

PROCEEDINGS UNDER ARTICLE 72

COMPLAINTS ABOUT EMERGENCY REGULATION

Application of Part 4

4.1 This Part deals with Complaints, under Article 72 of the Constitution, about emergency Regulations.

- [4.1.1] Constitutional Framework Article 72 (Complaints to Supreme Court Concerning Emergency Regulations) provides:

Any citizen aggrieved by reason of regulations made by the Council of Ministers in accordance with Article 69 may complain to the Supreme Court which shall have jurisdiction to determine the validity of all or any of such regulations.

Article 69 (Emergency Regulations) permits the making of emergency regulations when at war or under a state of emergency declared by the President on the advice of the Council of Ministers.

Limitations on such Regulations are to be found in art.71 which provides:

(1) Subject to subarticle (2) regulations made by the Council of Ministers in accordance with Article 69 shall have effect notwithstanding the provisions of Chapter 2, Part I except that no regulation shall-

(a) derogate from the right to life and the freedom from inhuman treatment and forced labour; and

(b) make provision for the detention of a person without trial for more than 1 month unless such person is an enemy alien.

(2) Regulations made by the Council of Ministers in accordance with Article 69 shall be such as are reasonably necessary in the circumstances of the emergency to which they relate and are justifiable in a democratic society.

Starting Proceedings

4.2 (1) A proceeding under Article 72 is started by filing a Complaint in the office of the Supreme Court anywhere in Vanuatu.

- [4.2.1] See CPR [2.3.1] for the location of offices.

(2) A Complaint filed by the person seeking redress must as far as possible be in Form 6, but is valid no matter how informally made. A Complaint filed by a legal practitioner must be in Form 6.

- [4.2.2] Extent of permitted informality The extent of permitted informality would seem to be very great (see for example the dicta of Muria J in *In re the Constitution; Malifa v Attorney-General* [1999] VUSC 43; CC 66 of 1999: " ...if they should come by the hundreds or thousands, then let them come.") unless filed by a "legal practitioner", a term which is not defined and stands in contrast, perhaps unintentionally, to the use of the defined word "lawyer" in the *Civil Procedure Rules*.

(3) However, in a case of extreme urgency a Complaint may be made orally, as long as it is put into writing, in accordance with Form 6, as soon as possible.

- [4.2.3] Meaning of "extreme urgency" There is no definition of "extreme urgency", a term sometimes seen used in connection with *ex parte* applications for injunctions: See for example *LTE Scientific Ltd v Thomas* [2005] EWCA Civ 1177 at [9]. Mere urgency should not suffice, though perhaps a merely urgent oral complaint, made personally, might be saved by subr.(2).

What a Complaint must contain

4.3 (1) A written Complaint must set out:

- (a) the name of the Regulation complained of, and the provisions complained of; and
- (b) the Articles of the Constitution which the complainant considers make the Regulation invalid; and
- (c) any defects in procedure which the complainant considers make the Regulation invalid; and
- (d) a statement of the reasons why the Regulation is invalid; and
- (e) if only a part of the Regulation is considered invalid, a statement whether that part is severable and the remaining provisions of the Regulation are valid.

(2) The Complaint must have with it:

- (a) a sworn statement in Form 2 by the complainant in support of the application; and
 - (i) stating that the complainant is a citizen of Vanuatu; and

[4.3.1] Only available to citizens Article 72 is confined to use by "citizens" as to which see generally Ch.3.

- (ii) setting out details of how the complainant is aggrieved by the Regulations; and

[4.3.2] Meaning of "aggrieved" The extent to which a complainant must be aggrieved is not specified. According to the usual principles of constitutional interpretation it may be expected that this will not be a high threshold. There may, however, be situations in which the grievance in question is either illusory, pretended or so insubstantial that the court may be unwilling to entertain it. Accordingly, care ought to be taken in the setting out of such details.

- (iii) setting out the evidence the complainant relies on; and

[4.3.3] Scope of evidence It is difficult to envisage relevant evidence beyond the manner in which the complainant is aggrieved because the power conferred by art.72 is to determine the validity of the Regulations by reference to the limitations contained elsewhere. There is no general mandate to inquire into their subsequent application or any other matters.

- (b) any other sworn statements that support the application.

[4.3.4] See further [4.3.3].

