

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

Civil Appeal
Case No. 24/3796 COA/CIVA

[2025] VUCA 11

BETWEEN: **MASSON DE MORFONTAINE LIMITED**
First Appellant

AND: **CHURCHHILL FINANCE LIMITED**
Second Appellant

AND: **CATHERINE LE BOURGEOIS**
Seventh Appellant

AND: **JOANA QIONG WU**
Eighth Appellant

AND: **CHEUNG TAK LUI**
Ninth Appellant

AND: **YUEN LUNG YUENG**
Tenth Appellant

AND: **ODIN REAL ESTATE LIMITED**
Eleventh Appellant

AND: **MIGALE LIMITED**
Twelfth Appellant

AND: **WEB ENGINEERING LIMITED**
Thirteenth Appellant

AND: **BRIGHTON VENTURES INCORPRATION**
Fourteenth Appellant

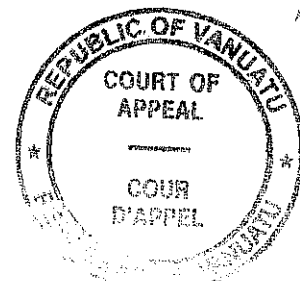
AND: **LA PILEA**
Fifteenth Appellant

AND: **WANFUTENG BANK LIMITED**
Sixteenth Appellant

AND: **REPUBLIC OF VANUATU**
Second Respondent

AND: **Robert Stanley Hughes**
Intervenor

Coram: *Hon. Justice O Saksak*
Hon. Justice M O'Regan
Hon. Justice R White
Hon. Justice D Aru
Hon. Justice M A MacKenzie



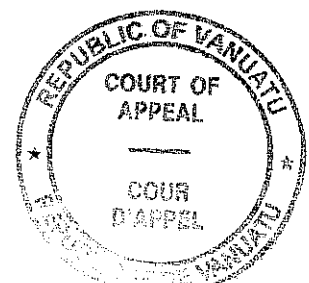
Counsel: *Mr R E Sugden, Mr H. Wilson and Ms K. Rouch for the Appellants
Mr M J Hurley for Mr Robert Hughes (Intervenor)
Mr S Aron for the Second Respondent*

Date of Hearing: *7 February 2025*
Date of Judgment: *14 February 2025*

JUDGMENT OF THE COURT

Introduction

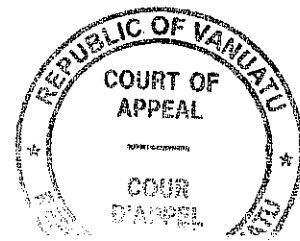
1. On 16 May 2024, Wanfuteng Bank Limited (WFB) and eleven other applicants commenced proceedings (the Proceedings) in the Supreme Court alleging breaches of their rights under the Constitution by agencies and employees of the Republic. They intitled the Proceedings "*Constitutional Application*" and sought redress in various ways, including orders for payment of compensation. The Republic was the sole Respondent.
2. Despite Sugden Lawyers being named in the Proceedings as the lawyers for all the applicants, including WFB, on 26 August 2024 another firm, Hurley Lawyers, filed an interlocutory application in the Proceeding entitled "*Application by Wanfuteng Bank Limited*". Under his signature on the application, Mr Hurley from Hurley Lawyers described himself as "*Wanfutung Bank Limited's Lawyer*".
3. The interlocutory application claimed, first, that WFB should not have been included as an applicant in the Proceedings without leave having been obtained under s.89 of the Companies Act 2012 for the Proceedings to have been commenced in its name. The basis for that claim was the assertion that Mr Robert Hughes was the sole registered director of WFB and that he had not authorised the involvement of WFB in the Proceedings. The interlocutory application also sought other orders to which we will refer shortly.
4. The primary Judge upheld the claim in the interlocutory application and, on 29 October 2024, made the following orders:
 1. *Unless and until an application for leave is made and granted under section 89 of the Companies Act No. 25 of 2012 as amended, the first named applicant, Wanfuteng Bank Limited, is removed as a party to this proceeding.*
 2. *Until further order of the Court, the shareholders and any purported director of Wanfuteng Bank Limited (save for the registered director, Robert Stanley Hughes), are restrained from passing or implementing any resolutions in respect of Wanfuteng Bank Limited and/or its officers or employees.*
 3. *Until further order of the Court, there shall be no changes to Wanfuteng Bank Limited's register of directors or shareholders.*



