



**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

CIVIL CASE No 106 OF 1995

**BETWEEN: MAXIME CARLOT KORMAN AND WILLY
JIMMY** acting in their capacities as Members of the
National Council of the Union of Moderate Parties
(UMP) and as members of the UMP (hereinafter called
the first and second named Applicants)

**AND: MENSUL EDOUARD, FIDELE VANUSOKSOK,
JEAN CLAUDE KANEGAI AND ALICK
GEORGE NOEL** (hereinafter called the first named
Respondents)

AND: THE ELECTORAL COMMISSION OF VANUATU
of Port Vila (hereinafter called the second named
Respondent)

CORAM: The Chief Justice

Mr George Vasaris for the Applicants
Mr David Hudson for the First Respondents
The Attorney General for the Second Respondents.

By an amended writ of summons dated 8 November 1995, the Applicants herein, in a representative action, claim relief by means of declarations and injunctions as set out in the summons as against the Respondents. The claim was supported by an affidavit of the Applicants dated 7 November 1995. In view of the urgency of the application the matter was expedited and time for service was abridged. The First Respondents merely filed an affidavit dated 8 November 1995, sworn by the Vice-President of the Union of Moderate Parties, Mr Thompson Kawai, stating that a list of candidates signed by himself and the Secretary General of the party Mr Petré Malsungai, dated 1 November 1995 and sent to the Electoral Office "was unanimously decided upon by the National Executive Committee of the UMP" including the second named Applicant, Willy Jimmy. There is no application to strike out the action or any submissions on the Court's locus standi on these types of actions. Indeed it is conceded that the Court can decide the present issues before it. The action is brought by 2 members of an unincorporated association known as the Union of Moderate Parties. It is a representative action.

In any event the leading case on the matter, and by which I am bound is the decisions of the Supreme Court and the Court of Appeal in the case of *Kalkot MATASKELEKELE v Iliou Johnston ABIL and Donald KALPOKAS* reported as Civil Case 99 of 1991 and on appeal as Civil Appeal Case No 7 of 1991. This makes it clear that the Courts can consider such actions as these, and rule in such cases. In any event representative actions can be brought under the rules that are applied to these Courts, namely Order 17 rule 9 of the High Court (Civil Procedure) Rules, 1964.

The case before the Court arises as a result of the decision by the Prime Minister and the National Executive of the Union of Moderate Parties (UMP) to send a list each, to the Electoral Office, composed partly of different candidates. Each list purporting to be the official list of candidates of the UMP to the forthcoming general elections on 30 November next. It is common ground that both lists arrived on time and that all candidates on both lists have complied with the required regulations to be registered as candidates for the forthcoming elections. The issue is solely over the question of who is entitled to describe himself as an official UMP candidate and who is not. It is a question of some importance, at least to those candidates who are not able to 'fly the party flag' at the forthcoming elections, since they would not have the backing of the official party, nor would they be able to use the party colours or emblems or use the official party name.

The Attorney General who appeared briefly for the Electoral Commission (Second Respondent), took a neutral stand. He simply submitted to the Court that under Section 28 of the Representation of the People's Act, the Commission must publish the official lists of candidates to the forthcoming elections not later than 14 days before the date set down for the elections. He therefore expressed the view that the Commission would welcome a Court decision at the earliest opportunity. He then asked to be excused from the proceedings.

I cannot better describe the role of the Court, my role, in this type of case than to quote from the words of Megarry V.C. in the case of *John v Rees* (1962) 2 All E.R. 362 at 367 "*I must make explicit what all lawyers will recognise as implicit, but which those who are not lawyers may not fully appreciate. I am not in the least concerned in this case with the rightness or wrongness or the desirability or undesirability of any political views or policies that there may be. This is so whether the views or policies are political in the ordinary external sense, in relation to other political parties or otherwise, or whether they are internal policies within the confines of any political or other unit. My concern is merely to see that those concerned in these proceedings obtain justice according to law, irrespective of politics.*" I will add that the law I am obliged to apply here is the law of the land, namely the law of Vanuatu, without any consideration for political views or policies or its consequences.

The Applicants sought leave to amend their summons to remove from the first paragraph the words "*twenty-eight (28) candidates described in the list signed by the Honourable Prime Minister and first named Applicant and dated 1 day of November 1995*" and to replace them by the words "*thirty-two (32) candidates described in the resolution of the Congress held at Yopuna village Epi Island on 17 to 22 September 1995*". That was allowed by consent of the First Respondents.

