

IN THE COURT OF APPEAL  
OF THE REPUBLIC OF VANUATU  
(Civil Appellate Jurisdiction)

Civil Appeal  
Case No. 19/1409 CoA/CIVA

**BETWEEN:** Alatoi Ishmael Kalsakau, Fred William Tasso,  
Joshua Kalsakau, Ephraim Kalsakau, Sato Kilman,  
Jotham Napat, Ian Wilson, Matai Seremiah, Jerry  
Kanas, Gracia Shadrack, Albert Williams, Marc Ati,  
Jimmy Nipo, Kalo Seule, Jay Ngwele Pakoasongi  
Kalo Lano  
*Appellants*

**AND:** The Republic of Vanuatu  
*First Respondent*

**AND:** Prime Minister Charlot Salwai Tabimasmas  
*Second Respondent*

**AND:** Johnny Koanapo MP, Hosea Nevu MP, Jerome  
Ludvaune MP, Tomker Netvunei MP, Christopher  
Emelee MP, Tom Noam MP, Bruno Lengkon MP,  
Silas Bule MP, Andrew Napuat MP, Seule Simon,  
John Silik Sala  
*Third Respondents*

**Coram:** Hon. Justice John Mansfield  
Hon. Justice Oliver Saksak  
Hon. Justice John Hansen  
Hon. Justice Daniel Fatiaki  
Hon. Justice Gus Andrée Wiltens

**Counsel:** Mr. J. Malcolm and Ms. S. Mahuk for the Appellants  
Mr. F. Gilu for the First and Second Respondents  
Ms. M. Grace for the Third Respondents Seule Simon and John Silik Sala  
Mr. Less Napuati for the Third Respondents (except Seule Simon and John Silik Sala)

**Date of Hearing:** 11<sup>th</sup> July 2019  
**Date of Judgment:** 19<sup>th</sup> July 2019

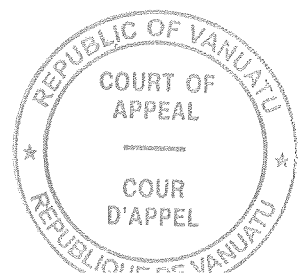
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## JUDGMENT

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### Introduction

1. This appeal raises similar issues to those addressed by the Court of Appeal in Speaker of Parliament v. The President of the Republic of Vanuatu, Civil Appeal Case 1388 of 2019 also delivered on 19 July 2019 (19/971 SC/CNST). It also gives rise to some different and additional issues.



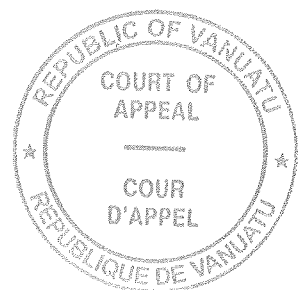
2. The appeal concerns the appointment by the Prime Minister of the third respondents as Parliamentary Secretaries. Such appointments were first made on 16 January 2013, by then Prime Minister, and that appears to have led to a number of such appointments including that of the third respondents.
3. The applicants, now the appellants, are Members of Parliament who say that the appointment of Parliamentary Secretaries from the Members of Parliament is not consistent with the Constitution, both generally and in addition, in the particular circumstances of the appointments of the third respondents.
4. In the submission at first instance, there was some challenge to the standing of the appellants to maintain their Constitutional challenge, and some suggestion that their claim should be dismissed in any event because some of them had earlier been appointed as Parliamentary Secretaries under a previous Government. Those contentions were not maintained on the hearing of this appeal. That was a sensible approach. The issues raised are of important public interest.
5. On the contentions then advanced to the primary Judge, the conclusion was reached that the contracts then in force which appointed the third respondents as Parliamentary Secretaries did not infringe the Constitution and the appellant's Constitutional application was dismissed, with costs.
6. This is an appeal from that decision.
7. For the reasons which follow, the Court has reached the view that the contracts appointing the present Parliamentary Secretaries from the Members of Parliament do infringe the Constitution, and are not lawful.
8. It was common ground that the decision now made does not have the effect of making invalid decisions of the Government made while those persons (or the earlier Parliamentary Secretaries) had office. It was also accepted that our decision should not have the effect of creating any obligation on those persons to repay the benefits they had received under their respective contracts. Those submissions were based on the principle of presumed validity of past acts, or *de-facto* validity. As that is the common position of the parties, we also adopt that position.

