

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

Civil Case No. 72 /2012

BETWEEN: **THE UNION OF MODERATE PATIS
COMMITTEE (INC)**
Claimant

AND: **CHARLOT SALWAI
STEVEN KALSAKAU
RAPHAEL WORWOR
AND EMILIANO BULETARE**
First Defendants

**VINCENT BOULEKONE
CHARLEY NAKO**
Second Defendants

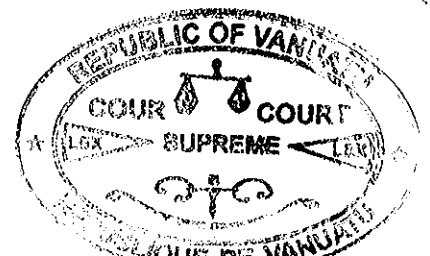
Hearing: **30th August 2012**

Before: **Hon. Justice Robert Spear**

Appearances: **Colin Leo for the claimant
Felix Laumae for the first defendants
Robin Tom Kapapa for the second defendants**

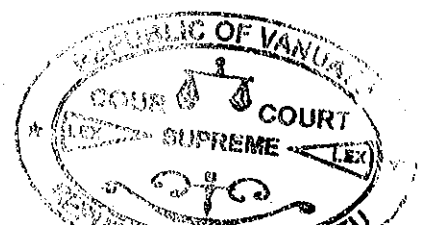
Judgment: **5 September 2012**

JUDGMENT OF THE COURT

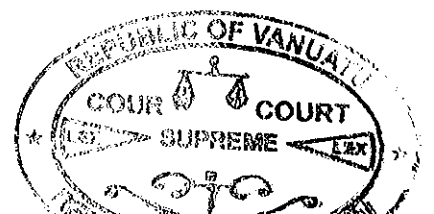


- 1) In a decision given by this court on 20 July 2012, an interlocutory injunction issued prohibiting each of the first defendants (then the sole defendants) from representing themselves as affiliated or associated in any way with the associations known as UMP or UMPC including any of their respective expanded forms¹. That prohibition extended to the use of the UMP symbol of an open hand and the slogan, "Ute Ute Ho".
- 2) The claimant UMP now seeks that interlocutory injunction against the first defendants to be made permanent and for it also to extend to restrict similarly the second defendants who have been subsequently added to this proceeding. The claim more exactly seeks the following relief:
 - a) *A permanent injunction to restrain the First and Second Defendants (whether acting by their President, Executive officers, Supporters, Servants, Assignees or Agents of UMPC or any of them or otherwise howsoever) from affiliating, associating, or using the name UMP or UMPC.*
 - b) *A permanent injunction to restrain the First and Second Defendants (whether acting by their President, Executive officers, Supporters, Servants, Assignees or Agents of UMPC or any of them or otherwise howsoever) from using the Claimant's symbol of an "open hand" and the Claimant's slogan "Ute Ute Ho"*
 - c) *The First and Second Defendants to pay the Claimant VT15,000,000 for damages*
- 3) The claim for damage of Vt 15 million is not supported by any evidence of loss. Furthermore, Mr Leo's submissions did not address it. No further attention will be given to that aspect of the claim.
- 4) The operative pleadings, the evidence filed by sworn statements, and some preliminary aspects of the case not material to the substantial issues now for determination have been addressed in a separate ruling.
- 5) Some explanation is required in relation to the major players in this case:

¹ UMP v Salwai & Ors: Civil case 72 of 2012; Spear J (20 July 2012)



- a The claimant is an association known as the *Union of Moderate Patis*. It was incorporated in March 2012 as a charitable association to become *The Union of Moderate Patis Committee (Inc.)*. It is widely known by the abbreviation, *UMP*. The three names can be treated interchangeably as a reference to the one association. UMP is a well-known and well-established national political party. Serge Vohor has been the President of UMP since 1988;
- b The defendants are all members of an association known as the *Union of Moderate Parties for Change* and which is also conveniently known either as *UMP for Change* or *UMPC*. Again, the three names can be treated interchangeably as a reference to the one association. UMPC was formed principally by the second defendants in November 2011;
- c The names of individuals are used without reference to any chiefly title. No disrespect is meant;
- d All defendants have been members of UMP;
- e The first three named first defendants (Charlot Salwai, Steven Kalsakau and Raphael Worwor) are longstanding and current members of Parliament. They were elected under the UMP banner both at the last election and at previous elections. They propose to stand again for election to parliament at the next elections on 30 October 2012 but under the UMPC banner;
- f The other defendants (Emiliano Buletare, Vincent Boulekone and Charley Nako) are all former members of parliament and under the *UMP* banner;
- g Further attention to the involvement of certain individuals in this dispute will be given during the summary of the history to UMP and UMPC.
- 6) National elections are to take place on 30 October 2012. Parliament has just risen for the final time in this parliamentary term and the campaigning for the national elections is now well underway. The essence of the claim is that if

