IN THE SENIOR MAGISTRATE'S COURT
OF THE REPUBLIC OF VANUATU

(Civil jurisdiction)

Civil Case No. 248 of 1996

BETWEEN: FRANCOIS XAVIER

Plaintiff

AND: The Government of the Republic of Vanuatu

Defendant

Coram : JERRY BOE
Plaintiff : DUDLEY ARU of Motis
Defense : JACK GILU of Attorney General

This matter is before this Honourable Court by way of claims, made by the Plaintiff, following Defendant's failure to comply with the contract signed between Francois Xavier and then Minister of Civil Aviation, Honourable Albert Ravutia, on 1 July, 1996. The plaintiff claims that on or about November 28, 1996, in breach of the said Agreement, the Defendant failed to pay the Plaintiff the sum of VT833.333, for cleaning services carried out at the two (2) terminals at Bauerfield airport for the month of November, 1996, as specified under clause two (2) of the said Agreement. Despite repeated calls and pressure made on the Defendant, the amount remains outstanding to date. The Plaintiff has brought the matter to Court and prays that the Court make order that Defendant ;

(1) Pay the sum of VT.833.333 being arrears for the month of November, 1996,

(2) Pay costs of this proceeding, and,

(3) such further or other orders as this Honourable Court deems fit.

The defendant, represented by the Attorney General, disagreed with the Plaintiff on all grounds and claimed that ;

(a) The contract was signed under undue Influence,
(b) The contract is vexatious and frivoulous in that it ;

(i) intends to defraud Public Revenue.
(ii) is contrary to Public Policy.

A brief history of the case is as follow. Sometime between 1993 and 1996, Francois Xavier Chani, trading as FX and BM Cleaning Services, signed series of contracts with the Government of Vanuatu to carry out cleaning services at both domestic and international air terminals at Bauerfield airport. There were three (3) such contracts. First, was by council of Ministers decision, (No.27), on 4th November, 1993, for the initial cleaning for the Mini-South Pacific Game. Secondly, a tender contract signed 31 December, 1993, and thirdly, a contract of two (2) years signed 1 July, 1996. Mr. Chani was paid VT.4.5 million on January, 1994, for this first contract.
His second contract was to award him VT.13,332,800, rising to VT.15.006.184, over a period of 5 years, but fell short after it was terminated by then Minister of Civil Aviation, Hourable Amos Bangabiti, by letter dated 15 March, 1995, giving three (3) months notice, following irregularities with tender procedures. Third contract, case in question, is to award him VT.10.000.000 every year totalling VT.20.000.000 for the two (2) years contract period. As of date, the defendant has only paid the first four (4) months, July, August, September and October of 1996. By letter dated 18 November, 1996, DONALD TONY, Acting Senior Accountant for Civil Aviation Department, informed Mr. Chani and, I quote. " **I wish to advise you that payment for your cleaning contract at Bauerfield Terminal for month of November and December 1996, cannot be paid now. Reason why we cannot pay is because too limited funds left in our recurrent head for cleaning contract."** end of quote.

Since then, the Defendant had made no attempt to pay out the outstanding amount of VT.833.333 to date. The Attorney General, submitted on behalf of the Government that the contract is illegal and will repudiate its obligations under it on grounds of undue influence and its intention to defraud public revenue and contrary to public policy.

Since Independant in 1980, Parliament has never made laws regarding contracts. Article 95 (1) (2) of the Constitution reads as follow :

1. **" Until otherwise provided by Parliament, all Joint Regulations and subsidiary Legislation made thereunder in force immediately before the day of independance, shall continue in operation or and after that day as if they had been made in persuance of the constitution and shall be construed with**

such adaptations as may be neccessary to bring them into conformity with the constitution".

2. **"Until otherwise provided by Parliament the British and French laws in force or applied in Vanuatu immediately before the day of Independance shall on and after that day continue to apply to the extent that they are not expressly revoked or imcompatible with the independant status of Vanuatu and wherever possible taking due account of custom"**. end of quote

It is clear that Article 95 authorises all Joint regulations, subdiary legislation and all British and French laws in force or applied immediately before the day of Independance or after the day continue to apply in Vanuatu, so long as they are not expressly revoked by Parliament or incompatible with the independant status of Vanuatu. Therefore, any Joint regulations, subdsidiary legislation, British or French laws dealing with contracts may be applied in Vanuatu, so long as they are compatible and in line with the Independant status of Vanuatu.

I now look at the contract signed between Mr. Francois Xavier and then Minister of Civil Aviation, Honourable Albert Ravutia, on 1 July 1996. Prior to that, I wish to also fully examine the two (2) previous contracts; one by Council of Ministers decision No. 27 of 4 November, 1993, and secondly, a tender contract signed on 31 December, 1993.

