

BETWEEN: George Boar
Claimant

AND: The Public Prosecutor
First Defendant

AND: Republic of Vanuatu
Second Defendant

Before: Justice Aru

Counsel: Mr. G. Boar Claimant in person
Mr. H. Tabi for the First and Second Defendants

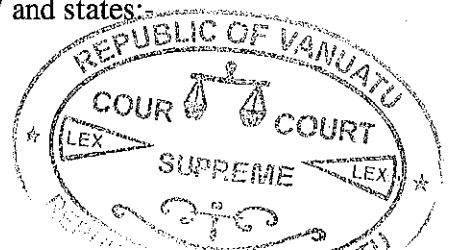
JUDGMENT

1. This is a claim for judicial review (JR) brought by the claimant and seeks the following relief:-

“a) a quashing order against the learned chief magistrate steven felix committal order dated 28 November 2017 on finding a prima facie case against the claimant and committing the claimant to stand trial in the supreme court on 6 december 2017 for the prosecution charge of misappropriation of VT 1,865, 660 contrary to s 125 a) of the Penal Code .”

Background

2. The claimant is a registered legal practitioner. Sometime in November 2012 and again in 2017 several criminal complaints for misappropriation were made against him to the Police by his former clients in Civil Case 123 of 2005. These complaints relate to monies received and held in trust on their behalf. The matter was investigated and the Prosecution prepared and filed with the Magistrate Court a draft information with a charge of misappropriation in the sum of VT2,335,660 contrary to s 125 b) of the Penal Code [CAP 135]. This figure was subsequently amended to VT1, 865, 000.
3. On 14 November 2017 a preliminary inquiry (PI) was held in the matter by the Chief Magistrate. At that hearing the claimant also applied to have the charge dismissed.
4. On 28 November 2017 the Chief Magistrate delivered his oral decision that there was a prima facie case made out and committed the matter to the Supreme Court for trial. This is the decision which the claimant is now seeking to review. The actual Committal Order (the Decision) is dated 30 November 2017 and states:-



"COMMITTAL ORDER

Whereas GEORGE BOAR is charged with the offence(s) of:

1. Misappropriation s125 b) CAP 135

Having considered the materials presented to me on the 28 November 2017 relating to the above –mentioned charge(s) in the above case , THIS COURT CONFIRMS that there is a prima facie case disclosed .

Accordingly, THIS COURT AUTHORISES the laying of the proposed Information against the accused person GEROGGE BOAR and he is hereby committed to the Supreme Court for trial upon information.

The Accused must appear in the Supreme Court at Dumbea Hall on 5 th day of November 2017 at 900am in the morning .

DATED at Port Vila this 30th day of November 2017.

BY THE COURT

(signed)

Chief Magistrate"

5. On 1 December 2017 the claimant filed these JR proceedings. It was later amended with leave and an amended application was filed on 25 January 2018.
6. At the first conference of this matter I heard argument from the parties in relation to matters specified in rule 17.8 particularly sub rule (3), (4) and (5) of the Civil Procedure Rules (CPR):-

"(3)The judge will not hear the claim unless he or she is satisfied that:

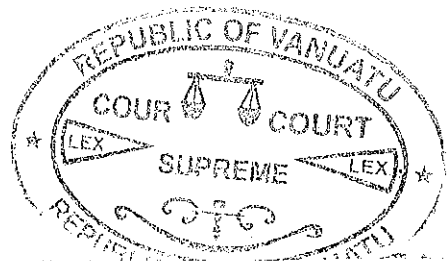
- (a) the claimant has an arguable case; and*
- (b) the claimant is directly affected by the enactment or decision; and*
- (c) there has been no undue delay in making the claim; and*
- (d) there is no other remedy that resolves the matter fully and directly.*

(4) To be satisfied, the judge may at the conference:

- (a) consider the papers filed in the proceeding; and*
- (b) hear argument from the parties.*

(5) If the judge is not satisfied about the matters in sub rule (3), the judge must decline to hear the claim and strike it out."

7. If I am not satisfied about the matters in sub rule (3) then I must decline to hear the matter and strike it out.



8. The first argument raised by the claimant is that the Chief Magistrate did not consider the deed of settlement dated 3 August 2017 signed by him and his former clients who are the complainants. He submits that the charge relates to monies paid into his trust account for his clients following the conclusion of Civil Case 123 of 2005 and Civil Appeal Case No 24 of 2008. The understanding was that he would deduct his fees and the balance paid to his clients. It was submitted that there were discrepancies in the figures in the charge and that the correct amount was paid to his clients under the deed of settlement but the Chief Magistrate failed to take it into account. It was argued that the matter was a taxation issue to be dealt with under the CPR if his clients were not happy with his invoices and not a criminal matter.
9. It was also submitted that if there were complaints about his conduct as Counsel then the correct procedure would be to lodge formal complaints with the Law Council under the Legal Practitioners Act [CAP119] which has been done. The criminal prosecution has now deprived him of the opportunity to appeal the disciplinary committee's decision against him.
10. The claimant's final submission is that the deed of settlement has deprived this Court of its jurisdiction to preside over the criminal proceedings committed by the Chief Magistrate.
11. The defendants on the other hand in response filed an application to strike out. It was argued that the JR claim must be dismissed as the decision maker being the Chief Magistrate is not named as a party. The second argument is that the Magistrate Court is not an administrative tribunal subject to JR proceedings but a Court of competent jurisdiction and the only way to challenge its decision is to appeal to this court pursuant to s 30 of the Judicial Services and Courts Act [CAP 270] (the JSC Act). It was finally submitted that if the matter is dismissed they would seek costs against the claimant in the sum of VT 60,000.