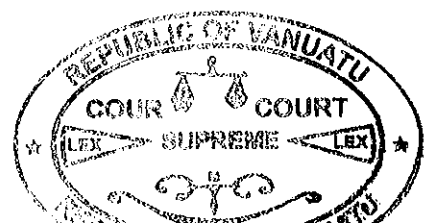


the defendants are permitted to present themselves to the public at this time as being either affiliated to or associated with an organisation known as *Union of Moderate Parties for Change* or *UMP for Change* or *UMPC*, it is likely to cause considerable harm to *UMP*. In particular, it is likely to sow the seeds of confusion in the minds of the general Vanuatu electorate as to who is standing for Parliament under the UMP banner and who is standing under the banner of another political party. Mr Leo argues that the damage that is likely to be caused to UMP if the defendants are not so restrained will be irreparable.

- 7) Charlot Salwai, Stephen Kalsakau and Raphael Worwor, all current MPs and elected at the last national election as UMP candidates, propose to stand again at the elections on 30 October 2012 but under UMPC the banner. Given the well established reputation of UMP as a major political party in Vanuatu, the similarity in the names (UMP / UMPC) and the “UMP” background of those three candidates, Mr Leo argues that if they are permitted to stand as UMPC candidates then this will give an unfair and illegitimate advantage because of the confusion or uncertainty that is likely to result. The argument is, more exactly, that this will permit them to gain political leverage off the UMP name notwithstanding that they are no longer members of that political party. UMP contends that this will be to its distinct disadvantage and particularly harmful of both the party and its candidates.
- 8) Effectively, UMP seeks to have the defendants restrained from passing themselves off as UMP candidates, affiliates or associates which will be the likely outcome notwithstanding that there is some difference in the names (UMP cf. UMPC) and irrespective of whether that is their intention.
- 9) The defence is essentially that:
 - a) First, the claimant association (or more exactly those members of it) does not have the right to the name UMP at all;

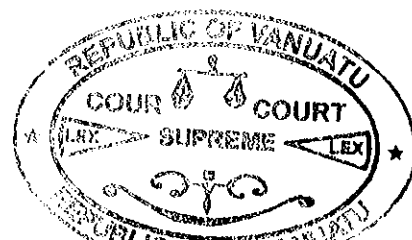


- b) Secondly, it certainly does not have the exclusive right to that name; and
- c) Thirdly, in any event, the names (UMP / UMPC) are sufficiently dissimilar such that the argument that the use of both names in the forthcoming elections will cause confusion is grossly overstated.
- 10) It is necessary to have some regard to the history to the two organisations (UMP and UMPC) and the individuals involved. As it happens, there is no significant dispute in respect of that history.
- 11) The history of UMP, by the evidence for the Claimant, starts in 1988 when Serge Vohor states he was elected President of UMP at the national congress held at the Man Ples area of Port Vila. Serge Vohor states that he has been and remains the President of UMP since he was first elected to that position in 1988 as a result of being re-elected at each national biennial conference since 1988.
- 12) The evidence for the Defendants explains the very origins of both UMP and UMPC. In particular, Vincent Boulekone and Charley Nako state that, well prior to independence in 1980, indeed as far back as the 1960s, various custom movements were formed in different places with a view to obtaining independence from France and England. Ten of these small groups or movements eventually met at Walla-Rano on Malekula in 1977 with a view to combining their resources and the decision was then made to create a union of these small movements. They initially named the union, *Tan Union*. Following independence in 1980, *Tan Union* provided three members of the first parliament of Vanuatu.
- 13) Further consideration was then given by the constituent members of *Tan Union* to develop and advance their collective political vision for the new nation of Vanuatu. To that end, there was a further meeting of the constituent members of *Tan Union* at Walla-Rano on Malekula in February 1982 when it was decided that the name of the organisation would change to



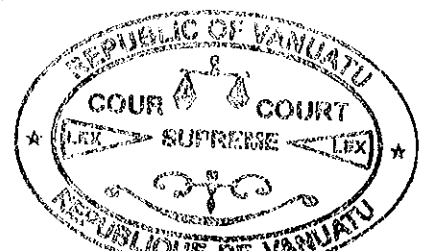
"Union Blong Ol Moderet Pati (U.M.P)". Vincent Boulekone was elected the first President of UMP. Charley Nako was at that meeting.

