IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU CIVIL CASE No 47 of 1996 and Appeal Petition No 3 of 1996

BETWEEN	:	**HONOURABLE RIALUTH SERGE VOHOR** **First Appellant**
AND	:	**HONOURABLE WALTER HADYE LINI** **Second Appellant**
AND	:	**HONOURABLE HILDA LINI** **Third Appellant**
AND	:	**HONOURABLE DONALD KALPOKAS** **First Respondent**
AND	:	**HONOURABLE AMOS ANDENG** **Second Respondent**
AND	:	**HONOURABLE MAXIME CARLOT KORMAN** **Third Respondent**
AND	:	**THE CLERK OF PARLIAMENT** **Fourth Respondent**
AND	:	**THE ATTORNEY-GENERAL** **Fifth Respondent**
AND	:	**THE COMMISSIONER OF POLICE** **Sixth Respondent**
AND	:	**THE HON THE CHIEF JUSTICE CHARLES VAUDIN d'IMECOURT** **Seventh Respondent**
AND	:	**THE HON JOE NATUMAN** **Eighth Respondent**

AND : **MEMBERS FOR THE TIME BEING OF THE JUDICIAL COMMISSION**
Ninth Respondents

Coram: The Chief Justice
Mr Patrick Ellum instructed by the Attorney -General
Mrs Hilda Lini in person
The second and third Petitioners do not appear

INTERLOCUTORY JUDGMENT

For obvious reasons, I have indicated that the petitions against the seventh Respondent shall be severed from this case and shall be dealt with at a later time before another judge. This Court deals only with Mr Ellum's application to dismiss the petitions on behalf of the Attorney-General (excluding the Chief Justice), pursuant to Section 218 (4) of the Criminal Procedure Code Act CAP 136. By two petitions dated 8th and 15th day of March 1996, pursuant to Article 53 (1) & (2) of the Constitution and Section 218 of the Criminal Procedure Code CAP 136, the Respondents/Appellants allege inter alia, that their Constitutional right to have a Court of Appeal convened has been breached and seek an order from this Court to have a Court of Appeal convened as soon as possible in the following terms:

"*TAKE NOTICE that the Appellants will apply to this Honourable Court for the following orders:*

1 *That pursuant to Article 47 (1), 49 (2) and 50 of the Constitution, and Section 17 and Part 4 of the Courts Act CAP 122 the Appellants are entitled to the services of three judges sitting in the Court of Appeal to determine as soon as possible and according to law the Appellants appeal lodged in proceedings No. 29 of 1996.*

2 *That the seventh and ninth Respondents forthwith arrange for a Court of Appeal to be convened for the Appellants' appeal in proceedings No 29 or 1996 to be heard as soon as possible.*

3 *That the seventh Respondent immediately surrender to the Registrar of the Court of Appeal all documents, notes, tape recordings, computer data, relating to the hearing of proceedings No 17 and 29 of 1996, without any interference with any of the said documents, notes, tape recordings records, computer data.*

4 *That the proceedings No 29 of 1996 involve important constitutional issues which require determination of the Court of Appeal forthwith.*

5 *That prima facie it appears that there was no sitting of Parliament on the 23 February 1996".*

This matter first came before the Court on Monday 22 April 1996, and was adjourned until Friday 26 April 1996 at 2.00 p.m. in order to enable Mrs Lini and the other Petitioners to instruct counsel in the absence of the original counsel in the matter, Mr de Robillard, and in order for them to be represented. Mrs Lini now, on 26 April 1996, informs the Court that they do not wish to be represented by other Counsel.

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU

This matter comes before the Court pursuant to Article 53 (1) of the Constitution and Section 218 of the Criminal Procedure Code Act CAP 136, the relevant parts of Section 218 are as follows:

218. (1) *Every application to the Supreme Court for the exercise of its jurisdiction under Articles .... 53(1), 53(2) ..... of the Constitution shall be by petition and shall be valid no matter how informally made.*

(2) The Supreme Court may on its own motion or upon application being made therefor by any party interested in the petition summon the petitioner before it to obtain any further information or documents it may require.

(3) The petitioner shall, within 7 days of the filing of his petition in the Supreme Court or within such longer period as the Court may on application being made therefor order, cause a copy of the petition together with copies of supporting documents filed in relation to such petition to be served on the party or on all those parties whose actions are complained of.

(4) Any party who is served with a copy of the petition in pursuance of subsection (3) may without prejudice to any other legal remedy available to such party apply to the Supreme Court for an order dismissing the petition on the ground that the petition is without foundation or vexatious or frivolous.

