IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

CIVIL CASE No.155 OF 1996

BETWEEN:	**ANDRE FANCOIS** OMJ.
	First Applicant
AND:	**DANTE LENISA and CATHERINA LENISA**
	Second Applicants
AND:	**SELB PACIFIC LIMITED**
	Third Applicant
AND:	**JURIS OZOLS**
	First Respondent
AND:	**THE HONOURABLE JUSTICE ROBERTSON**
	Second Respondent
AND:	**THE HONOURABLE JUSTICE MUHAMAD**
	Third Respondent
AND:	**THE HONOURABLE JUSTICE DILLON**
	Fourth Respondent
AND:	**DANIEL MOUTON**
	Fifth Respondent
AND:	**JOHN MALCOLM**
	Sixth Respondent
AND:	**MS SUSAN BOTHMANN BARLOW**
	Seventh Respondent

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AND: **GARRY BLAKE**

Eighth Respondent

Coram: Mr Justice Oliver A. SAKSAK

Mr Andre Francois appears unrepresented
Mr Dante Lenisa not present
Mr Jonathan Baxter-Wright for the Third Applicant
Mr Juris Ozols representing himself and Fifth Respondent
Mr John Malcolm for himself as the Sixth Respondent
Ms Susan Bothmann Barlow for herself as Seventh Respondent
Mr Mark Hurley for Eight Respondent
The Second, Third and Fourth Respondents are not represented.

JUDGMENT

This Judgment provides reasons for the Orders of this Honourable Court dated 15th October 1997.

At the very outset the Court must make it very clear that since the Order of the Court was made on 1st October until the sealing of this Judgment the First and the Second Applicants have never made any formal written requests for reasons to be provided. This Judgment is given on the Court's own volition.

The First, Second and Third Applicants filed a Petition pursuant to Articles 6 and 53 of the Constitution and section 218 of the Criminal Procedure Code Act [CAP. 136] on 24th September 1997.

There has been no service on the second, Third and Fourth Respondents but the Court was told that service was effected on the Court Registry.

A number of the parties herein filed applications to dismiss the Petition. The First Respondent proceeded under Summons (General Form) under Order 57. r. 13 or O.17, R.12 of the High Court (Civil Procedure) Rules

1964. He seeks an Order striking out the Petition on the grounds that it is without foundation, frivolous and vexatious. This was filed on 26th September 1997.

The Sixth Respondent filed a Cross-Motion under section 218 (4) of the Criminal Procedure Code Act on 26th September 1997 seeking to dismiss the Petition on the grounds that it is without foundation, frivolous and vexatious and that the First and Second Applicants are without locus standi.

The Seventh Respondent filed an application under section 218 (4) of the Criminal Procedure Code Act on 30th September 1997 seeking dismissal of the Petition. This was filed on 24th September 1997.

All Applications were returnable on 1st October 1997. The First and Second Applicants were not represented. The First Applicant personally attended the hearing. The Second Applicant was not present at the hearing on 1st October. There was an indication that Mr Roger de Robillard was counsel for the First and Second Applicants. He sent a letter by fax dated 30th September, 1997 to the Registrar asking among other things that the hearing scheduled for 1st October be adjourned. No formal application was made for such adjournment. This is one reason why the hearing proceeded on 1st October. The Second reason evolves around Mr de Robillard's status as a legal practitioner in this jurisdiction.

The Court takes judicial notice of the fact that Mr de Robillard is not enrolled in the Roll of Barristers and Solicitors maintained by the Supreme Court Registry. That omission is clear indication that there has not been proper admission by Mr de Robillard save on a temporary basis from time to time, to appear as a legal practitioner in this jurisdiction. That being so, Mr de Robillard's letter of 30th September 1997 requesting an adjournment was not worthy of consideration and the Court proceeded on the basis that the First and Second Applicants were not represented.

