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

Constitutional Application No. 05 of 2015

BETWEEN: **TONY NARI**
JOHN AMOS VACHER
SEBASTIEN HARRY
THOMAS LAKEN
First Applicants

AND: **PAUL BARTHELEMY TELUKLUK**
STEVEN KALSAKAU
MARCELLINO PIPITER
Second Applicants

AND: **THE REPUBLIC OF VANUATU**
Respondent

Coram: ***Justice D. V. Fatiaki***

Counsel: *A. Godden for the First Applicants*
R. Kapapa for the Second Applicants
F. Gilu for the Respondent
K. Mataskelekele as amicus curiae

Date of Judgment: *8 October 2015*

JUDGMENT

Prologue: "***Righteousness exalts a nation but sin is a disgrace to any people***"

[Proverbs 14:34]

1. In this constitutional application the applicants seek four declarations as follows:

   - **A DECLARATION** that the constitutional rights of the Applicants pursuant to Articles 5(1)(d), 5(1)(h), 5(1)(j), 5(1)(k), 6(1), 6(2), 16(1) and 47(1) of the Constitution have been infringed;

   - **A DECLARATION** that Article 62(4) have been infringed;

   - **A DECLARATION** that section 21 of the Leadership Code Act [CAP 240] is unconstitutional in that it infringes the rights of the Applicants herein as a citizen under Article 5(1)(d), 5(1)(h), 5(1)(j) and 5(1)(k);

- **A DECLARATION** that section 21 of the Leadership Code Act [CAP 240] ("Act") is unconstitutional in that it restricts and impinges upon the constitutional right of the Applicants to borrow from any other person or entity that is not recognized lending institution.

2. The applicants claim that their fundamental rights under Articles 5(1)(d), 5(1)(h), 5(1)(j) and 5(1)(k) of the Constitution have been infringed. Similarly they claim that Article 62(4) has been infringed by the Ombudsman in denying them *"an opportunity to reply to complaints made against them."*

3. At the first conference, on 18th September 2015, the court with a view to actively managing and narrowing the issues in the case had full and frank discussions with counsel for the applicants and State Counsel.

4. Suffice to say that at the end of the discussions counsel for the applicants withdrew claims under Articles 5(1)(h) and 5(1)(j) and the issues were narrowed to the following three (3):

Issue (1): Does section 21 of the Leadership Code Act breach the applicants' fundamental rights and freedoms under Act 5(1)(K) of the Constitution?

Issue (2): Has there been a breach of Art 62(4) of the Constitution in the preparation of the Ombudsman's Special Preliminary Report?

Issue (3): Is section 21 of the Leadership Code Act (Cap 240) unconstitutional for its vagueness and uncertainty and in breach of Art 5(1)(d)?

5. The brief and relevant chronology of the events leading up to the application is as follows:

- 17 August 2015 –The applicants were charged with 10 others before the Supreme Court in Criminal Case No. 73 of 2015 on an Information filed by the Public Prosecutor. Each applicant was charged with an offence of Corruption and Bribery of Officials contrary to section 73(1) of the Penal Code Act (Cap 135) and a second count of Acceptance of Loans contrary to section 21 of the Leadership Code Act (Cap 240);

- 27 August 2015 – a challenge to the Information charging offences under the Leadership Code Act was dismissed in a written ruling delivered by the trial Judge;

- 01 September 2015 – The first applicants in Criminal Appeal Case No. 3 of 2015 filed an appeal in the Court of Appeal challenging the above decision and urging eight (8) grounds in support as follows:

"1. *The Judge fell into error when she took much consideration and emphasis on a Special Preliminary Report prepared by the Ombudsman which was not done in accordance to procedures set out under the Constitution, Leadership Code Act [Cap 240] and Ombudsman Act [CAP 252].*

2. *The Judge erred in fact and law to consider the submission of the Defence particularly the process of prosecution of a leader under the Leadership Code Act [CAP 240].*

3. *The Judge erred in facts and law to consider the requirements under the Ombudsman Act [CAP 252].*

4. *The Judge erred in facts and law to consider the submission of the Defence regarding the requirement of producing a report under the Ombudsman Act [CAP 252].*

5. *The Judge erred in facts and law to properly consider Part 5 of the Leadership Code Act [240].*

6. *The Judge placed much weight on section 29 of the Public Prosecutors Act rather than carefully assessing the legal requirements of producing an Ombudsman report under the Ombudsman Act [CAP 252] and Articles 62 & 63 of the Constitution.*

7. *The Judge fail to consider the content of the Special Preliminary Report to decide whether the report was prepared following the requirements under the Ombudsman Act.*

8. *The Public Prosecutor fail to disclose the special report to the Court for consideration as to whether the Special Report was prepared under the requirements of the Ombudsman Act*".

The second applicants filed a similar appeal in Criminal Appeal No. 4 of 2015 challenging the actions of the Ombudsman.

- 02 September 2015 – An application to defer pleas and vacate trial dates fixed in Criminal Case No. 73 of 2015 was dismissed by the trial Judge in a short written ruling. The defendants were required to plead to the Information and each applicant pleaded *'not guilty'*;

- 09 September 2015 – The First applicants filed the present constitutional application together with a sworn statement from each applicant in support and a sworn statement of urgency from counsel;

- 10 September 2015 – The application and sworn statements were served on the State Law Office at 4.05 pm.

- 23 September 2015 – The Second Applicants filed an application to be joined as parties to the Constitutional Application (granted without opposition on 28 September 2015).

- 02 October 2015 – The Ombudsman applied to be joined as "*amicus curiae*" to assist the Court on **Issue 3** (granted unopposed on 6 October 2015).

6. Before proceeding any further I make some general observations about the application. The application was improperly intituled in naming nine (9) other persons who are neither applicants nor persons who filed supporting sworn statements or sought any redress from this Court. Those named individuals were accordingly struck off and the applicants were directed in future court papers, to confine the named applicants to themselves. Whatsmore, in the absence of any identification or mention of any legal principle or Constitutional Article supporting an unlimited fundamental right or freedom to borrow from any person or entity as claimed, DECLARATION (4) is wholly unsupported and is accordingly struck out.

