IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

CIVIL CASE NO. 101 OF 1997

(Civil Jurisdiction)

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF VANUATU

A N D

IN THE MATTER OF THE NATIONAL PROVIDENT FUND ACT [CAP. 189]

A N D

IN THE MATTER of an Application by DINH VAN THAN for declaratory and injunctive relief regarding the purported termination by the HON. WILLIE JIMMY, Minister of Finance.

Between : DINH VAN THAN

Petitioner and Applicant

And : HON. WILLIE JIMMY

First Respondent

And : VANUATU NATIONAL PROVIDENT FUND BOARD

Second Respondent

And : GOVERNMENT OF THE REPUBLIC OF VANUATU

Third Respondent

And : PETER SALI

Fourth Respondent

Coram : **Mr Justice Oliver A. Saksak**
Mr Mark Hurley for the Petitioner and Applicant
Mr Ishmael Kalsakau for the Respondents

JUDGMENT

This Matter comes before this Court by way of a Petition brought pursuant to Section 218 of the Criminal Procedure Code Act [CAP 136]. On 23rd July 1997 the Petitioner filed an Amended Petition which contains the facts and his claims as follows :-

1. Dinh Van Than (the Petitioner) was appointed as a Member and Chairman of the VNPF Board for a term of three (3) years with effect from 21st October, 1996 by Notice of appointment issued under the hand of the previous Minister of Finance made at Port-Vila on 21st October, 1996, this is a fixed term expiring on 21st October, 1999.

2. By a document headed 'Replacement' issued under the hand of the First Respondent made at Port-Vila on 18th July, 1997, the First Respondent purportedly replaced or removed from Office of Chairman Petitioner and Applicant.

3. The document headed 'Replacement' referred to at paragraph 2 above, also purportedly appointed the Fourth Respondent as the Chairman of the Second Respondent.

4. The First Respondent is the Minister of Finance in the Ministry of the Third Respondent.

5. The First Respondent's purportedly replacement notice is in breach of Sections 3(3) and 4(2) of the VNPF Act [CAP189].

6. Further, the said actions (or omissions) by the First Respondent are ultra vires the VNPF Act and/or constitute administrative conduct that is unreasonable or undertaken for improper purposes or otherwise unlawful and should be quashed as invalid.

7. Further and/or in the alternative, by virtue of the foregoing there have been two breaches of the Constitution of Vanuatu by the First Respondent in that the following fundamental rights have been breached, namely :

   i) the right to protection of the law ;
   ii) the right to equal treatment under the law or administrative action.

8. Further and/or in the alternative, the rules of natural justice have in all the above circumstances been breached.

The following are the Petitioner's prayers :-

1. A declaration that the purported replacement or removal notice issued under the hand of the First Respondent made at Port-Vila on 18th day of July, 1997 is null and void.

2. A declaration that the purported appointment of the Fourth Respondent as the Chairman of the Second Respondent issued under the hand of the First Respondent made at Port-Vila on the 18th day of July, 1997 is null and void.

3. A declaration that the Petitioner's appointment as Chairman of the Board of the Second Respondent for a term of 3 years with effect from 21st October 1996 cannot be declared vacant unless one or more of the criteria as set out in Section 3(3) and 4(2) of the Vanuatu National Provident Fund Act (CAP 189) is satisfied or unless the Petitioner resigns.

4. The First Respondent be and is hereby injuncted from declaring a vacancy in respect of the office of the Chairman otherwise than in accordance with Sections 3(3) and 4(2) of the VNPF Act pending further order of the Court.

5. The Second Respondent, its servants and/or agents be and are hereby injuncted from holding any meeting at which the Fourth Respondent purports to act as Chairman pending further order of the Court.

6. Damages.

7. Such other relief as the Court deems just.

8. Costs.

The evidence before the Court is in the form of affidavits. The Respondents filed two Affidavits on which they rely and the Petitioner filed one affidavit.