The first contract was by Council of Ministers decision (No 27) of 4 November, 1993. Before that, it was heard in Court, that somewhere on 2 November, 1993, Mr Chani, on behalf of FX and BM, submitted his quotation of VT.4.5 million to the Department of Civil Aviation for the initial cleaning of the domestic and international terminals for the Mini-South Pacific Games, which took place sometime 6 to 16 December, 1993. The council of ministers decision awarded the contract to FX and BM. According to the Attorney General, **Mr. Jack Gilu**, this contract should not have been awarded to FX and BM, due to the fact that proper proceedures were ignored by the Minister responsible and the council of Ministers. The council of Ministers did not take consideration of the Financial Regulations of 1993, setting out procedures by which a tender contract can be awarded.

Regulation No. 361 (3), reads, **"where the cost of a specific work or service exceeds VT.1 million, at least three (3) written tenders must be obtained. These tenders must be submitted to the contract Tender Board for its evaluation and for the awarding of the contract".**

Regulation No.363 (1), reads, **" Notice of invitation to tender must be given at least two weeks before the closing date".**

Financial Regulations are rules made by the Minister of Finance vested on him under section 24 of the Public Finance Act, CAP117. Because they are legally issued by the Minister of Finance, noone, not even the Minister, or council of Ministers can overide them. The preface of the Financial Regulations, issued in 1993, states very clearly, and I quote, **"Financial Regulations are a code of instructions or accounting matters applicable to all officers, including permanent officers, temporary officers, advisors and political appointees working for the Vanuatu Government. They cover all monies, raised and expended by the Vanuatu Govenment ."** end of quote.

This would appear that because Financial Regulations are legal procedures by which accounting matters are carried out, to ignore such procedures is in breach of law.

Mr. Xavier's first contract was VT.4.5 million. This amount is far in excess of VT.1.000.000, and for this reason, as specified under Regulation 361 (3), at least three (3) written tenders must be obtained and submitted to the Tender Board. According to evidence submitted by the Attorney General, there were no tenders called for. Mr. Xavier, had gone by himself to the Civil Aviation Department on 2 November, 1993, and submitted his quotation. Only two (2) days later on 4 November, 1993,by council of Ministers decision (No. 27), approved the contract. The Minister responsible for civil aviation matters at that time had totally chose to ignore Regulation No.361 (3), where at least three (3) written tenders must be submitted. They also ignored regulation No.365 (1) when they took the decision to award the contract without first submitting it to the Tender Board for its decision.

It is not true in law that this Honourable Court, or indeed any other Court must comply with the decisions of council of Ministers. It is the function of the Court to address and assist a Minister, council of Ministers or Parliament . Any decision intending to oust the jurisdiction of a Court offends public Policy. In **"Conway V. Rimmer"** (1968) I ALL ER. 874, where the Common law principle that a statement on oath by a Minister that the disclosure of certain evidence would be harmful to the state was binding and conclusive on a court, was completely overturned and obolished and replaced by a new principle that such a statement on oath by a Minister was not binding and conclusive on a court. In giving out the Judgement, the Judge said, I quote, **"I would therefore, propose that the House ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a minister, to withhold certain documents or other evidence and the public interest in ensuring the proper administration of justice."** end of quote.

Ealier on, Lord Simon, in Duncan's case, said, **"the decision ruling out such documents, is the decision of the judge. It is the judge who is in control of the trial, not the Executive...."** Both of these decisions are significant; the fact that noone, even a minister, council of ministers

or Parliament can withhold documents or prevent a court from carrying out its functions.

I now come to the second contract. Evidence heard in court showed that sometime on 5 November, 1993, the Civil Aviation Department had informed the ministry of civil Aviation to put out tender notices for the cleaning of both domestic and international terminals at Bauerfield. It was through these notices that the Acting first Secretary then, Irene Bongnaim, instructed the Director of Civil Aviation to allow only one (1) week tender notices, instead of two (2) weeks as required under Financial Regulation No.363 (1). The tender notice was then published in the "Vanuatu Weekly", issue No.468 of 20 November,1993, and closed on 30 November, 1993, a total of eleven (11) days.

Six (6) days after this tender notice, on Thursday 25 November, 1993, FX and BM, made its submission of VT.13.332.800, and was submitted to the second secretary, **Mr. Irene Bongnaim**, on 3 December, 1993. This contract was later signed by the minister of Civil Aviation then **Mr. Amos Bangabiti**, on behalf of the Goverment and Mr. Chani for FX and BM. The term of the contract was to be for five (5) years.

