

**IN THE SUPREME COURT OF**  
**THE REPUBLIC OF VANUATU**

*(Civil Jurisdiction)*

**Civil**

**Case No.23/473 SC/CIVL**

**BETWEEN: WU KIM MING**

Claimant

**AND: REPUBLIC OF VANUATU**

First Defendant

**AND: NELSON SESE**

Second Defendant

**AND: PUBLIC PROSECUTOR**

Third Defendant

**Date of Hearing:** *On the papers*

**Before:** *Justice W. K. Hastings*

**Distribution:** *R E Sugden for the Claimant*  
*J Wells for the Defendants*

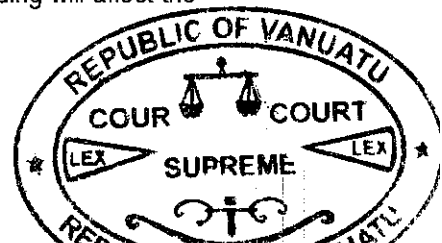
**Date of Decision:** *27 May 2024*

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**DECISION**

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1. This is an application by the claimant for an order under Rule 3.4 of the Civil Procedure Rules 2002 to consolidate two proceedings, *Wu Kim Ming v Republic of Vanuatu* (Constitutional Case No 17/1884) and this proceeding, *Wu Kim Ming v Republic of Vanuatu, Nelson Sese and the Public Prosecutor* (Civil Case No. 23/473).
2. The consolidation is sought on two grounds: the factual issues in the constitutional proceeding are identical with those in this proceeding up until the constitutional proceeding was stayed pending resolution of charges brought by the Public Prosecutor against the claimant (*Public Prosecutor v Ming Wu*, Criminal Case No. 21/2330); and the decision in the present proceeding will affect the decision in the constitutional proceeding.



3. The criminal charges brought against the claimant were dismissed on 19 September 2022 after the prosecutor offered no evidence.

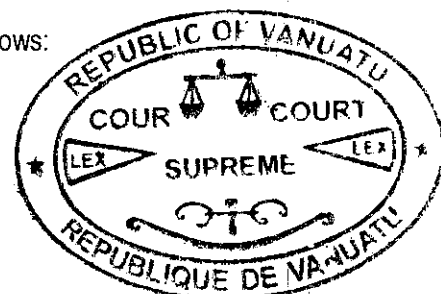
### Background

4. The civil claim was filed on 2 May 2023 and amended on 6 June 2023. It concerns events alleged to have occurred between 9 September 2005 and 19 September 2022. It alleges that police officers at Luganville Police Station harassed and abused the claimant for the purpose of forcing the claimant to pay money to the second defendant. The second defendant accused the claimant of deceiving him into paying VT 800,000 to a third party in November 2005. The claimant alleges that the police officers did nothing to stop the second defendant repeatedly demanding and stealing goods from the claimant's store.
5. The constitutional claim was filed in July 2017. It concerns events alleged to have occurred between 2008 and 31 May 2017. It alleges breaches of Articles 5(1)(b), (c), (d), (e), (h), (i) and 47(i) of the Constitution. It alleges in particular that on 8 July 2014, the police unlawfully arrested the claimant, publicly humiliated him, brutalized him and kept him naked in a police cell in the presence of other men and women, without food, water or medicine, for 4 to 6 hours.
6. The constitutional case was set down for trial on 17 August 2020, but before it commenced, the Public Prosecutor brought charges against the claimant on 4 June 2020 alleging that he obtained VT 800,000 from the second defendant by deception. The claimant alleges that the prosecution was an abuse of process and was brought in order to delay "judicial findings [in the constitutional case] of extreme abuse by police officers of their powers for the benefit of a relative and friend of those police officers." As noted above, the prosecution offered no evidence to support the charges and the criminal case was accordingly dismissed over 2 years later in September 2022.
7. In the civil case, the claimant seeks against the first defendant aggravated damages, damages for assault, unlawful arrest, breach of statutory duty and costs. Against the second defendant, the claimant seeks damages for trespass and conversion, and costs. Against the third defendant, the claimant seeks damages for malicious prosecution and costs.
8. In the constitutional case, the claimant seeks an order that the first defendant through the police force take steps to stop the second defendant stealing and extorting money from the claimant, and that it investigates and prosecutes the second defendant for offences he has committed against the claimant. The claimant also seeks compensation for economic loss already suffered, future medical and pharmaceutical expenditure as a result of trauma caused by agents of the Republic, pain and suffering, a sum to mark the Court's disapproval of the activities of the police, and costs.

