

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

Civil Case No.195 of 2011

BETWEEN: HON. MARCELLINO PIPITE
HON. SAMSON SAMSEN
HON. DONNA BROWNEY
Applicants

AND: HON. MAXIME CARLOT KORMAN
First Respondent

AND: HON. JOSSIE MASMAS
Second Respondent

Coram: Justice D. V. Fatiaki

Counsel: Mr. R. T. Kapapa for the Applicants
Mr. E. I. Nalyal for the Respondents

Date of Judgment: 5 April 2012

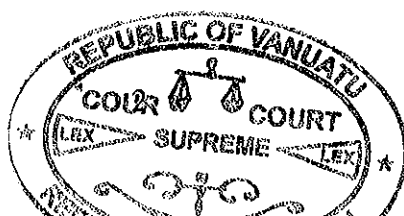
RULING

1. The claimants are sitting members of Parliament of the **Santo Rural constituency** who successfully stood for election under the **Vanuatu Republican Party (VRP)** banner during the last general elections in 2008. The first-named claimant is the current **Minister of Education**.
2. By letter dated **12 September 2011** written on the **VRP** letterhead and signed by the respondents in their respective capacities as **President** and **Secretary General** of the **VRP**, the claimants were terminated as members of the **VRP** for reasons outlined in the letter. These were for supporting a motion for the removal of the first respondent as Speaker of Parliament and for supporting a motion for the suspension of the first respondent as a member of Parliament. Both motions are notorious public facts that received wide publicity and were the subject matter of court proceedings by the first respondent challenging the motions.
3. On **12 October 2011** the claimants issued a Supreme Court claim seeking the following orders:

“(1) An order that the termination of the claimants by the defendants from the VRP is unlawful, void and of no effect;



- (2) *An order that the VRP interim National Executive and the first respondent convene and call the VRP National Congress no later than 9 December 2011 pursuant to Resolution 28 and the Constitution of VRP; and*
- (3) *An order that the National Congress of the VRP meet forthwith to elect its new National Executive pursuant to Order 2."*
4. At the same time the claimants filed an urgent application seeking a stay of the termination decision and an order restraining any further attempts to remove the claimants as members and/or office bearers of **VRP**. The application was supported by a sworn statement of the second named claimant and his personal undertaking as to damages.
5. On **13 October 2011** the claim and urgent application was served on the first respondent at his home and also on the second respondent at his home at **Ohlen** area, **Port Vila**. On the same day Mr. Nalyal entered a notice of beginning to act for the first respondent.
6. On **11 November 2011** the Court upon hearing counsel for the claimants and the first respondent granted the claimant's application for a stay of their termination letters and an interim injunction in the following terms:
- "Until further order the claimants, their servants, agents and assignees including other executive members of the VRP are restrained from any further attempt to remove the claimants as members of VRP and/or remove or replace the claimants as executive members of VRP".*
7. The Court also ordered the respondents to file and serve a defence by **18 November 2011**. Noticeable by its absence is any order regarding the holding of a **VRP National Congress**.
8. On the next conference date, **7 December 2011**, the claimants filed a **Request for Default Judgment** on the grounds that the respondents had not filed any response or defence within the times allowed in the Civil Procedure Rules.
9. During the conference it was pointed out to counsel for the claimants that it would not be possible to enter a default judgment on the claim as framed, which merely sought declaratory and mandatory orders more properly claimed in a claim for judicial review. [*see: **Rule 17.9 of the Civil Procedure Rules (CPR)***]. That rule also clearly indicates that the orders sought are discretionary namely, which *"the court may make and as such are not amendable to the default judgment processes provided in the CPR*



which envisages either a claim for a fixed amount [**Rule 9.2**] or a claim for damages to be assessed [**Rule 9.3 and 9.4**].

10. As was recently said by the Court of Appeal in setting aside a default judgment in **Taftumol v. Lin** [2011] VUCA 30 at paragraph 58:

"[58] The default order on its face had been obtained in contravention of Part 9 of the Civil Procedure Rules No. 49 of 2002. Those rules make provision for a judgment in default of a defence on a claim for a fixed money amount, or on a claim for damages, in which event the Court has power to enter judgment for damages to be assessed. Part 9 makes no provision for entering judgment in default on claims of any other kind. Part 9 makes provision for obtaining a summary judgment, but an application for that purpose would require the claimant to file affidavit evidence sufficient to establish the claimant's entitlement to judgment."

(my underlining)

11. In this regard too the utility of the order(s) sought, the delay in bringing the proceedings, and the behaviour of the parties including whether there are viable alternative orders are factors which might influence the Court to grant or refuse the orders sought in the exercise of its unfettered discretion.
12. On **8 December 2011** the claimants filed an unusual application under **Rule 18.10 (2)** "*to convert the Supreme Court claim into a judicial review claim*" based upon their acceptance that default judgment was inappropriate to the claim as filed and the continued failure of the respondents to actively participate in the proceedings or comply with the Court's orders that they file responses/defences and sworn statements by **25 November 2011**. Counsel for the respondents who was present sought time to respond to the claimants' conversion application.
13. By urgent letter dated **12 March 2012** the claimants requested a written judgment on the substantive claim on the basis that the claim is uncontested and the undisputed sworn statements filed by the claimants in support and, presumably, on the basis that no trial or hearing is necessary in the circumstances. The letter also alleges (without proof) that the respondents are "*... trying to organize a party Congress in Vila contrary to the oral judgment of the Court*" (whatever that may mean).
14. Having considered the matter I am satisfied that this Court should proceed to trial and final judgment. I cannot accept the unsatisfactory circumstance that a party can thwart the course of justice or the delivery of a judgment merely by refusing to participate in court proceedings that have been properly served, and, in defiance of the **Rules** and the court's order that a defence be filed.



15. Accordingly I fix this matter for hearing (formal proof) on **16 April 2012 at 2.00 p.m. at Dumbea.**
16. By way of final direction I also order the claimants to file and serve by **11 April 2012** a sworn statement in support of their allegation that the respondents are organizing a **National Congress** of the **VRP** at a place other than in accordance with **Resolution 28** of the National Congress held at the **Cathedral at Port Vila** between the **21 – 26 May 2006**. In this regard it should be pointed out that the year for the holding of the **National Congress** envisaged in the said **Resolution** is "2008" which has long expired.

DATED at Port Vila, this 5th day of April, 2012.

BY THE COURT



D. V. FATIAKI
Judge.