IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU **Constitutional Case NO. 114 of 1997**

(Constitutional Jurisdiction)

IN THE MATTER : **of Decision No.125/3 of the Council of Ministers Meeting 18/08/97 dated 21st July 1997**

BETWEEN : **THE OMBUDSMAN of the Republic of Vanuatu (MARIE NOELLE FERRIEUX PATTERSON)**

- Applicant

AND : **THE ATTORNEY GENERAL (Representing the Council of Ministers)**

- First Respondent

AND : **THE NATIONAL GOVERNMENT of the Republic of Vanuatu**

- Second Respondent

Coram : Mr Justice Oliver A. Saksak

Mr Kalev Crossland
Mrs Heather Lini Leo for the Ombudsman/Applicant
Mrs Mary Grace Nari

Mr Ishmael A. Kalsakau for the Respondents

JUDGEMENT

1. PRELIMINARY MATTER

The Applicant here is Mrs Marie Noelle Ferieux Patterson. She applies in her official capacity as the Ombudsman of the Republic of Vanuatu.

The Attorney General is sued in his representative capacity representing both the Council of Ministers and the National Government. Indeed there is no need to differentiate between these two entities because one is the same as the other. On other words, the Council of Ministers is the National Government of Vanuatu. Therefore in effect there is only one

Respondent. For the purposes of this judgement this will be the Second Respondent.

2. **HISTORY**

On 6th August 1997, the Applicant filed an Originating Notice of Motion under Order 61, Rules (2) and (4) and Order 55 Rule (1) of the High Court (Civil Procedure) Rules 1964, seeking judicial review and orders of prohibition. On the same day the Applicant sought leave ex parte to so apply. Leave was granted and interim orders of prohibition and stay were granted to preserve the status-quo pending the determination of the Applicant's application for judicial review.

Hearing commenced on 3rd September and went on into 4th, 5th and 19th September, 1997.

On 19th September the Applicant sought to amend her Originating Notice of Motion in the following terms :-

"AMENDED ORIGINATING NOTICE OF MOTION (PETITION) SEEKING JUDICIAL REVIEW PROHIBITION AND OTHER RELIEF) O.61(1), r;4(1) and O.55 (1) and S.218 Criminal Procedure Code"
(Note : The underlined words are the amendments).

Counsel for the Second Respondent strongly objected to the proposed amendment being accepted by the Court. He argued that the Original application was made pursuant to Order 61 of the High Court Rules as a Motion and therefore it could not be amended to make it a petition under Section 218 of the Criminal Procedure Code Act [CAP 136]. Procedurally the requirements under section 218 are different from the procedural requirements under Order 61 and Counsel argued that having chosen to proceed under Order 61 and then later change tactics to proceed under section 218 of the Criminal Procedure Code Act after having heard all the Applicant's submissions and arguments was an abuse of process. The Court was asked to rule on this issue as a preliminary matter. I ruled that the proposed amendment could not be accepted by the Court and dismissed the amendment accordingly. I now provide the reasons for such ruling.

Firstly I accept Counsel's argument that what the Applicant was embarking upon was an abuse of process. The documentation clearly reveals this. On 6th August 1997 the following documents were filed by the Applicant :-

(a) Ex Parte Application for Leave to apply for Judicial Review (Prohibition And Other Relief).

(b) Originating Notice of Motion seeking Judicial Review (Prohibition And Other Relief) O.61, r.4 (1) and O.55(1)

(c) Affidavit of Marie Noelle Ferrieux Patterson in support of Ex Parte Application for leave to apply for Judicial Review.

(d) Affidavit of Heather Lini Leo in support of Ex Parte Application for Judicial Review.

(e) Statement on Ex Parte Application for Leave to Apply for Judicial Review pursuant to Order 61 Rule 2(2) of the High Court Rules.

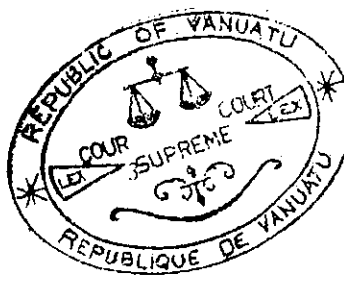
With these documents the Court was satisfied and granted leave to the Applicant. On the same day these documents were served on the Honourable Attorney General personally by Mrs Heather Lini Leo and she filed an affidavit to that effect on 26th August 1997. The Notice of Motion was returnable at 9 O'clock in the morning of Monday 3rd September 1997. On that date Counsels for the Applicant were heard. Their submissions and arguments were written and presentation was lengthy. It went into 4th and 5th September and then adjourned to 19th September for submissions by Counsel for the Second Respondent.

The amended Originating Notice of Motion was filed on 10th September 1997. There is no affidavit evidence that it was served on Counsel for the Second Respondent.

Whatever the Applicant intended to achieve by the proposed amendment is not clear to the Court but it seems to the Court that either the Applicant wanted to substitute the Originating Notice of Motion with or by a petition, or to mix up the two together. In my view to proceed either way was an abuse of process and could not be done. The reasons are simple in my view. Firstly, to ensure a speedy resolution a mixed procedure does not help but rather complicates issues and will often confuse the judge. Secondly, to substitute an originating notice of motion by a petition at a stage where the Applicant has already made submissions in full to the Court is a denial of the Respondent's reserved rights under Section 218 (4) of the Criminal Procedure Code Act. The relevant provisions of Section 218 are as follows :-

(1) Every application to the Supreme Court for the exercise of its jurisdiction under Articles 6, 53(1), 53 (2), and 54 of the Constitution shall be by petition and shall be valid no matter how informally made.

(2) ...



(3) The Petitioner shall, within 7 days of the filing of his petition in the Supreme Court or within such longer period as the Court may on application being made therefor order, cause a copy of the petition together with copies of supporting documents filed in relation to such petition to be served on the party or on all those parties whose actions are complained of.

(4) Any party who is served with a copy of the petition in pursuance of subsection (3) may without prejudice to any legal remedy available to such party apply to the Supreme Court for an Order dismissing the petition on the ground that the petition is with out foundation or vexations of frivolous.

(5) .....

(6) ..... "

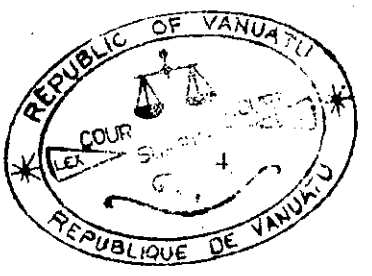
Whether or not the Respondent exercises his rights under section 218 (4) depends on the merits of each case but at least it must always be seen that the opportunity exists. In my view that opportunity exists only when the right procedures are followed. Here I find that this opportunity was concealed, if not, evaded and that was an abuse of process.

Counsel for the Applicant argued that since service of these documents on 6th August the Second Respondent did not file any notice or affidavit in opposition. Having heard Mr Kalsakau, it is my view that the omission is due to the fact that they were as confused as the Court has been as to process.

Finally for this part, I found that part of the Applicant's application relied on Articles 6 and 53 of the Constitution in which the Applicant alleges breaches of fundamental rights under Article 5 (1) (d) and (k). I ruled that this could not be heard on a notice of motion but by petition filed pursuant to section 218 of the Criminal Procedure Code Act (CAP. 135). And for reasons already given I further ruled that the Court would only determine the issue of Decision No. 125/3 and that I would hear Counsel for the Second Respondent only in that regard.

3. **FACTS**

On 8th July 1997 the Council of Ministers convened a meeting and made a decision which shall be referred to as Decision No. 125/3. It reads as follows :-



"3. *That a petition be draft(sic) to be signed by all members of Parliament, Leaders of Political parties, Presidents of Provincial Councils and other persons specified under Article 61(1) of the Constitution, requesting the President to dismiss the Ombudsman from Office".*

The Decision was communicated by letter dated 21st July, 1997 to the Prime Minister, the Deputy Prime Minister, the Minister of Justice, the Minister of Finance, All other Ministers, Attorney General, Director General of Finance and Director of National Planning. This letter was published in the Trading Post Issue No. 266 of 2nd August, 1997.

4. **APPLICANT'S ALLEGATIONS ARGUMENTS AND SUBMISSIONS**

The Applicant alleges that Decision 125/3 is without legal basis and is therefore unlawful. She asks that the Court declares the Decision null and void and of no legal effect. Counsel for the Applicant advances two principal submissions. Firstly Mr Crossland says that Decision No. 125/3 was the fruit of an exercise of executive power under Article 39(1) of the Constitution. He submits that nowhere in the Constitution, the Ombudsman's Act No. 14 of 1995 or in any other law is it provided that the Ombudsman can be dismissed by the President following receipt by the President of a petition signed by Members of Parliament, Leaders of Political parties, Presidents of Provincial Councils and other persons specified under Article 61(1) of the Constitution as proposed in the Decision itself. If this proposition is accepted, Mr Crossland submits that Decision No. 125/3 is ultra vires the Council of Ministers' power.

Secondly Mr Crossland submits that Decision No. 125/3 purports to suspend the operation of the relevant laws that do make provision for the dismissal of the Ombudsman. He refers to Article 61 (1) of the Constitution and Section 9 of the Act. In the circumstances, Mr Crossland submits that the Council of Ministers are acting contrary to the rule of law and such action is antithetical to the Republic's status as a sovereign democratic state as stipulated in Articles 1 and 4(3) of the Constitution. Further Mr Crossland submits that an attempt to subvert or override law is a very serious matter and that the Courts will be bound to declare such executive action purporting to do so unlawfully invalid and of no effect. Counsel relies on the New Zealand case of Fitzgerald V. Muldoon (1976) Z NZ LR 615. Counsel refers the Court to the speech of Wild CJ at p. 622 where the Chief Justice said :

"The Act of Parliament in force required that those deductions and contributions must be made yet here was the Prime Ministe announcing that they need not be made. I am bound to hold so doing he was purporting to suspend the law without consent of

Parliament. Parliament had made the law. Therefore the law could be amended or suspended only by Parliament or with the authority of Parliaments".

Counsel further refers the Court to Dicey's Law of the Constitution (10th ed. 3a) which reads :

"The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has under the English Constitution, the right to make or unmake any law whatever, and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."

Counsel then submits that the principle stated in Fitzgerald is equally applicable in Vanuatu because of the unequivocal provisions of Article 39 (1) of the Constitution

On the question of locus standi of the Applicant, Counsel submits that by virtue of Articles 53(1) and 6(1) of the Constitution the Applicant has standing to apply to the Supreme Court for redress.

5. **RESPONDENTS ARGUMENTS AND SUBMISSIONS**

Counsel for the Second Respondent argues that the Applicant being the Ombudsman has no locus standi to come before the Court to seek judicial review. He argues that pursuant to Section 1(3) of the law Officers Act [CAP 118] this is the Attorney General's job. This section reads :-

"1 (3) The Attorney General shall represent Vanuatu in all Civil proceedings in the Courts and shall on behalf of Vanuatu exercise any of her rights, prerogatives privileges or functions before any Court."

Mr Kalsakau then refers the Court to the Solomon Island case of The Ombudsman -v- Attorney General and Others Civil Case No. 239 of 1987.

He submits that the Applicant can only come before the Court after having obtained the consent of the Attorney General. Here, Mr Kalsakau submits, there is no evidence of such consent and therefore she has no locus standi.

Further, Mr Kalsakau argues that the Applicant has not exhausted her alternative remedies one of which was to have gone personally to the Attorney General to discuss the matter which she has not yet done.

Further Mr Kalsakau tells the Court that as the Applicant had received the President's undertaking not to act upon Decision No. 125/3 that there really was no risk and need to come to the Court.

Mr Kalsakau then makes references to section 25 of the Act - "*Power to Refer To The Public Prosecutor, Etc.*", and to section 30 - "*Powers of Enforcement*" and submits that none of these gives any power to the Applicant as Ombudsman to invoke the jurisdiction of the Courts.

I have looked at those provisions and say that there is no need to quote them in this judgement as these powers are limited to publicity of the proceedings, reports and recommendations of the Ombudsman.

Here the Court is not concerned with a Report of the Ombudsman, rather the Court is concerned about the making of a Decision and whether its effect on the Office-holder being the Applicant entitles her to come before the Court to invoke its jurisdiction.

Mr Kalsakau urged the Court to look carefully at the wording of Decision No. 125/3. He submits that the Decision involves a request to be made to the President who would ultimately decide whether or not to remove the Ombudsman. He argues that Decision No. 125/3 is not a decision in itself but rather that it is a resolution to request. He submits that the Decision is not to completely abolish the establishment of the Ombudsman. Mr Kalsakau invited the Court to consider eight procedural steps or issues as follows:-

(a) Is there a decision?
(b) Has that decision been made by the decision-maker?
(c) Does the decision affect directly the rights of the applicant?
(d) Does the applicant have locus standi?
(e) Are there alternative remedies available to the applicant?
(f) Is the decision ultra vires?
(g) Has the decision-maker taken irrelevant matters into consideration in making the decision?
(h) Has the decision-maker observed natural justice or procedural fairness?

Mr Kalsakau argues as follows :-

(a) As to whether or not there is a decision counsel argues that under Article 61(1) of the Constitution it is the President who has the power to appoint. Any decision to terminate the Ombudsman must be made by the President and not the Council of Ministers. He argued that the resolution of the Council of Ministers was subject to the final decision of the President.

(b) As regards the issue of whether or not the applicant is being directly affected by the action, Counsel argues that the answer is in the negative. He tells the Court that the Office is still operating.

(c) As to whether or not the applicant has locus standi, Counsel argues and submits that under section 1(3) of the Law Officers Act [CAP 118] the applicant has no standing. He argues that under this provision only the Attorney General can represent Vanuatu and his consent was necessary if the applicant wanted to proceed in the way she has done. He referred to the **Government -v- The President** Civil Case No. 124 of 1994 as his authority.

(d) As to alternative remedies Mr Kalsakau says that not all alternative remedies have been exhausted by the applicant. One was this was to discuss the matter with the Attorney General which was not done.

(e) As to whether or not the decision is ultra vires, Counsel argues that the Council of Ministers was not the decision-maker. The President is the decision-maker. He refers to Article 39 of the Constitution and argues that what the Council of Ministers did was and is in accordance with the law and therefore not ultra vires.

(f) On the issue of irrelevant matters, counsel argues that this depends really on the foregoing issues for instance that if the answer to (a) - (e) are in the negative, this becomes an irrelevant issue for consideration. In any event Counsel submits that the request was made by the Council of Ministers in exercise of its executive powers and nothing was wrong with that.

(g) Finally as to the issue of fair procedure, Mr Kalsakau argues that the Council of Ministers had nothing to do with the making of the decision and therefore there was no obligation on its part to observe these principles of natural justice and procedural fairness. These were encumbened on the decision-maker which is the President.

6. **THE ISSUES** :

Initially there is only one important issue which the Court should determine but it has transpired in the course of arguments and submissions that other subsidiary issues have arisen. I propose to deal with them in the following order :-

(a) **Does Decision No. 125/3 Have Legal Basis?**

First the Court has to be satisfied that the Decision itself exists. The Applicant has satisfied the Court that the Decision exists. In her affidavit evidence she includes as Exhibit "A" a copy of the decision as published in the Trading Post Issue No.266 of 2nd August, 1997, and a copy of the letter dated 21st July, 1997. I set out below the full text of the Decision :-

"RE : Decision No. 125 of the Council of Ministers Meeting No. 18/08/07/97
- REVIEW OF POSITION OF OMBUDSMAN

The Council of Minister's meeting No.18 of 08th July, 1997 approved;

1. *That a Bill be drafted and tabled at the August Extra-Ordinary session of Parliament, to repeal the present Ombudsman Act No.14 of 1995.*

2. *That a new Ombudsman Bill be drafted to be tabled at the November Ordinary Session of Parliament.*

3. *That a petition be draft [sic] to be signed by all Members of Parliament, Leaders of Political Parties, Presidents of Provincial Councils and Other persons specified Under Article 61(1) of the Constitution, requesting the President to dismiss the Ombudsman from Office."*

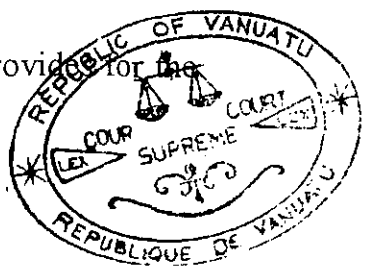
The Law And Evidence

(i) Article 61(1) of the Constitution reads :-

"The Ombudsman shall be appointed, for 5 years by the President of the Republic after Consultation with the Prime Minister, the Speaker of Parliament, the leaders of the political parties represented in Parliament, the Chairman of the National Council of Chiefs, the Chairmen of the Local Government Councils, and the Chairmen of the Public Service Commission and the Judicial Service Commission."

This is an appointment provision only. It makes no mention of dismissal of the Ombudsman. It makes no reference to a request. Further it makes no reference to a petition

(ii) Section 9 of the Ombudsman Act No.14 of 1995 provides for the termination of appointment of the Ombudsman :-



"*(1) The Ombudsman may resign by giving not less than six months notice in writing of his intention to do so to the President.*

(2) A person shall cease to be Ombudsman if circumstances arise that, if he were not the Ombudsman, would disqualify him for appointment as such.

(3) The appointment of the Ombudsman may be terminated by the President after Consultation with the parties identified in Article 61(1) of the Constitution in the event of :

(a) The Ombudsman being adjudicated bankrupt; or
(b) The Ombudsman being convicted and sentenced on a criminal charge (not being a road traffic offence; or
(c) The Ombudsman becoming permanently incapacitated by accident or ill health from performing his duties (in the event of disagreement, such incapacity to be certified by two medical practitioners, one nominated by the President and one nominated by the Ombudsman or his personal representative, or

(d) A finding of gross mis-conduct against the Ombudsman such as to make it inappropriate for him to continue to carry out the duties of his office. Such finding to be made by not less than three members of a tribunal appointed by the President and consisting of the Chief Justice (or a Judge of the Supreme Court appointed by him), the Attorney General, a nominee of the Prime Minister and a nominee of the Leader of the Opposition. The Ombudsman shall be given a fair opportunity to make representations to such tribunal about all allegations against him (the detail of which shall have previously been supplied to him in writing) and to be legally represented (if he so desires).

Provided that the Ombudsman shall be offered a reasonable opportunity to answer any allegations made against him before the President makes a decision terminating the appointment."

There is no reference in Section 9 that the Ombudsman can be terminated upon request made by petition from those persons listed in Article 61(1) of the Constitution. The decision

terminate the appointment of the Ombudsman rests clearly with and on the President. He cannot take that decision until he has consulted with various persons so specified. It is the President who starts the ball rolling. The ball is in his Court. It cannot happen the other way.

The Applicant's affidavit which is unchallenged shows clearly that none of the conditions specified in Section 9 of the Act affects her position and the Court accepts that position.

(iii) Article 39(1) of the Constitution reads :-

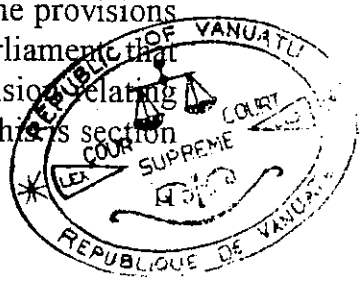
"The executive power of the people of the Republic of Vanuatu is vested in the Prime Minister and the Council of Ministers and shall be exercised as provided by the Constitution or a law." (emphasis, mine).

The only relevant laws for consideration here are the Constitution Article 61; and the Ombudsman Act No.14 of 1995, Section 9. Having examined these provisions I find nothing that allows the Council of Ministers to proceed as approved in Decision No.125/3 to petition for the dismissal of the Ombudsman.

Decision No.125 was a decision of the Council of Ministers in relation to or with regard to a Paper headed "*REVIEW OF POSITION OF OMBUDSMAN.* "The Decision was made in respect of the whole Paper. The Paper contained three(3) proposed plans of action which were approved for implementation. If the third plan of action (that is Decision No.125/3 were implemented it would in my judgement be unlawful.

(b) **Did The Council of Ministers Act Contrary To The Rule of Law?**

The answer to this issue must be yes. Article 39(1) of the Constitution is very clear. It states in the clearest of terms that executive power shall only be exercised within the ambit of the Constitution or a law and not otherwise. I accept Mr Crossland's submission that what the Council of Ministers decision would achieve would be a purported suspension of the operation of Article 61(1) of the Constitution and section 9 of the Ombudsman Act. And I accept that the principle stated in the Fitzgerald Case (supra) is equally applicable in Vanuatu because of the provisions of Article 39(1) of the Constitution. It was Parliament that enacted the Ombudsman Act with a particular provision relating to termination of appointment of the Ombudsman. This is section



9 which in turn adopts the wording of Article 61(1) of the Constitution to a certain extent. Any termination of appointment of the Ombudsman can only be made in accordance with section 9 of the Ombudsman Act and not otherwise unless and until Parliament amends the Act to provide otherwise, and I so rule. But virtue of Article 39(1) of the Constitution the Prime Minister and the Council of Ministers are not above the law or the Constitution. The same goes for everyone also in this country.

(c) **Is There A Decision?**

There is no doubt that there is a decision in place. I have already discussed this point at pages 9 and 11 and I need not repeat myself.

(d) **Was The Decision Made By Decision-Maker?**

The answer to this question is yes. This is by virtue of Article 39(1) of the Constitution. The Council of Ministers is a decision-maker. The affidavit of George Borugu who was at the time of the making of the decision the Acting Secretary clearly reveals this.

(e) **Does The Decision Affect Rights Of The Applicant Directly?**

The Applicant is the Ombudsman. The Paper which was the subject of Decision No.125 is headed : "*REVIEW OF POSITION OF OMBUDSMAN*". This is clear evidence of this Decision being made. The Applicant has remained in the position of Ombudsman since the making of the Decision. I find insufficient evidence to assist the Court and therefore make no ruling as to this particular issue.

(f) **Does The Applicant Have Locus Standi?**

The Applicant seeks to invoke the jurisdiction of the Court in her capacity as the Ombudsman. She could not do so in a personal action simply because she has remained in the position of Ombudsman. The only way she could have sued in a personal capacity is if she had been suspended or dismissed from Office. Mr Kalsakau argues that the Ombudsman could not sue in her Official capacity. He seeks to rely on the affidavits of Bakoa Kaltonga, Peter Sali and Malachi Russell who have deposed to three instances in which members and chairmen of three different statutory corporations in similar circumstances have had to sue in their personal capacities and using the services of private solicitors. I consider that those evidence are not relevant. Those

cases were different. In each case the members and chairmen were either suspended or dismissed. Here it is different. The Applicant is still the official office-holder. I see no reason why she cannot sue in her official capacity in the circumstances.

Furthermore Article 53(1) is capable of very wide interpretation of the word "anyone". It says :-

> *"Anyone who considers that a provision of the Constitution has been infringed in relation to him may, without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress."* (emphasis, mine)

Similarly Article 6(1) which reads :-

> *"Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right."* (emphasis, mine)

Here I am satisfied that the Applicant being the Ombudsman herself legitimately took legal proceedings to prevent the 'very likely' from happening. Under Article 6(1) she is legitimately entitled to do so even in her official capacity.

(g) **Are There Alternative Remedies?**

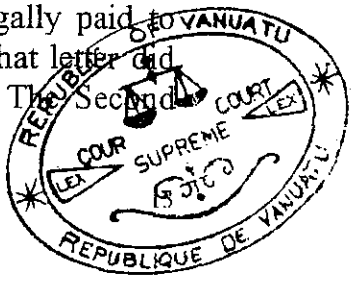
I find insufficient evidence to support a ruling and I make none in this respect.

(h) **Is Decision No.125/3 Ultra Vires?**

By virtue of Article 39(1) of the Constitution clearly Decision 125/3 is ultra vires the Council of Ministers and I so rule.

(i) **Has Decision-Maker Taken Account of Relevant/Irrelevant Matters?**

The Applicant has put in sworn evidence her letter of 1st August 1997 addressed to very prominent leaders of this nation. Paragraphs 9 and 10 of the letter records the observations of the Applicant. It states that a number of those who passed Decision No.125 are the subject of trenchant criticism by the Applicant's Office in public reports released by it and who are defendants brought against them for recoveries of money illegally paid to them. None except one of the many addresses of that letter did in fact reply, though I must say, unsatisfactorily. The Second



Respondent did not file any other affidavit evidence to rebut the observations of the Applicant. That being so I regard that the evidence is unchallenged and therefore rule that the Council of Ministers took into account irrelevant matters into consideration when making the Decision in question.

(j) **Has Decision-Maker Observed Rules Of Natural Justice?**

The Decision-Maker of Decision No.125 is the Council of Ministers. By law the Council is not the appropriate authority to decide on the dismissal of the Ombudsman. In that regard no duty or obligation is on them to observe rules of natural justice. On the other hand if the Council of Ministers were by law the appropriate authority they would be obliged to observe rules of natural justice and procedural fairness which in the present case evidence is clear that there was no such compliance.

7. DECLARATION AND ORDERS

Based on the foregoing reasons and findings IT IS HEREBY DECLARED AND ORDERED as follows :-

1. That Decision No.125/3 of the Council of Ministers Meeting 18/08/07/97 dated 21st July, 1997 is without basis in law and thus unlawful and of no legal or other effect.

2. That the interim prohibition Order of this Court made on 6th August, 1997 is made permanent: that is to say the Government its servants and/or agents are prohibited from making any further decision or act to dismiss, attempt or otherwise purport to dismiss the Ombudsman other than as expressly provided for in the provisions of Article 61 of the Constitution and section 9 of the Ombudsman Act No. 14 of 1995.

3. That there be no order as to Costs.

DATED at Port Vila this 30th day of October 1997.

BY ORDER OF THE COURT

OLIVER A. SAKSAK
Judge

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU