

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Constitutional Jurisdiction)

Constitutional Case No.06 of 2011

BETWEEN: HON. HAM LIN VANUAROROA (MP),
RALPH REGENVANU (MP),
DON KEN (MP),
MARCELLINO PIPITE (MP),
GEORGE WELLS (MP),
WILLIE REUBEN ABEL (MP),
HARRY IAUKO (MP),
MOANA CARCASSES KALOSIL (MP),
STEVEN KALSAKAU (MP),
MOKIN STEVEN (MP),
JAMES NGWANGO (MP), and
ALFRED CARLOT (MP)
Applicants

AND: Hon. NIPAKE EDWARD NATAPEI (MP)
First Respondent

AND: JOSHUA BONG
Second Respondent

AND: THE STATE REPUBLIC OF VANUATU
Third Respondent

Coram: V. Lunabek CJ

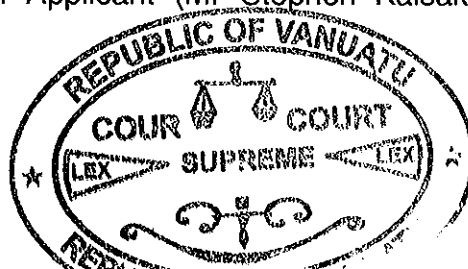
Counsel: Mr Robert Sugden for the Applicants
Mr Ishmael Kalsakau, Attorney-General of the Republic of Vanuatu for the
First, Second and Third Respondents

Date of hearing: 21 June 2011

Date of judgment: 22 June 2011

REASONS FOR JUDGMENT

This is an Urgent Constitutional Application filed by the Applicants on 21 June 2011. The Court deals with it as such. The Applicants are each and all appointed Ministers of State in the executive Government of the Republic of Vanuatu by Honourable Sato Kilman on 2 December 2010, except that Hon. Sato Kilman appointed the following on different dates: the Sixth Applicant (Mr Willie Reuben Abel) was appointed and worn-in on the 17 May 2011; the Ninth Applicant (Mr Stephen Kalsakau) was



appointed and sworn-in on the 14 May 2011; the Eleventh Applicant (Mr James Ngwango) was appointed and sworn-in sometime between the 11th and the 17th February 2011; and the Twelve Applicant (Mr Alfred Carlot) was appointed and sworn-in on the 10th March 2011.

The Applicants apply to the Supreme Court under Articles 6 and 53 of the Constitution because they say, among other matters, that:-

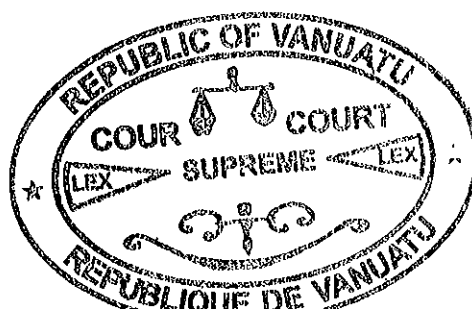
1. None of them was made Respondent to the Constitutional Case No.05 of 2011 and so, their positions and rights as Ministers of State was not challenged in that Constitutional Application ("No.05 of 2011") and none of them was afforded a right to be heard in that case.
2. Consequently, pursuant to Article 5(1)(d) (protection of the law) and 5(1)(j) (protection of property), the Orders made on 16th June 2011 were made so as to specifically apply only to the Hon. Sato Kilman who was named Respondent, but to no other Ministers of State namely, themselves, the Applicants.
3. They say that if the Orders made on 16 June 2011 in Constitutional Case No.05 of 2011 had been expressed so as to affect their rights as Ministers of State their right to natural justice under Article 5(1)(d) would have been infringed.
4. They also say that if they had been made Respondents in Constitutional Case No.05 of 2011, they would have had the opportunity of raising in their defence the following:

(i) Anshun estoppel

The fact that the Applicants should be estopped under the Anshun principle in that they had the opportunity to raise the issue concerning the election, on the 2nd December 2010, in their defence to the previous Constitutional Case No. 2 of 2011, but did not do so.

(ii) Waiver

The Applicants in Constitutional Case No 5 of 2011 had waived their rights to bring the application in as much as they brought the motion of no confidence that resulted in Constitutional Case No. 3 of 2011 thereby impliedly accepting the validity of the election on the 2nd

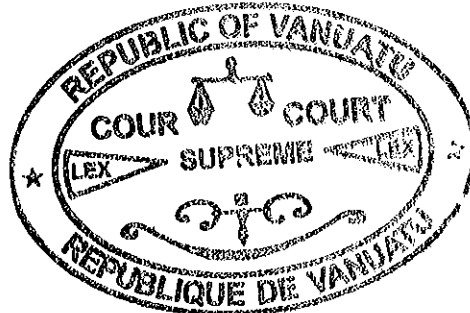


December 2010, or at least the validity of his subsequent swearing in as Prime Minister.

(iii) Laches

The court has a discretion to refuse the remedy sought on the basis of delay and the delay in this case especially having regard to the consequences and the expense thereof was such that if requested to do so the court would have exercised the discretion to refuse the relief.

