

**BETWEEN: THE TELECOMMUNICATIONS AND
RADIOCOMMUNICATIONS
REGULATOR**
Claimant

AND: CHARLOT SALWAI TABIMASMAS,
**Prime Minister and Minister responsible for
Telecommunication**
First Respondent

**AND: GERARD METSAN, Chief Information
Officer**
Second Respondent

**AND: DR. HASSO PHATIA, CEO of the Utilities
Regulator Authority**
Interested Party

Coram: *Mr. Justice Oliver A. Saksak*

Counsel: *Edward Nalyal and Eric Braun and Colin Leo for Claimant
Sakiusa Kalsakau for the Respondents*

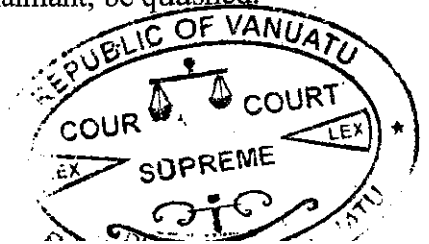
Date of Hearing: *24th and 25th May 2018*

Date of Judgment: *4th day of June 2018*

JUDGMENT

Introduction of Claims

1. This is a judicial review claim filed by the Claimant on 9th January 2018 seeking orders that-
 - a) The suspension notices issued by the First Respondent dated 25th October 2017 and 12th December 2017 (the Suspension Notices) be quashed,
 - b) The First Respondent's letter dated 12th December 2017 purporting in reliance on the Suspension Notices to appoint the CEO of the Utilities Regulatory Authority (URA) as "acting" Regulator in place of the Claimant, be quashed.

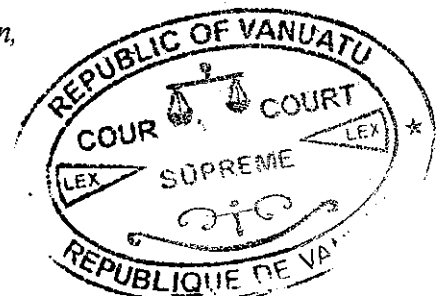


- c) The Respondents shall not control, direct, pressure or coerce the claimant as to how to perform her duties, functions, powers and responsibilities as Regulator,
- d) As interim relief:
- i. An order staying the Suspension Notices dated 25th October 2017 and 12 December 2017 issued by the Respondents, and the appointment by the Respondents dated 12th December 2017 of the CEO of the URA as “acting” Regulator in place of the Claimant, and
 - ii. The further interim relief specified in the Claimant’s Application for Urgent Relief, and
- e) Costs be awarded in the Claimant’s favour.

Interim Restraining and Stay Orders

2. The Claimant filed a separate application seeking the interim reliefs sought under paragraph 4. The application was heard by Justice Aru on 15th January 2018 who granted the following orders-

1. *“The Notices of Suspension issued by the Respondents and dated 25th October 2017 and 12th December 2017 (The Notices of Suspension) suspending the Applicant from her position as TRR, be stayed and of no further effect pending final hearing of the Applicant’s judicial review claim,*
2. *The Respondents be restrained, pending final hearing of the Applicant’s judicial review claim, from taking any action in reliance on The Notices of Suspension or grounds referred to therein,*
3. *The Respondents be restrained, pending final hearing of the Applicant’s judicial review claim, from interfering with the independence of the Regulator as mandated by the TRR Act and her Employment Contract, or that seek to direct, control or pressure her as to how to perform her duties, functions and responsibilities as Regulator,*
4. *The First Respondent’s letter dated 12 December 2017 purporting in reliance on the Notices of Suspension or grounds referred to therein,*



