

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

Judicial Review Case No. 4 of 2014

**IN THE MATTER OF THE COMMISSION OF  
ENQUIRY REPORT DATED 17 OCTOBER,  
2013 IN RESPECT OF FORMER SOUTH  
PACIFIC FISHING COMPANY LIMITED  
(SPFC) EMPLOYEES' CLAIM**

**AND IN THE MATTER OF THE  
HONOURABLE MOANA CARCASSES  
KATOKAI KALOSIL(MP)PRIME MINISTER'S  
(FORMER) DECISION CONTAINED IN THE  
LETTER DATED 23 JANUARY 2014**

**BETWEEN: REMY KUNUAN**  
Claimant

**AND: HON. MOANA CARCASSES  
KALOSIL**  
First Defendant

**AND: REPUBLIC OF VANUATU**  
Second Defendant

***Coram: Mr. Justice Oliver A. Saksak***

***Counsel: George F.Boar for Claimants  
Lennon Huri for the Defendants***

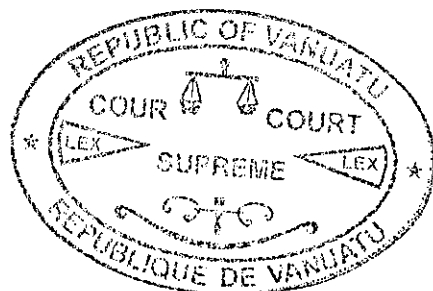
***Date of Hearing: 28<sup>th</sup> July 2014***

***Date of Decision: 22<sup>nd</sup> September 2014***

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**JUDGMENT**

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## Introduction

1. This is a claim for Judicial review filed by Remy Kunuan in his capacity as Administrator of Vanuatu Fishermen Cooperative Marketing Consumer Society Limited (VFCMCSL). He represents 1, 131 former employees of the South Pacific Fishing Company ( SPFC).
2. At the very outset the Court must make it plain clear that the Court will not be giving judgment as to-
  - a. **Whether the Republic is liable to pay the 1,131 employees represented, and**
  - b. **Whether they are entitled to the amount of One Billion, Five Hundred Ten Million, Four Hundred Seventy Nine Thousand and Four Hundred Fifty Six Vatu (VT 1.510.479.456).**

This clarification must be made because there appears to be some misunderstanding and/or expectation that this is what the Court is going to do.

### **3. Background Facts**

- 3.1 This application arose as a result of a Commission of Inquiry (Commission) appointed by the then Minister of Justice and Social welfare in August 2013. The Commission had the following Terms of Reference:

#### **1. Background**

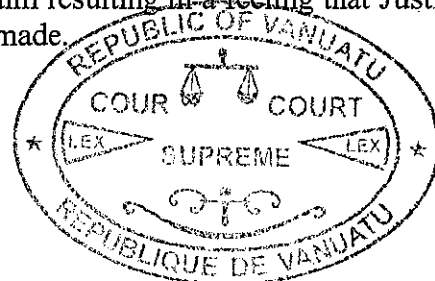
In 1998/1999, Vanuatu Financial Services Commission (VFSC) wound up the South Pacific Fishing Company, (SPFC) and put the company into receivership. Mr Julian Ala was appointed Liquidator, and together with the Government Business unit,( GBU) worked together to liquidate the company. One of the issue that, the Liquidator and GBU dealt with was settlement of the outstanding debts including outstanding Salaries of the fisherman.

The Government through the Ministry of Finance have paid numerous payments to the fisherman's association including transfer of Palekula lease to Fisherman's Association, which led to a deed of release which was signed between Vangov and Fisherman's Association on 30<sup>th</sup> May 2000.

Despite these, claims are still coming in from various groupings who claim to represent the fishermen association.

It has also throughout the years, resulted in the burning of the Palekula Fishing facilities.

It also transpired through various preliminary discussions held that various different matters are involved in the claim resulting in a feeling that Justice was not done and that favouritism was made.



As part of these matters, the SPFC issues, the general feeling of a lot of fishermen who feel that after having contributed to the Country so many years in very hard conditions of work they didn't gain any recognition or consideration, are contributing to a negative environment developing the idea of spoliation of the fishermen.

On top of that during election year 2012, a lot of politicians promised, in exchange of fishermen votes, to compensate them and sometimes with extraordinary amounts.

