

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

Constitutional
Case No. 18/3481 SC/CNST

BETWEEN: Alatoi Ishmael Kalsakau
Fred William Tasso
Joshua Kalsakau
Ephraim Kalsakau
Sato Kilman
Jotham Napat
Ian Wilson
Matai Seremiah
Jerry Kanas
Gracia Shadrack
Albert Williams
Marc Ati
Jimmy Nipo
Kalo Seule
Jay Ngwele
Pakoasongi Kalo Lano
Applicants

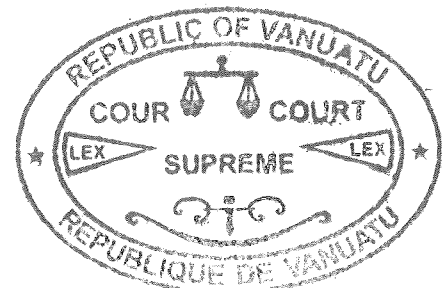
AND: The Republic of Vanuatu
First Respondent

AND: Prime Minister Charlot Salwai Tabimasm
Second Respondent

AND: Johnny Koanapo MP
Hosea Nevu MP
Jerome Ludvaune MP
Tomker Netvunei MP
Christopher Emelee MP
Tom Noam MP
Bruno Lengkon MP
Silas Bule MP
Andrew Napuat MP
Seule Simeon
John Silik Sala
Third Respondents

Coram: Justice Aru

Counsel: Mr. R. Kapapa for the Applicants
Mr. K. Tari for the First and Second Respondents
Mr. L. Napuati for the Third Respondents



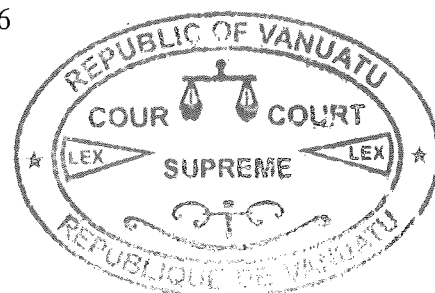
JUDGMENT

Introduction

1. This is a constitutional application. The applicants are members of parliament. Their complaint concerns the actions of the Prime Minister, Mr Charlot Salwai Tabimasma in appointing the third respondents parliamentary secretaries to the office of the Prime Minister. The applicants assert that these appointments violate the Constitution of the Republic of Vanuatu. A second application was also filed by the third respondents to strike out the constitutional application. Both applications were heard together.

Background

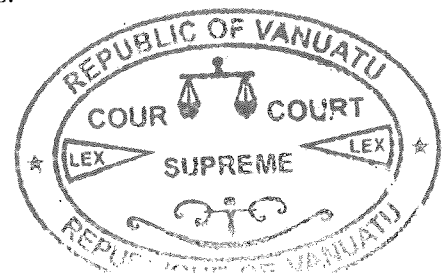
2. The background facts are not disputed. Around January 2013 Mr Sato Kilman who was then Prime Minister initially sought advice from the State Law Office to appoint Mr Moana C Kalosil as parliamentary secretary.
3. On 11 January 2013 the State Law Office advised that if the appointment did not impede Mr Kalosil's duties as a member of parliament (MP) then it would be open for the Prime Minister to appoint him to the post. Following the advice, the Prime Minister issued the Official Salaries (Amendment) Order No 5 of 2013 on 16 January 2013 adding the position of parliamentary secretary to the schedule to the Official Salaries Act (as amended) [CAP 168].
4. A series of orders were then later issued adding further positions of parliamentary secretaries and their staff to the schedule. These are:-
 - Official Salaries (Amendment) Order No 21 of 2013
 - Official Salaries (Amendment) Order No 92 of 2013
 - Official Salaries (Amendment) Order No 107 of 2013
 - Official Salaries (Amendment) Order No 104 of 2013
 - Official Salaries (Amendment) Order No 139 of 2013
 - Official Salaries (Amendment) Order No 140 of 2015
 - Official Salaries (Amendment) Order No 154 of 2015
 - Official Salaries (Amendment) Order No 155 of 2015
 - Official Salaries (Amendment) Order No 24 of 2016
 - Official Salaries (Amendment) Order No 63 of 2016
 - Official Salaries (Amendment) Order No 99 of 2016
 - Official Salaries (Amendment) Order No 126 of 2016
 - Official Salaries (Amendment) Order No 165 of 2016