This contract, the court heard, was later terminated by minister Bangabiti by letter dated 15 march 1995, giving three (3) months notice. Reasons for its termination came after a report issued by the Audit Office on 21 November, 1994, that tender procedures as set out in the Financial Regulations of July, 1993, were not followed.

It is obvious that this second contract was signed without Financial Regulations being followed. Mr. Irene's advice to have the tender advertised only for eleven (11) days was in breached of Regulation No. 363 (1) where, **"notice of invitation to tender must be given at least two (2) weeks before the closing date"**. The action of the Acting manger (corporate services) of Civil Aviation, Mr. A. Carlot on 3 December, 1993, and the second secretary of the civil aviation ministry, Mr. Irene and the signing of the agreement by minister Bangabiti is unwarranted. Under Regulation No. 365 (1), it is the Tender Board that decides on acceptance of bids, not Mr. Carlot, secretary Irene, or the Minister. Similarly, any bids made in excess of VT.3 million, must have the approval of the Attorney General as specified under Regulation No. 367 (2). Mr. Carlot, Mr. Irene and minister Bangabiti, have all chose to ignore this Regulation by not seeking first the Attorney General's opinion before the signing of the agreement. Also, the signing of the contract was done without the council of ministers decision as required under Regulation No. 368 (2), that, **"all tenders exceeding VT.3 million must be approved by the council of ministers before they are awarded"**.

Evidence provided by the Attorney General showed that the third contract was published in **"Vanuatu Weekly"**, issue No. 453 of 6 May, 1995. The closing date was 22 May, 1995, at 11.30 am, a total of 17 days. After the closing date on 22 May, 1995, it took another sixty-six

(66) days, approximately two (2) months, six (6) days, for the Tender Board to consider the bids on 27 July, 1995. Tenders received were as follow:

FX and BM Cleaning Services	------VT.11.968.000
Toso Maso Tours	--------VT. 9.000.000
Ito Jose	---------VT.11.050.250
Air Vanuatu	---------VT. 5.700.000

After considering the bids, The tender Board agreed that the contract be awarded to "Air Vanuatu". Reason, "Air Vanuatu" submitted the lowest bid of VT. 5.700.000 than the other three (3) companies and also because "Air Vanuatu" is Vanuatu Government's own airline. In his submission, the Attorney General, said that although the Tender Board agreed that "Air Vanuatu" was to carry out cleaning services, the then minister of civil aviation, Mr. Bangabiti, did not accept this decision and had unsuccessfully tried to convince the council of ministers to accept FX and BM for the cleaning contract. The council of ministers, however, decided to go along with the Tender Board's decision, but on a trial basis for three (3) months. This decision was not in line with the Tender Board's for twelve (12) months contract with "Air Vanuatu". As a result "Air Vanuatu" refused to accept the three (3) months contract. According to the Attorney General, no attempt were ever made by the ministry of transport or department of civil aviation to resolve the problem raised by "Air Vanuatu".

This contract was later terminated on 6 May, 1996, by the council of ministers. This came about as a result of the then Primeminister Korman's letter of 9 April, 1996, to Albert Ravutia, the then minister of civil aviation, to award the contract back to FX and BM Cleaning Services. Mr. Korman's letter was set out in the Ombudsman's Report of 25 October,1996, tendered in court by the Attorney General. Mr. Korman, in his capacity as Primeminister, stated in his letter that the reasons why the contract should be awarded back to FX and BM, was, I quote, **"due to complete failure of "Air Vanuatu" to commence the cleaning of the airport terminals for unknown reason".** end of quote. Mr. Korman also instructed the minister of transport and public works, who was then Amos Andeng, to prepare immediately to the council of ministers meeting the termintion of the contract with **"Air Vanuatu"** and award it back to FX and BM Cleanning Services in compliance with his last offer. The contract was then signed on 1 July, 1996, by then minister of civil aviation, Albert Ravutia and Mr. Chani, on the annual cost of VT.10.000.000.

The granting of the contract to FX and BM did not follow the right procedures. If the council of ministers had any valid legal grounds, if any, to terminate the contract with **"Air Vanuatu"**, they should refer back the matter to the department of civil aviation to have it put on tender again. By their decision on 24 April, 1996, the council of ministers had totally ignored the Financial Regulation Nos. 361 (3), 363 (1), 365 (1), 367 (1), and 368 (1).

