

BETWEEN: **Albert Nalpini**
 Claimant

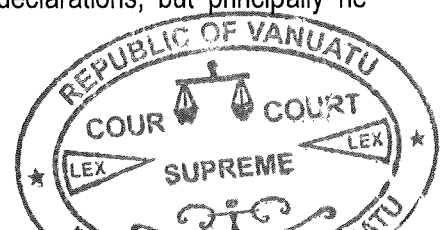
AND: **President of the Republic of Vanuatu**
 First Respondent
Police Service Commission
 Second Respondent

Date of Hearing: 18 July 2019
Before: Justice G.A. Andrée Willens
Counsel: Mr L. Napuati for the Claimant
 Mr S. Aron for both Respondents
Date of Decision: 2 August 2019

JUDGMENT

A. Introduction

1. Mr Nalpini was the duly appointed Commissioner of Police for Vanuatu as from 4 May 2017. He was suspended from Office on 26 September 2018. He maintained that that was done without prior notice or subsequent explanation. An inquiry into certain of Mr Nalpini's conduct was then commenced.
2. Mr Nalpini brought an action (Civil Case No. 18/3128) for judicial review to quash his suspension from duty. Ultimately, prior to any resolution of his application, the inquiry into his conduct made certain findings. Following the publication of those findings on 18 March 2018, Mr Nalpini discontinued his Judicial Review claim on 28 March 2018.
3. Subsequently, this application for Urgent Judicial Review (Civil Case No. 19/1234) was filed on 22 May 2019. Mr Nalpini seeks a number of orders and declarations, but principally he



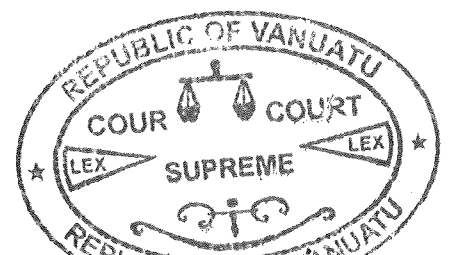
challenged the President's decision to remove him as Commissioner of Police on 16 April 2019. The basis of the application is that flawed processes have directly and adversely affected the President's decision.

4. This decision deals with an application filed by the State Law Office to the effect that Rule 9.9 of the Civil Procedures Rules precludes Mr Nalpini from bringing the current application for Judicial Review. In the alternative, Mr Aron seeks to strike out the application on the basis of *res judicata* and/or *Anshun estoppel*.

B. Similarity of the Challenges

(a) Civil Case No. 18/3128

5. Mr Nalpini alleged that he had not been afforded natural justice due to the lack of any explanation as to why he had been suspended; and secondly complained that the length of the suspension was unreasonable. Mr Nalpini, in a sworn statement, deposed to having heard rumours, but only being formally advised of his suspension on 26 September 2018. The closest he came to knowing why that was done came when he saw an article in the Vanuatu Post newspaper a day or so later which advised the public that there were "administrative issues".
6. On the same day as he was told of his suspension Mr Nalpini was also given a letter advising him that the Police Service Commission ("the Commission") was in the process of assessing his performance as against the terms and conditions of his employment. There were said to be allegations of misconduct and a complaint which had been registered with the Police Standard Unit. The Commission advised that once the assessment had been completed Mr Nalpini would be given a copy and invited to respond prior to a final decision being made.
7. In early December 2018 Mr Nalpini filed an application seeking further relief – he wanted earlier resolution. At a conference with counsel it was agreed that Mr Nalpini would be given a copy of the evidence which was relied upon in support of Mr Nalpini's suspension. It was further agreed that as the Commission's findings were imminent, it was sensible to ascertain the result prior to further progressing Mr Nalpini's application.
8. By letter dated 19 December 2018 Mr Nalpini first raised the issue of perceived bias on the part of members of the Commission as persons acting as investigators and decision-makers as well as having made the allegations originally.
9. Mr Nalpini's Disciplinary Hearing commenced on 20 December 2018, but further time was allowed for Mr Nalpini to be appraised of the allegations; and the hearing resumed on 21 January 2019. Thereafter, a Summary of the Hearing was prepared; and following the taking of evidence, written submissions were sought. Mr Nalpini responded in writing, and subsequently on invitation, by also presenting further oral submissions.
10. The Commission final report was issued on 18 March 2019. It concluded that the allegations, which comprised in their view "serious misconduct", had been proved against Mr Nalpini, and as such dismissal was appropriate. It was further determined that the conclusions be advised to the President and the Minister of Internal Affairs.



11. On 28 March 2019, Mr Nalpini discontinued Civil Case 18/3128; and the next day costs were awarded against Mr Nalpini and the file closed.