5. They further say that since 16 June 2011, the First Respondent (Hon. Nipake Edward Natapei) has taken steps as Acting Prime Minister to prevent the Applicants from continuing as Ministers of State in that:-
 - (i) He has purported to appoint new Ministers of State to replace the Applicants;
 - (ii) He has ordered the Commissioner of Police to take away the Applicants' ministerial vehicles and other privileges and to prevent them from entering ministerial offices and otherwise fulfilling their ministerial roles.
6. They say that the Second Respondent (Joshua Bong), the Commissioner of Police, has sent Police Officers who have taken ministerial vehicles and otherwise taken steps to prevent the Applicants from continuing as Ministers of the State and they continue to do so.
7. They finally say that the action of the Acting Prime Minister and the Commissioner of Police are an infringement of the Applicants' rights under Article 39(1) of the Constitution, resulting in the vesting in them of the executive power of the Government of the Republic of Vanuatu.
8. In summary, they say that the current actions of the Acting Prime Minister and the Commissioner of Police interfere in and prevent the Applicants from enjoying and fulfilling their roles as Ministers of the State is unlawful and in particular in breach of the Constitutional rights of the Applicants under Articles 5(1)(d), 5(1)(j) and 39(1).

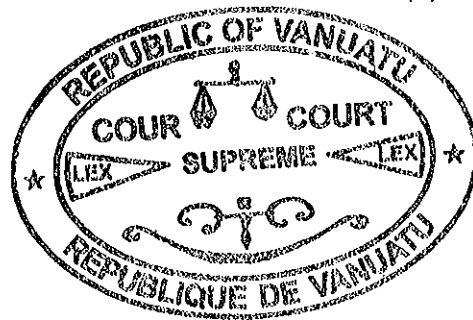


For those reasons, the Applicants apply to the Supreme Court and ask the Supreme Court to make the following Declarations and Orders:

1. A declaration that the Applicants are and continue to be Ministers of State in the Government of the Republic of Vanuatu.
2. An order restraining the First and Second Respondents from taking any steps that may have the effect, directly or indirectly, of interfering in any way in the discharge by the Applicants of their duties and powers as Ministers of State in the Government of the Republic of Vanuatu or from enjoying any of the rights, privileges and perquisites pertaining to their office.
3. Costs.

The First, Second and Third Respondents file their response and say as follows:

1. That on 2 December 2010, Honourable Sato Kilman, Honourable Dunstan Hilton, Honourable Moana Carcasses Kalosil and Honourable Paul Telukluk have tendered their resignation to their positions as State Ministers prior to the debate of the Motion of No Confidence against the First Respondent;
2. That the Applicants have not been appointed to Ministerial positions by a lawfully elected Prime Minister;
3. That on 16 June 2011, the Supreme Court issued its judgment in Constitutional Case No.05 of 2011 and they will rely on the full terms and effect of the said judgment.
4. That the Urgent Constitutional Application discloses no infringement of the Constitution.
5. That Order 3 of the Supreme Court dated 16 June 2011 clearly provides for the First Respondent to remain as Acting Prime Minister and for the State Ministers appointed by the First Respondent on 2 December 2010, excluding State Ministers who have tendered their resignation at that time, to cease to hold office but to continue to exercise their functions until a new Prime Minister is elected pursuant to Article 43(2) of the Constitution.
6. That they will rely on the full terms and effect of Article 43(2) of the Constitution.



7. That the Applicants have not been appointed to Ministerial positions by a lawfully elected Prime Minister.
8. As to the defences raised in paragraph 6 of the Application, the Respondents responded:
 - (i) That the Applicants could not have any such rights as such rights must and can only emanate from a purported lawfully elected Prime Minister;
 - (ii) That such allegation contained in paragraph 6 of the Application is tantamount to substantive matter deliberated in the Supreme Court in Constitutional Case No.05 of 2011;
 - (iii) That the Applicants never had those rights as duly appointed Ministers of the State and therefore, there was no reason to include them as Respondent in Constitutional Case No.05 of 2011.
9. That the Second Respondent carried out their duties based on legal instructions they have received and as such the Application discloses no infringement of the Constitution.
10. That this Application is contemptuous as it is purported to be raised as a request for further clarification of the Supreme Court Orders of 16 June 2011 or as an appeal of the Supreme Court Orders of 16 June 2011 before the Court of Appeal but by way of a new substantive matter.
11. That finally, in any event, the Applicants are not entitled to the relief sought or any relief.

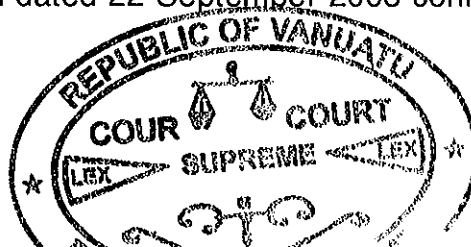
In the present case, sworn statements are filed in support of the Application and also in support of the response to the Application. The facts are not in dispute. Mr Robert Sugden, counsel for the Applicants and Mr Ishmael Kalsakau, Attorney-General acting for the First, Second and Third Respondents file the following statement of agreed facts:

“STATEMENT OF AGREED FACTS

The Applicants and the Respondents agree to the following facts:

1. That on 22 September 2008, Hon Edward Nipake Natapei was elected as Prime Minister of the Republic of Vanuatu.

Annexed is a true copy of official oath dated 22 September 2008 confirming

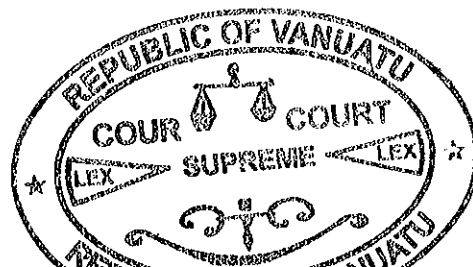


such election.