4. *Liberty to apply is granted in respect of any application to change Wanfuteng Bank Limited's register of shareholders.*
5. *The Second to Twelfth Applicants shall pay Wanfuteng Bank Limited's costs of and incidental to the Application filed on 26 August 2024 on an indemnity basis to be agreed, failing which to be assessed."*
5. The Appellants' notice of appeal against these orders contains numerous grounds and the Court was provided with substantial appeal books. However, at the commencement of the hearing, the Court invited the parties to address first those grounds of appeal which challenged the decision of the Judge to entertain and determine the interlocutory application of 26 August 2024. The hearing proceeded on that basis.
6. For the reasons set out below, we have concluded that the Judge should not have entertained or determined the interlocutory application. For that reason alone, the orders made by the Judge must be set aside. That makes it unnecessary for this Court to address the other matters sought to be raised on the appeal.
7. Our reasons follow.

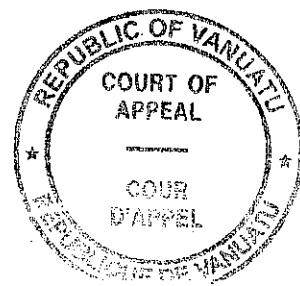
Some preliminary matters

8. The notice of appeal, as well as the form of the amended notice of appeal for which the Appellants sought leave, included as appellants four persons who had not been parties to the Proceedings at first instance. The first three were Andrew Brick, Glenda Abraham and Huo Sheng-Hsi, each of whom the Appellants claim had been appointed as directors of WFB on 15 November 2023. We will refer to these persons as "the Replacement Directors", without thereby implying any conclusion about the validity of their appointments. The fourth was Singha Trading Ltd (STL). The inclusion of the Replacement Directors and STL as Appellants was irregular as, not having been parties to the Proceedings, they had no right of appeal: *Kuarangkiri v Kunuan* [2024] VUCA 52 at [18], [20]. Accordingly, we ordered the striking out as appellants of STL (the Third Appellant) and of the Replacement Directors, these being the Fourth, Fifth and Sixth Appellants respectively.
9. The Appellants had also named Mr Hughes as the First Respondent to the appeal. This too was irregular as Mr Hughes had not been a party to the Proceedings. The Court struck out Mr Hughes as First Respondent but, on Mr Hurley's application, granted Mr Hughes leave to intervene in the appeal.
10. As the judgment of the primary Judge was interlocutory, the appeal against it required leave – see r. 21 of the Appeal Rules. The parties did not advert to this requirement and the hearing proceeded as though it concerned an appeal as of right. However, it is plain that leave to appeal should be granted, and we will make an order to that effect.