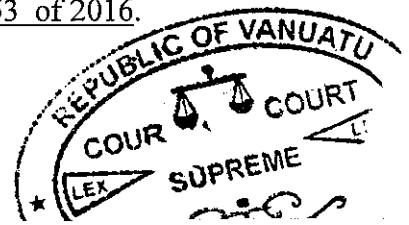
5. *The Respondents be restrained, pending final hearing of the Applicant's judicial review claim, from interfering with the independence of the Regulator as mandated by the TRR Act and her Employment Contract, or that seek to direct, control or pressure her as to how to perform her duties, functions and responsibilities as Regulator,*
6. *The First Respondent's letter dated 12th December 2017 purporting in reliance on the Notices of Suspension and grounds therein, to appoint the CEO of the Utilities Regulatory Authority as Acting Regulator in place of the Applicant, be stayed and of no further effect pending final hearing of the Applicant's judicial review claim,*
7. *The costs and incidental to this application be costs in the cause.*
8. *The file be returned to the Registry for re-allocation."*

3. The Claimant now seeks orders that the restraining orders in paragraphs 1 and 2 be made permanent.

Seven Causes of Actions Alleged

4. The Claimant's claim alleges 7 causes of action summarised as follows-

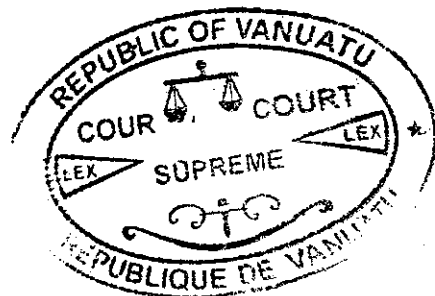
- a) First, that the Suspension Notices are contrary to law and are ultra-vires the authority of the Respondents.
- b) Second, that the Suspension Notices were issued for an improper purpose of preventing or hindering the Claimant from complying with the requirements of the TRR Act and her employment contract to perform her duties and responsibilities as Regulator impartially, independently, and free from pressure or coercion from political office-holders.
- c) Third, that the process used to issue the Suspension Notices were unlawful and unfair denying the Claimant her right to natural justice.
- d) Fourth, that the improper purpose of the Suspension Notices were to interfere with the Claimant's conduct of and outcome of 2 pending civil cases before this Court namely JR 2941 of 2016 and Civil Case No. 3053 of 2016.



- e) Fifth, that the Suspension Notices were not only unlawful and ultra vires but were also irrational and manifestly unreasonable.
- f) Sixth, that by suspending the Claimant and engaging in related conducts such as demanding that the Claimant make certain regulatory decisions and threatening investigations or termination of her employment, the Respondents had violated section 21 and other provisions of the Leadership Code Act [CAP. 240].
- g) Seventh, that the appointment by the First Respondent of the CEO of URA as acting Regulator during the suspension of the Claimant is contrary to section 4 of the TRR Act and is therefore unlawful.

Facts

- 5. On 20th November 2015 the then Prime Minister appointed the Claimant as Regulator for a period of 3 years.
- 6. On 19th October 2017 the First Respondent immediately suspended the Claimant as Regulator.
- 7. On 24th October 2017 the Claimant responded to the Prime Minister's letter of 19th October 2017.
- 8. On 25th October 2017 the Prime Minister revoked his letter of 19th October 2017 and gave 28 days notice to the Claimant.
- 9. On 2nd November 2017 the Claimant responded by letter to the Prime Minister's letter of 25th October 2017.
- 10. On 12th December 2017 the Prime Minister wrote a letter suspending the Claimant for a period of 2 months pending an investigation.

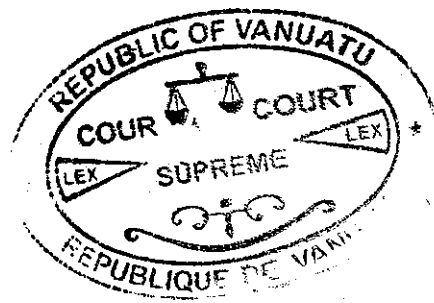


The Defence

11. The defendants conceded that the suspension letter dated 19th October 2017 was made in contravention of section 6 (2) of the TRR Act but that it was specifically revoked by the letter dated 25th October 2017.
12. The defendants conceded also that the suspension of the claimant for a period of 2 months made by letter of 12th December 2017 was made in contravention of the process required by section 6(1) and (2) of the TRR Act.
13. The defendants denied that the letter dated 25th October 2017 was a suspension letter but that it was issued to comply with the 28 days notice required by section 6 (2) of the TRR Act.
14. Finally it admitted that the purported appointment of the Chief Executive Officer (CEO) of the URA as the “ acting’ Regulator was done in the belief that with the suspension, the CEO would be deemed such under section 4 (11) of the TRR Act.

