

BETWEEN: HAM LINI VANUAROROA,
First Applicant

AND: MOKIN STEVENS, JAMES BULE, BRUNO
LEINGKONE, SATO KILMAN LIVTUNVANU,
DUNSTAN HILTON, GEORGE ANDRE WELLS
HAMARILIU, DON KEN, TONY NARI, KALFAU
MOLI, PASCAL IAUKO, CHARLOT SALWAI,
STEPHEN KALSAKAU, PAUL TELUKLUK, JOHN
LUM, HAVO MOLI, ALFRED CARLOT, WILLIE
JIMMY TAPANGARARUA AND MARCELLINO
PIPITE,
Second Applicants

AND: THE REPUBLIC OF VANUATU
First Respondent

AND: HON. MOANA KATOKAI CARCASSES KALOSIL
Prime Minister of the Republic of Vanuatu
Second Respondent

AND: VANUATU TRADE DEVELOPMENT PTE LTD
Third Respondent

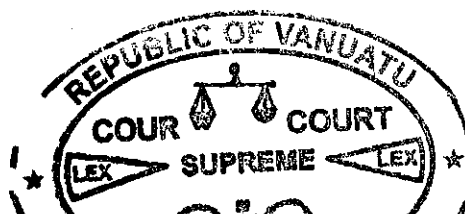
Corum: Lunabek Vincent – Chief Justice
Counsel: Mr Robin Kapapa for the First and Second Applicants
Mr Ishmael Kalsakau, Attorney General of the Republic of Vanuatu for
the First and Second Respondents
No appearance for the Third Respondent
Hearing Date: 14 October 2013
Date of Decision: 17 October 2013

JUDGMENT

NATURE OF CLAIM AND RELIEF

Before the court is an Amended Judicial Review Claim filed by the Applicants on 13th of September 2013. The Applicants claim for the following relief that:

1. The purported “decision” of the First Respondent to grant the purported Concession Agreement dated the 27th July 2013 to the Third Respondent fails to comply with due process and procedures under law and whereby must be called up and quashed as unlawful and without basis;
2. The purported decision of the Second Respondent to grant, execute and or sign the Concession Agreement dated the 27th July 2013 is outside his powers to sign and render the “Agreement” null and void and be called up and quashed as unlawful and without basis;
3. Further quashing orders that the purported decision of the Respondents made were;

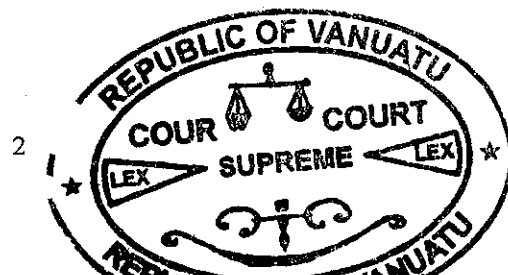


- (a) In contravention of the Public Finance and Economic Management Act section 59, 60 and the Government contract and Tender Act section 3, 4, 9, 10, 12 and other parts of the Act;
- (b) That the Respondents exercised their powers so unlawfully which breaches procedural fairness.
- (c) Cost;
- (d) Such further or orders as the Honourable Court may consider appropriate;

GROUNDS FOR CLAIM

The Applicants advance various grounds to base their claim. The main grounds are set out below:

1. They say they file their claim in a representative capacity and in the public interest to challenge the procedural, the process and the validity of the Concession Agreement executed between the Government of the Republic and the Third Respondent Company on 27 July 2013 and thus they have locus standing to make the claim before the court.
2. They say the purported concession agreement breaches the contracting process required by law, steps to be taken, and departed from the announced rules and procedures required by the Public Finance and Economic Management Act and the Government Contract and Tenders Act.
3. The Respondents fail to get prior approval of the Parliament as provided for in the Constitution of the Republic of Vanuatu by Virture of Articles 25 and the laws that map the issues around the Public Finance expenditures, guarantees and indemnities.
4. In all the Applicants say no proper steps were even taken by the First and Second Respondents to execute the said purported Agreement.
5. They say that the previous Executive Government had chosen another company to upgrade the Bauerfield Airport, but it fails to happen the way it was and at a very speedily way the agreement was signed and given to the Third Respondent without complying with the tender process and relevant Public Finance and Economic Management Act.
6. They say that the Prime Minister of the Republic of Vanuatu has no unilateral power to engage the Republic of Vanuatu into such huge amount of expenditure of Public Funds and they rely on section 60 of the Public Finance and Economic Management Act.
7. They say the Prime Minister's decision to execute the concession Agreement is contrary to the aforesaid Act and held the Concession Agreement unlawful and of no effect for reasons that the proper person to execute the agreement is the Minister of Finance.



