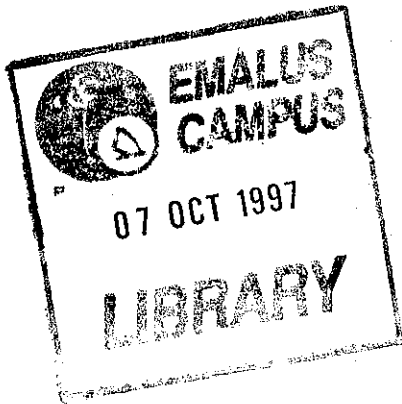


**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

CIVIL CASE No. 04 OF 1997



Between : JEAN PAUL VIRELALA, DANIEL MOLISA, JOHN SIMBOLO, MOI DIHN, ALFRED MASENG, IARIS NAUNUN, CHARLEY PAKOA, ALFRED MALIU & GAETAN PIKIOUNE, Members of the Board of Directors of Air Vanuatu (Operations) Limited of Lo Lam House, Kumul High Way, PORT-VILA, Vanuatu.

Plaintiffs

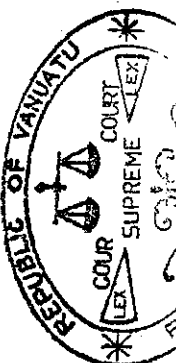
And : THE OMBUDSMAN of P.O.Box 126, PORT-VILA, in the Republic of Vanuatu

Defendant

Coram : Lunabek Vincent J., Acting Chief Justice
Mr Baxter Wright for the Plaintiffs
Mr Crossland for the Defendant

INTERLOCUTORY JUDGMENT

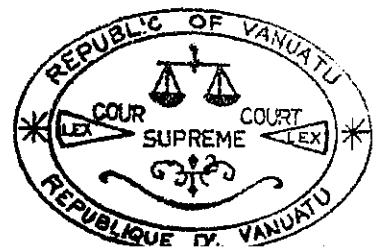
This matter arises out of an enquiry made by the Ombudsman of the Republic of Vanuatu, Mrs Marie Noelle Ferrieux Patterson. The enquiry is made subsequent to the direction of the Prime Minister, Rt. Hon. Serge Vohor ("Mr Vohor") and Others that Air Vanuatu (Operations) Limited ("Air Vanuatu") proceed with the purchase of an ATR42/500 new aircraft. The Plaintiffs who are all Members of the Board of Directors of Air Vanuatu deny the jurisdiction of the



Ombudsman and seek confirmation from the Ombudsman that she would terminated her enquiry. On 30 January, 1997, the Ombudsman, through her legal Counsel confirmed her jurisdiction and refused to terminate her enquiry. It is, therefore, on that basis that the Plaintiffs, on 12 March, 1997 filed an Amended Writ of Summons with a statement of claim seeking for :

1. A declaration that the Summons issued by the Defendant are ultra vires the powers of the defendant and are null and void and of no effect.
2. An order restraining the Defendant from issuing any further Summons against the Plaintiffs or any of them in connection with the same matter without the leave of the Court.
3. An order restraining the Defendant from taking any proceedings against the Plaintiffs or any of them for failure to comply with summonses issued by the Defendant.
4. Damages.
5. A Declaration that the Ombudsman Act No.14 of 1995 is invalid in that :-
 - (a) it is inconsistent with Chapter 9 of the Constitution;
 - (b) it was not passed in accordance with Chapter 14 of the Constitution;
 - (c) it purports to confer on the Ombudsman powers and functions greater and wider than those provided in Chapter 9 of the Constitution and thereby infringes the basic rights and freedom guaranteed to all persons by Article 5 of the Constitution in particular :

Article 5(b)	Liberty
“ 5(d)	protection of the law
“ 5(i)	freedom of movement

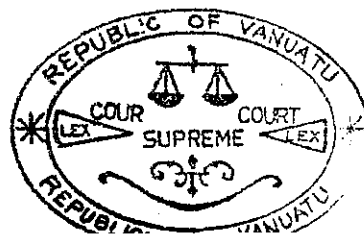


- Article 5(j) protection of property and from unjust deprivation of property; and
" 5(k) equal treatment under the law of administrative action
6. An order that the documents obtained from the Plaintiffs by the Ombudsman in relation to this matter be returned forthwith.
 7. An order that the statements taken from such of the Plaintiffs as have been interrogated by the Ombudsman and all copies thereof be destroyed or handed to the legal representatives of the Plaintiffs at or before a time fixed by the Court.
 8. An Order that an enquiry be had into damages suffered by the Plaintiffs.
 9. An Order that the Ombudsman, by herself, her servants and agents, be restrained from divulging any of the information concerning this matter that she or her servants or agents or anyone on her behalf has or have obtained from the Plaintiffs or from any documents supplied by them to the Ombudsman, her servants or agents.
 10. Such further or other Order as the Court deems just.
 11. Costs.

An Affidavit of one Mr Jean Paul Virelala is filed in support thereof.

On 18 March 1997 the Plaintiffs filed an Amended Summons seeking for the following Interlocutory relief :

1. An Order restraining the Defendant from issuing further Summons against the Plaintiffs in connection with the same matter without the leave of the Court.



2. An Order restraining the Defendant from taking any proceedings against the Plaintiffs or any of them for failure to comply with the Summons issued by the Defendant.
3. Such further or other relief as the Court deems just.
4. Costs.

This Application for interlocutory relief is supported by an Affidavit of Mr Baxter Wright filed on the same 18 March, 1997.

On the same date of 18 March, 1997 the Defendant/Ombudsman filed an Inter partes application asking for an Order from this Court :

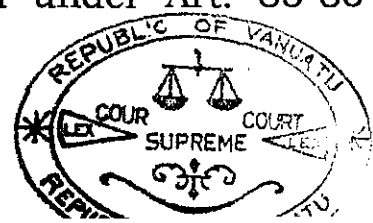
1. To strike out the Plaintiffs' statement of claim ; and
2. That the costs and disbursements of and incidental with this application be paid by the Plaintiffs to the Defendant.

It appears, therefore, that there are two different applications before the Court. I will deal with the Defendant's application to strike out the statement of claim first, as suggested by the Plaintiffs' Counsel, since if that application is granted, there is no basis upon which the interlocutory relief sought by the Plaintiffs could be sustained, or granted.

This Court has two (2) questions to determine :

1. The Plaintiffs challenge the Constitutional validity of the Ombudsman Act No.14 of 1995 and in particular :

Whether or not Vanuatu National Parliament had the authority to extend the powers and functions of the Ombudsman in addition to those already contained in the Constitution [under Chap.9 - Part II] without an amendment of the Constitution under Art. 85-86 of Chap. 14.



If the answer to question (1) is no, then :

2. The Plaintiffs say that the enquiry of the Ombudsman ultra vires the Constitution and the Ombudsman Act No. 14 of 1995.

I - THE DEFENDANT/OMBUDSMAN'S APPLICATION TO STRIKE OUT THE PLAINTIFFS' STATEMENT OF CLAIM

It is the Defendant's application and submission that the Plaintiffs' statement of claim discloses no reasonable cause of action, thus, should be struck out.

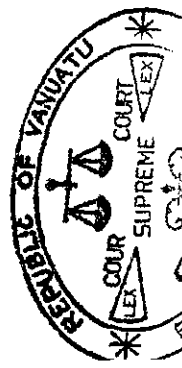
The Plaintiffs say the statement of claim discloses a reasonable cause of action which is neither vexatious nor frivolous. They say also that the Amended Writ of Summons dated and filed 12 March 1997 raises a number of serious and sustainable causes of action. I will proceed with them in turn.

I-A THE PLAINTIFFS CHALLENGE THE CONSTITUTIONAL VALIDITY OF THE OMBUDSMAN ACT No.14 OF 1995

THE PLAINTIFFS' SUBMISSIONS

The Plaintiffs' first cause of action pleaded in the Summons, at paragraphs 11 to 14 of the Statement of Claim, is that the Ombudsman Act No.14 of 1995 is itself unconstitutional, and consequently invalid and of no effect. It is subsequently submitted further that all actions on the part of the Defendant purportedly in accordance with the Act, are correspondingly invalid and of no effect.

The arguments of the Plaintiffs proceed on the contention that the Constitution contains a complete code for the High Office of Ombudsman and that the Ombudsman's powers are solely those the Constitution (as validly amended from time to time as set out in Chapter 14) confers on the



Ombudsman's Office in Part II of Chapter 9 "Administration", as set out in Articles 61 to 65 [of the Constitution].

The Plaintiffs noted also that Part II of Chapter 9 of the Constitution contains no grant to the Parliament of power to "give effect to the principles" therein such as Article 68 gives in Chapter 10 of the Constitution.

Further, the Plaintiffs say the Ombudsman is to be disqualified from office under Article 61 of the Constitution "if he holds any other office."

It is, therefore, submitted for the Plaintiffs that any amendment to the Office of the Ombudsman, as provided in Article 61 of the Constitution, must be by way of amendment to the Constitution itself. Since there has been no valid, or even purported constitutional amendment, it follows that Ombudsman Act No.14 of 1995 is invalid and any actions taken pursuant thereto are thus null and void and should be so declared.

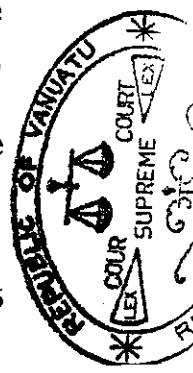
The Plaintiffs, further, by referring to Section 4 of the Act which specifically provides that :

"The Ombudsman shall have all powers to perform his functions and carry out his duties described in this Act in addition to the functions and duties vested in him by the Constitution."

says that the Parliament seeks to differentiate the two sources of powers.

On that basis, the Plaintiffs submitted that the Act is ineffectual to accomplish what was attempted, and all that remains are the constitutional provisions.

The Plaintiffs further say that the Ombudsman is named in the Constitution (Part II, Chapter 9) like other persons that are named in the Constitution : President (Art.33), the Speaker (Art.37), Prime Minister (Art.41), Ministers (Art. 42), the Chief Justice (Art.49), the Public Prosecutor, (Art. 55). All these persons being named in the Constitution are to be



regarded as having important functions and duties as variously set out in the Constitution.

It is submitted that their powers and functions are fully set out in the Constitution and they can neither be detracted from nor added to simply by an act of Parliament .

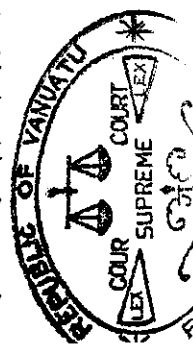
In respect to the Ombudsman, the Plaintiffs finally submitted that if the Parliament wishes to reduce the powers and functions of the Ombudsman contained in the Constitution, such an Act would require an amendment to the Constitution in accordance with the provisions of Chapter 14 of the Constitution. The Plaintiffs, thus, submitted that correspondly Parliament has no power to enlarge the Ombudsman's powers beyond those set out in the Constitution without a Chapter 14 amendment and that the powers afforded to the Ombudsman by the Act infringe the fundamental constitutional rights of all citizens, and if this were the intention of the authors of the Constitution, it was necessary to so state expressly in the Constitution itself which is not the case.

THE DEFENDANT/OMBUDSMAN'S SUBMISSIONS

The Defendant made some lengthy submissions. I will not go into details. I will summarise the main arguments and submissions which constitute direct reply to the Plaintiffs' submissions.

It is contended on behalf of the defendant/Ombudsman that the Plaintiffs' suggestion that Part II of Chapter 9 of the Constitution is a "Complete Code" is untenable. Such argument, it is said, misconceives the fundamental purpose of a Constitution. A Constitution, it is put, is a still evolving thing and is not to be interpreted statically but dynamically (otherwise it would be quickly rendered obsolete).

The Defendant/Ombudsman said further that caution ought to be taken when one is seeking to apply principles that are applied in a certain way in one country's Constitution to that of another. Some countries constitutions, it is said, are very long and are tantamount to a Code and others are short setting out guiding principles. It is noted that Vanuatu's



Constitution is comparatively short and expressed in reasonable wide language.

It is also observed that where a country's Constitution is shorter in length and more concerned with guiding principles, judges will play a more significant role in discovering applications in novel situations.

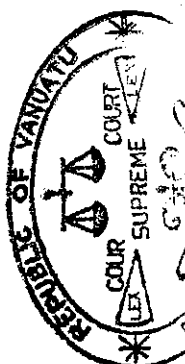
It is also put for the Defendant/Ombudsman that the correct approach to questions of Constitutional interpretation and application is one that is dynamic and not static.

It is further contented for the Ombudsman that if the Part II of Chapter 9 was intended to be Code one would expect that other matters covered in the Act to also appear in the Constitution. They do not. It is also said, that nowhere in the Constitution does it suggest that this part or any part of the Constitution is a "Complete Code". It is thus submitted that Vanuatu's Constitution, being of reasonable brevity, was not intended for one occasion, but for the continued life and progress of the nation.

It is also put for the Defendant/Ombudsman that the Plaintiffs' approach to read Articles 61 to 65 under a heading styled "Part II - The Ombudsman" in a "Chapter" styled "CHAPTER 9 - ADMINISTRATION" in isolation, is erroneous and of limited assistance. The defendant says the better approach is to read the Constitution as a whole not as a series of unconnected parts.

It was then submitted that there is a logical and obvious nexus between :

- (i) "Conduct" in Articles 62 and 63 of the Constitution [of the Part II - Chapter 9] with "Conduct" in Article 66 [Leadership Code in Chapter 10 of the Constitution] ;
- (ii) "public Servants" in Article 62(2) [under Part II] and "leaders" in Article 67 [under Chapter 10] : essentially "leaders" are a subset, Not only do they



lead but they serve the public/people under Articles 4(1) which provides that :

"National sovereignty belongs to the people of Vanuatu..." ;

And Art.39(1) which says :

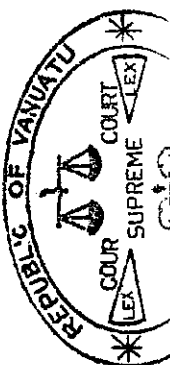
"The executive power of the people of the Republic of Vanuatu is vested in the Prime Ministers and Council of Ministers and shall be exercised as provided by the Constitution or a law."

The Defendant/Ombudsman relied also on Articles 67 and 68 of the Constitution to justify the basic grant of power/jurisdiction to the Ombudsman in the Constitution under Article 62 and the practical machinery to exercise that jurisdiction which is the Act.

It is submitted for the Ombudsman that Article 67 specifically leaves open the Class of persons who can be defined as "leader". It explicitly comprehends later legislation adding to the class. It is also said, that Article 67 does not say at all that the Constitution needs to be amended to add to the class. Nor does it say how effect is to be given to these principles. It is, thus, contended that logically, it is the Ombudsman.

The Defendant/Ombudsman further contended that as far as the enforcement of leadership principles is concerned, Article 68 of the Constitution is even more explicit. It is then submitted that Article 68 mandatorily ("shall" is used) requires Parliament to "give effect" "by law". Further, that it is a nonsense to suggest that Parliament is contemplating change to the Constitution to effect these principles and "law" here, it is said, can mean a statute. The Ombudsman Act does just that, it is submitted.

Finally, it is contented for the Defendant that the Plaintiffs' suggestion that the effect of the Act is to confer on the Ombudsman further official powers which thus breach the constitutional prohibition in Article 61(2) on the Ombudsman from holding any other "public office" is



meaningless. It is therefore, submitted that the Article is directed to preventing the Ombudsman from holding office in another organ of the State.

COURT CONSIDERATIONS

CONSTITUTION : CHAPTER 9 - ADMINISTRATION **PART II - OMBUDSMAN**

The Constitution provides for the Office of the Ombudsman as set out in Articles 61 to 65.

Very briefly, the general character of these constitutional provisions are set out as follows :

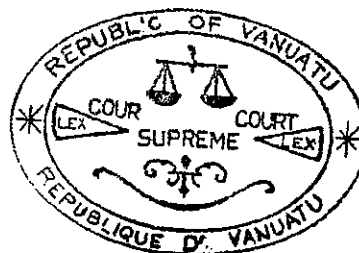
Article 61(1) deals with the appointment of the Ombudsman... and Art.61(2) provides for disqualification for appointment of a person as Ombudsman if he, inter alia, holds any other public office.

Articles 62(1); (2) says that the Ombudsman may enquire into the conduct of... all public servants, public authorities and ministerial departments, with the exception of the President of the Republic, the Judicial Service Commission, the Supreme Court and other judicial bodies.

Art. 62(3) states that the Ombudsman may request any Minister, public servant, administrator, authority concerned or any person likely to assist him, to furnish him with information and documents needed for his enquiry and the Ombudsman's enquiries shall be conducted in private (Art. 62(5)).

Art. 63 deals with the findings and reports of the Ombudsman.

Art. 63(2) says that :



“Whenever, after due enquiry, the Ombudsman concludes that conduct was contrary to the law, based on error of law or of fact, delayed for unjustified reasons, or unjust or blatantly unreasonable... he shall forward his findings...”;

and that Art. 63(5) provides for the Ombudsman to present a general report to Parliament each year... .

Article 63(5) provides for specific duties of the Ombudsman in respect of multilingualism and official languages.

OBSERVATIONS

It is to be noted, and I concede with the Plaintiffs’ argument that Chapter 9 - “Administration” Part II - “Ombudsman” - contains no express provision which permits or allows Parliament to give effect by law to the Ombudsman’s office.

And, equally, it is also important to note that there is neither express provision which prohibits Parliament from legislating to that effect.

OMBUDSMAN ACT No.14 OF 1995

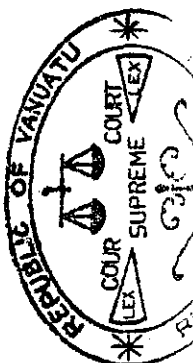
The general character of the Act can be briefly described under eight (8) heads.

Part I - Introductory - sets out the definitions, (Interpretations), application of law. Section 4 puts clearly the intention of legislature in this way :

“The Ombudsman shall have all powers to perform his functions and carry out his duties described in this Act, in addition to the functions and duties vested in him by the Constitution.”

Part II provides for qualification and conditions of employment, termination and retirement.

Under Part III - Functions of the Ombudsman

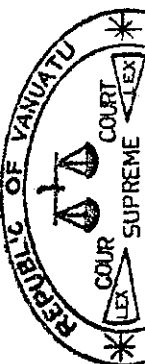


Section 14(1) says :

“For the purposes of Article 62(1) of the Constitution, in addition to the functions of the Ombudsman specified therein, the Ombudsman may also -

- (a) enquire into, either on complaint of a person or body referred to in Article 62(1)(a) and (b) of the Constitution or on his own initiative, any conduct on the part of -*
 - (i) any State Service, or a member of any State Service ; or*
 - (ii) any Governmental Body, or an officer or employee of a Governmental Body ; or*
 - (iii) any other body -*
 - (A) that is wholly or mainly supported out of public moneys of Vanuatu ; or*
 - (B) all of, or the majority of, the members of the controlling authority of which are appointed by the President, the Council of Ministers or a Minister, or an officer or employee of any such body ; and*
 - (iv) the Leader and Deputy Leader of the Opposition ; or*
 - (v) any body or service set up by statute, that the President, acting on, and in accordance with, the advice of the Council of Ministers, declares by notice in the gazette to be a service or body for the purpose of this section;”.*

This paragraph (a) of Subsection (1) of the Section 14 of the Act creates new categories of persons and/or bodies (or Services) which are now also subject to the Ombudsman's



jurisdiction for the purposes of the Ombudsman enquiry under Article 62(1) of the Constitution.

Articles 62(1) & (2) of the Constitution say that :

"(1) the Ombudsman may enquire into the conduct of any person or body to which this Article applies..." ;

"(2) This Article [Art.62(1)] shall apply to all public servants, public authorities and ministerial departments, with the exception of the President of the Republic, the Judicial Service Commission, the Supreme Court and other judicial bodies."
[underlining words are my emphasis]

So quite clearly, the Parliament intends to extend the jurisdiction of the Ombudsman to enquire into the conduct of all persons and bodies (or services) provided under Section 14(1) [(a)(i); (ii); (iii)(A) & (B); (iv); (v)] of the Act, apart from and in addition to the classes or categories of persons or bodies already contained in Articles 62(2) of the Constitution, namely, all public servants, public authorities and ministerial departments.

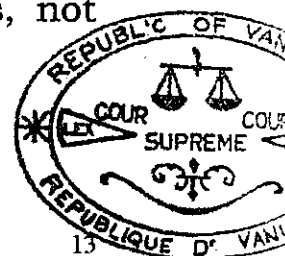
Section 14(1)(b) & (c) say :

"(1) ... the Ombudsman may also -

(b) enquire into any defects in any law or administrative practice appearing from any matter being enquired into ; and

(c) enquire into, either on complaint of a person or body referred to under Article 62(1)(a) and (b) of the Constitution or on his own initiative, any case of an alleged or suspected discriminatory practice ;"

It is to be noted that paragraphs (b) & (c) of Subsection (1) of the Section 14 of the Act create new subject matters, not provided for under the Constitution [in Article 62(1)].



Article 62(1) of the Constitution says :

“The Ombudsman may enquire into the conduct of any person or body to which this Article applies...”

Therefore, it is quite clear that, in addition to the jurisdiction of the Ombudsman to enquire into the conduct of persons or bodies as provided for under Article 62(2) of the Constitution, and subsequently, to enquire into the conduct of persons and bodies (or Services) provided for under Section 14(1) (a) [(i); (ii); (iii); (A) & (B); (iv); (v)] of the Act, the Ombudsman has also jurisdiction to enquire into :

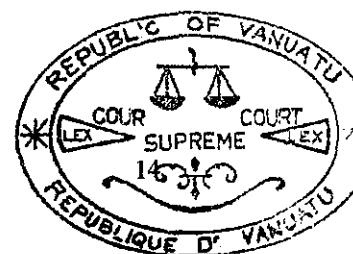
“any defects in any law or administrative practice ...”
and ;

“any case of an alleged or suspected discriminatory practice,” provided for under Section 14(1)[(b);(c)] of the Act.

I will pause for a moment here and just as a matter of reminder, it is to be observed that the forgoing observations constitute the basis of the Plaintiffs' arguments against the constitutional validity of the Ombudsman Act. In essence, the Plaintiffs say that Parliament cannot give extra-jurisdiction or cannot extend the powers and functions of the Ombudsman without, first proceeded by way of a constitutional amendment as provided for under Chapter 14 of the Constitution.

The Defendant replies in substance that the Ombudsman Act does not alter the Constitution by a de facto amendment, but that there is nexus between Chapter 9 and Chapter 10 of the Constitution so that in effect, there is a link between the two Chapters since a Constitution has to be interpreted and applied in a dynamic way, not in a static manner.

It transpires from what it was said above that apparently, there is a doubt as to the constitutional validity of Section 14(1)(a), (b) and (c) of the Act. We will see later on how to deal with the doubt in question.



Section 14(1)(d) provides, in effect, that :

(1) ... the Ombudsman may also -

(d) enquire into, either on complaint of any person or body referred to under Article 62(1)(a) and (b) of the Constitution or on his own initiative, any case of an alleged or suspected breach of Chapter 10 (Leadership Code) of the Constitution by a leader.

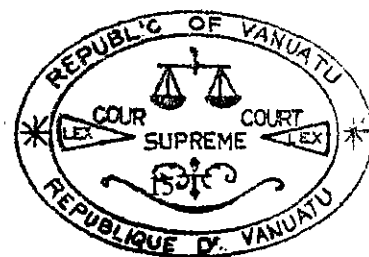
This Section 14(1)(d) gives jurisdiction to the Ombudsman to enquire into matters related to breaches of Chapter 10 (Leadership Code) of the Constitution. The jurisdiction given to the Ombudsman under S.14(1)(d) of the Act is done under Article 68 of the Constitution which clearly provides that :

“Parliament shall by law give effect to the Principles of this chapter.” [Leadership Code] (my emphasis).

Section 14 (2) of the Act says :

“For the purposes of paragraph (d) of Subsection (1), in addition to those persons referred to as leaders under Article 67 of the Constitution, leaders shall include :

- (a) *the Chairman and members of the Council of Chiefs; and*
- (b) *the Chairman and members of Local Government Councils ; and*
- (c) *the Mayors and members of Municipal Councils ; and*
- (d) *all Constitutional Office holders ; and*
- (e) *all Political Secretaries of Ministerial Departments ; and*



- (f) all Heads or members of boards of statutory authorities ; and
- (g) all Heads of Departments ; and
- (h) Chairmen, Managing Directors, Directors appointed by the President, Council of Ministers, Prime Minister, Deputy Prime Minister or a Minister, and General Managers of corporations in which the government has an equity holding ; and
- (i) any other person holding public office that the President declares on the advice of the Ombudsman after consultation with the Prime Minister and Leader of Opposition to be a leader for the purposes of this Act, such declaration to be published in the Gazette."

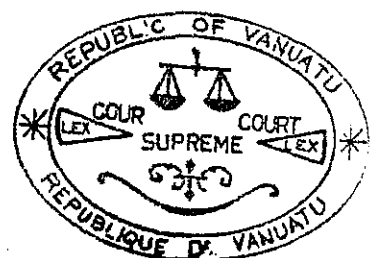
Article 67 of the Constitution provides :

"For the purposes of this chapter, [Leadership Code], a leader means the President of the Republic, the Prime Minister and other Ministers, Members of Parliament, and such public servants, officers of government agencies and other officers as may be prescribed by law." (my emphasis).

The expression "by law" means the Constitution or an Act of Parliament which is what Section 14(2) of the Ombudsman Act does.

Section 14(1)(d) & (2) are straight forward provisions in line with corresponding constitutional provisions which constitute the basis for granting the jurisdiction to the Ombudsman. Thus, no doubt transpires therefrom.

Section 14(3) says :



“For the purposes of Article 63(2) of the Constitution and of the above subsections the Ombudsman may, after due enquiry, additionally conclude that conduct was -

- (a) oppressive or improperly discriminatory, whether or not it is in accordance with law or practice ; or*
- (b) based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations ; or*
- (c) contrary to natural justice ; or*
- (d) conduct for which reasons should be given but were not.”*

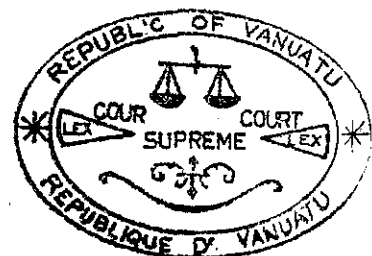
The subject-matter contained in S.14(3) are not provided for under the Constitution [Art.63(2)]. S.14(3) constitutes new series of findings given to the Ombudsman to make at the conclusion of his/her enquiries.

So here again, the same observations made earlier on applied. There is indeed a doubt as to the constitutional validity of the Ombudsman Act. Again, we shall see later on how to deal with that doubt.

Section 14(4) says :

“For the purposes of enforcing the principles of Article 66 (Leadership Code) of the Constitution, the following provisions shall apply :-

- (a) the Ombudsman may enquire into the conduct of a leader other than the President or any person holding judicial office ; and*
- (b) the President may enquire into the conduct of the Ombudsman and any person holding judicial office and, for that purpose, shall -*



- (i) *have all of the powers given to the Ombudsman pursuant to this Act in respect of such an enquiry ;*
- (ii) *be entitled to delegate such enquiry to the Ombudsman or any judicial or legal officer.”*

Articles 62(1) & (2) say :

- “(1) *The Ombudsman may enquire into the conduct of any person or body to which this Article applies.*
- (2) *This Article shall apply to all public servants, public authorities and ministerial departments, with the exception of the President of the Republic, the Judicial Service Commission, the Supreme Court and Other judicial bodies.* [underlining words are my emphasis].

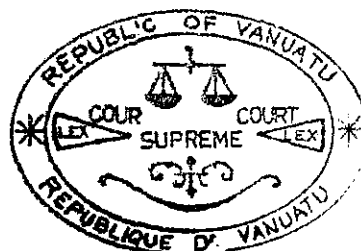
Interestingly, S.14(4) (a) in line with the provision of Article 62(2) of the Constitution referred to above, says that *the Ombudsman, in effect may enquire into the conduct of a leader, other than the President or any person holding judicial office ;* and [underlining words are my emphasis]

Section 14(4)(b) provides that *the President may enquire into the conduct of the Ombudsman and any person holding judicial office and, for that purpose, shall -*

be entitled to delegate such enquiry to the Ombudsman or any judicial or legal officer [see S. 14(4)(b)(ii) of the Act].

There is quite clearly here, a serious doubt as to the constitutional validity of sub. paragraph (ii) of paragraph (b) of subsection (4) of the Section 14 of the Act. I will come to that later on.

Part IV of the Ombudsman Act deals with the complaints and proceedings. It sets up procedures of the Ombudsman



(s.16) and the details of the machinery for the exercise of the power/jurisdiction given under the Constitution.

Article 62(3) provides that the Ombudsman

“may request any person to furnish him with information and documents.”

SS. 17 & 21 of the Act, no doubt, set out in detail the machinery for exercising that power. In effect, Art. 62(3) confers the power and s.17 codifies it.(The Act also provides a form of summons in a schedule to the Act).

Section 18 says that the Ombudsman and his officers are subject to the provisions of the Official Secrets Act [CAP.111]. Sections 19 & 20 of the Act set out some detailed mechanism since, the enquires of the Ombudsman are to be conducted in private as per Article 62(5) of the Constitution.

Section 23 of the Act sets out the procedures after an enquiry under Chapter 10 (Leadership Code) of the Constitution are made, and the publication of reports (S.24) and the power of the Ombudsman to refer some matters to Public Prosecutor after due enquiry and to make general annual report to the President, for presentation to Parliament.

Section 30 sets out the mechanism to enforce the Ombudsman's recommendations through the Courts.

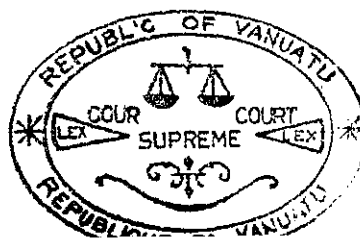
Part V of the Act deals with - Immunities

Part VI - deals with the Service of Ombudsman.

Part VII - relates to the Finance of the Office of the Ombudsman.

Part VIII - relates to Offences and Penalties.

SS. 44 to 47 set out the realistic mechanism or machinery to give effect to the credibility, effectiveness and efficiency of the functions and jurisdiction of the Ombudsman.



SS. 44 to 47 create offences and corresponding penalties of Vatu 100,000 or 6 months imprisonment or both for any person who attempts to influence the Ombudsman, or any person summoned to attend as a witness or to produce documents before the Ombudsman without sufficient excuse or neglects to do so, or refuses to be sworn or refuses to answer any questions relevant to the matters being inquired into... or any witness who wilfully gives false evidence in any enquiry being conducted by the Ombudsman, or any person in contempt of the Ombudsman.

Though the preamble of the Ombudsman Act refers to the powers and procedures and immunities of the Ombudsman in addition to those provided for in the Constitution and his delegates, and for the purposes of giving effect to the principles of Chapter 10 (Leadership Code) of the Constitution, it is apparent that primarily the legislative power upon which the Act must be supported is that with respect to give effect by law to the principles of Leadership Code under Chapter 10 of the Constitution on the basis of Articles 67 & 68 of the Constitution.

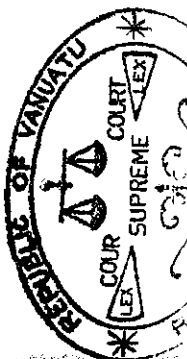
But so much of it as deals with functions and powers of the Ombudsman under Chapter 9 Part II of the Constitution cannot easily be referred to that power, and some other legislative power or constitutional interpretation must be found to support those provisions in particular Section 14 of the Act as mentioned earlier.

INTERPRETATION OF THE CONSTITUTION

I have had previously an opportunity to express my view as to the interpretation of the Constitution in constitutional case No.1 of 1997 in Re Samson & Others -v- the Attorney General (at p.6 unreported). I will, in substance, repeat myself again here.

PRINCIPLE : GENERAL RULE

It has to be remembered that it is a Constitution that we are interpreting. Fundamentally, thus, the task of interpreting a written Constitution, which is comparatively short and expressed in reasonably wide language setting out guiding



principles, such as Vanuatu's Constitution, is not an easy task. The Constitution is a form of law. In fact, it is the Supreme Law of the Republic of Vanuatu (Article 2 of the Constitution).

The interpretation of the Constitution is the sole preserve of the Supreme Court, as delegated by the people to it through the Constitution, and the Court has to be responsive to the constitutional values. The Court when interpreting the Constitution must adopt a broad-oriented and purposive approach directed towards advancing the constitutional objectives taking due account to the country circumstances and resources.

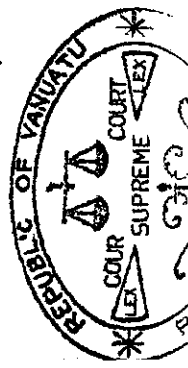
VANUATU CONSTITUTION : CHARACTER & NATURE

Vanuatu's Constitution is comparatively short and expressed in reasonably wide language setting out guiding principles. It is 95 Articles and two (2) short schedules going to 25 pages.

As a matter of comparison, Vanuatu and Papua New Guinea are two (2) Parliamentary democracies. They adopt Unitary System of Government as opposed to Federal System of Government. Papua New Guinea's Constitution comprises 275 Articles and effectively 38 schedules running to 135 pages. It sets out quite clearly the System of Hierarchy of (legal) norms : Constitution, organic laws, Acts of Parliament, underlying laws, etc... .

Papua New Guinea's Constitution is one of the longest and detailed Constitution in the world and in my view is tantamount to a Code.

Another comparison can be made between Vanuatu's Constitution of 1980 and the Commonwealth of Australia's Constitution Act, 1900. The latter's Constitution comprises of 128 Articles with a short schedule. But the fundamental difference between the two Constitutions, is that the Australia's Constitution (Commonwealth of Australia Constitution Act, 1900) sets out a Federal System of Government with specific powers and the states governments with general powers.



In *Melbourne Corporation v. The Commonwealth* [(1947) 74 C.L.R. 31], the enumerated powers doctrine was developed on the basis that the Constitution, contemplating a Federation of co-ordinate governments, predicated the continued existence of the states with their powers. Accordingly, a Commonwealth power could not be so interpreted as a power for prejudicial treatment. In other words, a Commonwealth power must be interpreted as a power of a Federal Government in a Federation with member States, not as a power of a Unitary Government where there are no constituent States.

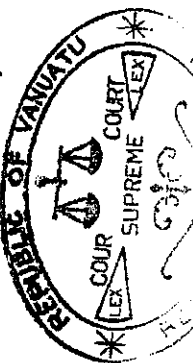
Although, in Australia, the Courts promote the doctrine of inter-independence of powers in a series of powers these days, [see for examples : *Johnston Fear & others v. The Commonwealth* (1943)67 C.L.R. 314, at p.317 ; *Pidoto v. State of Victoria* (1943)68 C.L.R. 87 ; *Attorney General (Vict.) v. The Commonwealth (Marriage Act Case)* (1962) 107 C.L.R. 529, followed in this regard by *Russel v. Russel* ; *Farrelly* (1976) 134 C.L.R. 495], the Australia's Constitution Act 1900 (Commonwealth) creates a system of enumerated powers which, for the purposes of comparison with Vanuatu's Constitution, can also be considered as a Code.

Having said that, I accept the view that the Constitution is the law behind the law and is still evolving.

On that basis, I share the view that the Constitution is to be interpreted and applied by keeping in mind and be in line with : *"...the progress of the country, and adapt themselves to the new developments of times and circumstances "* ; [see *R. v. Brislan* ; exp., *Williams* (1935)54 C.L.R. 262 at p.282].

In this case, I too, must read powers and provisions in the Constitution in an organic, developing or progressive manner.

Subject to the Constitution, Parliament of Vanuatu is given plenary powers under Article 16(1) of the Constitution to make laws for the peace, order and good government of Vanuatu. The expression "subject to the Constitution"



means that the powers of the Parliament are limited and that its limits are not to be transcended.

TWO CONSTITUTIONAL LIMITATIONS

It follows then that the Court will intervene to sanction an Act or a provision of an Act of Parliament which contravenes the Constitution in two (2) respective ways :

Firstly, the Court will declare an Act or a provision of an Act unconstitutional when it infringes one of the fundamental rights and freedoms guaranteed and protected under Article 5 of the Constitution.

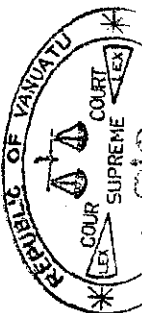
[See Appeal case No.6 of 1988 in Re. Barak Tame Sope & Others v. Attorney General & Others. Reported in Vanuatu Law Report Vol.1, 1980-88 p.411].

In that case, the Court of Appeal considering that the right of a Member of Parliament to express himself freely in Parliament cannot be restricted. Section 2(f) of the Members of Parliament (Vacation of seats) Act 1983 was intended to restrict that fundamental right. Their Lordships, thus, held that Section 2(f) of the said Act of 1983 is unconstitutional.

In Appeal Case No.1 of 1993 in Re. The Attorney General of the Republic of Vanuatu -v- Frederick Karlomuana Timakata at p.4 (unreported) says that :

"... A provision such as Article 5(1)(d) [of the Constitution] not only prevents the Parliament from ousting the jurisdiction of the Courts, but also prevents the Parliament from abrogating those principles of natural justice which may rightly be regarded as fundamental... Subject to the Constitution, the Parliament of Vanuatu is given plenary powers by Article 16(1) of the Constitution, and in the exercise of those powers it may repeal or alter existing law" [see Article 95 of the Constitution].

Secondly, the Court will intervene to sanction an Act of Parliament or a provision of an Act of Parliament, by declaring it unconstitutional in the circumstance where there is an express or explicit prohibition provision



contained in the Constitution to do or not to do something, but Parliament, nevertheless, legislates to that prohibited effect in contravention of the constitutional express prohibition provision.

With the exceptions of the two (2) limitations I mention above, I am of the view that Vanuatu Parliament has plenary powers under Article 16(1) of the Constitution, not only to make laws for "the peace" and "Order" but also laws for the "good government of Vanuatu".

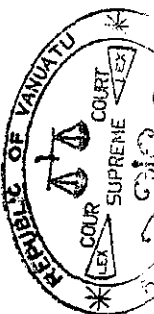
And the expression "good government of Vanuatu" is to be understood as an expression in an organic instrument of government that is to be adapted to changing times and circumstances.

In that respect, I share and adopt as my own the following opinion expressed by the Chief Justice John Marshall in the American Case of *McCulloch v. Maryland* [4 Wheat on 316 407 (1819)] when he says :

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. [see Marbury v. Madison]. But we think the sound construction of the Constitution must allow with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

In this case I accept the Defendant/Ombudsman's submissions that Part II - "the Ombudsman" - of the Chapter 9 "Administration" of the Constitution cannot be read in isolation but must be read together with Chapter 10 (Leadership Code) and other provisions of the Constitution as a whole.

This rule is a general rule applying to any one provision in the Constitution which means that :



“each provision of the Constitution should be regarded, not as operating independently, but as intended to be construed and applied in the light of other provision of the Constitution... Thus, an endeavour should be made... to give effect to all [provisions]” (my emphasis) [see Latham C.J., in *Bank of New South Wales -v- The Commonwealth* (1948)76 CLR 1 p.185].

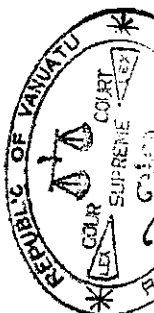
In my judgment, therefore, Vanuatu Constitution has to be interpreted and applied in a dynamic, organic or progressive manner. In essence, the Constitution is to be regarded as a unique and living fundamental legal instrument to be used and adapted for the purposes of developing the progress of the National Community [through the power of Parliament to make laws for ...“the good Government of Vanuatu”]; and at the same time, the Constitution is also a still evolving CORPUS of fundamental rights and freedoms, including other fundamental guiding principles upon which :

*“WE the people of Vanuatu,
PROUD of our struggle for freedom,... [are and must be]
DETERMINED to safeguard the achievements of this
struggle...”* [through the judicial process for their enforcement].

I am also in agreement with the Defendant when he/she says that there is a logical and obvious nexus between :

- (i) “conduct” in Articles 62 and 63 of the Constitution of the Part II of the Chapter 9 - with “conduct” in Article 66 [Leadership Code] in Chapter 10 of the Constitution. Furthermore, that there is also nexus between :
- (ii) “Public Servants” in Article 62(2) [under Part II Chapter 9] and “Leaders” in Article 67 [under Chapter 10] : essentially “Leaders” are a subset, not only do they lead but they serve the public/people under Articles 4(1) and Article 39(1) of the Constitution.

Article 4(1) says that :



"National sovereignty belongs to the people of Vanuatu..." ; and

Article 39(1) says that :

"The executive power of the people of the Republic of Vanuatu is vested in the Prime Minister and Council of Ministers and shall be exercised as provided by the Constitution or a law."

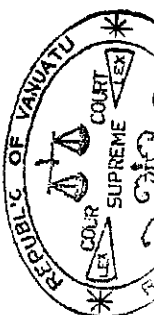
I accept further the Defendant's submission that Articles 67 and 68 of the Constitution justify the basic grant of jurisdiction to the Ombudsman in the Constitution under Article 62 and the practical machinery to exercise that jurisdiction is the Act. In fine, Article 67 specifically leaves open the class of person who can be defined as "leader". And further it is common ground that as per Article 68 of the Constitution, Parliament shall "by law" give effect to the Chapter 10 of the Constitution (Leadership Code).

And "by law" means the Constitution or an Act of Parliament which is what the Ombudsman Act No.14 of 1995 does provide.

Having now further powers and functions given by the Act in addition to these contained in the Constitution [under Chapter 9 - Part II], I am of the view that this does not amount to a breach of Article 61(2) of the Constitution by the Ombudsman from holding another "public office". Since and I accept the submission that Article 61(2) of the Constitution is directed to preventing the Ombudsman from holding office in another organ of the State which is not the case here.

I will therefore, pause again here to consider prima facie doubts I have expressed earlier on three (3) separate occasions.

On the first occasion, I express a prima facie doubt as to the constitutional validity of the Section 14(1) [(a); (i); (ii); (iii) (A)& (B); (iv) and (v)]; (b); (c); and



on the second occasion, I express also a prima facie doubt as to the constitutional validity of Section 14(3) of the Ombudsman Act.

By considering Section 14(1); (a); (b); (c); and Section 14(3) of the Ombudsman Act, together with the power of Parliament to make laws for ...“the good government of Vanuatu” [Art.16(1) of the Constitution], and since there is no relevant constitutional prohibition provision for the National Parliament to legislate as it did through the Ombudsman Act and in particular under S. 14(1)(a), (b), (c) and (3), I am of the opinion that Parliament had acted within the permissive limits of the Constitution. I therefore hold that the doubts should be and must be interpreted in the benefit of Parliament to rightly acted as it did - that is to say, within the permissive limits of the Constitution.

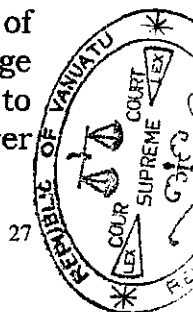
In support of this view, Latham, C.J., in *Adelaide Company of Jehovah's witnesses v. Commonwealth* [1943]67 C.L.R. 116] says this :

“... in the absence of a relevant constitutional prohibition it is not a proper function of a Court to limit the method of exercising a legislative power.” (at p.133)

I must say that there is a role for implication in constitutional interpretation. But, this role is a limited one, and the only implications, which could be made were those that must be necessarily implied from the actual terms of the instrument [Constitution].

Therefore, in my judgment, I am of the opinion that the Court is not free to limit the language of a legislative power contained in the Constitution or the Court is not free to invent implied prohibitions upon the exercise of Legislative power.

In that respect, I must add that, when making laws for “... the good Government of Vanuatu”, Parliament may commit possible abuse of powers. However, that possible abuse of powers is no reason in Vanuatu law for limiting the language of a legislative power contained in the Constitution. It has to be understood that the extravagant use of legislative power



presented a political issue, which required a political response : as long as it was within power, it could not be invalidated by the Court. This means that if the representatives of the people of Vanuatu (Members of Parliament) in Parliament use their national powers to pass laws against the interests of the people of Vanuatu considered as such, it is within the power of the people themselves to recent and reverse what may de done. No protection of this Court in such a case is necessary and proper. [on the same line of thoughts see the Australian case of Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd (1920) 28 C.L.R. 129 at pp. 151-2].

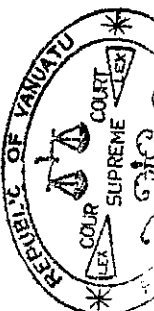
As to the doubt, I express as to constitutional validity of Section 14 (4)(b)(ii), I am of the opinion that that (ii)(b)(4) of the Section 14 of the Ombudsman Act is contrary to Article 62(2) of the Constitution. The reason being that Article 62(1)(2) of the Constitution says that "the Ombudsman may enquire into the conduct of... all public servants, public authorities and ministerial departments, with the exception of the President of the Republic, the Judicial Service Commission, the Supreme Court and Other Judicial Bodies" [underlining words are my emphasis]

In line with this constitutional express prohibition provision, Section 14(4)(a) of the Ombudsman Act says that the Ombudsman may enquire into the conduct of a leader other than the President or any person holding judicial office ; [underlining words are my emphasis].

S.14(a)(b) provides that the President may enquire into the conduct of the Ombudsman and any person holding judicial office and, for that purpose shall -

- (i) ...
- (ii) *be entitled to delegate such enquiry to the Ombudsman or any judicial or legal officer.*

By considering section 14(4)(b)(ii) of the Act together with the express prohibition provision of Article 62(2) of the Constitution, I am of the opinion that sub-paragraph (ii) of paragraph (b) of Subsection (4) of the Section 14 of the



Ombudsman Act is unconstitutional in that it is contrary to Article 62(2) of the Constitution.

Section 9 of the Interpretation Act (CAP 132) provides :

"(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 later 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.

On the basis of the foregoing considerations, I now make the following declarations and directions :

1. That the Ombudsman Act No.14 of 1995 is constitutionally valid ;
save that sub-paragraph (ii) of paragraph (b) of subsection (4) of the Section 14 of the said Act is unconstitutional ; and
2. I, accordingly, direct that the following words in Section 14(4)(b)(ii) of the Ombudsman Act No.14 of 1995 be removed :

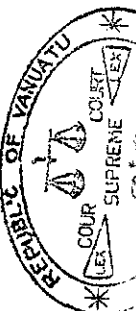
"... the Ombudsman or..."

I will now deal with the second issue which is :

**I-B- THE PLAINTIFFS SAY THE DEFENDANT/
OMBUDSMAN ULTRA VIRES THE CONSTITUTION
AND THE OMBUDSMAN ACT No.14 OF 1995**

PLAINTIFFS' SUBMISSIONS

It is the Plaintiffs' submissions that the enquiry by the Ombudsman is ultra vires the Constitution and the Ombudsman Act as it purports to be into a matter described by the Ombudsman as "Purchase of ATR 42 aeroplane"



which subject matter is not within either Article 62 of the Constitution nor Section 14, 16 or 17 of the Act, it is contended, it is not into "conduct" of subject individual as required therein.

It is further submitted by the Plaintiffs that "conduct" in Article 62 of the Constitution and Section 16 of the Act must be read down to mean "misconduct". It is therefore submitted for the Plaintiffs that an enquiry by the Ombudsman into the conduct of members of the Board of Directors of Air Vanuatu (Operations) Ltd into the possibility of acquiring an aeroplane, is ultra vires the Ombudsman's powers.

DEFENDANT'S SUBMISSIONS

It is contended on behalf of the Defendant/Ombudsman that the Plaintiffs are persons in terms of Article 62(3) "*likely to assist the Ombudsman, to furnish him/her with information and documents needed for his/her enquiry*" and/or that as "leaders", in terms of Article 67 of the Constitution and Section 14(2)(h) of the Ombudsman Act No. 14 of 1995, they are subject to leadership enquiry. It is therefore submitted for the Ombudsman that the Ombudsman acted intra vires her jurisdiction.

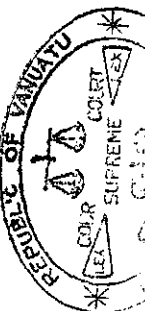
The Ombudsman further say that the enquiry proceeded on the basis of a detailed and considered analysis by the Air Vanuatu Executive which said, inter alia :

"Subject to the direction of the Prime Minister that Air Vanuatu proceed with the purchase of an ATR 42/500 new aircraft, paper No.1 was submitted recommending against such purchase because of the large economic loss which would occur to the company.

Air Vanuatu was then asked to evaluate the purchase or lease of a used earlier model TR42/500 aircraft.

This Paper No.2 reviews and evaluates the costs and revenue potential of such a venture.

Irrespective of concessions that might be granted by the Vanuatu Government and Government of France, the TR42 aircraft cannot be introduced without substantial



losses, sufficient to put at high risks the financial survival of Air Vanuatu and/or Vanair."

It is also put for the Ombudsman that on the basis of these factual consideration and information, it is incumbent on the Ombudsman to investigate prima facie evidence of misconduct and maladministration that could well be viewed adversely and report that publicly.

COURT CONSIDERATIONS

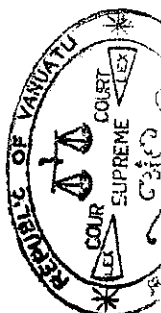
On the basis of these information and considerations, I accept the Defendant's submissions that the Ombudsman was acted intra vires her jurisdiction and reject the Plaintiffs' submissions in total.

In this instant case, the Plaintiffs are persons in terms of Article 62(3) of the Constitution, that is persons likely to assist him/her, to furnish him/her with information and documents needed for the Ombudsman's enquiry.

Equally, I accept also that the Plaintiffs as "leaders" in terms of Art. 67 of the Constitution and Section 14(2)(h) of the Ombudsman Act No.14 of 1995 are subject of the Ombudsman's jurisdiction under the Leadership enquiry.

As to the word "conduct", I am of the opinion that it is used with great accuracy to enlarge the scope of the enquiry and to make the general conduct of a person under Article 62 of the Constitution or Section 16 of the Act a part of the materials which are before the Ombudsman when the Ombudsman has to consider what, upon the whole, is the just way of dealing with these persons after the Ombudsman's enquiry.

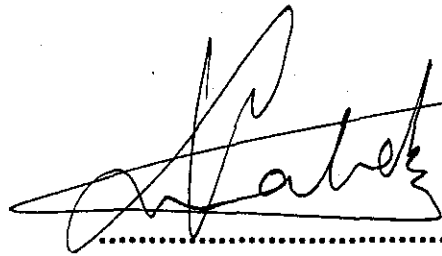
Under the above considerations, I accept the Defendant's submissions that the Ombudsman acted intra vires the constitution and the Ombudsman Act. There is, thus, no serious issue to be tried. On that basis indeed, I accept the submission that the Plaintiffs' Statement of Claim discloses no reasonable cause of action and is thus, struck out accordingly and I so rule.



There is no need for me to consider the Plaintiffs application in that respect.

I make no Order as to costs, [i.e., both parties will pay their own costs].

DATED AT PORT-VILA, this 22nd DAY of SEPTEMBER 1997



VINCENT LUNABEK J.
Acting Chief Justice