The gist of the Petitioner's Petition are twofold. Firstly the Petitioner says that according to law his appointment as Member and Chairman of the VNPF Board was for a fixed period of three (3) years commencing from 21st October, 1996 and ending on 21st October, 1999. As such he argues that he could not be removed, replaced and/or terminated in any other way except in accordance with the criteria stipulated in Section 3(3) of the VNFP Act [CAP.189]. He argues that because he was purportedly replaced or removed from the office of Chairman, the Minister's actions or omissions were ultra vires the VNPF Act. Further that such actions or omissions constituted administrative conduct which was unreasonable and undertaken for improper or unlawful purposes.

Secondly the Petitioner argues that his Constitutional rights to protection of the law and to equal treatment under the law or administrative action were infringed by the actions and/or omissions of the First Respondent.

The Petitioner's evidence show three important documents which I need to set out in full as follows :-

1. Instrument of Appointment

"REPUBLIC OF VANUATU
VANUATU NATIONAL PROVIDENT FUND ACT [CAP.189]

APPOINTMENT

IN EXERCISE of the power conferred upon me by Section 3(1) and 4(1) of the Vanuatu National Provident Fund Act [CAP.189], I SHEM NAUKAUT, Minister of Finance, hereby appoint :-

DINH VAN THAN GILBERT

as Member and Chairman of the Vanuatu National Provident Fund Board for a term of three (3) years with effect from the 21st day of October, 1996.

MADE at Port-Vila this 21st of October, 1996.

(signed)
Hon. SHEM NAUKAUT
Minister of Finance"

2. Letter of Termination

"Government of the Republic of Vanuatu
Ministry of Finance,
Commerce, Industry and Tourism
Private Mail Bag 058, Port-Vila.
Ref. 1/1/5 Telephone (678) 23032
Fax (678) 23142 or (678) 22597
Telex 1040 VANGOV

18th July, 1997

Mr Dinh Van Than
Chairman Board of VNPF
Port-Vila.

Dear Mr Than,

Termination as Chairman of VNPF Board of Directors

I regret to officially inform you that I here on this 18th of July, 1997 terminate your appointment as Chairman of the Board of VNPF.

Your appointment as Board Member to represent employers in the Board of VNPF remain valid, and you are still entitled all Board meetings in the future.

The termination of your appointment as Chairman of the Board was made because of your involvement to sign an affidavit now lodged before the Court to defend two former board members who are also members of the National United Party. That is not in the VNPF interest, it is of your own political party members to continue be in the Board. The Attorney General's Office has advised against such action and advise the Ministry to make this termination accordingly.

I take this opportunity to thank you for the services rendered to the VNPF during your term in the office.

Yours faithfully,

(signed)
W. JIMMY
Minister of Finance"

3. Replacement Notice

"REPUBLIC OF VANUATU

VANUATU NATIONAL PROVIDENT FUND [CAP.189]

REPLACEMENT

WHEREAS DINH VAN THAN was appointed Member and Chairman of the Board of the Vanuatu National Provident Fund pursuant to the relevant provisions of the Vanuatu National Provident Fund Act [CAP 189].

NOW THEREFORE, I, WILLIE JIMMY, Minister of Finance hereby remove the said DINH VAN THAN as Chairman of the said and same Board.

AND FURTHER that the appointed Member PETER SALI is here and now appointed as Chairman of the Vanuatu National Provident Fund.

This termination and replacement shall take effect from the date hereof.

MADE at Port-Vila this 18th day of July, 1997

(signed)
HONOURABLE WILLIE JIMMY
Minister of Finance"

Counsel for the Respondents argued that the Minister had acted in good faith. He argued that Section 3(3) of the VNPF Act [CAP 189] is not a termination provision. He submitted to the Court that in the absence of any specific provision relating to termination in the VNPF Act the First Respondent had power to terminate under the provision of Section 21 of the Interpretation Act [CAP 132].
He submitted further that even if section 21 of the Interpretation Act did not empower the First Respondent to so act, Section 3(1) should be construed as giving a discretion to the Minister to terminate where circumstances require that the discretion should be exercised.

Mr Hurley submitted on behalf of the Petitioner that Section 21 of the Interpretation Act has no place here as the term "terminate" is not used in the provision. He argues that section 3(3) of the VNPF Act provides grounds only for declaration of vacancy. He submitted that Section 3(3) provides 5 criteria by which a Member of the VNPF Board can be declared vacant and that as such it tantamounts to termination.