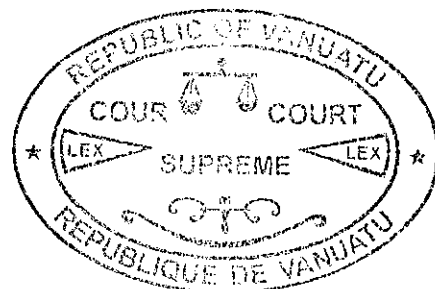
## **2. Aims of Commission**

- a. The aim of the commission is to enquire to know if there are some valid claims that could exist for the fishermen and to look into them and the proper way to resolve them if any. Resolution proposed, if any, must first involve a true reconstructive process in accordance with our customs, before any other consideration.

## **3. Objectives of the Commission**

The Objectives of the Commission are:-

- I. The first objective is to find out who is ( or are) the proper legal representative of the fishermen.
- II. The second objective of the Commission is to establish, whether there are any existing genuine or legitimate claims, wether moral, in cash or in kind, from the fishermen themselves and their representatives.
- III. The third objective is to inquire into how many and which compensations the government has paid to the fishermen's claims.
- IV. The fourth objective is to establish how these compensations were given and if they are processed and made in accordance with our customs.
- V. The fifth objective is to establish how these compensations were used and if they infringed rights of some fishermen in the use that was made of them.
- VI. The sixth objective is to establish if the Government had some responsibilities or incurred some liabilities towards the fishermen at the time of the compensations, born in the manner of giving.
- VII. The seventh objective is to recommend a process that will tell what is just and fair and will, in accordance with our customs, propose a settlement of differences that will cause Justice done and Justice seen to be done. This process will make sure that the matter will be closed for ever.



#### 4. Report

The Commission will provide a full report on the findings and recommendations of this inquiry to the Minister of Justice & Community Services, who will then consider the report and table a recommendation to the Council of Ministers.”

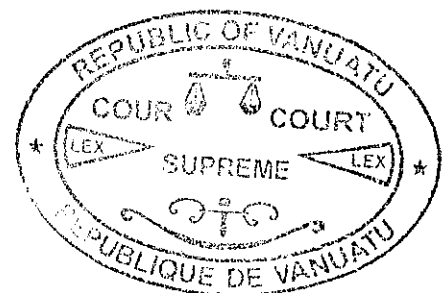
- 3.2 The Commission produced a Report known as the Tabisal Report which concluded, among others that:

“Nevertheless, the Commission concluded that the Fishermen’s claim for unpaid employment benefits is genuine and should be settled.

This Commission has identified a total of 1.131 fishermen whom employment benefits remained claimed against the Government. The total claim constitutes an amount of One Billion, Five Hundred Ten Million, Four Hundred and Seventy Nine Thousand, Four Hundred Fifty Six Vatu (VT 1.510.479.456)”

#### 3.3 The Tabisal Report recommended that:

1. Engage in direct negotiations with VNWU that should cover all the interest of all the employees of former SPFC, in a view to finally settle the existing dispute in accordance to our custom and give consideration to the families of the employees of SPFC who contributed to the New State of Vanuatu.
2. Negotiations should not emphasize on the paper vatu only but on who at ( sic) compensation really the fishermen could rely for recognition of their part in the State building process whereby both parties would reach a win/win situation.
3. The Government has a moral obligation to settle the Fishermen’s outstanding claims directly with each fisherman on their next-of-kin whenever appropriate.
4. The next Council of Ministers should consider this Report as a matter of urgency”.



## **Decision And Actions Under Challenge**

4. Following the Tabisal Report, the then Prime Minister, Moana Carcasses Kalosil wrote the following letter to the Claimant on 23<sup>rd</sup> January 2014:

*“Mr Remy Kuanuan  
President  
Fishermen Association  
Port Vila*

*Dear Mr Kuanuan,*

### **FORMER SPFC FISHERMEN CLAIMS**

*I wish to confirm that the current Government recognizes that it has an obligation to look into and settle claims put to it by former SPFC Fisherman.*

*As you are aware a Commission of Inquiry was appointed to look into this matter. While the commission has completed its task the government needs to be assured that all the claims are legitimate and accorded equal treatment considering the different types of contracts that your members entered into.*

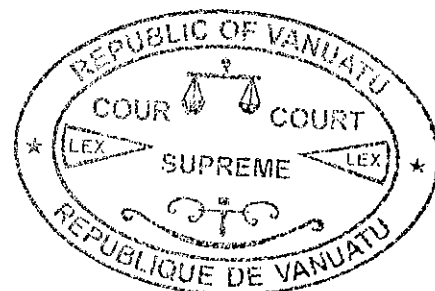
*The government is therefore in the process of establishing a High level Committee to look into each individual claim and advise the government on its legal obligation according to the Laws of the Republic of Vanuatu. For your information, this High Level Committee will not look into your claims only but other claims that are before the Vanuatu Government of its consideration. Once this High Level Committee has been established and has completed its work the Council of Ministers will take a decision on the best course of action to take to settle the outstanding claims.*