7. Secondly, I note that between the laying of the Information charging the applicants with offences against the Leadership Code Act and the filing and service of the constitutional application, over 3 weeks had elapsed. Plainly there was and is no "*urgency*", in this matter nor does counsel's sworn statement disclose any grounds for so-treating it. Whatsmore, the applicants have also elected to file an appeal against the ruling of the trial judge upholding the charges under the Leadership Code Act and that should have been the end of the matter. This Court is also not unmindful that the calling of evidence in Criminal Case No. 73 of 2015 has concluded and all that remains is closing addresses from counsels and the verdict of the trial Judge which is fixed to be delivered on 09 October 2015.

8. Furthermore, from a perusal of the trial judge's ruling and conscious that some of the materials and submissions placed before this Court in this application, in particular, the Ombudsman's Special Preliminary Report and covering letter were not placed before the trial judge and coupled with the absence of any judicial review challenge to the Ombudsman's Special Preliminary Report, the trial judge was entitled, in my view, to rely on the legal presumption of regularity - *"omnia praesumutur rite esse acta"*- that the Ombudsman's Special Preliminary Report was valid and compliant with the provisions of the Ombudsman Act and the Leadership Code Act.

9. Given the uncompleted stage of the criminal trial and in the face of the above-mentioned appeal which directly raises the validity and lawfulness of the Leadership Code Act charges as well as alleged breaches of the Constitution, the Ombudsman Act and the Leadership Code Act, the present application, may be viewed as a disguised appeal against the trial Judge's ruling by the applicants.

10. In those circumstances and mindful of the salutary warning of the Court of Appeal in Dinh Van Than v. The Minister of Finance [1997] VUCA 6 that:

"*There is a danger of seriously debasing the currency of constitutional petitions if they are resorted to when there is no need because the normal processes of the law are more than sufficient to deal with the issue*".

this Court could not ignore the real possibility that the present application is *"an abuse of process"* which ought not to be entertained at all. As this issue was unilaterally raised by the Court, the parties were given time to file evidence and submissions on the following preliminary issues:

"Is the applicants' constitutional application an 'abuse of process'? and does the Court have the power to strike it out for that reason?"

11. The applicants filed a sworn statement and counsels filed submissions that I have fully considered. State counsel seek the exercise of the court's power or alternatively a stay of the constitutional application until after the disposal of the applicants' appeals and applicants' counsel seeks a decision on the merits.

12. In this regard, I respectfully adopt the observations of Lord Diplock in Maharaj v. A.G of Trinidad and Tobago (No. 2) (PC) [1979] AC 385 where he said (at p 399):

"... no human right or fundamental freedom ... is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court ... [as the applicants have already done in Criminal Appeal Case No. 3 of 2015] *... the fundamental human right is not to a legal system that is infallible but to one that is fair ... The claim for redress ... for what has been done by a Judge is a claim against the state for what has been done in the exercise of the Judicial power of the state. This is not vicarious liability, it is a liability of the state itself ... even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within section 6* [the enforcement provision in the Constitution] *unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person ... It is only in the case of imprisonment already undergone before on appeal can be heard that the consequences of the judgment or order cannot be put right by an appellate court ... It is true that ... a party to legal proceedings who alleges that a fundamental rule of natural justice has been infringed in the determination of his case could, in theory, seek collateral relief in an application* [for constitutional redress] *... The High Court however, had ample powers both inherent and* [under the Civil Procedure Rules] *to prevent its process being misused in this way; for example, it could stay proceedings under Section 6(1) until an appeal against the judgment or order complained of had been disposed of."*

(my insertions in brackets and underlining for emphasis).

13. A similar warning was repeated by Lord Diplock in the context of a criminal case where there was a parallel remedy available in Chokolingo v. A-G of Trinidad and Tobago [1981] 1 WLR 106 at 111.

14. More recently in another criminal case Hinds v. AG of Barbados and another [2002] 1 AC 854 where the complaint was a denial of legal representation infringing the appellant's right to a fair hearing, the Privy Council in dismissing the appeal reaffirmed Lord Diplocks' warnings as remaining *"pertinent"* when it said (at paragraph 24):

"a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such challenge, based on constitutional grounds, has been made and rejected. The applicants complaint was one to be pursued by way of appeal against conviction, ..."

15. Even more trenchant is the decision of the Privy Council in Jaroo v. AG of Trinidad and Tobago [2002] 1 AC 871 where the Court in dismissing the appeal against the dismissal of the appellant's constitutional application, **Held**:

"(2) ... where a parallel remedy existed the right to apply for redress under ... the constitution was to be exercised only in exceptional circumstances; ... that an application ... (under the constitution) ... *was appropriate in cases where the facts were undisputed and only questions of law were in issue but was wholly unsuitable in cases depending for their decision on the resolution of disputes of fact, which ought to be determined by the procedures available in the ordinary courts under the common law; that before issuing* (a constitutional application) *a person should consider the true nature of the right allegedly contravened and whether, having regard to all the circumstances, some other common law or statutory procedure might more conveniently be used; that where such other procedure was available resort to the procedures afforded* ... (under the constitution for redress) ... *would be inappropriate and an abuse of process ..."*

(my underlining and insertions in bracket).

16. More relevantly for this Court is the decision of the Supreme Court in Benard v. Republic of Vanuatu [2007] VUSC 68 where the Court said (at para. 2 and 3):

"The Constitutional Procedure Rules of 2003 do not contain a specific provision empowering the Court to strike out an application on the grounds that it is without foundation or vexatious or frivolous. Such a provision was previously found in s 218 (4) of the Criminal Procedure Code Act which was contained within Part XIII of that Act which the Constitutional Procedure Rules replaced.