I now deal with the Third Applicant's application to be struck out of the Petition. Mr Baxter-Wright for the Third Applicant sought orders that service of the summons upon the Second, Third and Fourth Respondents be dispensed with. Further and in the alternative, that leave be granted to effect service upon the Second, Third and Fourth Respondents to be served upon the Supreme Court Registrar. Mr Baxter-Wright tells the Court that as a constitutional petition there are no specific rules in relation to withdrawal or striking out of a party and submits that the rules as

regards striking out of action in the High Court Rules 1964 equally apply. I must first deal with this point because it is so crucial.

In my Judgment it is not the question of what rules are applicable in the circumstances that is important. The primary question is whether or not the Second, Third and Fourth Respondents could and should be made parties to the petition at all. The Second, Third and Fourth Respondents are Honourable Justices of the Vanuatu Court of Appeal. The Court has been told that the Petition has been filed in relation to Civil Case No.42 of 1994. It concerns an employment dispute between Mr Mouton (Fifth Respondent) and SELB (Third Applicant). It was concluded in or about April 1995 and came under review in the Court of Appeal as Appeal Case No.2 of 1995. In or about October 1996 the Court of Appeal comprising of the three Honourable Justices sat to determine the appeal. The appeal was not concluded and it came back on in the October 1997 listing. It seems to me that this is the only reason why the three Honourable Justices of the Court of Appeal have been made parties to the Petition. I cannot see any other reason. There is no relief claimed by the First and Second Applicants against the Second, Third and Fourth Respondents.

The Second, Third and Fourth Respondents are Judges of the Court of Appeal, Vanuatu's highest Court. They are judicial officers and by law they are protected. Section 28 of the Court Act [CAP. 122] reads:-

"PROTECTION OF JUDICIAL AND OTHER OFFICERS

28. No Judge or Magistrate or other person acting judicially in relation to the administration of Justice shall be liable to be sued in any Court for any Act done or ordered to be done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction provided that he, at the time, in good faith, believed himself to have jurisdiction to do or order the act or other person appointed to execute the lawful warrants or orders of any judge, magistrate or other person acting judicially, shall be liable to be sued in any Court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same."

In concluding Appeal Case No.2 of 1995 the Court of appeal on slightly varied constitution on 17th October 1997 said this at page 3 of their Lordships' Judgment:-

"The Court regrets further delay, but it is of the parties own making. We repeated what was said by the Court of Appeal 12 months ago that this old dispute needs to be resolved ...."

Clearly it can be seen that where delay in proceedings occurs as a result of the parties own faults there is no point in suing the Judges. Judges cannot and should not and never be sued save in very exceptional circumstances. Only their judicial findings or judgments may be reviewed or appealed against. Doing so would be in conflict with the Constitutional recognition of judicial independence under the Vanuatu Constitution. In Civil Appeal No.2 of 1997 Dinh Van Than -v- Minister of Finance and others, (unreported) the Court of Appeal in its judgment of 9th October, 1997 said this at page 7:-

"The citing of a Judge in a Constitutional petition (as well as being in conflict with the Constitutional recognition of judicial independence under the Constitution will mean that the Judges will have to request the Attorney General on their behalf to apply to have them struck from the proceedings. If not they will simply abide by the decision of the Court. It is of the very nature of the separation of powers and the fundamental precepts of the doctrine of judicial independence that Judges do not become part of the litigation process or become personally involved in cases before the Court."

This Honourable Court is bound by the decisions and rulings of the Court of Appeal. That being so, it is therefore my Judgment that the Second, Third and Fourth Respondent could not have been parties to the Petition in the First place. Service of documents, let alone leave therefore becomes irrelevant and need not be an issue for further consideration. I therefore rule that the Second, Third and Fourth Respondents are struck off the Petition.