12. The President dismissed Mr Nalpini on 16 April 2019.

(b) Civil Case No. 19/1234

13. This case was filed on 22 May 2019. Mr Nalpini sought to quash the President's order dismissing him, on the basis that the Commission had not acted independently; nor had it acted in a timely manner. He sought additional related orders, but there is no need to refer to them at this point.

14. In his sworn statement filed in support of this action, Mr Nalpini made clear that there was an apprehension of bias due to the Chair of the Commission and the Chair of the Disciplinary Committee acting as complainants and investigators in the matter. Complaint was again raised regarding the lack of information provided to Mr Nalpini while he was suspended, and the length of time the inquiries took while he was suspended.

15. It is clear there is a great deal of duplication in the grounds for the both applications, although the subject matter of the decisions is different; the earlier action relating to Mr Nalpini's suspension, the latter action relating to Mr Nalpini's dismissal. The President is involved in both actions, as he was responsible for acting on the recommendations made to him. He is not criticised in any way; nor could he be. It is the actions of the Commission and the Disciplinary Committee that lay at the heart of Mr Nalpini's allegations.

C. Discussion

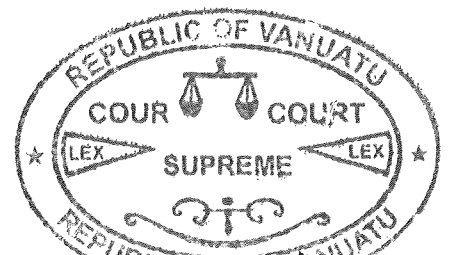
16. In support of the application to strike out Mr Nalpini's Judicial Review application, Mr Aron has submitted that Mr Nalpini is precluded from bringing his current action due to the principle of *res judicata* principle as set out in *Henderson v Henderson* (1843) 3 Hare 100: namely, that a party is not permitted to raise in subsequent litigation claims that ought to have been advanced in previous litigation.

17. Mr Aron also relied on what is termed *anshun estoppel*, which sets out a similar statement of the relevant law.

18. These statements of principle have been accepted as having applicability in Vanuatu: *Family Kalmet v Kalmet* [2017] VUCA 20 wherein the Court of Appeal stated:

"Firstly, res judicata is normally applicable in circumstances where there has been a final determination of the substantive issues before the court. Given the determination of those issues the application of res judicata operates to prevent those issues from being litigated again and also extends to arguments or issues which should properly have been determined at that time."

19. Mr Aron's submissions point to the fact that Mr Nalpini's alleged lack of knowledge regarding the reasons for his suspension was in issue in Civil Case No. 18/3128; as was the allegation of apprehension of bias on the part of the Commission. He submitted that the very same issues are now advanced in support of Civil Case No. 19/1234, albeit that the relief sought is different.

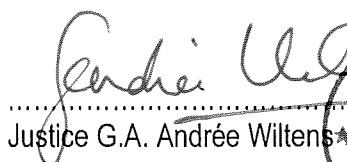


20. Mr Aron further submitted that Mr Nalpini could, and in his submission should if he sought to progress his case, have applied to amend the Claim to deal with dismissal rather than suspension. After all, Mr Nalpini had 10 days warning of the findings of the Commission and its recommendation to the President. Rather than file a Notice of Discontinuance, Mr Nalpini ought to have sought to amend his pleadings and keep his action on foot.
21. In response Mr Napuati seeks to distinguish between the claims on the basis of the remedies sought being to quash a suspension and subsequently to quash a dismissal. He made the point that the dismissal was not an issue when the first claim was filed. Further, he submitted that as a Notice of Discontinuance had been filed, there had been no final determination of the issues raised in Civil Case No. 18/3128, and accordingly he submitted there was no application of *anshun estoppel* or *res judicata*.
22. Civil Procedure Rule 9.9(4)(a) provides that where a claimant discontinues, the claimant may not revive the claim. The litigation is at an end. The issues raised in the litigation are no longer issues requiring determination, as they have been abandoned.

D. Decision

23. By filing his Notice of Discontinuance in Civil Case No. 18/3128, Mr Nalpini has discontinued his claims of lack of knowledge of the reasons behind his suspension, and discontinued his allegation of the apprehension of bias on the part of members of the Commission and/or Disciplinary Committee.
24. He is accordingly prevented from bringing a further action (reviving the claims) on the same basis – if he had wanted to pursue the matter he could and should have simply amended his pleadings to reflect the change of circumstances.
25. Civil Case No. 19/1234 is founded on the very same allegations. By discontinuing those allegations in his first claim, Mr Nalpini is now prevented from raising them again in the subsequent proceedings.
26. Accordingly, Civil Case No. 19/1234 is struck out in its entirety.
27. Mr Nalpini is to pay the costs of this action to the State Law Office. Those costs are to be agreed between counsel, or taxed by the Master.

Dated at Port Vila this 2nd day of August 2019
BY THE COURT


Justice G.A. Andrée Wiltens

