

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

Civil Case
No's 22/1509 and 22/1527 SC/CIVL

CC 22/1509

BETWEEN: **Union of Moderate Parties (UMP)
Committee (Inc.) represented by
Rialuth Serge Vohor**
First Claimant

AND: **Olivier Etul**
Second Claimant

AND: **Alatoi Ishmael Kalsakau**
First Defendant

AND: **Tom Robin Kapapa**
Second Defendant

CC 22/1527

BETWEEN: **National Executive Committee**
First Claimant

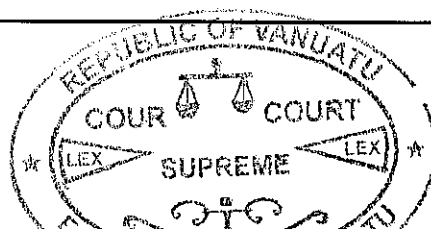
AND: **Alatoi Ishmael Kalsakau, Robin
Kapapa, Anthony Iarish Harry, Georgio
Calo, Charlie Ulas & Tom Lorry**
Second Claimants

AND: **Serge Vohor**
First Defendant

AND: **Marcellino Pipite, Saby Natonga, Noel
Lango, Vincent Kapalu, Luo Jesse,
Gaston Rory & Jean Kaisipai**
Second Defendants

Date of Hearing: 8 July 2022
Before: Justice V.M. Trief
In Attendance: Claimants in CC 22/1509 & Defendants in CC 22/1527 – Mr C. Leo
Claimants in CC 22/1527 & Defendants in CC 15/1509 – Mr S. Kalsakau
Date of Decision: 8 July 2022

DECISION AS TO APPLICATION FOR ORDERS THAT THE JUDGE DISQUALIFY HERSELF



A. Introduction

1. This was an Application by Serge Vohor, who represents the First Claimant in CC 22/1509, for Orders that the Judge Disqualify Herself (the 'Application'), supported by the Sworn statement of Vister Rialuth Serge Vohor. I now set out the Court's decision.

B. The Application

2. Orders were sought in the Application that I disqualify myself from hearing these proceedings, any other Orders deemed just and for reserved costs. The grounds for the Application were as follows:
 - a. That I had a lengthy working relationship with Alatoi Ishmael Kalsakau, the First Defendant in CC 22/1509 and Second Claimant in CC 22/1527, for a number of years at the State Law Office where I worked as Solicitor General working under the direct control of the then Attorney General, Mr A.I. Kalsakau, therefore there is an apprehension of bias by the judge in these proceedings;
 - b. That in 2020, in *Public Prosecutor v Salwai*, Mr A.I. Kalsakau was a complainant and in that matter, I recused myself from hearing that criminal case therefore the same is now sought in the present proceedings; and
 - c. That this is an important case for the UMP family throughout the Republic and the supporters of the UMP want to ensure that no doubt exists as to how these proceedings are litigated and conducted.
3. The Application was opposed. Mr Kalsakau submitted that the Application had been brought at the eleventh hour, that my working relationship with Mr A.I. Kalsakau was in the past and I had heard matters since involving Mr A.I. Kalsakau such as the Election Petition Case last year. He submitted that the passage of time was a relevant consideration such that a fair-minded person who possessed all the facts would not conclude that I would not discharge my judicial duty fairly and competently. He submitted that the Application was a delaying tactic to delay the resolution of these proceedings. He applied for today's wasted costs if the Application was rejected.

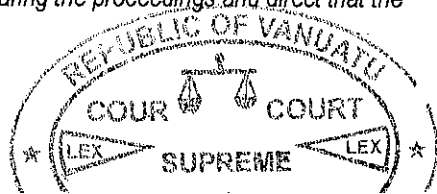
C. Discussion

4. Section 38 of the *Judicial Services and Courts Act* [CAP. 270] (the 'Act') provides:

38. (1) If:

- (a) a judge has a personal interest in any proceedings; or
- (b) there is actual bias or an apprehension of bias by the judge in the proceedings;

he or she must disqualify himself from hearing the proceedings and direct that the proceedings be heard by another judge.



- (2) *A party to any proceedings may apply to a judge to disqualify himself or herself from hearing the proceedings.*
 - (3) *If a judge rejects an application for disqualification, the applicant may appeal to the Court of Appeal against the rejection. If an appeal is made, the judge must adjourn the proceedings until the appeal has been heard and determined.*
 - (4) *A judge who rejects an application for disqualification must give written reasons for the rejection to the applicant.*
5. The Court of Appeal applied the following test for apprehended bias in *Matarave v Talivo* [2010] VUCA 3 at p. 11:

The test we apply is whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the questions which the Court was required to decide.

6. The Court of Appeal also stated in *Matarave* at pp 12-13 that:

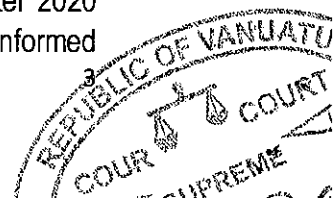
Where a suspicion or apprehension of apparent bias is said to arise from particular circumstances, the test is an objective one. The test requires the Court's assessment of the perception which the circumstances would give rise to in the mind of a fair minded lay observer informed of the facts. The test is to be applied at the time when the circumstances arose. The test is not one to be applied after the judgment is delivered and with knowledge of the outcome of the case...

As the passage quoted from the Supreme Court of New Zealand emphasises, it is necessary to establish the actual circumstances which have a direct bearing on the suggestion that the judge may be seen to be biased and that the factual enquiry should be rigorous...

It is not uncommon in the day to day relationships of parties in a community that a decision maker will come into the same place as a party in a current case. Casual meetings may unexpectedly occur, for example in shopping centres, churches or other meeting places. Sometimes there are public functions to which the decision maker and parties are invited, and at which they are all expected to attend. A fair minded observer would not apprehend bias just from contacts of this kind.

(my emphasis)

7. The circumstances stated to give rise to the apprehension of bias on my part are my working relationship with Mr A.I. Kalsakau at the State Law Office where I worked as Solicitor General with him as Attorney General. I served as Solicitor General from 2009. Mr A.I. Kalsakau ended his service with the State Law Office in 2015.
8. The other circumstance relied on is my recusing myself in 2020 from hearing *Public Prosecutor v Salwai* in which Mr A.I. Kalsakau was a complainant. Subsequently, I have heard matters involving Mr A.I. Kalsakau as a party including *Hymak v Shadrack*; Constitutional Case No .1761 of 2021 (judgment dated 4 June 2021) and *Weibur v Speaker of Parliament*; Election Petition Case No. 2241 of 2021 (judgment dated 6 September 2021).
9. Given the passage of time since my working relationship with Mr A.I. Kalsakau at the State Law Office ended (now some 7 years) and that I have heard cases after 2020 involving Mr A.I. Kalsakau as a party, I consider that a fair minded lay observer informed



of the facts would not perceive that the judge might not bring an impartial mind to the resolution of the questions which the Court was required to decide.

10. For the reasons given, I reject the Application.
11. I decline to order wasted costs for today. It was open to Mr Vohor pursuant to s. 38 of the Act to make the Application before trial commenced. I will order that costs are reserved.

D. Result and Decision

12. The Application for Orders that the Judge Disqualify Herself is **rejected**.
13. Costs are reserved.

DATED at Port Vila this 8th day of July 2022
BY THE COURT


Justice Viran Molisa Trief