Factual circumstances

11. WFB is a company incorporated in Vanuatu conducting a banking business pursuant to a licence issued under the Reserve Bank Act. Its shareholders are Masson De Morfontaine Limited as Trustee of the Red Lotus Trust (MdM), Churchill Finance Limited (CFL) and STL. MdM and CFL were parties to the Proceedings and are the First and Second Appellants on this appeal. There was evidence in the Supreme Court indicating that each of the MdM, CFL and STL is beneficially owned by Ms Catherine Le Bourgeois, the Seventh Appellant, who at one time had been a director of WFB.
12. The identity of the directors of WFB is a matter of contention in the Proceedings. Before 5 May 2023, the directors were Ms Qiong Wu and Mr Hughes. Ms Quiong Wu is the Third Applicant in the Proceedings and the Eighth Appellant in the present appeal.
13. Sworn statements in the Proceedings indicated that on 5 May 2023 WFB's shareholders had passed the resolution appointing MdM as a director and another resolution removing Mr Hughes as a director.
14. As already noted, evidence in the Proceedings indicated that WFB's shareholders had on 15 November 2023 passed a resolution appointing the Replacement Directors. The validity of that resolution was an issue in the Proceedings, as was a resolution passed on 29 December 2023 by which the shareholders confirmed Mr Hughes' removal as a director. It is the issues about the validity of these resolutions which have given rise to the dispute about whom it is, as between the Replacement Directors and Mr Hughes, who can give instructions on behalf of WFB in the Proceedings.
15. The Vanuatu Financial Intelligence Unit (FIU) is established by the Anti-Money Laundering and Counter-Terrorism Financing Act 2014 (the AML Act) within the State Law Office. Its director at relevant times has been Mr Floyd Mera. The FIU has important functions in Vanuatu under the AML Act in detecting and avoiding money laundering and/or the financing of terrorist activities.
16. Commencing in early 2023, the FIU had issued a number of notices and directions to WFB and to persons employed by it or involved in its affairs. The disposition of this appeal does not require that the content of those notices and directives be set out in detail. It is sufficient to note that several have been to the effect that named individuals, including Ms Le Bourgeois and Ms Qiong Wu, are not fit and proper persons to be directors of WFB or, as the case may be, to hold senior management positions within it; that certain "key persons" in WFB are not to be terminated without prior consultation with the FIU; that WFB is to refrain from appointing certain "key persons" without prior consultation with the FIU; that restrictions are to be imposed on the use by certain persons of their accounts with WFB; that the shareholders' resolution on 5 May 2023 removing Mr Hughes as a director was "null and void"; and that, subject to any resignation by Mr Hughes, he was to continue in his position as WFB's sole director until further advised by the FIU.



The claims in the Proceedings

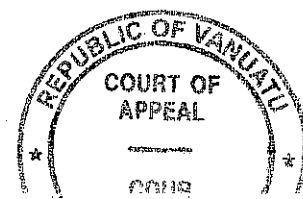
17. The principal claim in the Proceedings is that the notices and directives of the FIU have infringed rights granted to the Appellants as individuals under the Constitution of Vanuatu. In particular, the Appellants allege infringements of their rights, as individuals, to the protection of the law and to protection from unjust deprivation of property guaranteed by Articles 5(1)(d) and 5(1)(j) of the Constitution. In addition, the Appellants seek declarations that specified actions of the FIU were not authorised by the AML Act or by other legislation.
18. Of particular relevance presently is the claim in the Proceedings that a direction issued by the FIU on 17 April 2023 prohibiting WFB, its directors and its senior management from terminating, or appointing, “key persons” without consultation with the FIU was invalid. As we understand it, Mr Hughes and the FIU rely on that direction for their contention that the resolutions passed on 5 May and 29 December 2023 removing the former as director were invalid.
19. By way of relief, the Applicants seek orders quashing directives issued to WFB by the FIU after 31 January 2023, a declaration that Mr Hughes has not been a director of WFB since 5 May 2023, or at least 29 December 2023, and that the directors of WFB are presently MDM and the Replacement Directors. They also seek particular orders to give effect to those declarations.

The Interlocutory Application of 26 August 2024

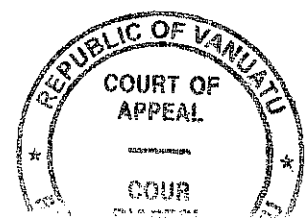
20. As noted above, the interlocutory application was brought by WFB with Mr Hurley describing himself as WFB’s lawyer. The orders sought by the WFB were in the same terms as those ultimately made by the Judge, as set out above, and it is not necessary to repeat them.
21. The interlocutory application was supported by sworn statements by Mr Hughes and by Mr Lonsdale Takoar, who had been appointed by Mr Hughes on 7 November 2023 as WFB’s acting Chief Executive Officer.
22. The interlocutory application sought the first order on the basis that Mr Hughes was WFB’s sole registered director; that he had not authorised the bringing of the Proceedings; and that he did not consider it to be in WFB’s interests for it to be an applicant in the Proceedings.
23. The grounds for the second and third orders sought in the interlocutory application were, in substance, the claimed invalidity of the removal of Mr Hughes as director and the appointment of the Replacement Directors and the claimed invalidity of various steps taken by WFB’s shareholders and the Replacement Directors to give effect to those resolutions.