Mr Baxter-Wright then argues that SELB, the Third Applicant ought to be struck out of the Petition. He tells the Court that internal changes within the SELB (the company) had created complications. He tells the Court how initially the First and Second Applicants were in complete control of the Company but they no longer do now. Both Applicants now own only 0.1 percent in the Company. Mr Baxter-Wright refers the Court to a Protocole d'Accord annexed to his affidavit in support of this application sworn and dated 24th September 1997 as annexure "E". He tells the Court that although the First and Second Applicants do no longer own a majority of the Company, they have authority to pursue or continue with Appeal

Case No.2 of 1995 to its conclusion. He argues that their authority is limited only to that particular case and no other. Mr Baxter-Wright tells the Court that the position of the Company has now changed. He tells the Court that the Company did not consent to the proceedings being filed in their name and have sought by formal company resolution to have the Company withdrawn from the Petition at the earliest opportunity. The Court has been referred to annex "A" of Mr Baxter-Wright's further affidavit of 26th September 1997 which clearly shows the existence of Article 96 - Resolution of Directors which reads:-

> *"Pursuant to Article 96 of the Articles of Association of the company, the Directors hereby resolve to take all such steps as are necessary to have the company withdrawn from the Vanuatu Supreme Court Civil Case No.155 of 1996."*

This resolution is dated 22nd September 1997 and signed by Mr Desplat and Mr G.L. Lenisa.

I have also examine the affidavit of Mr A. Desplat annexed in Mr Baxter-Wright's affidavit of 24th September, 1997 as annexure "G" in relation to the consent to proceedings and I am satisfied by paragraph 6 (d) and (e) that no such consent was given by the current Directors of the Company. Further I am satisfied that the First and Second Applicants authority is limited only to the continuing of Appeal Case No. 2 of 1995 to its conclusion and to nothing else.

The First and Fifth Respondents consented to the application by the Third Applicant to have the Company struck out from the Petition. The Seventh Respondent filed a formal consent on 30th September consenting to the Third Applicant's application. The Sixth and Eighth Respondents did not object to the Third Applicant being struck out of the Petition. Mr Francois was given an opportunity to be heard through Jennifer Nicols being his translator. He referred only to the letter of 30th September by Mr de Robillard. He tells the Court that he was surprised that SELB should seek to withdraw at the very last minute. When asked whether or not he had anything else to say, he told the Court that he had nothing. That being so and for the foregoing reasons SELB Pacific Ltd, the Third Applicant was struck out of the Petition. Counsel sought orders as to costs but this would be considered separately and a separate Judgment will be given in that regard.

I now deal with cross-motions filed by the First, Fifth, Sixth, Seventh and Eighth Respondents seeking to have the Petition dismissed in its entirety under section 218 (4) of the Criminal Procedure Code Act [CAP. 136].

The Seventh Respondent filed an affidavit in support of her application and in reply to clause 6.2 of the Petition. She says that the allegations against her are false and that the Petition was frivolous and vexatious.

The Petition was filed on 2nd December 1996. As at the date of hearing of these applications on 1st October 1997, the First and Second Applicants have not filed any affidavits in support of their Petition. The Affidavit of the Seventh Respondent was filed on 3rd September 1997 and the Seventh Respondent told the Court that she had difficulty in effecting service of documents. Leaving that aside, it is clear that the First and Second Applicants have had 10 months to substantiate their allegations concerning the Seventh Respondent and have not. It is clear that the First Applicant willingly approached the Seventh Respondent for legal advice and representation. He got it and then decided on his own initive to instruct another solicitor. He made an undertaking as to payment of all legal costs incurred and the Court has been told that all costs have been paid. In a letter dated 13th April 1994 the First Applicant thanks the Seventh Respondent for her services. This is annexure "A" to Ms Barlow's Affidavit. To thank someone for the services they have rendered is an indication of gratitude and pleasure at and for the services rendered. But to turn around some 2 years later and sue the person alleging that the services rendered by him 2 years earlier were poor services is nothing but a clear case of causing annoyance to the defendant. Here I am satisfied that the action against the Seventh Respondent by the First and Second Applicants is frivolous and vexatious and will dismiss it as against the Seventh Respondent for those reasons.

Mr Ozols, acting for himself as First Respondent and Mr Mouton, Fifth Respondent asks that the Petition be struck out. He alleges that the First and Second Applicants are without locus standi. Further he alleges that the Petition is without foundation, frivolous and vexatious. He filed an affidavit in support of these allegations on 26th September 1997.

