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

Constitutional
Case No. 24/1495 SC/CNST

BETWEEN:

WANFUTENG BANK LTD
First Applicant

CATHERINE LE BOURGEOIS
Second Applicant

JOANNA QIONG
Third Applicant

CHEUNG TAK LUI
Fourth Applicant

YUEN LUNG YUENG
Fifth Applicant

ODIN REAL ESTATE LTD
Sixth Applicant

MIGALE LTD
Seventh Applicant

CHURCHILL FINANCE LTD
Eighth Applicant

MASSON DE MORTFONTAINE LTD
Ninth Applicant

WEB ENGINEERING BUSINESS LTD
Tenth Applicant

BRIGHTON VENTURES INCORPORATED
Eleventh Applicant

LA PILEA
Twelfth Applicant

AND:

THE REPUBLIC OF VANUATU
Respondent

Date of Hearing: ***14 October 2025***

Date of Decision: ***15 October 2025***

Before: ***Hon Justice Mark O'Regan***

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU

Counsel: ***A A Jenshel and S Aron for Respondent (Strike Out Applicant)***
R E Sugden for Applicants (Strike Out Respondents)

DECISION: RULE 2.8 CONFERENCE

Introduction

1. The applicants have made a Constitutional Application pursuant to articles 6 and 53(1) of the Constitution alleging breaches of their rights under the Constitution by agencies of the respondent and those agencies' employees and seeking redress for those breaches. Those articles provide as follows:

> ***6 Enforcement of fundamental rights***
>
> *(1) Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.*
>
> *(2) The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right.*
>
> ***53 Application to Supreme Court regarding infringements of Constitution***
>
> *(1) Anyone who considers that a provision of the Constitution has been infringed in relation to him may, without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress.*

2. Under rule 2.8(a) of the Constitutional Procedures Rules 2003 (the Constitutional Rules), the Court may deal with any application to strike out the Constitutional Application. The respondent has filed an application to strike out and this was the subject of argument at the rule 2.8 conference held on 14 October 2025. This judgment deals with the strike out application.

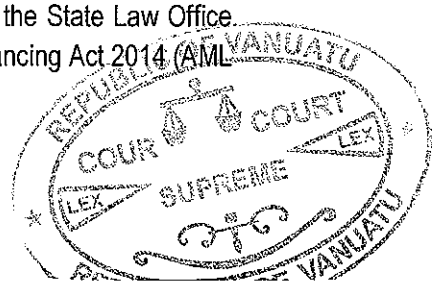
3. Under rule 2.8(g)(iii) of the Constitutional Rules, the Court may make orders about disclosure of information and documents. The applicants have filed an application for disclosure. However, for reasons I will come to, this was not resolved at the conference. There will need to be another conference to resolve this.

4. None of the other matters referred to in rule 2.8 needed to be addressed at the conference either because they were already resolved or because they were not subject to any applications by either party.

Background

5. The background is as follows.

6. The Vanuatu Financial Intelligence Unit (VFIU), a unit established within the State Law Office under section 4 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2014 (AML



Act), conducted an investigation of the first applicant, Wanfuteng Bank Limited (WBL) and, following that investigation, exercised certain powers under the AML Act against WBL and others (all of whom are applicants in the present proceeding). The applicants say the decisions made by the VFIU, certain employees of VFIU and others infringed their constitutional rights. In particular

a. WBL alleges its business was taken away from it by agencies of the respondent and employees of them, infringing its right to protection from unjust deprivation of property (Article 5(1)(j) of the Constitution)[1];

b. The second applicant alleges:

   i. her business and control over WBL as ultimate beneficial owner and in other entities has been devalued or lost, her reputation has been harmed and she has lost use of certain bank accounts as a result of decisions of agencies of the respondent and employees of them, infringing her right to protection from unjust deprivation of property (Article 5(1)(j));

   ii. her dismissal from positions in WBL as directed by the then director of the VFIU infringed her right to the protection of the law (Article 5(1)(d));

c. The third, fourth and fifth applicants, who were senior managers of WBL, allege they lost their positions or were excluded from managing WBL, were declared to be disqualified persons or to be not a fit and proper person and lost access to their bank accounts as a result of decisions of agencies of the VFIU and employees of it, infringing their right to protection from unjust deprivation of property (Article 5(1)(j)). They also allege that, as their dismissals were made without a process meeting the requirements of natural justice, their right to the protection of the law (Article 5(1)(d)) was also infringed.