Regulation 361 (3) was breached in that the council of ministers, having taken the decision they did, ignored that where specific work or service exceeds VT.1.000.000, at least three (3) written tenders must be obtained. Regulation 363 (1) was breached because notice of any invitation to tender must be given at least two (2) weeks before the closing date. But the council of ministers, after deciding to terminate the contract with "Air Vanuatu", immediately award it to FX and BM. Regulation 365 (1), was also breached in that the contract was awarded without the Tender Board's involvement. It is only the Tender Board that gives approval, not a minister or council of ministers as specified under Regulation 368 (1). Regulation 367 (1), was breached in that the council of ministers decision, ignored all technical advice relevant to the recommendation of acceptance.

In this case, to determine the legality of the contract signed between Francois Xavier and then Minister of Civil Aviation, Albert Ravutia, on 1 July 1996, the court must prove beyond reasonable doubt that the contract was signed without consent of both parties. In particular, whether any act of duress or undue influence by one of the parties was exerted upon the other in signing of the contract. This will depend very much on the evidence and documents tendered in court. Subsequently, a party found or presumed to have exerted duress and undue influence must disprove that he has exerted duress or undue influence on the other party.

Similary any contract to defraud the Revenue or that which tends to contradict Public Policy, is also held to be illegal. Illegal in a sense that the court may declare the contract **void, voidable, unforceable, or illegal** because it contravenes any legislation or statutes. Any contract to defraud the Revenue is **Illegal ab Initio**. Speaking of Public policy, some agreements are so obviously inimical to the interest of the community that they offend almost any concept of public policy; others, violate no basic feelings of morality but run counter only to social or economic expedience.

In examining this case, one must first distinguish between those contracts which are **ex facie illegal**, on the farce of it illegal and those which though **ex facie** lawful, are nevertheless illegal in performance or intent. The general rule is that if a contract is illegal in its form, it is void at law : no rights can arise under it. Following the principle **ex turpi causa non oritur actio**- no right of action arises from a base cause- the law will not assist a party in an action based on an illegal contract. It has to be recognised that in consequence of the operation of this principle one party may derive an unjust advantage at the expense of the other.

Where it is clear to both parties from the start that the contract is illegal, then the contract is void and without legal effect. In general, any money paid or property transfered by one party to the other under the contract is irrecoverable. There are, however, three (3) recognised exceptions to

this rule. **Gerald F. Bowden and Allan S. Morris in, "Introduction To The Law Of Contract And Tort at P. 113,** I quote, " **Where A has paid money to B under an illegal contract A may recover his money where:**

(i) **He can do so in an action unrelated to and independant of illegal contract ;**

(ii) **He can show that his guilt was not equal to that of B in his contribution to the illegal contract, or ;**

(iii) **He can show that he repented of his action before the illegal purpose of the contract had been substantially performed".** end of quote.

On the other hand, where the contrary is ex facie lawful, it may nevertheless be illegal in its peformance or illegal in its intent, or be exploited for illegal purpose. If both parties intend to exploit an otherwise lawful contract for illegal purposes, then neither party has a remedy against the other. On the other hand, if only one party has an illegal intention, and the other is unsure of that intent then the innocent party has a remedy against the guilty party.

As mentioned earlier, the basis of a contract is agreement between the parties, **a consenus ad idem**. Any element casting doubt on the genuiness of the agreement will, to a greater or lesser extent, affect the validity of the contract. For example, there is no genuine agreement if one party is forced to enter into a transaction by threat or coercion of the other. Likewise, if one party is induced to enter into a contract by a misrepresentation of fact by the other, he cannot be said to have truely consented.

Factors of this sort may vitiate the agreement, affect the nature of the contract, damage its validity. These vitiating factors fall generally into the following categories : **misrepresentation, mistake, duress and undue influence, contravention of public policy, illegality and lack of formality.**

Common law had established a clear cut approach to contracts with a defective element. Any loss sustained by a party in consequence of the defect would lie where it fell. The rule sometimes caused injustice, a blameless party could suffer loss while a guilty party benefited. This is the background against which equity has made her contribution, mitigating hardship where it occurred. The different approaches of equity and law are still manifest today, but they are of historical rather than practical, since the rules of both systems maybe applied by the court, as is thought appropriate. For example, a void contract is a **nullity,** without legal import and unenforceable. It maybe **void ab initio,** from the begining, where in effect no contract comes into existence, or it maybe rendered void by some subsequent defect. The contract maybe void

either because it contravenes a statute, or because it infringes a common law rule.

Similarly, **voidable** contract is when either one or both parties may opt to avoid their obligations under it. The agreement may have been based upon a misunderstanding, a misrepresentation, or a mistake so there is no true consent. When a misunderstanding has occured, which renders the contract voidable, the party who has acted upon the misunderstanding may repudiate the contract and avoid his liabilities under it, or affirm the contract and accept obligations it imposes. If a party fails to exercise his right to repudiate, he is deemed to have affirmed the contract and is thereby bound by its terms. **Unenforceable** contract, as opposed to a void or voidable contract is one which is in essence valid; it is neither void , nor voidable. Its defect is lack of some formality which is required by law. The absence of this formality means the law will not enforce the contract if one of the parties fails in his obligation. Where the parties to a contract which is unenforceable both fullfil their obligations without recourse to law, the contract comes to a perfectly valid termination.

As mentioned earlier, illegal contract is an agreeement that is either prohibited by statute, or is forbidden by a rule of common law. The contract is illegal and without legal effect, and since it is also unlawful may bring upon the parties the censure and sanctions of the criminal law.

The Attorney General, submitted that all three (3) contracts were obtained under "Undue Influence", that they intended to defraud public revenue, and finally, that in all circumstances, contrary to public policies. Under Common law, any contract, if proven to have been awarded under undue influence, or to have intention of defrauding public revenue, or contrary to public policies, is illegal. In this case, the Attorney General, must prove beyond reasonable doubt that the plaintiff obtained the contract by undue influence. Undue influence covers situation where one contracting party is able to exercise some degree of dominance over the other and may arise where some extra-contractual relationships exists between the parties, so that they cannot be seen to be contracting at arms length. A contract that has been induced by undue influence is voidable at the suit of the servient party provided he can prove, or raise a presumption that undue influence has been exercised over him. The right to avoid the contract cannot be exercised, however, where a third party has already obtained rights under it, nor can the right be exercised after undue delay- laches- by the plaintiff. If the act to repudiate is not exercised within reasonable time the contract is held to be affirmed. **Cheshire FIFOOT, in, "Law Of Contract", 5th edit.1979, by J. F. Northug,** at p.265, described two (2) distinct classes of **"undue influence"**. First, I quote, **"those where there is no special relationship between the parties. Secondly, those where a special relationship exists. In the first case, undue influence must be**

proved as a fact, in the second, it is presumed to exists". end of quote.

According to the Attorney General's submission, Mr. Xavier Chani, obtained the contract by undue influence because he has special relationship with the party, (herein called the UMP party), who was running the government then. In his evidence, the Attorney General tendered a letter from the UMP Port Vila regional president, Mr. Irene Bongnaim, showing all contributions made by the plaintiff to the UMP party. Contributions were as follow:

VT.500.000------------	Chartering a vessel, Cap de Pins to Mota Lava congress, (1993).
VT.100.000------------	For Ambae/Maewo local goverment election, handed to minister of transport Amos Bangabiti, (1993).
VT.200.000------------	For provincial election on Ambrym, handed to Irene Bongnaim, (1994).
VT.100.000------------	For TAFEA local goverment election, handed to Bob Kuao, (1994).
VT.350.000------------	For Pentecost provincial election,handed to Norbert Sumsum, (1994).
VT.10.000 ------------	UMP Port Vila, mini congress, (1994).
VT.23.000 ------------	UMP membership card for Pentecost statistics.

Altogether, a total of VT.1.283.000 was handed out to the UMP party. It was heard from the Attorney General that the plaintiff was able to influence the minister of transport, Mr. Amos Bangabiti and his second secretary, Mr. Irene Bongnaim, both strong supporters of UMP party, to award him the contracts. He said that Mr. Xavier knew Irene, when Mr. Irene was boarding master at the Lycee, the school, Mr. xavier attended. This relationship continued after they both left school and when Mr. Xavier heard about the contract, he went personally to see Mr. Irene, because he was then second secretary of the ministry of transport. The Ombudsman's Report of 25 October,1996, tenderd in court, showed that Mr. Xavier, had indeed gone to see Mr. Irene several times regarding this matter. The context of his letter dated 26 January, 1993, to Mr. Dunn, Director of Civil Aviation then, indicated that he had consulted the ministery of public works and spoke to the second secretary, Mr. Irene, a number of times and discussed the matter with him. He also said in that letter that he wanted to arrange an urgent meeting with Mr. Dunn because the government would like to privatise the cleaning of the air terminals as soon as possible. He also assured Mr. Dunn, that the six (6) former employees of civil aviation would not be sacked.

The context of his letter appears authoritive. It appears Mr. Xavier is exercising some authority over Mr. Dunn, instructing him to meet, telling him that the government would privatise the cleaning services and also telling him that the six (6) employees will not be sacked. Despite, civil aviation's refusal to accept his offer by letter dated 29 January, 1993, and again on 9 august, 1993, Mr. Chani still got the first contract which

was agreed by the council of ministers meeting, (No.27).This indicated Mr Chani must have gone through other proceding to get the contract.