However, nor is such a provision found in the Civil Procedure Rules No. 49 of 2002 but the Court of Appeal has recognized in Noel –v- Champagne Beach Working Committee [2006] VUCA 18; CAC 24 of 2006 that such a power exists under the Court's inherent jurisdiction in relation to civil claims. In that case, the Court of Appeal pointed out that Rules 1.2 and 1.7 of the Civil Procedure Rules provide a basis for exercising the jurisdiction. Both those rules have been imported into the Constitutional Procedure Rules by Rules 1.3 and 1.4 of the latter Rules. So I am in no doubt that the jurisdiction does exist in relation to Constitutional Applications also. That conclusion is strengthened by the specific reference in Rule 2.8 (a) to the Court's power at first conference to deal with any application to strike out."

17. In the present case not only was the applicants' challenge to the Leadership Code Act charges *"rejected"* by the trial judge, but, the applicant's have filed: *"(an) appeal to a higher court"* against the trial judges' rejection which is the proper avenue and *"remedy"* for the correction of judicial errors. Additionally, the applicants have not challenged the Ombudsman's Special Preliminary Report which they received in May/June 2015 as they could have done by way of an application for judicial review nor did they seek a stay of the Leadership Code Act charges when the trial commenced if they truly considered that their trial on the Leadership Code Act charges had been compromised or would be incurably *"unfair"*. Furthermore there is nothing to prevent the applicants making the same arguments and submissions that they propose to make in the present application, part of their closing addresses before the trial judge if there is an evidential basis for it.

18. Needless to say, any decision this Court makes in this constitutional application is also subject to the applicants' right to appeal it to a higher court. I am also mindful that the pre-emptive power to strike is to be *"exercised sparingly"* and only where the applicants' case is *"... so clearly untenable that it cannot possibly succeed"*. I am also satisfied that in Criminal Case No. 73 of 2015 the trial judge's ruling dealt with events that occurred after the submission of the Special Preliminary Report to the Public Prosecutor whereas the applications in this Court deals with different events that occurred before it and, to that extent, there is no possible danger of *"res judicata"* arising.

19. In all the circumstances, I propose to reserve my decision on this preliminary issue until after I have determined the agreed issues.

Issue 1: Does section 21 of the Leadership Code Act breach the applicants' fundamental rights and freedoms under Article 5(1)(k) of the Constitution?

20. So far as relevant for present purposes Article 5(1)(k) of the Constitution provides:

> *"The Republic of Vanuatu recognizes, that **subject to** restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of ... political opinions ... **but subject to** respect for the rights and freedoms of others and to the legitimate public interest in ... public order, welfare and health –*
>
> ***(k) equal treatment under the law ..."***
>
> (my emphasis)

21. It may be stated at once that the fundamental rights and freedoms recognized in Article 5(1) are not absolute and indeed are granted *"subject to"* several limitations.

For instance the Article expressly recognizes that the law may impose restrictions on the fundamental rights and freedoms of *"non-citizens"* and even Article 5(1)(k) specifically excludes from its ambit, a law which *"makes provision for the special benefit, welfare protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas."*

22. The applicants argue that section 21 of the Leadership Code Act breaches their fundamental right to *"equal treatment under the law"*, in so far as the section prohibits and criminalizes loans that are not similarly prohibited if accepted by an ordinary citizen. In the face of such different and unequal treatment of *"leaders"* and ordinary citizens in the acceptance of loans from *"a person"* other than from *"a recognized lending institution"*, the applicant's complain they are being unequally treated by the law and to that extent section 21 infringes Article 5(1)(k) and is unconstitutional.

23. Although there is a superficial attraction to the submission, it does not withstand close scrutiny. Firstly, the submission, like comparing apples and oranges, wrongly compares *"leaders"* and ordinary citizens. The essence of discrimination and unequal treatment is that equals or equivalents, are being treated differently and the corollary is that unequal persons should not be treated the same.

24. As was said by the Privy Council in Matadeen v. Pointu (1999) 1 AC 97 at 107:

"Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently. Their lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed their lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour."

25. Section 21 of the Leadership Code Act (Cap 240) provides:

"A leader must not accept a loan (other than on commercial terms from a recognized lending institution and only if the leader satisfies the lending institutions usual business criteria or in accordance with the necessary practice of a particular place for or during a traditional ceremony) advantage or other benefit whether financial or otherwise, from a person."

The section is contained within the Leadership Code Act and applies to *"a leader"* only. It has no application to individuals or ordinary citizens who are not *"leaders"*, conducting their personal or private affairs. The section does not treat some *"leaders"* differently from other *"leaders"*, on the contrary, all *"leaders"* are treated the same. The submission also ignores the fact that *"leadership"* unlike one's '*race*' or '*sex*', is a matter of personal choice by the concerned individual. The applicants

all became *"Members of Parliament"* by voluntarily choosing to stand for election and being successful. They are "*leaders*" by choice.

26. In similar vein in Supreme Court Reference No. 1 of 1978 [1978] PNGLR 160 the Supreme Court of Papua New Guinea described the purpose of the Leadership Code provisions of their constitution which is in almost identical terms to Article 66 in the following manner:

> "*We consider that the Constitution in so far as it seeks to preserve the people of Papua New Guinea from misconduct by its leaders should not be considered a "penal" statute. In requiring a higher standard of behavior from its leaders than from ordinary citizens it should not be considered as "penalizing" or "punishing" a leader, but as ensuring in the interests of the safety of the people that only persons who are prepared to accept added restrictions on their personal behavior should become leaders. No citizen need become a leader*".

27. Applicants counsel seeks however, to draw a distinction between a leader's private and public persona. The distinction is merely a semantic one without substance or validity. Article 67 clearly defines a *"leader"* for the purposes of chapter 10 of the constitution without any differentiation between his private and public actions and I reject the submission. To allow it would entail this Court reading into the Article words such as "*... in his official or public capacity"* which would run completely counter to the clear intent of Article 66(1) which extends to both a leader's "*... public and private life.*" Needless to say the applicants could easily avoid the provisions of section 21 by not contravening its prohibition or alternatively by simply shedding their leadership status.