#### Background

9. The following is taken from the decision of the primary Judge. The facts are not disputed.

*"2. Around January 2013 Mr Sato Kilman who was then Prime Minister initially sought advice from the State Law Office whether it was lawful to appoint Mr Moana C Kalosil as Parliamentary Secretary.*

*3. On 11 January 2013 the State Law Office advised that if the appointment did not impede Mr Kalosil's duties as a Member of Parliament then it would be open for the Prime Minister to appoint him to the post. Following the advice, the Prime Minister issued the Official Salaries (Amendment) Order No 5 of 2013 on 16 January 2013 adding the position of Parliamentary Secretary to the Schedule to the Official Salaries Act (as amended) [CAP 168].*

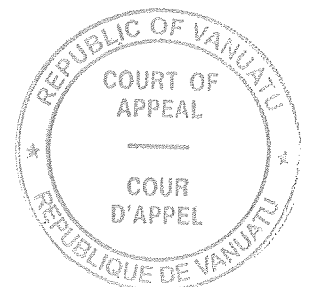


4. A series of orders were then later issued adding further positions of Parliamentary Secretary and their staff to the schedule. These are:-

- Official Salaries (Amendment) Order No 21 of 2013
- Official Salaries (Amendment) Order No 92 of 2013
- Official Salaries (Amendment) Order No 107 of 2013
- Official Salaries (Amendment) Order No 104 of 2013
- Official Salaries (Amendment) Order No 139 of 2013
- Official Salaries (Amendment) Order No 140 of 2015
- Official Salaries (Amendment) Order No 154 of 2015
- Official Salaries (Amendment) Order No 155 of 2015
- Official Salaries (Amendment) Order No 24 of 2016
- Official Salaries (Amendment) Order No 63 of 2016
- Official Salaries (Amendment) Order No 99 of 2016
- Official Salaries (Amendment) Order No 126 of 2016
- Official Salaries (Amendment) Order No 165 of 2016
- Official Salaries (Amendment) Order No 196 of 2016
- Official Salaries (Amendment) Order No 28 of 2017
- Official Salaries (Amendment) Order No 44 of 2017
- Official Salaries (Amendment) Order No 47 of 2017
- Official Salaries (Amendment) Order No 104 of 2017
- Official Salaries (Amendment) Order No 19 of 2018
- Official Salaries (Amendment) Order No 119 of 2018
- Official Salaries (Amendment) Order No 127 of 2018
- Official Salaries (Amendment) Order No 128 of 2018
- Official Salaries (Amendment) Order No 202 of 2018
- Official Salaries (Amendment) Order No 203 of 2018

5. On 11 February 2016, Mr Charlot Salwai Tabimasmas was elected Prime Minister of the Republic of Vanuatu. He then appointed the third defendants the respondents as Parliamentary Secretaries on the following dates:-

- 19 February 2016  
**Mr. Johnny Koanapo (MP)** was appointed parliamentary secretary to the Prime Minister.  
**Mr. Silas Bule (MP)** was appointed parliamentary secretary to the Prime Minister responsible for Education.  
**Mr. Andrew S Napuat (MP)** was appointed parliamentary secretary to the Prime Minister responsible for Provincial Affairs.
- 27 May 2016  
**Mr. Seule Solomon (MP)** was appointed parliamentary secretary to the Prime Minister responsible for Youth & Sports.
- 28 June 2016  
**Mr. John S Sala (MP)** was appointed parliamentary secretary to the Prime Minister responsible for Revenue Initiatives.
- 23 November 2016



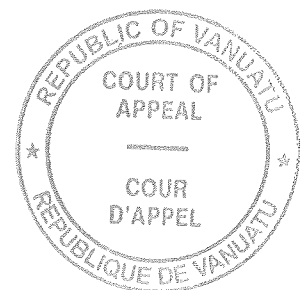
*Mr. Tomker Netvunei (MP) was appointed parliamentary secretary to the Prime Minister responsible for Fisheries.*

- 22 December 2017  
*Mr. Hosea Nevu (MP) was appointed parliamentary secretary to the Prime Minister responsible for provincial affairs.*  
*Mr. Jerome Ludvaune (MP) was appointed parliamentary secretary to the Prime Minister responsible for Health.*  
*Mr. Bruno Leingkone (MP) was appointed parliamentary secretary to the Prime Minister responsible for Revenue Initiatives.*
- 27 December 2017  
*Mr. Christopher Emelee (MP) was appointed parliamentary secretary to the Prime Minister responsible for Maritime Affairs.*
- 9 August 2018  
*Mr. Tom Noam (MP) was appointed parliamentary secretary to the Prime Minister responsible for Climate Change Disaster Relocation.*

10. There were also a series of staff appointments made to serve under the Parliamentary Secretaries. The precise arrangements do not need to be noted. The constitutional application did not challenge their legality as they were not parties. They are not "Public Service" contracts and can be readily brought to an end."
11. All the Parliamentary Secretaries signed contracts of employment and were paid benefits and salaries under the Official Salaries Act.

