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

Civil
Case No. 17/2831 SC/CIVL

BETWEEN: STEFAN MANDEL

Claimant

AND: THE OMBUDSMAN OF THE REPUBLIC OF VANUATU

Defendant

Date of HEARING:	***14th day of June, 2018 at 8:15 AM***
Before:	***Justice Oliver A. Saksak***
Counsel:	***Mr Nigel Morrison for the Claimant/Respondent*** ***Mr Hardison Tabi for the Defendant/Applicant***
Date of Hearing:	***14th June 2014***
Date of Decision:	***26th July 2018***

DECISION

1. The application by the defendant to strike out the Claimant's claim is successful and is accordingly allowed.

Reasons

2. The defendant filed an application on 30 October 2017 seeking two orders –

   (a) That the Claimant's claim filed on 9 October 2017 be struck out; and

   (b) That the Claimant pays the defendant's costs of the application in the sum of VT50,000.

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3. At the hearing in Chambers on 14 June 2018 Mr Tabi told the Court he simply relied on the written submissions filed on 30 October 2017 and the Memorandum dated 29 March 2018, and added nothing further. Mr Morrison also told the Court he relied solely on the sworn statement of the Claimant filed in opposition to the application on 28 February 2018 and added nothing further.

4. Three grounds were advanced by the defendant as the basis of the strike out application –

   (a) That the claims filed on 23 October 2017 did not meet the requirements of Rule 4(2)(1) of the Civil Procedure Rules No. 49 of 2002 (the Rules).

   (b) That the claims arising from the Ombudsman's Report dated 6 September, 2001 is time-barred.

   (c) That the claim did not disclose any cause of action against the defendant.

First Ground

5. For the first ground, Rule 4.2(1) of the Rules requires that the claim –
   (a) Be as brief as the nature of the case permits,
   (b) Set out all the relevant facts on which the Claimant relies and not contain the legal arguments about it; and
   (c) If custom law is relied on, state the custom law.

6. The Claimant's claims filed on 23 October 2017 are numbered paragraph 1 through paragraph 16.

7. The statements of the Claimant's case from paragraph 11 to 16 are relatively lengthy. And it is correct that no statute or principle of law applicable to the claim are identified.

8. Arguing in opposition to the application the Claimant submits that whilst relying on the Civil Procedure Rules, the defendant ignored the overriding objectives of the Rules. This is stated in Rule 1.2(1) which states:

"(1) **The overriding objective of these Rules is to enable the Courts to deal with cases justly.**"

(2) Dealing with cases justly includes, so far as is practicable:

(a) **ensuring that all parties are on equal footing;**
(b) **saving expense**; and
(c) dealing with the case in ways that are proportionate:

(i) to the importance of the case; and
(ii) to the complexity of the case; and
(iii) to the amount of money involved; and
(iv) to the financial position of each party; and

(d) **ensuring that the case is dealt with speedily and fairly**; and
(e) Alotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.
(My underlining for emphasis).

9. In his evidence the Claimant disclosed a letter he wrote on 21 August 2001 as "SM2" to his sworn statement. It is 18 pages long. The letter has an interesting ending on page 18. It could have ended better than that. A serious and concerned writer would end with a demand that the then Ombudsman (a) not publish the report because of the allegations labeled against him that he claimed were false and or (b) to remove those relevant parts before publication. Further, it would end with a notice to the Ombudsman that in the event of him not taking any steps within 14 days, he would take legal proceedings. That would indicate to the Ombudsman the Claimant's seriousness about the matter. But none of that happened.

10. In writing 14 years later to another Ombudsman who was not responsible for the publication of the Report on 6 September 2001, the following questions are necessary to be asked –

(a) What did the Claimant intend to achieve?

The answer is obviously "nothing" as the Report had been published some 14 years and he did nothing to prevent it at the time.

(b) Was the Claimant ensuring the overriding objective of the Rules to be observed by his failure and/or omission?

The answer would be "no".

(c) In waiting 14 years before filing his claim, is the Claimant ensuring all parties are placed on equal footing?

The answer would be "no".

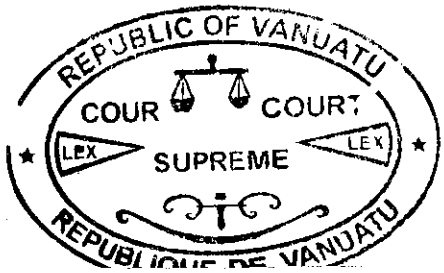
(d) In waiting 14 years before filing his claim, is the Claimant ensuring the case is dealt with speedily and fairly?

The answer would obviously be "no".

11. The prejudices caused to persons who would likely be witnesses in the case after some 14-15 years after the event is in my view immense. There is likelihood of persons being unavailable. There is high likelihood of loss of memories due to the long delay. And the costs and expenses likely to be involved would be immensed as well. These are factors that have to be considered when deciding whether the requirements of Rule 4.2 are met by the Claimant filing his claim in October 2017. And I accept the State's submission that those requirements were not met by the Claimant.

Second Ground

12. The second ground of the application is the delay of 14-15 years making the claim time-barred. First, for reasons I have already stated in relation to the first ground, I accept the State's submissions that this claim is time-barred. In any event the Claimant has not indicated the basis of the claim whether founded on tort or on contract. The reliefs sought do not include damages but a declaration that the report was made in bad faith and for an order to remove references from the report.



13. The evidence of the Claimant annexes his letter of 21 August 2001 ("SM2") which provides his comments and responses to the then Ombudsman. But there is no evidence from him (a) that this letter was served on the Ombudsman by whom and when, (b) that showed he suffered any prejudices as a result of the publication of the report, (c) that any other person or persons named in the report supported or confirmed the allegations made were false or (d) that any of the other officials named with the Claimant complained about or was unhappy with the report.

14. In order to show bad faith on the part of the then Ombudsman the Claimant has to have evidence to show the factors identified in (a)-(d) in paragraph 14. And I am not satisfied or convinced that he has done that.

15. The Claimant is relying on his counsel's letter of 31 July 2015 as the starting point. However to succeed he has to show evidence of his earlier correspondences or meetings to the Ombudsman or his officers. There is presently no such evidence, so his submissions opposing this ground cannot be tenable and are rejected.

Third Ground

16. Finally the third ground that there is no cause of action, I accept the State's submissions.

17. In his pleading at paragraph 4 the Claimant states that the Report he complains about was published on 6 September 2001. On 31 July 2015 Claimant's counsel wrote to Mr Matas Kelekele. At the end of the letter it was requested that consideration be given to the withdrawal of the report. One would have to ask how that would at all be possible when the Report was in the public domain for 13-14 years after its publication on 6 September 2001?

18. At the end of page 4 of the letter reasons are given by the Claimant why he waited 13 years before taking legal action and his answer was that it would have severely damaged Vanuatu's reputation and said "It could have been self-defeating". If it was "self-defeating" for the Claimant at the time, then it is obvious by that word the Claimant was not serious in doing so as he expected only defeat at the time. So if in 2001 it was self-defeating to "demolish" the report and " "expose it for the criminal fraud that it was", the

Claimant chose not to take any action. He therefore has to accept responsibility for his failure and/or omission.

19. I accept the State's submissions on this ground that there is no cause of action shown by the Claimant against the defendant.

20. For all these reasons the claim of the Claimant is hereby struck out in its entirety.

21. The defendant is entitled to their costs of the application awarded at VT50,000 against the Claimant.

DATED at Port Vila this 26th day of July, 2018.

BY THE COURT

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Oliver Saksak

Judge

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