- Official Salaries (Amendment) Order No 196 of 2016
- Official Salaries (Amendment) Order No 28 of 2017
- Official Salaries (Amendment) Order No 44 of 2017
- Official Salaries (Amendment) Order No 47 of 2017
- Official Salaries (Amendment) Order No 104 of 2017
- Official Salaries (Amendment) Order No 19 of 2018
- Official Salaries (Amendment) Order No 119 of 2018
- Official Salaries (Amendment) Order No 127 of 2018
- Official Salaries (Amendment) Order No 128 of 2018
- Official Salaries (Amendment) Order No 202 of 2018
- Official Salaries (Amendment) Order No 203 of 2018

5. On 11 February 2016, Mr Charlot Salwai Tabimasmas was elected Prime Minister of the Republic of Vanuatu. He then appointed the third defendants as parliamentary secretaries on the following dates:-

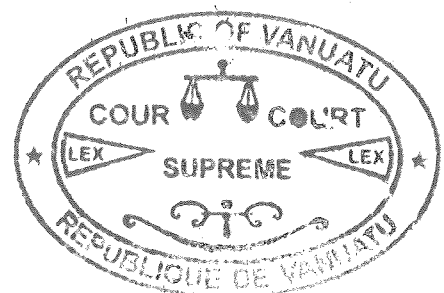
- 19 February 2016
Mr. Johnny Koanapo (MP) was appointed parliamentary secretary to the Prime Minister.
Mr. Silas Bule (MP) was appointed parliamentary secretary to the Prime Minister responsible for education.
Mr. Andrew S Napuat (MP) was appointed parliamentary secretary to the Prime Minister responsible for provincial affairs.
- 27 May 2016
Mr. Seule Solomon (MP) was appointed parliamentary secretary to the Prime Minister responsible for Youth & Sports.
- 28 June 2016
Mr. John S Sala (MP) was appointed parliamentary secretary to the Prime Minister responsible for revenue initiatives.
- 23 November 2016
Mr. Tomker Netvunei (MP) was appointed parliamentary secretary to the Prime Minister responsible for fisheries.
- 22 December 2017
Mr. Hosea Nevu (MP) was appointed parliamentary secretary to the Prime Minister responsible for provincial affairs.
Mr. Jerome Ludvaune (MP) was appointed parliamentary secretary to the Prime Minister responsible for Health.
Mr. Bruno Leingkone (MP) was appointed parliamentary secretary to the Prime Minister responsible for revenue initiatives.



- 27 December 2017
Mr. Christopher Emelee (MP) was appointed parliamentary secretary to the Prime Minister responsible for maritime affairs.
- 9 August 2018
Mr. Tom Noam (MP) was appointed parliamentary secretary to the Prime Minister responsible for climate change disaster relocation.

6. The following staff appointments were also made to serve under the following parliamentary secretaries.

- **Mr. Johnny Koanapo (MP)**
Senior Advisor
Technical Advisor
Assistant Senior Advisor
2nd Assistant Senior Advisor
Secretary Typist
Driver
Residence Cleaner
- **Mr. Jerome Ludvaone (MP)**
Senior Advisor
Technical Advisor
Assistant Senior Advisor
2nd Assistant Senior Advisor
Secretary Typist
Driver
Residence Cleaner
- **Mr. Tomker Netvunei (MP)**
Senior Advisor
Technical Advisor
Assistant Senior Advisor
2nd Assistant Senior Advisor
Secretary Typist
Driver
Residence Cleaner
- **Mr. Hosea Nevu (MP)**
Senior Advisor
Technical Advisor
Assistant Senior Advisor
2nd Assistant Senior Advisor



Secretary Typist
Driver
Residence Cleaner

- **Mr. Bruno Leingkone (MP)**

Senior Advisor
Technical Advisor
Assistant Senior Advisor
2nd Assistant Senior Advisor
Secretary Typist
Driver
Residence Cleaner

- **Mr. Christopher Emelee (MP)**

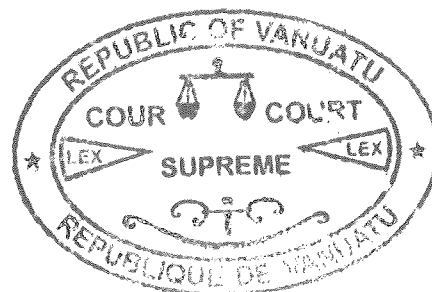
Senior Advisor
Technical Advisor
Assistant Senior Advisor
2nd Assistant Senior Advisor
Secretary Typist
Driver
Residence Cleaner

- **Mr. Silas Bule (MP)**

Senior Advisor
Technical Advisor
Assistant Senior Advisor
2nd Assistant Senior Advisor
Secretary Typist
Driver
Residence Cleaner

7. All the parliamentary secretaries signed contracts of employment and were paid salaries and benefits accorded under the Official Salaries Act. The advisors and staff appointed to serve the above parliamentary secretaries all signed contracts of employment and were paid salaries provided under the official salaries Act.