The Interlocutory Application was inappropriate

24. A number of matters, considered individually and in combination, indicate the inappropriateness of the Interlocutory Application and of the primary Judge’s determination of it.



25. First, the interlocutory application had the incongruity of WFB seeking an order precluding it (without satisfaction of a procedural condition) from pursuing its claim for relief in the Proceedings. There was no need for such an application. If WFB did not wish to continue as an applicant, it could simply have filed a notice of discontinuance pursuant to Rule 9.9 of the Civil Procedure Rules (CPR) (made applicable by Rule 1.3 of the Constitutional Procedural Rules 2003).
26. Secondly, the interlocutory application was filed by Hurley Lawyers on behalf of WFB when that firm was not the solicitors on the record for WFB in the Proceedings. Rule 7.2(1) of the CPR permits a party to proceedings to apply for an interlocutory order at any stage of the proceedings. Rule 2.7(1) requires that the application be signed by the litigant or the litigant's lawyer. As Sugden Lawyers were the lawyers on record for WFB, they were the lawyers authorised by the CPR to bring interlocutory applications on behalf of WFB in the Proceedings.
27. The CPR do not contemplate litigants in the one proceeding being represented simultaneously by two or more lawyers. Hence the provisions in Rule 18.8 of the CPR for the filing of Notices of Commencing to Act and Notices of Ceasing to Act so that the Court and the other parties know who it is who is representing the litigant. As Sugden Lawyers were recorded in the Proceedings as the lawyers for WFB, it was not open to Hurley Lawyers to so describe themselves, or to act for WFB, in the Proceedings.
28. Thirdly, resolution of the interlocutory application required the determination of a substantive issue in the proceedings, namely, the status of Mr Hughes as a director of WFB. That is because the Appellants, in particular Ms Le Bourgeois and Ms Qiong Wu, contended that Mr Hughes had been removed as director by the shareholders' resolution on 5 May 2023 or, if not then, by the resolution on 29 December 2023. As already noted, Mr Hughes contended that the FIU direction of 17 April 2023 had the effect that those resolutions were invalid. The Appellants impugned the validity of that direction. No doubt because of the dispute about this issue, the Appellants sought the declaration that Mr Hughes had not been a director of WFB since 5 May 2023 (alternatively, since 29 December 2023) and the declaration that the Replacement Directors were the directors of WFB.
29. This being a substantive issue in the proceedings, it could not be resolved on an interlocutory application. It had to be the subject of a trial.
30. It is of course open to a litigant to seek the determination of one issue in proceedings in advance of others, that is, by a separate trial of that issue. But there had been no application in the Supreme Court for separate trials of issues in the Proceedings. As this Court stated recently in *Republic of Vanuatu v Suta* [2024] VUCA 45, the circumstances in which it is appropriate for the Court to order the determination of some issues in a proceeding in advance of others are likely to be rare.
31. The primary Judge accepted, at [8], that it was "*the most unusual for a Court to be obliged to determine, at such an early stage, the validity of that which is challenged in the proceeding*". Despite recognising that that was so, the Judge went on to say:



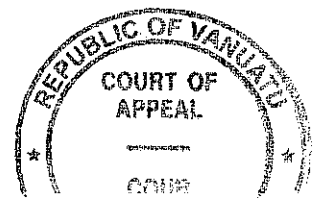
I am not satisfied that the directives preventing the shareholders from appointing replacement directors were beyond the power of VFIU and that the purported appointments complied in all other respects with the Anti-Money Laundering and Counter-Terrorism Financing Act No 13 of 2014 (AMLCTF Act). Thus, those purported appointments of replacement directors remain questionable until findings are made within these proceedings. The purported removal of Mr Hughes remains ineffective until findings are made otherwise.