According to the Attorney General, because Mr. Xavier has this special relationship existing between him and minister Bangabiti and his secretary, Irene Bongnaim, he was able to get the minister and his secretary to table to the council of ministers, a paper which subsequently, led to their agreement to award the contract to him despite, refusals by civil aviation deparment. In the second contract, because Mr. Xavier had given minister Bangabiti an amount of VT.100.000 on 25 October, 1993, for the Ambae/Maewo local government election, the Attorney General, submitted that this would appear the awarding of the contract on 31 December,1993, two (2) months later, was a direct influence on the minister to do so. As I have already set out in full earlier that the awarding of this second contract was done without proper procedures as set down in the Financial Regulations of July,1993. If this can be said of the first and second contract, then the third contract, according to evidence submitted by the Attorney General, minister Bangabiti, because of a special relationship existing between him and Mr. Xavier, tried to convince the council of ministers to award the contract to Mr. Xavier, despite the Tender Board's decision to accept "Air Vanuatu". It is not clear to this court why the council of ministers allow "Air Vanuatu" the contract on a three (3) months trial basis. It is also not clear as to why nothing was done to remedy differences existing between "Air Vanuatu" and the council of ministers decision to award "Air Vanuatu" on a trial basis for three (3) months. It could only be suggested that the three (3) months trial basis awarded to "Air Vanuatu" and the negligence to remedy the differences, was, having considerd all evidences, in my view, a deliberate act on the part of minister Bangabiti and his secretary, Irene Bongnaim.

This is very obvious in then primeminister Korman's letter dated 9 April, 1996, submitted by the Attorney General in the Ombudsman's Report of 25 October, 1996. In this letter, Mr. Korman said, I quote, **"Due to complete failure of "Air Vanuatu" to commence the cleaning of the airport terminals for unknown reason, I request the minister of transport and public works to prepare immediately to the council of ministers meeting for the termination of the contract with "Air Vanuatu" and award it back to FX and BM cleaning services in compliance with his last offer"**. end of quote.

The text of this paragraph, in my view, shows that Mr. Korman must have been informed by Mr. Xavier, or someone that "Air Vanuatu" was not doing the services contracted for. I have no doubt that Mr. Korman must have been aware of donations or handouts made by Mr. Xavier, to finance UMP party in its campaign. Mr. William Tari, according to the Attorney General's submission indicated that Mr. Xavier himself went to see Mr. Korman about the contract. Mr. Korman then wrote a letter to the civil aviation minister, who was then Albert Ravutia. It is interesting to note that Mr. Korman, as primeminster, in that letter decided instead

not to instruct the minister of civil aviation, though he addressed the letter to him, but the minister of transport, Amos Andeng, to prepare to the council of ministers meeting the termination of the contract and award it back to FX and BM in compliance with his offer. According to evidence provided by the Attorney General, Minister Ravutia is of "Friend Melanesian Party" and minister Amos Andeng, is of UMP party. Instructing Amos Andeng, who was at that time, not responsible for civil aviation matters, suggests that Mr. Korman, had only one thing in mind; that by appointing minister Andeng, he would act favourably on behalf of Mr. Xavier. The decision had already been made by Mr. Korman, "prepare paper to terminate contract with "Air Vanuatu" and award it back to FX and BM". Minister Andeng was only to act upon the instructions from the primeminister. By doing so Mr Korman had acted agaisnt Article 42 (2) of the Constitution, I quote,"**The primeminister shall assign responsibilities for the conduct of government to the ministers".** end of quote.

Although the Article is too general in its context, there was a minister responsible at that time for civil aviation matters, unless, at that time he had rendered himself unworthy to carry out his duties, or for reasons beyond his control. Under such circumstances, primeminster, in my view, has power under Article 42 (2), to assign another minister to perform only that specific task, or the whole responsibility under civil aviation ministry. After completion of the task, the primeminister, may re-assign that responsibility to the minister responsible for that portfolio. But in this case, the minister of civil aviation did not go overseas, or had tampered his capacity to be unworthy to perform his duties with civil aviation matters, that should warrant Mr. Korman, to remove this matter from him. The circumstances surrounding the case, suggest that Mr. Korman had no reasons whatsoever in doing so than doing favouritism to the plaintiff.