(3) An oral application:

[4.3.5] Meaning of "application" The reference to an "application" was probably the result of copying from r.2.3(3) and should probably have been "Complaint".

- (a) must state the matters listed in subrule 4.3(1); and

(b) must be sworn to by the complainant.

- [4.3.6] Content of oral application It is difficult to see how an oral Complaint/application can be made to “state” the required matters or to be “sworn to” unless, as to the latter, the applicant gives *viva voce* evidence. It might be thought that these are the subsequent requirements, however subr.(4) would seem to eliminate that possibility. It is suggested that the only conclusion is that an oral application cannot be made purely orally and that these are the *de minimis* documentary requirements.

(4) When an oral Complaint is put into writing, it must also include:

(a) any orders made by the Court on the Complaint; and

- [4.3.7] General observations This would seem to be useful only if the oral Complaint was *ex parte*, as seems always likely from the requirement of extreme urgency in r.4.2(3). It may be that this paragraph is intended to circumvent any delay in the generation of sealed orders by the court. It is suggested that the court should nevertheless consider more comprehensive orders as to what material should be served on the other parties and when, with a view to dealing with as many matters as possible at the next return date.

(b) if any part of the hearing has been held, a statement of what was said at the hearing.

- [4.3.8] General observations The paragraph does not explain whether it is intended to refer to “what was said at the hearing” by the applicant (in giving *viva voce* evidence) or “what was said at the hearing” by everybody, in lieu of transcript. The latter possibility seems a little curious, however the former could easily have been put more precisely if no more was intended.

Parties to a proceeding started by a Complaint

4.4 (1) The parties to proceedings started by a Complaint are:

(a) the complainant; and.

(b) the Attorney-General of Vanuatu, on behalf of the Council of Ministers of the Government of Vanuatu, as the respondent:

- [4.4.1] No restriction on necessary parties It is suggested that there is nothing in this rule which affects the requirement that any person whose rights may be affected by the proceedings must be joined as a necessary party: *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999.

(2) A witness may at any time apply to the Court to be legally represented.

(3) The Court may at any time order that a person may be legally represented.

- [4.4.2] Relevant “person” Presumably the “person” contemplated by this subrule is in fact the “witness” contemplated by subr.(2) or a party whose interests may be affected.

Filing

4.5 (1) A Complaint is filed by lodging 4 copies of the Complaint with the Court.

(2) After the Complaint is filed and before returning sealed copies to the complainant, the Court must:

- [4.5.1] See *CPR* r.18.5 as to sealing.

- (a) fix a date for the first Conference in the matter; and
 - (b) write this date on the Complaint.
- (3) The Conference date must be between 14 and 21 days after the filing date.
- (4) The Court may by order reduce this period, either on application by a party or on its own initiative.

Service

- 4.6 (1) A Complaint must be served on the Attorney-General within 7 days after the filing date.
- (2) The Court may by order reduce or extend this period, either on application by a party or on its own initiative.
- (3) The complainant must file a sworn statement, in Form 2, setting out details of the time and manner of service of the Complaint before the complainant takes any further action in the proceeding.

Duty of Court to inquire into Complaint

- 4.7 The Court is to inquire into the matters raised by the Complainant.

[4.7.1] See [2.7.1] – [2.7.3].

Conference

- 4.8 (1) At the first Conference, the Court may deal with any applications to strike out the Complaint; and

[4.8.1] Striking out complaints A Complaint may be struck out in the inherent jurisdiction of the court: *Benard v Vanuatu* [2007] VUSC 68; Const Cas 1 of 2007 at [3], [9] – [12].

- (a) order the respondent to file a response; and
 - (b) issue a summons under Rule 2.9; and
 - (c) order that a person may be legally represented; and
- [4.8.2] General observations It is doubtful whether the court could compel any person to be represented. This paragraph is probably intended to be mutually supportive of subr.4.4(3).
- (d) decide if the Complaint needs to be served on anyone else, and state how it is to be served; and
 - (e) fix a date for another Conference, if one is necessary; or fix a hearing date; and
 - (f) make orders about:

- (i) filing and serving a response; and
- (ii) filing and serving sworn statements by the parties, their witnesses and anyone else; and
- (iii) disclosure of information and documents, in accordance with Part 8 of the Civil Procedure Rules; and
- (iv) filing and serving written submissions and lists of authorities to be relied on; and
- (v) giving notice to witnesses to attend the hearing; and
- (vi) any other matter necessary to assist in furthering the enquiry into the Complaint.