I now refer to the relevant Sections of the laws which have been referred to the Court. Firstly Section 3 of the VNPF Act [CAP 189] :

"COMPOSITION OF THE BOARD

3(1) The Board shall consist of -

(a) six Members appointed by the Minister and who shall be -

i) two persons employed by the Government one of whom shall be a representative of the Ministry responsible for finance ;

ii) two representatives of employers not being persons employed by the Government or the Board ;

iii) two representatives of employees not being persons employed by the Board; and

(b) the General Manager, ex-officio Member.

2. Subject to subsections (3) and (4) Members of the Board other than the General Manager may be appointed for a term of 3 years or for such shorter period as the Minister may in his discretion in any case determine.

3. If the Minister is satisfied that a Member appointed under subsection (1)(a) -

(a) has been absent from 2 consecutive meetings of the Board without the written consent of the Chairman ;

(b) has become insolvent ;

(c) is incapacitated by physical or mental illness ;

(d) has been convicted of a crime involving moral turpitude ;

(e) is otherwise unable or unfit to discharge the function of a Member ;

the Minister may notice published in the Gazette declare the office of the Member vacant.

4. A Member appointed by the Minister in accordance with subsection (1)(a) may resign by giving not less than 30 days notice in writing to the Minister."

Section 4(2) reads -

"The Chairman and Deputy Chairman shall each serve as such until their term as Member expires and may be reappointed."

Section 21 of the Interpretation Act reads -

"Where an Act of Parliament confers power on any authority to make any appointment that authority shall also have power (subject to any limitations or qualifications which affect the power of appointment) to remove, suspend, reappoint or reinstate any person appointed in the exercise of the power."

Applying these legal provisions to the facts I find firstly that Section 3(2) of the VNPF Act relates only to appointments and it cannot be used as a termination provision. The Instrument of Appointment is clear. The Appointment of the Petitioner was for a period of 3 years. If this was not the intention of the appointing authority the Instrument would have said so. But as it is, I find that the Petitioner's term of appointment was 3 years, it can mean no more or no less than that period as expressly stated. That being so Section 4(2) comes into play. This provision is mandatory. This means that whatever the period of appointment is expressed in the appointment Instrument, that is the period that the appointee must serve as far as the law stands.

But what happens when the appointing authority wishes to terminate the appointment earlier ? It has been argued that the VNPF Act has no termination provision and as such Section 21 of the Interpretation Act can be used for the purposes of good government. Counsel for the Respondents referred to Article 16(1) of the Constitution which reads -

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

What is "peace, order and good government" of Vanuatu ? This is discussed at some length in Civil Case No. 103, 104, 105 of 1992 President Timakata -v- The Attorney General 2 VLR 575 at pp 585 - 587. In that case the English case of Chenard -v- Arissol (1949) AC 127 is cited as the authority for the proposition "that the Court will not inquire whether any particular enactment of this character does in fact promote the peace, order and good government".

The VNPF Act Parts 1-4, 6, 7, 9-13 took effect from October 13th 1986 and Parts 5 and 8 took effect from August 10th, 1987. It is an Act of Parliament made pursuant to Article 16(1) of the Constitution. Reading Section 3(3) of the Act carefully the Court accepts that the Act has no termination provisions. The Court also accepts that Section 3(3) relates only to declaration of vacancy which if existed, would amount to a termination. But the Court is unable to accept that "Termination" can only be effected within the criteria provided in that section. The reason for this is that it is not mandatory for a Minister to publish a notice in the gazette declarating a vacancy in a member's office. Rather it is within the discretion of a Minister to publish. And the Minister exercises that discretion only if he is satisfied that an appointed member falls within one or more of the five criteria. If he is not satisfied but for the purposes of good government as provided for under Article 16 of the Constitution, it is my judgement that in the absence of any specific termination provision, the Minister being the appointing authority, has general powers under Section 21 of the Interpretation Act to act. It would have been different if the Act made it mandatory for publication of a vacancy, then the matter would rest there. But as it is and in light of Section 8 of the Interpretation Act, read together with article 16 (1) of the Constitution, Section 21 can be used in these circumstances. Section 8 of the Interpretation Act reads

"An Act shall be considered to be remedial and shall receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

It has been argued and submitted by Counsel for the Petitioner that to rely on Section 21 of the Interpretation Act would be inconsistent with the Constitution. Mr Hurley referred the Court to Section 9 of the Interpretation Act which reads:

"(1) Every Act shall be read and construed subject to the Constitution and where any provision of an Act conflicts with a provision of the Constitution the latter provision shall prevail.

