

BETWEEN: ELSIE BONG

Applicant

AND: JOHN ROY MARANGO

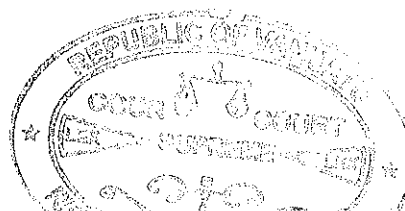
Respondent

Date of Ruling: 24 November 2017
Before: Justice Daniel Fatiaki
In Attendance: Counsel – Ms. Vola Matas for the Applicant
No appearance for the Respondent

RULING

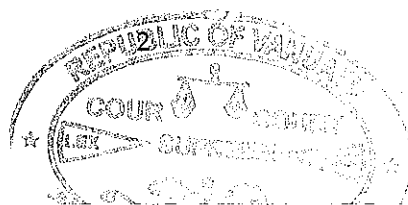
1. This case has come before the Supreme Court by way of a referral by the Magistrate's Court of an application for a protection order filed by the applicant against the respondent on 26 June 2017. In his referral order the magistrate invokes Rule 16.20 of the Civil Procedure Rules 2002 ("CPR") after ruling that "... the level of violence or threatened violence (in the application) is serious".
2. As this is the first occasion that this Court has had to consider the Family Protection Act 2008 ("FPA") or deal with a referred application for a protection order, counsel's assistance was sought. I am grateful for the assistance provided.
3. In her Memorandum counsel refers to the provisions of Sections 11 and 18 of the FPA which deal with the making of a protection order and a temporary protection order respectively and states:

"Rule 16.15 to 16.20 of the Civil Procedure Rules were used prior to March 2008 when there was no laws to protect victims of domestic violence. Since the commencement of the Family Protection Act in March 2009, all protection order applications are issued in accordance to (sic) the Family Protection Act".
4. In the present case the applicant accepts that prior to the incident which gave rise to her application she had been in an (undefined) "*relationship*" with the respondent and was in the process of ending it. She had previously obtained a protection order against the respondent in February 2017 which lapsed shortly before the incident occurred.
5. The Family Protection Act 2008 came into effect on 2 March 2009 and has as its purpose the preservation and promotion of harmonious family relationships and



the prevention of domestic violence in all levels of society in Vanuatu. The Act is based on traditional values of Vanuatu and on Christian principles which recognizes that domestic violence of any kind is unacceptable behaviour. The Act also provides effective legal protection for the victims of domestic violence and punishment for all persons who commits such acts.

6. It is however clear from the definitions of an “*authorized person*” and “*court*” that the latter term means (not includes) a “*Magistrates Court*” or “*Island Court*” which is given an original jurisdiction to deal with domestic violence offences and applications for protection orders (see: Sections 10, 11, 17, 18, 28 and 29). On the other hand, the Supreme Court is given an appellate jurisdiction under Part 7 of the FPA entitled: “*Appeals*” (see: Sections 47, 48 and 49).
7. Nowhere in the FPA is there a power given to the Magistrates Court or the Island Court to refer an application under the FPA to the Supreme Court nor does the Supreme Court possess an original jurisdiction under the FPA to deal with such applications.
8. In the face of such a clear statutory demarcation of the jurisdiction of the Magistrates Court and the Supreme Court (“*expressio unius est exclusio alterius*”) can it, nevertheless, be said that Rule 16.20 of the CPR is valid and effectively confers by way of a referral, an original jurisdiction on the Supreme Court to hear and determine an application for a protection order? I think not.
9. Accepting that Rule 16.20 permits a magistrate “... to refer a domestic violence protection proceeding to the Supreme Court” if the magistrate forms “... the view that the level of violence or threatened violence is serious”, still, there can be no denying its chronology or the effect of Section 15(4) of the Interpretation Act [CAP. 132]. The Rule was made 7 years before the Family Protection Act was enacted and therefore cannot, alter or supplement the wholly appellate jurisdiction conferred on the Supreme Court under the FPA. Indeed, the converse is to be presumed and any inconsistency between the Rule and the provisions of the FPA renders the Rule in the words of Section 15(4) “... void to the extent of the inconsistency”.
10. Secondly, the Rule or regulation-making authority under the FPA is the Minister responsible for Womens Affairs and the CPR was made by the Judicial Committee under the now repealed Courts Act [Cap. 122]. Self-evidently the FPA did not enable the making of Rule 16.20 nor can the Rule confer a power to refer or a jurisdiction to hear where none exists in the FPA.
11. And finally, if the Supreme Court could exercise an original jurisdiction by granting a protection order under Rule 16.20 then the provisions of Part 7 of the FPA would be rendered nugatory and an aggrieved respondent would have no avenue to appeal against the protection order because Section 49(2) which provides for a further appeal to the Court of Appeal only applies to appellate decisions of the Supreme Court. That could never have been the intention of Parliament in enacting Part 7 of the FPA.
12. If I should be wrong in that view then, I turn to briefly consider the particular circumstances of the application. I gather this from the applicant's statement filed



in support of her application for a protection order which has been helpfully translated into English. Nowhere in the statement is it suggested that the applicant and the respondent are or were legally married or were living together at the time of the incident, nor, is it known whether or not the respondent is a biological parent of the daughter mentioned in the applicant's statement. Certainly no marriage or birth certificate is attached to the applicant's statement ("*the missing facts*").

13. The importance of the missing facts is reinforced by a consideration of Sections 3, 4 and 5 which provide:

"3 Meaning of family member

Each of the following is a member of a person's family:

- (a) *the spouse of the person;*
- (b) *a child of the person and/or the person's spouse;*
- (c) *a parent of the person or the person's spouse;*
- (d) *a brother or sister of the person or the person's spouse;*
- (e) *any other person who is treated by the person as a family member.*

4 Meaning of domestic violence

- (1) *A person commits an act of domestic violence if he or she intentionally does any of the following acts against a member of his or her family:*
 - (a) *assaults the family member (whether or not there is evidence of a physical injury);*
 - (b) *psychologically abuses, harasses or intimidates the family member;*
 - (c) *sexually abuses the family member;*
 - (d) *stalks the family member so as to cause him or her apprehension or fear;*
 - (e) *behaves in an indecent or offensive manner to the family member;*
 - (f) *damages or causes damage to the family member's property;*
 - (g) *threatens to do any of the acts in paragraphs (a) to (f).*
- (2) *Without limiting paragraph (1)(d), a person may stalk another person by:*
 - (a) *following the person; or*
 - (b) *watching the person; or*
 - (c) *loitering outside premises where the person lives, works or frequents for the purposes of any social or leisure activity; or*
 - (d) *making persistent telephone calls to the person or to premises where the person lives or works.*
- (3) *For the purposes of this Act, if a person (in this subsection called "the instigator") counsels or procures another person to commit an act that, if done by the instigator, would be an act of domestic violence, then the instigator is taken to have committed the act.*
- (4) *To avoid doubt:*
 - (a) *a single act may amount to an act of domestic violence; and*
 - (b) *a number of acts that form part of a pattern of behaviour may amount to domestic violence even though some or all of those acts when viewed in isolation may appear to be minor or trivial.*



5 Meaning of spouse

Spouse of a person means an individual of the opposite sex to the person who:

- (a) is or has been married to the person; or
- (b) although not married to the person, is living with the person in a marriage-like relationship or has lived with the person in such a relationship; or
- (c) is a biological parent of a child with the person (whether or not they are or have been married or are living or have lived together)".

14. Plainly "*an act of domestic violence*" must be committed against a family member as defined before it can be the subject matter of an application for a protection order under Sections 11, 17 and 18. Accordingly, if the complainant is not married to the defendant then evidence must be produced which establishes, in the words of Section 5(a) that she "... *has been married*" to the defendant or under Section 5(b), that: "... (he/she) *is living with (the defendant) in a marriage-like relationship or has lived with (the defendant) in such a relationship*". In the absence of such evidence the protective provisions of the FPA are not enlivened.
15. In the present case whilst what occurred in the car park outside the complainant's place of employment were undoubtedly criminal acts of actual and threatened violence, intimidation, verbal abuse, and damaging property they are only acts of "*domestic violence*" if committed "... *against a member of his or her family*". The words of the above sections are clear. Unfortunately the evidence of the applicant about the nature of her "*relationship*" with the respondent is quite unsatisfactory and equivocal in establishing that she is "*(a) member of his family*". Accordingly, on that basis also, both the application for a protection order and its referral by the magistrate was misconceived and incompetent.
16. The case file is returned to the Magistrates Court and the applicant is directed to file a sworn statement within 7 days fulfilling the requirements of Section 5. Thereafter the Magistrate is to consider the application afresh if it is still being pursued.

DATED at Port Vila, this 24th day of November, 2017.

BY THE COURT


D. V. FATIAKI
Judge.