(2) A response:

- (a) must not deny the complainant's claims generally but must deal with each paragraph of the Complaint; and

[4.8.3] See further *CPR* r.4.5(3).

- (b) must be in Form 3.

Summons to disclose documents and information, produce documents and objects, etc

4.9 (1) The Court may at any time order that:

- (a) a summons be issued requiring a person to attend court to give evidence and produce documents or objects; and
- (a) a person allow the Court to inspect an object and visit a place

(2) The order may be made at a party's request or on the Court's initiative.

(3) A summons must be in Form 4

Hearing

4.10 (1) The hearing of the Complaint must be in open court.

[4.10.1] See further *CPR* r.12.2.

- (2) However, the Court may order the public to be excluded from a specific part of the hearing in exceptional circumstances if it is necessary to do so in the interests of the defence, safety, public order, public welfare or public health of Vanuatu.**
- (3) Evidence in chief is to be given by sworn statement unless the Court orders otherwise.**

[4.10.2] See further *CPR* r.11.3.

(4) The hearing is to be conducted as follows, unless the Court orders otherwise:

- (a) the complainant makes an address opening his or her case and, if evidence is to be given orally, brings evidence in support of his or her case;**
- (b) the respondent and anyone entitled to be legal represented cross-examine the complainant's witnesses;**
- (c) the complainant re-examines his or her witnesses;**
- (d) the respondent and anyone entitled to be legal represented make an address opening their case and, if evidence is to be given orally, bring evidence in support of their case;**
- (e) the complainant cross-examines the respondent's witnesses;**
- (f) the respondent and anyone entitled to be legal represented re-examine their witnesses;**
- (g) the complainant makes a closing address;**
- (h) the respondent and anyone entitled to be legal represented make their closing addresses.**

(5) At the hearing the Court may:

- (a) ask questions of the witnesses; and**
- (b) call witnesses on its own initiative; and**
- (c) inspect an object and visit a place; and**
- (d) take any other step necessary to help the Court make a decision on the Complaint.**

[4.10.3] Scope of para.(d) Paragraph (d) may permit the court to call in a complainant and obtain information which may cure any deficiencies of form: *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999. This may be desirable when the complainant is unrepresented: *Benard v Vanuatu* [2007] VUSC 68; Const Cas 1 of 2007 at [5].

Judgment

4.12 (1) After the hearing the Court must give judgment, as set out in this Rule.

(2) The judgment must be announced in open court.

[4.12.1] Meaning of "judgment" See further *CPR* r.12.2. Article 72 refers to determination as do subparas (3) and (4) and it is suggested that the reference in subparas (1) and (2) to judgment may have been unintentional as it leads to confusion.

(3) The Court must state its reasons for making its determination.

(4) The determination must state:

- (a) whether or not the provisions of the Regulations are valid; and**
- (b) if the provisions are invalid, whether or not they can be severed; and**
- (c) if they can be severed, to what extent any remaining provisions of the Regulations are valid after severance.**

[4.12.2] Scope of additional consideration This paragraph seems, contrary to expectation, to require the court to consider whether every other part of the Regulations is valid.

(5) Except as set out in subrule (6), the Court must ensure that copies of the judgment and reasons are available to the public.

(6) However, the Court may withhold from the public a part of the reasons for its determination in exceptional circumstances:

- (a) out of respect for the rights and freedoms of a party or another person; or**
- (b) because it is necessary to do so in the interests of the defence, safety, public order, public welfare or public health of Vanuatu.**

Enforcement and costs

4.13 (1) When the Court gives judgment, or as soon as practicable after giving judgment, the Court:

- (a) may make an enforcement order; and**

[4.13.1] See further *CPR* Part 14 and subs.(3), below.

- (b) must decide the question of costs.**

[4.13.2] See further *CPR* Part 15.

(2) An enforcement order must set out how and when the Court's determination is to be enforced.

(3) Part 14 of the Civil Procedure Code applies to the enforcement order.

[4.13.3] This should be a reference to the *Civil Procedure Rules*.

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