

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

**Civil
Case No. 18/2649 MC/CIVL**

BETWEEN: MOTOUTORUA DINO

Claimant

**AND: MOTOUTORUA MICHEL & MOTOUTORUA
JOSHUA**

First Defendants

AND: SAU MANSALÉ & ORS

Second Defendants

AND: TOUTANIK JOHN ROY & ORS

Third Defendants

Date of Decision: *5th of April, 2019*

Before: *Fsam*

In Attendance: *Mr Molbaleh_E for the Claimant*

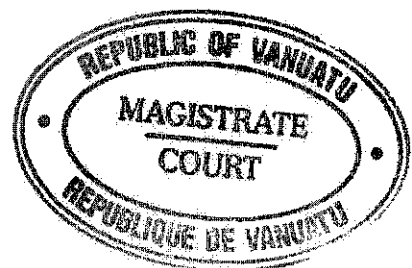
Mr Willie_R & Mrs Timakata_L for the Defendants

Copy: *Molbaleh Lawyers, Timakata & Associates.*

DECISION ON PRELIMINARY ISSUES

Introduction

1. On the 26th of February 2019, directions were issued by this Court for counsels to file their submissions in respect of preliminary issues raised by the defendants in this case.
2. Submissions were so filed with preliminary issues identified for this Court's consideration where it is hoped that if properly addressed, will ensure a final determination of the substantive proceeding.



3. The three preliminary issues raised are as follows:

4.1. Whether the claimant has locus standi to institute proceedings on or behalf of the Warkali Motoutorua Association;

4.2. Whether the Claimant has an identifiable cause of action recognized by law;

4.3. Whether the third defendants should be struck off as parties on the basis there existed no pleading or evidence against them.

Background Facts

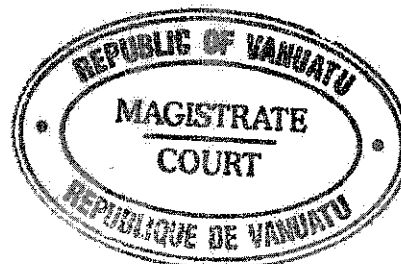
4. The Claimant Mr Dino Motoutorua (hereinafter referred to as "Mr Dino") brings a claim against the Defendants in this case on the basis that, being the chairperson of the Warkali Association (hereinafter referred to as "the association"), and having convened a meeting of the association on the 25th day of August, 2018, the first defendants tried to get some people who were not members to attend the meetings of the association, causing disturbances and threats.

5. As a result of the disturbances, the claim was filed with restraining orders sought against the defendants accordingly.

6. The Defendants filed their Amended Defence and Counterclaim on the 22nd November 2018, counter-arguing the legality of the registration of the association and the validity of Mr Dino's position as Chairman, and wherefrom the preliminary issues aforementioned were put forward.

7. The Defendants sought costs accordingly.

Submissions and Discussions



8. This Court heard submissions from both Counsels on behalf of parties in respect of issues raised.

9. The Defendants on issue of locus standi, say the claimant is currently not a member of the association's executive as he was removed on the 7th of July, 2018 as a member following a meeting of the association, with minutes of this meeting referred to and annexed as "JM2" to second defendant, Mr Joshua Motoutorua's (Mr Joshua) sworn statement filed 23rd October 2018.

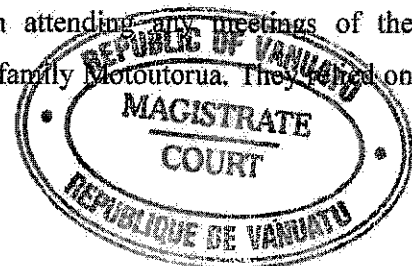
10. The Defendants say that by the 7th of July 2018, Mr Dino's position as chairman had lapsed and Mr Joshua had been elected then to be chairman in his place. Reference was made to Article 4 of the Warkali Association. The Article is set out in bislama as follows:

"Fasin blong Work insaed long Asosiesen"