- 14) Vincent Boulekone also drafted a constitution that was adopted by UMP in 1982. In particular, the 1982 constitution declared (Article 10.0) that the national Congress of UMP determined the overall policy and political direction of the Party. It also provided for both a governance structure for the party (Article 7) and for the administration of the party (Article 6). This 1982 constitution is a quite succinct document that focuses primarily on the objectives (the political vision) of UMP as a political party. This constitution is somewhat light on detail relating to governance and management. That can be expected given that this was essentially a founding document.
- 15) Charley Nako states that it was resolved at that time that the president of UMP would be elected from the presidents of the various member groups that made up UMP. The 1982 constitution is silent on this point. Accordingly, it was an issue that was capable of being revisited at any national congress on a simple majority basis.
- 16) Both Vincent Boulekone and Charley Nako articulated a complaint (and this is probably the nub of the issues between UMP and UMPC) that the current President of UMP (a reference to Serge Vohor) had ignored the powers of the *"Council of Presidents"* and that, *"he has been ruling the union since 1986 outside the original arrangements of as the original founders of UMP"*. Again, the 1982 constitution is silent on what is meant by the *"original arrangements"* and the *"Council of Presidents"*. Indeed, the 1982 constitution (and the 2003 constitution) makes no reference at all to a Council of Presidents when it defines the structure of the party.
- 17) Jeff Patunvanu of the Nagriamel Movement (one of the original moderate parties) confirms the evidence of Charley Nako that UMP was founded by the Nagriamel Movement along with other custom movements in Vanuatu. Mr Patunvanu stated that, in August 2007, the Nagriamel Movement

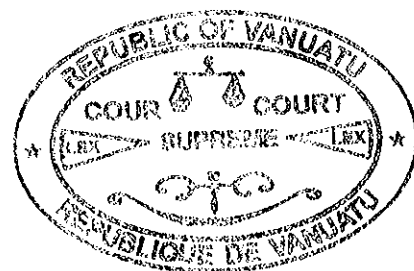


resolved to withdraw its membership of UMP because of its dissatisfaction with the leadership of Serge Vohor.

- 18) Jeff Patunvanu states further that, in November 2011, the Nagriamel Movement together with the *“leaders of other custom movements that founded UMP, decided to reorganize our union ... under the name UMPC”*. This was “formalised” in early 2012 by the declaration of the Nagriamel Movement and other custom movements to, *“change their union’sname from UMP to Union of Moderate Parties for Change (UMPC)”*. This identifies the issue in contention between the Parties or more exactly between UMP and UMPC.
- 19) Vincent Boulekone explained his involvement with UMP following his election as its first president in 1982. He resigned as president of UMP in 1987. Serge Vohor was elected president in 1988 although Vincent Boulekone, Charley Nako and others in UMPC contend that this election was irregular. I will return to this contention.
- 20) Vincent Boulekone explained that he was expelled from UMP in 1989 but he re-joined following a custom ceremony in 1995. He was elected Vice President of UMP in 1997. In 1999, he was one of 17 expelled from UMP with Charlot Salwai also a member of that group. Vincent Boulekone then distanced himself from the operation of UMP and commenced working with other *“leaders of the moderate parties and custom movements to reorganize ourselves and redirect UMP”*
- 21) The essence of the evidence for the defendants is that, by 2003 and the time of the national congress of UMP at Ifira, at least one of the original or founding member groups of UMP had become so disgruntled with the existing UMP organisation that it left the union. Furthermore, that by November 2011, a number (if not all) of the founding members of UMP decided to take back control of UMP. They considered that they were entitled to do so simply by their assertion that they retained primary rights of ownership in UMP with the consequences already mentioned.



- 22) There is no challenge to the evidence that Serge Vohor was elected President of UMP in 1988 and that he was re-elected as President at each of the national congresses that followed.
- 23) There is also no challenge to the evidence that at the 20th national congress of UMP on the Island of Ifira in October 2003, UMP adopted a new constitution described as its "*Articles of Association*". Vincent Boulekone asserts that the first defendant Emiliano Buletare drafted that constitution. That 2003 Constitution is a carefully drafted and extensive document. It essentially establishes a regulatory framework within which UMP determined it would operate. The minutes of that national congress show that the first defendant Steven Kalsakau chaired that national congress.
- 24) Furthermore, the minutes of the 21st national congress of UMP in September 2006 confirm not only that Serge Vohor was re-elected President, but that: (1) Charlot Salwai was elected Secretary General; (2) Steven Kalsakau was elected Treasurer; (3) Raphael Worwor was appointed to the national executive committee as the representative of the Malampa Province; and (4) Emiliano Buletare signed the minutes as the "*Rapporteur*".
- 25) The 23rd National Congress of UMP in May 2010 at Pangi village at South Pentecost record the re-election of Serge Vohor as President as well as the election of: (1) Charlot Salwai as Vice President; (2) Steven Kalsakau as Vice Treasurer; (3) Raphael Worwor again as the Malampa Province representative; and, (4) Emiliano Buletare as the Secretary General.
- 26) The 24th National Congress of UMP took place at Eratap between 28 February 2012 and 1 March 2012. The minutes record that the national council then resolved to expel the four defendants from UMP. A further resolution was to the effect that the four defendants did not have the right to use the name *Union of Moderate Party (UMP)* but that, of course, begs the question as to who has the right to use the name.