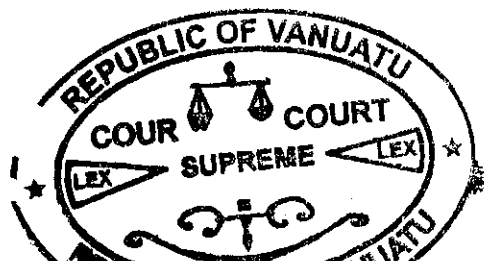
STATEMENTS IN SUPPORT OF CLAIM

The claim is supported by sworn statements filed by following deponents: Willie Jimmy, Charlot Salwai, Stephen Kalsakau and Marcellino Pipite on 18 and 19 September 2013 respectively.

DEFENCE / RESPONSE TO CLAIM

On 4 October 2013, the first and second Respondents file a defence or response to the Amended Judicial Review Claim, the essence of which is set out below:

1. The First and Second Respondents say that they admit that the First and Second Applicants are citizens of Vanuatu but they lack standing to institute this proceeding in so far as being members of the opposition group in Parliament and they do not have capacity of the common interest of the population of Vanuatu and that being members of Parliament of the opposition bloc in Parliament, their motives are political and not public.
2. They say they plead maxim in equity that the First and Second Applicants have come to the court with unclean hands in so far as that their conducts and motives at the initial stage of the airport project ("the project") were political.
3. They say that it is pre mature for the Applicants to seek the intervention of the court at this juncture as they are in the process of complying with the law.
4. They say they will rely on clause 2 of the contract for its full terms and effect.
5. They say it is difficult to comprehend a financial loss for the claimants.
6. They say that they will rely on subsection 3(2) of the Privately Financed Airport Infrastructure Projects Act No. 20 of 2008 ("BOT's Act") for its full terms and effect.
7. They say that Save the Government Contract and Tenders Act set out the general requirements for agreements, it has no specific application to the agreement subject to this proceeding and they will rely on subsection 3(2) of the Privately Financed Airport Infrastructure Projects Act No.20 of 2008 for its full terms and effect-
8. They say that references to another company in sub-paragraph (10) of the claim at the very least impugns upon the veracity of the claimants claim to having the capacity to be representative of the public interest and out of a general concern for adherence to law.
9. They say that the Applicants refused to take part in the process of establishing Parliamentary committees purported to consider and work on several condition precedents provided under the agreement in compliance with the Public Finance and Economic Management Act.
10. They say that they will rely on Article 42(1) and (2) of the Constitution for its full terms and effect.



11. They say that by resolution of the Council of Ministers ("the Council") Meeting the Prime Minister was mandated by Council to execute the contract on behalf of the Government.

12. In the further answer to the Claim, the First and Second Respondents say:

- (a) the Judicial Review Claim is misconceived for reason that the Applicants have placed total reliance on non compliance with the Government and Contract and Tenders Act as the offending law which has no application upon the project;
- (b) the original initiation of the project was instigated by the Applicants when they were in Government and was ultimately surpassed by a directive of the former Prime Minister that the project would be regulated by the BOT's Act through a task force of senior Government Officials;
- (c) they plead maxim in equity that the Applicants who were members of the former council of Ministers have come to court with unclean hands insofar as they were originally part of the initial process of the airport project and that their motives are political and not in the public interest; and
- (d) they are not entitled to any relief sought by their claim herein.

STATEMENTS IN SUPPORT OF DEFENCE OR RESPONSE

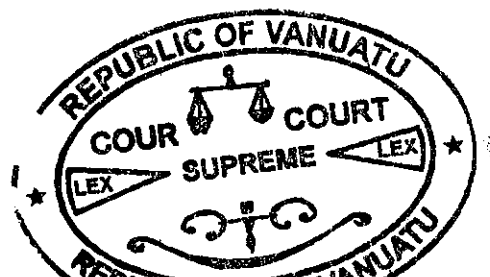
The Defence or Response to the claim is supported by two sworn statements filed on 7 October 2013 by George Maniuri, Director General to the Ministry of Finance and Economic Management and Benjamin Shing, Director of the Department of Strategic Planning Policy and Aid Coordinator, situated within the portfolio of the office of the Prime Minister.