*The current government acknowledges that it has taken sometime to reach the stage we are at and we applaud you for the patience that you have. We beg your indulgence to give us a bit more time to ensure that we can come back to you with an offer that is acceptable to you and consistent with the laws of our country.*

*Thank you for your understanding.*

*(Signed)*

**Hon Moana Carcasses Katokai Kalosil (MP)”**



## Claims

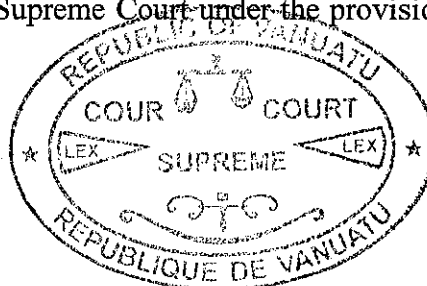
5. This is the action and decision the Claimant seeks to have judicially reviewed by this Court on the basis, as alleged that-
- a) It was made in breach of natural justice,
  - b) It was made in breach of the Claimant's legitimate expectation as to payments of their outstanding salaries,
  - c) The Tabisal Report and Recommendations were conclusive and binding and should have been accepted and complied with,
  - d) It was irregular in law,
  - e) The First and Second Defendants took into account irrelevant and/or extraneous matters.

## Reliefs Sought

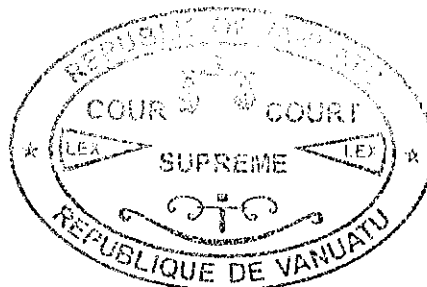
6. The Claimant seeks the following:
1. An Order prohibiting the First and Second Defendants from establishing the High Level Committee referred to in the First Defendant's determination contained in the letter dated 23<sup>rd</sup> January 2014.
  2. A quashing Order that the decision of the First and Second Defendants contained in the letter dated 23<sup>rd</sup> January 2014 be brought up and quashed.
  3. A mandatory Order directory the first and Second Defendants to comply with the conclusion of the Tabisal Report published on 17<sup>th</sup> October 2013 which found the Claimant's unpaid employment benefit as genuine and should be settled.
  4. Costs.

## Agreed Facts and Issues

7. Counsel for the Claimant and for the Defendant filed by consent on 11<sup>th</sup> August 2014 the following agreed facts-
1. The South Pacific Fishing company ('SPFC') was incorporated in 1957 by the British Resident Commissioner and after independence, the ownership of SPFC was transferred to the Government of Vanuatu which become 100% shareholder of the said company.
  2. On 12 April 1999, Telecom Vanuatu being the petitioner/ creditor of SPFC filed in Court in the matter of Companies Act [CAP 191] and in the matter of South Pacific Fishing Company a company registered in Vanuatu, Company Case No. 06 OF 1999, its petition seeking an order of the Court to wind up SPFC and on 17 August 1999, the Court in the above proceeding made its judgment and ordered, inter alia, that the SPFC Limited is wound up by the Supreme Court under the provisions of the Companies Act [CAP 191].



3. On 5 May 2000 the NASIONAL FISAMAN Cooperative Marketing & Consumer Society Limited ('NFCMCSL') was registered with the Department of Cooperatives and Ni-Vanuatu Business as a cooperative society.
4. On 30 May 2000, leasehold title no. 04/2644/001 between the SPFC as the lessee and James Toura, Barnabas Visi and Moses Moli as the lessors ('lease title') was transferred and registered by the Government of Vanuatu from SPFC to NFCMCSL as lessee.
5. On 9 February 2006, the Department of Lands registered the transfer of the lease title from NFCMCSL to Jed Land Holdings & Investments Limited.
6. On 21 December 2006, the Vanuatu Financial Services Commission ( VFSC), a statutory entity separate from the Vanuatu Government which can be sued and be sued in its own name and the official receiver of the SPFC as appointed by the Court on 16 April 1999 paid VT 10 million to the NFCMCSL.
7. On 15 October 2012, The Council of Ministers ('CoM') approved and directed in its decision no. 139 of 2012, the Minister of Justice and Community Services to appoint a *Commission of Inquiry Act* [ CAP 85] (' *Commission of Inquiry Act*') to inquire into the claims of the Fisherman's Association.
8. On 17 January 2013, the Minister of Justice and Community Services Hon. Laken Thomas appointed a Commission of Inquiry into the claims of the Fisherman's Association pursuant to subsections 1(1) and (2) of the *Commissions of Inquiry Act* [CAP 85] ('the Act').
9. On 11 June 2013, the appointed Commission issued a report of its proceeding and of the result of its inquiry to the Minister responsible for Justice and Community Services recording the reasons leading to its conclusion pursuant to section 11 of the Act ('Thompson Report').
10. On the 8<sup>th</sup> August 2013 the Minister of Justice and Community Services Hon. Jonas James appointed another Commission of Inquiry to inquire into the claims of the Fishermen's Association pursuant to subsections 1(1) and section 5 of the Act.
11. On 17<sup>th</sup> October 2013 the Commission of Inquiry issued a report of its proceeding and of the result of its inquiry to the Minister responsible for Justice and Community services recording the reasons leading to its conclusion pursuant to section 11 of the Act (' Tabisal Report').
12. On 6 January 2014, the Director of the Department of Cooperatives and Ni-Vanuatu Business cancelled the registration of the NFCMCSL.
13. On 23 January 2014, the First Defendant wrote a letter to the Claimant making reference to the Tabisal Report and informed him of the Government's intention of appointing a high level committee to look into the Fishermen's claims."



**8. The agreed issues are:-**

1. Whether the Claimant has locus standi to bring this action?
2. Whether the First and Second Defendant's decision contained in the First Defendant's letter dated 23<sup>rd</sup> January 2014 was made in breach of natural justice?
3. Whether the First and Second Defendants decision contained in the First Defendant's letter dated 23<sup>rd</sup> January 2014 was erroneous in law?
4. Whether the First and Second Defendant's took into account irrelevant considerations in making the decision contained in the First Defendant's letter dated 23<sup>rd</sup> January 2014?

**Discussions**

- 9.1 The first issue for determination concerns standing of Remy Kuanuan as administrator and representative of the 1.131 former employees of SPFC.
- 9.2 Mr Boar submits that this issue should be answered in the affirmative. Counsel relies on Rule 3.12 of the Civil Procedures Rules No. 49.2002 and the cases of **Gidley V. Mele** [2007] VUCA 7 and **Carmin V. Esanda France Finance** [1995] 69 ALJR 206.
- 9.3 The State submits on the other hand that the Claimant has no standing because-
- a) The VFCMCSL was deregistered and ceased to exist as at 6<sup>th</sup> January 2014, and
  - b) The Claimant filed this proceeding later on 27<sup>th</sup> February 2014.
- 9.4 The State's submissions are untenable and are rejected. The statement of Sowany Joseph filed by the State provides evidence not only of the deregistration of VFCMSCL but also the appointment of Remy Kunuan as the administrator dated 14<sup>th</sup> October 2011. See Annexure "SJ5". Further the deponent annexes as "SJ6" the authorisation of the Claimant as administrator by the members of the VFCMSCL. He provides no evidence that (a) the appointment has been revoked by him and (b) that the members authorisation has been revoked. For those reasons, I accept Mr Boar's submissions on this issue that the Claimant has standing. Therefore the first issue is answered in the affirmative.
- 10.1 The Second issue is whether the decision of the First Defendant contained in the letter dated 23<sup>rd</sup> January 2014 was made in breach of natural justice.
- 10.2 Mr Boar makes very lengthy submissions in relation to this issue and refers to numerous case authorities. Those cases include **Solomon v. A. Solomon & Co. Ltd** [ 1897] AC 22 HL, **Jones v.Lipman** [ 1962] All ER 442, **Bryne v. kinematograph Renter Society Ltd** ( 1958) 2 All ER 579, **Bramwell v.Repatriation Commission** ( 1999) 158 ALR 623, **Asbridge Investment Ltd v.Minister of Housing and Local Government** ( 1965) 1 WLR 1320, **R.V.Gaming Board**



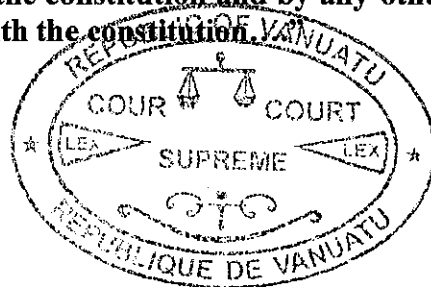


for Great Batain ( 1970) 2QB 417at 430, AG v. Ryan ( 1980) AC 78 and R v. Commission of Racial Equality Exp Hillington ( 1982) AC 779.