- 27) Serge Vohor states that UMP was registered (incorporated) as a charitable organisation in or about 1997 but it was struck off the register at some later stage for non- payment of fees. However, at the 24th National Congress at Eratap (February/ March 2012), it was resolved to register UMP again as a charitable organisation and that was attended to. The certificate of incorporation records that “*the Union of Moderate Patis Committee (Inc.)*” was incorporated on 8 March 2012 as a charitable association under the Charitable Associations (Incorporation) Act [CAP 140]. The constitution remained as adopted in 2003.
- 28) On 29 March 2012, UMPC sought to incorporate as a charitable association. However, the Registrar refused to register UMPC under the name *UMP for Change* because that name closely resembled UMP which, of course, was already incorporated
- 29) UMPC then appealed the Registrar’s decision. The appeal was allowed and the Registrar was directed by the Minister of Finance to incorporate UMPC in the name “*UMP for Change*”. A certificate of incorporation was then duly issued on 27 April 2012 confirming the incorporation of “*The Union of Moderate Parties for Change (UMPC) Committee Association (Inc.)*” as a charitable association.
- 30) In a separate proceeding² brought by UMP, the decision of the Minister of Finance to direct the incorporation of UMPC was quashed and UMPC remains an unincorporated association. That decision of this court is also now under appeal to the Court of Appeal.
- 31) It is convenient to mention at this point that in both the defence evidence and the submissions of Mr Laumae and Mr Kapapa, it was argued that UMP is not and never was a political party like the Vanuaaku Party. Instead, that it has always been and remains a union or collective of various small custom movements (moderate parties) who came together in 1982 to further their collective political version. While there may be structural and historical

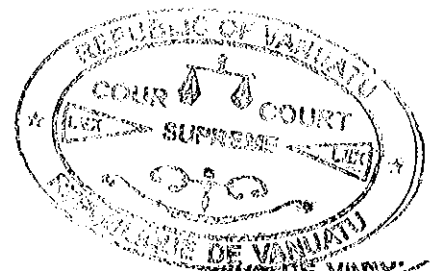
² *UMP v Minister of Finance Judicial Review 10 of 2012; Spear J (14 August 2012)*



differences between UMP and say the Vanuaaku Party (and the court has no real appreciation of what they might be) it is abundantly clear that UMP is always been a political party whatever its origins might be.

Claimant's legal argument

- 32) Mr Leo argues that UMP is as determined by the 2003 Constitution. That leaves the governance of UMP under the presidency of Serge Vohor and other members of the national council. None of the defendants are now members of UMP and more specifically none of the defendants or any group they purport to represent have a right to present to the public in a way that suggest that their group is either affiliated to or associated with UMP.
- 33) Mr Leo's principal argument is that Charlot Salwai, Steven Kalsakau and Rapheal Worwor must not be allowed to stand for parliament in the forthcoming elections in a way that even suggests that they have any connection with UMP. If that is allowed to occur, the distinction between UMP and UMPC is unlikely to be appreciated by the voting public resulting in confusion and uncertainty. That could only benefit those three defendants and any other UMPC candidates. Furthermore, it will cause damage to UMP and the candidates that it endorses.
- 34) More generally, Mr Leo argues that all the defendants should be restrained at this time from representing themselves to the voting public as belonging to an organisation that includes the letters *UMP* or the words *Union of Moderate Partis* or close variations thereof. It is clear from the defendants' evidence that the second defendants (in particular) have a senior leadership role within the breakaway group UMPC and that if the second defendants are also restricted (from presenting themselves to the public as affiliated to or associated with an organisation that includes the letters *UMP* or the words *Union of Moderate Parties* or close variations thereof) then that will work to reduce dramatically if not eliminate the risk of such confusion amongst the voting public in the lead-up to the forthcoming national elections. That will in turn reduce the risk of harm to UMP.



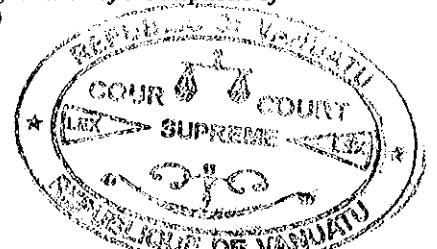
- 35) If others not party to this proceeding attempt to present themselves to the public in a way that suggest that they are connected with UMP then Mr Leo recognises that UMP will be left to take individual action against those people.
- 36) Mr Leo argues that the legal authority for placing such restrictions on the defendants arises out of the development of the cause of action known as *passing off* and in particular as applied in this Court in 1996 in *Vohor v. Edeng*³. That case also dealt with UMP and what was described is a breakaway group.

First Defendants' legal argument

- 37) Mr Laumae argued that the law in Vanuatu is not settled as to whether the tort of passing off extends to providing protection to a political party in respect of that party's name. Mr Laumae relied particularly upon cases dealing with the development of passing off in other jurisdictions but also another decision of this Court in 1996 by a former Chief Justice in the *Seventh Day Adventist* case⁴. Mr Laumae sought to distinguish *Vohor v. Edeng* on the basis that it dealt with "*breakaway members of UMP without deciding legal proprietorship (in the name UMP)*" and argued that the case at hand requires a determination as to the ownership of the name UMP.
- 38) The further argument of Mr Laumae is that control or ownership of UMP remains at all times with the original founding groups or moderate parties. This was declared particularly by Vincent Bulekone and Charley Nako as well as other defence witnesses. That defence evidence attempts to portray the election of Serge Vohor in 1988 as something of a *coup d'état* and that his subsequent re-election as well as the adoption of the 2003 Constitution have no legitimacy as they did not gain the support of the original founding members or groups of UMP.

³ [1996] VUSC 14; Civil Case 075 of 1996 (27 August 1996)

⁴ *Vanuatu Mission of the Seventh Day Adventist Church v Seventh Day Church of the Republic of Vanuatu* [1996] VUSC 19; Civil Case 057 of 1996 (19 September 1996)



- 39) Finally, Mr Laumae submitted that the names UMP and UMPC and their expanded versions were not so similar that the voting public would not appreciate the difference between them. Accordingly, the claimant must fail as it is unlikely to suffer loss in the event that any of the defendants stand for parliament under the UMPC banner or even if UMPC is presented to the public as a contesting political party.

Second Defendants' legal argument

- 40) Mr Kapapa argues in a similar vein to Mr Laumae. However, his argument focus more on the history to UMP and (what is contended was) the continuing and dominant role that the original and founding member groups (the moderate parties) still have in respect of the organisation bearing the name UMP. He argued:

28 *The ...1982 Constitution ... is still valid and effective. The purported amendment or revocation of this constitution in 2003 at the Ifira Congress was not valid because it was never approved by the parties that were the original members of the UMP union.*

- 41) Mr Kapapa also argued:

16 *... the formation of UMPC was solely for the purpose of regaining the support of the movements and the parties that originally formed UMP in 1982, but had since been sidelined by the UMP constitution of 2003. It is the argument of the Second Defendants that the Claimant cannot prevent them from using the name UMPC as it portrays an ideology that differs from that of UMP. And the parties and movements that now formed UMPC are willing to operate on the same basis of trust and confidence that was their foundation when they got together as a union under UMP in 1982.*

- 42) Mr Kapapa raised the complaint made about the leadership style of Serge Vohor and in particular makes the allegation that he has "continuously ignored the power of the council of presidents".

- 43) I observe that while a council of presidents may have been recognised when this organisation (that became UMP) was first established, not even the 1982



constitution recognises such a body as a council of presidents when addressing the structure of UMP. Indeed, the 1982 constitution specifically identifies the various “organs” of UMP when defining the structure and there is no reference to a council of presidents. The only suggestion that a council of presidents exists and has any constitutional role in the operation of UMP is from the defendants. Neither the 1982 Constitution nor the 2003 Constitution recognises such a body.

- 44) Mr Kapapa also argued that to restrict the defendants in the way sought by the claimant would be in breach of the Constitution and in particular the guarantee of freedom of expression, assembly and association found in Article 5 of the Constitution of the Republic of Vanuatu.

Consideration

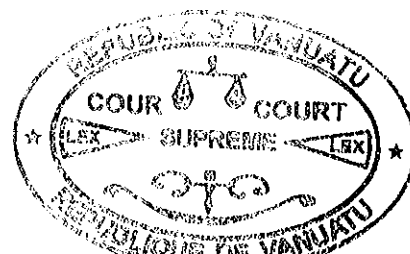
- 45) It is appropriate first to make some observations about the rule relating to unincorporated or voluntary associations. In this respect, the fact that the claimant incorporated as a charitable association in March 2012 is neither here nor there in respect of the issues raised in this case. It is clear that ownership rights to the name of an association is not a matter that the Registrar of Charitable Associations is empowered to determine. In the case involving the judicial review of the decision of the Minister of Finance to direct the incorporation of UMP for Change, it was acknowledged by the parties (UMP and UMPC) that this must be so⁵.
- 46) The Constitution of the Republic of Vanuatu guarantees individuals the right to form groups or associations - Article 5(1)(h). Of course, that guarantee is made subject to having, “*respect for the rights of freedoms of others and to the legitimate public interest and defence, safety, public order, welfare and health*”. Accordingly, and conventionally, this is not an absolute right to freedom of assembly or association nor is there an absolute right to freedom of expression. It would be absurd to consider that Article 5 provided such an

⁵ *UMP v Minister of Finance Judicial Review 10 of 2012; Spear J (14 August 2012) at para 7*



absolute right. Such rights are subject to such limitations and restrictions as can be justified in a free and democratic country..

- 47) Be that as it may, this case is not about the guarantee of rights and freedoms as the relief claimed by UMP does not in any way attempt to restrict any of the defendants from assembling or associating with each other. What is sought is a restriction that has been recognised by the common law for many years and that is the protection of the goodwill of an organisation in its name.
- 48) As mentioned, the law recognises that individuals form groups or associations for a myriad of reasons. It might be for religious purposes, for sport, social interchange or (as in this case) political purposes. There is nothing exceptional about this. Furthermore, the law recognises that these associations are entitled to agree on a structure to their associations by adopting rules under which the association will operate. While the association continue in existence, its affairs are generally governed to the extent that the rules adopted by it apply.
- 49) The association may change its rules by a simple agreement amongst its members or, if the rules provide for a procedure for a rule change, then pursuant to that procedure.
- 50) The essence of an association is that it is voluntary as to membership. If a person or a group wishes to be a member of the association, then they are required to abide by and recognise the rules of the association. If they elect to leave the association then of course they are not bound by those rules but equally they are no longer members of the association.
- 51) Resigning membership or being expelled from the association is different to the dissolution of the association. If an association is dissolved, the rules and any other social contract that exist between its members ceases to have effect except to the extent for which the rules might provide.

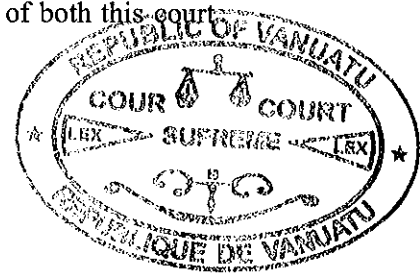


- 52) Another way to describe the rules of an association is as its constitution or its articles of association.
- 53) A political party such as UMP is no different to any other voluntary association. In this case, the association adopted a constitution in 1982 which defined its governance structure but focused more on the objects of the association. All those members of UMP at the time that the 1982 constitution was adopted were entitled to remain as members of UMP or resign. If they elected to remain as members of UMP then they were bound to respect and adhere to the rules of the association (the constitution) and the law recognises the right of the association to insist upon those rules being observed.
- 54) The 1988 election of Serge Vohor's presidency has never been contested in the Courts as being either irregular or unlawful. While there is a defence complaint that it was irregular and that it was a "coup d'état" orchestrated by Serge Vohor as he seized power within UMP, there is nothing specific that has been raised in the evidence that establishes this to be so. Furthermore, each of the six defendants has at some significant stage since 1988 been a member of UMP while Serge Vohor was president. Again, membership was voluntary and it was a matter for the individual defendant to elect whether to belong to UMP or not.
- 55) The evidence does not identify any contest to the legitimacy of Vincent Bulekone's expulsion from UMP in 1989. Of course, Vincent Bulekone was welcomed back into UMP following the custom ceremony that took place in 1995.
- 56) Similarly, there is no complaint made in the defence evidence that the expulsion of the 17 members (including Vincent Bulekone and Charlot Salwai) in 1999 was other than pursuant to the will of the majority of members of UMP and thus pursuant to the 2003 constitution.
- 57) There is also nothing to suggest that the 2003 constitution was other than in accordance with the wish of the majority of members at the national congress



at Ifira. As already mentioned, Stephen Kalsakau chaired that congress and, with the exception of Vincent Bulekone and perhaps Charlie Nako, the other defendants took up leading roles in UMP under that constitution and remained in position for a significant period of time under that constitution.

- 58) There is also no challenge made to the legitimacy of the decision reached by the national congress of UMP earlier this year to expel the first defendants.
- 59) It is accordingly difficult to see how the first defendants in particular, but also the second defendants, can challenge the validity and effectiveness of the 2003 constitution when they either voluntarily submitted themselves to it or took no steps to challenge its legitimacy.
- 60) The argument for the defendants, particularly the second defendants, that UMP has departed from its original format and that it was ignoring the role of the original moderate parties that founded UMP ignores the fundamental precepts of voluntary associations. That is, a voluntary association such as UMP is entitled to organise itself and govern its operations as it sees fit providing that this does not contravene the law. It is entitled to evolve through a review of its constitutional framework. There is simply no substance to the defence argument that UMP remained governed or subject to the control of the founding groups or moderate parties.
- 61) It is trite law that a voluntary association may acquire property in assets and it also recognises that there can be property in a name. In this case there is no doubt that the claimant association has property in the name *UMP* and *Union of Moderate Parties* or close variations thereof. The evidence is overwhelming that the claimant association has been a significant, major political party in Vanuatu since at least 1982 and that it is well known by those names. This conclusion is of significance when the cause of action relied upon here of passing-off is examined more closely
- 62) These are not the idle ramblings of an individual Judge but the synthesis of high authority dating back many years including decisions of both this court



and the Court of Appeal of Vanuatu. In *Mataskelekele v Abbil No. 1*⁶ an earlier decision of this court that dealt with another political party, Goldsbury ACJ stated:

On behalf of the defendants it was submitted that this court should not interfere in the affairs of a private unincorporated association of people. Authority for this view appears in Cameron v Hogan [1934] 51 LRC at p.358. That case was decided by the High Court of Australia. Contrary authority appears in John v Rees [1962] 2 All ER beginning at page 274. The same topic is considered in the learned text book "Equity - Doctrines and Remedies" Meagher, Gummow and Lehane 2nd Edition at para 2154 et seq.

It is the view of this court that the law to be applied here is that found in John v Rees. Applying that law this court is of the opinion that it is open to any member of a voluntary unincorporated association to bring an action to court when that member alleges the association to have failed to comply with its own rules or constitution, or, where they apply, it has failed to observe the rules of natural justice.

John v Rees is also useful in explaining the courts function in this type of case. I therefore adopt the words of Megarry, J. when he says, "I must make explicit what all lawyers will recognise as implicit, but which those who are not lawyers may not fully appreciate. I am not in the least concerned in this case with the rightness or the wrongness or the desirability or undesirability of any political views or policies that there may be. This is so whether the views or policies are political in the ordinary external sense, in relation to other political parties or otherwise, or whether they are internal politics within the confines of any political or other unit. My concern is merely to see that those concerned in these proceedings obtain justice according to law, irrespective of politics".

The doctrine illustrated in John v Rees shows that a contract exists between the members of an association such as the Vanuaaku Pati. Thus any member may ask the court to consider any alleged breach of that contract. In this case, the plaintiff alleges that the rules of the Pati have been or are about to be broken by and consequent upon a decision of the Executive Committee of the party.

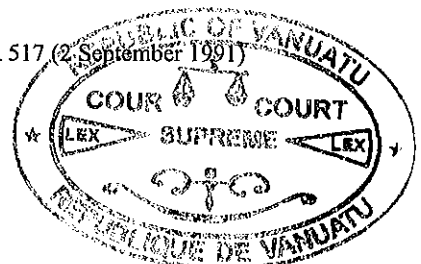
63) That case went on appeal⁷ and it received some support:

"His Lordship's decision is supported by authority: See John v. Rees (1969) 2 All E.R. 274, although there is other authority to the contrary – see Cameron v. Hogan [1934] HCA 24: (1934) 51 CLR 358 and the cases cited in Meagher, Gummow and Lehane, "Equity Doctrines and Remedies," 2nd Edition, para 2154 et seq

64) In *Vohor v Adeng*⁸, a case that dealt also with UMP, Lunabek J (as he then was) addressed this very issue and, with respect, I agree entirely with his conclusions:

⁶ [1991] VUSC 7; [1980-1994] Van LR 512 (6 August 1991)

⁷ *Mataskelekele v Abbil No. 2* [1991] VUCA 1; [1980-1994] Van LR 517 (2 September 1991)



Despite Cameron -v- Hogan , it is not the first time that the Courts of this country deal with disputes between individual members of unincorporated associations, such as Political Parties; see Mataskelekele -v- Abbil (1991); Kalpokas -v- Lini Civil Case 127 of 1991; Korman & Jimmy -v- Mensul Civil Case No 106 of 1995.

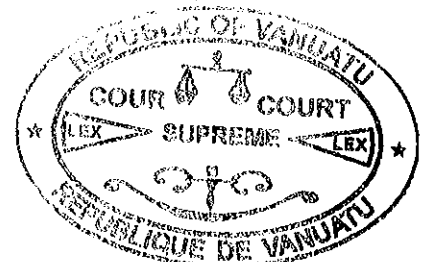
The Courts should be willing to assist in resolving disputes with such organisations in which members have deliberately adopted formal rules to govern their relations.

In my judgment, people who join an unincorporated Association such as the Union of Moderate Parties and subscribe to its Constitution and by-laws should be taken to intend to be bound by them and should be entitled to invoke the Courts in appropriate circumstances to have their disputes settled and the limitations, if any, to be placed on the right is, no doubt, to be worked out on case to case basis. A Court can therefore interfere in the internal workings of an unincorporated association, such as a political party and I so rule.

- 65) The tort of passing off has its origins in commercial law. It is unnecessary to detail the history of the action and how it has developed to provide such protection, where appropriate, to both religious and political associations in respect of their name or names; essentially, the goodwill of the association. This development is very well addressed by his Lordship in *Vohor v Adeng* leading up to his Lordship's conclusion (again, with which I entirely agree) that "a political party should have the same protections as to its reputation and/or standing and goodwill in its name as is afforded by the law to commercial organisations and now extended to charities and churches organisations."
- 66) It can be noted that in the *Seventh Day Adventist*⁹ (case which closely followed *Vohor v Adeng*), a former Chief Justice observed that he could not see how the protection he provided to the church in respect of its name could extend to provide similar protection to a political party. However, the reasons for this comment were not given. With respect, I cannot avoid the eminent sense of the conclusion reached in *Vohor v Adeng* particularly in the Vanuatu context and for all the reasons given by Lunabek J in his decision.

⁸ [1996] VUSC 14; Civil Case 075 of 1996 (27 August 1996)

⁹ *Seventh Day Adventist Church v Seventh Day Church* [1996] VUSC 19; Civil Case 057 of 1996 (19 September 1996)



- 67) This court has previously recognised that a political party is entitled to enjoy the same protection in its name as a commercial organisation. Lunabek J again in *Vohor v Adeng*,

"(The) use by one political party of the name of another for the purpose of appropriating the standing and goodwill which the other has built up constitutes a form of wrong known to the law as unfair competition, against which this Court will intervene to use the full power of the injunctive process."

And then relating this to the Vanuatu context

"Furthermore, I accept ... that, in the particular circumstances of Vanuatu, it is desirable, so as to avoid confusing, less sophisticated voters, that there should be clear distinctions between political parties otherwise, it will be practically impossible to hold democratic elections in this country."

...

"If two factions of a party, or two separate parties, are both allowed to use the same name, elections in Vanuatu would become impossibly difficult to administer."

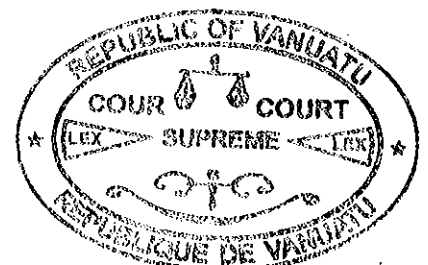
It can also be foreseen ... that in (a) Vanuatu context, were the courts to do nothing, civil disturbances could occur if a group of people have built up a political machine, a popular following, and some other groups, or faction within their own party, appropriating that name to their own use"

- 68) That decision in *Vohor v. Adeng* was not appealed. It has stood the test of time and, in my view, remains good and enforceable law in this country. It is a reflection of the development of the law in context with the context here being the political and social environment within which national elections are contested in Vanuatu.
- 69) Accordingly, I find that UMP is entitled to protect the goodwill that it has built up over the years in its name whether in the style *UMP* or *Union of Moderate Partis* or close variations thereof. I accept that this must necessarily extend to clearly identifiable symbols, signs or marks of UMP that the voting public identifies as being part of the public face of UMP. They are the open hand symbol and the expression *Ute Ute Ho* notwithstanding that they may have their origin in the history of one of the original founding groups...
- 70) The original moderate parties which spawned UMP, also bestowed on UMP various symbols and signs. Any right to exclusivity in respect of those



symbols and signs (such as the open hand symbol and the cry *Ute Ute Ho*) was lost when they were given freely to UMP that then adopted them as its own.

- 71) The final issue to be determined is whether the defendants or any of them would indeed be passing themselves off as UMP if they sought political advancement using a name that includes UMP or close variations to it. The case for UMP in that respect is overwhelming. However, it has to be considered in respect of each of the defendants.
- 72) The first three named defendants Charlot Salwai, Steven Kalsakau and Raphael Worwor are all standing for parliament in the forthcoming elections. They proposed to do so under the banner of a political party styled and known as *UMPC, UMP for Change* or *Union of Moderate Parties for Change*. If they are permitted to do so, there is more than just a risk that the general electorate will become confused as to who is indeed representing the well-known and long-standing political party, UMP. That would provide those defendants with a significant advantage as they are likely to gain leverage by the inclusion of UMP in the name of the party that they are representing.
- 73) Those three first defendants have a high public profile as long standing members of parliament and members of UMP. Accordingly, it is likely to be difficult for the voting public to appreciate fully that they are no longer standing under the UMP banner when they have UMPC beside their names. This would also likely cause significant harm to UMP and any candidates that it has endorsed who will be standing against those three defendants.
- 74) It is the very essence of politics that a political party works to develop political strength so that its policies can be progressed. A party such as UMP is driven to have as many of its candidates elected as possible so that its voice in parliament is one that cannot be ignored. If there is confusion about its candidates then it is at least possible, if not probable, that one or more of the UMP candidates could miss out on election.



Conclusion

- 75) Accordingly, Charlot Salwai, Steven Kalsakau and Raphael Worwor are prohibited from either representing themselves to the public or being so represented as affiliated to or associated with any organisation that includes the letters *UMP* or the words *Union of Moderate Parties* or close variations thereof in its name. That prohibition extends to the use of the open hand symbol and the expression *Ute Ute Ho* which have become clearly identifiable marks of UMP. Specifically, that prohibition includes any association or entity described as *UMPC*, *UMP for Change* or *Union of Moderate Parties for Change*.
- 76) That is not to say that those three defendants are unable to stand for parliament - just that they must not publicly declare their allegiance to or affiliation with a political party that even suggests that they have remained with UMP.
- 77) These restrictions apply to any other defendant who stands for parliament in the forthcoming national elections.
- 78) All defendants are prohibited from representing or otherwise promoting to the public that there is an association or entity described as *UMPC*, *UMP for Change* or *Union of Moderate Parties for Change* or close variations thereof.
- 79) Costs will follow the event so that the claimant is entitled to costs on a standard basis against all the defendants jointly and severally either to be agreed or taxed.

BY THE COURT

