

# **ABUSE OF COURT PROCESS: A STUDY OF HOW VANUATU COURT OF APPEAL HAS ADRESSED ABUSE OF COURT PROCESS OVER TWO DECADES**

KANKSHA MAHADEVIA GHIMIRE<sup>1</sup>

Courts across common law jurisdictions endeavour to ensure that each litigant gets equal and fair opportunity to present its case, while restraining the abuse of court's process by litigants or their counsels. Decisions by Vanuatu courts demonstrate that they too are constantly challenged to achieve and uphold this delicate balance. Vanuatu's apex court, the Court of Appeal (CA), affirms it has inherent powers to curb abuse of court's process<sup>2</sup> sharing the position taken by courts across common law jurisdictions. Additionally, the CA has broad powers to determine appeals from Vanuatu's Supreme Court (SC), including the powers and jurisdiction of the SC set out under the Civil Procedure Rules 2002<sup>3</sup> (**Rules**) to address abuse of court process.<sup>4</sup> The purpose of this article is to explore how the CA has addressed abuse of court's process by litigants. This article focuses on cases brought before the CA over the past 20 years in which at least one party is the government or a statutory body.

Section I of this article discusses how courts and commentators generally understand abuse of court process, and why courts believe it is necessary to address it. Section II sets out the reasons for focusing on cases involving the government or statutory body and limiting CA case review to the last 20 years. Section III describes the powers set out under the Rules that may aid CA in addressing abuse of court process. Court's inherent powers including its limitations are discussed under Section IV. Section V discusses courts' power to address abuse of court process, and Section VI describes the cases in which CA identified elements of abuse of court process, and how it addressed the issue.

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<sup>1</sup> BSL LLB, ILS Law College, University of Pune, India. Adjunct faculty of USP School of Law.

<sup>2</sup> *Republic of Vanuatu v Natonga* [2016] VUCA 28.

<sup>3</sup> Repealed The High Court (Civil Procedure) Rules 1964 and the Magistrates' Courts (Civil Procedure) Rules 1976 (Rule 18.16 of Civil Procedure Rules 2002).

<sup>4</sup> Discussed in Section III.

## I. ABUSE OF COURT'S PROCESS

The abuse of court's process by litigants is a problem that courts deal with across common law jurisdictions, and it has come to be similarly understood.<sup>5</sup> Abuse of court process has been described as, "use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."<sup>6</sup> A litigant's action may amount to abuse of court's process in situations where proceedings are frivolous, oppressive or vexatious,<sup>7</sup> and "violate the fundamental principles of justice underlying the community's sense of fair play and decency."<sup>8</sup> Similarly, acts or omissions that are "unfair to the point that they are contrary to the interest of justice,"<sup>9</sup> or "oppressive treatment" are considered to be abuse of court process.<sup>10</sup>

Courts across common law jurisdictions have held that such abuse must be curtailed to ensure fairness, protect the integrity of the legal system, safeguard the principle of finality (i.e. litigations must end), and preserve courts' and litigants' resources.<sup>11</sup> The Vanuatu CA in the *Republic of Vanuatu v Natonga*<sup>12</sup> (*Natonga case*) expressed that actions that had the potential to abuse of court process and adversely impact the integrity of the judicial process were cause for significant concerns. Courts state that the court process must be protected

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<sup>5</sup> John P Gaffney, "Abuse of Process in Investment Treaty Arbitration," 11:4 *Journal of World Investment & Trade* (2010) 515-538.

<sup>6</sup> UK - *Attorney General v Baker* [2000] EWHC 453 (Admin).

<sup>7</sup> Papua New Guinea (PNG) - *Siu v Wasime Land Group Incorporated* [2011] PGSC 4 (*Siu*); Canada - *R v Scott* [1990] 3 SCR 979 [*Scott*]; Solomon Islands - *Samuel Saki and Others v Ross Mining (Solomon Islands) Ltd and Other* Unreported, High Court, Solomon Islands, Civ Cas 169/97, 19 December 1997 stated in Jennifer Corrin Care, *Civil procedure and Courts in the South Pacific*, (London: Cavendish Pub, 2004) at 223 [*Care*]; Samoa - *Peter Meredith & Co Ltd v Drake Solicitors Nominee Company Ltd and Others*, Unreported, Supreme Court, Samoa, 10 December 2001 stated in Care at 223.

<sup>8</sup> *Scott*, *supra* note 7.

<sup>9</sup> Canada - *R v Power* [1994] 1 SCR 601; Australia - *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

<sup>10</sup> Canada - *R v Conway* [1989] 1 SCR 1659; Australia - *Batistatos v Roads and Traffic Authority of New South Wales (No S530/2005)* (2006) 226 CLR 256.

<sup>11</sup> J J Fawcett, "Trial in England or Abroad: The Underlying Policy Considerations," 9 *Oxford Journal of Legal Studies* (1989); Canada - *Scott*, *supra* note 7; *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79* 2003 SCC 63 [*Toronto City*]; UK - *Harris v Bolt Burdon* [2000] CPLR 9, CA; *Johnson v Gore Wood & Co* [2001] 1 All ER 481; Australia - *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 323 ALR 1.