8. The advisors and support staff of the parliamentary secretaries are not parties to these proceedings.



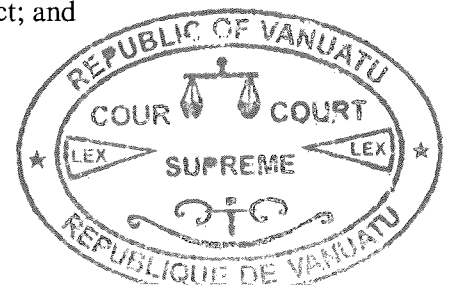
Applications

Constitutional Application

9. The constitutional application is made under article 6 (1) and (2) and article 53 (1) and (2). The applicants assert that by appointing parliamentary secretaries the respondents violated their rights under article 5 (1) d), e), j) and k); and articles 39, 40, 42 and 43 and 66 (1) d) of the Constitution.

Grounds

10. A number of grounds are highlighted in the constitutional application. These are summarized as follows. First the applicants say that the appointment of parliamentary secretaries is not provided for under the Constitution of the Republic of Vanuatu or under any law enacted by Parliament yet their salaries and benefits are being paid from public funds.
11. The applicants assert that parliamentary secretaries are paid additional salaries and benefits on top of their salaries as MPs simply to retain their support to the second respondent. By doing so the second respondent has increased the number of Ministers in Government which is limited by article 40 (2) to a quarter of the number of members of Parliament. And Executive power is also exercised by parliamentary secretaries contrary to article 39.
12. The applicants also assert that the actions of the second respondent in appointing parliamentary secretaries in such manner calls into question the integrity of Government as protected under article 66 (1) d).
13. The relief sought by applicants are:-
 - a) A DECLARATION that the appointments of the parliamentary secretaries by the second respondent violates their rights as guaranteed by article 5 (1) d) ,e) , j) and k) and articles 39 , 40, 41, 42 and 43;
 - b) A DECLARATION that the appointment of the third respondents and their political advisors is in breach of 39 (1) , 40 (2), 42 and 43 of the Constitution and infringes upon the applicants rights to expect integrity in Government and under article 5 (1) d) and k);
 - c) A FURTHER DECLARATION that the conduct and appointment of the second and third respondents and other political advisors violates article 66 (1) d);
 - d) AN ORDER that the conduct of the respondents infringes article 66 and violates the laws of appointment regulated under the Government Act; and



- e) AN ORDER requiring all the third respondents and their staff appointed as a result of their appointments as parliamentary secretaries to pay back to the Government any monies paid to them when occupying their positions as parliamentary secretaries and staff.

Application to strike out

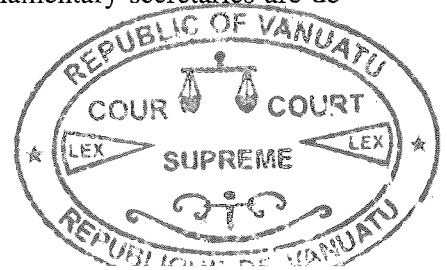
14. The third respondents in response to the constitutional application filed an application to strike out. The application is also supported by the first and second respondents.
15. In summary, the grounds of the application to strike out are that the applicants rights have not been infringed and they have come to this Court with unclean hands as their members have appointed parliamentary secretaries and some have been appointed parliamentary secretaries. They assert that parliamentary secretaries are not Ministers and do not attend Council of Ministers meetings.

Issues

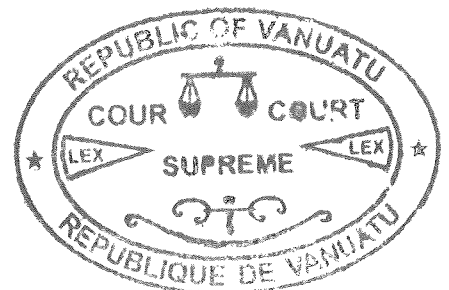
16. The following issues arise in these proceedings:-
- (a) Whether the applicants rights under article 5 (1) (d) (e) (j) and (k) of the Constitution have been infringed; and
- (b) Whether article 39, 40, 42, 43 and 66 (1) d) a provision of the Constitution has been infringed in relation to the applicants.

