

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

**Constitutional
Case No. 24/1431 SC/CNST**

BETWEEN: JOSHUA TAFURA KALSAKAU, SEULE KALO,
IARIS NAUNUN, JIMMY NAMPAS, NORBERT
SUMSUM and ALEX STEPHEN
Applicants

AND: THE REPUBLIC OF VANUATU
Respondent

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

**Constitutional
Case No. 24/1231 SC/CNST**

BETWEEN: MASSAMULE THUHA JEAN LUC
VIREMAURI ROLLAND ASSIAL
VIRELIVUSIDALIURE JOSEPH MAURI
GARAEGESA
MOLIAUTE JONAH TOA KANASE
Applicants

AND: THE REPUBLIC OF VANUATU
Respondent

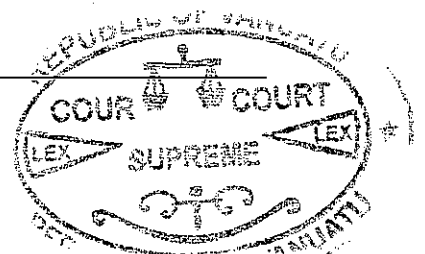
Date of Hearing: 24 May 2024

Before: Hon. Chief Justice Lunabek

In Attendance: Mr S. C. Hakwa for the Applicants in Constitutional Case No. 1431 of 2024
The Applicants self-represented in Constitutional Case No. 1231 of 2024
Mr Kiel A. Loughman, Attorney General and Mrs Florence W. Samuel for the
Respondent in both constitutional cases

Date of Judgment: 25 May 2024

REASONS FOR JUDGMENT



Introduction

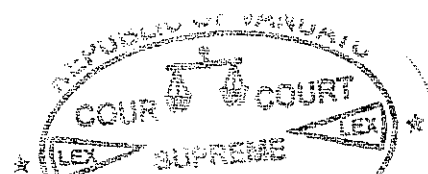
1. Before the court are two Constitutional Applications (Constitutional Case No. 1231 of 2024 and Constitutional Case No. 1431 of 2024). They are listed and heard together by this Court as they raise the same or similar issues before the Court.

I. Constitutional Case No. 1231 of 2024

2. The Applicants, in the Constitutional Case No. 1231 of 2024, filed their application on 22 April 2023 pursuant to Articles 6(2) and 53(2) of the Constitution seeking for the following relief:
 - (i) That Article 17A and 17B referred to as (“the proposed Constitutional Amendments”) proposed to be inserted as amendments to Article 17 of the Vanuatu Constitution through the Referendum scheduled on May 29, 2024, are deemed unconstitutional;
 - (ii) That the Court declares that the proposed amendments are in conflict with Article 5(1)(c), (d), (g), (h) and (i) of the Constitution which are enshrined in the Universal Declaration of Human Rights, and that any amendment to the Constitution should serve to protect the rights of the individual;
 - (iii) That the Court declares that the proposed amendments contain too much details to be incorporated into a Constitution, and they should have been included in a separate legislation specifically addressing the intricacies of the government system;
 - (iv) That the Court declares that the timeframe set for the referendum is insufficient, and an extended period for public debate and consultation is necessary to ensure thorough consideration of the Referendum;
 - (v) That the Respondent pays the costs of this Application.

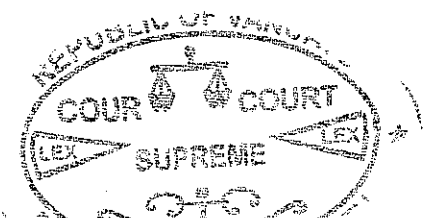
II. Grounds of Constitutional Case No. 1231 of 2024

3. The Applicants, in Constitutional Case No. 1231 of 2024, advance their application on the following grounds:
 - (i) The Constitution of Vanuatu is the Supreme law of the Republic of Vanuatu;
 - (ii) The Constitution asserts Vanuatu to be a “Sovereign democratic state”, with sovereignty vested in “the people of Vanuatu which they exercise through their



elected representatives". The Constitution enumerates certain "fundamental rights and freedoms of the individual", establishes a basic citizenship law, establishes and regulates the country's major political, judicial, and cultural institutions;

- (iii) The proposed constitutional amendment by Parliament in Articles 17A and 17B of the Constitution through the Referendum is to be a solution to the crossing of floor activities of the members of Parliament. However, any modification to the Constitution should aim, among other things, to safeguard the rights of the individual. The proposed constitutional amendments is in breach of Article 5(1)(c), (d), (g), (h) and (i) of the Constitution which are enshrined in the international bill of rights;
- (iv) The proposed constitutional amendments through Articles 17A and 17B of the Constitution cannot offer a remedy for any flaws in the existing political and legal systems or any deficiencies in the government's structure;
- (v) The proposed constitutional amendments contain too much details to be incorporated into a constitution which typically outlines broad principles. They should have included in a separate legislation addressing the intricacies of the governmental system;
- (vi) The proposed constitutional amendments are poorly drafted;
- (vii) The timeframe set for the referendum is insufficient. An extended period for public debate and consultation is necessary. The issues at stake involve competing interests and complexities that may be challenging for the general public to grasp. Considering the geographic spread of the islands and the costly and time-consuming nature of reaching all communities, a grace period of 2 or 3 years would be more appropriate to ensure thorough consideration of the Referendum;
- (viii) The proposed constitutional amendments will worsen the country's instability and may not accomplish the intended goal of political stability. They could potentially inflict more harm on the political climate of Vanuatu;
- (ix) The proposed constitutional amendments fail to adhere to principles of democracy;
- (x) If the proposed constitutional amendments are implemented, they will prevent members of parliament to exercise their freedom to vote for motions of no-confidence;
- (xi) The proposed constitutional amendments are underestimating the resilience of Vanuatu's entrenched political culture. Other Pacific nations (such as Samoa, Kiribati, Tuvalu, Nauru, Papua New Guinea and Solomon Islands) have taken the same path and have not been declared successful;



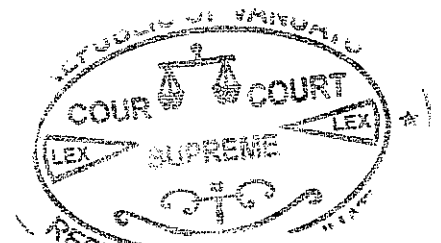
- (xii) Identifying the root cause of the issue is crucial, it extends beyond mere floor-crossing or party-switching. It is the thirst of power. Proposing constitutional changes to curb this appetite resemble in constraining members of Parliament (leaders), hindering them from utilizing their capabilities and opportunities to tailor solutions to Vanuatu's unique circumstances. Vanuatu should be able to propose a home-grown solution or indigenous remedy to its existing political instability.
4. Each of the four (4) applicants in Constitutional Case No. 1231 filed a sworn statement on 22 April 2024 in support of their constitutional application.

III. Response to Constitutional Case No. 1231 of 2024

5. The Respondent answers to the grounds of the Constitutional Case No. 1231 of 2024 as follows:
- (a) In response to ground (i) of the Application, the Respondent says Article 2 of the Constitution states that the Constitution is the Supreme Law of the Republic of Vanuatu;
- (b) In response to ground (ii), except that the respondent says Article 1 of the Constitution states that the Republic of Vanuatu is a sovereign democratic state and article 5 of the Constitution provides for the fundamental rights and freedoms, the respondent deny each and every allegation in ground (ii);
- (c) As to ground (iii) of the Application, the respondent says Parliament in the exercise of its law-making powers under Article 16 of the Constitution, passed the Eighth Constitutional Amendment (hereinafter the amendments) on 12 December 2023 which constitutional amendment shall not come into effect unless it has been supported in a national referendum in compliance with Article 86 of the Constitution. Otherwise, the respondent denies each and every allegation in ground (iii) of the Application;
- (d) In response to ground (iv) of the Application, the respondent says as follows:
- (i) The constitutional amendment does not contradicts Article 5(1)(c), (d), (g), (h) and (i) of the Constitution;
- (ii) The constitutional amendment, pursuant to Article 86 of the Constitution, unless supported by a national referendum, has not yet come into effect and therefore any alleged breach of rights has not occurred;



- (iii) The constitutional amendment is in regards to the parliamentary system in particular the rights of the members of Parliament. The constitutional amendment does not affect the rights of any person other than members of parliament;
 - (iv) Given that the constitutional amendment relates to the Parliamentary system, especially the members of parliament, the applicants lack the standing to bring this matter to court.
- (e) In response to ground (v), (vi) and (vii) of the Application, the respondent repeat their response in paragraph (iv) above. The respondent says the applicants contradict themselves in ground (vi) of their Application;
 - (f) As to ground (viii) of the Application, the respondent says that whilst Article 86 of the Constitution regarding a national referendum needed to be complied with, the issue of timing for the conduct of referendum is irrelevant in the consideration of a constitutional challenge such as this. Otherwise, the respondent denies the same;
 - (g) The respondent denies the allegations contained in ground (ix) of the Application and repeat their reply in paragraph 4 above;
 - (h) The respondent denies the allegation in ground (x) of the application and says under Article 1 of the Constitution, the Republic of Vanuatu is a sovereign democratic State. The respondents repeat their reply in paragraph 4 above;
 - (i) As to ground (xi) of the Application, the respondent repeats their reply in paragraph 4 above. Again, the respondent says the applicants are not members of parliament to allege a breach of the rights;
 - (j) As to ground (xii) and (xiii) the respondent says these are irrelevant matters put before the Court resulting in a wastage of the Court's time. The respondent denies ground (xii) and (xiii) of the application and repeats its reply in paragraph 4 above;
 - (k) The respondent denies each and every allegation in ground (xiv) of the application and repeat tis response in paragraph 4 above. The respondent says the applicants lack the standing to commence this proceeding. In any event unless and until the constitutional amendment are supported by a national referendum pursuant to Article 86 of the Constitution, the said constitutional amendments have not yet taken effect and any such proceeding prior to a national referendum is pre-mature;
 - (l) The respondent says this constitutional case should and must be dismissed in its entirety with costs;



- (m) The respondent filed sworn statements in support of the responses in both constitutional cases. The sworn statements will be referred to later.

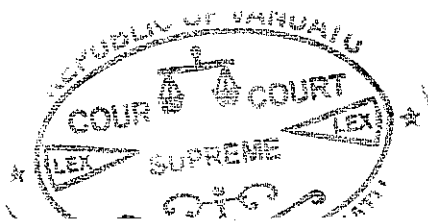
IV. Constitutional Case No. 1431 of 2024

6. Mr Hakwa on behalf of the Applicants, in the Constitutional Case No. 1431 of 2024, filed the constitutional application on 8 May 2024 pursuant to Articles 6(2) and 53(2) of the Constitution and seek for the following relief:
- (a) A declaration that the Political Parties Registration Act No. 15 of 2023 is unconstitutional;
 - (b) A declaration that the Constitution (Eighth) (Amendment) Act No. 21 of 2023 is unconstitutional;
 - (c) An order to restrain the Electoral Commission from organizing a National Referendum pursuant to the Referendum Act No. 04 of 2004 as amended from time to time for the purposes of the Constitution (Eighth) (Amendment) Act No. 21 of 2023;
 - (d) An order that the Respondent pay the Applicants' costs of and/or incidental to this Application; and
 - (e) Such other or further orders as this Court shall consider just upon the grounds contained in the Application.

V. Grounds of Constitutional Case No. 1431 of 2024

7. The Applicants, in Constitutional Case No. 1431 of 2024, advance their application on the various grounds contained in the application. They are summarized in four (4) main grounds as follows:
- (a) **Breach of the Applicants' fundamental rights and freedoms;**

In this case, the Applicants say the Republic of Vanuatu has acted in contravention or in breach of their fundamental rights or freedoms which the Republic of Vanuatu has guaranteed them under Article 5(1) of the Constitution and in particular paragraphs (b), (f), (g) and (h) thereof as a consequence of the enactment by Parliament of the Constitution (Eighth) (Amendment) Act No. 21 of 2023;
 - (b) **Breach of other rights or freedoms other than fundamental rights or freedoms**



They say the Republic of Vanuatu has acted in contravention or breach of their other rights or freedoms which the Republic of Vanuatu has guaranteed them under Articles 4, 17 and 54 of the Constitution as a consequence of the enactment by Parliament of the Political Parties Registration Act No. 15 of 2023;

(c) The proposed national referendum which the Electoral Commission (hereinafter referred to as “the Commission”) has fixed for 29 May 2024

They say even if Act 15/23 and Act 21/23 are valid and in full compliance with the Constitution their rights which Article 86 of the Constitution guarantees them have been breached or are likely to be breached if the Commission conducts or organises the proposed national referendum in the manner or circumstances in which it is currently purporting to do;

(d) The conduct of the President of the Republic of Vanuatu

They say the wrongful Assent which the President of the Republic of Vanuatu has provided to Act 21/23 on 29 December 2023 has tainted Act 21/23 with illegality thereby wrongfully depriving them from exercising their right which Article 86 of the Constitution guarantees them.

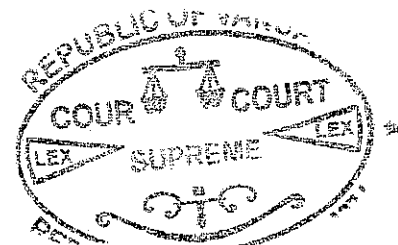
8. In this constitutional case, the Applicants filed the following sworn statements:

- (a) Joshua Tafura Kalsakau filed two sworn statements on 8 and 13 May 2024;
- (b) Iaris Nangun filed a sworn statement on 13 May 2024;
- (c) Norbert Sumsum filed a sworn statement on 13 May 2024; and
- (d) Alex Stephen filed a sworn statement on 13 May 2024.