<sup>12</sup> [2016] VUCA 28.

from such abuse, failing which "public interest in a fair and just trial process and the proper administration of justice"<sup>13</sup> will be undermined.<sup>14</sup>

Abuse of court process is determined in light of the context. Abuse of process may arise if a litigant attempts to have the same proceedings heard for the second time,<sup>15</sup> inordinate and inexcusable delays in performing an action<sup>16</sup> such as unreasonably late filing,<sup>17</sup> delays intending not to bring a matter for litigation,<sup>18</sup> the delay causes "serious prejudice"<sup>19</sup>, or proceedings contain no reasonable cause of action.<sup>20</sup>

## II. FOCUS: CASES INVOLVING GOVERNMENT OR STATUTORY BODIES

Effective administration by public institutions is critical for the development of a nation.<sup>21</sup> The causal relationship of improved public administration resulting in better nation development has come to be widely accepted.<sup>22</sup> The courts play a critical role in ensuring proper administration by government and statutory bodies. To illustrate, people approach courts by filing civil suits or judicial review when they believe public institutions have incorrectly exercised their rights or powers. Public institutions approach courts to enforce

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<sup>13</sup> *Scott, supra* note 7.

<sup>14</sup> *Scott, supra* note 7.

<sup>15</sup> Canada - *Fenerty v The City of Halifax* (1920) 53 NSR 457 [**Fenerty**]; Fiji - *Singh v Singh* [1979] FJSC 111 (**Singh**); UK - *Harris v Society of Lloyd's* [2008] All ER (D) 04.

<sup>16</sup> Canada - *Martell v. Robert McAlpine Ltd.* 25 N.S.R. (2d) 540; Craig Dunford, "Recent Developments in the Law Relating to Abuse of Process and the End of the Right to Be Non-Suited: The Effect of *Arbuthnot Latham v Trafalgar Holdings* and *Gilham v Browning*," (1999) 50:1 Northern Ireland Legal Quarterly [**Dunford**].

<sup>17</sup> *Singh, supra* note 15.

<sup>18</sup> Samoa - *Leafa Vitale v Porotesano Malifa*, unreported, Supreme Court, Samoa, Civ Cas 149/91, 27 June 1994, stated in *Care* at 223; UK - *Carter Commercial Developments Ltd v Bedford Borough Council* [2001] All ER (D) 388.

<sup>19</sup> Canada - *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44.

<sup>20</sup> *Siu, supra* note 7; Australia - *General Steel Industries Inc v Cmr for Railways (NSW)* (1964) HCA 69.

<sup>21</sup> Marina Nistotokskaya, et al, "Bureaucratic Structure, Regulatory Quality and Entrepreneurship in a Comparative Perspective: Cross-Sectional and Panel Data Evidence" (2016) 26.3 Journal Of Pub Administration Research And Theory 519-34; World Bank, *World Development Report 1997: State in a Changing World* (Oxford: Oxford University Press, 1997); Michael J. Trebilcock & Mariana Mota Prado, *What makes poor countries poor? : Institutional Determinants of Development* (Cheltenham: Edward Elgar, 2011) at 28-36.

<sup>22</sup> Atul Kohli, "State Capacity for Development" (2010) UNDP 2010 Global Event Working Paper, page 12; European Commission, "European Competitiveness Report 2004" (2004) Commission staff working document SEC(2004)1397; Joseph La Palombara, "An Overview of Bureaucracy and Political Development" (2015) 15 Comp Pub Administration, 193-220.

their statutory powers, or when they believe persons have breached their obligations towards government or statutory bodies. Courts' determination identifies and declares to the public as well as the public institution whether or not the institution's actions/decisions were legal and valid. Consequently, courts' decisions assist in strengthening implementation and enforcement of law by stopping public institutions' invalid actions/decisions, and enforcing valid actions/decisions.

As discussed in Section I, abuse of court process in *any* litigation has detrimental impact. However, this article focuses on cases disputing government or statutory bodies' decisions or actions, where abuse of court process may potentially undermine public institutional functioning, as the abuse may delay determination by courts. Consequently, valid decisions or actions by public institutions would go unenforced longer, or invalidity of actions/decisions would be determined much later.

This role of the courts in Vanuatu is particularly critical, as Vanuatu is a young republic.<sup>23</sup> Majority of the statutory bodies have been set up in the past 3 decades, and empowering laws are young. To illustrate, the Broadcasting and Television Act No. 3 of 1992 commenced on 26 November 1992 and established the Vanuatu Broadcasting and Television Corporation. The Ombudsman exercises its powers pursuant to the Constitution as well as the Ombudsman Act No. 27 of 1998 (commenced on 11 January 1999), which repealed the Ombudsman Act No. 14 of 1995. The Telecommunications and Radio Communications Regulation Act No. 30 of 2009 commenced on 27 November 2009. The Utilities Regulatory Authority Act No. 11 of 2007 commenced on 11 February 2008, set up the Utilities Regulatory Authority responsible for regulating electricity and water supply in Vanuatu. The SC in its decision of 22 September 2016 in the judicial review case *Union Electrique Du Vanuatu Ltd (T/A UNELCO Suez) v Republic of Vanuatu and Utilities Regulatory Authority*<sup>24</sup> observed that regulation of electricity and water was a recent phenomenon in Vanuatu.