Evidence

15. The Claimant relied on the evidence by sworn statement filed on 19th December 2018. Counsel for the defendants sought leave after the statement was tendered to file objections to paragraphs 5, 6, 33, 70 and 72. The objections were overruled by the Court.
16. The Claimant relied also on the evidence in her further sworn statement filed on 16th May 2018. The Court accepted and allowed the objections on the main grounds that they were filed outside the 21 days requirement under Rule 11.6 (b) of the Civil Procedure Rules. This ruling was consistently made in light of the objections raised by the claimant that the sworn statement of the First Respondent filed only on the hearing date should not be allowed, and the Court accepted and allowed the objection. The sworn statement of the First Respondent was therefore not admitted into evidence.



17. That left the Respondents with no evidence in support of their defence as the Second Defendant did not file any sworn statement.

18. The Interested Party took no part in the proceeding.

Discussions

19. The respondents' defence is a bare or naked defence without evidence in support. The claimant's evidence is therefore unchallenged and unrebutted.

20. The respondents raised only one sole issue of whether or not the decision to suspend the claimant for 2 months on 12th December 2017 was right in law?

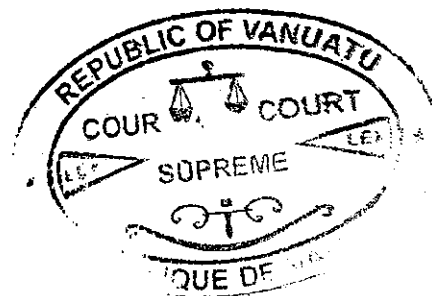
21. The respondents have conceded this issue and that is the end of this issue.

22. As for the letter dated 25th October 2017 the respondents submit that it was not a suspension letter but was made to rectify the 28 days notice requirement that was lacking in the letter of suspension dated 19th October 2017 which was revoked. The respondents further submit that this letter should not be declared unlawful and/or quashed.

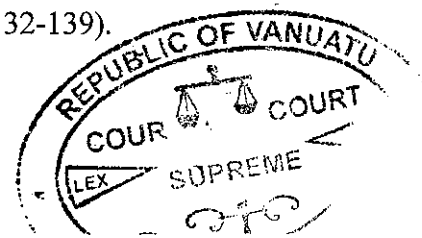
23. This submission is absurd. The suspension letter of 19th October 2017 has been revoked. That means that it does not exist and there is therefore no suspension at all. So why issue the 28 days notice? Put it another way, what useful purpose does the 28 days notice serve without the suspension?

24. Furthermore the 28 days from 25th October 2017 has expired or been spent.

25. The respondents submit also that the letter of 25th October 2017 should not be quashed but should merely be declared unlawful. Alternatively that the First Respondent should be given leave to revoke his decision. Further, that mandatory injunctions should not be issued.



26. First, leave cannot be granted for the First Respondent to revoke his decision. Ample time has been given and allowed for that course to have been taken and it has not been done. It is therefore irrational to seek such leave from the Court.
27. As for the mandatory injunctions, the respondents place reliance on the immunities and limitations under section 10 (3) of the State Proceedings Act.
28. This provision cannot and must not be used as an excuse to do an act which would otherwise be unreasonable, illegal and unlawful. Where there is unchallenged evidence establishing unreasonable, illegal and unlawful acts on the part of the decision maker that violates or contravenes an empowering provision of a statute or a contract of engagement, no such immunities could be available.
29. In this case the Regulator is a separate and independent legal personality (section 7 (5)). And the Regulator must act independently and impartially in performing the responsibilities, functions, duties and powers set out under the TRR Act and any other laws. Section 7 (5) and (12) have been incorporated into the Claimant's employment contract in section 1 of Annexure A (Terms of Reference and Scope of Services).
30. In this case the Claimant's evidence showing unlawful and improper actions in contravention of sections 7(5), 7(12) and Section 1 of her Terms of Reference are seen from-
- a) Paragraphs 42-46, 66-70 and 83-90 of her sworn statement dated 19th December 2017 that she was required to follow commercial objectives of Interchange Limited.
 - b) On 22nd November 2012 the Respondents used the suspension to demand that the Regulator immediately terminate its external legal advisor and a consultant in contravention of section 2.4 of her Employment Contract (Paragraphs 83-86 and 123-131).
 - c) Further on 22nd November 2017 the Respondents demanded that the Claimant revoke orders made against Interchange Limited that are the subject of Judicial Review Case No. 2941 /2016 (see paragraphs 83-86) and 132-139).