On the issue of locus standi Mr Ozols argued that if SELB Pacific Ltd, the Third Respondent has been struck out of the Petition then the First and Second Applicants really have no standing to issue the Petition. He submits that Civil Case No.42 of 1994 was a case between the Fifth Respondent (Plaintiff/Appellant) and SELB Pacific Ltd (Defendant/Respondent). His evidence shows that on 1st November 1996 the Court of Appeal in Appeal Case No.2 of 1995 made interlocutory orders one of which was that the Third Applicant should pay VT2,934,615

to the Appellant/Fifth Respondent before 1st December 1996 pending final Judgment. This Order was breached. One other order was that no applications should be instituted that were in anyway related to the proceedings of Appeal Case No. 2 of 1995 without leave of the Court of Appeal. This order was breached by the filing of the Petition as Civil Case No. 155 of 1996. It is common knowledge that no such leave was sought and granted. To breach Court Orders and then come to seek Justice in the Court is stupidity and a mockery of the common equity principle or maxim. "He who seeks equity must do equity. He who comes into equity must come with clean hands". If the Applicants cannot do equity then they do not deserve equity. This principle was enunciated as long ago as 1819 in the case of David-V- Duke of Malborough (1819), 2 swan.108 at page 157 per Lord Eldon, L.C. Also Portsea Island Building Society -V- Barclay [1895], 2 Chan. 298, C.A at Page 308.

Mr Ozols gives evidence of correspondences he has sent to Mr de Robillard who he believed at the time to have been representing the First and Second Applicants. One such correspondence was sent by fax on 25th March 1997. The other on 1st April 1997. There has been no responses to those letters.

Mr Ozols invites the Court to read the Petition as a whole to see whether a constitutional breach is established and he submits that there is none. He refers to Civil Case No. 29 of 1996 where it was held that it is plain from Article 53 of the Constitution that the Petitioner must establish a constitutional breach. If he cannot, then there is no cause of action. I have read the Petition and conclude that there is nothing in it that shows a constitutional breach that warrants the filing of the Petition. And I conclude that the Petition is without foundation, is frivolous and vexatious as regards the First and Fifth Respondents respectively. Further, for the foregoing reasons I conclude that the First and Second Applicants have no locus standi to file the Petition and will dismiss it as against the First and Fifth Respondents.

Mr John Malcolm appearing on his own behalf as the Sixth Respondent says that the Petition should be dismissed forthwith on the grounds that it is without foundation, is frivolous and vexatious. Further he submits that the First and Second Applicants are without locus standi to bring the action against the Respondents. He advances similar arguments and submissions as Mr Ozols. He argues that the Petition was filed 10 months ago and nothing has been done to put progress on the case despite correspondences in evidence which have been sent to Mr de Robillard. He

points out that the only prayer pertinent to the Sixth Respondent was a claim for damages to be assessed. He submits that the claim for damages is not an appropriate matter for a Petition and submits further that the proper course of action for damages in respect of a solicitors costs was to issue a Writ seeking damages for negligence or for taxation of accounts. He refers to Halsburys Laws of England Vol. 37. para.139. I accept Mr Malcolm submissions. I have also read submissions as regards the frivolous and vexatious nature of this Petition and for reasons already given above, I accept those submissions in their entirety and conclude that as against the Sixth Respondent this Petition is without foundation, is frivolous and vexatious and will dismiss it for those reasons.

Mr Hurley appearing on behalf of the Eighth Respondent submits that the Petition is without foundation, is frivolous and vexatious. He submits that the First and Second Applicants have no locus standi in that their Petition discloses no reasonable course of action. Mr Hurley tells the Court that the Eighth Respondent joins with all the other Respondents to seek that the Petition be dismissed. He submits that the Petition represents an abuse of process. Mr Hurley tells the Court that all the submissions made by Mr Ozols and Mr Malcolm are agreed and ask that the Petition be dismissed with costs. For the reasons already provided I conclude that as against the Eighth Respondent the Petition is without foundation, is frivolous and vexatious and will dismiss it accordingly.

The whole Petition is therefore dismissed. All the Respondents seek costs. This will be decided separately in a separate Judgment.

Dated at Port Vila, this 17th day of November 1997.

BY THE COURT

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OLIVER A. SAKSAK
JUDGE

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