2. That as at 2 December 2010, Hon Edward Nipake Natapei was lawfully voted out as Prime Minister of the Republic of Vanuatu by a motion of no confidence.
3. That prior to the motion of no confidence, on 22 September 2008, the following members of Parliament were appointed by the then Prime Minister Hon. Edward Nipake Natapei:
 - i) Hon. Ham Lini Vanuaroro as Deputy Prime Minister and Minister of Public Utilities;
 - ii) Hon. Sela Molisa as Minister responsible of Finance and Economic Management;
 - iii) Hon. James Bule as Minister responsible for Trade, Industry and Commerce;
 - iv) Hon. Joe Natuman as Minister responsible for Lands, Geology, Mines and Rural Water Supply;
 - v) Hon. Partick Crowby Manarewo as Minister responsible for Internal Affairs;
 - vi) Hon. Joshua Kalsakau as Minister responsible for Justice and Social Welfare;
 - vii) Hon. Willie Ruben Abel as Minister responsible for Education;
 - viii) Hon. Roro Sambo as Minister responsible for Health;
 - ix) Hon. Bakoa Kaltonga as Minister responsible for Foreign Affairs;
 - x) Hon. Havo Molisale as Minister responsible for Agriculture, Forestry, Fisheries and Quarantine.

Annexed is a true copy of official gazette No. 31 of 2008.

4. Thereafter on 30 September 2008 the following Members of Parliament were removed as Ministers of state:
 - i) Hon. Joshua Kalsakau as Minister responsible for Justice and Social Welfare;
 - ii) Hon. Don Ken as Minister responsible for Youth and Sports;
 - iii) Hon. Willie Ruben Abel as Minister responsible for Education;



- iv) Hon. Roro Sambo as Minister responsible for Health;
- v) Hon. Joe Natuman as Minister responsible for Lands, Geology, Mines and Rural Water Supply;
- vi) Hon. Ham Lini Vanuaroroa as Minister responsible for Infrastructure and Public Utilities;

Annexed is a true copy of official gazette No.31 of 2008.

5. That on the same date, the then Prime Minister appointed the following Members of Parliament as state Ministers:

- i) Hon. Ham Lini Vanuaroroa as Deputy Prime Minister and Minister responsible for Justice and Social Welfare;
- ii) Hon. Serge Rialuth Vohor as Minister responsible for Infrastructure and Public Utilities;
- iii) Hon. Natuman as Minister responsible for Health;
- iv) Hon. Chariot Salwai as Minister responsible for Education.

Annexed is a true copy of official gazette No. 32 of 2008.

6. On 19 June 2009, the following members of Parliament were removed as State Ministers:

- i) Hon. Joe Natuman as Minister responsible for Health;
- ii) Hon. Moses Kahu as Minister responsible for Youth and Sports;

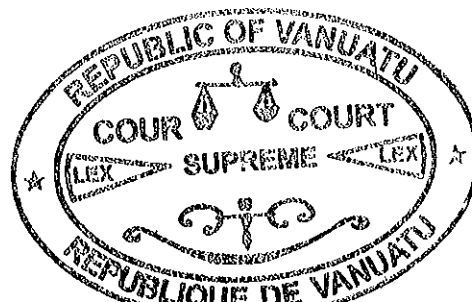
7. On the same date, the following members of Parliament were appointed as State Ministers:

- i) Hon. Joe Natuman as Minister responsible for Foreign Affairs;
- ii) Hon. Moses Kahu as Minister responsible for Health;
- iii) Hon. Jossie Masmass as Minister of Youth and Sports;

Annexed is a true copy of official gazette No.23 of 2009.

8. On 17 November 2009, the following members of Parliament were removed as Ministers of State:

- i) Hon. Patrick Crowby as Minister responsible as Minister for Internal Affairs;



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- ii) Hon. James Bule as Minister responsible Trade, Commerce and Industry;
- iii) Hon. Jossie Masmias as Minister responsible for Youth and Sports;
- iv) Hon. Esmond Sai as Minister responsible for Ni-Vanuatu Business and Cooperative;
- v) Hon. Harvo Molisale as Minister for Agriculture, Forestry, Fisheries, Livestock and Quarantine;
- vi) Hon. Harry Iauko as Minister responsible for Lands, Geology, Mines and Rural Water Supply;

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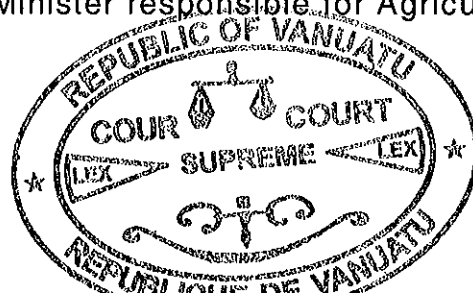
9. On the same date, the following members of Parliament were appointed as State Ministers:

- i) Hon. Sato Kilman as Deputy Prime Minister and Minister for Trade, Commerce and Industry;
- ii) Hon. Bakoa Kaltonga as Minister responsible for Justice and Social Welfare;
- iii) Hon. Moana Kalosil Carcasses as Minister responsible for Internal Affairs;
- iv) Hon. Stephen Kalsakau as Minister responsible for Agriculture, Fisheries, Forestry and Quarantine;
- v) Hon. Danstan Hilton as Minister responsible for Ni-Vanuatu Business and Cooperative;
- vi) Hon. Paul Telukluk as Minister responsible for Lands, Geology, Mines and Rural Water Supply;
- vii) Hon. Raphael Worwor as Minister responsible for Youth and Sports.