It is for these reasons that this article focuses on how the CA has dealt with abuse of court process in cases where one party is the government or statutory body. Further, as many of

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<sup>23</sup> The Republic of Vanuatu (previously New Hebrides) gained its independence on 30 July 1980.

<sup>24</sup> Judicial Review Cases Nos. 25/14; 4/15; 30/15 & 745/15 (unreported).

the empowering laws are young, the research of case law is limited to the past 2 decades. This article focuses on abuse of court process by litigants and not their counsels.

### III. THE RULES

The CA has been given broad powers to decide appeals from SC pursuant to the Western Pacific Court of Appeal Rules 1973 (**Court of Appeal Rules**)<sup>25</sup> and the Judicial Services and Courts Act<sup>26</sup> (**JSCA**). The CA is not limited to hear only those grounds submitted by the appellant.<sup>27</sup> Rather the CA can consider such additional grounds it considers important subject to giving parties opportunity to contest the grounds before arriving at a decision.<sup>28</sup> Additionally, the CA has the power to issue such judgment or order "which ought to have been given or made."<sup>29</sup> To determine an appeal from the SC, the CA "has the powers and jurisdiction of the Supreme Court"<sup>30</sup>, including the powers of the SC set out under the Rules to address abuse of court process.

The Rules repealed the High Court (Civil Procedure) Rules 1964 and the Magistrates' Courts (Civil Procedure) Rules 1976,<sup>31</sup> and came into operation on 31 January 2003.<sup>32</sup> Unlike certain other jurisdictions in the Pacific, the Rules do not specifically refer to abuse of court process. For example, the Tongan Supreme Court Rules 2007 explicitly permit striking out a pleading if it is "an abuse of process of the Court."<sup>33</sup> However, despite no specific reference to abuse of court process the Rules intend to address such abuse by litigants for the reasons discussed below.<sup>34</sup>

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<sup>25</sup> Governs the operations of the CA pursuant to Article 95(1) of the Constitution of Vanuatu; *Atkinson v Gee* [2002] VUCA 1; *Leymang v Ombudsman* [1997] VUCA 10.

<sup>26</sup> [CAP 270]; The JSCA came into effect from 2<sup>nd</sup> June 2003, and repealed the Courts Act [Cap. 122] that commenced on 30 July 1980.

<sup>27</sup> Rule 5 of the Court of Appeal Rules.

<sup>28</sup> Rule 5 of the Court of Appeal Rules.

<sup>29</sup> Rule 27(3) and (4) of Court of Appeal Rules.

<sup>30</sup> Section 48(3)(b) of the JSCA.

<sup>31</sup> Rule 18.16 of the Rules.

<sup>32</sup> Rule 18.17 of the Rules.

<sup>33</sup> O.8 Rule 8.(1)(d) of the Tongan Supreme Court Rules 2007.

<sup>34</sup> The Rules also address abuse of court process by counsel, however abuse of court process by counsels is not covered in this article.

The Rules state that the overall objective of the Rules is to enable the Magistrates Court and the SC "to deal with cases justly."<sup>35</sup> The Rules explain that "[d]ealing with cases justly includes, so far as is practicable":<sup>36</sup>

"(a) ensuring that all parties are on an equal footing; and

(b) saving expense; and

(d) dealing with the case in ways that are proportionate:

(i) to the importance of the case; and

(ii) to the complexity of the issues; and

(iii) to the amount of money involved; and

(iv) to the financial position of each party; and

(d) ensuring that the case is dealt with speedily and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

The SC and Magistrates Courts are obligated "to give effect to the overriding objective."<sup>37</sup> As seen in Section I, abuse of court process is seen to result in unfairness, and inappropriate use of courts' and litigants' resources. These concerns are reflected in the sub-rules (a), (b), (d)(iv), (d) and (e) listed above. The litigants have an express right to object to answering written questions if the questions are vexatious or oppressive.<sup>38</sup> If the judge agrees, the question need not be answered.<sup>39</sup> 'Vexatious' or 'oppressiveness' is the language often used when determining abuse of court process, as seen in Section I. The Rules specifically empower the court to order payment of indemnity costs if:<sup>40</sup>

"(a) the other party deliberately or without good cause prolonged the proceeding;

or

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<sup>35</sup> Rule 1.2(1) read with Rule 1.6 of the Rules.

<sup>36</sup> Rule 1.2(2) of the Rules.

<sup>37</sup> Rule 1.3 of the Civil Procedure Rules, 2002; Rule 1.3 read with Rule 1.6 of the Rules.

<sup>38</sup> Rule 8.24(2)(d) of the Rules.

<sup>39</sup> Rule 8.24(4) of the Rules.