28. In describing the nature and concerns of legislation Justice Gonthier in Thibaudeau v. Canada (1995) 2 SCR 27 said at (p 29):

> *"It is of course, obvious that legislatures may - and to govern effectively – must treat different individuals and groups in different ways. Indeed such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society."*

29. The classifying or differentiation of individuals and groups and their treatment being an intrinsic characteristic of legislation, the mere fact that *"a law"*, in this case the Leadership Code Act, treats individuals differently does not mean that it is unconstitutional. In addition, the applicants must demonstrate affirmatively that the classification or basis of differentiation in the Leadership Code Act offends against a fundamental right or one of the prohibited categories of discrimination and exceeds "*the legitimate public interest in public order*".

30. More recently the Chief Justice said in Bohn v. Republic of Vanuatu [2013] VUSC 42 in dealing with Article 5 (1) (k) of the Constitution:

> *"A complainant under Article 5(1)(k) must show not only that he or she is not receiving equal treatment under the law or that the law has a different impact on him or her in the protection or benefit accorded by law but, in addition, he or she must show that the legislative impact of the law is discriminatory".*

31. The vital question to be asked and answered respecting a challenge based on *"unequal"* treatment is - what are the permissible comparators or grounds for the legislative categorization and classification?

32. Plainly, if one considers the provisions of section 21 solely on the basis of how it treats or affects all citizens of Vanuatu as a group, then there can be no doubting that its provisions are unequal in treating like individuals namely citizens of Vanuatu, unlike. However, if the basis or criterion of comparison is altered to the official or political status of the individual or citizen concerned then, equally, there would be no obvious inequality in treatment since one would be dealing with unlike individuals of different "*status*", differently. ***ie***. leaders v. ordinary citizens.

33. In the present case the answer to the vital question – what is the permissible categorization or basis of comparison in the Leadership Code Act – is, thankfully, provided in Chapter 10 of the Constitution which identifies *'leaders'* as a separate and permissible category for which Parliament is mandated to specifically legislate. The Leadership Code Act by its long title and purpose is the relevant legislation passed by Parliament pursuant to its constitutional mandate under Article 67 and 68. It must be remembered that the Leadership Code Act is not a statute of general application but a special legislation with a limited ambit. The categorization of *"leaders"* and the effecting legislation are therefore authorized by the supreme law itself. Section 21 does not breach Article 5(1)(k) in so far as it treats all *"leaders"* equally.

34. In light of the foregoing **Issue 1** is answered: *"No"* section 21 of the Leadership Code Act does not breach the applicants' fundamental right to "*equal treatment under the law.*"

Issue (2): Has there been a breach of Article 62 (4) of the Constitution in the preparation of the Ombudsman's Special Preliminary Report?

35. To properly understand this issue it is necessary to set out some common undisputed background facts:

(1) The Ombudsman did prepare a Special Preliminary Report ("the Report");

(2) The Report contained findings and recommendations against the applicants alleging breaches of the Leadership Code Act;

(3) The Report was sent to the Public Prosecutor;

(4) The Public Prosecutor on considering the Report determined that there were sufficient grounds to support a prosecution of the applicants for breaches of the Leadership Code Act;

(5) The applicants were each charged with an offence of Acceptance of Loan contrary to section 21 of the Leadership Code Act in an Information filed by the Public Prosecutor in the Supreme Court;

(6) The applicants unsuccessfully challenged the Leadership Code Act charges before the trial judge;

(7) The applicants have filed an appeal against the trial judges' ruling in their above-mentioned unsuccessful challenge;

36. Notwithstanding their appeals, the applicants assert an infringement of Article 62(4) only in seeking a declaration to that effect. Although complaint is made in the sworn statements against the manner in which the Ombudsman investigated and reported on the applicants alleged breaches of the Leadership Code Act, no remedies are actually directed at the Special Preliminary Report or sought against the Ombudsman. Likewise, in the context of the Ombudsman's enquiry no complaint has been made of any breach of the applicants' fundamental right to *"protection of the law"*, nor is Article 5(1)(d) mentioned in the First Applicant's submissions in relation to the Ombudsman.

37. Article 62(4) of the Constitution clearly requires the Ombudsman (*"shall"*) when conducting an enquiry under the Article, to grant any person complained of an opportunity to reply to complaints made against him. It cannot be isolated from its constitutional context or from the other preceding sub-articles of Article 62 especially, sub-articles (1) and (2) which so far as relevant reads:

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

and the remainder of the sub-article identifies the various persons who can make a complaint including the Ombudsman acting *"of his own initiative"*, then, sub-article (2) identifies the person(s) or body(ies) to which Article 62 applies as follows:

"(2) This Article shall apply to public servants, public authorities and ministerial departments with the exception of the President of the Republic, the Judicial Service Commission, the Supreme Court and other judicial bodies".

(my underlinings)

38. No-where in sub-article (2) is any mention made of *"Ministers"*; *"Members of Parliament"*; or the *"Leader of the Opposition"* as persons or Offices to which Article 62 applies (***cf:*** with Article 67). Quite simply therefore Article 62(4) has not been breached in relation to the applicants in so far as the Article has no application to the applicants who are: *"Members of Parliament".* For that reason alone issue 2 could be answered negatively. Mindful however, of the relative informality with which a constitutional application can be framed *[**see**:* Rule 2.2(2)] and avoiding form and technicality over merit and substance, I turn to consider the evidence in support of the claimed infringement in the context of sections 20(3) and 21(4) and (5) of the Ombudsman Act and Article 5(1)(d) of the Constitution.

39. Noticeable by its absence in Chapter 10 of the Constitution are any procedures or provisions dealing with the investigation, prosecution or enforcement of a leader's duties under Article 66(1) and 66(2). The procedure is provided for in Parts 3, 5 and 6 of the Leadership Code Act. In particular, Part 5 of the Leadership Code Act provides a special procedure for the investigation and prosecution of breaches of the Leadership Code Act. The process involves the Ombudsman whose role was described by the Court of Appeal in Sope v. Republic of Vanuatu [2014] VUCA 20 as: *"... a pivotal role in investigating and reporting on the conduct of any leader ..."*

40. Section 34 of the Leadership Code Act sets out the role of the Ombudsman in the investigation and prosecution of a *"leader"* as follows:

"(1) The Ombudsman must investigate and report on the conduct of a leader"

if he receives a complaint that a leader has breached the Leadership Code or where he has formed the view on reasonable grounds that a leader may have breached the Leadership Code Act. Subsection (2) then provides that:

"The Ombudsman must provide a copy of his report to the Public Prosecutor and where the complaint involves criminal misconduct a copy of the report must be provided to the Commissioner of Police."

and in carrying out an investigation under the Leadership Code Act, subsection (3) of Section 34 expressly provides:

"Where an Act provides for the functions, duties, and powers of the Ombudsman the provisions of that Act will apply".

