

**BETWEEN: DAVINA IESUL**

Claimant

**AND: XAVIER EMMANUEL HARRY**

Defendant

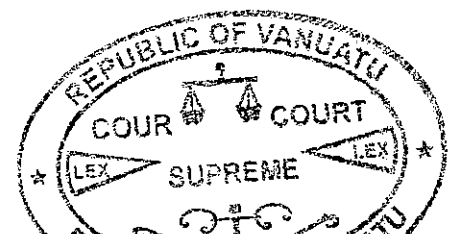
*Date:* 17<sup>th</sup> July 2023  
*Before:* Justice W.K. Hastings  
*Distribution:* Ms J. Kaukere for the Claimant  
The Defendant in person

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**JUDGMENT**

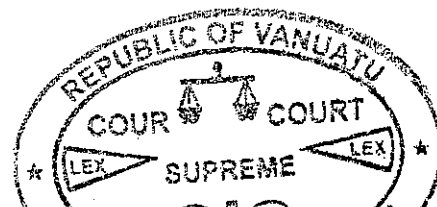
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1. Ms Iesul applies for child maintenance and seeks an order that Mr Harry pay her VT 160,000 for the day-to-day care of their four children. Ms Iesul and Mr Harry lived in a de facto relationship from 2008 until they separated in June 2021.
2. Justice Spear issued a Minute on 18 April 2023 requiring a memorandum from Ms Kaukere by 28 April 2023 that:
  - a. Identifies the statutory or other legal basis on which the Supreme Court may entertain claims for child maintenance;
  - b. Explains why this claim was not filed in the Magistrates Court in accordance with s 1 of the Maintenance of Children Act [Cap 46]; and
  - c. Explains why the claim was served on Tania Aru and not the defendant as required by r.5.2.
3. Ms Kaukere filed the memorandum on 28 April 2023. In summary she answered each question as follows:
  - a. The legal basis on which the Supreme Court may entertain a claim for child maintenance is that the Supreme Court has unlimited jurisdiction. She also referred to *Viska Muluane v Tom Nako* (Civil Case No 20/735, 30 September 2020) in which Justice Andrée Wiltens granted an application for the payment of child maintenance.



- b. The reason why this application was not filed in the Magistrates Court is because the Supreme Court has unlimited jurisdiction and the welfare of the children is paramount.
  - c. The claim was served on Tania Aru because she is the defendant's new partner, and two attempts to serve the defendant were unsuccessful.
4. Justice Spear issued another Minute on 26 May 2023 that stated the matter could not be progressed until the claim was personally served on the defendant in accordance with r.5.2, or pursuant to an order for substituted service under r.5.9.
5. There is now a sworn statement of service on file dated 1 June 2023 that the defendant was personally served on 31 May 2023. Although the names on the sworn statement of service differ from those in the intitlement – the claimant is referred to as Devina Fred not Davina Iesul, and the defendant is referred to as Xavier Iauko not Xavier Emmanuel Harry - I am assured that they are the same people. That resolves issue c. I now turn to consider issues a and b.
6. Ms Kaukere is correct to say the Supreme Court has unlimited jurisdiction, and that Justice Andrée Wiltens granted an application for the payment of child maintenance in 2020. That does not mean however that the Supreme Court should take jurisdiction any time a party asks it to. To do so would subvert Parliament's intention that maintenance claims are to be brought in the Magistrates' Court.
7. The operative words of s 1 of the Maintenance of Children Act [Cap 46] read as follows:

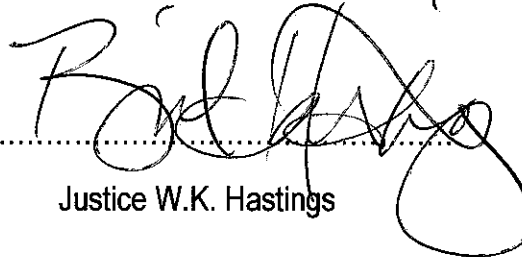
A woman ... may apply to the Magistrates' Court ... for an order ... for the maintenance and upbringing of the child.
8. The permissive "may" can be interpreted in two ways. By using "may" instead of "shall," Parliament may have intended that a woman could apply to a Court other than the Magistrates' Court for a maintenance order – a woman "may" apply to the Magistrates' Court. Or "may" could signify simply that a woman has a choice about whether to apply for a maintenance order or not, but if she chooses to do so, she must do it in the Magistrates' Court – a woman "may" apply for a maintenance order, and it must be in the Magistrates' Court.
9. I prefer the latter interpretation for the following reasons. First, if the court of first instance could be either the Magistrates' Court or the Supreme Court, there would have been no need for Parliament to specify the Magistrates' Court. Second, if an application could be made in either Court, bringing it in the Supreme Court would limit appeal rights. Third, from a policy perspective, there would be little reason to have Magistrates' Courts if any matter could be started in the Supreme Court simply because it has unlimited jurisdiction. Having unlimited jurisdiction does not mean it should always be exercised. By mentioning the place where maintenance applications are to be brought, Parliament intended that place to be used. The Supreme Court must be restrained in deciding to accept an application that Parliament has said is to be made in the Magistrates' Court. There would need to be good reason to exercise the unlimited jurisdiction this Court has to determine an application that Parliament has said must be made in the Magistrates' Court.



10. Ms Kaukere has not supplied that good reason. Merely stating that the Supreme Court has unlimited jurisdiction, for the reasons given in the preceding paragraph, is not enough. The Magistrates' Court has dealt with many of these applications and is aware that the interests of the children are of paramount importance. Ms Kaukere has given me no reason why this application could not be brought in the Magistrates' Court.
11. I accept that Justice Andrée Wiltens determined a similar application in 2020 and that having unlimited jurisdiction meant he could do so, but there is nothing in His Lordship's decision to indicate that the issue of whether or not to exercise his unlimited jurisdiction to hear the application was put before him or that it was considered. The precedent value of that decision is as a result reduced because it does not address the question of when unlimited jurisdiction should be exercised.
12. For these reasons, I decline to hear Ms Kaukere's application for a child maintenance order. The application needs to be made in the Magistrates' Court in accordance with s 1 of the Maintenance of Children Act [CAP 46] and r.2.4 of the CPR.
13. This application is to be transferred to the Magistrates' Court in the District where the Claimant resides.

**Dated at Port Vila this 17th day of July 2023**

**BY THE COURT**

  
Justice W.K. Hastings