32. It is not necessary for the Court presently to address the reasoning disclosed in that paragraph. It is sufficient to say that, by upholding the interlocutory application, the Judge seems to have overlooked that his decision would preclude WFB from seeking a determination of the validity of the very matters on which the interlocutory application was based (unless the persons who had caused it to bring the Proceedings obtained the leave of the Court to do so). As we indicate below, the leave of the Court was not required for WFB to bring the Proceedings in any event.
33. This Court was not provided with the filed defence of the Republic in the Proceedings (assuming one has been filed). Thus, we do not know whether the Republic has alleged that the Proceedings, insofar as they are brought by WFB, are incompetent by reason of an absence of leave under s.89 of the Companies Act 2012. If the Republic has raised such a defence, this is another indication that an order for a separate trial of the issue would have been required. If the Republic has not raised this issue in its filed defence, it was not a pleaded issue in the Proceedings requiring determination at all.
34. Fourthly, both the interlocutory application and Mr Hughes' supporting sworn statement made it apparent that the basis for the application rested on Mr Hughes status as the "sole registered director" of WFB. The Judge too seemed to regard that as a significant matter warranting the orders he made, as he referred more than once in his reasons to Mr Hughes being the "sole" Director and to the Replacement Directors as "purported" directors and to their "purported" appointments as directors. Likewise, the second order of the Judge excluded Mr Hughes as the "registered" director from the category of "purported" directors. Moreover, the third order (restraining changes to WFB's register of directors) seemed to reflect an understanding by the Judge that Mr Hughes status as a registered director gave his position some additional or prima facie legitimacy.
35. In fact, the circumstance that Mr Hughes was a registered director did not create any presumption of regularity or legitimacy in his favour. Section 194 of the Companies Act [2012] makes that plain:

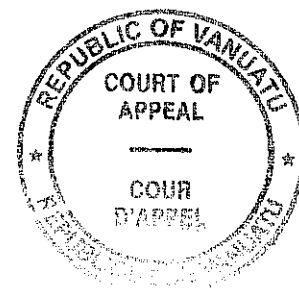
No presumption of validity or invalidity

The registration, or refusal of registration of a document by the Registrar does not affect or create a presumption as to, the validity or invalidity of the document or the correctness or otherwise of the information contained in it.

36. Thus, it was, with respect, an error for the Judge to have proceeded on the assumption that Mr Hughes' continued registration as director created some presumption as to the validity of his position in comparison with that of the Replacement Directors.



37. Before leaving this point, we also note that the Appellants had alleged in the Proceedings that the Vanuatu Financial Services Commission had been in breach of its obligations under the Companies Act [2012] by failing to register the removal of Mr Hughes as director and by failing to record the appointments of the Replacement Directors.
38. Fifthly, in substance and in form, the second order made by the Judge is an interlocutory injunction, as it restrained the shareholders and directors of WFB, other than Mr Hughes, from passing or implementing any resolution in respect of WFB and/or its officers or employees. The wide-ranging terms of that injunction are to be noted.
39. The principles applicable to the grant of interlocutory injunctions by the Supreme Court were considered by this Court in *Teaching Services Commission v Director General in the Ministry of Education and Training* [2024] VUCA 7 at [61]-[64] and it is not necessary presently to repeat what was then said. Usually, applicants for interlocutory injunctions should proffer an undertaking to the Court to meet the losses caused to others by the injunction in the event that they are found ultimately not to be entitled to the claimed relief.
40. In the present case, the interlocutory application of 26 August 2024 was not seen as an application for an interlocutory injunction. Had it been so seen, the absurdity of WFB proffering to the Supreme Court an undertaking to pay itself damages in the event that it was found not entitled to the injunction would have exposed the inappropriateness of the interlocutory application.
41. Finally, at the hearing of the appeal, we raised with Mr Hurley whether s.89 of the Companies Act [2012], on which Order 1 made by the Judge depends, was even engaged in the present case. That is because s.89 is part of a suite of provisions enabling the bringing of actions "*in the name of and on behalf of*" a company, and not by the company. Proceedings of this kind are often referred to as "*derivative actions*". They are available when a company does not intend to bring proceedings or when it is in the interests of the company that the conduct of the proceeding should not be left to the directors or to the determination of shareholders as a whole – see s.92 of the Companies Act 2012.
42. There was no need for the shareholders or directors to have had resort to s.89 in the present case. That is so because WFB was itself bringing an action for redress in respect of the alleged wrongful conduct by the Republic which affected it. As in the case of any other company alleging that it has been the subject of unlawful governmental action, WFB's shareholders and directors did not require the leave of the Supreme Court in order to do so.
43. The course open to Mr Hughes, if he wished to contend that the persons causing WB to bring the proceedings were not authorised to do so, was to commence separate proceedings seeking a declaration to that effect and, possibly, an order with respect to the continuation of those proceedings. No doubt, if Mr Hughes had brought proceedings of that kind, he would have had to establish his own standing to seek the relief sought and would as well have had to establish the lack of authority of the Replacement Directors.