(5) Unless the Supreme Court shall be satisfied in the first instance that the petition is without foundation or vexatious or frivolous, it shall set the matter down for hearing and inquire into it. It shall summon the party or parties whose actions are complained of to attend the hearing.

(6) *On the day appointed for hearing, the Supreme Court shall enquire into the matters raised by the petition and after hearing all parties concerned shall give its decision and its order or directions (if any) thereon in open court.*

Article 53 of the Constitution states:

(1) Anyone who considers that a provision of the Constitution has been infringed in relation to him may, without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress.

(2) The Supreme Court has the jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution.

The background to this matter is that the Appellants (now Respondents to this application) first petitioned this Court in February 1996, seeking inter alia, to challenge the election of the third Respondent (Applicant in this matter), The Hon Maxime Carlot Korman as Prime Minister of the Republic of Vanuatu, by 60% of the elected members of Parliament. The original petition was against the first six Respondents in this present matter. The Chief Justice, the Minister of Justice and the members of the Judicial Service Commission, were not parties to the original petition. The original

petition was dismissed on 1 March 1996: see Civil Case No 29 of 1996. Following the dismissal of the original petition, the present Petitioners, through counsel, Mr de Robillard, filed the present petitions in the Supreme Court twice; once on the 8th March 1996 in a file headed 'Appeal Case 3 of 1996' and a second time on the 15 March 1996 in a file headed Civil Case No 47 of 1996. The purpose being to request the convening of a Court of Appeal, to hear and determine a purported appeal in Civil Case No 29 of 1996. Both petitions are identical, and Mr de Robillard joined three other parties, namely, the Chief Justice, the Minister of Justice and the members for the time being of the Judicial Service Commission, in the present petitions. They were not originally parties to Civil Case No 29 of 1996. Save for the Attorney-General, who was served with the present petitions on the 11 and 15 March respectively, all the other parties to the petitions were not served until the 18 or 19 April 1996, after this application to strike out the petitions was issued ans served.

Mr Ellum submits as follows:

1) That these petitions should be dismissed pursuant to Section 218 (4) on the ground that they are without foundation, vexatious and frivolous.

2) That the petitions are in any event null and void because, save for the Attorney-General, none of the other parties were served with a copy of the petitions within the time allowed under section 218 (3) of CAP 136, namely within 7 days of the petitions being filed, and that no application was made to the Supreme Court to extend the time within which the petition should be served. Therefore, he submits, the petitions are invalid as against those seven Applicants on that ground.

3) That no appeal is pending before the Court which could form the basis of the application of these petitions, that therefore the Petitioners are not entitled to the services of a Court of Appeal, and therefore nobody's Constitutional rights have been infringed which calls for any remedy, because i) the original judgment of the Supreme Court in Civil Case 29 of 1996, was clearly an interlocutory judgment, which in order to be appealed against required leave of the single judge, pursuant to Rule 21 of the Rules of Appeal of the Supreme Court. No confusion could have arisen since the judgment itself was properly headed 'Interlocutory judgment'. No application for such leave had ever been made within the permitted time of 30 days, nor had such leave ever been granted; and ii) no notice of appeal has ever been filed nor served on any of the parties herein, in any event, within the time permitted by the rules, namely 30 days, or at all.

4) That there are clear procedures to be followed in the event that a party wishes to appeal a case, that those procedures have not been followed in this case and that Constitutional petitions are not the proper way to go about to seek the convening of a Court of Appeal, that to do so in the present manner is not only frivolous and vexatious, but an abuse of the Constitutional process.

5) That it has, since the Civil Case No 29 of 1996 began, transpired that Mr de Robillard, who filed these petitions on behalf of the Petitioners, is not and never was a registered legal practitioner in Vanuatu, as he claimed to be or at all. This matter having been confirmed by the Registrar of the Supreme Court.

It is clear that the original matter before the Court, in which Mr de Robillard appeared for the Petitioners, namely Civil Case 29 of 1996, was an interlocutory application which was dismissed pursuant to Section 218 of CAP 136 without being set down for hearing under Section 218 (5). It is also clear that the judgment was headed 'interlocutory judgment' so that no confusion could arise as to the nature of the judgment. A perusal of Section 218 of CAP 136 makes it clear that there are two stages to these Constitutional applications under Article 53. The first stage, 'the interlocutory stage', is the application for dismissal under Section 218 (4). Unless the Court is satisfied 'in the first instance' that the petition is without foundation etc, it must set the matter down to be heard. The second stage is when the matter is set down and is heard according to Section 218 (6). In practice, the initial interlocutory application is heard in chambers, as indeed the present matter was.

