

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

Civil
Case No. 22/750 SC/CIVL

**BETWEEN: Ombudsman of the Republic of
Vanuatu**
Claimant

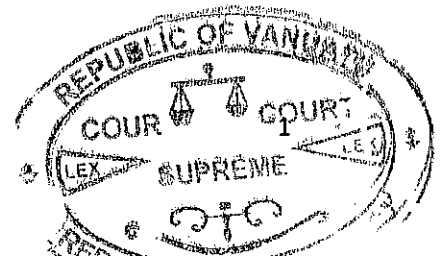
**AND: David Otto c/- Vanuatu National
Provident Fund**
Defendant

Date of Hearing: 5 May 2022
Before: Justice V.M. Trief
In Attendance: Claimant – Mr G. Takau, via video link
Defendant – Mr G. Blake, via video link
Date of Decision: 11 May 2022

**REASONS FOR DECISION AS TO URGENT EX PARTE APPLICATION FOR IMPOSITION
OF FINE FOR FAILING TO RESPOND TO THE OMBUDSMAN'S NOTICE**

A. Introduction

1. This was an Urgent *Ex Parte* Application by the Claimant the Ombudsman of the Republic of Vanuatu seeking the imposition of a VT500,000 fine, that the Defendant David Otto be summonsed to appear before the Court pursuant to s. 23 of the *Ombudsman Act* (the 'Act'), to deliver up the documents sought and costs.
2. The Defendant David Otto is an I.T. Manager of the Vanuatu National Provident Fund (the 'VNPF').
3. The Ombudsman also filed Sworn statement of Urgency of Hamlison Bulu, Undertaking as to Damages and Supreme Court Claim.
4. Outline Submissions of Respondent were filed for Mr Otto.
5. Having heard counsel Mr Takau and Mr Blake, and having considered the documents filed, I **declined and dismissed** the Application. I now set out my reasons in writing.



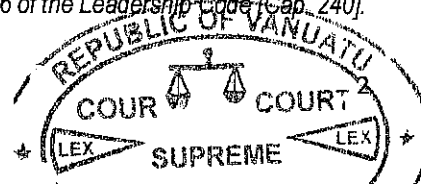
B. Background

6. The Claim sets out that Parmod Achary, General Manager of the VNPF, was charged and brought before the Court and released on bail on 1 March 2022.
7. The Ombudsman instigated on his own initiative an inquiry into Mr Achary for breach of s. 13 of the *Leadership Code Act*. The VNPF General Manager is defined as a leader in that Act.
8. On 1 April 2022, the Ombudsman issued a Notice of Witness to Mr Otto to appear before him on 6 April 2022 to assist the inquiry.
9. Mr Otto did not attend.
10. The Ombudsman filed the Claim and Urgent *Ex Parte* Application in this matter.

C. The Law

11. Sections 22 and 23 of the Act provide:

22. (1) *The Ombudsman must, if possible, obtain evidence and information by informal request, seeking the cooperation of those concerned.*
- (2) *The Ombudsman may issue a notice in writing in the form contained in the Schedule to any person:*
 - (a) *to appear before the Ombudsman for examination by him or her; or*
 - (b) *to furnish any information or documentary evidence to the Ombudsman needed for an enquiry.*
- (3) *If a person is required to appear before the Ombudsman for examination in accordance with subsection (2), he or she may request that:*
 - (a) *a tape recording be made of the examination; and*
 - (b) *the person's legal representative or another person be present during the examination.*
- (4) *The Ombudsman must comply with a request under subsection (3).*
- (5) *If an examination of a person has been tape recorded, the person may request a copy of the recording from the Ombudsman. The Ombudsman must comply with the request as soon as reasonably practicable.*
- (6) *The Ombudsman may administer an oath or affirmation to a person appearing as a witness before him or her, and may examine the witness on oath or affirmation.*
- (7) *A statement made by a person in the course of any enquiry by, or any proceedings before, the Ombudsman, is admissible in evidence against that person or any other person in any Court proceedings, enquiry or other proceedings required under Part 6 of the Leadership Code [Cap. 240].*
- (8) *No evidence in respect of proceedings before the Ombudsman is to be given against any person, including the person under enquiry, except in relation to proceedings under Part 7 of this Act or Part 6 of the Leadership Code [Cap. 240].*



- (9) *If a person is required by the Ombudsman to appear before him or her for the purpose of this section, the person is entitled, on request, to reimbursement of reasonable travel costs (calculated on the basis of what public transport would cost for the trip) and such other expenses as are prescribed by the regulations.*
- (10) *A person required to supply documents to the Ombudsman is entitled, on request, to be reimbursed for reasonable photocopying charges incurred by the person.*
23. *If a person who has been served with a notice under section 22:*
- (a) *fails or refuses to appear before the Ombudsman; or*
- (b) *fails or refuses to furnish any information or documentary evidence to the Ombudsman,*

the Ombudsman may apply to the Court for the person to be summoned to appear before the Court or to furnish to the Court the information or documentary evidence requested in the notice.

(my emphasis)

12. Section 49 of the Act provides:

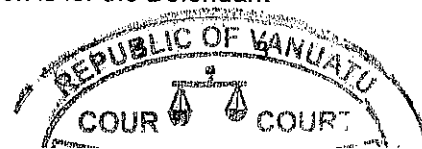
49. *A person who has been given a notice under section 22 to attend as a witness or to produce documents before the Ombudsman is guilty of an offence if the person without sufficient excuse:*
- (a) *refuses or neglects to do so, or*
- (b) *refuses to be sworn or refuses to answer any questions relevant to the matters being enquired into or put to him or her by the Ombudsman or an officer acting under a delegation made under section 14.*

Penalty: VT500,000 or imprisonment for 6 months or both.

(my emphasis)

D. Reasons

13. The primary relief sought in the Claim is a fine of VT500,000 for breach of s. 49 of the Act. The first order sought in the Application is that a VT500,000 fine be imposed. It is an abuse of process to seek by way of interlocutory application the ultimate relief sought in the Claim.
14. The Ombudsman sought to have a fine imposed on an *ex parte* Application therefore giving no opportunity to the Defendant to be heard. That is unfair and cannot be done.
15. The failure to comply with a s. 22 notice is a criminal offence under s. 49 of the Act, punishable by a VT500,000 fine, 6 months' imprisonment or both. It is utterly misconceived therefore to file a Claim in the civil jurisdiction of the Court seeking the imposition of a fine for breach of s. 49 of the Act. Any breach of s. 49 must be pursued by criminal justice process: *August v Ombudsman of the Republic of Vanuatu* [2021] VUCA 59 at para. 11.
16. Section 23 of the Act provides for the Ombudsman to apply to the Court for a person to be summoned to appear before the Court if he or she has failed or refused to appear before the Ombudsman. The second order sought in the Application is for the Defendant



to be summoned to appear before the Court. However, with respect, what is the point of summoning the Defendant if he has already been fined for failure to appear?

17. It is set out in para. 2 of the Application and para. 8 of the Claim that the Ombudsman has received a complaint from Josian Viraliliu that Mr Archary is allegedly attempting to commit the offence of attempting to obstruct or interfere with the execution of a criminal proceeding with other senior officers of the VNPF. However, in his Sworn statement, the Ombudsman Mr Bulu evidenced that he has instigated on his own initiative his inquiry into Mr Archary's conduct. The party bringing an *ex parte* application is obligated to provide full and frank disclosure. That has not occurred here with the Application (and Claim) saying one thing and the Ombudsman's own evidence saying otherwise.
18. There is a criminal case on foot against Mr Archary. It is therefore quite inappropriate that the Ombudsman is seeking to have Orders granted in the Court's civil jurisdiction that are related to the criminal case on foot.

E. Costs

19. Costs must follow the event. Mr Blake sought costs of VT100,000 given the time taken since the Notice of Witness was first given, the correspondence back and forth with the Ombudsman's Office, filing of Outline Submissions of Respondent and attendance at the hearing of the Application. Mr Takau submitted that the Court should order VT50,000 costs. I agreed with Mr Blake. Costs were not sought on an indemnity basis and in the circumstances, an order for costs of VT100,000 was reasonable.

F. Result and Decision

20. For the reasons given, the Claimant's Urgent *Ex Parte* Application was **declined and dismissed**.
21. The Claimant is to pay the Defendant's costs of the Application of VT100,000 **by 4pm on 3 June 2022**.
22. The law is clear that s. 49 of the *Ombudsman Act* prescribes a criminal offence for failure to attend or to produce documents pursuant to a s. 22 notice. It is misconceived to proceed by way of civil claim as the Ombudsman has in this matter. I therefore expect Mr Takau as responsible counsel to give clear legal advice to his client and that steps including discontinuance be taken to prevent any further cost being unnecessarily incurred.
23. Unless earlier discontinued, the Defendant is to file and serve Defence and Strike-Out Application **by 4pm on 19 May 2022**.

DATED at Port Vila this 11th day of May 2022
BY THE COURT


Justice Viran Molisa Trief