41. In this latter regard the Ombudsman Act [CAP. 252] was enacted 4 months after the Leadership Code Act and is described by its long title as:

> *"...an Act to provide for the functions, powers procedures and immunities of the Ombudsman in addition to those provided for in the Constitution, and for the purpose of giving effect to the principles of Chapter 10 of Leadership Code Act [CAP. 240] and for other purposes relating to the Ombudsman."*

42. Section 1 of the Ombudsman Act also defines an *"enquiry"* as including *"an investigation under Part 5 of the Leadership Code Act [CAP. 240]* and Section 11(1) includes amongst the Ombudsman's duties in respect of the conduct of a leader, a function*: "to conduct an investigation in accordance with Part 5 of the Leadership Code Act [CAP. 240]".*

43. The other applicable provisions of the Ombudsman Act which needs to be referred to in considering the present issue are: Sections 21(4) and (5) and section 20(3) which collectively provides consistently with the requirements of Article 62(4) of the Constitution as follows (excluding irrelevant references):

Procedures of the Ombudsman

"The Ombudsman must not make a report that is adverse to ... a leader unless, before completing the relevant enquiry, the Ombudsman has given ... the leader ... an opportunity to comment either orally or in writing, on the subject of the enquiry".

And subsection 21 (5) provides:

"... if an Ombudsman's report is adverse to ... a leader, the Ombudsman must include in the report the substance of any statement ... the leader ... may have made in explanation of or opposition of the Ombudsman's conclusions".

For present purposes it is only necessary to highlight that the opportunity to comment must be given before an adverse report is made and must include in it, any explanation or opposition made by the leader being investigated to the Ombudsman.

Finally and more generally, Section 20(3) states:

"The rules of procedural fairness apply to any enquiry conducted by the Ombudsman."

44. In light of a particular complaint against the Ombudsman's Special Preliminary Report it becomes necessary to refer again to Sope v. Republic of Vanuatu [2004] VUCR 20 where the Court of Appeal said of the Ombudsman's report in that case:

"The report is the conclusion of an on-going process which was undertaken in terms of both the Ombudsman Act and the Leadership Code Act. It specifically recommended that

the Public Prosecutor commence a prosecution against Mr. Sope under section 27 of the Leadership Code Act for breach ... constituted by this conviction for forgery."

45. Plainly, the Court of Appeal was of the view that an Ombudsman's enquiry could be *"... an ongoing process ..."* which concludes with the preparation of a *"report"* that may contain a recommendation for a prosecution for breach of the Leadership Code Act.

46. Although the Leadership Code Act no-where provides for a Special Preliminary Report, the definition of the expression *"Ombudsman's report"* clarifies that it is *"... prepared by the Ombudsman after due enquiry ..."* Given the findings and recommendations made against the applicants in the so-called Special Preliminary Report, I am satisfied that it was and is: *"(a) report on the conduct of a leader"* within the context of Section 34(1) of the Leadership Code Act and by the Ombudsman's own admission, resulted from an enquiry that *"... effectively ended on 9th January 2015"*.

47. So much for the law, I turn next to the applicants' evidence in support of this second Issue. The First applicants each deposes in identical terms:

"I understand that the Public Prosecutor when laying charges against me was relying upon a Special Preliminary Report that was prepared by the Ombudsman.

The Special Preliminary Report was conducted by the Ombudsman during the course of his investigation into breaches of the Leadership Code Act [Cap 240] which he alleged I had committed.

Although I strongly deny any wrong doing in regards to the above-mentioned legislation, I can confirm that when the Ombudsman was conducting his investigation he failed to summon me or call me to his office so that he could ask me questions about the allegations he alleged I had committed.

I understand from legal advice that I have been provided by my lawyer that the Constitution the Leadership Code Act (Cap 240) and the Ombudsman Act (Cap 252) make it a mandatory requirement for the Ombudsman to provide me the person which the complaint is against the opportunity to reply to the complaint made against me."

48. The applicants also rely on the Ombudsman's covering letter that accompanied their copy of the Special Preliminary Report as well as the following 3 extract(s) taken from the Special Preliminary Report of the Ombudsman:

Extract (1) - *"2.1. The purpose of this special preliminary report by the Ombudsman is to assist the Public Prosecutor consider prosecuting persons that may have breached provisions of the Leadership Code Act and at the same time provide an opportunity for those complained against to respond to allegations made herein during the prosecution or court hearing and other responses before the Office of the Ombudsman issues a working paper and subsequently a public report on the matter if a public report is required....."*

Extract (2) - *"6.4. **Finding 4**: The above mentioned 18 Members of Parliament* (including the applicants) *allegedly breached section 21 of the Leadership Code Act for individually accepting "a loan, advantage or other benefits" from MP Moana CK Kalosil, in particular for accepting purported 'loans' from MO Kalosil when he did not operate "a recognized lending institution....."*

Extract (3) - "**7. *PRELIMINARY RECOMMENDATIONS***
The Ombudsman makes the following ... preliminary recommendations:

*7.4. **On the basis of Finding 4**: That the Public Prosecutor brings charges of Acceptance of loans [loan, advantage or benefit] against each of the 18 Members of Parliament namely* (including the names of the First and Second Applicants] *pursuant to section 21 of the Leadership Code Act [Cap.240]."*

49. The respondent in seeking to sustain the validity of the Ombudsman's actions has filed a sworn statement from the Ombudsman. Relying on the contents of the sworn statements State Counsel submits that the Ombudsman has strictly discharged his duty to give the applicants *"an opportunity to reply"* by sending them a copy of the Special Preliminary Report together with his covering letter inviting their comments and responses. I disagree.