44. For these reasons, we consider the interlocutory application of 26 August 2024 to have been misconceived and conclude that it was inappropriate for the Judge to have granted the relief it sought. Subject to the matter to be considered next, this means that the appeal must be allowed.

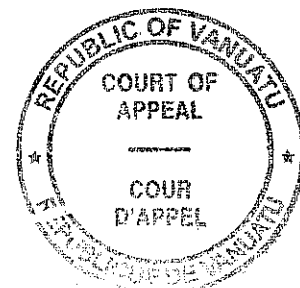
The reliance on a concession

45. Mr Hurley submitted that it was not open to the Appellants to raise issues on the appeal about the appropriateness of the interlocutory application as a vehicle for the determination of who was entitled to represent WFB in the Proceedings. He relied in this respect on a concession made by Mr Sugden on 29 August 2024, and recorded in a Supreme Court Minute on that date, that the Interlocutory Application was "*a suitable vehicle*" for this purpose. He also noted that Mr Sugden had not sought after 29 August to resile from that concession and had participated in the hearing of 11 October 2024 before the Judge without making any objection to the competence of the interlocutory application.
46. This submission can be disposed of shortly. It is of course open to a litigant to make admissions of facts or concessions about matters of evidence and the like. Concessions of these kinds usually affect the interest of the litigant only and are taken to be within the capacity of the litigant to make. However, concessions by litigants about matters of law or fundamental principle are of a different character. Being a court of law, the Supreme Court is obliged to act in accordance with the law. That obligation is not affected by concessions by a litigant in an individual case. The matters to which we have referred above, in particular, the inappropriateness of having one party in litigation represented by different firms of lawyers, let alone by lawyers presenting antagonistic or inconsistent positions on behalf of the litigant, are of this character. Whatever Mr Sugden's views about the appropriateness of the interlocutory application as a vehicle for the determination of the issue about who could represent WFB in the Proceedings, it is plain that it was not, as it involved the Court having to proceed in a way which is foreign to the judicial process. The consequence is that the Appellants are not bound by Mr Sugden's concession.
47. In fairness to Mr Sugden, we record that he sought to explain on the appeal the recorded concession. It is not necessary for us to canvass that explanation or to make any determination about it.

Conclusion

48. As we indicated at the commencement of these reasons, our conclusion about the inappropriateness of the interlocutory application of 26 August 2024 makes it unnecessary to consider the other issues raised by the amended notice of appeal.
49. For the reasons set out above, we make the following orders:

- (a) The Appellants have leave to appeal;
- (b) The Appeal is allowed;



- (c) The Orders of the Judge made on 29 October 2024 are set aside;
- (d) The Interlocutory Application of WFB filed in the Constitutional Application on 26 August 2024 is dismissed.
- (e) The Intervenor, Mr Hughes, is to pay the Applicants' costs of and incidental to the Interlocutory Application filed on 26 August 2024.
- (f) Mr Hughes is to pay the Appellants' costs of and incidental to the Appeal.
- (g) The costs to which the Appellants are entitled under orders (e) and (f) are, by consent, fixed in the sum of VT500,000 and are to be paid within 30 days.
- (h) There be no order as to the costs of the Republic, the Second Respondent.

DATED this 14th day of February 2025.

BY THE COURT


Hon. Acting Chief Justice Oliver A. Saksak