Submissions

17. The submissions made by the applicants in summary are that the Prime Minister and the Government are using the position of parliamentary secretaries to “buy” votes in defeating motions of no confidence and secondly that the appointments of members of parliament to parliamentary secretary positions is to maintain and increase the number of members on the Government side in Parliament thus allowing Parliament to be a mere rubber stamp for the Executive.
18. It was submitted that they have the standing to bring the proceedings and rely on what the Court of Appeal said in **Vohor v President of the Republic of Vanuatu** [2015] VUCA 40 and **Vanuaroroa v Republic of Vanuatu** [2013] VUCA 41.
19. The applicants submit that the position of parliamentary secretary is not established by any law yet holders of this office are paid a salary and other benefits from public funds. Furthermore, parliamentary secretaries make executive decisions contrary to article 39, 40 and 42 of the Constitution. It was submitted that parliamentary secretaries are de



- facto executive members and their appointment undermines the principle of separation of powers entrenched in the Constitution. The end result they submit is that the opposition in Parliament cannot play its role as a check and balance on Government actions therefore they have a special interest as members of parliament to challenge the appointments of parliamentary secretaries.
20. It was further submitted that appointing parliamentary secretaries without a proper basis violates article 66 (1) d) of the Constitution as it diminishes respect for and confidence in the integrity of Government. The remuneration and benefits they receive is in addition to their salaries as members of parliament.
 21. Regarding article 5 rights it was submitted that by appointing parliamentary secretaries without a proper basis infringes upon their rights to protection of the law and equal treatment. They submit that all members of Parliament are to be treated equally. In support of this submission they rely on Matadeen v Pointu (1999) 1 AC 97; Bohn v Republic of Vanuatu [2013] VUSC 42 and Thibaudeau v Canada (1995) 2 SCR 27.
 22. The first and second respondents on the other hand submit that the position of parliamentary secretary was approved by the Council of Ministers and added to the list of office holders under the Official Salaries Act. They submit that the applicants are not part of the Executive as executive power is only vested in the Prime Minister and the Council of Ministers. The appointments are made pursuant to an Executive decision therefore there is no infringement of article 39, 40, 42 and 43. It was submitted that the applicants do not have standing to bring the proceedings.
 23. In relation to article 5 rights it was submitted that these rights are accorded to individuals whereas the applicants are applying as members of parliament. It was submitted that the applicants lacked standing to apply to enforce those rights under article 6 of the Constitution.
 24. It was further submitted that parliamentary secretaries were appointed to assist the Prime Minister in carrying out his duties in implementing Government policies. They submit that the appointments do not diminish the integrity of Government and do not infringe article 66 (1) d) of the Constitution. They submit that the application must be struck out.
 25. For the third respondents it was submitted that the Constitution provides the legal framework to appoint parliamentary secretaries. Article 39 vests executive power of the people of the Republic of Vanuatu in the Prime Minister and the Council of Ministers. They are to exercise such power in accordance with the Constitution or a law. It was submitted that the position of parliamentary secretaries was established under the Official Salaries Act with the prior approval of the Council of Ministers following advice from the Attorney General.



26. As to infringements of article 5 rights the third respondents make the same submissions that the applicants are applying as members of parliament therefore they have no standing to bring proceedings under article 6. It was further submitted that the applicants have come to Court with unclean hands. Mr Sato Kilman was the Prime Minister who introduced the position of parliamentary secretary and Mr Gratia Shadrack was once appointed a parliamentary secretary. Mr Albert Williams, Mr Jotham Napat and Mr Gracia Shadrack all signed a memorandum of agreement regarding the formation of the Government on 19 February 2016 at Pele to continue the appointment of parliamentary secretaries and to increase the number of appointments.
27. It was also submitted that the third respondents will rely on the principle of de facto office applied in **Kilman v Natapei** [2011] VUCA 24 if the constitutional application is granted. The Court of Appeal in that case referred to its earlier decision in **Leymang v The Ombudsman** [1997] VUCA 10 which applied the principle of “*de facto office*” and said:-

" ... a well recognised rule of the common law that where a person has exercised powers and functions of a public office which involve the interests of the public and third persons, with colour of right, the exercise of those powers and functions is accorded validity even if there has been a defect or irregularity in the manner of the appointment of that person such that the appointment was not a valid one. This doctrine has been referred to as the doctrine of de facto office."

Law

28. The relevant provisions of the Constitution are set out below:-

“6. Enforcement of fundamental rights

(1) Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is 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.

....

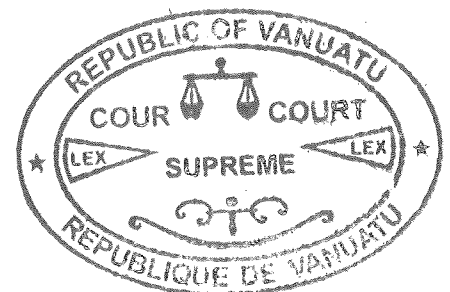
5. Fundamental rights and freedoms of the individual

(1) The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the 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;

(e) freedom from inhuman treatment and forced labour;



.....

(j) protection for the privacy of the home and other property and from unjust deprivation of property;

(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.

.....

53. Application to Supreme Court regarding infringements of Constitution

(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.

.....

39. Executive power

(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.

(2) The Prime Minister shall keep the President of the Republic fully informed concerning the general conduct of the government of the Republic.

(3) The President of the Republic may refer to the Supreme Court any regulation which he considers to be inconsistent with the Constitution.

40. Council of Ministers

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

(2) The number of Ministers, including the Prime Minister, shall not exceed a quarter of the number of members of Parliament.

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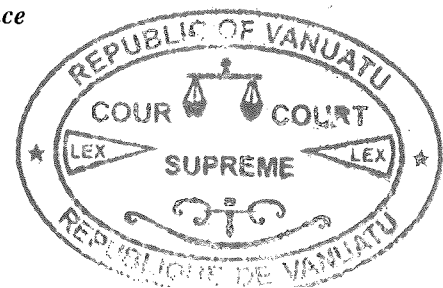
42. Appointment and removal of other Ministers

(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.

43. Collective responsibility of Ministers and votes of no confidence



(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.

.....

66. Conduct of leaders

(1) Any person defined as a leader in Article 67 has a duty to conduct himself in such a way, both in his public and private life, so as not to –

(a) place himself in a position in which he has or could have a conflict of interests or in which the fair exercise of his public or official duties might be compromised;

(b) demean his office or position;

(c) allow his integrity to be called into question; or

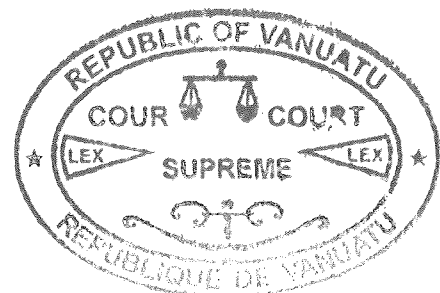
(d) endanger or diminish respect for and confidence in the integrity of the Government of the Republic of Vanuatu.”

Discussions

29. At the first conference hearing of this matter, orders were issued for the applicants to file and serve their written submissions by 26 April and the respondents to respond by 3 May. The applicant's submissions were only filed on the day of the hearing. Before the hearing begun, the respondents were asked whether they needed time to respond. Mr Tari and Mr Napuati informed the Court that they were happy to proceed as they had filed and served an application to strike out and will be relying on their submissions on the strike out application to respond to the applicants' submissions. They also informed the Court that there was no need for any cross examination as the facts are not in dispute.

30. At the outset, I need to inform the parties that when considering this matter, I am not concerned with the politics or political interests of either side. All I am concerned with is giving an answer to the issues arising in these proceedings.

31. The Republic of Vanuatu is a sovereign state. Its system of government is based on the Westminster parliamentary system. Its foundation is firmly established in the Constitution or 'Mama law'. All laws and Acts of Parliament are subject to the Constitution and no other law applies over or above the Constitution.



32. This is a constitutional application. The requirements for complaints about infringements of rights or provisions of the Constitution are quite specific as provided under article 6 (1) and (2) and article 53 (1) and (2).

Standing

33. At the first conference hearing the respondents took no issue with the standing of the applicants to bring these proceedings.

34. The gist of the applicant's complaint is the action of the second respondent to appoint the third respondents who are also members of parliament as parliamentary secretaries. They do have a sufficient and legitimate interest to bring these proceedings. (see **Vohor v the President** [2015] VUCA 40 and **Mass v Government of the Republic of Vanuatu** [2018] VUCA 11).

Issue 1: Whether article 5 1) (d) (e) (j) and (k) have been infringed

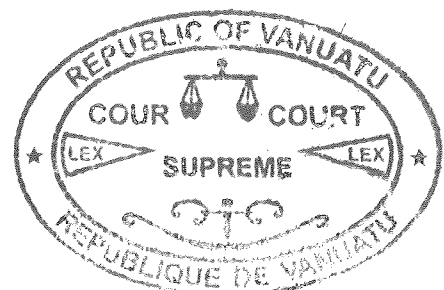
35. Article 5 provides for the fundamental rights and freedoms of the individual. Article 6 provides the mechanism to enforce those rights. Under article 6 (1) "*Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right*". The actions complained of are the appointment of the third respondents as parliamentary secretaries by the Prime Minister.

36. To succeed, each applicant individually must demonstrate by his evidence that his right guaranteed to him by the Constitution has been, is being, or is likely to be infringed by the appointment of parliamentary secretaries. There is no evidence before me to that effect.

37. The only evidence filed which the applicants rely on are the evidence of Mr. Kalsakau, Mr. Napat and Mr. Shadrack. The evidence does not demonstrate how each of them is affected by the infringement alleged.

38. The other applicants have not filed any evidence to say how their rights as alleged have been infringed.

39. In their application the applicants say that they are duly elected members of parliament. As individuals they have not demonstrated that their right to protection of the law, freedom from inhuman treatment, protection of their property and equal treatment under the law has been infringed by the Prime Minister appointing the third respondents as parliamentary secretaries.



40. In answer to the first issue there is no infringement to the applicants rights under article 5(1), (d), (e), (j) and (k).

Issue 2: Whether article 39, 40, 42, 43 and 66 (1) d) have been infringed

41. Article 53 (1) provides that “*anyone who considers that a provision of the Constitution has been infringed in relation to him*” may apply to the Supreme Court for redress.

42. The applicants as members of parliament assert that article 39, 40, 42, 43 and 66 (1) d) has been infringed in relation to them by the Prime Minister appointing the third respondents as parliamentary secretaries.

43. The position of parliamentary secretary was first introduced in 2013 when the then Prime Minister sought advice from the State Law Office on its legality in light of s25 of the Leadership Code Act [CAP 168] which provides:-

“25. Leader not to hold any other public office or position

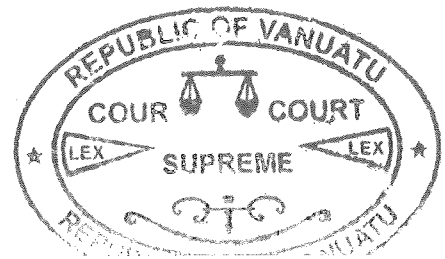
A leader must not hold any other public office or position for which he or she receives a salary, payment or other benefit of any kind, whether financial or otherwise, from the government or a statutory body, if that other office or position conflicts with or interferes in any way with the ability of the leader to fulfil his or her principal tasks and duties as a leader.”

44. The advice from the State Law Office was to the effect that if a member of parliament holds such office and it does not affect his ability to fulfil his principal tasks and duties as a member then it was open for the Prime Minister to appoint the member of parliament to the position of parliamentary secretary to the Prime Minister.

45. Since then a series of amendments have been made to vary the schedule to the Official Salaries Act by adding positions of parliamentary secretaries. Section 3 of the official salaries Act requires that “*the Prime Minister may with the prior approval of the council of ministers by order (a) add to vary or replace the schedule...*”. As of 19 February 2016 onwards, the second respondent as Prime Minister appointed the third respondents parliamentary secretaries under contracts of employment with a salary and benefits. Seven of them had advisors and support staff appointed as well.

46. The long title to the official salaries Act states that it is an Act “*to provide for salaries and other benefits payable to holders of certain offices*”. The offices listed in Part 1 of the schedule to the Act are established either under the Constitution or by an Act of Parliament.

47. It was submitted that the office of parliamentary secretary, is not established under the Constitution or any Act of Parliament. And using public funds to pay for the salaries

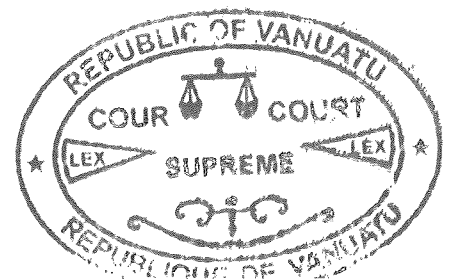


and benefits of parliamentary secretaries is a violation of article 25 of the Constitution which prohibits expenditure of public funds except as provided by law.