<sup>40</sup> Rule 15.5(5) of the Rules.

- (b) the other party brought the proceeding in circumstances or at a time that amounted to a misuse of the litigation process; or
- (c) the other party otherwise deliberately or without good cause engaged in conduct that resulted in increased costs; or
- (d) in other circumstances (including an offer to settle made and rejected) if the court thinks it appropriate."

The circumstances listed above i.e. intentional or unreasonable delay, misusing court's process thereby undermining its integrity, and inappropriate wastage of resources, reflect the same concerns and acts that amount to abuse of court's process described in Section I. Additionally, the Rules authorize the court to impose costs if " a party's actions, or failure to act, have otherwise led to the time of the court or other parties being wasted,"<sup>41</sup> and provides for the manner in which vexatious litigants are to be dealt with.<sup>42</sup> Thus, it is evident that the Rules intended that courts address abuse of court process. Additionally, the Rules give broad powers to the court by explicitly stating that if the Rules do not provide a proceeding or step in a proceeding, "The court is to give whatever directions are necessary to ensure the matter is determined *according to substantial justice*."<sup>43</sup>

While there may be shortcomings in the Rules and the way they address abuse of court process concerns, this article does not analyse these.<sup>44</sup> CA's powers to address abuse of court process are not limited solely to the powers under the Rules. It has broad powers under the Court of Appeal Rules (read with JSCA) as described above. Furthermore, it has inherent powers to address abuse of court process, discussed in Section IV below. Hence, the article focuses on how the CA used its already existing powers to address abuse of court process.

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<sup>41</sup> Rule 15.25(1)(c) of the Rules.

<sup>42</sup> Rule 18.12 of the Rules. The Rules also stipulate actions that may be exercised by courts against litigant's counsel to address wastage of courts' or litigants' resources by counsel (Rule 15.25(5)), and if proceeding had no prospect of success, was vexatious or mischievous, or lacking merit (Rule 15.26).

<sup>43</sup> Rule 1.7 of the Rules.

<sup>44</sup> Care, *supra* note 7 identifies certain shortcomings in the Rules.

#### IV. INHERENT POWER

In addition to the powers given to the SC under the Rules (extended to the CA by virtue of the JSCA<sup>45</sup>) to address abuse of court process, the CA has inherent jurisdiction to deal with such abuse. Courts across common law jurisdictions have asserted that courts have inherent jurisdiction to prevent abuse of court process.<sup>46</sup> Decisions of courts from outside Vanuatu have persuasive value for CA. In *Connelly v Director of Public Prosecutions*<sup>47</sup> the House of Lords specified,

"There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

In *Agiru v Electoral Commission*<sup>48</sup> the Supreme Court of PNG declared, "the court's inherent power is its authority to do all things that are necessary for the proper administration of justice. Such inherent power consists of all powers reasonably required to enable the court to perform efficiently its judicial functions and to protect its dignity and integrity." The PNG National Court in *Gire Gire Estates Ltd v Barava Ltd*<sup>49</sup> asserted, "the court must stand ready to protect its own due process from being abuse."<sup>50</sup> The Fiji Court of Appeal in *State v Chand*<sup>51</sup> affirmed "The inherent powers, on the other end, are ancillary powers, which are necessary to enable the Courts to act effectively within their jurisdiction..." The Vanuatu Court of Appeal, reflecting this view, stipulated in the *Natonga*

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<sup>45</sup> Section 48(3)(b) of the JSCA.

<sup>46</sup>UK - *Reichel v Magrath* (1889) 14 App Cas 665 [**Reichel**]; Canada - Toronto City, *supra* note 7; William H Charles, "Inherent Jurisdiction and its Application by Nova Scotia Courts: Metaphysical, Historical or Pragmatic?" (2010) 33:2 Dalhousie L J 63; Dunford, *supra* note 16; Halsbury's Laws of England (online), *Disposal of proceedings without a trial*, "Striking Out A Claim Or Defence" [**Halsbury's Laws**]; Philip A Joseph, "Constitutional Law" 2003 NZ L Rev 387; Australia - *Rogers v The Queen* 1994 HCA 42; *Walton v Gardiner* (1993) 177 CLR 378 at 393; Canada - *353903 Ontario Ltd v Black & MacDonald Ltd* (1999) 180 NSR (2d) 194 (SC).

<sup>47</sup> [1964] AC 1254.

<sup>48</sup> [2002] PGSC 5.

<sup>49</sup> [2015] PGNC 52.

