

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

**Constitutional  
Case No. 21/3284 SC/CNST**

**BETWEEN: THE OMBUDSMAN OF THE  
REPUBLIC OF VANUATU**  
Applicant

**AND: OFFICE OF THE HEAD OF STATE,  
State House, Port Vila.**  
First Respondent

**AND: PETER BONG**  
Second Respondent

**AND: THE REPUBLIC OF VANUATU**  
Interested Party

**Date of First Conference  
Hearing:**

**12 October 2021**

**Before:**

**Chief Justice Lunabek**

**In Attendance:**

**Mr Eric Sciba and Mr Gregory Takau for the Ombudsman  
Mr Garry Blake for the President of the Republic  
Mrs Florence W. Samuel for the Republic of Vanuatu**

**Date of Decision:**

**12 October 2021**

**Date of Publication of  
Reasons:**

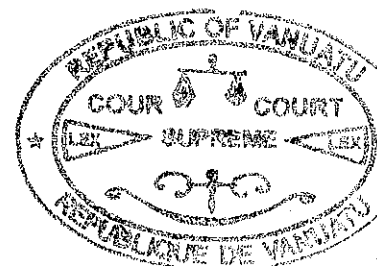
**4 November 2021**

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**JUDGMENT STRIKING OUT THE CONSTITUTIONAL  
APPLICATION FILED 04 OCTOBER 2021**

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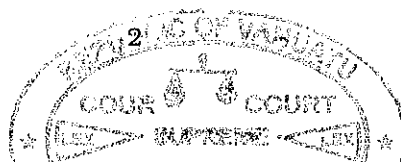
1. On 31<sup>st</sup> August 2021, the President of the Republic of Vanuatu, His Excellency Obed Moses Tallis Tamar Ne had issued a pardon instrument entitled "*Pardon of Convictions – Order No. ... of 2021*" pardoning the following persons convicted of offences against the laws of Vanuatu:
  - (a) Joe Natuman; and
  - (b) Serge Vohor; and
  - (c) Charlot Salwai Tabimasmās.
2. The said pardon order commenced on the day it is made (31 August 2021).
3. The Pardon (Order No. ... of 2021) is made in exercise of the powers conferred on the President of the Republic by Article 38 of the Constitution.
4. The Ombudsman of the Republic of Vanuatu filed an urgent constitutional application on 04 October 2021 challenging the lawfulness of the Presidential Pardon (Order No. ... of 2021) and



seeks, among other orders, declaration that Order No. 38 of 2021 pardoning Mr Joe Natuman, Mr Serge Vohor and Mr Charlot Salwai Tabimasmas was made contrary to the Constitution and therefore is unconstitutional.

5. This Urgent Constitutional Application is supported by two (2) sworn statements of Hamlison Bulu filed respectively on 4 October 2021 and 6 October 2021; and other additional sworn statements of urgency filed in support of the urgent hearing of the Constitutional application filed 04 October 2021. These are:
  - sworn statement of Hamlison Bulu filed 04 October 2021;
  - sworn statement of one Darval Simon filed 04 October 2021;
  - sworn statement of one Yan Dapang filed 04 October 2021;
6. The Urgent Constitutional case filed 04 October 2021 is listed for first conference pursuant to Rule 2.8 of the Constitutional Procedure Rules 2003 (*"the Rules"*) on 12 October 2021 at 9:00am o'clock.
7. Before I consider any matter and any process set under rule 2.8(a) to (g) of the Rules, I enquire into the matters raised by the Constitutional Application as required by Rule 2.7 of the Rules.
8. I begin my enquiry asking Counsel for Ombudsman about the urgency of the said Constitutional Application. I was informed then that there is no longer urgency in the application. He has made an application to amend the application.
9. I ask Counsel to explain to me whether the application is made pursuant to Article 6 or 53(1) or both of the Constitution. I am informed that it was made under Article 53(1) of the Constitution. Article 53(1) provides:

*"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."*
10. I ask what are the rights for which the Ombudsman sought redress and the article of the Constitution that confers these rights or sets out these provisions.
11. I am informed by counsel for the Ombudsman that the Ombudsman is making this application pertaining to breaches of the Constitution affecting him as the duly appointed Ombudsman pursuant to Article 61 of the Constitution.
12. Further it is said also that the Ombudsman has a Constitutional mandate to ensure there is good governance in the administration of the government, Section 10 and 11(1)(b) of the Ombudsman Act [CAP. 252].
13. At the outset the above paragraph referring to Sections 10 and 11(1)(b) of the Ombudsman Act is struck out. It is the Constitution (as the supreme law) and a provision of that Constitution that

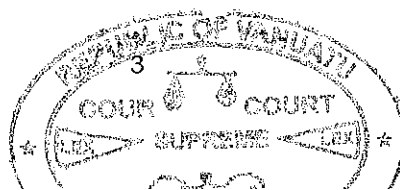


a constitutional application is concerned with, not an ordinary enactment of Parliament (an Act) or a provision of an enactment of Parliament.

14. This was put aside, so I enquire further into the application and read the so called Urgent Constitutional Application, I then sense that what the Ombudsman alleged in essence is that Article 38 of the Constitution was breached by the President of Vanuatu when he issued an Order pardoning the convictions of Joe Natuman, Serge Vohor and Charlot Salwai Tabimasmas on 31 August 2021.
15. I continue with my enquiry and I ask Counsel for the Ombudsman how or to show me the way the exercise of the power of pardon by the President under Article 38 affected the Ombudsman appointment under Article 61 of the Constitution or the functions of the Ombudsman under the Constitution.
16. The purpose of my enquiry is to be satisfied there is a cause of action that is founded in the Constitution. That is the purpose of my enquiry at the First Conference on 12 October 2021 after I first perused the application and the sworn statements filed in support.

### **Short Discussions**

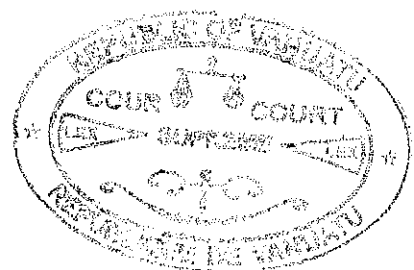
17. Article 61 of the Constitution provides for the appointment of an Ombudsman. Not more not less than that.
18. It is difficult to see how the exercise of the power of pardon under Article 38 of the Constitution affects the appointment of the Ombudsman under Article 61 or the function of the Ombudsman under the Constitution.
19. It is noted that the Ombudsman is appointed under Article 61 to:
  - Enquire into the conduct of any person or body to which Article 62 applies;
  - Make findings, after due enquiry; and
  - Make reports of his findings.
20. Article 62 shall apply to all public servants, public authorities and ministerial departments, **with the exception of the President of the Republic, the Judicial Service Commission, the Supreme Court and other judicial bodies; [see Virelala v Ombudsman [1997] VUSC 35; Civil Case 004 of 1997 (22 September 1997)] (Emphasis added).**
21. Article 38 provides: "*The President of the Republic may pardon, commute or reduce a sentence imposed on a person convicted of an offence. Parliament may provide for a committee to advise the President in the exercise of this function*".
22. It is clear that the President has the power to grant pardon in respect of criminal convictions, and may commute or reduce the sentences imposed pursuant to Article 38.



23. The Court of Appeal also in **Sope v Republic of Vanuatu [2004] VUCA 20; Civil Appeal case 15 of 2004 (5 November 2004)** stated that Article 38 (of the Constitution) provides a power in two ways for the President. First, he may pardon a person convicted of an offence. Secondly, he can commute or reduce a sentence imposed on the person convicted of an offence.
24. In this case, the pardon operates from 31 August 2021 when it was granted. From that time forward the consequences of the conviction and sentences, including disqualification, are removed (see also the decision of the Court of Appeal in **Sope v Speaker of Parliament [2003] VUCA 5; Civil Appeal Case 04 of 2003 (9 May 2003) on the effect of pardon.**
25. It is noted that the President has complete discretion to exercise the power of pardon under Article 38, and this whether or not Parliament provides a committee, to advise the President in the exercise of his functions (under Article 38). In fairness to the President, he was not provided with the assistance of the Committee which Article 38 contemplated should be established on 31 August 2021 when he exercised his powers under Article 38 of the Constitution.
26. As Pardon or prerogative of mercy lies solely within the discretion of the President, such decisions including the pardon order made on 31 August 2021 in almost every instance, are not amenable to judicial review.
27. The whole purpose of Article 38 was to allow the President to grant mercy to persons convicted, and that is what the President did on 31 August 2021.
28. The power of pardon or prerogative of mercy is not the subject of legal rights. It begins where the legal rights end. It is outside the judicial process.
29. The grant of pardon may properly be made as an act of clemency on a national anniversary, or as a gesture of reconciliation to a section of society, or because of the ill-health of a convicted person or of great hardship suffered by that person's family.
30. It is not correct to say that the President has infringed the right of one citizen by granting a pardon to another. It is not right to say that in the exercise of the power of pardon the President is obliged to treat all persons equally. It is within the President's discretion to grant, a pardon in one case and not in another if on the consideration to the matter, he considered that to be an appropriate course. A comparison of the nature of offences for which two offenders were convicted is by itself not decisive.
31. The decision in **Attorney General v President of the Republic of Vanuatu [1994] VUSC 2** spells out these principles referred to above.

### Decision


32. Based on the above, the Court makes the following decision:



- (1) The application to further amend the Urgent Constitutional Application filed 6 October 2021 is refused;
- (2) The application to add Willie Jimmy as an Interested Party is refused;
- (3) The Ombudsman has no standing to seek the orders and declaration he sought in the Urgent Constitutional Application;
- (4) The Urgent Constitutional Application filed on 4 October 2021 does not disclose a cause of action that is founded on the Constitution;
- (5) The Urgent Constitutional Application filed on 4 October 2021 is accordingly struck out;
- (6) There is no orders as to costs.

**DATED at Port Vila this 12<sup>th</sup> day of October, 2021**

**BY THE COURT**

  
.....  
**Vincent Lunabek**  
**Chief Justice**