Appeal Rule 21 states:

1) *No notice of appeal against an interlocutory order of the Supreme Court, made at first instance, in any civil case or matter shall be filed unless leave to appeal has first been obtained from a judge of the Supreme Court, or, if such leave be refused, from the Court of Appeal.*

2) *Every application for leave to appeal under this rule shall be by summons in chambers to be filed with the Registrar of the Supreme Court, or with the Registrar of the Court of Appeal, as the case may be, within the period prescribed in rule 20 for the filing of notice of Appeal.*

Rule 20 states:

Except where by Ordinance otherwise provided and subject to rule 21, any notice of appeal, whether from an interlocutory or final decision of the Supreme Court, shall be filed with the Registrar of the Supreme Court within thirty days after the decision complained of, calculated form the date on which the judgment or order of the Supreme Court was signed, entered or otherwise perfected.

The initial interlocutory judgment was signed, in Civil Case No 29, on 1 March 1996. Indeed, a perusal of the files now before the Court confirm that no application was ever made for leave to appeal, nor was any notice of appeal ever filed, in accordance with the Court of Appeal Rules. The only documents filed were i) the so called Constitutional petitions pursuant to Article 53 and Section 218 CAP 136, to the Court of Appeal, and ii) some purported grounds of Appeal. No appeal in Vanuatu is conducted by petition. Constitutional Petitions under Article 53 can only be heard in the first instance by the single judge sitting alone; see Section 14 (2) of CAP 122. Such petitions cannot be heard by the Court of Appeal at first instance, they can only be heard by the Court of Appeal by way of an appeal from a decision of a judge sitting at first instance, either after an interlocutory application, or after a full hearing.

As I have said before, Article 53 can only provide a remedy in the event that someone's Constitutional rights have been infringed. Here the complaint is that it is the Petitioners right to a Court of Appeal which has been infringed. Having heard Mr

Ellum instructed by the Attorney-General, I am satisfied in the first instance that these petitions are without foundation, and that no one's Constitutional rights have been infringed in the first instance, since there is no appeal pending before the Court of Appeal lodged by these Petitioners; for the good reason that no leave has been applied for or granted and, in any event, no notice of appeal has been filed within the time permitted by the rules and none has been served, which could entitle the Appellants/Respondents to have the services of the Court of Appeal. I therefore dismiss these petitions pursuant to the powers vested in me under Section 218 (5) of CAP 136. I am also satisfied, that in seven of the cases, the petitions are, in any event, invalid, in that they were not served on the parties within the time allowed under Section 218 (3), nor was the time for service extended by the Court. I am also satisfied that these petitions are vexatious and frivolous and an abuse of process. In this jurisdiction, appeals are not conducted by way of Constitutional petitions to the Court of Appeal. Nor is it proper to join, as parties to an appeal, persons that were not parties to the action at first instance, such as the judge who heard the action at first instance or the Minister responsible for Justice, or the members of the Judicial Service Commission. The proper way to lodge an appeal is in accordance with the Rules of Appeal, and in this case Mr de Robillard for the Appellants/Respondents has singularly failed to follow the required procedure. Had he done so, he could then have claimed that his clients were entitled to the services of three judges to hear the appeal, but he has not and therefore his clients are not entitled to the services of the Court of Appeal as claimed. I am sure that if he had lodged his appeal in the proper manner under the rules, a Court of Appeal would have been convened to hear the matter in the normal course of event. Nor is there any such thing as a Constitutional right to an immediate Court of Appeal. Furthermore, these petitions are in my view, a gross abuse of the Constitutional procedure and an abuse of process, and they are both frivolous and vexatious; see Burstall v Beyfus (1884) 26 Ch. D. 35 and see Farnham v. Milward (1895) 2 Ch. D. 730. As for the fourth ground of Mr Ellum's submission, namely that Mr de Robillard is not and was not a registered legal practitioner in Vanuatu, and therefore is not entitled to conduct cases for any of the parties herein and thus file the present petitions, although as a matter of fact Mr Ellum is correct (everyone had been operating under the misconception that he was a properly registered practitioner at the time), because it may be the case that Mr de Robillard himself may have been operating under the misconception that he was a properly registered legal practitioner in Vanuatu and therefore entitled to act, I do not take that matter into consideration in coming to my decision in this case and it forms no part of my decision making process.

I direct, therefore, that the costs of this application shall be paid by the Appellant/Respondents jointly and severally; such costs to be taxed or agreed.

BY THE COURT this 29 day of April 1996

CHARLES VAUDIN d'IMECOURT
Chief Justice

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU