

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

**CIVIL CASE No.18 OF 2009**

**BETWEEN:** Hon. PAUL AVOCK HUNGAI, Lord Mayor of  
Port-Vila, Municipal Council, P.O.Box 99, Port-  
Vila  
Claimant

**AND:** SOLOMON SIMON, the Town Clerk of Port-Vila  
Municipal Council, P.O.Box 99, Port-Vila  
Firs Defendant

**AND:** PORT-VILA MUNICIPAL COUNCIL, P.O.Box 99,  
Port-Vila  
Second Defendant

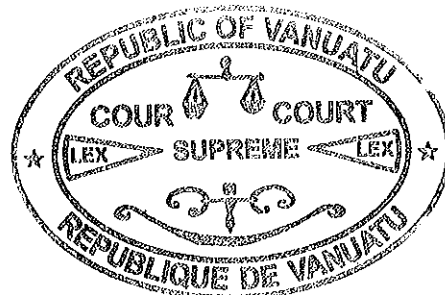
**Coram:** Chief Justice Vincent Lunabek

**Counsel:** Mr Robin Tom Kapapa for the Claimant  
Mr Willie Daniel for the First Defendant  
Mr Ronald Warsal for the Second Defendant  
Mrs Viran Trief, Solicitor General, as Amicus curia

**JUDGMENT**

This is a Judicial Review Claim filed by the Claimant under Part 17 of the Civil Procedure Rules 2002. On 23 January 2009, nine (9) Councillors met in Council and made a decision to remove the executive power of the Port-Vila Municipal Council from the Claimant, Lord Mayor Paul Avock Hungai, and they nominated and approved that the First Defendant, Solomon Simon, Clerk of the Port-Vila Municipal Council shall mandate the executive power of the Council. They further made a decision to remove all office and vehicle keys and other privileges connected with the office and functions of the Lord Mayor from the Claimant, Lord Mayor Paul Hungai.

On 9 February 2009, the Claimant filed the Judicial Review Claim challenging the legality of the impugned "decision" and seeks the following Orders:-

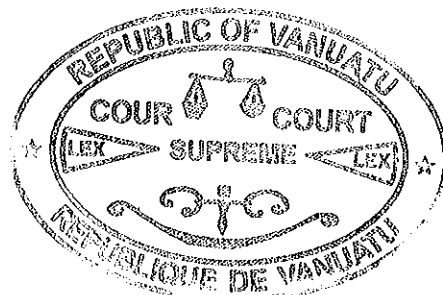


- 1, That the purported "decision" of the 23<sup>rd</sup> January 2009 made by the Defendants of removing the executive power of the Honourable Lord Mayor be called up and quashed as unlawful and without basis.
2. That the purported "decision" of the First and Second Defendants of nominating and approving that the First Defendant mandate the executive power of the Council is invalid, null and void and thereby be called up and quashed and be set aside as unlawful and without basis.
3. That the "decision" by the First Defendant and Second Defendant to remove all office and vehicle keys from the Claimant be called up and quashed and set aside as unlawful and without basis.
4. That further quashing order that the purported "decision" was in contravention of the Municipalities Act [CPA.126] in all the circumstances ultra-vires the First and the Second Defendants' power to hold the meeting, which means that any decision taken on the 23<sup>rd</sup> January 2009 is null and void.

The brief facts are as follows: sometimes on or about the 23<sup>rd</sup> of January 2009, the Council was called in a meeting and the Claimant under his powers as the Mayor of the Port-Vila Municipal Council adjourned the meeting for a further date to be scheduled and such date to be agreed to by the Claimant and the Defendants. The Claimant adjourned the meeting for reasons that the calling of the meeting was not proper. Despite the adjournment, nine (9) councillors of the Port-Vila Municipal Council proceeded to have a meeting without the Lord Mayor who was at that time on his official duties overseas. The First Defendant and the Second Defendant after the adjournment met together and took a decision to remove the Lord Mayor's powers and to restrain him from accessing, entering and using his office. The decision was taken on 23<sup>rd</sup> January 2009 and the Defendants give effect to the purported decision.

The following are the issues in this case:

1. Whether or not the decision of the Second Defendant of the 23<sup>rd</sup> January 2009 purporting to remove the executive powers of the Council from the Honourable Lord Mayor to the Town Clerk is lawful?



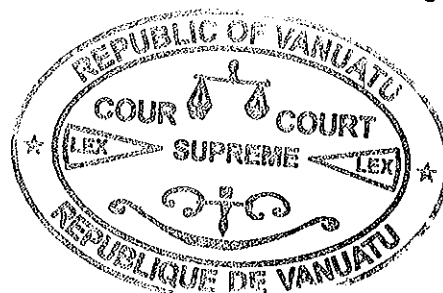
2. Whether or not the Second Defendant can reconvene the Council Meeting without the Lord Mayor and took a decision”
3. Whether or not the process and procedure of calling a meeting, and drawing up the agenda’s has been complied with in calling the meeting of the 23<sup>rd</sup> January 2009?
4. Whether or not the meeting of the said 23<sup>rd</sup> January 2009 is lawful?

On 13 February 2009, the Court issued interim Orders to maintain the status quo between the parties. The status quo allows the Claimant Lord Mayor to return to his office including other privileges attaching to the office and functions of a Lord Mayor within the Municipalities Act [CAP.126].

At a conference hearing, the Court held that the Claimant has an arguable case and the claim is listed for hearing on 7 April 2009. As there were no major factual disputes, the Court directed the parties and their counsel to prepare and ready with their submissions. At the time of hearing, counsel for the Defendants informed the Court that they do no longer dispute the issues of legality raised in the Judicial Review Claim. In essence, they accepted that the decision of 23 January 2009 to remove the executive power of the Council from the Lord Mayor to the Clerk of Municipality is unlawful and without basis.

This concession and admission of the illegality and unlawfulness of the impugned “decision” is sufficient to dispose of the matter and to issue the Orders and declarations sought in the Judicial Review claim. However, I feel it necessary to apply the law to the undisputed facts in order to put the issues raised in the present case at rest.

It is to be noted that in the present case, there is no dispute of facts to the meeting held on the 23<sup>rd</sup> of January 2009. There is no dispute to the fact that the Lord Mayor adjourned the previous meeting for reasons that the calling of that meeting was improper. There is no dispute of the fact that the Defendants removed the executive power of the Council from the Claimant and mandated that power to the Clerk of the Port-Vila Municipality. There was no dispute that following the mandate all office and vehicle keys were removed from the Claimant. The minutes of the meeting show that



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Councillor Wenjio has argued strongly that the calling of the meeting was not proper and that the Town Clerk should have consulted the Mayor as the executive Head of the Port-Vila Municipal Council.

The evidence of Wenjio provided that on the 23<sup>rd</sup> of January 2009, the meeting was convened and the Lord Mayor adjourned the meeting and said that it was improper and that the procedures were not complied with in the calling of the meeting. The meeting was adjourned and there was no objection raised against the adjournment. Thereafter the Councillors met and made the decision which is now under challenge. The evidence of the Lord Mayor shows that he did not receive any notice issued by the nine Councillors. Further the Standing Orders provide that any Councillors wishing to include items on the Council's meeting agenda must do so eight days before the date of the meeting. The Claimant said he did not know who drew up the agenda of the meeting. He further stated that the Clerk did not inform him of anything about the said meeting. There is no evidence of any attempts that the Clerk did meet up with the Lord Mayor.

The law and its application

1. The Procedures and Conduct of the Port-Vila Council Meeting

*The Municipalities Act [CAP.126] is the law governing the Port Vila Municipal Council.*

Section 14 of the Act provides as follows:

*"Chairman of meeting of a Council*

*14.(1) Save as provided in subsection (2) the mayor shall preside at all meetings of the council.*

*(2) In the absence of the mayor and of the deputy mayor the councillors present at any meeting of the council shall elect one of the member to act as chairman for the purpose of such meetings."*

The law provides that only the Claimant shall preside over all Council Meetings, or in his absence the Deputy Lord Mayor or when the mayor and his deputy were absent, the Council shall elect one of the members to act as Chairman. In this case, the



Claimant was not aware of any meeting scheduled for 23<sup>rd</sup> January 2009, and the evidence from all the sworn statements confirmed that the Claimant adjourned the said meeting upon the ground that the calling was not proper. The minutes of the said meeting show that the Lord Mayor said the calling of the said meeting was not proper and postponed the said meeting. Even if the nine Councillors requested the meeting, and a member of the Council has been elected to act as Chairman of the meetings (although, no evidence is adduced to this point), the process for calling the meeting has not been complied with.

The Municipalities Act (under section 12(1)) provides that subject to the provisions of this Act every council shall make standing orders for-

- (a) the regulation and conduct of the meetings of the council and its committees;

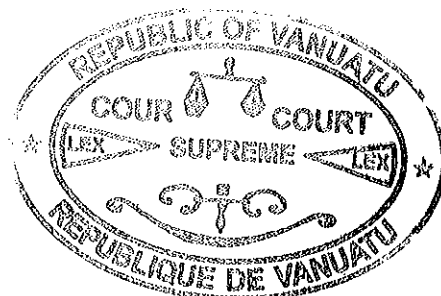
Section 6 "Calling of Meeting"

- "(1) The Mayor shall in writing issue notice of Council Meetings to each Councillor stating the place and time of meeting therein."*

Section 10 "Agenda"

- "(1) The Agenda for all ordinary meetings shall be drawn up by the Mayor in conjunction with the Clerk and shall be issued with notices convening such meetings...."*
- (2) (a) If a Councillor wishes a subject to be included on the agenda he shall give the Clerk written notice of the item not less than eight days before the day of the meeting."*

In this regard, the procedure that was required to be followed was breached and that the Defendants proceed to reconvene a meeting without the Mayor or without complying with the procedure that is laid down by the governing law of a Municipal Council. The purpose of reviewing this decision is not to diminish or totally remove powers of Councillors, but to supervise, determine constraints, and deal with their unauthorised exercise of powers. Marshall CJ in **Marbury v. Madison** refers to this as:



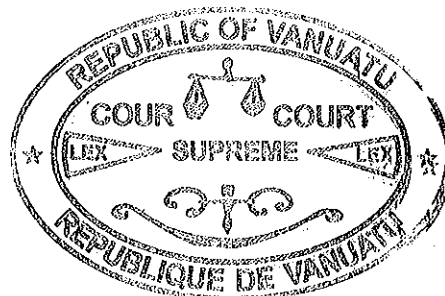
*“...role of the Courts in controlling the limits on the exercise of powers which [is] constitutionally mandated. This constitutional checking role of the Courts makes it easier to accept that they have a general obligation to control exercise of power by the executive or decision makers which is not authorised.”*

More specifically, the Mayor/Claimant has not chaired the said meeting of the 23<sup>rd</sup> January 2009. He was not aware of how the meeting was called, and the items of the agenda of the meeting were not discussed with the Claimant; and the Town Clerk failed in all to consult the Mayor/Claimant's Office which is responsible for drawing up the Agendas of all Council meetings in conjunction with the Clerk. Therefore any decision taken on the said 23<sup>rd</sup> January 2009 is of no effect null and void and is unlawful.

In addition, the law is clear that the Mayor shall preside in all meetings and in his absence the Deputy Lord Mayor or the councillor elected by the members of the Council. The circumstances show that on the 23<sup>rd</sup> January 2009 the Chairman of the Council who is the Mayor adjourned the said meeting for a later date and time. There was no dispute of the adjournment of the meeting. The Mayor was on official duties at that time and did not know or consent to any other meetings. The relevant law referred to above shows that no meeting can be lawfully convened without the Lord Mayor or in his absence the deputy lord Mayor or councillor elected by the member of the Council. The Lord Mayor is not aware of any meeting convened by the Council on Friday 23 January 2009. It follows that any decisions taken is void and of no effect. Part of the void decision is as follows:

*“... following executive decisions pursuant to Municipal Act [CAP.126] by removing the executive power of the Council from the Honourable Lord Mayor with effect as of Friday today 23<sup>rd</sup> January 2009. The Town Clerk of the Port Vila Municipal Council has been nominated and approved by the full council meeting to mandate the executive power of the Council.”*

The Municipalities Act, section 4, provides that the Minister may from time to time by Order-



- (d) Provide for the election of a mayor who shall be chairman of the council;

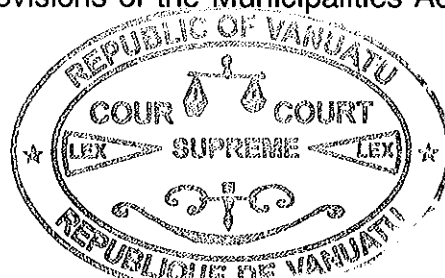
The Amendment of the Municipal Council Elections Regulations Orders No.60 of 1982 "1 subsection 27(1) Delete "1 year" substitute "2 years".

The Act does not provide for removal of the Lord Mayor from Office. The Second Defendants has expressly admitted this in their Defence under Paragraph 8. The Defence under paragraph 8 expressly states that paragraph 7 is admitted. Paragraph 7 of the Judicial Review Claim provides as follows:

*"By virtue of the Act, the Lord Mayor must remain in office until his full terms. The Order of the Council provides for an election of Lord Mayor for every two years and the current Lord Mayor who is the claimant was duly elected on the 11<sup>th</sup> of November 2005 to head the council for two years and again was re-elected on 11<sup>th</sup> November 2007 to head the council as the Lord Mayor for another two years. The claimant's term of office lapse in November 2009. The removal of Mayor from office within his term is unlawful void and of no effect."*

Section 25 of the Act provides for the duties and powers of Council. Section 25(1) provides for the general duties that the Council shall control, manage and administer the Municipality. The control and management of the Council does not mean the removal of the Lord Mayor from Office or removal of his powers. Part of his powers and duties is to chair the Council meetings, draw up Agendas, call meetings and responsible for order or discipline in the meetings of Council and administer the day to day business of the Council. Section 26 provides for other general powers. There is no provision or law that purport the Council to remove its executive power from the Lord Mayor as its Head in the manner contemplated in the present case. The Council consists of the elected Councillors including the Lord Mayor and the Lord Mayor is the Municipal Council Executive Head.

It follows then that the Town Clerk is not an elected Councillor and cannot resume the duties and responsibilities of the Lord Mayor in the circumstances as contemplated in the present case. The said decisions of removing the executive power from the Honourable Lord Mayor with effect as of 23<sup>rd</sup> January 2009 is unlawful and of no effect as contrary to the provisions of the Municipalities Act. The



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Town Clerk of the Port Vila Municipal Council cannot be nominated and approved by the full council meeting to mandate the executive power of the council for reasons that the law does not allow him to exercise the functions of the Lord Mayor. The Act provides for the role and duties of the Clerk but does not authorise him/her to exercise the powers of an elected Councillor and at the same time the Lord Mayor. Even if the Clerk may, subject to the general directions of the Council, exercise the powers of the Council (Section 19(3) of the Municipalities Act [CAP.126]), the circumstances of this case are outside and beyond what is intended under Section 19(3) referred to above. Given the facts of the case the Clerk has failed to comply with the laws governing the Council by calling the meeting of 23 January 2009 without conjunctively consult the Lord Mayor, Claimant. Such a decision is thus unlawful, void and of no effect.

The Act does not provide for separate executive powers between the Lord Mayor and the Council, and for such reasons the Claimant, Lord Mayor Paul H. Avock, is the head of the Council until his term of office lawfully ends in November 2009. The Act does not provide for separate powers of Lord Mayor and the Council. The powers of the Council are to be exercised jointly by the duly elected councillors and the Lord Mayor as the head of the Council. In this given case, the Claimant must continue to hold and will perform his official functions until his term of office ends. There is no authority that gives the Town Clerk or other Councillors to make any decisions to remove or restrict or take away any rights, privileges or benefits which form part of or attached to the office of the Lord Mayor. It is finally important to note that the agenda of the meeting of the said 23<sup>rd</sup> of January did not provide for any such act or contain an item relating to the matters which were the subject of the decision of the Defendants on 23 January 2009. The Act stipulates that any person acting as chairman must act in accordance with the purposes of such a meeting.

The decision by the Second Defendant and the Clerk to remove the executive powers of the Council from the Lord Mayor is contrary to the Act and is invalid. Further the decision by the Defendants to remove the keys and suspending the Claimant salary is null and void and of no effect. The Clerk or the First Defendant has no power to so act. Further the law only provides for more than 5 members to call a committee meeting. Whether or not a meeting was called by more than 5 members, it





should be served on the Clerk who must consult the Lord Mayor who has the power to call the meeting pursuant to law. The Clerk has failed in all to comply with this process and procedures making the said meeting of 23<sup>rd</sup> January unlawful and the purported decisions taken during the said meeting null and void and of no effect.

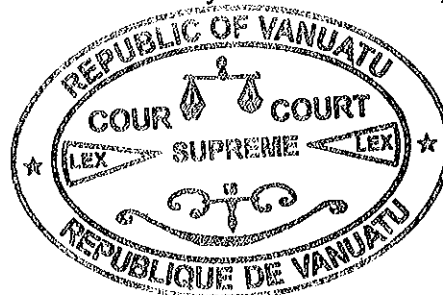
Finally, the procedure by which a decision is made is subject to judicial review if the rules of procedural fairness are in breach. The aggrieved person may seek review if there was a breach of the rules of natural justice in connection with the making of the decision and the procedures in making a decision. The Council failed to inform or take appropriate steps in informing the Claimant about the decision. The term of office of a lord mayor is two years and the Council has no power to remove him as intended in the present case.

Procedures ought to be followed regardless of its chances of correct outcomes. Administrative decisions which affect a person rights, interests or legitimate expectations require procedural fairness and such rights must not be affected in a direct and immediate way. In **Peter Colmar v. VCMB & others**, Civil Appeal No.31 of 2006 (at page 3 of the Judgment) the Court of Appeal stated:-

*"Members of this Court have additional concerns which includes the ability of Vanuatu Commodities Marketing Board simply to pass resolutions which effectively cancels existing licence when no notice had been given to those licence holders, no opportunity to be heard had been given, and no reasons have been given which would justify the cancellation."*

The Court accepts the submissions of the Claimants and says that:

1. The purported decision is unlawful for reasons that it fails to comply with the required procedures and relevant statutory provisions of the Municipalities Act [CAP.126];
2. The Clerk has no power to call the meeting and draw up Agendas upon his own capacity or himself;
3. The Lord Mayor has the power to call the Council meeting under the law and therefore any meeting convened on the 23<sup>rd</sup> of January is null and void;



4. The decision on the 23<sup>rd</sup> of January 2009 taken is null and void;

The Court makes the following Orders:

### **ORDERS**

1. That the purported "decision" of the 23<sup>rd</sup> January 2009 made by the Defendants of removing the executive power of Council from the Honourable Lord Mayor be called up and quashed as unlawful and without basis.
2. That the purported "decision" of the Second Defendant of nominating and approving that the First Defendant mandate the executive power of the Council is invalid, null and void and thereby be called up and quashed as unlawful and without basis.
3. That "decision" by the Second Defendant mandating the First Defendant to remove all office and vehicle keys from the Claimant be called up and quashed as unlawful and without basis.
4. That further quashing order that the purported "decision" was in contravention of the Municipalities Act [CAP.126] in all the circumstances ultra-vires the First and Second Defendants' power to hold the meeting, which means that any decision on the 23<sup>rd</sup> January 2006 is null and void.
5. That the purported meeting held on the 23<sup>rd</sup> January 2009 and its entire decision is unlawful, null and void and of no effect.
6. Costs against the Second Defendants to be taxed if not agreed.

**DATED at Port-Vila this 7<sup>th</sup> day of April 2009**

**BY THE COURT**

**Vincent LUNABEK  
Chief Justice**