7. All applicants also challenge the Anti-Money Laundering and Counter-Terrorism Financing Regulation (Amendment) Order No 153 of 2015 (creating paragraph 15B of the Anti-Money Laundering and Counter-Terrorism Financing Regulation Order No 122 of 2014), relating to the criteria for declaring a person to be not a "fit and proper" person (and therefore a "disqualified person") under the AML Act. I will refer to this as the 2015 Order. They allege the making of the 2015 Order by the (then) Prime Minister created criteria that are so open to abuse they do not meet the requirements of article 5(1)(j) and therefore constitute an abuse of the power of the Executive under article 39 that affects the applicants for the purposes of article 53(1).

The respondent's case for strike-out

8. The respondent's case for strike out, as outlined in its application, was, in a nutshell, as follows. As most of the applicants have commenced judicial review proceedings that challenge the decisions said to have infringed the applicants' constitutional rights, the constitutional application duplicates the judicial review proceedings. The respondent argues that, in those circumstances, the constitutional application is an abuse of process and should be struck out in

1 All references to "articles" are to articles of the Constitution.

its entirety. The respondent's application also contained an argument that the claim described above at [7] did not disclose an arguable breach of Article 39. However, the respondent's counsel at an earlier conference (not Mr Jenshel) indicated that the only argument to be pursued at the conference was that relating to duplication of proceedings.

9. At the conference on 14 October 2025, the respondent's recently-appointed counsel, Mr Jenshel, modified the respondent's position. He indicated the respondent did now pursue an order that the claim described above at [7] be struck out on the basis that it did not disclose an arguable breach of Article 39. He also indicated that the respondent sought, as an alternative to an order striking out the claim, an order staying the claim until after the resolution of the judicial review proceedings.

Abuse of process: alternative proceedings available

10. I received detailed written submissions from both parties about the law relating to abuse of process resulting from the making of a constitutional application in circumstances where another procedure was available or was already on foot. I am satisfied that the authorities establish that there may be circumstances where resort to a constitutional application when another form of (non-constitutional) proceeding is available or on foot will be an abuse of process.

11. In *Dinh van Than v Minister of Finance* [1997] VUCA 6, the Court of Appeal said:

> *The possibility of seeking a constitutional petition is a unique mechanism within the Republic of Vanuatu. The words of the Constitution are very wide. It is clear that it may be applied for and used even though they are alternative remedies available under the law.*

12. But the Court later added:

> *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.*

13. In *Republic of Vanuatu v Bohn* [2008] VUCA 6, the Court of Appeal endorsed *Dinh van Than*, upholding as a correct statement of the law the proposition that:

> *...a constitutional application should not become simply an alternative means of obtaining justice where under the general law good and sufficient processes are available.*

14. In *Benard v Republic of Vanuatu* [2007] VUSC 68 (*Benard*), this Court refused to strike out a constitutional application. The Court observed:

> *8 ...The fact that the applicant could bring or has brought judicial review proceedings in respect of the same matters does not bar him from bringing the matter before the Court by way of Constitutional Application. That is clear from the plain wording of Article 6(1) and was recognised by this Court in* Timakata -v- Attorney General *[1992] VUSC 9.*

15. In contrast to that, in *Nari v Republic of Vanuatu* [2015] VUSC 132, this Court observed that a Constitutional Application may be struck out if it is an abuse of process, such an abuse being the fact that alternative proceedings were available. The Court referred to various decisions of the Privy Council on appeal from Trinidad and Tobago. In particular, at [15] of the judgment

the Court referred to the approach taken by the Privy Council in *Jaroo v Attorney-General of Trinidad and Tobago* [2002] 1 AC 871. In *Jaroo*, their Lordships said:

> *39. Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure [i.e. a constitutional application], the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to [a constitutional application] will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the [constitutional application] procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse.*

16. At [16] of the judgment in *Nari*, the Court cited *Benard* for the proposition that there was jurisdiction to strike out a constitutional application. But it did not refer to the observation made by the Court in *Benard* that is reproduced above at [14], despite its apparent inconsistency with *Jaroo*. The Court in *Nari* did not, however, reach a concluded view as to whether the constitutional application in that case should be struck out because of the availability of alternative proceedings (at [19]).

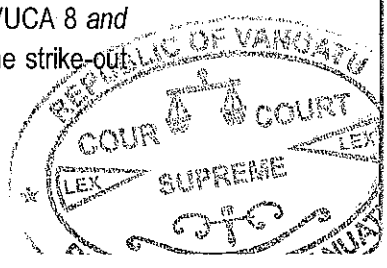
17. The analysis in *Nari* is obiter and, in any event, not binding on me. *Nari* is also inconsistent with *Benard*. As I see it, the mere fact that an applicant in a constitutional application has other proceedings on foot does not necessarily make the constitutional application an abuse of process. In that respect I agree with the observation in *Benard* referred to above at [14]. The question that must be answered is whether the underlying reasons for duplicated proceedings being treated as an abuse of process are present.

18. Those underlying reasons were succinctly summarised by Donaldson MR in *Buckland v Palmer* [1984] 1 WLR 1109 at 1114 as "the public interest in avoiding the possibility of two courts reaching inconsistent decisions on the same issue" and "the public interest in there being finality in litigation and in protecting citizens from being 'vexed' more than once by what is really the same claim". Another reason, highlighted by the Court of Appeal in *Dinh van Than*, is the public interest in ensuring that constitutional applications are not used in a manner that demeans of the importance of constitutional applications.

Strike-out criteria

19. Although rule 2.8 refers explicitly to an application to strike out, the Constitutional Rules do not contain a provision empowering the Court to strike out such an application. More generally, there is no provision in a statute or in Court rules expressly conferring on this Court the power to strike out a claim.

20. However, the Court of Appeal has made it clear that a power to strike out a civil claim exists under the Court's inherent powers (see sections 28(1)(b) and 65(1) of the Judicial Services and Courts Act [Cap 270]) and in pursuit of its obligations under rules 1.2 and 1.7 of the Civil Procedure Rules, which give the Court wide powers to ensure proceedings are determined in accordance with natural justice. See *Kalses v Le Manganèse de Vaté Ltd* [2004] VUCA 8 *and Hocten v Wang* [2021] VUCA 53 at [11]. In *Benard* at [3], this Court found that the strike-out



power applies also to constitutional applications.

21. As noted earlier, the Constitutional Rules clearly contemplate the possibility of a strike-out application being made because rule 2.8 specifically refers to the obligation of the Court to deal with any strike-out application at the rule 2.8 conference.

22. There is no dispute in this case that the Court has power to strike out the present Constitutional Application if it were to find that it was an abuse of process and I am satisfied the Court does have that power.

23. In *Hochten v Wang*, the Court of Appeal gave this guidance in relation to the exercise of the power to strike out a civil claim:

> *The jurisdiction should be exercised sparingly, and only in clear cases where the Court is satisfied that it has both the material and the assistance from the parties required to reach a definite conclusion.*

24. In *Noel v Champagne Beach Working Committee* [2006] VUCA 18, the Court of Appeal observed (also in relation to a civil claim):

> *Disputed issues of fact should be decided at trial not on an application to strike out which is normally dealt with on the basis that the facts pleaded in the claim can be proven.*

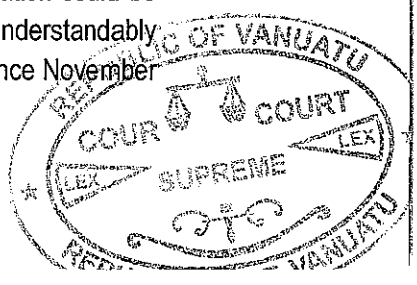
25. I consider the approach taken in those cases is also apt in the context of an application to strike out a constitutional application. This is also consistent with the approach taken by this Court in *Benard*.

Duplication?

26. I accept the respondent's argument that there are aspects of the constitutional application that duplicate the judicial review application. But there are differences in parties (WBL is not a party to the judicial review application) and a significant difference in relation to remedies, given the claim in the constitutional application for compensation, a remedy that is not available in judicial review proceedings.

27. At the conference, counsel agreed that the Court should expedite the hearing of the judicial review application and steps were put in place to allow that to occur. In my view, resolving the judicial review application will require both parties to rethink their position in relation to the constitutional application. The applicants will have a chance to amend their pleadings in the constitutional proceeding to reflect the outcome of the judicial review proceeding. I have the carriage of both proceedings and they are being managed together. In those circumstances, I do not consider that the areas of duplication are such that there is any risk of inconsistent decisions, nor do I consider that keeping the two applications on foot (but under careful management) 'vexes' the respondent. It is also clear that the subject matter of the constitutional application is significant in both legal and monetary terms and there is no suggestion the constitutional application demeans the importance of such applications.