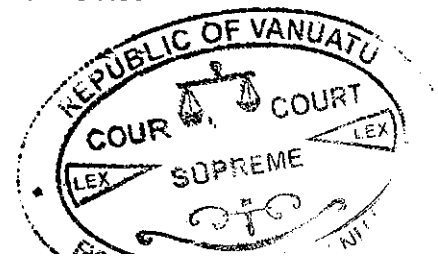


- d) Paragraphs 66-70 and 74 where it is shown the second Respondent secretly conspired and colluded with a TRR employee to prepare the grounds of the Claimant's suspension contrary to her employment contract.

31. From those evidence I find as follows:-

- a) First Cause of Action- There were unlawful and unreasonable grounds of the purported suspension.
- b) Second Cause of Action- The purported suspension was for the improper purpose of preventing or hindering the Claimant from acting independently and impartially in the performance of her responsibilities, duties and powers under the TRR Act.
- c) Fourth Cause of Action- The Purported suspension was for the improper purpose of interference with the claimant conduct of two pending civil cases in the Supreme Court.
- d) Fifth Cause of Action- The purported suspension was irrational and unreasonable and contrary to section 6 of the TRR Act.
- e) Sixth Cause of Action- the defendants actions and conduct may possibly be in violation of the Leadership Code Act but this is a matter for the ombudsman upon receiving a complaint under section 17 of its Act.
- f) Seventh Cause of Action- The appointment by the First Defendant of the CEO as "acting" Regulator during the Claimant's suspension is contrary to section 4 of the TRR Act.

32. Third Cause of Action, Denial of Natural Justice. This cause of action fails. The evidence of the Claimant clearly shows how she made extensive and comprehensive responses to the allegations raised against her in both the letter of 19th October 2017 and that of 25th October 2017 (see DB 31 and DB 34).



The Result

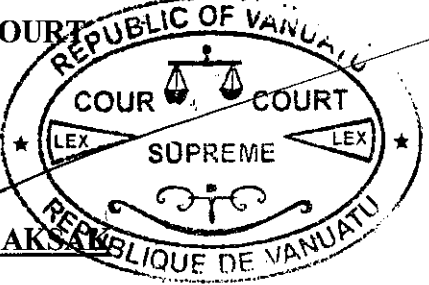
33. The Claimant is successful in her claims against the First and Second Respondents. Judgment is therefore entered in her favour.

34. Declarations and Orders

- a) The letter dated 25th October 2017 is hereby declared unlawful and is hereby quashed.
- b) The letter dated 12th December 2017 is hereby declared unlawful and is hereby quashed.
- c) The appointment of the CEO as “acting” Regulator during the period of the Claimant’s suspension is hereby declared unlawful and is hereby quashed.
- d) The First and Second Respondents be hereby restrained from interfering with the independence of the Claimant as Regulator as mandated by the TRR Act and her Employment Contract, or to direct, control or pressure her as to how to perform her duties, functions, powers and responsibilities as Regulator.
- e) The First and Second Respondents shall pay the Claimant’s costs of and incidental to this action on the standard basis as agreed or taxed.

DATED at Port Vila this 4th day of June 2018

BY THE COURT



The seal of the Supreme Court of Vanuatu is circular. It features a central scale of justice. Above the scale, the words "REPUBLIC OF VANUATU" are written in an arc. Below the scale, the words "COUR SUPREME" are written in an arc. On either side of the scale, the word "LEX" is written in a triangle. The entire seal is surrounded by a decorative border.

OLIVER.A.SAKSA

OLIVER.A.SAKSA

Judge