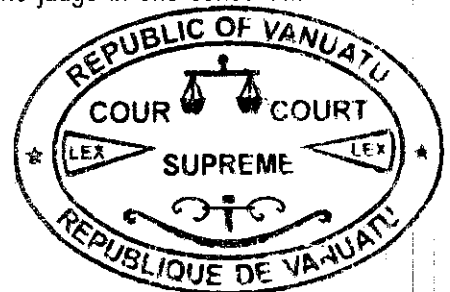
### Discussion

9. There is nothing in the Constitutional Procedure Rules 2003 that prevents consolidation of a constitutional case with a civil case. Indeed, rule 1.3 of the Constitutional Procedure Rules states that if those rules make no provision for a matter relating to a constitutional proceeding, the Civil Procedure Rules apply to that matter.
10. Rule 3.4 of the Civil Procedure Rules 2002 therefore applies. It provides as follows:

The court may order that several proceedings be heard together if:



- (a) the same question is involved in each proceeding; or
  - (b) the decision in one proceeding will affect the other; or
  - (c) for any other reason the court considers the proceedings should be heard together.
11. The claimant submits that the pleadings in both proceedings share a large number of factual issues that need to be decided. The constitutional case was ready for trial on liability before it was stayed for the criminal case to run its course. There were sworn statements and a medical report from 9 witnesses for the claimant, and sworn statements from 5 witnesses for the Republic. The claimant submits that the sworn statements filed in the constitutional case are all relevant to the civil case.
12. The first and third defendants oppose the application. The Republic concedes that the constitutional proceeding and the civil proceeding concern the same set of facts and events. The Republic however submits on the basis of *Republic of Vanuatu v Benard* [2016] VUCA 4 that to consolidate these two proceedings would be “tantamount to an abuse of court process” because the claimant is pursuing two avenues “for essentially the same reliefs for compensation.” The Republic raises the risk of double compensation for injuries caused by the same events. To my mind, that risk is greater if these two proceedings were not consolidated.
13. *Benard* concerned how the calculation of common law damages differs from the calculation of compensation for breaches of constitutional rights. In its discussion of how compensation for an established breach of a constitutional right should be calculated, the Court of Appeal stated at paragraphs 35 and 36:
35. As a starting point compensation should make good actual pecuniary losses suffered by the victim, like special damages in a common law action make good out-of-pocket expenses. If personal injury or damage to business or reputation of the kind which attracts general damages in a common law assessment is suffered compensation for that should be recognized, and again common law principles may provide by analogy a useful guide.
36. But beyond compensation for those items, common law principles as to punitive damages are likely to be of little assistance. Depending on the flagrancy of the conduct constituting the breach of the constitutional right the compensatory award may be lower than would be an award at common law, or might be much higher.
14. The Court of Appeal acknowledged that the starting point for the calculation of compensation for a breach of constitutional rights takes into account matters that are taken into account in the calculation of common law damages. After that, the calculation of punitive damages, which is focused on the claimant, differs in principle from the calculation of compensation for a breach of constitutional rights, which takes into account the wider impact of the Republic’s violation of the citizen’s fundamental rights. The starting point may be the same, but the end point may well be different depending on how flagrant the conduct of the Republic was. The Court of Appeal said in *Benard* at paragraph 28, “In an appropriate case it could be open to a person to pursue both avenues of remedy, but double compensation will not be allowed.” This is an argument in favour of consolidation. There is less risk of double compensation by one judge in one consolidated proceeding than two judges in two separate proceedings.



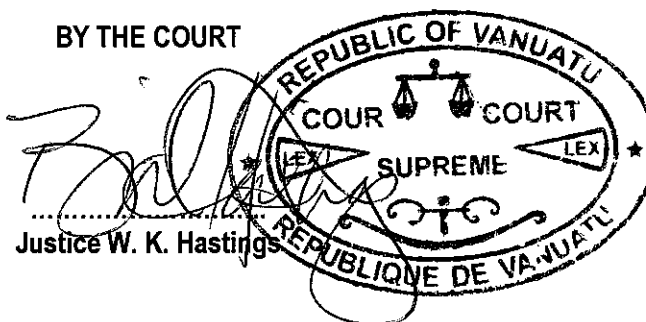
15. Only one of the three criteria in r.3.4 needs to be satisfied for the Court to exercise its discretion to consolidate proceedings. The Republic has already conceded that both proceedings involve the same set of facts and events. Findings of fact by the judge in each proceeding will determine the award of damages in the civil proceeding, and on the reasoning in *Benard*, form the basis of the calculation for compensation for breaches of constitutional rights in the constitutional proceeding. Each proceeding will involve at their core the same findings of facts. Consolidation of the proceedings will avoid the risk of inconsistent findings of fact in separate proceedings. In that sense, the decision in one proceeding will affect the other if the proceedings were not consolidated. I am therefore satisfied that the criteria in both r.3.4(a) and (b) are met.
16. There are also practical reasons for consolidation. If the proceedings were not consolidated, two sets of identical sworn statements would have to be filed. Consolidation would reduce that to one set. The sworn statements already prepared for the constitutional case could be used in the consolidated proceeding, with any necessary updating. Any interlocutory steps required to get two cases ready for trial will be halved, or at least substantially reduced. Duplication of steps will be avoided.

**Result**

17. For these reasons, the application is granted. I order that Constitutional Case No. 17/1884 be heard together with Civil Case No. 23/473.
18. Costs of this application are awarded to the claimant/applicant to be taxed if they are not agreed.

**Dated at Port Vila, this 27<sup>th</sup> day of May, 2024**

**BY THE COURT**



Justice W. K. Hastings