

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

Civil Appeal
Case No. 24/1631 COA/CIVA

IN THE MATTER OF: AN APPEAL BY JOSHUA TAFURA KALSAKAU,
SEULE KALO, IARIS NAUNUN, JIMMY
NAMPAS, NORBERT SUMSUM and ALEX
STEPHEN IN THE SUPREME COURT OF THE
REPUBLIC OF VANUATU

BETWEEN: JOSHUA TAFURA KALSAKAU, SEULE KALO,
IARIS NAUNUN, JIMMY NAMPAS, NORBERT
SUMSUM and ALEX STEPHEN
Appellants

AND: THE REPUBLIC OF VANUATU
Respondent

Date of Hearing: 7 August 2024

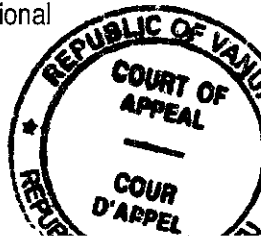
Coram: Hon. Justice J. Mansfield
Hon. Justice R. Young
Hon. Justice O. A. Saksak
Hon. Justice D. Aru
Hon. Justice V. M. Trief
Hon. Justice E. P. Goldsbrough

Counsel: S. C. Hakwa for the Appellants
A. K. Loughman for the Respondent

Date of Judgment: 16 August 2024

JUDGMENT OF THE COURT

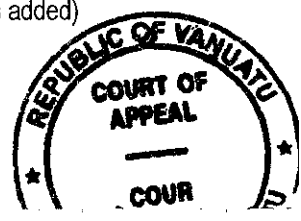
1. In December 2023, the Vanuatu Parliament enacted the Constitutional (Eighth) (Amendment) Act No. 21 of 2023 and the Political Party Registration Act No.15 of 2023. The Constitution Act was to add Article 17A and Article 17B to Article 17 of the Vanuatu Constitution. Clause 17 of the Constitution relates to the election of members of Parliament.
2. By Article 86 of the Vanuatu Constitution, an amendment to the "parliamentary system" "shall not come into effect unless it has been supported in the national referendum". The Constitution (Eighth) (Amendment) Act, given it related to the parliamentary system, was therefore referred for a national referendum to be held.



3. The referendum was to be conducted on 29 May 2024. On 8 May 2024 the appellants filed an urgent Constitutional Application. The application sought:
 - a) a declaration that the Political Parties Registration Act was unconstitutional;
 - b) a declaration that the Constitution (Eighth) (Amendment) Act was unconstitutional;
 - c) an order restraining the Electoral Commission from organising a national referendum.
4. The application was heard by the Chief Justice on 24 May 2024 and a judgment given the following day, 25 May 2024. The court made the following orders:
 - a) The application to declare that the Political Parties Registration Act was unconstitutional was adjourned there being no urgency to deal with the application within the short time available;
 - b) The application to declare that the Constitution (Eighth) (Amendment) Act was unconstitutional was refused as being premature;
 - c) The order seeking to restrain the Electoral Commission from organising a national referendum was refused.
5. The national referendum therefore proceeded on 29 May 2024 and voted in favour of the constitutional amendments.
6. The appellants appealed the decision of the Chief Justice to this court. At the hearing before this Court the appellants advised that they did not seek to challenge the decision of the Chief Justice to adjourn the challenge to the constitutionality of the Political Parties Registration Act.
7. Given the national referendum had been held the challenge to the decision of the Chief Justice to refuse the application to stay the national referendum no longer involved a live issue.
8. The appellants did however wish to challenge the Chief Justice's decision that the challenge to the Constitution (Eighth) (Amendment) Act was refused as premature.
9. In the Chief Justice's decision of May 2024, refusing the challenge as premature he said at paragraph 50:

*"In the present case, I accept the submissions of the Attorney General that the challenges of the constitutionality of the Constitution (Eighth) (Amendment) Act No. 21 of 2023 and the related submissions raised thereof, are premature as the referendum is yet to be held. Item 2 of the Constitution (Eighth) (Amendment) Act No. 21 of 2023 must have the support of the referendum for it to be effective and enforce. Before the referendum is held and supported the Constitutional Amendments in Articles 17A and 17B of the Constitution (Eighth) (Amendment) Act No. 21 of 2023, they do not affect the rights of any person and there is no breach of any rights under Article 5(1) of the Constitution **at this point in time.**"*

(emphasis added)



10. After discussion between this court and counsel for the appellants, it became apparent that the purpose of filing the appeal to challenge the dismissal of the challenge to the Constitution (Eighth) (Amendment) Act was to ensure that the appellants did not face a claim if no appeal had been filed that now that the constitutional amendments had been approved by national referendum, they had not challenged the dismissal of their constitutional application by the Chief Justice.
11. After hearing from counsel for the Republic, the Court was able to reassure the appellants that the Chief Justice's dismissal of the challenge to the Constitution (Eighth) (Amendment) Act as premature, was a decision only at a point of time prior to the referendum. As the Chief Justice made it clear in paragraph 50 (above), his conclusion that it was premature was because the referendum had not been held and therefore at that time, the proposed constitutional amendments in Article 17A and 17B had not come into force. And so at that time of the Chief Justice's decision, there was no effect on the rights of any persons and no breach of any rights under the Constitution, because the constitutional amendments had not become law. Before they could become the law of Vanuatu, approval by national referendum was required. If the national referendum did not approve Articles 17A and 17B, then they would not become law and no rights would be infringed. If the proposed Articles became law as a result of the vote in the national referendum, then at that point in time a challenge to the constitutionality of the Constitution (Eighth) (Amendment) Act could be made.
12. Given the constitutional amendments in Articles 17A and 17B have been approved in a national referendum and are part of the Constitution of Vanuatu, it is now open to the appellants, should they wish to do so, to challenge the constitutionality of those provisions. Having understood that was the position, confirmed by counsel for the Republic, counsel for the appellants accepted that on the basis of that assurance, this appeal could be dismissed.
13. Given the assurance given by counsel for the Republic of Vanuatu and given the view this Court expressed in this decision the appeal is dismissed.
14. No costs were sought by the Republic and accordingly we order no costs.

DATED at Port Vila, this 16th day of August, 2024

BY THE COURT



Hon. Justice John Mansfield