28. Mr Jenshel suggested at the conference that a decision on the strike-out application could be deferred until after the resolution of the judicial review application. Mr Sugden understandably objected to this, given that the strike-out application has been before the Court since November



2024 and the conference to resolve the strike-out application has been scheduled for over a month. As I see it, the applicants have responded as required to the strike-out application and are entitled to a decision on it.

29. I am not satisfied that the respondent has made out a case for the striking out of the constitutional application on the basis of duplication of proceedings.

Challenge to 2015 Order

30. That leaves the respondent's application in relation to the challenge to the 2015 Order. After discussion at the conference, it was agreed that this challenge would be better addressed once the judicial review application is resolved. I give leave to the respondent to reactivate its application to strike out in relation to that aspect of the constitutional application after the judgment in the judicial review application is delivered. If the respondent wishes to do this, it must give notice to the Court and the applicants to that effect within 14 days after the delivery date of the judgment.

Stay?

31. As mentioned earlier, the respondent raised for the first time at the conference the possibility that the Court should stay the constitutional application pending the resolution of the judicial review application, rather than strike out the constitutional application. I accept that making an order for a stay may be an available remedy in a case of abuse of process resulting from duplication of proceedings. But I do not have a formal application to that effect before me and I did not expect counsel for the applicants to address this possibility on the hoof, given that he had no previous notice of this possibility being raised.

32. In any event, it is not clear to me what a stay would achieve. As indicated earlier, steps are now in train for the judicial review application to be expedited. Resolution of that application will bring a considerable degree of clarity to the parties' positions, which will no doubt require all parties to reassess their positions on the constitutional application. The parties are agreed that the focus of activity will be the judicial review application and it is not proposed that any steps will be required from the parties in relation to the constitutional application until after the judicial review case is resolved.

Disclosure application

33. The disclosure application seeks extensive disclosure from the respondent. Some of the material sought is said to be in the possession of WBL and is sought from the respondent on the basis that the respondent controls WBL through agencies such as the Reserve Bank and the VFIU. Some disclosure has already been made in the judicial review proceeding, but much more is sought in the constitutional application proceeding.

34. At the conference the parties agreed that the issues relating to disclosure in this proceeding should be parked for now, so the parties can focus on the judicial review application. I agree to that course. It will therefore be necessary to have a further conference in this proceeding after the judicial review proceeding has been resolved. I will convene a further conference after that has occurred.

Result

35. The application to strike out the constitutional application is dismissed, subject only to leave being reserved to the respondent to reactivate its application in relation to the 2015 Order point after the judicial review claim has been resolved. The oral application for a stay is also dismissed. The applicants' application for disclosure is to be addressed at a future conference.

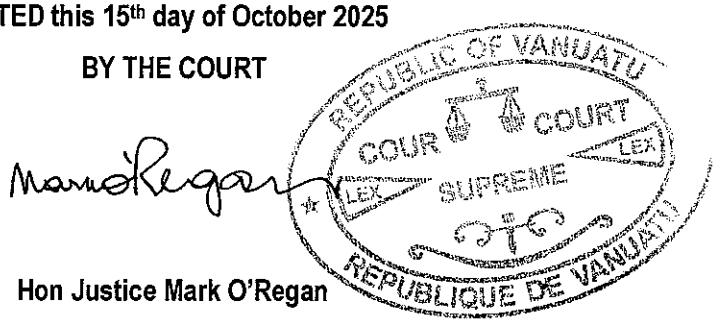
Costs

36. The applicants are entitled to costs in relation to the strike-out application. These are awarded on a standard basis and should be treated as costs in the cause.

37. The applicants also sought costs resulting from the adjournment of the conference that was scheduled to take place on 8 October at the last minute at the instigation of the respondent. If costs were a sanction for that conduct, an award would be well-merited. But they are not. I do not consider the inconvenience to the applicants' counsel is such that on normal costs principles an award should be made.

DATED this 15th day of October 2025

BY THE COURT



Hon Justice Mark O'Regan