It was then agreed by both parties that the issues could be crystallised as such:

- i) The Court has locus standi to decide these issues
- ii) The matter Turns essentially on the interpretation that the Court gives to the UMP Constitution on the one hand and on the meaning of the Resolution taken by the Party on Epi on the 17 to 22 September 1995.

It is common ground that an Extraordinary National Congress of the UMP met between the 17 and 22 September 1995 in the village of Yopuna on the Island of Epi. By consent the Agenda to that meeting was shown to the Court. It appears to contain a mistake as to the date, since it refers to the agenda of a meeting held on the 17 to 19 September 1995, whereas the resolutions passed is headed with the date 17 to 22 September 1995. I mention this for the record, although nothing turns on this, it would seem that the Congress must have lasted longer than anticipated by the agenda of the meeting. The agenda discloses clearly that one of the reasons for the National Extraordinary Congress called on Epi was to decide the list of candidates to the forthcoming elections. This agenda is important for two reasons, firstly because it can only be drafted under the by-laws to the Constitution of the UMP, by the National Executive Committee, who are the only organ of the Party able to convene a National Extraordinary Congress; the By-laws of the Constitution of the UMP states:

CHAPTER 5 NATIONAL EXTRAORDINARY CONGRESS

21. *The National Executive Committee may decide on the convocation of a National Extraordinary Congress.*
22. *A National Extraordinary Congress shall consider restrictive agenda prepared by the National Executive*

and secondly, the Agenda is important because it must be circulated to the membership under rule 14 of Chapter 3 "..... in order to give the opportunity to all members to express democratically their views and opinions at meetings of the National Congress"

The Court was told that there were essentially, three lists as disclosed in the Applicants affidavit namely:

- i) The First Applicant's list
- ii) The First Respondents' list, and
- iii) The Congress list.

Only two of those lists were actually sent to the Electoral Office on the 1 November in time to register candidates for the forthcoming elections, list i) and ii). Therefore it was important to take evidence to see if the names in the third list, the Congress list, were all contained in one or other of the first two lists mentioned above. For this reason, oral evidence on oath was taken from Mr Tom Bakeo the Director of the Electoral Office. His evidence established that all the names of all people on all the lists were properly enrolled as candidates for the elections. Therefore the only

remaining issue to determine was who can describe themselves as the Official UMP candidates and who could not.

Mr Vasaris on behalf of the Applicants submitted as follows:

- i) That only members on the list of candidates decided upon by the National Extraordinary Congress held at Epi between 17 to 22 September 1995 can be the Official UMP candidates.
- ii) In order to come to that conclusion the Court must look at and interpret the UMP Constitution on the one hand and look at the decision of the National Extraordinary Congress on the other.

It is submitted further that there are two copies of the Constitution, the first in French and the second in English which is a translation of the first. I therefore propose to approach the interpretation of the UMP Constitution in a way that would give preference to the version which according to the true spirit, intent and meaning of the drafting, best ensures the attainment of its objects. In my view that must be the original text, namely the French text.

Mr Vasaris submitted that the first matters one must look at are Chapter 6 and 7 of the By-laws; those referring to the 'Direction' in the English version and 'Administration' in the French version, and the 'Party Structure'. He submits that Congress is the paramount body, whether it sits at an Ordinary Meeting or an Extraordinary Meeting. He further submits that the National Extraordinary Congress validly passed the following resolution (which is not disputed by the First Respondents) namely:

RESOLUTION No 2: Namba tri (3) Extraordinary Congress we i bin sitaon long YOPUNA Village Epi Island long 17 to 21 Septemba 1995
I resolve se hemi appruvum ol following candidats blong contestem 1995 general election long name blong Union blong ol Moderate Patis (UMP)

It is further submitted by Mr Vasaris that that determination was conclusive. He submits that the other organs of the Party are obliged to act according to that resolution and to implement it. He pointed to Chapter 6 of the Constitution and more particularly Article 23 and submits that the National Council is but the directing and coordinating authority of the party and must act in compliance with the directives defined by the National Congress and Extraordinary Congress. On the other hand the National Executive Committee, he submits, under chapter 7 Article 30, is there to assist the President in the day to day running of the party and is solely responsible for executing policies and directives set by the National Congress and the National Council, and has no policy making powers. He submits that under Chapter 8 that the President of the Party is there to preside over the various national bodies (National Congress, National Extraordinary Congress, National Council and National Executive Committee) and has the duty to ensure that its decisions are implemented, but has no policy making powers, save only those delegated to him by Congress in the sui generis sense. As for the Secretary general he is there solely to execute and implement the decisions of the Party. He submits that the National Council under the direction of

Congress and on the advice of the Regional Council and the Committee on organisation and elections shall decide the nominations and withdrawals of candidates, but cannot act on its own. Finally he submits that there is nothing in the Constitution that allows any organ of the Party, be it the National Executive or any other, to overrule Congress or vary or modify its resolutions. They are obliged to execute the Directive of National Congress, whether in its ordinary capacity or Extraordinary capacity.

Mr Hudson for the Respondents submits as follows.

i) There is no rule in the Constitution to allow Congress to establish a list of candidates. That is the sole preserve of the National Council. He relies on Article 24 of Chapter 6 for that proposition.

ii) That since there has been no evidence of any decision taken pursuant to the first limb of Article 24, by the National Council, the second limb of Article 24 permits the Executive Committee, as an emergency power to establish such a list; and finally,

iii) That, in order to give effect to the above proposition, the words "*late withdrawals*" shall be dealt by the National Executive Committee" in the second limb of Article 24, must be construed as giving the power to the Executive Committee not only to withdraw candidates from the list but to present its own list of candidates.

• The Court adjourned in order to consider learned Counsel's submissions, and to prepare a written judgment.

Article 6 of Chapter 5 of the UMP Constitution states:

The operation of the party mechanism shall be governed by by-laws which shall form part of this Constitution.

Article 7 of Chapter 6 directs that:

The direction of the Party shall be under the jurisdiction of the following national authorities:

- (a) the National Congress*
- (b) the National Extraordinary Congress*
- (c) the National Council*
- (d) the president of the party*
- (e) the National Executive Committee (Head Committee)*

• By-laws have been created, which as we have seen form part of the Constitution, in order to give powers and effect to the Constitution.

Chapter 3 of the By-laws defines the powers and functions of the National Congress, in the sui generis sense. Article 13 defines how often the National Congress may sit one of which only may be called the Annual National Congress. It directs that notice

of the meetings shall be given by the National Executive Committee, which has the power to choose the venue and prepare the agenda of the meetings.

Article 14 states the procedures whereby the meetings shall be called "*in order to give the opportunity to all the members of the Party to express democratically their views and opinions at meetings of National Congress*". Copies of the agenda must be sent out to the **area constituencies**.

Article 15 gives the National Congress the power to make decision in these terms:

"All decisions of the National Congress shall be taken by a majority of votes of mandates bearers".

We have already seen in Chapter 6 of the Constitution itself at Article 7 above mentioned, that the National Congress is the first organ of the Party with the power to "*direct*" that is "l'administration" as it says in the French text, namely, the power to administer the Party. National Congress is therefore the top organ of the Party with full powers to administer, direct, run, the party. In order to do so it needs an executive organ or organs.

The National Extraordinary Congress is nothing more or less than the National Congress sitting otherwise than at its yearly national meeting. It has all the powers of the National Congress except that the agenda that it may consider is a restrictive agenda. The mode of voting at such a meeting is the same and it comes to its decisions in the same manner.

That it is clear that the National Congress or National Extraordinary Congress of the Party has supremacy over the National Council and has the powers to give it orders or directions is made clear in Chapter 6 at Article 23 which states:

"The National Council in compliance with the directives defined by the National Congress and the National Extraordinary Congress acts as the directing and co-ordinating authority of the Party. It has the power on the advice of the Regional Council and the Committee on organisation and elections to decide the electoral nominations and withdrawals of candidates. Article 24 states:

"On the advice of the regional Council and the Committee on organisation and election, it shall decide electoral nominations and withdrawals of candidates". That does not mean that it is given an exclusive power to decide lists of candidates above and beyond the powers of Congress, namely, the Party in its largest democratic form, to give the Council and the other organs of the Party supreme directions as to who shall be its candidates at a forthcoming election.

The powers of the National Executive Committee are contained in Chapter 7 of the By-laws at Article 30 as follows:

"The National Executive Committee shall assist the President in the day to day running of the Party and shall be responsible for executing policies and directives set by the National Congress and the National Council"

Therefore, the National Executive Committee is the executing organ of the Party, not a decision making organ of the Party. It cannot, on its own, formulate Party policies and certainly not decide on who shall be the Official candidates of the Party. It can only execute the directives set by the superior organs of the Party.

I now come back to the submission made by Mr Hudson on the second limb of Article 24 of Chapter 6 of the By-laws which reads as follows:

"Late withdrawals shall be dealt with by the National Executive Committee"

It is, as we have seen above when considering the first limb of Article 24, the National Council on the advice of the Regional Council and the Committee on organisation and election that decides nominations and withdrawals. Does it follow from that that *"late withdrawals"* are decided by the National Executive Committee, as a decision making organ, not an executive organ. Namely, is it there being given a policy making power that it does not normally have? If that were a proper construction of the second limb of Article 24, it would be an extraordinary power given by the Constitution to the lowest organ of the Party, which would entitle it to wait until the last moment and then withdraw all the names on the list if it chose to do so, in flagrant breach of Party decision taken at its highest level. Does the Article go further and entitle the National Executive Committee to add names to the Party list as submitted by Mr Hudson? I think not. It is and remains the executive organ of the Party obliged to carry out the decisions and directives of the superior organs of the Party, the most important being the Party in National Congress or National Extraordinary Congress, whose directives and policies must be followed by the others.

It is common ground that the meeting of the National Extraordinary Congress in Epi in September last was properly called and lawfully constituted. It would, under the rules of the Party, have consisted of **all the organs** of the Party. In other words all the organs of the Party at national, Provincial, Regional and local levels would have been present. I have no doubt that the Regional Council and the Committee on organisation and election would have been present. It cannot escape the Court's attention that one of the main reasons of the meeting was the approval of the UMP candidates at the 1995 General Elections. It cannot be imagined therefore that the bodies directly concerned in the arrangements of the list of candidates would not have been present and would not have been consulted by the National Council and that the National Executive Committee who organised the meeting would not have been aware of it.

I hold therefore that the list, provided on the 1 November by and signed by the Secretary General of the Party and its Vice-President, was for all intent and purposes ultra vires, as indeed was the list as initially presented by the Prime Minister. The list which should have been presented and signed by the Secretary General (for he has the executive power to sign for the party given to him under Chapter 9 Article 35 of the By-laws), is the list agreed by the National Extraordinary Congress at its meeting of September 1995 at Epi.

Fortunately that list can be reconstituted from all the names put forward by the First Applicant and the Secretary General of the Party in this case.

I therefore, declare that the Official candidates for the UMP at the forthcoming elections can be no other than those whose names appear in the list of The National Extraordinary Congress held at Epi in September Last, namely:

BANKS/TORRES	Théodore SOLONG
LUGANVILLE	Alfred MASSING
SANTO/MALO	Serge VOHOR James IMBERT Louis DERIP George TAVUTI Albert RAVUTIA Francky STEVENS
MAEWO	Jonah TALI KANASSE
AMBAE	Samson BOE Amos BANGABITI
PENTECOST	Marcel TABIUSU
MALLICOLO	Paul TELUKLUK Romain BATICK Vidal SOKSOK Ciriaque METMETSAN Jacob THYNA
AMBRYM	Amos ANDENG Iréné BONGNAIM
PAAMA	Demis LANGO
EPI	Kila MANDE
TONGOA/SHEP	John Lee SOLOMON
EFATE RURAL	Louis CARLOT Thomas Brothy FARATIA
PORT-VILA	Maxime CARLOT KORMAN Willy JIMMY Kepoué MANWO
TAFEA	Charley NAKO Jean KEASIPAE Jacques NIRUA David KALANGA

OUTER AREA AND Thomas NENDU

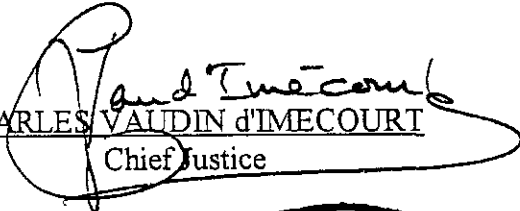
- The following other candidates who have been properly registered but do not figure on the above Official Party list, can stand at the General Elections, but must stand as independent candidates. They cannot use the Name or the Colour or the Emblem of the Union of Moderate Parties and I so declare and order. Those candidates are:

MENSUL EDOUARD
FIDELE VANUSOKSOK
JEAN CLAUDE KANEGAI
ALICK GEORGE NOEL

The question of costs is reserved to be considered.

By order of the Court

Dated this 9th day of November 1995


CHARLES VAUDIN d'IMECOURT
Chief Justice

