made by the appellant in the application. He asserts that there has been a huge conspiracy against him which has operated to infringed fundamental rights and freedoms guaranteed by the Constitution to him and more generally the citizens of Vanuatu. The introduction contained in the appellant's first affidavit in support of the application, contains an overview of the appellant's complaints. It is long but very helpful in understanding the issues raised by the application. It reads:

> *"Application*
> *Brief background of the Conspiracy – I have come to do business in Vanuatu and I have prepared a business plan. That business plan has included production of coconut oil and various other products for export. I had at the time a very successful Facebook page and website and I was planning to use them as the marketing tool for my products. I have knew Ronan Harvey from a previous visit in Vanuatu, I have met with Ronan Harvey at the beginning of 2013 in Port Vila and in Santo, he has invited me to come to discuss my business plan at his property at Velit Bay in the east coast of Santo. On April 2013 I have moved with my family in to Velit Bay Estates, including my wife Mia Mass (AKA Peled) and my son Benjamin Mass. I have prepared my business to launch, in the process I have received from VIPA (Vanuatu Investments Promotion Authority) an investor's certificate which made it legal for me to prepare for my business to be launched.*
>
> *On December 2013 Ronan Harvey has decided to "pull the plug", he has sent me a life threatening email, he has ordered my deportation out of Velit Bay Estate, he has ordered on his employees to threaten and bribe my wife to stay with my minor child at Velit Bay while I was deported even though it was against my will, Ronan Harvey was clear about the fact that he did not allow me to take my machinery and equipment with me out of Velit Bay Property. Ronan Harvey is a very wealthy and very dangerous individuals, I have lived on Velit Bay Estate for 8 month, I have been his best friend and I was very loyal to him which made him close to me in our friendship. I do know the ways that Ronan Harvey thinks and act, he was discovered to me after I move in to Velit Bay Property as a very dangerous man, as a man who is bribing any government agent in order to achieve his criminal agendas. Ronan Harvey used to bribe ministers multiple times for different reasons before my engagement with him on Velit Bay, I have witnessed those bribery payment but has used to tell me about it with pride. He has also told me that he had a bribery connection with the prosecution to keep postponing a criminal*

case which was filed against him by Peter Buchard in 2012 for 2 intentional assaults which Ronan Harvey has committed with a metal pipe in the store of Peter Buchard in Luganville. Other than that, I know that Ronan Harvey wanted to murder people, for example a man who has sold him a sea plane from America and Ronan Harvey was not happy with the condition of the plane once the container has arrived to Vanuatu. Ronan Harvey has told me about many other criminal offences which he had committed, most of them are detailed in this sworn statement and the exhibits attached.

Since 13/12/13 I have faced a massive and in-human Conspiracy which have included hundreds of Criminal Offences which were committed against me and others. I have run my own investigation of Conspiracy throughout the past 3 years and 10 month that the Conspiracy have existed. I have a background of investigations from my younger days in the Israeli Army and I have applied my experience as I have investigated this Conspiracy. I have done that investigation so that I would be able to prove it to the Courts one day. I have also done it for the people of Vanuatu who I dear so much. I have seen the high level of corruption in the Criminal Justice system as a victim of injustice as I have believed all along that one day that investigation would be valuable for the public interest I do strongly believe that my investigation would change the Criminal Justice System in the Republic of Vanuatu to perform its task in a much more accurate and reliable manners. I do strongly believe that this would be a tremendously good change for the members of the Public and for the Government of the Republic of Vanuatu, I know that there is no trust in that system by the members of the public and others. The Vanuatu Police today is so un-trusted that the Vanuatu Police is not a member of the Interpol. I believe that I am in a position to give a pretty bold statement and state that I am confident that the Criminal Justice System in the level of Police and Prosecution in Vanuatu is not functioning at all right now, there is a group of public service who are controlling the Criminal Justice System and they are selling the Justice in Vanuatu to wealthy individuals. Those Public Servants who are in control can cause for a wrongful conviction of innocent individuals in any criminal case that they want, they can close any criminal case that is in front of the Police, they can cause the Police to cease investigation of cases, they can cause for a total ignorance of the Police from cases which were filed even if those cases are tremendously strong, they can murder people and cover up the murder by sabotaging the investigation of that murder, they can instruct the Prosecution to do whatever that they want the Prosecution to do, either to Prosecute a fabricated Criminal case or to close a rightful Criminal Case against individuals. Those group of Public Servants are racketeering the Criminal Justice System of the Republic of Vanuatu. I pray that the tremendous amount of suffering which I had to sustain, which seems to be heard to even consume, would not be buried as the Mafia and the Public Servants who were involved in this Conspiracy are wishing right now to happen. I tremendously hope that the investigation of the Conspiracy, which I have performed in the past 3 years and 9 month, would bring this Constitutional Case to result that will change that sad reality of the Criminal Justice System in Vanuatu forever. That kind of change that would result in the upholding of the Constitutional Rights for many other Ni-Vanuatu Citizens that did not and would not manage to straight that problem without me. The kind of result that would uphold the Law and will support justice rather than crime. That is the inevitable conclusion."