50. On the evidence presented to the Court I have no hesitation in concluding that there was a serious infringement of the requirements of section 20(3) as well as sections 21(4) and (5) of the Ombudsman Act in the failure to give the applicants the opportunity to reply to the complaints made against them under the Leadership Code Act before the Ombudsman made the "*findings*" and "*recommendations*" contained in the Special Preliminary Report sent to the Public Prosecutor.

51. I am fortified by the judgment of the former Chief Justice where he said in not dissimilar circumstances to the present case, in Jimmy v. Ombudsman [1996] VUSC 26 in declaring the Ombudsman's report in that case *"... null and void and of no effect"*:

> *"There is no doubt that the Constitution required that the Ombudsman should afford to the party complained of an opportunity to reply to the complaint level (sic) at him.* ***It does not entitle the Ombudsman to hold an inquiry, come to a decision and then send her report to the party for his comments before she published it. She must consider his comments on the complaints before she comes to a decision*** *..."*
>
> (my emphasis)

and later:

> *"What is important is to remember that the rules of natural justice apply to an Ombudsman's inquiry as it applies to ... other quasi judicial investigation. If the inquiry has lacked the minimum procedural fairness implicit in those rules, then any decision of the Ombudsman is open to the judicial review procedure."*

A fortiori where the applicable statutory provisions of the Ombudsman's Act expressly imports the principles of natural justice and procedural fairness into a leadership enquiry under the Leadership Code Act.

52. For completeness, I am also firmly of the opinion that any opportunity that might be available to the applicants after the submission of the Special Preliminary Report to the Public Prosecutor and after the criminal prosecution was commenced against the applicants, is illusory and fails to cure the breaches that had already occurred in the preparation and submission of the Special Preliminary Report.

53. It might well be that, with the initiation of the prosecution charging the applicants with Leadership Code Act offences, events had overtaken the Ombudsman's on-going enquiry. This was certainly the Ombudsman's view when he wrote to the applicants' that the matter (his enquiry) was *"subjudice"* and therefore anything that the applicants wished to say about the contents of the Special Preliminary Report complaints should thenceforth be addressed to the Court.

54. The suggestion, although understandable, is wrong in several respects. Firstly, it constitutes a wrongful declining of a mandatory statutory duty imposed on the Ombudsman under Sections 21(4) and (5) of the Ombudsman Act; secondly, it has the potential to crucially undermine the constitutional *"presumption of innocence"* and the applicants' statutory right to maintain their silence in the face of a criminal charge or prosecution. (***See***: Section 14 of the Penal Code and Section 88 of the Criminal Procedure Code); thirdly, an official enquiry which can and does result in criminal charges being leveled against an individual must comply with the requirements of natural justice if it is not to be struck down as a breach of the individuals' fundamental right to *"protection of the law"*; and lastly there is the prohibition contained in section 22(7) of the Ombudsman Act.

55. Section 22(7) of the Ombudsman Act clearly states (so far as relevant):

> *"No statement made by, ..., a person in the course of an enquiry by ... the Ombudsman is admissible in evidence against that person ... in any court ... except on the trial of that person for perjury, or in proceedings under Part 6 of the Leadership Code [Cap 240]."*

56. Plainly whatever the applicants may say to the Ombudsman in the course of his enquiry would be inadmissible on the criminal charges they are presently facing in the Supreme Court, in so far as the applicants are neither charged with Perjury nor are they facing *"proceedings under Part 6 of the Leadership Code Act [Cap 140]"* which deals with the Punishment of Leaders. Accordingly, the suggestion that the applicants have an opportunity to respond to allegations made in the Special Preliminary Report, *"... during the prosecution or court hearing"* constitutes in my

view, a clear infringement of the statutory prohibition and protections afforded to the applicants.

57. Having answered issue 2 in the applicants' favour, the Court **hereby declares** that there was a breach of the mandatory provisions of Section 20(3) and Sections 21(4) and (5) of the Ombudsman Act in the enquiry conducted by the Ombudsman against the applicants and culminating in the Special Preliminary Report sent to the Public Prosecutor. The Court **further declares** the Special Preliminary Report null and void and of no effect and I direct that a copy of this judgment be made available to the trial judge in Criminal Case No. 73 of 2015 as a matter of urgency.

58. The third and final agreed issue is:

Issue (3): Is section 21 of the Leadership Code Act (Cap 240) unconstitutional for its vagueness and uncertainty and in breach of Article 5(1)(d) of the Constitution?

This issue directly challenges the constitutionality of Section 21 of the Leadership Code Act as drafted. This court has already determined that Section 21 does not breach Article 5(1)(k) in its treatment of the applicants.

59. However the applicants argument under this issue is that in the absence of a definition of what constitutes *"a recognized lending institution"* in Section 21, the ambit and requirement of the Section are so broad and vague as to render it unprotected by the "*legitimate public interest in ... public order*" and constitutes a breach of the applicants' fundamental right to *"protection of the law"*.

60. It is beyond question that Section 21 is an unusual penal provision contained within a special legislation with a confined application. Equally, the Leadership Code Act is not legislation enacted under the general legislative power contained in Article 16(1) of the Constitution, rather, it is a special legislation mandated under Articles 67 and 68 of the Constitution with the declared *"purpose"* of giving effect to Chapter 10 of the Constitution by providing a Leadership Code to "*... govern the conduct of the leaders of the people of Vanuatu*" who are defined in Article 67 as including ...*"Ministers"* and *"members of Parliament*".

61. The submissions of counsel for the First Applicants is to the effect that it is a principle of fundamental justice that no law may be so vague and uncertain that an accused person would find it difficult to determine what conduct is prohibited or permitted and to defend himself against a charge brought pursuant to the impugned law. Such a vague and uncertain law would offend a person's fundamental right to "*protection of law*".