Discussion

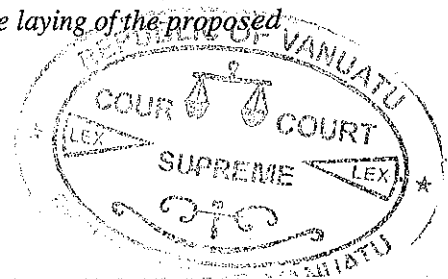
12. In any criminal proceeding in this Republic the procedures are set out in the Criminal Procedure Code [CAP 136]. This was summed up by the former Chief Justice Vaudin d'Imercourt CJ in **Public Prosecutor v Issachar** [1994] VUSC 8 as follows:-

"Committal proceedings in Vanuatu are governed by section 143 to 146 of CAP 136, and more precisely for the purposes of this appeal by sections 145(2) and 146(1). Section 145(2) states:

"The senior magistrate shall decide whether the material presented to him discloses, if the same be not discredited, a prima facie case against the intended accused requiring that he be committed to the Supreme Court for trial upon information."

Section 146(1) states:

"The senior magistrate shall record his decision in writing and deliver copies to the prosecutor and the intended accused. The decision shall show clearly that the senior magistrate either authorises or does not authorise the laying of the proposed



information against the intended accused. If the information is so authorised, a copy of the decision shall be sent by the senior magistrate to the nearest registry of the Supreme Court."

The law of Vanuatu therefore requires two things of a magistrate, (i) that he decides whether there be a prima facie or not to commit for trial, and (ii) that he should give his decision in writing showing clearly whether he authorises or does not authorise the laying of an information. He then has the obligation to serve that decision on the prosecution and the accused. What the statute does not require him to do is to give reasons for his decision."

(emphasis added)

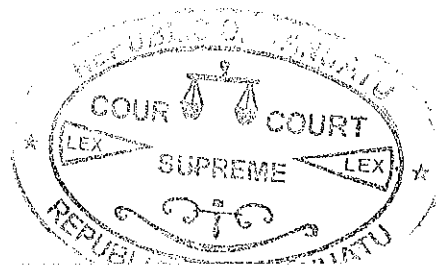
13. The issue before the former Chief Justice was whether the Magistrate should give reasons for his decision. That is not one of the grounds for bringing this JR proceeding.
14. In **Moti v Public Prosecutor** [1999] VUCA 5 the Court of Appeal allowed the appeal and quashed the committal order as the Court found that the appellant was denied the opportunity to contest the allegation against him before the order was made committing him to the Supreme Court. Concerning committals, it said:-

"We are satisfied that Sections 145 and 146 ought to be read as a composite whole and not as a series of sequential steps required to be followed in a particular order by the Senior Magistrate conducting a preliminary enquiry. Further we are satisfied from the wording of the Section that the procedure envisaged in a preliminary enquiry is a speedy informal one primarily designed to ensure that an accused person shall not be committed to the Supreme Court for trial upon information unless a 'prima facie' case has been made out on all the 'materials' presented to the Senior Magistrate. The test is in our view is **not** whether on the materials presented the intended accused should be convicted but the less stringent one of whether he could be convicted.

For the sake of completeness we note that the Senior Magistrate is required in terms of Section 146 (1) to record his decision in writing, and in particular, state whether he authorises or does not authorise the laying of the proposed information against the intended accused, and, Section 146 (3) expressly prohibits the acceptance by the Supreme Court Registry of any information unless it has been 'specifically authorised' by a decision of the Senior Magistrate.

.....
We are persuaded that the opportunity for an accused person to make a statement or representation under Section 145 (3), if it is to serve any useful or protective purpose, must be afforded **before** the decision is made that a 'prima facie' case exists upon the materials sufficient to commit the accused to the Supreme Court for trial upon information. Having said that however, we do not consider that the constitutional protections afforded an accused person in a preliminary enquiry necessarily entails a right to cross-examine witnesses."

(emphasis added)



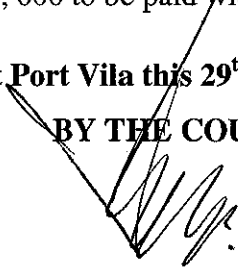
15. It is not disputed that the claimant made representations on the allegations against him and was heard before the decision to commit was made. In applying the test, the Chief Magistrate found that a prima facie case existed therefore the matter was committed to the Supreme Court as stated in the committal order. The matter has been committed and is pending finalisation before the Supreme Court.

16. The submissions made by the claimant are rejected. The JR proceeding is misconceived and must be struck out. It is an abuse of process as the procedure for dealing with the Police complaint are still ongoing and yet to be completed. The bringing of this JR proceeding only adds unnecessary delays to finalisation of the criminal case. The claimant does not have an arguable case. Although he is directly affected there are remedies available to the claimant under the Criminal Procedure Code [CAP 136] that would fully resolve the matter one way or the other.

17. I decline to hear the claim and it is therefore struck out. The defendants are entitled to costs in the sum of VT 60, 000 to be paid within 14 days.

DATED at Port Vila this 29th day of May, 2018

BY THE COURT



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**D. Aru
Judge**