6. The amended constitutional application seeks orders that 43 pleaded situations have infringed provisions of Articles 5(1), 5(2), 55, 57 and 66(1) and 66(2) of the Constitution. Article 5(1) and 5(2) specify guaranteed rights and freedoms of the individual. Article 55 concerns the function of the public prosecutor and provides that he shall not be subject to direction or control of any other person or body in the exercise of his functions. Article 57 concerns the appointment and tenure of public servants. Article 66 concerns the conduct of leaders and the Leadership Code. By Article 67 a leader means the President, the Prime Minister and other Ministers, Members of Public and proscribed public servants and other public officers.

7. Whilst the introduction refers to a "*Conspiracy*", the 43 situations pleaded seem to allege many separate conspiracies which are inter related. The conspiracy, or perhaps conspiracies, are said to involve at least 48 public officers and the "*Mafia*" of Ronan Harvey that includes at least 26 individuals who are not public officers. The appellant's affidavit in support of the application says that there have been 1639 infringements of constitutional rights.

8. Of the 43 situations pleaded in the proposed amended application 15 allege conspiracies between public officers, in particular the Commissioner of Police, Ronan Harvey and members of the alleged Mafia. The most extensive of these situations is set out in the situation numbered 18 as follows:

> "*That the Commissioner of Police, the State Prosecutors Office, the Public Prosecutors Office, the Public Solicitor, the Chief Registrar, the Immigration Department, VIPA, the Chairman of the Public Service Commission, the Chairman of the Police Service Commission, the Minister of Justice, the Minister of Internal Affair and the Prime Minister have conspired with Ronan Harvey, Tales Mois Kaloris, Paul Dalley, Sean Griffin, Lawyer Kayleen Tavoa and her daughter Diane, Lawyer Nigel Morrison, Billy Lawac, Joe Wallack, Lilly Harry, Berry Kaloran, Robin Alesta Yatika, Kiki Roy, Derrick Back, Kuvu Noel and his bodyguard Jefery, Torquil Macleod, Will Harvey, Faemon Joel, Thele Toto, Basil Anderson, Jacqueline Kaddy, Tania Isom, Peter Buchards, Skip Ser, Anthony Welch and Renny Samson, to Defeat Justice and other hundreds of serious criminal offences which were committed against the application in the past 4 years constitutes an infringement of Articles 5(1) (a – k), 5(2) (a – g), 55, 57(1), 66(1) (a – d) and 66(2) against the applicant.*
>
> *Particulars*
> *The Particulars are contained in the 1st sworn statement of the Applicant in support of this Application at paragraph 1(18).*"

9. The particulars of this paragraph pleaded in the affidavit run over more than 12 pages of detail, much of which is based on opinion and is related in a way that would not be admissible in evidence.

10. The style of drafting of situation 18 set out in paragraph [8] above is illustrative of the style adopted in describing the other 42 situations.

11. The other pleaded situations identify, in addition to the 15 conspiracies, 7 alleged malicious prosecutions of the appellant and 8 instances of alleged procedural or substantive law errors by judges or others in the judicial service. Other situations include separate allegations that the Commissioner of Police and other public officers have failed to properly fulfill administrative functions vested in them including failures to investigate complaints made by the appellant about the conspiracy.

12. The allegations of malicious prosecution, and the errors by people including judges in the judicial service are related to court proceedings that have been instituted against the appellant since the 2013 events at Velit Bay.