(2) Where a provision in an Act conflicts with a provision in the Constitution the Act shall nevertheless be valid to the extent that it is not in conflict with the Constitution."

It is submitted on behalf of the Petitioner that where a breach of the Constitution is alleged, Section 21 of the Interpretation Act does not apply. The breaches of the Constitution alleged by the Petitioner are in respect of Article 5 (1)(d)-Protection of the Law, and Article 5 (1)(k)-Equal Treatment under the Law or Administrative Action.

It is submitted that because the Petitioner was appointed for a period of three years under Sections 3(1) and 4(1) of the VNPF Act, therefore pursuant to Section 4(2) of the Act the Petitioner has legal protection to serve until his term of three years expire in October, 1999. That is the protection the Petitioner claims as the fundamental right to protection of the Law under Article 5(1)(d) of the Constitution.

Article 5(2) of the Constitution defines, though not exhaustively what protection of the law shall include. In my view, the right to protection of the law afforded by Section 4(2) of the VNPF Act on the Chairman and Deputy Chairman is not an absolute right. Section 21 of the Interpretation Act in my view, is not inconsistent with the Constitution. Where an Act of Parliament gives no discretion whatsoever to the Minister to act under any circumstances, the right to protection of the law if provided for in the Legislation becomes an absolute right. But where there is a discretion as I have held there is in Section 3 (3) of the VNPF Act, and that discretion is exercised by virtue of Section 21 of the Interpretation Act having due regard to Article 16 (1) of the Constitution, the right to protection of the law becomes restricted in the sense that it is only a partial right. When it comes to a right to be afforded procedural fairness and natural justice when exercising a discretionary power in administrative actions, the right to protection of the law is so fundamental that it cannot be ignored. But I will come back to these a little later.

It has been argued by Counsel for the Petitioner that politics has and should have no place in the Courts of Vanuatu. And Mr Hurley made reference to the remarks of the Acting Chief Justice, Mr Justice Lunabek concerning the role of the Court to uphold the law of Vanuatu. The case referred to *was civil case No. 126 of 1996 Hon. Willie Jimmy and others -v- Attorney General and Speaker of Parliament.* Mr Hurley also referred the Court to the English case of *John -v- Rees [1969] 2 All ER. 274 at page 281* where Megarry, J said this:

"My concern is merely to see that those concerned in these proceedings obtain justice according to law, irrespective of politics."

These are important statements which are not in issue but I include them in my judgement merely to draw attention to the peculiar circumstances of Vanuatu. Vanuatu has a peculiar Constitution and its politics are peculiar to its peculiar circumstances. When a legislation made under Article 16 of the Constitution has a provision which reads:

" 16. The moneys belonging to the Fund shall be invested by the Board IN ACCORDANCE WITH POLICY GUIDELINES approved by the Minister for the time being responsible for Finance and the Reserve Bank of Vanuatu..."

This is Section 16 of the VNPF Act [CAP 189]. I have placed emphasis on the words underlined because these have bearing on the statements of Lunabek and Megarry, JJ above. It reveals that Vanuatu indeed has peculiar circumstances and I think it would be more appropriate to say that here in Vanuatu each case has to be decided on its own merits according to the relevant legislation, if any, that applies appropriately to the circumstances of the case. Indeed I would go one step further to say that in my view such a provision is dangerous and the sooner it be amended and/or replaced, the better.