BRIEF FACTS AND ISSUES

Brief Facts

On 7th of October 2013, the parties to this matter have identified these common facts:

- The First and Second Applicants are Members of Parliament and are members of the opposition bloc inside Parliament.
- On 21 January 2013, the former Prime Minister, Honourable Sato Kilman Livtunvanu wrote a letter to all his Ministers and other senior government officials to suspend all discussions with all other parties regarding a new International Airport and allow negotiation to proceed with an interested party who is prepared to consider the preference of the Government to implement the airport project.
- It was always the intention and preference of the Government to pursue the airport project through the *Privately Financed Airport Infrastructure Projects Act* No.20 of 2008.



- A taskforce group was established to undertake the intention of the Government to implement the airport project. The members of the taskforce group consisted of senior government officials.
- The taskforce group had conducted numerous meetings with private stakeholders and the general public as well as making presentations to the Council of Ministers on 18 April 2013. The taskforce had considered all interest put forward to advance the airport project.
- Three options were identified and were submitted to the Council of Ministers for their endorsement on which option the airport project will be implemented upon. This submission was made by the Second Applicants Willie Jimmy Tapanga Rarua in his capacity as the then former Minister of Finance on 18 April 2013.
- On 18 April 2013, Council of Ministers approved option 3 which is a Build Operate Transfer proposal by the Third Defendant, Vanuatu Trade Development Limited Pte Ltd.
- On 4 July 2013, Council of Ministers endorsed that the Prime Minister is to execute the Concession Agreement on behalf of the Government of the Republic of Vanuatu.
- On 27 July 2013 the Concession Agreement was signed between the Government of the Republic of Vanuatu and the Vanuatu Trade Development Pte Ltd.

Issues

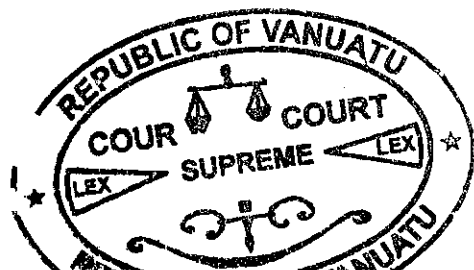
On 7th of October 2013, the following issues have also been identified by the Applicants and the First and the Second Respondents to be matters for the Court's consideration:

- Whether the Government Contract and Tenders Act [Cap 245], or the Privately Financed Airport Infrastructure Projects Act No.20 of 2008, is applicable to the Concession Agreement signed on 27 July 2013.
- Whether the Prime Minister has standing to execute the Concession Agreement on behalf of the Government of the Republic of Vanuatu.

The two issues are determined in turn.

Issue one: Whether the Government Contract and Tenders Act [Cap 245], or the Privately Financed Airport Infrastructure Projects Act No.20 of 2008, is applicable to the Concession Agreement signed on 27 July 2013.

At the submissions hearing on 14 October 2013, Counsel for the Applicants, Mr Robin Kapapa informs the court that the Applicants concede that the Privately Financed Airport Infrastructure Projects Act No.20 of 2008 governs privately financed infrastructure projects in civil aviation sector (section 3(1)).



[Handwritten signature]

The Applicants also concede that the Privately Financed Airport Infrastructure Projects Act 2008 expressly excludes privately financed infrastructure projects in the civil aviation sector from the provisions of the Government Contract and Tenders Act [Cap 245] (section 3 (2)).

Based on the Applicants' concessions, the court accepts the following submissions of the Attorney General on behalf of the First and Second Respondents in respect to issue one:

The Government Contract and Tenders Act [Cap 245] is a general legal framework aimed to regulate the manner in which all contracts are entered into by the Government for the supply of goods or services or the execution of public works in consideration of payment of public moneys.

The Privately Financed Airport Infrastructure Projects Act No.20 of 2008 is a specific legislation designed to regulate the implementation of privately financed airport infrastructure projects.

In circumstances where provisions of relevant legislation are in conflict, then the provisions of specific legislation must be regarded to override the provisions of the general legislation.

In *Port Denerau Marin Ltd v. Tokomanu* [2006] FJCA 27 Civil Appeal No.ABU0026 of 2005 the Court of Appeal of Fiji Islands stated;

One pertinent general principle of statutory interpretation is that an earlier statute may be overridden by a later. Another is that general legislation may be regarded as overridden by special legislation.

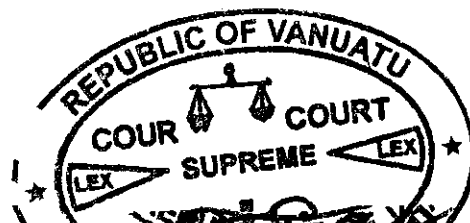
In the circumstance of this case, the Privately Financed Airport Infrastructure Projects Act No.20 of 2008 is the later legislation and specifically legislated to regulate a particular form of activity which is the implementation of privately financed airport infrastructure projects. Accordingly, for the purposes of this proceeding, the Privately Financed Airport Infrastructure Projects Act No.20 of 2008 takes precedence over the Government and Contracts Act.

Nonetheless as the facts of this case show the political will and intention of the Government had been clearly expressed that the airport project is to be implemented by the legal framework of the Privately Financed Airport Infrastructure Project Act No.20 of 2008.

This expressed intention was outlined in the letter of the then Prime Minister, Honourable Sato Kilman MP dated 21 January 2013 and annexed as BS1 to Mr Shing's statement.

The expressed intention of the Government was also highlighted as the recommended option by the submission tabled before the Council of Minister by the then Minister of Finance, Honourable Willy Jimmy Tapanga Rarua (annexure BS4) and was endorsed by the decision of the Council of Ministers meeting on 18 April 2013 (annexure BS5).

Section 2 of the Privately Financed Airport Infrastructure Projects Act No.20 of 2008 provides:



The objects of the Act are:

- (a) to promote and facilitate the implementation of privately financed airport infrastructure projects by enhancing transparency, fairness and long term sustainability; and
- (b) to remove undesirable restrictions on private sector participation in airport infrastructure development and operation; and
- (c) to develop the general principles of transparency, economy and fairness in the award of contracts in relation to airports by the public authorities through the establishment of specific procedures for the award of infrastructure projects.

Section 1 of the Privately Financed Airport Infrastructure Projects Act No.20 of 2008 defines infrastructure project to be:

infrastructure project means the design, construction, development and operation of new infrastructure facilities in relation to airports or the rehabilitation, modernization, expansion or operation of existing infrastructure facilities to airports.

Pursuant to the objects of the Privately Financed Airport Infrastructure Projects Act No.20 of 2008 as envisaged under section 2, subsections 3 (2) provides:

(2) The provisions of the Government Contracts and Tenders Act [Cap 245] do not apply to privately financed infrastructure projects under this Act.

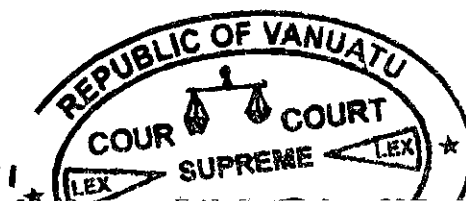
In this case as the fact, illustrate, the proposal made by the Third Respondent Company and which was approved by the Council of Ministers is to be privately financed by the Concession Company (Third Respondent) for the construction, development and operation of new infrastructure as well as the rehabilitation and or the expansion or upgrading of existing infrastructure facilities (in this circumstance, the Bauerfield Airport).

Ordinarily, in circumstances where the airport project will be privately financed, logic, would dictate that the Government Contract and Tenders Act would not apply as it would be an initiative where Government does not allocate any budget or put up any funds for it.

Nonetheless subsection 3(2) of the Privately Financed Airport Infrastructure Projects Act No.20 of 2008 is unequivocal to say that the Government Contracts and Tenders Act would not apply to privately financed infrastructure projects which it includes the airport projects subject of this proceeding.

In addition to the concessions made in relation to issue one above, Counsel for the Applicants wish to make submissions on matters not pleaded in the Amended Judicial Review Claim and without any factual base.

In any event, the position is as submitted by the Attorney General that it is trite law that courts would be restricted to the pleadings of the case and not necessarily depart from what is alleged to be the issue for court's determination.



The parties to this proceeding have already determined the issues subject for the Court's consideration. Furthermore, the parties have determined the common facts subjected for deliberation by the Court. All issues of facts have been agreed upon based on the pleadings before the Court. It is not open to the Applicants to now raise matters not stated in the pleadings for the Court's consideration.

In *Roquara v. Takau* [2001] VUCA; CAC 5 of 2001, the Court of Appeal stated:

It is a fundamental principle of the law that, in any case, a person against whom allegations are made should know what the allegations are with precisions so that they can decide how to respond to them. We have been persuaded that the line here was breached. If the dispute is considered solely in terms of the strict letter of the pleadings, the judgment appears to have strayed into areas which do not come within them...

The proposition submitted by the Applicants to the extent that the Privately Financial Airport Infrastructure Projects Act No.20 of 2008 was never complied with, were matters never pleaded in the Applicant's Amended Judicial Review Claim and there was no factual base for this proposition.