#### The role of the Court

12. It is important to make clear that it is the responsibility of the Court to give effect to the Constitution.
13. In Natapei v. Wells [2013] VUSC 43, the Court noted that the Constitution adopts a Parliamentary democratic system involving the three arms of Government: the Parliament, the Executive and the Judiciary. It provides in Chapter 7 for the Executive arm of Government. In Vohor v. Attorney General [2004] VUCA 22, the Court of Appeal confirmed that the Parliamentary system includes the processes of electing Members of Parliament, electing the Prime Minister and for the appointment of Ministers. Those things are all provided for in the Constitution.
14. The Court must give effect to the Constitution. It does so by looking at what has been done or is to be done by a piece of legislation or regulation or by executive action only to the extent that it contravenes or might contravene the Constitution.
15. Consequently, the matters which were referred to in passing in the submissions about the Prime Minister's reasons for appointing Parliamentary Secretaries, or for the levels of payment fixed, or for the number of proposed support staff do not concern the Court in this proceeding. We do not speculate about those reasons. That is a matter for executive decision-making by the Executive arm of Government.

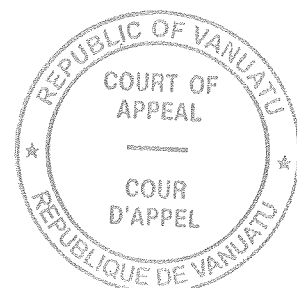


### The primary judgment

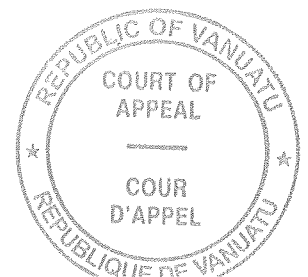
16. It is clear from the relief sought in the Constitutional application that the principal attack was that the appointment of Parliamentary Secretaries (and political advisors) is contrary to Articles 39-43 of the Constitution.
17. It is also claimed that the appointment of Parliamentary Secretaries including having regard to the terms of the appointments, is contrary to Article 66 (1) (d) of the Constitution.
18. The primary Judge correctly noted that persons appointed as political officers or as other staff to support a Parliamentary Secretary were not parties to the application. For that reason alone, their status was not considered.
19. The submissions before the primary Judge largely focussed on Articles 5 and 39 of the Constitution. As the primary Judge did not consider that, in their express terms, the appointment of Parliamentary Secretaries contravened those Articles, the application was dismissed.

### Consideration

20. The contentions on this appeal took a somewhat broader and more detailed analysis of Chapter 7 of the Constitution. That was no doubt prompted by the decision of the Chief Justice in the President of the Republic of Vanuatu v. Saimon, Speaker of the Parliament (Constitutional Case 19/971, 17 May 2019) (19/971 SC/CNST). That decision was given on the referral to the Court by the President under Article 16 (4) of the Constitution about the validity or otherwise of the Bill for the Constitution (Seventh) (Amendment) No. 1 of 2019 (the Bill). The Chief Justice found the Bill should not be assented to by the President without the support of a national referendum as required by Article 86 of the Constitutional.
21. The Court of Appeal has given the judgment referred to in [1] above on the same date as this judgment on an appeal in the President's referral case. The Bill was a Legislative proposal to provide for the appointment of Parliamentary Secretaries by the addition of Article 46 A to the Constitution under the heading of Chapter 7- The Executive.
22. The Court of Appeal dismissed the appeal of the Speaker from the decision of the Chief Justice.
23. That decision has exposed the different considerations which need to be considered to determine the validity of the process of Executive appointment of Parliamentary Secretaries, as well as the proposed legislative changes considered in that case.
24. Counsel for the appellants and counsel for the Republic and the Prime Minister agreed, that if that Bill could not be passed without a public referendum by reason of Article 86, almost certainly the same considerations would make the Executive appointments of Parliamentary Secretaries from the Members of Parliament invalid.
25. For the reasons given in that case, it is our view that the appointment of Parliamentary Secretaries by the Prime Minister are also invalid. It is obvious that the Prime Minister cannot do by Executive action what the Parliament cannot do without a public referendum by reason of Article 86 of the Constitution.