<sup>50</sup> *Ibid.*

<sup>51</sup> [2015] FJCA 64.

case that the Court had inherent jurisdiction to "regulate its own processes and to act in a manner which avoids abuse of process."<sup>52</sup>

Yet, the exercise of this inherent jurisdiction is limited, as courts have announced that they must exercise it cautiously,<sup>53</sup> without undermining fairness.<sup>54</sup> The CA in *Municipality of Luganville v Garu*<sup>55</sup> stressed that fairness must not be sacrificed for the sake of 'timely' decisions.<sup>56</sup> This was stated in the context of repeated delays caused by, and miscommunications between, counsels. In *Government of the Republic of Vanuatu v Carlot*<sup>57</sup> the CA determining whether defence should be struck out on account of failure to comply with the Rules opined, "There must be vigilance to ensure that the Court does not fall into the trap of delivering justice on a knee jerk basis, with the danger that a fair outcome is not achieved...."<sup>58</sup>

## V. POWERS TO DEAL WITH ABUSE OF PROCESS

Generally, to address abuse of court process by litigants, courts have inherent jurisdiction to stay<sup>59</sup> or strike out all or part of a statement of defence/pleading, which is frivolous, vexatious and an abuse of the procedure,<sup>60</sup> or does not comprise of a reasonable cause of action.<sup>61</sup> Courts may dismiss an action already heard.<sup>62</sup> Courts may dismiss an application

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<sup>52</sup> Natonga case, *supra* note 12.

<sup>53</sup> UK - *Fairclough Homes Ltd v Summers* [2012] 4 All ER 317; *Securum Finance Ltd v Ashton* [2000] All ER (D) 843; *Rogers v Rhys Evans* [2000] All ER (D) 433; *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167; Vanuatu - *Municipality of Luganville v Garu* [1999] VUCA 8; *Government of the Republic of Vanuatu v Carlot* [2003] VUCA 23.

<sup>54</sup> UK - *Devon and Cornwall Autistic Community Trust v Cornwall Council* [2015] All ER (D) 279.

<sup>55</sup> [1999] VUCA 8.

<sup>56</sup> Vanuatu - *In re Civil Contempt of Court, de Robillard* [1997] VUCA 1; *Avock v Government of the Republic of Vanuatu* [2002] VUCA 44; *Vanuatu Commodities Marketing Board (VCMB) v Dornic* [2010] VUCA 4; *Vanuatu Commodities Marketing Board (VCMB) v Dornic* [2010] VUCA 18, para 19.

<sup>57</sup> Vanuatu - *Government of the Republic of Vanuatu v Carlot* [2003] VUCA 23.

<sup>58</sup> *Ibid.*

<sup>59</sup> Australia - *TYNE (as trustee of the Argot Trust) and Anr v UBS AG (No 3)* (2016) 110 ACSR 492; UK - *Lawrance v Lord Norreys* (1890) 15 App Cas 210, HL; *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210, HL; India - *Salaman v Secretary of State in Council of India* [1906] 1 KB 613, CA.

<sup>60</sup> UK - Reichel, *supra* note 46; *Hashwani v Jivraj* [2015] All ER (D) 169; Canada - *Hirtle v Hirtle* (1949) 24 MDR 447 (NSSC); Halsbury's Laws, *supra* note 46.

<sup>61</sup> Canada - *Pothier et al v Attorney General of Nova Scotia et al* (1984) 63 NSR (2d) 151 (SC).

<sup>62</sup> Canada - Fenerty, *supra* note 15.

if it is frivolous or vexatious, or an abuse of process.<sup>63</sup> In addition to these inherent powers to address abuse of court process, the Rules specifically empower the CA to take certain actions at their own initiative i.e. not requiring that an application or request first be made by the litigant. CA may levy indemnity costs,<sup>64</sup> and other costs,<sup>65</sup> on the contravening litigant (discussed in Section III). In *Vanuaroroa v Republic of Vanuatu*<sup>66</sup> the CA cautioned that courts should be wary of imposing indemnity costs. They should be imposed only in exceptional circumstances. When analysing the facts of the case, the CA said that “if it could properly be said that there had been a misuse of the court by a party,”<sup>67</sup> only then would ordering indemnity costs be appropriate.

## **VI. CASES BEFORE VANUATU COURT OF APPEAL**

In light of the CA's inherent jurisdiction as well as powers under the Rules to address abuse of court process, this section describes the cases in which CA identified actions that may amount to abuse of court process, or made a determination that abuse of court process occurred, and how they dealt with it. In all the following cases the appellants and respondents were represented by counsel.

### **ACTIONS IDENTIFIED THAT MAY CONSTITUTE ABUSE OF COURT PROCESS**

The CA observed delays and 'procedural games'<sup>68</sup> in *Korman v Ombudsman of the Republic of Vanuatu*<sup>69</sup> (**Korman**), and *Rolland v Teaching Service Commission*<sup>70</sup> (**Rolland**). In *Korman*, the issue involved recommendations the Ombudsman had made in 1996 and 1997, and the appeal before the CA dealt with the rulings the Chief Justice had passed in 2001. The CA gave its decision in November 2001 (the Rules did not apply as

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<sup>63</sup> Canada - *Canada Attorney General v Marinserve MG Inc* 2003 NSSC 26.

<sup>64</sup> Rule 15.5(5) of the Rules

<sup>65</sup> Rule 15.25(1)(c) of the Rules.

<sup>66</sup> [2013] VUCA 41.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Korman v Ombudsman of the Republic of Vanuatu* [2001] VUCA 13.