48. Furthermore, the applicants submit that the actions of the second and third respondents has endangered or diminished respect for and confidence in the integrity of the Government of the Republic of Vanuatu contrary to article 66 (1) d).
49. The applicants submit that parliamentary secretaries, exercise executive power which is only vested in the Prime Minister and council of ministers under article 39. And that they conduct the business of Government contrary to article 42 which is the role of Ministers appointed by the Prime Ministers.
50. Secondly, that these appointments have increased the number of ministers contrary to article 40 (2) which limits the number of ministers to a quarter of the number of members of parliament.
51. It was further submitted that by appointing the third respondents as parliamentary secretaries, Parliament becomes a rubber stamp for the Executive contrary to article 43, and is unable to hold the Executive responsible for its actions.
52. It is quite obvious from the evidence before me that the third respondents have not been appointed Ministers by the Prime Minister. As parliamentary secretaries they are not part of the Council of Ministers. Executive power is only vested in the Prime Minister and the Council of Minister as provided under article 39. They are the ones collectively responsible to Parliament pursuant to article 43. The number of Ministers has not exceeded a quarter of the number of the members of parliament as provided under article 40 (2).
53. In Attorney General v Kalpokas [1999] VUCA 4 the Court of Appeal dealt with the question of validity of positions under the Official Salaries Act where such positions are not established separately by law. They said: -

“This brings us to the critical issue raised by the appellants: where is the source of authority which permits the Prime Minister on behalf of the Government to appoint the respondents to the offices recognized in the Schedule to the Official Salaries Act?”

The appellants contended that the Official Salaries Act provides the machinery provisions which enable payment of salaries and other benefits to holders of the offices stated in the Schedule, but provides no express authority for anyone to make the initial appointment to those posts. By its terms the Official Salaries Act does not purport to grant such an authority to anyone. It is therefore necessary, as the appellants contend, to identify the source of authority of the appointment elsewhere. The appellants contend that no such authority can be identified, therefore the appointments which the Prime Minister purported to make must be invalid.



We are unable to accept that argument. The Official Salaries Act, by recognizing the particular offices stated in the Schedule also recognizes that people lawfully may be appointed to those posts. The Act recognizes that elsewhere legal authority does exist for the appointments. In a case of the important office holders at the head of the list, a source of authority is readily identified. For example the appointment of Prime Minister is provided for by Art. 41 of the Constitution. The appointment of other Ministers is provided for in Art.42. The appointment of Speaker and Deputy Speaker is provided for in Art.22. The appointment of Judges is provided for in Articles 47 and 49. These are appointments to specific statutory offices. The respondents however do not hold offices of that kind, but are merely "political appointees". As such, their functions are to assist in the day to day operations of particular ministries. The executive power of Government is, by Art. 39 of the Constitution, vested in the Prime Minister and Council of Ministers. In our opinion, the appointment of the respondents as political appointees was an exercise of executive power.

Art. 39(1) requires that the executive power "shall be exercised as provided by the Constitution or a law".

The Official Salaries Act recognizes that there will be appointments to the offices described in the Schedule. No other source of authority, apart from Art.39, exist for making those appointments which are, as we have observed, are to assist the two performances of the administrative functions of Government. Absent any other authority, we consider an exercise of the executive power under Art.39 is as provided by a law, namely the Official Salaries Act.

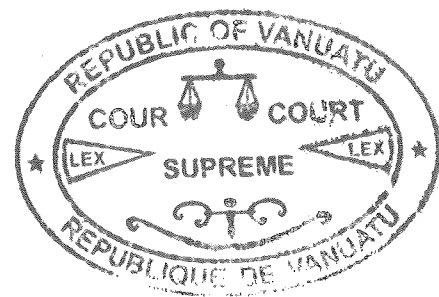
To take any different view, would be to obstruct the ministries in the performance of their executive functions, and be contrary to the obvious intention of the Official Salaries Act.

In our opinion were lawfully appointed to the offices held by them, and accordingly their terms and conditions of appointment were those set out in the letters of appointment which constitute the relevant contracts between the Government and the respondents. Those terms and conditions are more favourable to the respondents than similar conditions which would otherwise apply under the Employment Act.

In our opinion the respondents the argument that the contracts of appointment are invalid or unenforceable because they fetter an executive power to hire and fire staff at will is without substance. Even if there is such a power in the Republic of Vanuatu (a question on which we express no view) the contracts in this case do not constitute such a fetter. The contracts permitted the engagement of the respondents to be terminated at any time. The Government on behalf of the Republic undoubtedly has power to enter into contracts, including employment contracts."

(emphasis added)

54. The third respondents as parliamentary secretaries, in my view, fall within the same category as the political appointees in the above case. Their salary and benefits are set out in the Official Salaries Act but the position is not established separately.



55. The second respondent as Prime Minister at paragraphs 7 , 8, 9 ,10 , 11, 12 and 13 of his sworn statement states that:-

“ 7. ...subsequent to the establishment of the office of parliamentary secretary by Order 5 of 2013 , there are various other orders that were made by the Prime Minister with the approval of the Council of Ministers adding to varying and /or replacing the schedule of the OSA in relation to the position of parliamentary secretary.....

8. I can also confirm that the appointments of persons to the office of parliamentary secretary are made by way of an employment contract with the second respondent and as such it does not require an oath similar to an oath taken by a Minister of State before the Attorney General.

9.I can confirm that sub article 39 (1) of the Constitution ,sub section 4 2) of the Government Act, paragraphs 3 1) (a) of the Official Salaries Act and Order 5 of 2013 paved the way for the second respondent with the approval of the Council of Ministers to establish the office of the parliamentary secretary .

10. I can confirm that the third respondents are currently serving or at one time served in the position of parliamentary secretary

11. I can confirm that the employment of the support staff to the parliamentary secretary are also provided for by way of the orders made by the Prime Minister with the approval of the Council of Ministers .

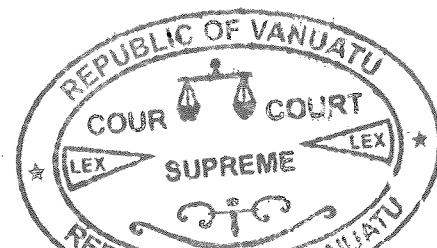
12. I can also confirm that these support staff entered into an employment contract with the second respondent.

13. I can confirm that the position of parliamentary secretary was necessary to implement the policies of the Government as contained in their respective responsibilities and duties annexed to their employment contracts”

56. The third respondents state in each of their sworn statements that they were appointed parliamentary secretary and signed employment agreements with the second respondent. They also state that at no time did they take an oath as a Minister.

57. The appointment of parliamentary secretaries was therefore an exercise of executive power pursuant to article 39 (1) of the Constitution. The position was added to the Official Salaries Act by the Prime Minister with the prior approval of the Council of Ministers. The Government has the powers to enter into employment contracts as it did with the third respondents. Termination clauses in these contracts stipulate that they can be terminated at any time.

58. The appointment of parliamentary secretaries in my view was therefore validly made. The next question is was article 39, 40, 42, 43 and article 66 (1) d) infringed in relation to the applicants. The answer must be in the negative. Their rights and privileges as



members of parliament are not affected in any way by the appointment of the third respondents as parliamentary secretaries.

59. In **Republic of Vanuatu v Bohn** [2008] VUCA 6 the Court of appeal said:-

“The Constitution of this country makes clear that the right to advance a Constitutional Application is complementary to other processes. It would seriously diminish its value if it were used in a routine or frivolous way. It is better seen as the safety net or back stop where other processes are not reasonably available.”

(emphasis added)

60. If the applicants are serious that the Government is using the position of parliamentary secretaries to buy votes, or to bribe individuals to defeat motions of no confidence there are other processes provided by law readily available for that.

61. The fact that the applicants are now complaining about the appointment of parliamentary secretaries when some of them initiated the original amendments to the official Salaries Act and appointed the first parliamentary secretaries does not help their cause.

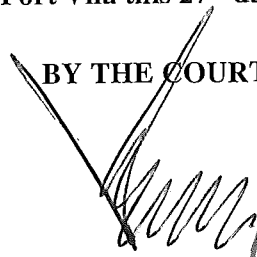
Result

62. The constitutional application is dismissed and is hereby struck out.

63. The respondents are entitled to costs to be agreed or taxed.

DATED at Port Vila this 27th day of May, 2019

BY THE COURT



D. Aru
Judge