It is an abuse of the Court's process for Counsel to attempt to depart from his pleadings in a manner to canvass an issue not raised by the said pleadings.

During the submissions hearing and upon the court's queries to the Applicants' Counsel as to whether in fairness and justice he could do that at this stage of the proceeding, he answered in the negative and withdrew his submissions to that effect.

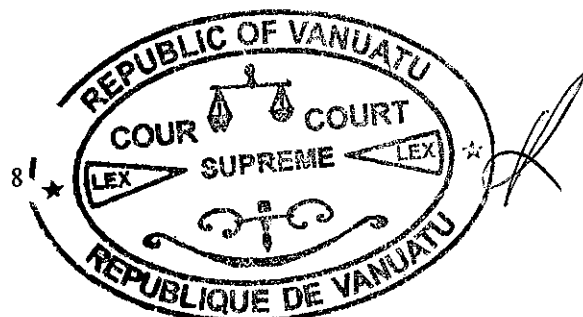
I now deal with issue two.

Issue Two: Whether the Prime Minister has standing or authority to execute the Concession Agreement on behalf of the Government of the Republic of Vanuatu.

I have read, perused and scrutinised the submissions of the Applicants' Counsel in respect to Issue Two. I must say I do not find any submissions of Mr Kapapa on the second issue which is about the execution of the Concession Agreement by the Prime Minister of the Republic on 27 July 2013.

Counsel for the Applicants made substantive submissions on Provisions of the Public Finance and Economic Management Act and particularly section 60.

But with respect to the Learned Counsel section 60 is about the power of the Minister of Finance to give guarantees and indemnities under the process prescribed under the Public Finance and Economic Management Act. The subject of issue Two is a different matter. Again here the court accepts the submissions made by the Attorney General on behalf of the First and Second Respondents that the airport project of such magnitude draws the attention of significant administration decision and as such it is within the prerogative of the Prime Minister to execute the Concession Agreement on behalf of the Vanuatu Government as envisaged under Article 5(a) of the Government Act.



In any event, the genesis of the Prime Minister's prerogative under Article 39(1) of the Constitution in relation to his executive power suffices to permit him to execute the Concession Agreement on behalf of the Government of the Republic of Vanuatu.

Also the affirmation of exercising this authority was further emphasised by the resolution of the Council of Ministers in its meeting on 4th of July 2013 when the Council of Ministers mandated the Prime Minister to execute the Concession Agreement. The resolution of the Council's meeting is annexed to the statement of Mr Shing as annexure BS8.

Accordingly the Prime Minister is recognised in law to execute the Concession Agreement. That is my answer to issue Two.

I must say that this claim is misconceived from the start by counsel for the Applicants.

An example of this can be seen in the Relief 1 and 2 sought in the claim. They read:

- "1. The purported "decision" of the First Respondent to grant the purported Concession Agreement dated the 27th July 2013 to the Third Respondent fails to comply with due process and procedures under law and whereby must be called up and squashed as unlawful and without basis;
- "2. The purported decision of the second Respondent to front, execute and or sign the Concession Agreement dated the 27th July 2013 is outside his powers to sign and render the "Agreement" null and void and be called up and quashed as unlawful and without basis."

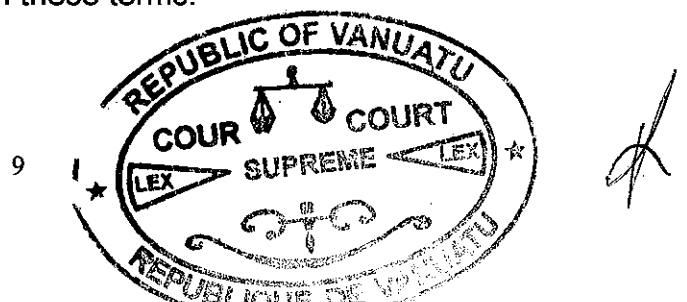
So again here, the "purported decisions" sought to be invalidated and quashed in reliefs 1 and 2 should be the decisions of the Council of Ministers dated 18 April 2013 and 4 July 2013 as reflected in the common facts of this case. The claim and submissions of the Applicants should reflect this if these decisions are to be challenged.

It is clear that the claims and reliefs do not match the submissions of Counsel.

Further I must also say that Counsel for the Applicants misapprehends the basic concept of the Concession Agreement with condition precedents clauses as it transpired in his submissions in this case.