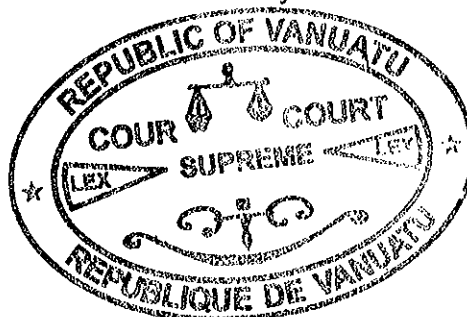
Annexed is a true copy of extraordinary official gazette No. 17 of 2009.

10. That prior to 2 December 2010, the following Members of Parliament held Ministerial Portfolio as appointed by Hon Edward Nipake Natapei:

- i) Hon. Bakoa Kaltonga as Minister responsible for Justice and Social Welfare;
- ii) Hon. Stephen Kalsakau as Minister responsible for Agriculture,



- Fisheries, Forestry and Quarantine;
- iii) Hon. Raphael Worwor as Minister responsible for Youth and Sports;
 - iv) Hon. Sela Molisa as Minister responsible for Finance and Economic Management;
 - v) Hon. Sato Kilman as Deputy Prime Minister and Minister responsible for Trade and Industry;
 - vi) Hon. Dunstan Hilton as Minister responsible for Ni-Vanuatu Business
 - vii) Hon. Moana Carcasses Kalosil as Minister responsible for Internal Affairs;
 - viii) Hon. Paul Telukluk as Minister responsible for Lands, Geology, Mines and Rural Water Supply;
 - ix) Hon. Joe Natuman as Minister responsible for Foreign Affaires;
 - x) Hon. Charlot Salwai as Minister responsible for Education;
 - xi) Hon. Moses Kahu as Minister responsible for Health;
 - xii) Hon. Serge Vohor as Minister responsible for Infrastructure and Public Utilities.”
11. On 2 December 2010, prior to the debate of the motion of no confidence against Hon. Edward Nipake Natapei, the following members of Parliament resigned as State Ministers:
- i) Hon. Sato Kilman as Deputy Prime Minister and Minister responsible for Trade and Industry;
 - ii) Hon. Dunstan Hilton as Minister responsible for Ni-Vanuatu Business and Cooperative;
 - iii) Hon. Moana Carcasses Kalosil as Minister responsible for Internal Affairs;
 - iv) Hon. Paul Telukluk as Minister responsible for Lands, Geology, Mines and Rural Water Supply;
12. In addition to the above agreed facts, on 16 June 2011, the First Respondent and others successfully challenged the Constitutional validity of the election of Honourable Sato Kilman by Parliament as Prime Minister on 2 December 2010 resulting in the following Orders and Declarations by the Court on 16 June 2011:



“ORDERS AND DECLARATIONS

1. *THAT, the declaration by the First Respondent Speaker, Maxime Carlot Korman of 2 December 2010 that the Second Respondent, Hon. Sato Kilman was elected Prime Minister of Vanuatu was unconstitutional and invalid.*
2. *THAT, the purported election of the Prime Minister, Hon. Sato Kilman on 2 December 2010, was made contrary to the provisions of Article 41 and Schedule 2 of the Constitution, therefore was unconstitutional and invalid.*
3. *THAT, the Hon. Nipake Edward Natapei remains as the Acting Prime Minister until a new Prime Minister is elected - Article 43(2) of the Constitution. The effect of Article 43(2) is limited only to Mr Nipake Edward Natapei but not to the then appointed Ministers of Government.*
4. *THAT, the situation arising as the consequences of the constitutional challenges and changes in the administration of the affairs of the Government of the Republic of Vanuatu are deemed to be protected by the effect of the Judgment of the Court of Appeal dated 13 May 2011 and this from 13 May 2011. This is more so for the public expenditure.*
5. *THAT, the First Respondent Speaker of Parliament is ordered to convene Parliament as soon as possible so that the Members of Parliament shall elect a Prime Minister in accordance with the provisions of Article 41 and Schedule 2 of the Constitution.*
6. *THAT, the First and Second Applicants are entitled to their costs against the First Respondent and such costs shall be agreed or determined.*
7. *THAT, such costs shall be paid by the First Respondent personally.”*

The relevant provisions of the Constitution are set out for ease of reference and consideration.

“CHAPTER 1

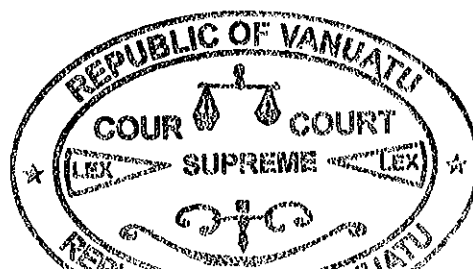
THE STATE AND SOVEREIGNTY

REPUBLIC OF VANUATU

1. *The Republic of Vanuatu is a sovereign democratic state.*

CONSTITUTION SUPREME LAW

2. *The Constitution is the supreme law of the Republic of Vanuatu.*



...

NATIONAL SOVEREIGN, THE ELECTORAL FRANCHISE AND POLITICAL PARTIES

- 4.(1) *National sovereignty belongs to the people of Vanuatu which they exercise through their elected representatives.*
- (3) *Political parties may be formed freely and may contest elections. They shall respect the Constitution and the principles of democracy."*

"CHAPTER 2

FUNDAMENTAL RIGHTS AND DUTIES

PART 1 - Fundamental Rights

FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL

- 5.(1) *The Republic of Vanuatu recognizes, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health-*
- (d) *protection of the law;"*

"ENFORCEMENT OF FUNDAMENTAL RIGHTS

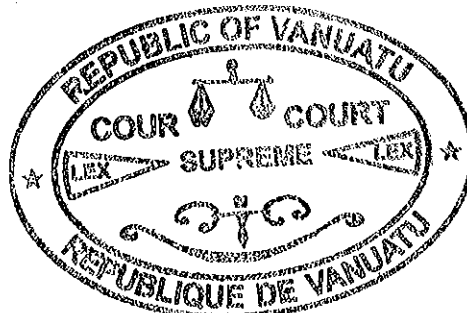
- 6.(1) *Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.*
- (2) *The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right."*

"CHAPTER 4

PARLIAMENT

PARLIAMENT

15. *The legislature shall consist of a single chamber which shall be known as Parliament.*



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POWERS TO MAKE LAWS

“16.(1)Parliament may make laws for the peace, order and good government of Vanuatu.

(2) Parliament shall make laws by passing bills introduced either by one or more members or by the Prime Minister or a Minister.

....”

“ELECTION OF MEMBERS OF PARLIAMENT

17.(1) Parliament shall consist of members elected on the basis of universal franchise through an electoral system which includes an element of proportional representation so as to ensure fair representation of different political groups and opinions.”

“PROCEDURE OF PARLIAMENT

21.(1) Parliament shall meet twice a year in ordinary session.

(2) Parliament may meet in extraordinary session at the request of the majority of its members, the Speaker or the Prime Minister.

(3) Unless otherwise provided in the Constitution, Parliament shall make its decisions by public vote by a simple majority of the members voting.

(4) Unless otherwise provided in the Constitution, the quorum shall be two-thirds of the members of Parliament. If there is no such quorum at the first sitting in any session Parliament shall meet 3 days later, and a simple majority of members shall then constitute a quorum.

(5) Parliament shall make its own rules of procedure.”

“SPEAKER

22.(1)...

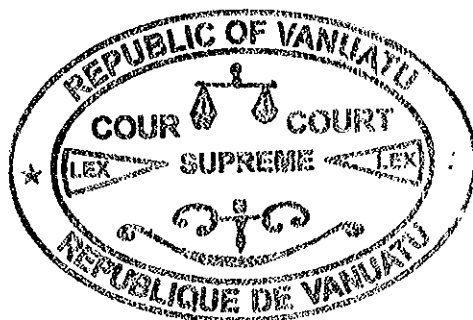
(2) The Speaker shall preside at sittings of Parliament and shall be responsible for maintaining order.

...”

“PROCEEDINGS TO BE PUBLIC

24. Unless otherwise provided proceedings of Parliament shall be held in public.”

“LIFE OF PARLIAMENT



28.(1) Parliament, unless sooner dissolved under paragraph (2) or (3), shall continue for 4 years from the date of its election.

(2) Parliament may at any time decide, by resolution supported by the votes of an absolute majority of the members at a special sitting when at least three-fourths of the members are present, to dissolve Parliament. At least 1 week's notice of such a motion shall be given to the Speaker before the debate and the vote on it."

**"CHAPTER 7
THE EXECUTIVE**

EXECUTIVE POWER

39.(1) The executive power of the people of the Republic of Vanuatu is vested in the Prime Minister and Council of Ministers and shall be exercised as provided by the Constitution or a law."

"COUNCIL OF MINISTERS

40. (1) There shall be a Council of Ministers which shall consist of the Prime Minister and other Ministers."

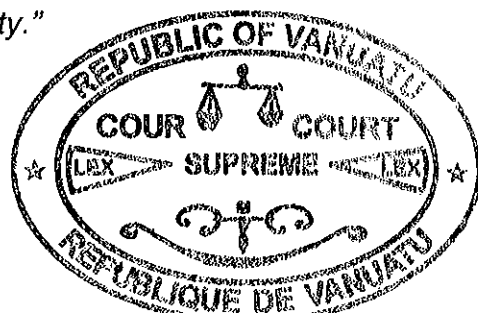
"ELECTION OF PRIME MINISTER

41. The Prime Minister shall be elected by Parliament from among its members by secret ballot in accordance with the roles in Schedule 2."

"SCHEDULE 2

ELECTION OF THE PRIME MINISTER

1. The candidate who obtains the support of the absolute majority of the members of Parliament shall be elected Prime Minister.
2. If no candidate is elected under paragraph 1, a second ballot shall be taken but the candidate obtaining the lowest number of votes in the first ballot shall be eliminated.
3. If on the second ballot no candidate obtains the support specified in paragraph 1, further ballots shall be held, each time eliminating the candidate with the lowest vote in the preceding ballot until one candidate receives the support specified in paragraph 1, or if only two candidates remain the support of a simple majority."



“APPOINTMENT AND REMOVAL OF OTHER MINISTERS

- 42.(1) *The Prime Minister shall appoint the other Ministers from among the members of Parliament and may designate one of them as Deputy Prime Minister.*
- (2) *The Prime Minister shall assign responsibilities for the conduct of government to the Ministers.*
- (3) *The Prime Minister may remove the Ministers from office.”*

“COLLECTIVE RESPONSIBILITY OF MINISTERS AND VOTES OF NO CONFIDENCE

43. (1) *The Council of Ministers shall be collectively responsible to Parliament.*
- (2) *Parliament may pass a motion of no confidence in the Prime Minister. At least 1 week’s notice of such a motion shall be given to the Speaker and the motion must be signed by one-sixth of the members of Parliament. If it is supported by an absolute majority of the members of Parliament, the Prime Minister and other Ministers shall cease to hold office forthwith but shall continue to exercise their functions until a new Prime Minister is elected.”*

**“CHAPTER 8
JUSTICE**

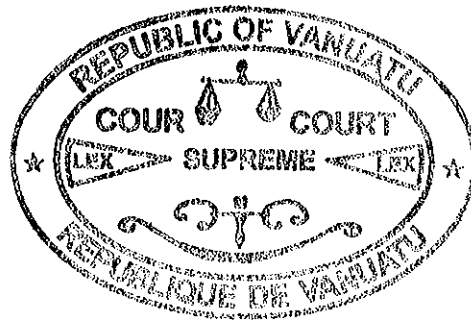
THE JUDICIARY

- 47.(1) *The administration of justice is vested in the Judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law.”*

“APPLICATION TO SUPREME COURT REGARDING INFRINGEMENTS OF CONSTITUTION

- 53.(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 jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution.*

...”



It is appropriate that I say this now. I wish to express my gratitude and thank counsel for their submissions and assistance in such a very short time frame in this case. Whatever the outcome of this case, it is important that Parliament elects a Prime Minister of Vanuatu in accordance with Article 41 Schedule 2 of the Constitution.

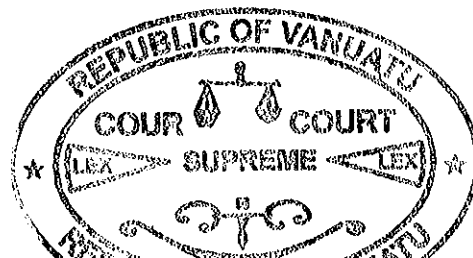
As in similar cases, before I consider the arguments and submissions of counsel of the respective parties, I wish to emphasize that this Court in considering those is not interested in or moved by the positions, personalities, or politics (if any) involved in the circumstances that gave rise to this case. This Court is also aware of the constitutional separation of the various functions and powers of the state between the Legislature, Executive and Judiciary which concept has been jealously guarded and maintained over many years. It is a role of the Court to ensure that an appropriate separation of powers is maintained and this at all times.

It is also important to remind and reiterate what the Supreme Court and the Court of Appeal on many occasions say. The case of **Tari v. Natapei** [2001] VUCA 18, Civil Case No.11 of 2001 (1 November 2001) is an illustration of the position:

“The Republic of Vanuatu is a Constitutional Parliamentary Democracy. The Constitution is the foundation document. As clause 2 of it notes, the Constitution is the Supreme law of the Republic of Vanuatu...”

It is the function and duty of the Supreme Court to vindicate the supremacy of the Constitution so as to ensure that the rule of law is maintained at all times in this Republic and particularly more so when the Constitution, the parliamentary democratic system of government, the fundamental rights guaranteed under it, the fundamental institutions of the government created by the Constitution and the principles of their operations and interrelations are not understood by the majority of the people of Vanuatu as they are not part of their cultures and traditions but they must respect and obey the Constitution as the supreme law of Vanuatu.

From the outset, the Application is made because the Applicants submitted that the Respondents wrongly interpreted the Orders of the Supreme Court dated 16 June 2011 particularly Order 3 and also that because they were not parties to the



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Constitutional Case No.05 of 2011 they were not given an opportunity to be heard so that they can defend themselves. They submit that they are still Ministers of the State, the Judgment and Orders of the Supreme Court of 16 June 2011 does not apply and affect them.

I deal with these points as part of the clarifications of the Court Orders in particular Order 3 of the Judgment dated 16 June 2011.

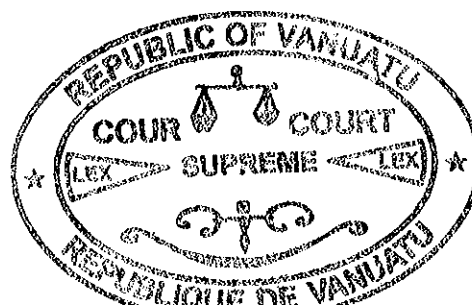
Before the Court hears both counsel on their arguments and submissions, the Court clarifies to both counsel and the parties in Court what Order 3 of the Judgment of the Supreme Court of 16 June 2011 means.

Order 3 reads:

“THAT, the Hon. Nipake Edward Natapei remains as the Acting Prime Minister until a new Prime Minister is elected - Article 43(2) of the Constitution. The effect of Article 43(2) is limited only to Mr Nipake Edward Natapei but not to the then appointed Ministers of Government.”

The question asked for clarification is which appointed Ministers of Government is Order 3 referred to? The clarification that the Court provided to counsel and parties is that the effect of Article 43(2) is limited only to the Mr Nipake Edward Natapei but not to the then appointed Ministers of Government by Hon. Sato Kilman. Order 3 flows directly from Orders 1 and 2 of the Judgment of 16 June 2011. In the particular circumstance of this case, it is acknowledged that Order 3 has to be clarified and it is proper that the application is made.

As part of the clarification of Order 3 it must be noted that the ruling made in the Judgment in Constitutional Case No.05 of 2011 took the situation back to the point on 2 December 2010 immediately after the Motion of No Confidence had been successfully passed against Mr Edward Natapei and it was not under challenge in Constitutional Case No.05 of 2011 and the tragic fact that the election of a Prime Minister was constitutionally wrong and invalid. In such circumstance, Article 43(2) of the Constitution provides the way forward and the Court applies it in Order 3 of the Judgment of 16 June 2011.



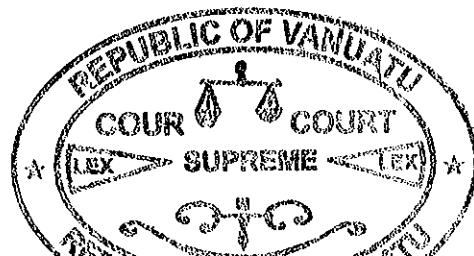
Article 43(2) says:

“Parliament may pass a motion of no confidence in the Prime Minister. At least 1 week’s notice of such a motion shall be given to the Speaker and the motion must be signed by one-sixth of the members of Parliament. If it is supported by an absolute majority of the members of Parliament, the Prime Minister and other Ministers shall cease to hold office forthwith but shall continue to exercise their functions until a new Prime Minister is elected.” [Emphasis added].

On 2 December 2010, Hon. Sato Kilman was unconstitutionally elected. His election as found by the Court on 16 June 2011, was unconstitutional and invalid. This means it was null and void ab initio (from the start which was 2 December 2010). Hon. Sato Kilman has no power under the Constitution to appoint the Applicants as Ministers of the State from 2 December 2010 and on any other dates as he purported to do. The Applicants have not been appointed to Ministerial positions by a lawfully elected prime Minister because Hon. Sato Kilman was not lawfully elected by Parliament on 2 December 2010.

The submissions of the learned Attorney-General reflect the meaning of Order 3 of the Supreme Court Judgment dated 16 June 2011 which provides for the First Respondents to remain as Acting Prime Minister and for the State Ministers appointed by him (the First Respondent) on 2 December 2010, excluding State Ministers who have tendered their resignation at that time, to cease to hold office but to continue to exercise their functions until a new Prime Minister is elected pursuant to Article 43(2) of the Constitution.

As part of clarification and effect of the Judgment of 16 June 2011, the submissions made on behalf of the Applicants that none of the Applicants was made Respondent to the Constitutional Case No.05 of 2011 and so; their positions and rights as Ministers of the State was not challenged in that Constitutional Application cannot be maintained. The Applicants have not been appointed to ministerial positions by a lawfully elected Prime Minister. They could not have any such rights as such rights must and can only emanate from a purported lawfully elected Prime Minister. In the



present case, since the Applicants never had those rights as duly appointed Ministers of State, there was no reason to include them as Respondent in the Constitutional Case No.05 of 2011. The Constitution provides a system of democratic government for the Republic which is based on the rule of law, and the application of the principles of natural justice: see Article 5(1)(d) and **Attorney General v. Timakata** (1992) Vanuatu Law Reports 575 at 599, and on appeal (1993) 2 Vanuatu Law Reports 679 at 682. An essential requirement of the rules of natural justice is that a party to proceedings that adjudicate on existing rights be given the opportunity to put his or her case to the decision-maker. It is beyond question that a litigant before a Court in judicial proceedings is entitled to do so even if the submissions may appear irrational, distasteful or offensive to other parties, or to the public generally. [**Francois v. Ozols** [1998] VUCA 5].

In this case, the Applicants do not have such right that they claim because they have not been appointed to ministerial positions by a lawfully elected Prime Minister.

The Applicants' submissions that if the Orders made on 16 June 2011 in Constitutional Case No.05 of 2011 had been expressed so as to affect the rights of the Applicants as Ministers of the State, their rights to natural justice and Article 5(1)(d) would have been infringed cannot stand for the same reasons as provided above which is that since they have not been appointed to ministerial positions by a lawfully elected Prime Minister, they do not have any existing rights as Ministers of State and Article 5(1)(d) could not have been infringed in relation to each of them.