Ol bos blong Asosiesen oli Komiti we oli electem hem..... . Olgeta man we oli electem olgeta oli go long Komiti oli memba blong Asosiesen we oli electem olgeta long fasin ia long miting we oli holem long everi tu (2) yia mo oli singaotem Annual General Miting (AGM). Olgeta memba blong Komiti oli save stap tu (2) yia.Komiti hemi mas gat tri (3) memba we igat Jeaman, Sekreteri mo Tresora. Work blong Komiti hemi blong memkem se Warkali Motoutorua hemi wok folem ol Rul e Asosiesen hemi talemaot. Komiti hemi save panisim ol memba blong Asosiesen we oli no kam long ol miting blong Asosiesen, "

11. That accordingly, Mr Dino was not entitled to consider matters relating to the association, or such as to convene the meeting of 25th August, 2018 because he was already removed as Chairman from the association on the 7th of July 2018, and he has no standing to initiate any claim on behalf of the association.

12. Defence counsel further submitted that Mr Dino having no longer being chairman of the association, has no standing to stop the defendants from attending any meetings of the association of which they are members through bloodline of family Motoutorua. They relied on



annexures "JM1" and "JM3" of Mr Joshua's sworn statement, in respect of their family tree and a letter from the Paramount Chief Kalsakau III setting out their ties to the association and confirming who are considered eligible members of Warkali association, which included anyone by bloodline, of Family Motoutorua, including women who are of the Motoutorua bloodline but have married out of the Motoutorua family.

13. On the issue of whether or not there is a cause of action, the Defendants submitted that the claimant has failed to set out a cause of action and referred to relevant Rules of procedure and statutory provisions in their submission that the claim be struck out, particularly with reference made to the Western Pacific High Court (Civil Procedure) Rules 1954. R.S.C. 0.25. r.4.

14. However, I do not see how these provisions apply to the case before us and with lack of actual case authorities that would have assisted this court to better deal with this issue any further.

15. On the Third issue, Counsel says there is no pleading or evidence made against the third defendants and that they be removed according to Rule 3.2(2) of the Civil Procedure rules.

16. Mr Willie submits then that the Magistrate court claim and interim restraining orders be struck out in their entirety.

17. On the first issue of locus standi, the Claimant through his counsel Mr Molbaleh, says Mr Dino is the Chairperson of the Warkali Association, duly elected to that position, although Mr Molbaleh does not produce evidence in Court to support this position that Mr Dino was never removed as chairperson of the association.

18. Mr Molbaleh further refers to the certificate of incorporation annexed and marked "MD2P1" and "MD2 P2" as attached to Mr Dino's sworn statement, that while the association has been registered accordingly, the defendants, particularly the first defendants are not included as committee members, therefore they could not claim they are members of the association. Mr Molbaleh submitted that this Court considers this certificate of incorporation to outweigh



defendant's submission in respect of the second issue of locus standi-that Mr Dino is the rightful chairman of the warkali association. Although I fail to see how Mr Molbaleh's reference to the certificate of incorporation shows Mr Dino is the rightful chairman as he so alleges or how he along with the other named committee members registered were appointed accordingly.

19. On the second issue of cause of action, Mr Molbaleh submitted that the claim was filed against the first and second defendants specifically restraining them because the association was restricted to only male bloodlines, and these defendants are not of the male bloodlines and were forcing themselves to be included in the 25th August 2018 meeting. However Mr Molbaleh could not assist this Court with any evidence to support this allegation.

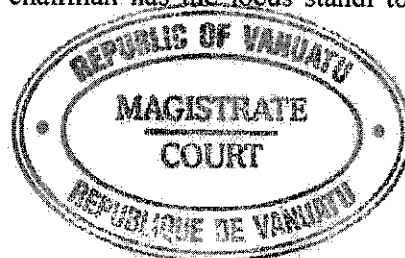
20. Mr Molbaleh further submitted that all defendants including the third defendants had forcefully tried to enter the meeting of 25th August, 2018, using threats and abusive words to the claimant such as "pikinini blong rod", and the particulars given constitute a valid cause of action.

21. And finally on the third issue of whether or not the third defendants be removed as parties to this proceeding, Mr Molbaleh submits that they were also involved in threatening the claimant and swore at him at the meeting. However, there is again lack of evidence on part of claimant to support this allegation.