- 10.3 I have no difficulty with the principles of common law enaciated in those list of cases. In my considered view those cases would support the Claimant's case on the merits of their substantial claims.
- 10.4 Natural justice of the Claimant's claims commenced from and with the appointment by the Minister of Justice of the Commission of Inquiry pursuant to the *Commission of Inquiry Act* [Cap 85].Following that Inquiry, the Commission published a Report ( Tabisal Report). Infact there were 2 inquiries the first was the Thompson Inquiry which published the Thompson Report but this fell short of the expectation of the State hence the appointment of the Second Commission of Inquiry. With those Commissions, the Claimants have been given opportunity twice on their one set of claims. And the process is not yet complete.
- 10.5 When the Commission carried out its enquiries it had found that the Claimants do have some valid claims and made some recommendations. The Commission had fulfilled its term of reference No.2. When the Commission published and submitted its Report and recommendations to the Minister, it had fulfilled its term of reference no.4. The Minister then tabled the Report to the Council of Ministers on 4<sup>th</sup> November 2013. See Annexure "**RIC8**". After that the First Defendant as Prime Minister at the time wrote the letter dated 23<sup>rd</sup> January 2014. This letter is clear. Paragraph one confirms and recognises that the State "**has an obligation to look into and settle the claims put to it by former SPFC fisherman**". Paragraph two acknowledges that the Commission has completed its task, however it makes it clear that the State "**needs to be assured that all claims are legitimate and accorded equal treatment**" because of the different types of contracts involved. This the Commission has not done as it requires further necessary steps to be taken, hence the decision to establish a High Level Committee (*Paragraph three*), after which the matter would return to the Council of Ministers for further decision. The establishment of the High Level Committee, if done would fulfil objective ( vii) of the *Commission of Inquiry*. Paragraph four acknowledges the delays taken to resolve this issue and commends the Claimant for their patience but, seeks further time for other necessary steps to be taken and done so the State can make "**... an offer that is acceptable... and consistent with the laws of our country**"
- 10.6 There is no suggestion in that letter about any denial of any opportunity to be heard further in relation to their claims. In fact the opposite can be clearly implied by the establishing of the High Level Committee that their task would involve calling the Claimants back into meetings to clarify their contracts and claims further. But that would take time.
- 10.7 Therefore when he First Defendant as Prime Minister at the time wrote the letter, he was exercising executive power vested in him by section 4(2) of the Government Act [Cap 243] which states-

**" Prime Minister**

- (2) The executive power of the people of the Republic of Vanuatu is vested in the Prime Minister and the council and shall be exercised as provided for by the constitution and by any other enactment not inconsistent with the constitution.**



10.8 Further the then the Prime Minister was exercising his leadership role placed on him by section 5 (a) of the Government Act which states-

**“5. Leadership role of Prime Minister**

**The Prime Minister will have principle responsibility for:**

**(a) Strategic policy- Planning and significant administrative decisions”.**

10.9 When the Council of Ministers deferred decision on the Report of the Commission on 4<sup>th</sup> November 2013, the Council was taking collective responsibility pursuant to section 6 of the Government Act which states-

**“ 6. Council of Ministers**

**(1) The Council shall be the paramount institution of the Executive responsible for the exercise of executive power subject to the constitution and any other enactment not inconsistent with the Constitution**

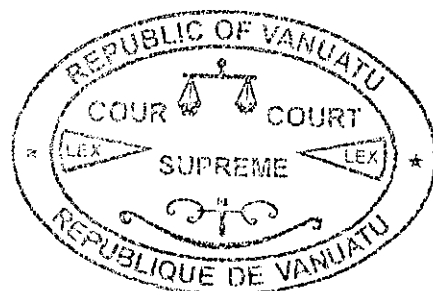
**(2) The collective responsibility of the Council is to assist in:**

- a) The strategic policy planning of significant matters affecting Vanuatu,**
- b) Making significant administration decision”.**

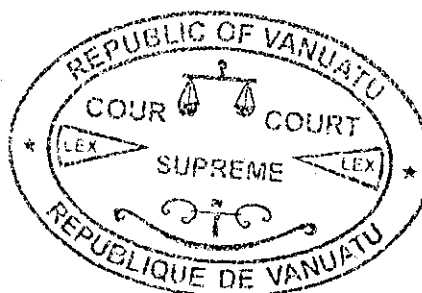
10.10 The decision of the then Prime Minister to establish a High Level Committee amounted to a **“strategic policy planning”** and he was not obliged to give the Claimants the opportunity to be heard prior to making that decision. The amount of the claims is so substantial that to accept it on the basis of the Tabisal Report without making any further assessments and ascertainment would be irresponsible on the part of the executive arm of government and would be contrary to public policies or public interest of Vanuatu.