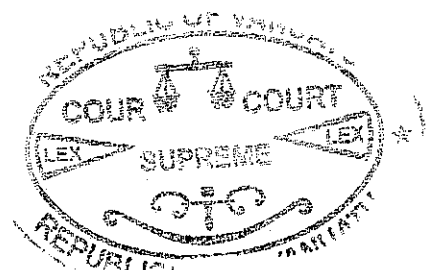
VI. Response to Constitutional Case No. 1431 of 2024

9. The Respondent answers to the grounds of this Constitutional Case No. 1431 as follows:

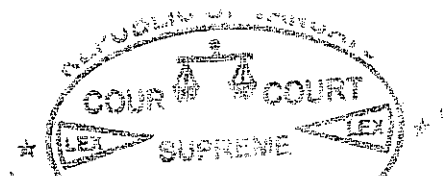
- (a) The Respondent does not plead to grounds 2 to 6;
- (b) Safe that the fundamental rights and freedoms are recognized and guaranteed under Article 5(1), and the terms and effect of the provisions of Articles 4,6,17,53 and 54 of the Constitution, it does not plead to grounds 4, 5 and 6;
- (c) As to grounds 7 and 8:



- (i) The Respondent says that on 12 December 2023, Parliament in the exercise of its law-making powers under Article 16 of the Constitution, passed the Constitution (Eighth) amendment Act No. 21 of 2023 (the "Constitution amendment") and which amendment shall not come into effect unless it has been supported in a national referendum in compliance with Article 86 of the Constitution;
 - (ii) It says the Constitutional amendment does not breach Articles, 5(1), 4, 6, 17, 53 and 54 of the Constitution;
 - (iii) It says pursuant to Article 86 of the Constitution amendment unless the constitutional amendment is supported by a national referendum, the said amendment shall not come into effect and therefore any alleged breach of constitutional rights has not occurred and so, any claims arising thereof is premature;
 - (iv) The Constitution amendment is in regards to the Parliamentary system in particular the rights of the members of Parliament. The Constitutional amendment does not affect the rights of any person other than members of Parliament;
 - (v) It says on the basis of Paragraph 3(d) above, the applicants lack the standing to bring this matter to Court; and otherwise, it denies each and every allegation contained therein.
- (d) As to ground 9, it says the Preamble of the Constitution speaks for itself and will rely on it for its terms and effect;
 - (e) The provisions contained in Articles, 1, 2, 4, 5, 6, 15, 16, 17, 20, 21, 22, 27, 39, 43, 54, 84, 85, and 86 as pleaded in grounds 10 to 28 speak for themselves and the respondent will rely on them for their full terms and effect;
 - (f) The provisions of section 13 of the Parliament Act [CAP 116] as pleaded in paragraph 29 speaks for itself and the respondent will rely on the provisions for its full terms and effect;
 - (g) In response to paragraphs 30 to 40:
 - (i) It says that article 85 of the Constitution provides for the procedures for passing Constitutional amendments and which is followed during a special sitting of Parliament;



- (ii) It says pursuant to article 84 of the Constitution, the Prime Minister introduced the Constitutional amendment;
- (iii) It says the Constitutional Amendment and including the explanatory note speaks for itself;
- (iv) It admits that at its 7th Extraordinary Session in December 2023, Parliament passed the following Bills:
- Bill for Political Parties Registration Act No. of 2023
 - Bill for the Electoral Act No of 2023
 - Bill for the Decentralization (Amendment) Act No. of 2023
 - Bill for the Municipalities (Amendment Act No. of 2023; and
 - Bill for the Referendum (Amendment) Act No of 2023.
- (v) It says Parliament in the exercise of its law making powers pursuant to article 16 of the Constitution, passed the Constitutional amendment and the Bills pleaded in paragraph (d) above; and
- (vi) Otherwise, it will rely on the Constitutional amendment and the Bills for their full terms and effect.
- (h) In response to ground 41, it says section 17 of the Act of 15/23 speaks for itself.
- (i) In response to grounds 42 to 45 it repeats its response in paragraphs 3 and 7 above in respect to the enactment of the Constitutional Amendments and the Bills and it denies that the enactments contravenes article 2, 4, 5(1)(b), (f), (g), (i), and (k), 17 and 53 of the Constitution. The Respondent says in grounds 42 to 45, the Applicants contradict themselves in the preceding grounds in the application in respect to the allegation that the Constitutional Amendment contravenes the articles of the Constitutions. Further, the respondent says the grounds are not matters appropriate for a Constitutional Application.
- (j) In response to grounds 46, the President by virtue of his powers under article 16(3) assents Bills passed by Parliament unless he considers that a Bill is inconsistent with a provision the Constitution which he then then can refer it to the Supreme Court. The President's decision to assent to a Bill pursuant to article 16(3) of the Constitution is an independent decision with no requirements to disclose to the public the Bills prior his assenting.
- (k) In response to grounds 47 and 48, the respondent repeats its response in paragraph 10 above, and it will rely on article 16(3) and (4) of the Constitution for its full terms and effect and that pursuant to the commencement of the Constitutional amendment under item 2 the said Constitutional amendment will take effect upon it being

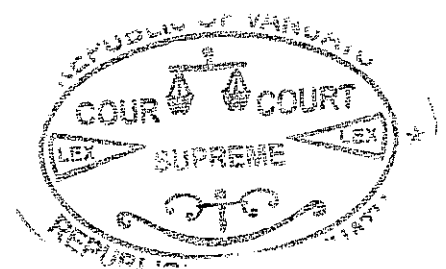


supported by a referendum under article 86. By item 17 of the Act 15/23 the provisions take effect once the Constitutional Amendment becomes effective. Accordingly the respondent denies any wrong doings by the President in assenting the Conditional amendment.

- (l) In response to grounds 49 to 53:
 - (ii) It repeats its response in paragraphs 3 and 7 above;
 - (iii) It says that the grounds on alleged processes are not matters that can be considered when challenging the constitutionality of a bill or an act;
 - (iii) It says that the Applicants and those allegedly represent lack standing to claim breach of their rights resulting from the Constitutional amendment and Act 15/23 because the constitutional amendment is applicable only to members of parliament and the applicants are not members of parliament;
 - (iv) It says even if there was a breach (which is denied) not only that the Applicants lack standing but the claim is premature given the Constitutional amendment and Act 15/23 are not yet effective; and
 - (iv) Otherwise denies each and every allegation contained therein.
- (m) In response to ground 54, in exercise of powers under section 4 of the Referendum Act No. 12 of 2016, the Electoral Commission by order 24 of 2024 (the "Order"), determined 29 May 2024 to be the date for the national referendum. The Respondent will rely on the Section 4(1) and the Order for its full terms and effect;
- (n) In response to grounds 55 to 58, repeats its response in paragraphs 12 and 13 above, save that the Order speaks for itself, the grounds fail to justify how such alleged actions give rise to a Constitutional case in light of their alleged breach of rights by the Constitutional amendment Act No. 21 of 2023 and the Act no.15 of 2023;
- (o) In response to paragraphs 59, the respondents repeats paragraphs 3, 7, 12 and 13 of its response and repeats that the Applicants and those allegedly represent are not members of parliament such that they can claim that their rights has been breached, is being breached or is likely to be breached because of the constitutional amendment. By operation of article 86 of the Constitution the Constitutional amendment must be supported by a referendum and as such it is yet to be effective. Accordingly, their claim is premature and the respondent denies any breaches of the Constitution claimed by the Applicants;



- (p) In response to paragraphs 60 and 61, safe that pursuant to article 86 a Constitutional amendment shall not come into effect unless it has been supported in a national referendum, those grounds are assumptive and premature;
- (q) In response to grounds 62 and 63:
- (i) It says Article 4(3) does not concern the parliamentary system otherwise the respondent says Article 4(3) and 86 of the Constitution speak for themselves and will rely on the articles for their full terms and effects;
 - (ii) It repeats its response in paragraphs 3, 7 and 11; and
 - (iii) Otherwise, it will rely on the Constitutional amendment in respect of their commencement dates for their full terms and effects.
- (r) In response to ground 64, the Respondent repeats paragraphs 3, 7 ,11 and 16 of its response above and denies any wrong doings and will rely on the Constitutional Amendment and the Order determining the date of the referendum for their full terms and effects;
- (s) In response to ground 65, the Respondent says the ground is irrelevant of a Constitutional challenge and otherwise denies the paragraph;
- (t) In response to grounds 66, 67 and 68:
- (i) It says Parliament in exercise of its law-making powers under article 16 of the Constitutional passed, the constitutional Amendment and Act 15/23;
 - (ii) It repeats paragraph 11 of its response;
 - (iii) It says on the basis of its response in paragraph 20(b), the Electoral Commission by virtue of its powers under section 4 of the Referendum Act determine the date of referendum by Order No. 24 of 2024; and
 - (iv) Otherwise denies each and every allegation contained therein.
- (u) In further answer to the claim:
- (i) It says that the Constitutional amendment is in regards to the Parliamentary system in particular the rights of the members of Parliament;
 - (ii) It says the Constitutional amendment does not affect the rights of any persons other than members of Parliament;



- (iii) It says the Constitutional amendment shall come into effect once it has been supported in a national referendum in compliance with article 86;
- (iv) It says Act 15/23 will be effective once the Constitutional Amendment takes effect;
- (v) It says on the basis of sub-paragraphs 21 (b) (c) the Applicants lack standing to bring the Constitutional Application as they are not members of Parliament, there is no breach of their rights alleged and the claim is premature; and
- (vi) It says that on the basis of the above paragraphs, the Constitutional application must be dismissed with costs.

10. The Respondent filed five (5) following sworn statements in support of the responses to the two constitutional cases 1231 of 2024 and 1431 of 2024:

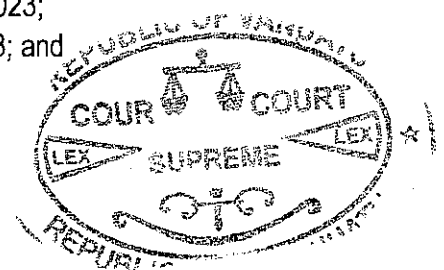
- (a) Mr Clarence Marae, Private Secretary, Office of the President, filed a sworn statement on 16 May 2024;
- (b) Mr Edward Kaltamat, Chairman of the Vanuatu Electoral Commission, filed a sworn statement on 16 May 2024;
- (c) Mr Leon Teter, Acting Clerk of Parliament, filed a sworn statement on 17 May 2024; and
- (d) David Thomas, Acting Parliamentary Counsel, office of the Attorney-General filed a sworn statement on 17 May 2024.

VII. Facts

11. The facts of these two constitutional applications appear not in dispute. They are set out below.

12. On 11 December 2023, Parliament met during its 7th extra-ordinary session, and passed the following Bills:

- Bill for the Political Parties Registration Act No. of 2023;
- Bill for the Electoral Act No. of 2023;
- Bill for the Decentralization (Amendment) Act No. of 2023;
- Bill for the Municipalities (Amendment) Act No. of 2023; and
- Bill for the Referendum (Amendment) Act No. of 2023.



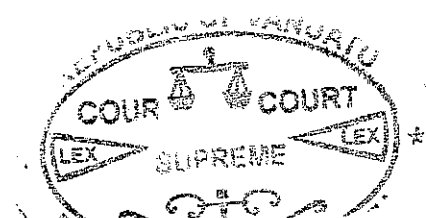
13. On 12 December 2023, during its special sitting, Parliament passed the “Bill for the Constitution (Eighth) Amendment Act No. of 2023 (the “Constitutional Amendment”).
14. On 20 December 2023, the Office of the President was served with the original text of the above Bills passed by Parliament for the President to assent and which include the Bill for the Constitutional Amendment and the Bill for the Political Parties Registration.
15. On 29 December 2023, the President assented the Bills for the Constitutional Amendment and Political Parties Registration and forwarded the same back to Parliament.
16. On 29 December 2023, the Office of the Acting Clerk of Parliament (Mr Leon Teter) received the original text of the assented two Act from the Office of the President; and the Acting Clerk of Parliament entered the number of the Act on the original text of the Constitution (Eighth) Amendment as Act No. 21 of 2023 and Political Parties Registration as Act No. 15 of 2023; and on the same date (29 December 2023), he sent the original text of the Constitution (Eighth) Amendment No. 21 of 2023 and the Political Parties Registration Act No. 15 of 2023 to the Office of the Attorney-General for publication in the gazette.
17. On 29 December 2023, the Office of the Attorney-General received from Parliament the original text for the Constitution (Eighth) Amendment Act No. 21 of 2023 and the Political Parties Registration Act no. 15 of 2023 for publication in the gazette.
18. The Constitution (Eighth) (Amendment) Act No. 21 of 2023 and the Political Parties Registration Act No. 15 of 2023 are yet to be published in the gazette.
19. The Electoral Commission met on the 16th of January 2024 and fixed the polling date of the national referendum on the 29th of May 2024.
20. The declaration order for the national referendum on 29 May 2024 was made by the Electoral Commission on 19 January 2024 by order published in the gazette.

VIII. Submissions

21. Mr Hakwa in Constitutional Case No. 1431 of 2024 advanced his arguments and submissions on the following four (4) main grounds:

(a) **Breach of the Applicants’ fundamental rights and freedoms**

They say the Republic of Vanuatu has acted in contravention or breach of their fundamental rights and freedoms which the Republic of Vanuatu has guaranteed them under Article 5(1) of the Constitution and in particular paragraphs (b), (f), (g)



and (h) thereof as a consequence of the enactment by Parliament of the Constitution (Eighth) (Amendment) Act No. 21 of 2023 (hereinafter referred to as "Act 21/23");

(b) Breach of other rights or freedoms other than fundamental rights of freedoms

They say the Republic of Vanuatu has acted in contravention or breach of their other rights or freedoms which the Republic of Vanuatu has guaranteed them under Articles 4, 17 and 54 of the Constitution as a consequence of the enactment by Parliament of the Political Parties Registration Act No. 15 of 2023 (hereinafter referred to as "Act 15/23");

(c) The proposed national referendum which the Electoral Commission (hereinafter referred to as "the Commission") has fixed for 29 May 2024

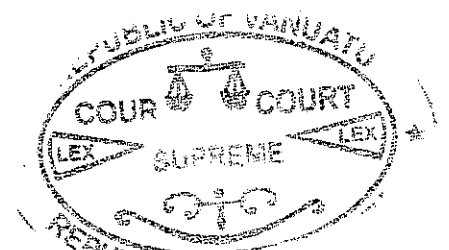
They say even if Act 15/23 and Act 21/23 are valid and in full compliance with the Constitution their rights which Article 86 of the Constitution guarantees them have been breached or are likely to be breached if the Commission conducts or organizes the proposed national referendum in the manner or circumstances in which it is currently purporting to do;

(d) The conduct of the President of the Republic of Vanuatu

They say the wrongful Assent which the President of the Republic of Vanuatu has provided to Act 21/23 on 29 December 2023 has tainted Act 21/23 with illegality thereby wrongfully depriving them from exercising their right which Article 86 of the Constitution guarantees them.

22. In the terms of breaches of the fundamental rights and freedoms of the Applicants, Mr Hakwa submits that Parliament does not have lawful authority to amend Article 17 of the Constitution in the manner as set out in new Articles 17A and 17B in the Constitution (Eighth) (Amendment) Act No. 21 of 2023.

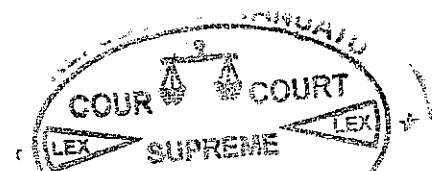
23. Mr Hakwa says, the impugned provisions of the Constitution (Eighth) (Amendment) Act No. 21 of 2023, are new Articles 17A(5) and new Article 17B(9) which say respectively: "This Article applies despite the provisions of sub-article 5(1) of the Constitution". He submits, it was wrong, improper and unconstitutional for Parliament to legislate by way of sub-section (5) of new Article 17A and sub-section (9) of new Article 17B to amend, exclude, exempt or restrict the application of the fundamental rights and freedoms which Article 5(1)(b), (f), (g) and (h) guarantees the Applicants together with all other citizens of Vanuatu.



24. Mr Hakwa also submits that whilst Parliament may make law for the peace and good government of Vanuatu, in the exercise of its power or authority Parliament must also comply with the Constitution and all other statutes pertaining to its authority to legislate. Here, he says Parliament does not have lawful authority to enact the new Articles 17A and 17B in Act 21 of 2023 in the manner which it did.
25. Mr Hakwa further submits the new Articles 17A and 17B are not the lawful exceptions which sub-articles (1) of Article 5 of the Constitution provides which refers to emergency regulations which may be made under Article 69, 70, 71 and 72 of the Constitution.
26. He relies on the case authority of Barak Tame Sope, William Edgell, Charles Godden, Jimmy Simon and Anatole Lingtamat (Appellants) v Attorney General (First Respondent), Vanuaku Pati (Second Respondent) and Onneyn Tahī, MP, Speaker of Parliament (Third Respondent) Civil Appeal Case No. 6 of 1988.
27. Mr Hakwa finally submits that the complaint about the Constitution (Eighth) (Amendment) Act No. 21 of 2023 of 29 December 2023 is that the President acted in contravention of Section 13 of Acts of Parliament Act [CAP. 116] and Article 86 of the Constitution in purporting to assent to Act No. 21 of 2023 on 29 December 2023. He says the bills was certified prematurely and assented to prematurely. He conceded that pursuant to Article 86 of the Constitution the Act No. 21 of 2023 is a matter of Parliamentary System, the bill is required to be submitted to the people of Vanuatu to approve or reject in a referendum.
28. In Constitutional Case No. 1231 of 2024, Mr Joseph Mauri Garaegesa reads their written submissions on his own behalf and on behalf of other Applicants. They say that the issue is the constitutionality of the proposed constitutional amendment, namely Article 17A and Article 17B of the Constitution (Eighth) (Amendment) Act No. 21 of 2023. They say the following:
 - (a) That the suggested Articles 17A and 17B breach their fundamental right in Article 5(1)(c) of security of the person;
 - (b) That the suggested Articles 17A and 17B breach their fundamental right in Article 5(1)(d) of protection of law;
 - (c) That the suggested Articles 17A and 17B breach their fundamental freedom in Article 5(1)(g) of freedom of expression;
 - (d) That the suggested Articles 17A and 17B breach their fundamental freedom in Article 5(1)(h) of freedom of assembly and association;
 - (e) That the suggested Articles 17A and 17B breach their fundamental freedom in Article 5(1)(i) of freedom of movement.



29. They ask the Court to make a declaration of constitutional invalidity and therefor of unenforceability of Articles 17A and 17B.
30. The Attorney General, Mr Loughman, on behalf of the Respondent makes submissions challenging the locus standi of the Applicants in both constitutional cases No. 1231 of 2024 and 1431 of 2024.
31. Mr Loughman submits that the Applicants in both cases, do not have locus standi to bring the two constitutional applications. He says that the Constitution (Eighth) (Amendment) Act No. 21 of 2023, in so far as it is an Act in regards to the Parliamentary system of government, the Act applies only to a member of Parliament as contained in the language and terms of Articles 17A and 17B. He provides support to his submissions with case authority cited therein.
32. With respect to the Political Party Registration Act No. 15 of 2023, he submits that the Applicants do not have standing to challenge the constitutionality of Act No. 15 of 2023 as the power to challenge the constitutionality of any Act of Parliament or provision of an Act of Parliament is vested in the President under Article 16(4) of the Constitution.
33. After the court's query with Mr Loughman that the President has assented the Constitution (Eighth) (Amendment) Act No. 21 of 2023 and the Political Parties Registration Act No. 15 of 2023 on 29 December 2023. Those two Act become laws and the President could no longer challenge their validity. That was the understanding of the Court at the First Conference Hearing pursuant to the Constitutional Rules (R 2.8) when Applicants in both constitutional cases were before the Court and the court was satisfied they made out their case and allowed them standing.
34. Mr Loughman, then, redirects his submissions on the prematurity of the constitutional case No.1431 of 2024 challenging the constitutional validity of the Constitution (Eighth) (Amendments) Act No. 21 of 2023.
35. Mr Loughman submits that in any event unless and until the constitutional assents are supported by a national referendum pursuant to Article 86 of the Constitution, the said constitutional amendments have not yet taken effect and any proceeding prior to a national referendum is pre-mature.
36. Mr Loughman explained that when a bill has been passed by Parliament it shall be presented to the President who shall assent to the bill within 2 weeks. If the President assents to a bill it indicates that the President has considered the bill and has decided that the bill is not inconsistent with a provision of the Constitution.
37. He submits that except for a bill for an amendment of a provision of the Constitution regarding the status of Bislama, English or French, the electoral system or the parliamentary



system, every bill that the President assents to become effective on the assent of the President.

38. He says that the Constitution (Eighth) (Amendment) Act No. 21 of 2023 is such a bill envisaged under Article 86 of the Constitution and he submits that notwithstanding the fact that the President has assented to the said bill, as per the clear wordings and intention of Article 86 of the Constitution, "shall not come into effect unless it has been supported in a national referendum".
39. In the present case, notwithstanding the fact that the President had already assented to the Constitutional (Eighth) (Amendment) Act No. 21 of 2023, the Act cannot come into effect unless supported by a national referendum. A referendum is planned to take place on 29 May 2024 in compliance with Article 86 of the Constitution. As such the constitutional requirement of a referendum under Article 86 override any assent the President may have done to such a bill.

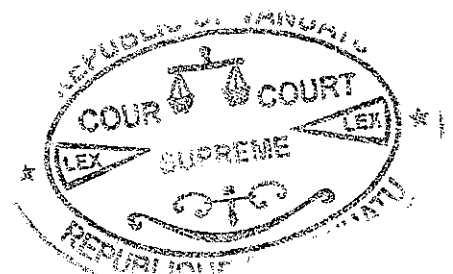
IX. Discussions

40. Article 5(1) of the Constitution is set out as follows:

"5. *Fundamental rights and freedoms of the individual*

(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 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 –*

- a) *life;*
- b) *liberty;*
- c) *security of the person;*
- d) *protection of the law;*
- e) *freedom from inhuman treatment and forced labour;*
- f) *freedom of conscience and worship;*
- g) *freedom of expression;*
- h) *freedom of assembly and association;*
- i) *freedom of movement;*



- 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.
- ...

41. I set out Item 2 of the Schedule to the Constitution (Eighth) (Amendment) Act No. 21 of 2023. It reads:

"2. After Article 17

"17A. Vacation of seat where a member of Parliament resigns or is terminated for ceasing to support a political party

- (1) *This Article applies to a member of Parliament if the member, having been a candidate of a political party and elected to Parliament:

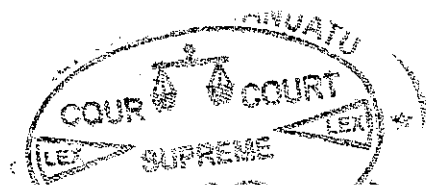
 - a. *resigns from the political party; or*
 - b. *is terminated as a member of the political party for ceasing to support the political party.**
- (2) *The President of a political party must notify the Speaker in writing within 14 days after a member has resigned from, or has been terminated for ceasing to support, the political party in accordance with that political party's constitution.*
- (3) *The Speaker must, within 7 days of receiving the notice under subarticle (2), declare the seat of that member of Parliament vacant by Order published in the Gazette.*
- (4) *For the purposes of this Article, a member of Parliament representing a political party is deemed to have ceased support of the political party when he or she satisfies the grounds provided under the political party's constitution that indicate when a member is deemed to have ceased support for the political party.*
- (5) *This Article applies despite the provisions of subarticle 5(1) of this Constitution.*

17B Vacation of seat of an independent member

- (1) *This Article applies to a member of Parliament who:*



- (a) *is elected to Parliament as an independent candidate; or*
 - (b) *is the only member representing a political party; or*
 - (c) *is elected to Parliament representing a custom movement.*
- (2) *Within 3 months after the first day of the first sitting of Parliament at which the Speaker and the Prime Minister are elected, a member of Parliament referred to under subarticle (1) must submit to the Clerk of Parliament a declaration of his or her affiliation to a political party represented in Parliament, in the form approved by the Clerk of Parliament and counter-signed by the political party's President.*
- (3) *In the case of a by-election, a newly elected member of Parliament referred to under subarticle (1) must, within 3 months after the first day of the next sitting of Parliament after that by-election, submit to the Clerk of Parliament a declaration of his or her affiliation to a political party represented in Parliament, in the form approved by the Clerk of Parliament and counter-signed by the political party's President.*
- (4) *At the next sitting of the Parliament:*
- (a) *in the case of a general election - the Speaker must, having received affiliations under subarticle (2), officially announce the affiliations of all members of Parliament; or*
 - (b) *in the case of a by-election - the Speaker must, having received the newly elected member of Parliament's affiliation under subarticle (3), officially announce the affiliation of that member of Parliament.*
- (5) *A member of Parliament who fails to make a declaration under subarticle (2) or (3) is deemed to have vacated his or her seat at the end of the 3 month period referred to in that subarticle.*
- (6) *The President of a political party must notify the Speaker in writing within 14 days after a member of Parliament has ceased to be affiliated with the political party in accordance with the political party's constitution.*
- (7) *The Speaker must, within 7 days of receiving the notice under subarticle (6), declare the seat of the member of Parliament vacant by Order published in the Gazette.*
- (8) *For the purposes of this Article, a member of Parliament is deemed to have ceased to be affiliated with a political party when he or she*



satisfies the grounds provided under the political party's constitution that indicate when a member is deemed to have ceased to be affiliated with the political party.

(9) This Article applies despite the provisions of subarticle 5(1) of this Constitution.”

3 Transitional

If:

- (a) an independent member of Parliament; or
- (b) a member of Parliament who is the only member representing a political party; or
- (c) a member of Parliament representing a custom movement,

is elected to Parliament before the commencement of item 2, that member must affiliate with a political party represented in Parliament within 3 months after the commencement of item 2.

- 42. Item 2 of the Schedule to the Constitution (Eighth) (Amendment) Act No. 21 of 2023, does not commence unless it is supported in a national referendum under Article 86.
- 43. I set out below the provisions of the Political Parties Registration No. 15 of 2023.

“REPUBLIC OF VANUATU

Assent: 29/12/2023
Commencement:

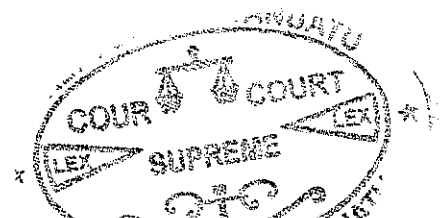
**POLITICAL PARTIES REGISTRATION
ACT NO. 15 OF 2023**

An Act to register political parties and for related matters.

Be it enacted by the President and Parliament as follows-

PART 1 PRELIMINARY

- 1 **Application of this Act**
 - (1) This Act applies to political parties intending to contest an election under the Electoral Act No. 16 of 2023.
 - (2) To avoid doubt, the provisions of this Act do not apply to independent candidates.



2 Interpretation

In this Act, unless the contrary intention appears:

Commission means the Electoral Commission established under Article 18 of the Constitution of the Republic of Vanuatu;

policy platform means the document (whether in written, printed or electronic form) that outlines the policies and priorities of a political party;

Principal Electoral Officer means the Principal Electoral Officer provided for under Article 19 of the Constitution of the Republic of Vanuatu.

PART 2 REGISTRATION OF POLITICAL PARTIES

Division 1 Functions and powers of the Principal Electoral Officer

3 Functions of the Principal Electoral Officer

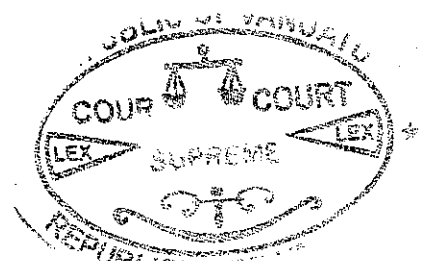
In addition to the functions of the Principal Electoral Officer under the Electoral Act No. 16 of 2023, he or she has the following functions:

- (a) *to formulate, monitor and review policies relating to the registration of political parties; and*
- (b) *to oversee the registration and administration of political parties; and*
- (c) *to administer and ensure compliance with this Act; and*
- (d) *to perform any other functions that may be conferred on the Principal Electoral Officer by this Act or any other Act.*

4 Powers of the Principal Electoral Officer

- (1) *The Principal Electoral Officer has the power to do all things necessary or convenient to be done for or in connection with the performance of his or her functions under this Act.*
- (2) *Without limiting subsection (1), the Principal Electoral Officer has the power to investigate and inquire into the affairs of a political party for the purposes of determining if there has been a breach of this Act.*
- (3) *For the purposes of subsection (2), the Principal Electoral Officer may:*
 - (a) *by notice in writing to an executive member of a political party, require the political party to provide copies of any documents within the period specified in the notice; and*
 - (b) *require an executive member of the political party to answer any questions, orally or in writing.*

5 Delegation of functions and powers



- (1) *The Principal Electoral Officer may, in writing, delegate to any staff of the Electoral Office, any of his or her functions or powers under this Act other than the power of delegation.*
- (2) *The delegation may be made generally or in respect of a particular matter or class of matters.*
- (3) *The Principal Electoral Officer may at any time revoke or vary a delegation.*
- (4) *A delegation does not prevent the Principal Electoral Officer from performing a function or exercising a power that he or she has delegated.*

6 Principal Electoral Officer to be independent

- (1) *Subject to subarticle 20(2) of the Constitution of the Republic of Vanuatu, the Principal Electoral Officer is not subject to the direction or control of any person in performing any of his or her functions or exercising any of his or her powers under this Act.*
- (2) *A person must not:*
 - (a) *obstruct, hinder or prevent the Principal Electoral Officer or any of his or her staff from performing any functions or exercising any powers conferred on them by or under this Act; or*
 - (c) *knowingly give false information in making an application under this Act to the Principal Electoral Officer or any of staff of the Electoral Office that has been authorised by the Principal Electoral Officer to receive information.*
- (3) *A person who contravenes subsection (2), commits an offence punishable on conviction by a fine not exceeding VT5,000,000 or by imprisonment for a term not exceeding 12 months, or both.*

Division 2 Registration and deregistration process

7 Registration requirement of political parties

- (1) *An association of persons or an organisation must not operate or function as a political party unless it is registered under this Act.*
- (2) *To avoid doubt, an association of persons or an organisation that is not registered as a political party under this Act is not eligible to lodge a declaration of candidature form under the Electoral Act No. 16 of 2023.*
- (3) *Despite subsections (1) and (2), an association of persons or an organisation operating as a custom movement may lodge a declaration of candidature form under the Electoral Act No. 16 of 2023 without being registered under this Act, if the custom movement lodges a declaration of candidature form for candidates in only one island in Vanuatu.*

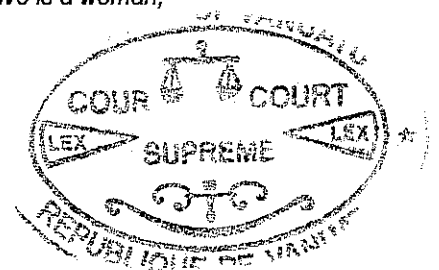
8 Application for registration



- (1) *An association of persons or an organisation which intends to register as a political party must apply to the Principal Electoral Officer in the form approved by the Commission and must include in its application:*
- (a) *the information and documents referred to in subsection (2); and*
 - (b) *the prescribed application fee; and*
 - (c) *any other information or documents that may be required by the Principal Electoral Officer.*
- (2) *Upon receiving an application, the Principal Electoral Officer must ensure that the application contains the following information:*
- (a) *the name and logo of the proposed political party; and*
 - (b) *the policy platform of the proposed political party; and*
 - (c) *a copy of the constitution of the proposed political party; and*
 - (d) *the names of all the office bearers of the proposed political party.*

9 Screening of applications

- (1) *The Principal Electoral Officer must not make a recommendation to the Commission to register an applicant as a political party unless he or she is satisfied that:*
- (a) *the prescribed rules relating to the names and logos of the proposed political party have been complied with; and*
 - (b) *the policy platform of the proposed political party is of national scope after assessing it against the prescribed criteria; and*
 - (c) *the constitution of the proposed political party provides for the following matters:*
 - (i) *the method of election of the members of the executive and their respective functions and powers; and*
 - (ii) *the composition of the executive which must comprise of at least 6 members, of which:*
 - (A) *there are three mandatory positions which are President, Treasurer and Secretary; and*
 - (B) *at least one member of the executive is a woman; and*



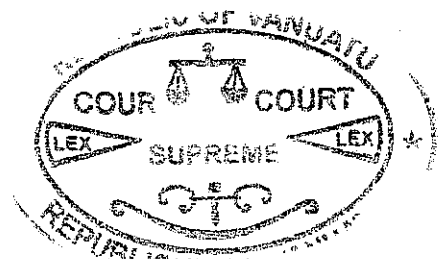
- (iii) the method of selection of candidates for election to Parliament, to a Municipal Council or to a Provincial Government Council; and
 - (iv) the procedure for disciplining members of the political party including termination of their membership from the political party; and
 - (v) provisions outlining the grounds on which a member of the political party is deemed to have ceased to support that political party; and
 - (vi) provisions outlining the grounds on which an independent member of parliament is deemed to have ceased to affiliate with that political party; and
- (d) the proposed political party meets any other additional requirements as may be prescribed by the Commission.
- (2) The Principal Electoral Officer must recommend to the Commission, the names of the proposed political parties that meet all the requirements under subsection (1).

10 Registration

- (1) The Commission may register a political party on the recommendation of the Principal Electoral Officer.
- (2) A political party which is registered under subsection (1) remains registered as a political party under this Act until it is deregistered under section 12.
- (3) If the Commission decides not to register a proposed political party as recommended by the Principal Electoral Officer:
- (a) the Commission must inform the Principal Electoral Officer of the reasons for its decision; and
 - (b) the Principal Electoral Officer must, in writing, inform the applicant of the reasons for the decision of the Commission within 1 month after the date on which the decision was made.

11 Register of political parties

- (1) The Principal Electoral Officer must keep and maintain a register of political parties registered under subsection 10(1).
- (2) The register is to contain the details of each political party including its name, address, contact details and such other information as the Principal Electoral Officer may consider necessary to be included in the register.



- (3) *The Principal Electoral Officer must ensure that the register is available for inspection by any person during the official hours of the Electoral Office.*
- (4) *A political party must inform the Principal Electoral Officer of any changes made to the information relating to it on the register within 1 month after the changes occur.*

12 Deregistration

(1) *Subject to section 13, the Commission may, on the recommendation of the Principal Electoral Officer, deregister a political party if the Commission is satisfied that:*

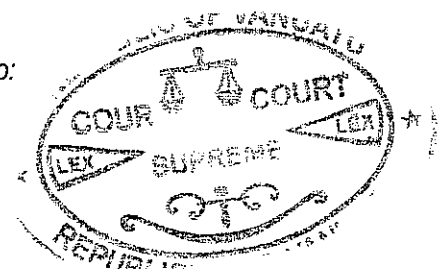
- (a) *the political party has failed to meet a requirement under subsection 9(1); or*
 - (b) *the political party has failed to provide annual financial reports to the Vanuatu Financial Services Commission under the Charitable Associations (Incorporation) Act [CAP 140]; or*
 - (c) *the political party requests to be deregistered; or*
 - (d) *the political party was registered as a result of a mistake or fraud; or*
 - (e) *the political party has failed to meet the minimum threshold of voters' support at the preceding general election as determined by the Commission by Order.*
- (2) *For the purposes of assessing whether to deregister a political party, the Commission may, in writing, request the secretary of the political party to provide:*
- (a) *the updated copies of the political party's constitution and policy platform; and*
 - (b) *any further information or documents as the Commission requires.*

13 Notice of deregistration

(1) *If the Commission is of the opinion that a ground for deregistration of a political party exists, the Commission must provide 30 days written notice to the political party of its intention to deregister the political party.*

(2) *A notice under subsection (1) is to be given to the secretary of the political party and must:*

- (a) *be in the prescribed form; and*
- (b) *provide a period within which the political party is to:*



- (i) *make representations in writing to the Commission as to why it should not be deregistered; or*
 - (ii) *take the necessary steps to ensure compliance with this Act.*
- (3) *If the political party fails to comply with paragraph (2)(b) at the expiry of the notice under subsection (1), the Commission is to give a second notice to the political party and provide it with a further 30 days in which to take the necessary steps to comply with the provisions of this Act as specified in the second notice by the Commission.*
- (4) *If the political party fails to comply with a second notice under subsection (3), the Commission is to deregister the political party.*
- i. *The Principal Electoral Officer must ensure that the names of all political parties which are deregistered are published as soon as practicable in the Gazette.*

14 Duty to affiliate with political party

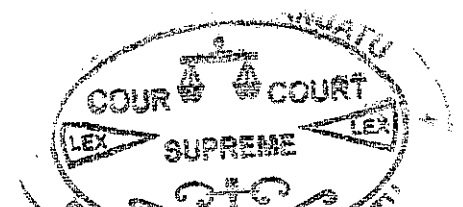
(1) *If a political party is deregistered under subsection 13(4), members of Parliament, a Municipal Council or a Provincial Government Council who are affiliated with the political party must, within 6 months after the deregistration takes effect:*

- (a) *affiliate with another existing political party; or*
- (b) *affiliate with a new political party.*

(2) *A member of Parliament, a Municipal Council or a Provincial Government Council who fails to comply with subsection (1) within the 6 month period is taken to be an independent member of the Parliament, Municipal Council or Provincial Government Council.*

(3) *A member of Parliament who becomes an independent member of Parliament under subsection (2) must comply with the requirements of subarticle 17B(3) of the Constitution of the Republic of Vanuatu as if he or she were a newly elected member of Parliament following a by-election."*

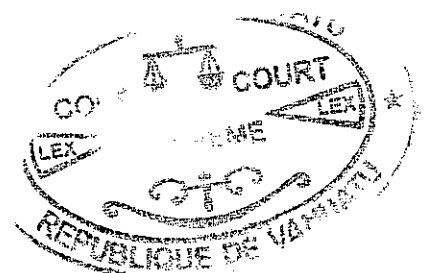
44. On the perusal of the two Acts 21 of 2023 and 15 of 2023, it is apparent that there is a paramount urgency to deal with the Constitution (Eighth) (Amendment) Act No. 21 of 2023 as New Articles 17A and 17B are subject to the support of the upcoming national referendum fixed on 29 May 2024 which is 4 days from today.
45. I have perused the provisions of the Political Parties Registration. There is no urgency to deal with it.
46. At the hearing, the issue of urgency was raised, counsel and parties appear to understand the situation.



47. It must be said that the criticism of the President by Mr Hakwa is wrongly made. Section 13 of the Acts of Parliament is not about the President. It is about the Speaker or the Deputy Speaker if the Speaker is absent or otherwise unable to act shall, before the Bill is presented to the President for his assent, certify in whatever form he considers appropriate that the Bill was passed after having been so supported and with such special quorum or with those requirements and support of a national referendum.
48. The criticism (if any) should be made to the Speaker or Deputy Speaker who passed on the bill(s) to the President.
49. It is noted that in any event this Section 13 of the Acts of Parliament Act is inconsistent with Article 86 of the Constitution. Article 86 prevails in this situation. There is nothing wrong with what the President did when he assented to the Constitution (Eighth) (Amendment) Act No. 21 of 2023 on 29 December 2023. The assent of the President to the Constitutional Amendments Act No. 21 of 2023 is subject to and conditional to the support of the referendum fixed on 29 May 2024 pursuant to Article 86 of the Constitution.
50. In the present case, I accept the submissions of the Attorney General that the challenges of the constitutionality of the Constitution (Eighth) (Amendment) Act No. 21 of 2023 and the related submissions raised thereof, are premature as the referendum is yet to be held. Item 2 of the Constitution (Eighth) (Amendment) Act No. 21 of 2023 must have the support of the referendum for it to be effective and enforce. Before the referendum is held and supported the Constitutional Amendments in Articles 17A and 17B of the Constitution (Eighth) (Amendment) Act No. 21 of 2023, they do not affect the rights of any person and there is no breach of any rights under Article 5(1) of the Constitution at this point in time.
51. Accordingly, the Constitutional Case No. 1231 of 2024 must be dismissed.
52. The part of the Constitutional Case No. 1431 of 2024 which challenges the constitutionality of the Constitution (Eighth) (Amendment) Act No. 21 of 2023 must also be dismissed.
53. The other part of the Constitution Case No. 1431 of 2024 which challenges the constitutionality of the Political Parties Registration Act No. 15 of 2023 is adjourned and will be called for a conference hearing on a date and time as there is no urgency to deal with it at this time before the referendum.

X. Decision

54. The court makes the following Declarations and/or Orders:



1. A declaration that the Political Parties Registration Act No. 15 of 2023 is unconstitutional, is adjourned and pending before the Court, as there is no urgency to deal with it in a haste time-frame;
2. A declaration that the Constitution (Eighth) (Amendment) Act No. 21 of 2023 is unconstitutional, is refused as premature;
3. The Constitutional Case No. 1231 of 2024 is dismissed;
4. The relevant part of the Constitutional Case No. 1431 of 2024 which challenges the constitutional validity of the Constitution (Eighth) (Amendment) Act No. 21 of 2023 is dismissed;
5. The other part of the Constitutional Case No. 1431 of 2024 which challenges the constitutional validity of the Political Parties Registration Act No. 15 of 2023 is listed before the Court on Monday 19 August 2024 for conference at 8:30AM or liberty is given to counsel and parties to apply if they want a date earlier than 19 August 2024;
6. An order to restrain the Electoral Commission from organizing a National Referendum pursuant to the Referendum Act No. 04 of 2024 as amended from time to time for the purposes of the Constitution (Eighth) (Amendment) Act No. 21 of 2023, is refused;
7. Each party to pay its own costs.

DATED at Port Vila, this 25th day of May, 2024.

BY THE COURT



.....
Hon. Chief Justice Vincent Lunabe