26. The Constitution in Article 86 says that a provision amending the Constitution that is "*regarding the parliamentary system*" cannot come into effect unless it has been supported by a national referendum. The provisions in Chapter 7. The Executive in the Constitution prescribe part of the "*parliamentary system*". Relevantly, they describe how the executive power of the people of the Republic can be exercised. That power is vested in the Prime Minister and the Council of Ministers: Article 39 (1). The number of Ministers is restricted to not more than a quarter of the Members of Parliament: Article 40(2). The Prime Minister then assigns responsibility for "*the conduct of government*" to the Ministers: Article 42 (2). So "*the conduct of government*" is to be allocated to a limited number of persons, namely the Prime Minister and the Ministers.
27. The appointment of Parliamentary Secretaries is not consistent with that constitutional structure because:-
- (1) the Parliamentary Secretaries as appointed from the Members of Parliament have some responsibility "*for the conduct of government*", that is the exercise of the Executive power of the people of the Republic, but the Constitution does not provide for or allow that; and
  - (2) the Parliamentary Secretaries as appointed, have that responsibility. The Executive power of the people is then able to be exercised by a greater number of Members of Parliament than the 13 Ministers presently allowed for. It does not matter whether there are one or ten Parliamentary Secretaries, the Constitution does not allow for that wider spread of Members of Parliament who can conduct the responsibilities of Government.
28. It is clear that each of the Parliamentary Secretaries has a role in "*the conduct of government*". Each of them has signed an Employment Agreement with the Prime Minister which identifies which of the responsibilities of government that particular Parliamentary Secretary must fulfil. Each contains a Duty statement with key responsibilities, and describes the responsibilities in detail, including both Parliamentary duties and Departmental duties.
29. The acknowledgment of this by the appellants and the first and second respondents (the third respondents did not take an opposite position) was a proper one.
30. That is enough to allow the appeal.
31. However, it is desirable to make a few other observations.
32. It does not appear from the reasons of the primary Judge that he was taken to the detailed terms of the various Employment Agreements.
33. It is abundantly clear that the Employment Agreements are inconsistent with the Parliamentary Secretaries being able to carry out their duties to their electorate as Members of Parliament. The Agreements require the Parliamentary Secretaries to devote their whole time and attention to performing the specified duties under the Employment Agreements. Some, but not all of the Employment Agreements prescribe that the agreement may be terminated at the option of the Prime Minister if the Parliamentary Secretary adopts a political party which is not the same as that of the Prime Minister. The significance of those provisions is quite apparent.



34. The State Law Office gave advice to the Prime Minister on 11 January 2013 that the appointment of a Parliamentary Secretary would not offend section 25 of the Leadership Code Act [CAP 240], provided that "holding such office does not affect his ability to fulfil principal tasks and duties as a Member of Parliament". That did not amount to an endorsement of the Constitutional significance of Parliamentary Secretaries. Its focus was the Leadership Code Act. The provision clearly would apply to the Employment Contracts which have been entered into. They would affect the Members ability to fulfil their role as Members of Parliament.
35. There was an additional submission of the appellants that the appointment of Parliamentary Secretaries upon the terms of the Employment Agreements also contravenes Article 66 (1) (a) and (2) (b) of the Constitution. It is said that the same features of the Agreements as would contravene section 25 of the Leadership Code Act would also contravene Article 66 (1) (b) because it would demean the office of a Member of Parliament; and would contravene Article 66 (1) (a) because it would put the members in a position where there is, or could be, a conflict of interest or that the fair exercise of duties as a Member of Parliament might be compromised; or would contravene Article 66 (2) because it might be expected to give rise to doubt in the public mind as to whether the duties as Member of Parliament as prescribed by Article 66 (1) are being properly carried out.
36. In the light of our earlier conclusions, we do not need to resolve those questions.

#### Orders

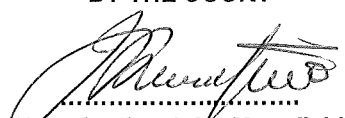
37. Appeal allowed.
- (1) Orders as to costs made by the primary Judge on 27 May 2019 is set aside.
  - (2) On the appellant's constitutional application dated 18 December 2018, it is declared that the appointments by the second respondent from time to time (as set out in these reasons for judgment) of the third respondents as Parliamentary Secretaries are void and of no effect.
  - (3) There is no order as to costs of the application in the Supreme Court or on this appeal.

As noted, the parties are agreed that the declaration in (3) takes effect from the date of this judgment.

38. The Court points out and acknowledges, the preparedness of all parties to present to the Supreme Court and on this appeal the documents material to progress the resolution of the Constitutional application.

**DATED at Port Vila this 19<sup>th</sup> day of July, 2019.**

**BY THE COURT**

  
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**Hon. Justice John Mansfield**