The Attorney general also submitted that the three (3) contracts intended to defraud pubilc revenue. He said that the first contract was not advertised. If it had been advertised the Tender Board would have given the contract to the lowest tender. In this case, the Finacial Regulations of 1993, was totally ignored and by the council of ministers decision (No.27), of 4 November, 1993, awared the contract to the plaintiff and paid him VT.4.5 million, twice as much as civil aviation, who had been carrying out cleaning services for only VT.2.7 million annually.

The second contract saw the plaintiff submitting his tender for VT.13.332.800 per annum. Again, there were no tenders called for. Not even the Tender Board to decide on the lowest but efficient bidder. It was even not approved by the council of ministers. Mr. Bangabiti, had signed the contract knowing very well that it did not go through proper procedures and that it cost the government another extra VT.10.632.800, more than what civil aviation was doing for VT.2.7 million.

The third contract, the subject of this proceeding, was awarded at an annual cost of VT.10.000.000, despite "Air Vanuatu's lowest bid of VT.5.7 million and Toso Maso Tours of VT.9.000.000. According to Mr. Korman's letter dated 9 April, 1996, it seems he had no regard of those lowest bids submitted. He had specifically instructed for the cancellation of contract with "Air Vanuatu" and award it to FX and BM in compliance with his last offer. FX and BM's last offer was VT.11.968.000.

The final submission presented by the Attorney General, was that the contracts in all its forms and performances contradict public policy. Public policy comprises a number of loosely defined principles which are recognised as existing for the public good and whose contravention is thought to have a detrimental effect upon the fabric of society. Cheshire Fifoot, (ibid), at p.271. said of illegality at Commom Law based upon public policy,and I quote, **"what the judges of that period were at pains to emphasise was that they would not tolerate any contract that in their view was injurious to society. To give a few examples, nobody would be allowed to "stipulate for iniquity", no contract would be enforce that was "contrary to the general policy of the law", or injurious to and against the public good", or contra bonos mores or that had arisen ex turpi causa".** end of quote.

With all evidences submitted by the learned Attorney General, the three (3) contracts appeared to have caused such unnecessary injuries to the general policy of this nation. The fact that the contract tend to go against public good. For instance, they tended to ignore finanncial regulations and promote self interests among a few high responsible officers, such as the minister of transport, his secretary, the primeminister and to a certain extent, the council of ministers. The contracts further caused injuries in that they exploit the people of Vanuatu of their revenue.

Counsel for the defense submitted that his client did not enter these contracts with undue influence. He said that his client, like anyone else, had submitted his tender and the council of ministers had taken the decision to award him the contract. He said that it is too late now for the Attorney General to say that the contract is illegal because the Defendant had already performed his obligation by paying his client for four (4) months. Therefore, he concluded that the Defendant had breached the contract.

I deal with the first point that the Plaintiff did not enter the contract with undue influence. Undue influence persists under two (2) headings:
(i) **where no special relationship exists, and** (ii), **where special relationship exists.** This court believes beyond reasonable doubt that special relationship does exist between Mr. Xavier, and those he dealt with to get the contract, especially, minister Amos Bangabiti and later, Amos Andeng, second secretary, Irene Bongnaim and also the primeminister at that time, Mr. Korman. Evidences have shown that Mr. Xavier, during negotiations for the contract made several visits to talk to Irene Bongnaim, Ministers Bangabiti and Andeng and primeminster, Mr.

Korman. As he stated in his letter presented by the Ombudsman's report, his visits were to talk about the contract of cleaning the terminals. Evidences have also shown that he gave money to finance UMP congresses and elections. The very people whom he dealt with to get the contract were the very people whom he gave money to namely, Mr. Irene Bongnaim, the sum of VT.200.000 and Bangabiti, the sum of VT.100.00. Therefore, it is the view of this court that a special relationship did exist in awarding the contracts.

Motis also submitted in defense that it was the council of ministers who agreed and award the contract, therefore, it is valid. If indeed, the council of ministers is above the law, then there should be no laws and the judiciary cannot interfere with their decisions. But this may not be so. We are constantly being reminded with the saying, "law is above all". Indeed, in **"Conway v. Rimmer"**, as discussed earlier, the court had taken the decision that it is up to the court to decide for itself what is contrary to public interest and not when the minister stated in oath that he would not release secret information to the public. In other words no minister or council of ministers should restrict the court of its jurisdictions. This, I uphold. From the evidence that I have heard, the council of ministers had awarded the contract without the Tender Board's decision. It is the Tender Board who decides whom to award the contract, not the council of ministers. In the Financial Regulation No.368 (2), the council of ministers are only authorise to approve tenders exceeding VT.3 million, but the action of awarding the contract remains on the hands of the Tender Board.