Further the Supreme Court was acting in accordance with its ordinary functions under the Constitution, and the Judicial Services and the Courts Act. If the effect of one of the Orders was to remove someone from office or remove property from a litigant, such a removal could not constitute a breach of right under Article 5(1)(d) or could not constitute an "unjust deprivation of property" with the meaning of Article 5(1)(j). The removal and the deprivation would be one effected in accordance with the law. [**Francois v. Ozols** (1998) VUCA 5]; [Also, see more importantly **Kilman v. Speaker of Parliament of the Republic of Vanuatu** [2011] VUCA 15; Civil Appeal Case No.09 of 2011 (13 May 2011)]. In the above Appeal Case of **Kilman v. Speaker of Parliament**, the Court of Appeal made Orders removing Ministers of



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State who were appointed by a Prime Minister who was not constitutionally and lawfully elected by Parliament so the unlawfully appointed Ministers were not given any opportunity to be heard and for them to put their defences that was because they did not have any existing rights to the positions of Ministers of State and as such they did not have any right of natural justice within the meaning of Article 5(1)(d) of the Constitution. Order 3 of the Judgment of the Supreme Court dated 16 June 2011 has the same meaning and effect in respect to the Applicants the Constitutional Case No.06 of 2011.

The Applicants' submissions that if they had been made Respondents in Constitutional Case No.05 of 2011, they could have had the opportunity of raising defences are rejected for the same reasons provided earlier. In addition, it is difficult to see how defences of contractual law or equitable principles or remedies would affect the exercise of constitutional rights and its effective enforcement as the supreme law of the Republic in the specific situations and environment of Vanuatu.

As a final aspect of the clarification of the Orders of 16 June 2011, the submissions of the Applicants that they still maintain their positions as Ministers of the State due to their swearing-in in the office and the gazettal effect of their instrument of swearing-in cannot be maintained. Applicants are not appointed by a lawfully elected Prime Minister. Their act of swearing-in as Ministers of State and the gazettal of such swearing-in cannot retroactively legalize or render lawful their appointments by a Prime Minister who was not lawfully elected Prime Minister and the purported Prime Minister had no constitutional power to appoint the Applicants as Ministers of the State. Any such appointments are unconstitutional and invalid ab initio (see again, **Kilman v. Speaker of Parliament** [2011] VUCA 15.

As final part of the Applicants' submissions, they argue and submit that the First Respondent, since the Judgment of 16 June 2011, appoint new Ministers of State to replace the Applicants.

Pursuant to Article 43(2) of the Constitution and with the factual circumstances occurring on 2 December 2010, the First Respondent Nipake Edward Natapei and Ministers appointed by him on 2 December 2010 who did not resign from their



ministerial positions before the Motion of no confidence on 2 December 2010, shall continue to exercise their functions until a new Prime Minister is elected. Pursuant to Article 43(2) of the Constitution, the First Respondent shall continue to exercise the functions of the Prime Minister until a new Prime Minister is elected and this includes appointing Ministers to replace Ministers who had resigned on 2 December 2010.

The arguments and submissions about the actions and steps taken by the Second Respondent are also rejected as not justified.

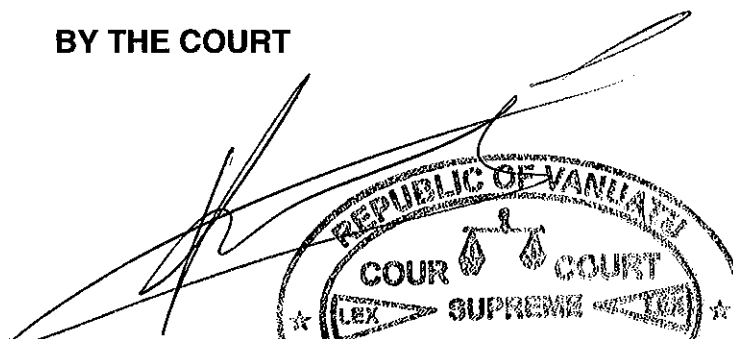
In the present Application, there is no provision of the Constitution which is infringed in relation to each of the Applicants. The Application must be dismissed.

ORDER

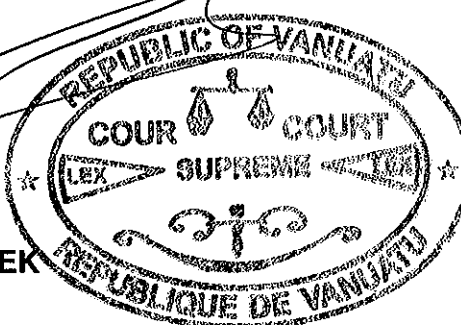
1. The Urgent Constitutional Application filed 21 June 2011 is hereby dismissed.
2. The Respondents are entitled to their costs against the Applicants.
3. Such costs are assessed at Vatu 250,000 against the Applicants and to be paid within 10 days.

DATED at Port-Vila this 22nd day of June 2011

BY THE COURT



Vincent LUNABEK
Chief Justice



The seal of the Supreme Court of Vanuatu is circular. The outer ring contains the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom, separated by two stars. The inner circle features a central emblem of a scale of justice. Below the emblem, the words "COUR SUPREME" and "COURT" are written. At the bottom of the inner circle, the word "LEX" is written.