62. Counsel also submits that apart from the "*... added incentive of the wording 'loan' section 21 is simply a duplication of section 23*". I cannot agree. In my view the nature and elements of an offence under Section 23 are quite different from that under Section 21 which appears, on its face, to be an offence of strict liability with the following elements:
    (1) A "*leader*";
    (2) "*accepts a loan advantage or other benefit*";
    (3) "*from a person*" that is not a "*recognized lending institution*";
    Furthermore inherent in the idea of a "*loan*" is an expectation or agreement of repayment which is conceptually different from a genuine "*gift*" which is unsupported by consideration or any expectation of reciprocity to "*protection of law*". Section 23 (Bribery) on the other hand, in addition to elements (1) and (2) above, requires proof of a corrupt intent which entails purposely doing an act which the law forbids as tending to corrupt.

63. The Second Applicants for their part in recognizing the supremacy of the Constitution over ordinary legislation advances a two-stage approach to a consideration of the question, firstly, there must be proof by the applicant of an infringement of his fundamental right and, if established, then secondly, proof by the State that the infringement is justified under a constitutional exception on the basis of "*... the legitimate public interest in ... public order*".

64. In this latter regard counsel submits that the broad scope of Section 21 is such that it is not possible to claim that the section is protecting "*a legitimate public interest in public order*" because the section prohibits all loans to a leader made by persons other than a "*recognized lending institution*" regardless of the amount of the loan or whether the loan might reasonably give rise to doubt in the public's mind as to the honesty of the leader concerned. In this way section 21 "*... goes much further than the limits placed on leaders under the Constitution*" [*see:* Articles 66 (1) and (2)].

65. In seeking to uphold the constitutional validity of section 21 of the Leadership Code Act, state counsel submits that section 21 is purposefully wide in its application in order to achieve the matters envisaged under Article 66 of the Constitution regarding the conduct of leaders and counsel emphasizes the applicants' heavy burden to establish that the breadth of section 21 amounts to a breach of one of the matters enumerated in Article 5 (2) dealing with the "*protection of the law*".

66. In interpreting section 21 I am guided by the provisions of Section 8 of the Interpretation Act [CAP. 132] that states: "*An Act shall be considered remedial and*

shall receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

67. I am also guided by the persuasive dictum of the House of Lords in Fothergill v. Monarch Airlines Ltd. [1980] UKHL 6 where the Court said:

"*The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining "the intention of parliament"; but what this metaphor, though convenient, omits to take into account is that the court, when acting in its interpretative role, ... is doing so as mediator between the State in the exercise of its legislative power and the private citizen for whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive power of the State. Elementary justice or, ...* ***the need for legal certainty, demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible****. The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions.*"

(my emphasis)

68. I am also mindful of the provisions of Article 2 which confirms the supremacy of the Constitution and of Section 9 of the Interpretation Act which reinforces that supremacy by providing: "*Every Act shall be read and construed subject to the Constitution and where any provision of an Act conflicts with a provision of the Constitution the latter provision shall prevail*".

69. Finally there is the "*presumption of constitutionality*" which is a convenient expression of the proposition that the legislature must be taken to have had the Constitution in mind when it enacted section 21 of the Leadership Code Act and is therefore presumed to have legislated in conformity with the Constitution. The presumption is referred to by Lord Diplock when he said in AG of the Gambia v. Momodu Jobe [1984] 1 AC 689 at 702:

"The draftsmanship ... is characterised by an unusual degree of ellipsis that has made it necessary to spell out explicitly a great deal that is omitted from the actual words appearing in the sections and has to be derived by implication from them. In doing so their Lordships have applied to a law passed by the Parliament in which, by the Constitution itself, the legislative power of the Republic is exclusively vested, a presumption of constitutionality. This presumption is but a particular application of the canon of construction embodied in the Latin maxim ***magis est ut res valeat quam pereat*** ** which is an aid to the resolution of any ambiguities or obscurities in the actual words used in any document that is manifestly intended by its makers to create legal rights or obligations. In*

passing the Act by the procedure appropriate for making an ordinary law for the order and good government of The Gambia ... ***the intention of Parliament cannot have been to engage in the futile exercise of passing legislation that contravened provisions ... of the Constitution and was thus incapable of creating the legal obligations for which it purported to provide****. Where, as in the instant case, omissions by the draftsman of the law to state in express words what, from the subject matter of the law and the legal nature of the processes or institutions with which it deals, can be inferred to have been Parliament's intention,* ***a court charged with the judicial duty of giving effect to Parliament's intention, as that intention has been stated in the law that Parliament has passed, ought to construe the law as incorporating, by necessary implication, words which would give effect to such inferred intention, wherever to do so does not contradict the words actually set out in the law itself and to fail to do so would defeat Parliament's intention by depriving the law of all legal effect.***"

[* *Ut res magis valeat quam pereat* – it is better for a thing to have effect than to be made void"].

(my emphasis)

70. The presumption is rebuttable, but, in order to do so this Court would have to be satisfied by the applicants, that no reasonable member of Parliament who understood correctly the meaning of the relevant fundamental right alleged to have been breached by Section 21, could have supposed that criminalizing loans by leaders from non-recognised lending institutions, was not reasonably required for the protection of "*... the legitimate public interest in ... public order ...*".

71. It is also salutary to bear in mind the constitutional role of the legislature or Parliament which exercises the legislative power of the State to "*... make laws for the peace order and good government of Vanuatu*"; and prima facie it is for Parliament to decide what is or is not reasonably required in the interests of public order. Such a decision involves considerations of public policy which is outside the field of the judicial power and may have to be made in light of information available to government of a kind that cannot effectively be adduced in evidence by means of the judicial process.

72. Before applying the rights and freedoms under Article 5 to determine the constitutionality of section 21 of the Leadership Code Act, it is first necessary to determine the scope and ambit of Section 21, in other words, the elements of the offence it creates and what the prosecution is required to prove in order to secure a conviction of Accepting a Loan under section 21.

73. As earlier identified in para. 56 the elements that the prosecution must prove to establish an offence of Accepting a Loan in breach of section 21 of the Leadership Code Act are:
(1) A "*leader*";
(2) "*accepts a loan*";
(3) "*from a person*" who is not a "*recognized lending institution*".