13. In September 2014 the appellant was charged with inciting and soliciting theft, inciting and soliciting unlawful assembly and inciting and soliciting assault. The appellant after trial was convicted in the Supreme Court and sentenced to imprisonment. On appeal by the appellant the conviction and sentence were quashed. A retrial was not ordered as the appellant had already served the sentence: Mass v. Public Prosecutor [2016] VUCA 11, Criminal Appeal 08 of 2015.

14. In 2015 the appellant was charged with sexual intercourse without consent (rape). After a lengthy trial the appellant was convicted. On appeal the conviction was set aside and a retrial was ordered: Mass v. Public Prosecutor [2015] VUCA 41; Criminal Appeal Case 06/2015. At the retrial it was established to the satisfaction of the Public Prosecutor that the evidence in support of the alleged rape had been falsely concocted. The appellant had so asserted both at his first trial and at the second trial. Upon the falsity of the case against the appellant being accepted by the Public Prosecutor the trial was stopped and the appellant was acquitted.

15. In September 2014 the appellant was also charged with possession of cannabis. That charge was dismissed at trial when the trial judge ruled that there was no case to answer: Public Prosecutor v. Mass [2016] VUSC 155; Criminal Case 183 of 2014. The appellant in complaints subsequently made to public officers asserts that the evidence against him had been fabricated by people in the Mafia in conjunction with corrupt police officers who were part of the Conspiracy. He alleges he was maliciously prosecuted in this matter by the Commissioner of Police and the Public Prosecutors Office.

16. Including the additional affidavits which the appellants sought to file after the hearing of the strike out application the affidavits comprise 13 dense volumes

containing thousands of pages of closely typed detail said to relate in one way or another to each of the 43 pleaded situations.

The Supreme Court decision

17. Notwithstanding Rule 2.2 which provides that informality does not invalidate an application, Rule 2.8(1) recognizes the reality that there will be occasions when an application so fails to meaningfully identify a constitutional breach capable of redress in accordance with the Constitution that it should be struck out. That rule empowers the Supreme Court to deal with any application to strike out an application at a conference, including the first conference.

18. The primary judge noted the generality of the pleading intended to formulate the appellant's claims. The pleaded situations were said to infringe rights contained in Articles 5(1), 5(2), 55, 57 and 66 of the Constitution. The judge considered that it was very difficult to see how rights recognized in Article 66, 57 and 55 could have been infringed. Where Articles recognized fundamental rights and freedoms of the individual he considered whether the pleaded situations could support a finding of infringement. As for the fundamental rights or freedom recognized in Article 5 the judge concluded that the situations pleaded, and the supporting material advanced by the appellant, did not constitute anything more than vague generalization based on opinion and did not plead evidence in an admissible form that could support a finding that the guaranteed rights infringed had been denied to the appellant, apart possibly from the right to equal treatment under administrative law (Art. 5(k)). In respect of that right the judge said:

> *"The only possible infringement of Mr Mass's fundamental rights must relate to equal treatment under administrative action. This appears to be Mr Mass's complaint. He says because, for example the police commissioner, did not do what he wanted him to do then he was subjected to unequal treatment, to unequal administrative action. This is the recurrent theme throughout the documentary "evidence" produced by Mr Mass. He complains that the Public Prosecutor did not do as he (Mass) instructed him to do. He says the same thing about The Chief Registrar of the Supreme Court, the Minister of Internal Affairs, even the Prime Minister. He says this about the 48 Public servants referred to in paragraph 1 above. Not only that, Mr Mass says that these 48 Public Servants conspired with 26 members of the Ronan Harvey Mafia."*

19. The judge noted that the complaints made in the application against the many people implicated in wrong-doing were almost identical with allegations which the appellant had unsuccessfully attempted to agitate in civil proceedings in the Supreme Court. Those proceedings had been commenced by the appellant against Western Pacific Cattle Company, a company controlled by Ronan Harvey. As those proceedings progressed through interlocutory applications the

appellant ascertained that Western Pacific Cattle Company had gone out of business, its assets had been realized and distributed to Ronan Harvey, and moved offshore. The appellant then applied to join 11 new parties who he alleged had played different roles in schemes or "*conspiracies*" which had the effect of delaying the trial of the claim so that in the meantime the respondent had been stripped of its assets and placed beyond reach. The intended purpose of the joinder of the new parties was to claim damages from them for putting the potential fruits of the claim against Western Pacific Cattle Company beyond reach. Leave to add those additional parties was refused in the Supreme Court on 9th February 2017. An appeal against that refusal was unsuccessful in this Court: Mass v. Western Pacific Cattle Company [2017] VUCA 42; Civil Appeal Case 2722 of 2017. The judge noted that the urgent constitutional petition had been filed after the Supreme Court refused to join the additional parties. A reason for the judge refusing leave to join the new parties and plead the alleged conspiracies against them was that the proposed pleadings were based on opinion and were not presented in a way that could be admissible in evidence. The primary judge considered that those deficiencies were repeated in the constitutional application. He concluded that "*the allegations are so vague and generalized that they do not establish that Mr Mass was subjected to unequal administrative action*".

20. The judge also noted that the remedies sought in the proposed amended application are not orders of the kind that could be made on a constitutional application. The orders sought are:

> "*1. Damages to be assessed by this Honourable Court.*
>
> *2. Interest at 12%.*
>
> *3. That the Government be prevented from deporting the Applicant until such time when this Constitutional Application is heard.*
>
> *4. That the Government of Vanuatu will be ordered to make an official complaint to the New Zealand authorities which will include all of the allegations of the Criminal Offences which were committed by Ronan Harvey from New Zealand as part of the Conspiracy which have occurred in Vanuatu as alleged by the Applicant in this Urgent Constitutional Application.*
>
> *5. That the Government of the Republic of Vanuatu will make all necessary efforts and accommodations to allow the New Zealand Police free entrance to Vanuatu shall they wish to investigate the allegations of Conspiracy which have occurred out of the Criminal Offences which were committed by Ronan Harvey from New Zealand as part of the Conspiracy which have occurred in Vanuatu as alleged by the Applicant in this Urgent Constitutional Application.*
>
> *6. That the Government be ordered to urgently assign a group of special investigators who are independent from political pressure and from the interference of the Public Servants involved in the Conspiracy, to perform the investigation of the Criminal Conspiracy Case which was filed with the Police and was submitted to this Court by the evidence of the Applicant.*

7. *That the Government be ordered to urgently assign a special Prosecutor who is independent from political pressure and from the interference of the Public Servants involved in the Conspiracy, to perform the Prosecution of the Criminal Conspiracy Case which was filed with the Police and was submitted to this Court by the evidence of the Applicant.*

8. *That the Government be ordered to immediately provide the Applicant with the rights of a stateless person pursuant to the Convention Relating to the Status of Stateless Persons [1954] PITSE 1 (29 September 1954).*

9. *That the Government be ordered to immediately provide the Applicant with the budget and any other necessities as asses by the Court, for his witness protection program.*

10. *Costs.*

11. *That the matter be heard urgently.*

12. *Any other orders deemed appropriate by the Court*".

Grounds of Appeal

21. Six grounds of appeal are set out in the Notice of Appeal which may be summarized as follows:

(1) The respondent's application to strike out the petition was frivolous and vexatious as it was premature because the appellant had not finished filing his case, and in any event the application had no merit;

(2) The strike out application was an abuse of process as it was heard less than three days after it was filed in breach of Rules 1.3, 2.2 and 7.3(2) of the Civil Procedure Rules;

(3) The primary judge erred in law and fact in his decision.

(4) The primary judge was in breach of Section 38(1)(a) and (b) of the Judicial Services and Courts Act because the application included an allegation against the primary judge himself;

(5) The proven infringements of the appellant's right to protection of the law and equal treatment under the law or administrative action required the Attorney General to answer the allegations made in the application;

(6) The decision to strike out the petition set a dangerous precedent on the important aspect of upholding the Constitution and the administration of justice.

Appellant's arguments in support of the appeal

22. The appellant addressed this court at length. His emphasis was on the merits of the allegations of wrongdoing detailed in his supporting affidavits, and on the failures of the government, at many levels from ministers down through senior public officers. He stressed their failure or omission to perform their administrative duties to investigate the numerous and repeated complaints which he had made to them. A recurring theme in both his written and oral submissions was that government officers had failed to comply with 4 orders of the court to conduct investigations into his allegations. On questioning by the court it became apparent that there were no orders of the court to this effect. On 4 occasions different judges in the course of dealing with trials of the proceedings against the appellant had said that investigation of his complaints would be desirable.

23. The material filed by the appellant showed that the judge's suggestions had been passed on to relevant authorities, and that inquiries had followed the suggestion made in at least two of the cases. There was no evidence that the other suggestions were not considered by the relevant authorities. The appellant's complaint seems to be that the enquiries have not to this point in time led to the prosecution of alleged conspirators.

24. The procedural issues raised by grounds 1 and 2 of the Notice of Appeal were only briefly raised in oral arguments. The appellant contended that the primary judge was wrong to strike out the petition having regard to Rule 2.2(2) and Articles 6 and 53 which deal with informality and the exercise of concurrent remedies.

25. Ground 4 which sought to disqualify the primary judge on the ground that he was the subject of one of the 43 pleaded situations was not raised in oral argument. That situation alleged that the judge had failed to give a hearing of the cannabis charge in a reasonable time.

26. The other grounds of appeal were covered in both the oral and written submissions concerning the merits of the application.

27. On questioning by the court the appellant strongly maintained that all the situations complained about in the application, save for those directed to the conduct of judicial officers, were part of the overall *Conspiracy*.

28. The appellant identified the motive or intent of the conspirators as being three fold:

- To wrongly deport the appellant;
- To fabricate cases against him so as to have him imprisoned; and
- To attempt to murder him.

29. Amongst the 300 or so criminal offences alleged by the appellant as being within the Conspiracy there were attempts to murder, kidnapping and theft.

Respondent's submissions on the appeal

30. The respondent sought simply to uphold the primary judge's decision for the reasons he gave.

Discussion

31. Rule 2.2(2) allows informality in the making of a constitutional application, but as is apparent from Rule 2.3 a petition must be made to comply with essential requirements necessary to identify with sufficient clarity the right or obligation that has been infringed, the Article of Constitution that confers that right or obligation, who has infringed it, and how the infringement occurred. Moreover the facts relied on must be identified in a way that is meaningful. Until these requirements are fulfilled the respondent is not to be called upon to answer the application, and the court would not be in a position to decide it. These essential requirements are well understood in civil litigation, and they have equal application in the formulation of a claim for redress for an infringement of a constitutional right or obligation. Whilst a constitutional application is not rendered invalid for want of form when it is filed, thereafter it must be brought into compliance with the Rules before it can go forward. In this case the application had been drafted by a person with considerable intellectual and drafting skills and was intended from the outset to meet the requirements of the Rules. Indeed this was asserted before the primary judge even though additional affidavit material was to be filed. In those circumstances it was not premature for the primary judge to consider if the petition met the requirements of Rule 3.2.

32. As for the rights created under Article 6 and 53 to seek redress in addition to any other remedy, the constitutional right is to "*apply to the Supreme Court*". This the appellant did. Articles 6 and 53 do not provide that after an application is made the claim for redress can proceed regardless of well recognized procedural and substantive law principles that control the ordinary trial of disputed questions of fact and law.

33. We do not consider that the primary judge proceeded prematurely to consider the application to strike out the petition. The application was not frivolous or vexatious. It was an application of the kind envisaged by Rule 2.8(a). We reject the contention that it was an abuse of process for the judge to decide the application at the stage in the proceedings when he did. Grounds 1 and 2 must fail.

34. The allegation in ground 4 of the Notice of Appeal concerning the primary judge is based on an allegation of an infringement of the appellant's rights because of delay in the trial of the cannabis charge. This ground can be disposed of briefly. The allegation against the judge was fully known to the appellant, yet he raised no objection to the judge deciding the application. This is hardly surprising as he had received a favourable decision from the judge in the cannabis case; and moreover, the allegation against the judge in the petition was of a trivial nature. The appellant must be taken to have waived any ground he might have had for alleging a perception of bias on the part of the judge.

35. As to ground 5, the respondent and the public officers of the Republic who are named in an application are not called upon to answer it until the Court is satisfied that it should order the respondent to file a response: see Rule 2.8(b). In this case whilst the application remains struck out the respondent (including the Attorney General) is not required to respond.

36. Ground 6 is without substance, if the decision of the Court is one made according to law and that is the issue now for decision by this Court.

37. The remaining ground 3 concerns the merits of the application and a consideration of the reasons of the primary judge. Having considered the submissions of the appellant we are not persuaded that the primary judge erred in reaching the conclusions which he did leading to the application being struck out. However we consider there are more fundamental reasons why the application should be struck out.

38. The 43 pleaded situations fall into the following categories:

    (1) There are those that alleged participation by public officers and members of the "*Mafia*" identified in one or other of the pleaded situations as an aspect of the overall *Conspiracy*. Included in this category are the situations of malicious prosecution which the relevant particulars and the appellant's argument before this Court make clear are said to be in furtherance of the conspiracy.

    (2) Those that complain of failures or omissions to investigate complaints made by the appellant to leaders of the Republic and to other public officers, and in one situation of failure or omission to report the conduct of Ronan Harvey to the New Zealand authorities.

    (3) There are those that raise complaints about judicial officers. The appellant complains that they made wrong decisions and wrong rulings in the course of trials and that there were delays in bringing the trial of charges to a conclusion.

39. In our opinion as we now set out the situations in each of these categories cannot provide a basis in law for the appellant to seek redress under any of the Articles of the Constitution on which he relies, and for this reason we consider the application both in its original form and its proposed amended form should be struck out.

Allegations of conspiracy and malicious prosecution included within the *Conspiracy*

40. The formulation of the appellant's claims and the particulars in this category of situations fails to recognize and reflect that the constitutional obligations to recognize and respect guaranteed fundamental rights and freedoms is an obligation imposed on public officers as part of the public law of the Republic. In particular the application fails to recognize that constitutional rights and freedoms arising under Article 5 are not infringed by wrongful conduct of individuals who are not public officers. The constitutional duty to recognize Article 5 rights and freedoms is imposed on public officers whilst, and only whilst they are exercising those functions. In François v. Ozols [1998] VUCA 5 this court noted that the opening words of Article 5 are critical to the understanding of the nature of the fundamental rights and freedoms which it guaranteed. The court said the words: "*The Republic of Vanuatu recognizes" ... are not apt to create new private rights and obligations between individuals. The words are a covenant by the Republic to all persons (subject only to a qualification in respect of non-citizens) that in each relationship with them the Republic will recognize the fundamental rights and freedoms set out in Article 5*".

41. The obligations recognized in Article 5 do not alter the general law which governs the relationship of citizens among themselves. For example, if one citizen deprives another of property, Article 5(g) does not enable the deprived citizen to seek constitutional redress. The only available remedy is for the deprived citizen to seek damages under the general law.

42. In so far as claims are included in the petition to recover damages for the conduct of Rowan Harvey and his company, Western Pacific Cattle Company, for events at Velit Bay, and the wrongful conduct of the "*Mafia*" at that time, those claims are for the general law and cannot be addressed under a constitutional petition.

43. But of greater importance in considering this category of claims for redress, it is only the wrongful conduct of public officers carried out in the exercise of their public functions that are amenable to constitutional redress. The public officers must be acting in the course of and for the purpose of their public functions. They may in good faith exercise those functions mistakenly, or on an incorrect understanding of their obligations in the law, but they will still be acting within the scope of their public functions. However as under the general law dealing with vicarious liability, if a public officer acts corruptly, if he knowingly acts fraudulently

or engages in criminal conduct, he or she is not acting as a public officer. In the context of vicarious liability, this court in Temar v. Government of the Republic of Vanuatu [2005] VUCA 30; [2006] 2 LRC 33 followed the persuasive authority of Racz v. Home Office [1994] 1 All ER 97 where the following test was posed; "*... if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such cases a servant is not acting in the course of his employment but has gone outside it*".

44. As the Temar case shows, an employee may be on duty wearing the uniform and insignia of office but if he or she acts in a way that is unrelated to authorized functions and are contrary to law the employer is not liable.

45. In Iaukas v. Republic of Vanuatu [2015] VUSC 131; Constitutional Case 5 of 2008 at [41] – [42] the Chief Justice recorded that the Republic contended that this test should be applied in a constitutional claim for redress for a serious assault alleged against police officers, but it was not necessary in determining the question then before the Court to decide whether that would be the correct test.

46. We consider the Temar test should be applied in cases where the question is whether for the purposes of constitutional redress the Republic is responsible for the conduct of a public officer. Questions of fact and degree will arise in individual situations, and the decision whether a particular act is merely an unauthorized way of carrying out an authorized function may in many cases be a difficult one.

47. However, here the *Conspiracy* alleged was operating over a prolonged time and involved 48 public officers and the Ronan Harvey Mafia. The intent of the *Conspiracy* extended to the wide spread destruction of evidence, to malicious prosecution, to the fabrication of evidence, to theft, to kidnapping and to seven attempted murders. It is difficult to think of a more obvious case of public officers acting outside their authorized functions and contrary to duty and law.

48. For this reason none of the matters pleaded under this category of situation could give rise to a right to redress under the Constitution.

Failures and omissions to investigate complaints and the failure to report to New Zealand authorities

49. The material filed by the appellant as part of his affidavits contain numerous very long complaints to a wide range of public officers detailing allegations of conspiracy. These complaints are often convoluted, expressed in terms of opinion and conclusions, and to others are likely to be read as self-serving statements made by the appellant. Nevertheless they constitute complaints requesting investigation by relevant public authorities into the criminal activity

alleged. Whilst the appellant asserts that the recipients of the complaints failed or omitted to investigate, the evidence goes little further than to show that the appellant cannot identify positive action which he interprets as being the outcome of an investigation that established the veracity of his complaint.

Standing

50. The Introduction set out earlier in these reasons clearly describes the appellant's concern with the wellbeing of the institutions of government in Vanuatu, expressly those relating to law and justice. His passion is to right the wrongs he perceives that the community is suffering. The extent of his concerns and the actions sought to remedy some of them is highlighted by his complaints that the authorities did not report his allegations about Ronan Harvey to the New Zealand authorities, and in the claims for relief numbered 4 – 7 earlier set out.

51. In short the appellant is seeking to act as a self-appointed advocate to protect the public interests of the community.

52. Arising for consideration by this court at this stage in the proceedings is not the merits of the allegations of failure or omission to investigate the complaints, but the standing of the appellant to seek redress for those alleged failures and omissions. A person seeking redress under Articles 53 of the Constitution must at law have a sufficient interest in the infringement of the fundamental right or freedom, or constitutional obligation to justify seeking redress for the infringement. Is the party seeking redress actually effected infringement? Generally speaking, unless the claimant's personal or economic interests are directly affected the claimant will not at law have a sufficient interest to bring proceedings. We consider that the requirement to have a sufficient interest to pursue a remedy for a wrongdoing is the same under the Constitution as it is under the general law.

53. The question of standing, or sufficient interest not infrequently arises in judicial review proceedings. For example, in R v. Bulger Secretary to State for the Home Department [2001] 3 All ER 49 the father of a murdered boy was held not to have a sufficient interest to bring review proceedings challenging a decision that the murderers be sentenced under a regime that imposed a mandatory maximum sentence. There was considerable public interest in that question at the time, but the father's interest in the sentencing of the murderers was indirect and insufficient to give him standing.

54. In Australian Conservation Foundation v. Commonwealth of Australia (1980) 146 LLR 493 the High Court of Australia held that a person who has no special interest in the subject matter of an action over and above that enjoyed by the public generally has no standing to sue for a relief to prevent a violation of a

public right or to enforce a public duty. The appellant does not meet this test when seeking redress for this category of situations.

55. Very limited exceptions have more recently been recognized in the United Kingdom to allow public interest litigation to be taken by individuals who would not meet the test propounded by the High Court of Australia: see Judicial Review, Principles and Procedure by Aubum, Moffett and Sharland, Oxford Press 2013 at paras 24.20 to 24.30. Factors considered in deciding whether a person without a direct interest should be permitted to bring proceedings will include the nature of public interests, whether the claimant has real and genuine interest in the cause and the decision under challenge, the relevant legislative framework, the nature of the remedy sought and the motive for bringing the proceedings.

56. On the nature of remedy sought it is important to recognize the separation of powers that is central to the constitutional system of the government recognized in this Republic by the Constitution. The role of a self-appointed advocate for a public interest cause was considered by Brennan J sitting as a single judge in the High Court of Australia in Re Citizen Limbo (1989) 92 ALR 81. Mr Limbo was one of a group of self-appointed advocates for the human race which was running a campaign in support of international peace and the operation of the rule of law and enforcement of human rights. Justice Brennan at page 82/83 said:

> *"But when one comes to a court of law it is necessary always to ensure that lofty aspirations are not mistaken for the rules of law which courts are capable and fitted to enforce. It is essential that there be no mistake between the functions that are performed by the respective branches of government. It is essential to understand that courts perform one function and the political branches of government perform another. One can readily understand that there may be disappointment in the performance by one branch or another of government of the functions which are allocated to it under our division of powers. But it would be a mistake for one branch of government to assume the functions of another in the hope that thereby what is perceived to be an injustice can be corrected. Unless one observes the separation of powers and unless the courts are restricted to the application of the domestic law of this country, there would be a state of confusion and chaos which would be antipathetic not only to the aspirations of peace but to the aspirations of the enforcement of any human rights".*

57. Those observations were made in a jurisdiction that does not have constitutionally recognized fundamental rights and freedoms. In this Republic "*domestic law*" enforceable by the court does include the constitutional rights in Article 5, but the observations of Brennan J relating to the separation of powers nevertheless still have application here. Brennan J was considering a separation of powers between the political branch of government and the judicial branch, but the importance of recognizing the distinction between the functions of the executive branch of government and the judicial branch is no less important. It is not for the courts to assume the role of supervising the day to day performance

of the executive, including the police force and the business licensing departments, and to dictate how they must exercise discretions inherent in the ordinary exercise of their functions. It is not for the courts to supervise the ordinary performance by ministers and public officers of their functions. If a person directly affected by a decision of a public officer can establish that the decision was not lawfully made, the courts have jurisdiction to intervene. But otherwise, how public officers perform their public functions is a matter for them, and ultimately for parliament and the public at the ballot box to address.

58. In the present case in the situations where failures or omissions are pleaded it was for the ministers and other public officers to decide how, if at all, they would respond to complaints made by the appellant. If they decided simply to disregard the complaints that decision was within their power and the court, whether under the Constitution or the general law, has no jurisdiction to intervene.

59. The situations in this category of complaint do not give the appellant standing. His interest, as the whole of these proceedings show, is a very personal one. He seeks to bring the application to further his own self-interest which is particularly evident from his claim for damages and from the heavy emphasis given alleged wrongs against him.

60. We consider that the appellant lacks standing to seek redress under the Constitution in respect of this category of situations.

The Complaints against judicial officers

61. The complaints made by the appellant against the judicial officers for the decisions made and procedural steps taken by them misunderstand the constitutional functions of the judicial arm of government, and the judicial process generally. In the context of a claim for breach of fundamental rights provided by the Constitution of Trinidad and Tobago Lord Diplock in Maharaj v. AG of Trinidad and Tobago (No. 2) [1979] AC 385 at 399 said:

> *"In the first place, no human right or fundamental freedom recognized by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1(a); and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event."*

62. In so far as error of law and procedure may have adversely impacted on the appellant the errors have been corrected according to law, and there has been no breach of a fundamental right for which redress under the Constitution is possible.

63. In the case of delay about which the appellant complains, in this jurisdiction the difficulties created by the pressure of work on the court system and the limited resources available must be taken into account. The fundamental rights and freedoms guaranteed by Article 5 are "*subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order and work fair and health*". The limited resources of the court must in the public interest and for good public order be fairly shared between all those who come to court. In the context of Vanuatu all the appellant's cases were deal with within a reasonable timeframe.

64. Claims for the orders sought in respect of the conduct of judicial officers do not provide a basis for constitutional redress.

Result

65. For the above reasons we consider the primary judge was not in error in striking out the petition. Indeed, the additional reasons we have added further confirm that the decision of the primary judge was correct.

66. The appeal will be dismissed. The appellant must pay the respondent's costs in this court fixed at VT25,000 (a conservative figure suggest by the respondent in its submissions).

DATED at Port Vila, this 27th day of April, 2018.

BY THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

Hon. Vincent Lunabek
Chief Justice.