<sup>69</sup> *Ibid.*

<sup>70</sup> [2014] VUCA 32.

they came into effect in 2003). The CA instructed the litigants, "There has already been too much delay," and "it [was] time to stop playing procedural games." The CA expressly noted the significance of the matter, stating: "There can be no doubt that the issues which are raised are in a number of aspects of critical importance to this Republic and its future." The CA ordered that the hearing be held on urgent basis so that the core issues could be resolved and matter finally determined. In *Rolland* the dispute was regarding salary payments of 45 teachers engaged by the school with the approval of the Ministry of Education. In its decision in November 2014, the CA noted recurring delay in filing of information by the litigants. Additionally, the CA remarked, "Although much could be made of the case in terms of legal theory and the breaching of rules (which seem to have been common place), the matter deserves to be treated with reality and the issues put to an end." The CA remitted the matter to SC for resolution.<sup>71</sup> In both decisions the CA observed repeated breaches of court procedure rules by litigants on both sides. However, the CA did not determine whether such actions amounted to abuse of court process. The CA's primary concern was the quick resolution of disputes.

In *Avock v Government of the Republic of Vanuatu*<sup>72</sup> (**Avock CA**) the disputed issue was the termination of appellant's employment as sheriff by the Judicial Services Commission on grounds of theft. The appellant delayed filing his application for appeal to the CA. Despite what the CA considered "would normally be an inexcusable period of delay" in such filing, the CA permitted the application because the appellant should have the opportunity to make his arguments. Additionally, the CA was concerned that denial might create a "perception ... that the legal establishment is closing ranks by denying him the opportunity to air his grievance." The CA was of the opinion that the delay, although inexcusable, should be overlooked in this situation because "justice will better be done (and as importantly be seen to be done)." The CA on 1 November 2002 remitted the matter to the SC for resolution. Subsequently, the SC in its decision in *Avock v Government of the Republic of Vanuatu*<sup>73</sup> on 19 December 2003 observed that the claimant contradicting its submissions to the CA raised new issues, submitted documents late, and large portions of

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<sup>71</sup> Matter was remitted to SC for consideration. It subsequently came up for appeal on 8 May 2015 to the CA in *Rolland*. The CA has remitted the matter to the SC for determination.

<sup>72</sup> [2002] VUCA 44.

<sup>73</sup> [2003] VUSC 105.

evidence was hearsay. The SC further stated, “The facts from his [claimant's] own evidence are totally against him... His complaint about the role of the acting Chief Justice in interviewing him, suspending him and then being part of a tribunal in hearing his case defies common sense.” The complainant flouted procedure before the CA and subsequently before the SC. However, despite such behaviour the SC did not explicitly determine if actions amounted to abuse of court process, and awarded standard costs against the complainant.

The appellant appealed to the CA against an interlocutory order passed by the SC in *Cyclamen Ltd v Port Vila Municipal Council*<sup>74</sup> (***Cyclamen***). The SC's order dealt with the judicial review the appellant had filed in March 2004 against the Port Vila Municipal Council (PVMC) and Minister's decisions on leases held by the appellant. The CA identified several instances of procedural failures by the appellant. The CA observed, “Regrettably they [pre-trial conferences and interlocutory applications by appellant] seem to have achieved little beyond delay.” The CA remarked that despite appellant failing to comply with the prerequisites of Rule 8.20 of the Rules, the SC granted the appellant's request to submit questions in writing. On analysis of the questions the SC determined that the questions were immaterial, and the CA affirmed SC's conclusion. Further, CA noted that the appellant had also failed to comply with the procedural requirement of Rule 17.4(3) (filing of Sworn Statement), and stated “Had the Rule been complied with, it is likely that many of the interlocutory issues that have greatly delayed the determination of the claim for judicial review, including the contest over the issue of written questions, would not have arisen.” Despite appellant's repeated procedural non-compliances, the CA did not determine if such acts or consequent delay amounted to abuse of court process. Appeal was dismissed on 6 October 2006 with standard costs and matter was sent to SC for final determination.<sup>75</sup>

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<sup>74</sup> [2006] VUCA 20.

<sup>75</sup> Three separate cases proceeded before SC against the Minister and PVMC. The first case was decided in 22 March 2007 (*Cyclamen Ltd. v Port Vila Municipal Council & Minister of Lands* [2007] VUSC 7); second case on 22 May 2007 (*Cyclamen Ltd. v Minister of Lands* [2007] VUSC 51). SC issued the judicial review decision against Council on 7 December 2007, more than a year later (*Cyclamen Ltd v Port Vila Municipal Council* [2007] VUSC 97).

In *Apisai v Government of the Republic of Vanuatu*<sup>76</sup> (*Apisai*) the appellant was appealing a ruling made by the SC in May 2005. However, the appellant withdrew his appeal. Commenting on withdrawal in its decision on 29 March 2007, CA noted that the appellant had been given “a fairly pointed suggestion from the Court” to withdraw and that it was the correct decision as the appeal would have been “unproductive” and “not advanced the resolution of the case.” The CA remarked that the dispute was nearly 5 years old and needed to be resolved immediately. Matter was sent back to SC for immediate resolution and instructed that it be handled in a “pragmatic and principled” manner. When the matter of costs arose, the CA noted that the counsel of the Government had made a reasonable request for costs. However, the CA chose not to award it despite being to the detriment of the Government, for if it did the matter would drag on adding further costs.