Determination of Issues

22. I first deal with the issue of locus standi. I consider that the other two issues particularly the second issue hinges on this issue.

23. I consider Article 4 of the Warkali Association as submitted by Defence counsel, and although I would have preferred for the complete constitution of the warkali association to be made available to clarify further points made by the Defence Counsel in respect of the first issue, that assistance was not provided. I do not see any specific reference made in this article that says only the members of the Committee including the chairman has the locus standi to initiate a



claim. There is no specific reference as to the three-member committee being the only ones eligible to initiate court proceedings on behalf of the association.

24. Although no further evidence by the Defence was given to prove the 7th July 2018 meeting was the Annual General Meeting, I consider this as so, wherefrom I accept from defence's evidence that Mr Joshua Motoutorua was appointed as Chairman accordingly.

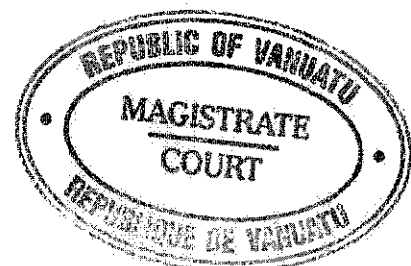
25. I also accept that the defendants are members of the Warkali Association by virtue of bloodline lineage of family Motoutorua.

26. In respect of the claimant's position on locus standi, there is no evidence before Court to show that he was never removed as chairperson of the association.

27. The claimant's reference to the certificate of incorporation (MD2 P1) and the charitable association extract (MD2 P2) also is not relevant to prove Mr Dino is and remains the chairman of the association as alleged. This is clearly disputed by the Defence as well, given the registration of the association was done after Mr Dino was already removed as chairperson of the Warkali Association since 7th of July 2018 association meeting.

28. I accept defence's submission and therefore find for this issue that the claimant does not have locus standi to initiate the claim in this case.

29. As to the issue of cause of action, while the Defence fails to provide further relevant authorities or evidence to support their submission on this issue, Counsel for Claimant says the particulars of violence and threatening on part of defendants constitute a valid cause of action. Although careful consideration on the history of this threats and violence show the claimant has contributed to the threats and violence as well, and tension has obviously been present for some time between the parties, over disagreements between Motoutorua family members, as to who is the actual appointed executive members of the Warkali Association responsible in seeing to the efficient and effective running of the association.



30. And while the claimant has no locus standi to bring proceeding on behalf of the association in this case, I find for the second issue that he also has no cause of action against the defendants accordingly.

31. On the third issue, I accept the defendant's submission that there is no evidence or pleadings against the third defendants in this case, and I therefore order that they be removed as parties to the proceeding accordingly.

Conclusion

32. Having decided on the preliminary issues, I make the following orders:

Orders

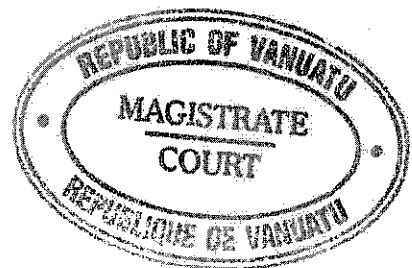
33. That the claim be dismissed accordingly.

34. That the interim orders dated 26th of September, 2018 are revoked.

35. I also bear in mind that there is a counter-claim in this case. Given the circumstances however, while the claim is dismissed, the counter-claim is also dismissed, and there is neither a winner nor loser in this case accordingly.

36. I therefore make no order as to costs. Each party will be responsible for their own costs.

37. Finally while dispute remains between the parties as to who is the rightful chairman or executives members of the Warkali Association, or who are normal members who share some rights or interests of the association, and given the circumstances affecting the effective running of the association, I am doubtful that this is the correct Court to determine the parties' case if at all.



38. I therefore suggest that it would be proper for the parties to file a claim for judicial review in respect of the establishment of the association, its registration and its overall function to put any remaining issues between the parties hopefully at rest.

DATED at this 5th day of April, 2019.

BY THE COURT

.....
Magistrate