Motis also submitted in defense that the contract cannot be held illegal now because the defendant had already acted upon the contract when he paid his client for the first four months of the contract. Under Common law, no rights can be exercised after undue delay- laches. If the right to repudiate is not exercised within reasonable time, the contract will be held to be affirmed. In this case, the right to be exercised here, falls upon the Plaintiff, not the Defendant. The Defendant is submitting that the contract is illegal through his evidences in court.

In summary, this court proves beyond reasonable doubt that:

(a) the contract was awarded with undue influence;
(b) the contract intends to defraud public revenue, and
(c) the contract, in all circumstances, is contrary to public policy.

For these reasons, if the contract signed by Mr. Xavier and then minister of civil aviation, Mr. Ravutia, on 1 July, 1996, is ex illegal, that is to say, on the face of it all illegal, the general rule applies, that is, any contract said to be illegal in its form is void at law: no rights *can arise under it* following the principle **ex turpi causa non oritur actio**-no right of action arises from a base cause- the law will not assist a party in an action based upon an illegal contract. In this case, Mr. Xavier, ministers Bangabiti, Andeng, Ravutia and Primeminister then, Mr. Korman, all knew that they were committing the government, the Defendant in this case, into an illegal contract by getting the council of ministers to agree

in awarding the contract to the Plaintiff. It must be noted here that a government of the day is a separate identity or institution from the politicians who run it. Politicians come and go but the government remains. If one party had known at the begining that the contract he was signing with the other party was illegal, but had kept the other party misinformed, the contract becomes void if the injured party repudiate its obligations under the contract. In this case, the Director of civil aviation and his officers, indeed those at the Attorney General's office, were totally kept out of the negotitions towards signing of the contract, although the contract concerned civil aviation financial resources and directives. This is the very reason why the Director of civil aviation, Mr. Kasten, is repudiating the contract through the Attorney General. I cannot think of a good agreement than that which takes into consideration all advices from the civil aviation Director and his technical officers. To ignore him and advices from his staff meant there is no true consent in signing the first, second and third contract.

Having looked at the evidence, this court wish to emphasise the following points:

(i) That the first and second contract did not comply whatsoever with tender requirements set out in the Financial Regulations of July, 1993;

(ii) That the third contract, the subject of this proceeding, signed 1 July, 1996, also did not comply whatsoever with tender requirements set out in the Financial Regulations of 1993;

(iii) That special relationship exists between the Plaintiff and those engaged to enter the contract with the goverment;

(iv) That the first, second and third contract, were in all circumstances intended to defraud public revenue;

(v) That the first, second and third contract were obtained contrary to public policy in that they have caused injuries to the people of Vanuatu by exploiting the revenue, deliberate negligent of the laws
of this land and above all questioning the leadership role of public officers.

Having said that, this Honourable court wish to say that laws and regulations are made for a simple reason; they direct and show us what to do and what not to do. Failure to comply with laws results in offences being committed and anyone found in this situation is liable for criminal offences, or where one party injures another party because of his actions, the injured party may seek redress from the court. The court will not hesitate to point out where breaches of laws or regulations occure. Indeed, this is the functions of the court. Failing to do so meant this court, or any other courts, will be negleting their duties.

I order.

COURT ORDER

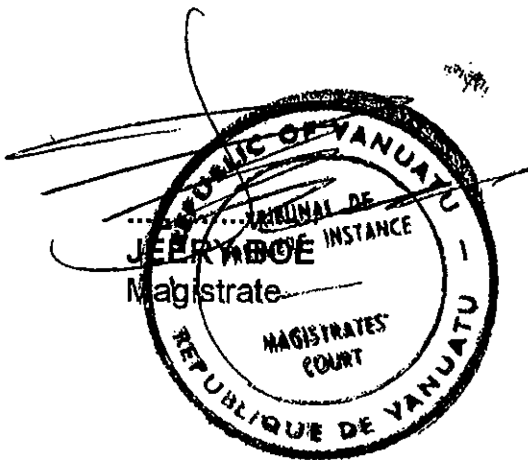
(1) That the contract signed on 1 July, 1996, between Mr. Xavier and then Minister of Civil Aviation, Mr. Albert Ravutia, is **void ab initio.**

(2) That the Plaintiff repay the Defenedant, (herein referred as government), the sum of VT.3.333.332, within two (2) months, being for money paid at the rate of VT.833.333, per month for the months of July, August, September and October, of 1996.

(3) Plaintiff to pay costs of this proceeding to be taxed or agreed.

(4) Thirty (30) days to appeal.

Dated at Port Vila this ......11....... **day of** ......February..... **1997**



JERRY BOE
Magistrate