The section does not clearly require proof of any evil or bad motive purpose or intention on the part of the "*leader*" accepting the loan nor are the leader's good or altruistic intentions a defence to a charge under the section. An intention to accept a loan from an unrecognized lending institution is enough to satisfy the requirements of the law (***see:*** Section 6 of the Penal Code).

74. Having said that the use of the expression "*a recognized lending institution*" does present some obscurity and ambiguity to the offence. For instance, does the expression exclude a licenced money lender? or a registered company whose objects include the lending of money? or an organization or institution that lends money to its members such as a Credit Union or a registered Co-operative Society or, as applicant's counsel submits, the Members Financial Savings and Loan scheme of the Vanuatu National Provident Fund.

75. The matter is clarified in my view, by referring to the provisions of the Financial Institutions Act [CAP. 254] which specifically provides for the regulation of the business of banking in Vanuatu and for the licencing and supervision of financial institutions carrying on banking business.

76. In particular, Section 2 of the Financial Institutions Act relevantly defines "*banking business*" as follows:

> *"(1) A person is carrying on banking business if the person:*
>
> *(a) accepts deposits of money from members of the public that are withdrawable, or payable upon demand, after a fixed period or after notice; or*
>
> *(b) undertakes operations with members of the public involving the frequent sale or placement of bonds, certificates or other securities;*
>
> ***and uses such deposits or the proceeds of such operations, either in whole or in part, for loans*** *... and at the risk of the person accepting the deposits or undertaking the operations."*

Plainly the making of loans is an integral part of "*banking business*" and can only be carried on by a body corporate that is licensed to do so under the Act (***see:*** Sections 6 and 7). Accordingly, an individual who lends money on a singular or irregular basis from his own personal and private funds would not be operating a "*banking business*" and in my view, commits no offence nor would he require to be licensed under the Act.

77. I am equally of the view that such an individual would not be considered a "*lending institution*" nor would he be "*recognized*" as such in the absence of a licence granted under the Financial Institutions Act. in other words in the absence of a Money Lenders Act, a "*recognized lending institution*" means a body corporate that

has been licensed under the Financial Institutions Act to carry on a "*banking business*" in Vanuatu. It is noteworthy that in Section 21, a "*recognized lending institution*" is a "*business*" which offers loans "*on commercial terms*" to borrowers "*who satisfies its usual established lending criteria*".

78. I agree with the oral submissions of the Ombudsman that "*recognized*" in the expression "*recognized lending institution*" does not mean what is common or public knowledge as the applicants submit, instead it means recognized by law. In similar vein State counsel orally submits that a reasonable ordinary person would understand the expression "*recognized lending institution*" as referring to a commercial bank or corporate body and not to a private individual.

79. In light of the foregoing the applicants' complaint about the vagueness of the expression "*recognized lending institution*" is rejected.

80. I turn next to consider the complaint about the unlimited disproportionate nature of the prohibition in Section 21 in so far as it criminalizes "*bona fide*" loans between family members, friends, colleagues, associates and even generous supporters of a leader even where there are no adverse consequences to a leader's conduct or behaviour.

81. If I may say so such a loan would appear "*ex facie*" to be unobjectionable and outside the ambit of Article 66(1) of the Constitution which specifically targets the conduct or behavior of a leader that has an enumerated consequence, such as, give rise to a "*conflict of interest*" or which compromises a fair exercise of his public or official duties or demeans his office or position or allows his integrity to be questioned or which endangers or diminishes respect for or confidence in the integrity of the Government. More generally, Article 66(2) prohibits a leader from using his office for personal gain or from entering into any transaction or engaging in any enterprise or activity that would give rise to doubt in the public mind as to the propriety of his conduct.

82. In this latter regard, section 3 of the Leadership Code Act describes what is expected of leader who holds a position of influence and authority in the community, in the following terms:

"A leader must behave fairly and honestly in all his or her official dealings with colleagues and other people, avoid personal gain, and avoid behaviour that is likely to bring his or her office into disrepute. A leader must ensure that he or she is familiar with and understands the laws that affect the area or role of his or her leadership".

83. In biblical terms:

"*Since an overseer is trusted with God's work he must be blameless, not overbearing, not quick tempered, not given to drunkenness, not violent, not pursuing dishonest gain. Rather he must be hospitable, one who loves what is good, who is self-controlled, upright, holy and disciplined.*" [**Titus 1:7 and 8** (NIV)].

84. In similar vein is the dictum of the Supreme Court in Ombudsman v. Batick [2001] VUSC where it said:

"*The purposes of the Leadership Code and the (Ombudsman) Act are, among other things to prevent corruption in "high places" and the crippling effects it has on the economic and social systems of the country*".

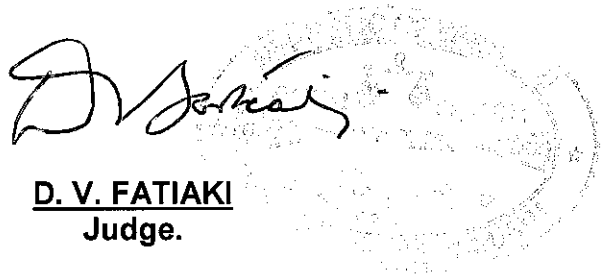
85. Both State Counsel and the Ombudsman are united in their submissions that the purpose and intent of section 21 is to supplement section 23 by addressing an excuse or explanation (that is difficult to disprove) that money received by a leader from any source is not a bribe but a loan. In counsel's words: "*... (it) ... is intended to support the bribery provision to prevent leaders from escaping the guilt by saying there was no bribery when in fact they may have received some form of benefit disguised as loan*".

86. After carefully considering the competing submissions I reject the applicants' argument and answer Issue 3 by upholding the constitutional validity of section 21.

87. The applicants having succeeded on Issue 2, I decline to exercise the court's power to strike out the application. However as the applicants were unsuccessful on Issue 1 and Issue 3 I make no orders as to costs.

DATED at Port Vila, this 8th day of October, 2015.

BY THE COURT



D. V. FATIAKI
Judge.