I have perused the clauses of the Concession Agreement executed on 27 July 2013. That Concession Agreement is explicit in its terms under clause 2 of the contract that provides for condition precedents. I accept the submissions of the Attorney General that the circumstances under clause 2 need to happen before the cut off date (27 July 2014) in order that the concession agreement may be binding upon the parties. A particular condition precedent is the need to comply with the Public Finance and Economic Management Act. That is yet to happen before the cut off date. Accordingly the Concession Agreement itself does not and cannot oust the jurisdiction of the Public Finance and Economic Management Act.

It is also to be noted that in an attempt to assist the Applicants' Counsel, in a conference hearing on 6 September 2013, the court granted leave to the Applicants to amend their initial Judicial Review Claim in these terms:



"2. Leave is given to the Applicants to amend the Judicial review claim by:

- (i) Changing the status of the applicants as MPs into their normal names as persons representing others who have same procedural concerns or issues raised in this proceeding and in the public interest by 13 September 2013;
- (ii) **The Applicants cannot advance any issue of promissory note as advanced in their claim as such an issue is premature and also it is yet to be considered by Parliament in accordance with the law.**

3. Therefore, the only issue in this proceeding is in respect to the process of the Concession Agreement leading up to its signature by the First Respondent, Prime Minister of Vanuatu on 27 July 2013."

Mr Kapapa seemed to ignore orders 2 (ii) and 3 above.

It is also clear that the submissions of Counsel of the Applicants on section 60 of the Public Finance and Economic Management Act in respect to Issue Two are premature and cases authorities submitted by him in that regard are irrelevant.

Finally, I accept the submissions that the Applicants also do not have the locus standi to pursue this proceeding. The fact that the Applicants are members of Parliament and are of the opposition bloc clearly highlights their choice of option as deposed in their evidence other than the option decided by the Government. This fact establishes the intention of the Applicants not necessarily to see that the Government Contract and Tenders Act have been complied with but rather to fulfil their choice of option. That is a matter outside the jurisdiction of the courts of law.

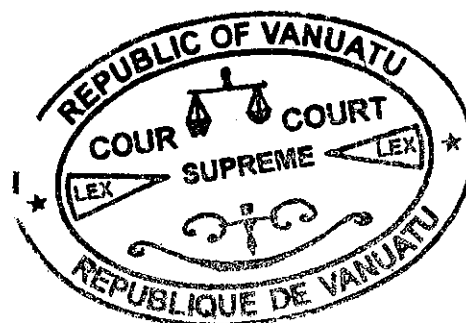
In conclusion, the Amended Judicial Review Claim must be struck out as it is misconceived. The First and Second Respondents are entitled to costs.

COSTS

I have heard submissions of both Counsel on the costs of this proceeding. The Attorney General informed the Court of a letter he wrote to Mr Robin Tom Kapapa of Kapapa Lawyers dated 30 September 2013 copied to the Chief Registrar of the Supreme Court which is now in the court file. The letter notified Counsel for the Applicants that the claim is misconceived and invited him to withdraw the claim or faced with indemnity costs.

The circumstance and conduct of this case warrant indemnity costs to be made against the Applicants and their Counsel in person.

The First and Second Respondents are entitled to the costs to be determined on indemnity basis against the Applicants for 1/3 and their counsel for 2/3 share.

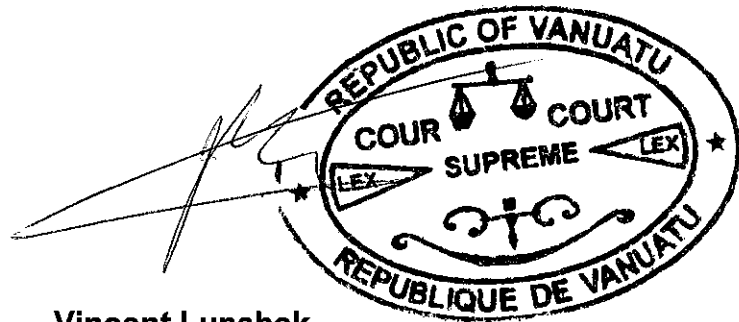


ORDER

1. The Judicial Review Claim filed in this proceeding is Struck Out.
2. The First and Second Respondents are entitled to costs on indemnity basis.
3. Such indemnity costs shall be against the Applicants for the 1/3 and Mr Robin Kapapa in person for 2/3.

DATED at Port-Vila this 17th day of October 2013

BY THE COURT



**Vincent Lunabek
Chief Justice.**