#### **ABUSE OF COURT PROCESS EXPRESSLY IDENTIFIED**

The CA explicitly noted abuse of court process by appellant in *Patunvanu v Government of the Republic of Vanuatu*<sup>77</sup> (*Patunvanu*). However, the CA did not take action to address abuse of court process, beyond admonishing the appellant. The CA referring to the appellant stated, “We certainly hope that there are no other instances of such inappropriate misuse of Court processes as are evident on this file [by the appellant].” This case is particularly significant as the disputed default orders were issued in November 2000. The CA determined on 18 November 2005 that the Government should never have been made a party. Consequently, the Government was needlessly a defendant for the duration of 5 years.

In *Vanuatu Broadcasting and Television Corporation (VBTC) v Malere*<sup>78</sup> (*VBTC v Malere*) the CA concluded that VBTC had abused court process. The CA in its decision on 30 April 2008 declared, “It is impossible to read the material on the file without concluding that this was one of those situations where a party was simply using the Court system to play for time and to avoid meeting clear responsibilities which it had to former employees.” The CA remarked that its former employees had been “held out of their proper

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<sup>76</sup> [2007] VUCA 1.

<sup>77</sup> [2005] VUCA 18.

<sup>78</sup> [2008] VUCA 2.

entitlements for in the vicinity of 3 years.” The CA ordered that the respondents must receive their dues (plus interest of 5%), failing which the respondents can apply for immediate enforcement. The CA warned the appellant that “if it [continues in this] unrealistic and obstructive [manner], it is at risk of having solicitor and client costs awarded against it.” For the first time in such cases, the CA stated what would happen if the decision was not promptly adhered to or if the appellant continued with such delaying tactics. Although it tries to ensure there is no additional delay, the CA does not specifically deal with the delay that the appellant had already caused. Further, the CA remitted an outstanding issue of whether employees were entitled to special damages on account of unlawful termination under Employment Act to the SC for determination. The SC delivered its decision on 10 August 2009.<sup>79</sup> The SC ruled in favour of employees awarding special damages as well as common law damages for unlawful termination. In addition, granting the appellant's request, the SC awarded standard costs against the VBTC “because a substantial portion of the Claimants costs have been as a result of the Defendants failure to address the claim in the proper manner.”<sup>80</sup>

In *Vanuatu Commodities Marketing Board (VCMB) v Dornic*<sup>81</sup> (***VCMB v Dornic 4***) and *Tuna Fishing (Vanuatu) Ltd v Government*<sup>82</sup> (***Tuna Fishing***) the CA determined that both parties failed to act sensibly, and flouted court procedure causing delay. Consequently, the CA refused to award costs as both parties were at fault. In *VCMB v Dornic 4* CA added that it is imperative that each party follow court process and keep the other fully informed (hearing dates, allegations, etc.) so that the counterparty has reasonable opportunity to present its case, and the court can arrive at a fair resolution. The CA stated that intentional subverting of court processes resulted in wastage of litigants’ finances, court resources and was an abuse of the client’s position. Subsequently, the case of *VCMB v Dornic*<sup>83</sup> (***VCMB v Dornic 18***) came up before the CA again, and was decided on 16 July 2010. The CA upheld SC’s decision requiring respondent to pay costs on indemnity basis pursuant to the Rules,<sup>84</sup> stating:

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<sup>79</sup> *Malere and Others v Vanuatu Broadcasting and Television Corporation* [2009] VUSC 164.

<sup>80</sup> *Ibid.*

<sup>81</sup> [2010] VUCA 4.

<sup>82</sup> [2008] VUCA 3.

<sup>83</sup> [2010] VUCA 18.

<sup>84</sup> Rule 15(5) of the Rules.

“... the Respondent in making the Application for Summary Judgment has:-

- (a) prolonged the proceedings by taking a step that has no prospect of success, instead of getting this matter to a trial;
- (b) accordingly, has misused the litigation process; and
- (c) deliberately or without good cause engaged in conduct that unnecessarily caused increased costs.”

Through this case, the CA took a stronger action against such abuse than had been taken previously by awarding indemnity costs, however the indemnity cost had been requested by the appellant.

The Veriondali Village Land Tribunal determined custom ownership over Belbarav land. The ownership had been under dispute since Independence of Vanuatu. Several proceedings were instituted in this matter in 2012, and certain stages were appealed before the CA in 2013<sup>85</sup> and 2015.<sup>86</sup> The SC decision of 2012<sup>87</sup> was appealed before the CA in *Acting Director of Lands Survey and Registry v Molbarav*<sup>88</sup> [***Acting Director of Lands Survey and Registry v Molbarav***]. The CA observed blatant abuse of court process by the first respondents. The CA was astonished to see the first respondents submit an enforcement application within 2 months of CA's decision, which the CA stated "would seem to be directly contrary to the injunction confirmed by the Court of Appeal and in contempt of it." The CA also observed that the first respondent failed to provide the SC judge with critical information that had direct bearing on the judge's decision. Taking into account the abuse,<sup>89</sup> the CA on 20 November 2015 dismissed the SC's decision. The first respondents were ordered to pay costs on standard basis of respondents in the SC case Civil Case No. 25 of 2012, and costs on indemnity basis of all parties in the appeal. For the first

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<sup>85</sup> *Molvatol v Boetara Trust & the Republic of Vanuatu* [2012] VUCA 13; *Timothy Molbarav v Wells & the Republic of Vanuatu* [2013] VUCA 14.

<sup>86</sup> *Molvatol v Molsakel & Otrs* [2015] VUCA 10.

<sup>87</sup> *Molbarav v Wells* [2012] VUSC 201 (Civil Case No. 25 of 2012).

<sup>88</sup> [2015] VUCA 36.

<sup>89</sup> The CA had also remarked that the counsel's had failed in their duty to court (SC). As this article is not examining abuse of court process by counsel, the abuse by counsel in this case is not elaborated further.

time in such cases, the CA ordered payment of indemnity costs in exercise of its powers under the Rules without the request of litigating parties.

The issue before the CA in *Vanuatu National Council of Women Committee (Inc) v Bani*<sup>90</sup> (*Vanuatu National Council of Women Committee (Inc) v Bani*) involved payment of outstanding salary by the appellant to the respondent. The CA on 15 April 2016 declared that the appellants had abused court process, and harassed the respondent by preventing her from "enjoying the fruits of her judgment." The Magistrates Court had ordered the appellant to pay the respondent in 2014. The decision was appealed to SC in June 2015, which the appellant lost, and subsequently reached the CA. The CA also observed that the SC judge when ruling in favour of the respondent, determined that "the application was *frivolous and vexatious*." The CA ordered the appellant to pay indemnity costs upon respondent's request.

The question before the CA in the *Natonga case* was whether SC could revisit or set aside consent order. Respondent had alleged before SC that the appellant had unlawfully terminated his employment in 2013. Pursuant to negotiations Solicitor General and the respondent agreed to settle for VT 5,656,705. The filings made by the respondent to the SC to reflect their agreement stated a higher amount. In the filings the respondent had added his counsel's fees and demanded that too be paid by the appellant. The appellant approached the CA stating that the filings made by the respondent reflected an amount of VT 13 million, which had not been consent to by the appellant. The CA remarked that it was evident there was "possible abuse of Court process" by the respondents. The Court had the power to regulate its process and address such abuse. However, apart from correcting the consent order involving this increased amount, the CA chose not to analyse the matter further to determine whether the 'possible abuse of Court process' amounted to intentional and actual abuse.

## **VII. CONCLUSION**

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<sup>90</sup> [2016] VUCA 13.

As seen in Section I, courts across common law jurisdictions have accepted that abuse of court process has significant ramifications, and must be curtailed. To address the issue of abuse of court process the CA has wide powers under the Court of Appeal Rules and the Rules (discussed in Sections III and V). Additionally, the CA has inherent powers to curb abuse of court process though it should be exercised with caution ensuring fairness in all proceedings (described in Sections IV and V).

The cases in Section VI reveal that in many of the judgments, while the CA observed repeated procedural failings often resulting in delay as seen in *Korman, Rolland, Avock CA, Cyclamen* and *Apisai*, it did not examine whether those actions amounted to abuse of court process. Further, in many of the cases although the CA identified abuse of court process (as seen in *Patunvanu, VBTC v Malere*, and *Natonga case*), it went no further than to decide the issue on its merits like any other ordinary litigation that did not involve such abuse, and ordered standard costs. In *VBTC v Malere* the CA took a more stringent view, and for the first time in such abuse of process cases, warned the litigant abusing court process of what would happen if it failed to comply with decision. However, the CA did not take action against the abuse the litigant had indulged in. The *Apisai case* was unique for although CA noted abuse by the appellant, to ‘protect’ the Government it decided not to award even standard costs.

In *VCMB v Dornic 18* and *Vanuatu National Council of Women Committee (Inc) v Bani* the CA awarded indemnity costs against the litigant for abuse of court process, but those indemnity costs had been requested. Only once in *Acting Director of Lands Survey and Registry v Molbarav* did the CA exercising its discretion to order indemnity costs to penalize the litigant responsible for abusing court process.

The analysis reveals that the CA has rarely exercised its powers (under the Rules or inherent powers) to address abuse of court process. The abuse of court process has resulted in significant delays, as commented upon by the CA (reflected in Section VI). Consequently litigants have been successful in needlessly delaying determination of the validity and legality of decisions/actions taken by government or statutory body (reflected in Section VI). Hence, it is imperative that the CA be more proactive in curbing abuse of court process by litigants, yet continuing to ensure fairness as it has strived to do till date.