

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

Constitutional Case No.05 of 2011

BETWEEN: HON. EDWARD NIPAKE NATAPEI MP
First Applicant

AND: HON. MOLISA SELA MP
SERGE VOHOR MP
CHARLOT SALWAI MP
LORIN SOLOMON MP
KISITO TEILEMP MP
TAI VOISUSU MP
BRUCE ASAL MP
PAUL TELUKLUK MP
JOSHUA KALSAKAU MP
IOANE SIMON MP
ETA RORY MP
BOB LOUGHMAN MP
MOSES KAHU MP
PHILIP BOEDORO MP
THOMAS ISOM MP
DAVID ABEL MP
PATRICK CROWBY MANAREWO MP
JOSIE MASMAS MP
DOMINIQUE MORIN PM, All Members of
Parliament of Port-Vila, Vanuatu
Second Applicants

AND: Hon. MAXIME CARLOT KORMAN, MP
Speaker of Parliament
First Respondent

AND: Hon. SATO KILMAN, MP
Prime Minister of the Republic of Vanuatu
Second Respondent

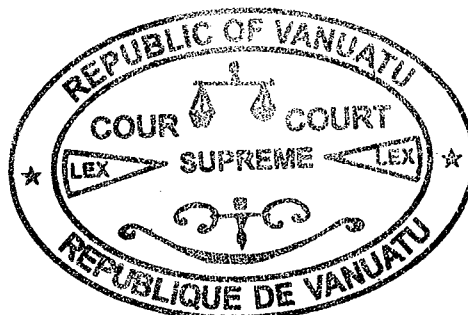
AND: THE STATE REPUBLIC OF VANUATU
Third Respondent

Coram: V. Lunabek CJ

Counsel: Mr Edward Nalyal , counsel for the First and Second Applicants
Mr Justin Ngwele of the State Law Office representing the Attorney-General
on behalf of the First and Third Respondents
Mr George Boar and Mr Daniel Yawha representing the Second Respondent

Date of hearing: 13th June 2011

Date of judgment: 16th June 2011



REASONS FOR JUDGMENT

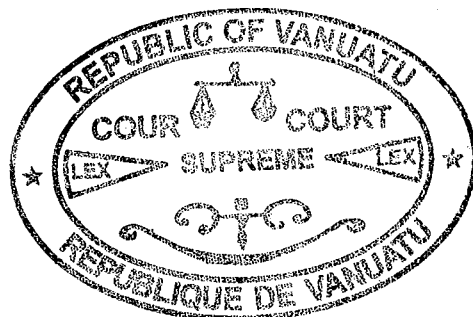
This is an Amended Urgent Constitutional Application filed on 8th day of June 2011 by the First and Second Applicants. It was amended on various occasions. It challenges, in essence, the constitutional validity of the election of the Second Respondent Prime Minister, Hon. Sato Kilman on 2 December 2010.

BACKGROUND

Relevantly, the First Applicants, Mr Edward Nipake Natapei file a Constitutional Application in Constitutional Case No.04 of 2011 on 20 May 2001 and sought orders that the election of the Prime Minister, Hon. Sato Kilman on 2 December 2010 was made contrary to Article 41 of the Constitution.

On 25 May 2011, Mr Edward Nalyal filed an Urgent (Amended) Constitutional Case No.05 of 2011 on behalf of the Second Applicants, seeking among other relief, an order that the purported election of the Prime Minister, Honourable Sato Kilman on 2 December 2010, was made contrary to the provisions of Article 41 and Schedule 2 of the Constitution, and therefore it was unconstitutional and invalid.

The two (2) Constitutional Applications were dealing with the same subject matter by the same parties. On 26 May 2011, the two (2) Constitutional Applications No.04 of 2011 and No.05 of 2011 were listed before the Supreme Court for conference. On the 26 May, both Constitutional Applications were adjourned pending further considerations and amendments. On 26 May 2011, the Court has informed the Applicants and the Respondents that on the face of the documents so far filed, there is no urgency for the Court to deal with the two (2) Applications as it was now some 6 months after the impugned election of the Prime Minister by Parliament on 2 December 2010. However, if the Applicants considered otherwise, then, they must file and serve proper application for urgency with sworn statement in support and such an application of urgency if filed will be scheduled for hearing on Tuesday 7 June 2011 at 4.00pm o'clock.



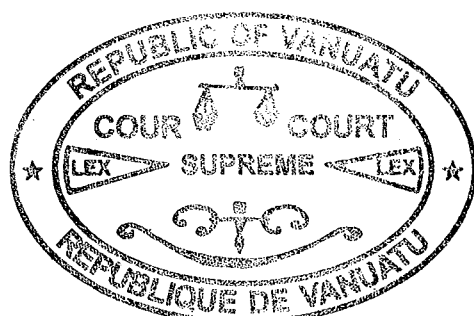
The Applicants filed an application for urgency with sworn statement in support, which were placed before the Court on 7 June 2011.

On 7 June 2011, the First Applicant, Mr Edward Nipake Natapei filed a Notice of Discontinuance in the Constitutional Case No.04 of 2011 against the Respondents. Constitutional Case No.04 of 2011 is so discontinued. Mr Edward Nipake Natapei was then joined as the First Applicant in the Urgent Constitutional Application No.05 of 2011 which challenges, among other matters, the constitutional validity of the election of the current Prime Minister, Hon. Sato Kilman of 2 December 2010.

On 7 June 2011, the Court ruled that although, the challenge of the constitutional validity of the election of the Prime Minister, Sato Kilman was made 6 months after his election by Parliament on 2 December 2010, there is evidence that the election of Prime Minister Sato Kilman by Parliament on 2 December 2010 is questionable in regard to the relevant provisions of the Constitution and because of its constitutional importance, its currency on the life of Government of the Republic of Vanuatu, and the fact that it is raised before the Supreme Court for the first time and it is a fresh issue, the Supreme Court must deal with it and determine it with some urgency. After appropriate directions for further amendments on the Application and responses with sworn statements in support of both the Application and the Responses to be filed, the Urgent Constitutional Application was filed on 8 June 2011. It was further amended with leave of the Court on 13 June 2011 with the addition of declaration 1 sought in the relief by the Applicants.

CONSTITUTIONAL APPLICATION AND RELIEF SOUGHT

The main contention of the First and Second Applicants is that the declaration made by the First Respondent, Hon. Maxime Carlot Korman, Speaker of Parliament that the Second Respondent, Hon. Sato Kilman was declared Prime Minister of the Republic of Vanuatu on 2 December 2010, was unconstitutional and invalid. It follows that the election of the Hon. Sato Kilman by Parliament on 2 December 2010 was unconstitutional and invalid because such an election was not made in accordance with Article 41 Schedule 2 of the Constitution.



3

A handwritten signature in black ink, consisting of a large, stylized letter 'F' with a long horizontal stroke extending to the right.

The First and Second Applicants seek for the following Orders and Declarations:

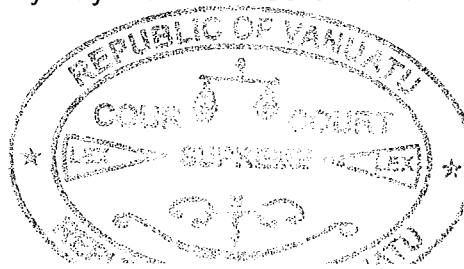
1. An order that the declaration made by the First Respondent, Speaker of Parliament, on 2 December 2010 that the Second Respondent, Hon. Sato Kilman MP, is declared Prime Minister of Vanuatu, is unconstitutional and invalid.
2. A declaration that the purported election of the Prime Minister, Honourable Sato Kilman on 2 December 2010, was made contrary to the provisions of Article 41 and Schedule 2 of the Constitution, therefore, unconstitutional and invalid.
3. A declaration that the Honourable Nipake Edward Natapei remains as the Prime Minister until a new Prime Minister is elected.
4. An order that the Speaker of Parliament reconvene Parliament in accord with the Standing Orders of Parliament so that the Members of Parliament may elect a Prime Minister in accord with the provisions of Article 41 of the Constitution of the Republic of Vanuatu.
5. Any other Orders this Court considers just.

The Application is supported by the sworn statements filed by the following deponents:

- Mr Nipake Edward Natapei of Port-Vila filed On 26 May 2011 ("CL1") and 8 June 2011 ("CL2");
- Mr Hilaire Bule of Port-Vila, filed 25 May 2011 ("CL3");
- Mr Sela Molisa of Port-Vila filed 8 June 2011 ("CL4");
- Mr Joshua Kalsakau filed 8 June 2011 ("CL5");
- Mr Charlot Salwai of Port-Vila filed 8 June 2011 ("CL6");

RESPONSES TO THE CONSTITUTIONAL APPLICATION

The First and Third Respondents filed their responses to the Application on 10 June 2011. They say that the election of the Hon. Sato Kilman as Prime Minister of Vanuatu on 2 December 2010 was made by Virtue of a declaration made by the First Respondent Speaker of Parliament, Hon. Maxime Carlot Korman, and so is not an infringement of Article 41 of the Constitution. They say that Hon. Sato Kilman was



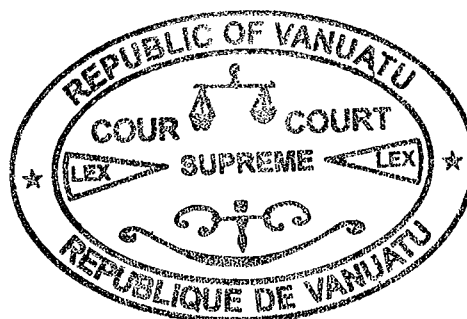
nominated and elected as Prime Minister unopposed. Accordingly, there could not be any process of election pursuant to Article 41 and Schedule 2 of the Constitution. They further say that Article 41 and Schedule 2 of the Constitution can only be activated if among 52 Members of Parliament, more than one persons are nominated to contest for the position of the Prime Minister.

- Mr Maxime Carlot Korman filed a sworn statement on 13 June 2011 in support of the First Respondent's response ("R1");
- Mr Lino Bulekuli dit Sacsac, Clerk of Parliament, filed a sworn statement in support of the Third Respondent's response ("R2").

The Second Respondent, Hon. Sato Kilman, Prime Minister of Vanuatu, filed a response to the Application on 10 June 2011.

The Second Respondent responded to the Application and said that:-

- His election as the Prime Minister was constitutional and valid;
- Article 41 and Schedule 2 of the Constitution was not breached; and
- There was a voting and the outcome of the voting was carried out constitutionally with 30 votes in favour and 15 votes against;
- His election on 2 December 2010 was based on Parliamentary Practices and proper mechanism in a democratic Parliament;
- Article 41 Schedule 2 of the Constitution is not applicable in his election of 2 December 2010 because his nomination was unopposed and Article 41 Schedule 2 is only applicable when 2 or more candidates are nominated for Prime Ministership;
- The secret ballot is employed in this instance to eliminate the candidates who receive less number of votes leaving candidates with higher number of votes to contest again until the candidate with higher number of votes is ultimately declared Prime Minister;
- On 2 December 2010, since there was no opposing candidate for the Prime Ministership, the Speaker then declared him (Second Respondent) Prime Minister after an election was done;
- The outcome of the election will make no difference if conducted by secret ballot.



The Second Respondent further says that:

- Shortly after the election of 2 December 2010, the Applicants lodged Motions of no confidence against his leadership but these motions were all unsuccessful;
- On 13 May 2011, the Court of Appeal declared him as lawfully elected Prime Minister;
- On 20 May 2011, he got the confidence votes of Parliament to remain Prime Minister of Vanuatu;
- Therefore, the Second Respondent says, the Application of the Applicants is misconceived, frivolous and ought to be struck off in its entirety;
- There are no constitutional breaches and the Court cannot interfere with the valid decision of Parliament when he (Second Respondent) was constitutionally and validly elected as Prime Minister of Vanuatu on 2 December 2010.

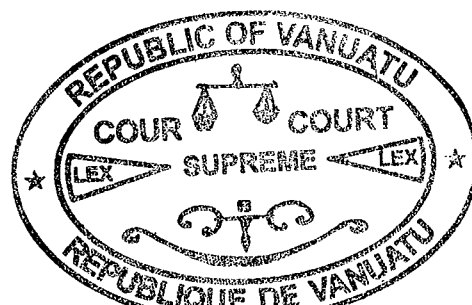
The Response of the Second Respondent Prime Minister Sato Kilman is supported by the sworn statements of the following deponents:

- Mr Meltek Sato Kilman Livtunvanu of Port-Vila, Prime Minister of Vanuatu filed 13 June 2011 ("R3");
- Mr Moana C. Kalosil, MP, Minister of Finance and Economic Management filed 13 June 2011 ("R4");
- Mr Ralph Regenvanu, MP, Minister of Justice filed 13 June 2011 ("R5");
- Mr Harry Iauko, MP, Minister of Infrastructure and Public Utilities ("R6").

ISSUES

The following issues are to be determined by the Court:

1. What is the meaning to be given to Article 41 and Schedule 2 of the Constitution?
2. Is it mandatory?
3. If the answer to question 2 is "yes", whether the Speaker can make a declaration that the Second Respondent, Sato Kilman, as declared Prime



Minister of Vanuatu on 2 December 2010 irrespective of the provisions of Article 41, Schedule 2 of the Constitution?

4. Do the First and Second Applicants have the locus standi to petition the Supreme Court in the present Constitution Application?

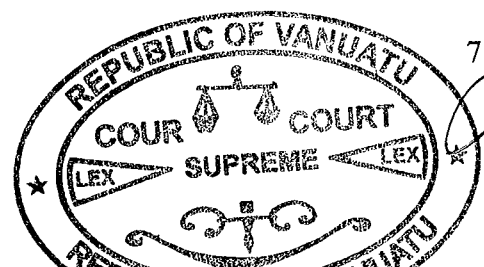
EVIDENCE AND FACTS

It is common ground that most of the facts of this case are not in dispute. The only factual dispute between the Applicants and the Second Respondent is whether or not, the Second Respondent, Hon. Sato Kilman, was elected by Parliament on 2 December 2011 as Prime Minister.

The trial and oral evidence was concentrated on that disputed point of facts. The sworn statements of the Applicants and the oral testimonies of Mr Sela Molisa, Mr Joshua Kalsakau and Mr Charlot Salwai show and confirm that on 2 December 2010, Parliament successfully passed a Motion of no confidence against the First Applicant, Mr Edward Nipake Natapei, the then Prime Minister of Vanuatu. The Motion was passed with 30 votes in favour and 15 votes against. There was an adjournment of Parliament. The then Speaker, George Andrew Wells resigned as Speaker. An election of a new Speaker took place. The First Respondent, Maxime Carlot Korman was the sole Member proposed. He declared himself Speaker of Parliament. The Speaker proceeded to elect a Prime Minister. Hon. Ham Lini nominated Sato Kilman MP as Prime Minister. That nomination was seconded by Hon. Joshua Kalsakau. The Speaker requested for further nominations of candidate for Prime Ministership. There was no further nomination or candidate for Prime Ministership.

The First Respondent Speaker, Hon. Maxime Carlot Korman, made a declaration that the Member of Parliament Sato Kilman was declared Prime Minister of the Republic of Vanuatu. The evidence of the Applicants establishes that on 2 December 2010, before the Respondent declared Hon. Sato Kilman Prime Minister of Vanuatu, there was no election conducted either by secret ballot nor voting by raising of hands.

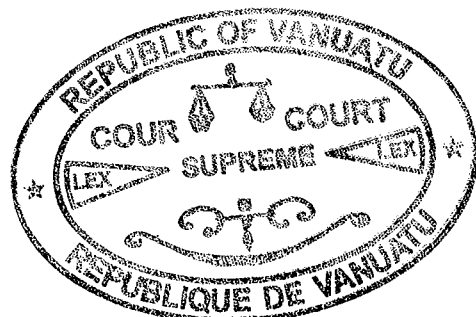
The evidence of the Applicants that on 2 December 2010, when the Second Respondent was declared Prime Minister, there was no election by secret ballot nor



voting by raising of hands is confirmed by the evidence of the First Respondent, Hon. Maxime Carlot Korman when he says that there was no election by secret ballot nor voting by raising of hands when he declared Hon. Sato Kilman Prime Minister of Vanuatu because Hon. Sato Kilman's nomination to the Prime Ministership was unopposed.

The Clerk of Parliament, Lino Bulekuli dit Sacsac filed a sworn statement on 13 June 2011. It was not disputed and it was admitted as evidence. The clerk of Parliament deposes that on 2 December 2010, the second ordinary session of Parliament took place in Port-Vila. At the time he was present and assumed the role of Clerk of Parliament. He says (at paragraph 4 of his statement) that his role when Parliament is in session is to assist the Speaker of Parliament in conducting the proceedings of Parliament. He is in charge of the officers who are responsible in drawing up the minutes relating to any session of Parliament. Once the minutes are completed, he is responsible in proof reading the minutes which are then compiled for approval in the next session of Parliament. He further says (at paragraph 5 of his statement) that on 2 December 2010, concerning the election of the Prime Minister he recalled preparing the ballot papers, roll of the names of the Members of Parliament and tally sheets to be used by the scrutinizers during the process of an election as specified in Article 41 and Schedule 2 of the Constitution. He deposes further that he was in Parliament at that time and he does not recall any secret ballot being conducted or voting by a show of hands during the election of the Prime Minister, Hon. Sato Kilman. Finally, he confirmed that the minutes of Parliament as disposed in the sworn statement of the Speaker of Parliament reflect the manner in which Parliament conducted itself on 2 December 2010.

During the trial, at the conclusion of the Applicants' oral evidence and before the evidence of the First and Third Respondents, Mr George Boar on behalf of the Second Respondent, Hon. Sato Kilman Prime Minister of Vanuatu, conceded that on 2 December 2010, there was no election by secret ballot nor any votes by raising of hands conducted before the First Respondent Speaker of Parliament declared Sato Kilman MP, Prime Minister of Vanuatu.

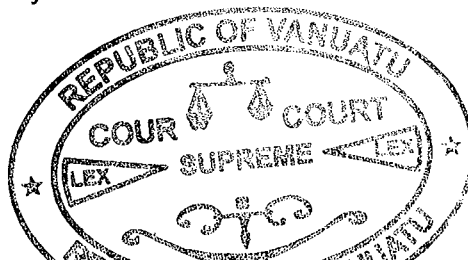


This concession by Mr George Boar on behalf of the Second Respondent, Hon. Sato Kilman, Prime Minister of the Vanuatu at that stage of the trial hearing may have a far reaching effect. It is evidence that Mr Sato Kilman, Mr Moana Carcasses Kalosil, Mr Ralph Regenvanu and Mr Harry Iauko, sworn in evidence by way of sworn statement, on disputed facts which are not correct. Each of them says in their respective statement that they were present in Parliament on 2 December 2010 when the Second Respondent Hon. Sato Kilman was declared Prime Minister of Vanuatu. They each give an account of specific facts that they were directed to vote for the Second Respondent as Prime Minister by raising hands and the result of the voting was that 30 Members of Parliament voted for and 15 voted against. These facts were not correct or true in relation to the election of Second Respondent on 2 December 2010. It is a very serious matter and I am seriously concerned because it involves the Prime Minister of the Republic and the most senior Ministers of State including the Minister of Justice.

On the face of such concession, which did not arise at the beginning of the trial on the disputed points of facts but after counsel for the Second Respondent strongly challenged the Applicants and their witnesses on the said disputed point of facts, there is a clear need for the police investigation on any offence of perjury or conspiracy in the sworn statements filed in support of the Second Respondent. People who file sworn statements in Court, must be honest and credible as the Court is expected to rely on their sworn statement as evidence of facts and to apply the law to these facts in order to do justice in a particular case at hand.

The following are the set of facts leading up to the declaration by the First Respondent Speaker on the 2nd December 2010, that the Second Respondent, Hon. Sato Kilman was elected Prime Minister of Vanuatu:

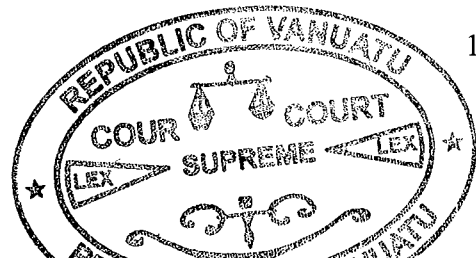
1. On 2 December 2010, Parliament sat in its Second Ordinary Session.
2. The Hon. Speaker of Parliament, Hon. George Andrew Wells issued a written order prohibiting the media and the members of the public to enter Parliament.
3. The Speaker's prohibition order was executed by the police officers (see statement of Hilaire Bule).
4. A Written Motion of no confidence against the then Prime Minister, Hon. Edward Nipake Natapei was to be debated by Parliament.



5. The Hon. Prime Minister, Hon. Edward N. Natapei was overseas on his official engagements.
6. The Motion of no confidence against the then Prime Minister Natapei was carried by 30 votes in favour and 15 against.
7. The then Speaker, Hon. George Andrew Wells declared the seat of the Prime Minister vacant.
8. He had suspended the sitting of Parliament at 4.35pm and resumed it at 5.10pm.
9. The Clerk of Parliament, Lino Bulekuli dit Sacsac informed the House about the resignation of the Speaker of Parliament, Hon. George Wells at 4.30pm on 2 December 2010.
10. Parliament proceeded to elect a new Speaker of Parliament. Hon. Maxime Carlot Korman was the unopposed nomination for the Speaker. He accepted his nomination and declared himself the newly elected and unopposed Speaker of Parliament.
11. Hon. Ham Lin MP, the then Leader of Opposition in Parliament nominated Hon. Sato Kilman to be Prime Minister of Vanuatu. The nomination of the candidate of Hon. Sato Kilman was seconded by Hon. Joshua Kalsakau.
12. Hon Sato Kilman accepted his nomination.
13. The First Respondent Speaker, Hon. Maxime Carlot Korman declared the Hon. Sato Kilman as the newly elected and unopposed Prime Minister of the Republic of Vanuatu.

Before I go further, I must say that it is seriously regrettable that this constitutional question on the validity of the election of a Prime Minister was challenged six (6) months after the impugned declaration on 2 December 2010 as many important decisions on behalf of the Government of the Republic have been undertaken since which have consequences on the life of the Government and people of Vanuatu.

However, as I have mentioned at the beginning of this judgment, it is a constitutional question which due to its importance, its currency and the fact that it is brought for the first time before the Supreme Court as a fresh constitutional question, the Supreme Court is duty bound to determine it in accordance with the Constitution and the law.



As in similar cases, before I consider the arguments and submissions of counsel of the respective parties, I wish to emphasize that this Court in considering those is not interested in or moved by the positions, personalities, or politics (if any) involved in the circumstances that gave rise to this case. This Court is also aware of the constitutional separation of the various functions and powers of the state between the Legislature, Executive and Judiciary which concept has been jealously guarded and maintained over many years. It is a role of the Court to ensure that an appropriate separation of powers is maintained and this at all times.

It is not the Court's intention in deciding this matter to interfere with the sovereignty or independence of Parliament in the conduct of its internal affairs as Parliament is entitled to act pursuant to the Constitution; nor does the Court presume to judge the desirability or efficacy of the established parliamentary "practices and procedures" that form an integral part of that conduct.

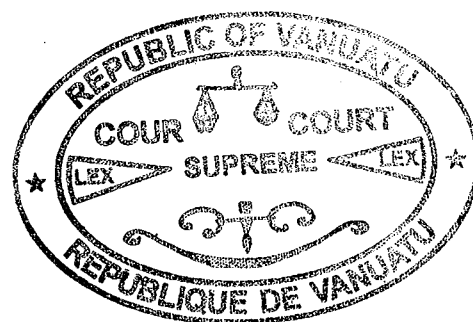
It is also important to remind and reiterate what the Supreme Court and the Court of Appeal on many occasions say. The case of **Tari v. Natapei** [2001] VUCA 18, Civil Case No.11 of 2001 (1 November 2001) is an illustration of the position:

"The Republic of Vanuatu is a Constitutional Parliamentary Democracy. The Constitution is the foundation document. As clause 2 of its notes, the Constitution is the Supreme law of the Republic of Vanuatu.

In Chapter 4 the Constitution provides for a Parliament. In Clauses 16, 17, 21, 22 and 27 in particular, are enumerated the important place of Parliament, and the rights and immunities which are attached to it and its members.

Where there is room for debate, or it is possible that ambiguity exists, assistance may be gained from a consideration of the way in which Parliaments in other places have operated in the past or operate now. But any of that is in all circumstances and at all times subject to the clear and unambiguous words of the Constitution which is the Supreme Law."

THE LAW



The relevant provisions of the Constitution are set out below for ease of reference:

"CHAPTER 1

THE STATE AND SOVEREIGNTY

REPUBLIC OF VANUATU

1. *The Republic of Vanuatu is a sovereign democratic state.*

CONSTITUTION SUPREME LAW

2. *The Constitution is the supreme law of the Republic of Vanuatu.*

...

NATIONAL SOVEREIGN, THE ELECTORAL FRANCHISE AND POLITICAL PARTIES

4.(1) *National sovereignty belongs to the people of Vanuatu which they exercise through their elected representatives.*

(3) *Political parties may be formed freely and may contest elections. They shall respect the Constitution and the principles of democracy."*

"CHAPTER 2

FUNDAMENTAL RIGHTS AND DUTIES

PART 1 - Fundamental Rights

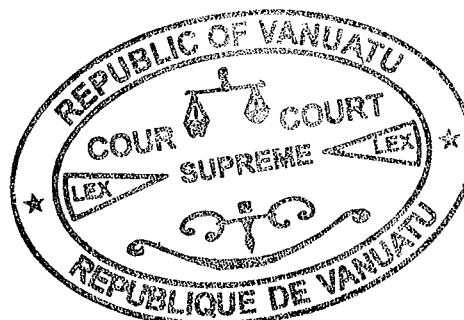
FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL

5.(1) *The Republic of Vanuatu recognizes, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health-*

(d) protection of the law;"

"ENFORCEMENT OF FUNDAMENTAL RIGHTS

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



- (2) *The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right.*

**“CHAPTER 4
PARLIAMENT**

PARLIAMENT

15. *The legislature shall consist of a single chamber which shall be known as Parliament.*

POWERS TO MAKE LAWS

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

- (2) *Parliament shall make laws by passing bills introduced either by one or more members or by the Prime Minister or a Minister.*

....”

“ELECTION OF MEMBERS OF PARLIAMENT

17.(1) *Parliament shall consist of members elected on the basis of universal franchise through an electoral system which includes an element of proportional representation so as to ensure fair representation of different political groups and opinions.”*

“PROCEDURE OF PARLIAMENT

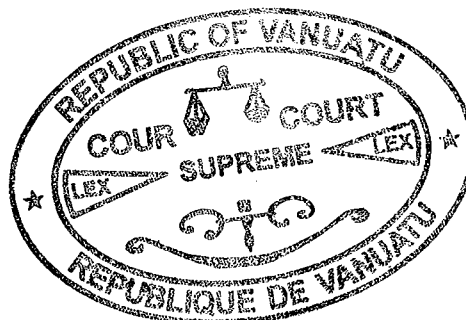
21.(1) *Parliament shall meet twice a year in ordinary session.*

- (2) *Parliament may meet in extraordinary session at the request of the majority of its members, the Speaker or the Prime Minister.*

(3) *Unless otherwise provided in the Constitution, Parliament shall make its decisions by public vote by a simple majority of the members voting.*

(4) *Unless otherwise provided in the Constitution, the quorum shall be two-thirds of the members of Parliament. If there is no such quorum at the first sitting in any session Parliament shall meet 3 days later, and a simple majority of members shall then constitute a quorum.*

(5) *Parliament shall make its own rules of procedure.”*



“SPEAKER

22.(1)...

(2) *The Speaker shall preside at sittings of Parliament and shall be responsible for maintaining order.*

...”

“PROCEEDINGS TO BE PUBLIC

24. *Unless otherwise provided proceedings of Parliament shall be held in public.”*

“LIFE OF PARLIAMENT

28.(1) *Parliament, unless sooner dissolved under paragraph (2) or (3), shall continue for 4 years from the date of its election.*

(2) *Parliament may at any time decide, by resolution supported by the votes of an absolute majority of the members at a special sitting when at least three-fourths of the members are present, to dissolve Parliament. At least 1 week’s notice of such a motion shall be given to the Speaker before the debate and the vote on it.”*

“CHAPTER 7

THE EXECUTIVE

EXECUTIVE POWER

39.(1) *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.”*

“COUNCIL OF MINISTERS

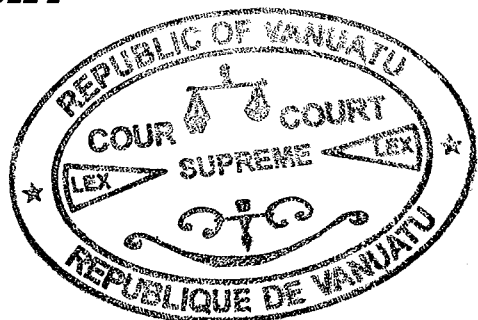
40. (1) *There shall be a Council of Ministers which shall consist of the Prime Minister and other Ministers.”*

“ELECTION OF PRIME MINISTER

41. *The Prime Minister shall be elected by Parliament from among its members by secret ballot in accordance with the roles in Schedule 2.”*

“SCHEDULE 2

ELECTION OF THE PRIME MINISTER



1. *The candidate who obtains the support of the absolute majority of the members of Parliament shall be elected Prime Minister.*
2. *If no candidate is elected under paragraph 1, a second ballot shall be taken but the candidate obtaining the lowest number of votes in the first ballot shall be eliminated.*
3. *If on the second ballot no candidate obtains the support specified in paragraph 1, further ballots shall be held, each time eliminating the candidate with the lowest vote in the preceding ballot until one candidate receives the support specified in paragraph 1, or if only two candidates remain the support of a simple majority.”*

“COLLECTIVE RESPONSIBILITY OF MINISTERS AND VOTES OF NO CONFIDENCE

- 43.(1) *The Council of Ministers shall be collectively responsible to Parliament.*
- (2) *Parliament may pass a motion of no confidence in the Prime Minister. At least 1 week’s notice of such a motion shall be given to the Speaker and the motion must be signed by one-sixth of the members of Parliament. If it is supported by an absolute majority of the members of Parliament, the Prime Minister and other Ministers shall cease to hold office forthwith but shall continue to exercise their functions until a new Prime Minister is elected.”*

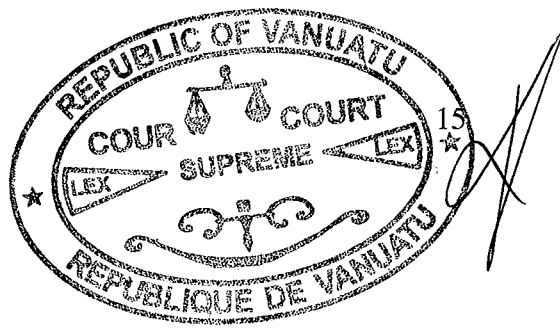
**“CHAPTER 8
JUSTICE**

THE JUDICIARY

- 47.(1) *The administration of justice is vested in the Judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law.”*

“APPLICATION TO SUPREME COURT REGARDING INFRINGEMENTS OF CONSTITUTION

- 53.(1) *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.*



Counsel for the Second Respondent submitted in the like manner. Mr George Boar went as far as submitting that the Speaker of Parliament can declare a Prime Minister irrespective of the provision of Article 41 and Schedule 2 of the Constitution. When he was asked to refer to the source of power of the Speaker of Parliament to so act, Mr Boar was unable to identify. This is because there is no such a power apart from Article 41 and Schedule 2 of the Constitution. The Speaker of Parliament is duty bound to apply the Constitution in the exercise of his functions, duties and responsibilities as Speaker of Parliament.

Article 41 of the Constitution provides:

"The Prime Minister shall be elected by Parliament from among its members by secret ballot in accordance with the roles in Schedule 2."

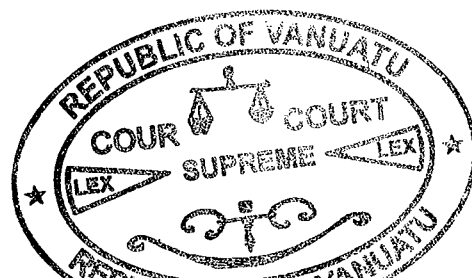
Schedule 2 is set out as follows:

"SCHEDULE 2

ELECTION OF THE PRIME MINISTER

- 1. The candidate who obtains the support of the absolute majority of the members of Parliament shall be elected Prime Minister.*
- 2. If no candidate is elected under paragraph 1, a second ballot shall be taken but the candidate obtaining the lowest number of votes in the first ballot shall be eliminated.*
- 3. If on the second ballot no candidate obtains the support specified in paragraph 1, further ballots shall be held, each time eliminating the candidate with the lowest vote in the preceding ballot until one candidate receives the support specified in paragraph 1, or if only two candidates remain the support of a simple majority."*

Article 41 of the Constitution is simple and is very clear. The Prime Minister shall be elected by Parliament among its members by secret ballot. It is a mandatory provision. Schedule 2 of Article 41 set out the roles as to the process and the circumstances under which the election of a Prime Minister is to be conducted. The submissions of the First, Second and Third Respondents to the contrary are rejected. I accept the submissions of counsel Mr Edward Nalyal for the Applicants that Article



41 and Schedule 2 provide a process that is carefully designed for the election of a Prime Minister by Parliament. There is no other way to elect the Prime Minister apart from in accordance with Article 41 and Schedule 2 of the Constitution. If there is another way, then, the Constitution must say so. There is no such a provision in the Constitution.

In the present case, on 2 December 2010, when the First Respondent Speaker declared the Second Respondent Hon. Sato Kilman elected Prime Minister of Vanuatu unopposed without conducting an election by secret ballot in accordance with Article 41 and Schedule 2 of the Constitution, that declaration was made in breach and contrary to Article 41 and Schedule 2 of the Constitution. It was unconstitutional and invalid.

It follows from the unconstitutional declaration of the Speaker of Parliament of 2 December 2010, that the purported election of Hon. Sato Kilman as Prime Minister of Vanuatu on 2 December 2010 was made contrary to Article 41 and Schedule 2 of the Constitution. It is, therefore, unconstitutional and invalid.

The First, Second and Third Respondent submitted further that the First and Second Applicants have no locus standi and as such there is no provision of the Constitution which was infringed in relation to each of them. That submission cannot be maintained in the present case.

The First Applicant, Hon. Edward Nipake Natapei, was deposed by a Motion of no confidence against him which was carried out by 30 votes in favour and 15 votes against on 2 December 2010. He was voted out in accordance with Article 43(1)(2) of the Constitution. The circumstance of the present case shows that on 2 December 2010, there was a declaration of vacancy in the position of the Prime Minister. However, the declaration by the Speaker of 2 December 2010 was unconstitutional and invalid.

In any event, by virtue of Article 43(2) of the Constitution, Hon. Edward Nipake Natapei, the then Prime Minister shall continue to exercise his functions as Prime



A handwritten signature in black ink, consisting of several loops and a long tail, is written over the page number.

Minister until a new Prime Minister is elected. The First Applicant has a locus standi to petition the Supreme Court under Article 53 of the Constitution.

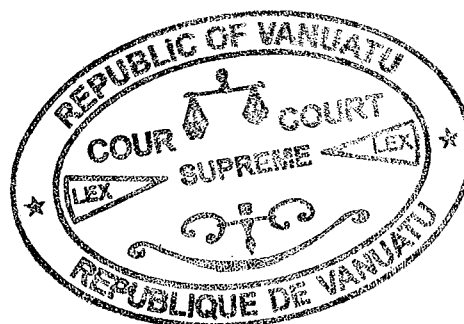
The Second Applicants, as Members of Parliament, have a constitutional right to elect the Prime Minister. The declaration of the First Respondent Speaker of 2 December 2010, declaring the Second Respondent, Hon. Sato Kilman, Prime Minister of Vanuatu without election by secret ballot deprived the Second Applicants and other Members of Parliament of their rights to elect the Prime Minister by secret ballot in accordance with Article 41 and Schedule 2 of the Constitution.

There is an issue of the effect of the Judgment of the Court of Appeal dated 13 May 2011. The Judgment of the Court of Appeal dated 13 May 2011, does not protect the election of the Prime Minister Sato Kilman. It was about an interpretation question of the meaning of what is an absolute majority of the Members of Parliament for the election of a Prime Minister. The very question resolved by the Court of Appeal in its judgment of 13 May 2011 was not about the election of the Second Respondent, Hon. Sato Kilman.

As a matter of public interest, the Judgment of the Court of Appeal shall protect the situations arising as consequences of the various constitutional challenges and changes since 13 May 2011 affecting the Government of the Republic.

The final matter is that I am seriously concerned about the action and conduct of the First Respondent Speaker in this case which costs the Government of the Republic of Vanuatu huge amount of Vatu when he exercises his functions and responsibilities as Speaker outside the clear provisions of the Constitution. I consider that I shall make costs order personally against him.

On the above considerations, the Court makes the following Orders and Declarations:



ORDERS AND DECLARATIONS

1. THAT, the declaration by the First Respondent Speaker, Maxime Carlot Korman of 2 December 2010 that the Second Respondent, Hon. Sato Kilman was elected Prime Minister of Vanuatu was unconstitutional and invalid.
2. THAT, the purported election of the Prime Minister, Hon. Sato Kilman on 2 December 2010, was made contrary to the provisions of Article 41 and Schedule 2 of the Constitution, therefore was unconstitutional and invalid.
3. THAT, the Hon. Nipake Edward Natapei remains as the Acting Prime Minister until a new Prime Minister is elected - Article 43(2) of the Constitution. The effect of Article 43(2) is limited only to Mr Nipake Edward Natapei but not to the then appointed Ministers of Government.
4. THAT, the situation arising as the consequences of the constitutional challenges and changes in the administration of the affairs of the Government of the Republic of Vanuatu are deemed to be protected by the effect of the Judgment of the Court of Appeal dated 13 May 2011 and this from 13 May 2011. This is more so for the public expenditure.
5. THAT, the First Respondent Speaker of Parliament is ordered to convene Parliament as soon as possible so that the Members of Parliament shall elect a Prime Minister in accordance with the provisions of Article 41 and Schedule 2 of the Constitution.
6. THAT, the First and Second Applicants are entitled to their costs against the First Respondent and such costs shall be agreed or determined.
7. THAT, such costs shall be paid by the First Respondent personally.

DATED at Port-Vila this 16th day of June 2011

BY THE COURT

**Vincent LUNABEK
Chief Justice**