Now I go on to consider the Petitioner's allegation about breach of rules of natural justice by the First Respondent. The Petitioner relied *on Civil Cases No. 103, 104, 105 of 1992: The President Frederick Kalomuana Timakata -v- The Attorney General 2 V.L.R at p.575.* At first instance the learned Chief Justice Charles Vaudin d'Imecourt, J said this at p. 599:

" It is quite clear that the principles of natural justice have been held to apply to both legal and administrative proceedings and are part and parcel of the protection of the law within the meaning of Article 5(1)(d) is both a guarantee of procedural fairness and/or fundamental rights. In Boulekone -v- Timakata, Civil Case No. 90 of 1986 it was held by the full Supreme Court of the Republic of Vanuatu in a case presented under Article 6(1) of the Constitution as follows:

"Fundamental rights are set out in Article 5(1) which includes under paragraph (d) 'protection of the law'. Article 5(2) describes what it meant by 'Protection of the law'. Without repeating it in detail one can say that it specifies the essential requirements of a fair hearing by anyone facing an allegation, that is to say the principles of natural justice as known and understood in the free and democratic world will be applied by the tribunal considering the allegation. All tribunals in Vanuatu are accordingly bound by the rules of natural justice whether they be administrative in function or purely judicial."

However it is submitted on behalf of the Respondents that the obligation on the first Respondent to provide reasons is not an incident

of procedural fairness or natural justice and does not of itself render a decision ultra vires or constitute a breach of fundamental rights under Article 5 of the Constitution. Mr Kalsakau relied on the decision of the Court of Appeal in *Appeal Case No. 1 of 1993: Attorney General -v- President Frederick Kalomuana Timakata* 2VLR 679. He referred the Court also to the English Case of *Padfield -v- Minister of Agriculture, fisheries and food (1968) AC 997.*
In Appeal Case No.1 of 1993 the Court of Appeal said this at pp.684-685:

"It is therefore not possible to hold that the rules of natural justice require that reasons should be given for an administrative decision and still less possible to hold that there is fundamental rule of that kind. The fact that the giving of reasons may be regarded by a citizen as increasing the protection that the law provides does not mean that a failure to give reasons is a denial of the protection guaranteed by Article 5(1)(d). That Article does not entitle the citizen to every form of assistance that the law might conceively provide or to every procedural right that may be available at any particular time. The article entitles the citizen to the observance of those principles of natural justice which may be properly be regarded as fundamental and not to other principles which may be valuable but which are not fundamental. The requirement that reasons be given for an administrative decision is not a fundamental principle of natural justice".

I accept that it is now established that the requirement for written reasons does not form part of the rules of natural justice or the common law: see Mc Innes -v- Onslow Fane (1978)3 All ER 221 per Megarry VC, Public Board of New South Wales -v- Osmond (1986) 159 CLR 656 at 662, Sharp -v-Wakefilld (1891) AC 173 at p. 183, Padfield -v- Minister of Agriculture, Fisheries and Food (1968) AC 997 and the Majority decision in the Court of Appeal in Breen -v- Amalgamated Engineering Union (1971) 2 QBD 175.

Counsel for the Petitioner referred me to the strong dissenting views of Lord Denning in the Breen case at p. 190 in which the Master of the Rolls said:

" It is now well settled that a Statutory Body, which is entrusted by statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other hand, or what you will. Still it must act fairly. It must in a proper case give a party a chance to be heard. The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the Statutory Body must be guided by relevant considerations which it ought not to have taken into account, the decision cannot stand. No matter that the Statutory Body may have acted in good faith, nevertheless the decision will be set aside. That is established by Padfield -v- Minister of Agriculture, Fisheries and Food (Supra) which is a land mark in modern administrative law... If the rules set up a domestic body and give it a discretion it is to be implied that that body must exercise its

discretion fairly. Even though its functions are not judicial or quasi-judicial, but only administrative, still it must act fairly. Should it not do so the Courts can review its decision, just as it can review the decision of a Statutory Body. Then comes the problem: ought such a body statutory or domestic, to give reasons for its decisions or to give the person concerned a chance of being heard? Not always, but sometimes. It all depends on what is fair in the circumstances. If a man seeks a privilege to which he has no particular claim- such as an appointment to some post or other - then he can be turned away without a word. He need not to be heard, no explanation need be given. But if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard. I go further. If he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, according as the case may demand. The giving of reasons is one of the fundamentals of good administration."

Professor Wade recognises that it has never been a principle of natural justice that reason be given for decisions, but he goes on to submit at p. 547:

"Nevertheless there is a strong case to be made for the giving of reasons as an essential element of administrative justice. The need for it has been sharply exposed by expanding law of judicial review, now that so many decisions are liable to be quashed or appealed against on grounds of improper purpose, irrelevant considerations and errors of law of various kinds unless a citizen can discover the reason behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. A right to reasons is therefore indispensable part of a sound system of judicial review... Its is also a healthy discipline for all who exercise power over others." (see Wade's Administrative Law, 6th Edition 547-550).

Applying these principles of Common Law to the evidence before me in this case, I find that the Petitioner was given reasons for his termination in the First Respondent's letter dated 18th July, 1997. The reasons may have been for improper purposes or of irrelevant considerations but as I have already indicated that due to the peculiar circumstances of Vanuatu, Parliament has enacted the VNPF Act [CAP 189] in particular Section 16, the Petitioner's allegation that he has not been afforded natural justice cannot stand.

But was the letter of 18th July sufficient? I think not. In Vanuatu there is what is called "the nakamal way". Writing has never been the Vanuatu way, this has been introduced. The Vanuatu way is the "nakamal way" which involves summoning a person to be affected by one's decision into one's office and talking things over with him. In my considered opinion substantial justice requires that such should have been the right course of action to have been taken by the Minister. I say this only because I am very much in favour of the dissenting judgement of Lord Denning in the Breen case and the submission of

Professor Wade which I have cited above. Had it not been for the strong line of established cases which I have cited above, I would have easily found that the Petitioner was not afforded natural justice and procedural fairness because he was not summoned in the "nakamal way". But until the situation is changed I uphold the common law as it stands on the issue.

Counsel for the Respondents told the Court that the termination of the Petitioner was incomplete awaiting the return of the First Respondent from overseas tour. I am unable to accept that argument as it is so clear from the letter dated 18th July, 1997 that the termination had been effected and there can be no doubt in my mind that it was only a provisional termination.

Finally concerning the Replacement Notice dated 18th July, 1997 the Petitioner says that the First Respondent had no power to issue same and further that the Minister had no power to appoint a new Chairman when there was no vacancy.

In my judgement this is neither a termination nor a replacement. The documents are so confusing that even this Court does not know what it actually is. It is not a termination under Section 21 of the Interpretation Act as the Respondents say it is because if it were it should and would have said so in its enabling provisions. The letter of 18th July makes no reference to Section 21 of the Interpretation Act.

The Replacement Notice signed and dated 18th July, 1997 is not what it purports to be because there is no reference on it as to which law allows the First Respondent to issue it. Replacement can only be made in my judgement, where there is a vacancy in accordance with Section 3(3) of the VNPF Act. But the Respondents say this is no case of Section 3(3) of the VNPF Act. They say it is a termination under Section 21 of the Interpretation Act. In my judgement we cannot have a valid replacement when we do not have a valid termination in the first place.

In the circumstances therefore I make the following Declarations:

1- That the purported replacement or removal notice issued under the hand of the First Respondent made at Port Vila on 18th Day of July, 1997 is hereby declared null and void and is of no effect.

2- That the purported appointment of the Fourth Respondent as the Chairman of the Second Respondent issued under the hand of the First Respondent made at Port Vila on the 18th day of July, 1997 is hereby declared null and void and is of no effect

The declaration sought by the Petitioner in prayer No. 3 is not granted.

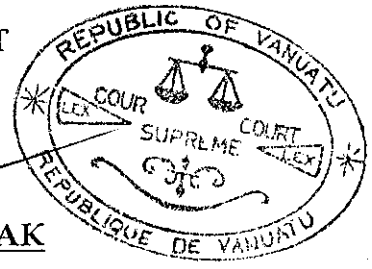
The injunctory reliefs sought by the Petitioner in prayers No. 4 and 5 are not granted.

Prayer no. 6 seeking damages is not considered as this is not an appropriate case for damages.

IT IS ORDERED that the Petitioner be reinstated to his office as Chairman forthwith. Further it is ordered that the Respondents pay the Petitioner's costs to be taxed if not agreed.

DATED at PORT-VILA this 7th day of August 1997.

BY THE COURT



OLIVER A. SAKSAK
Judge.