11. For those reasons the Court answers this issue in the negative. The Court rejects all the submissions and arguments of the Claimant and accepts the submissions by the State.

12.1 On the third issue on Whether the decisions of the first and Second Defendants was erroneous in law, Mr Boar submits that the *Commission of Inquiry* was a quasi-judicial body and as such its decision was binding on the State. Counsel relied on the case of **R. v. Fulham Rent Tribunal.Exp. Zerek** (1951) 2K B1. This case does not assist the Claimant’s case. And it is erroneous to submit that the defendants were and are bound by the findings and recommendations of the Tabisal Report.



- 12.2 There is a distinction between tribunals and inquiries. Tribunals are concerned with finding facts and applying legal rules to those facts. Inquiries on the other hand, while they are also concerned with facts finding, they are directed towards making recommendations on questions of policy. This is based on the difference between judicial and administrative power. Inquiries are part of the procedure for ensuring that the administrative power is fairly and reasonably exercised, so that they have the same purpose as the legal principles of natural justice. Many statutes themselves provide for inquiries or hearings and lay down a mandatory procedure for dealing with objections. But the statutory procedure is usually only a framework, within which the principles of natural justice operate to fill in details and ensure that fair procedures are followed.
- 12.3 In a vast majority of cases which statutory inquiry procedures are employed the ultimate decision is one of policy. It is essential for such decisions that the technique of inquiry has been developed. Should the Prime Minister confirm the recommendation, or should he refuse it? The answer will depend on what he decides is expedient in the public interest. They cannot be found in applying rules of law. When the then Prime Minister wrote to the Claimant on 23<sup>rd</sup> January 2014, he had made his decision expediently in the public interest. As such that decision was not erroneous. This issue is therefore answered in the negative.
- 13.1 The fourth issue of whether the first and Second Defendants took into account irrelevant considerations, Mr Boar submits the Claimants had legitimate expectation that the defendants would act reasonably and within the ambit of natural justice. Counsel relies on the case of Re-Westminster City Council (1986) AC668 and Annetts v. Mccann (1991) 97 ALR 177. Counsel further relies on Article 93 of the Constitution. These cases do not assist the Claimants. Article 93 of the Constitution provides for Electoral system and is not applicable.
- 13.2 The relevant Vanuatu case is that of Malifa v. Attorney General [1999] VUSC 43 that states the correct position of legitimate expectation as follows:-  
**“It would seem that legitimate expectation would only apply where the person, in respect of whom an administration decision is taken, possesses a right or obligation recognised by law”.**  
 That position appears to be consistent with the position as stated by Lord Diplock in Council of Civil Service Union v. Minister of Civil Service [1985] AC 374.
- 13.3 The substantial claims of the Claimants are based on different contracts. There are issues of-
- a) Deaths of Claimants and next-of- kin
  - b) Different dates of contracts,
  - c) Amounts, and
  - d) Time limitations



Only a Court of law can determine these issues based on relevant admissible evidence. Those rights or obligations have not yet been decided by the Courts. The Claimants have not taken any steps to file any proceedings to have those rights determined. They cannot simply rely on the Tabisal Report, as the Report has not established any legal rights or obligations which can be enforceable in law. Only a Court of law can do that. The Report only contains recommendations which are subject to public policy considerations and decisions. The case of LMC v. Garu (1999) VUCA8 is distinguished and is not applicable to this case.

- 13.4 The Court rejects the submissions and arguments by the Claimant and accepts the submissions of the State to answer the fourth issue in the negative.

### **Conclusion**

- 14 The Claimant's claim is misconceived and is therefore dismissed in its entirety. All Orders and reliefs sought are declined.
- 15 There will be no order as to costs as costs lie where they fall. Each party will pay their own costs.

**DATED at Port Vila this 22<sup>nd</sup> day of September 2014**

**BY THE COURT**



**OLIVER.A.SAKSAK**

**Judge**

