IN THE SUPREME COURT
REPUBLIC OF NAURU

Civil Suit No.8 of 2013

Kieran Keke MP, Roland Kun MP, Landon Deireregea MP, Godfrey Thoma MP, Marcus Stephen MP, Mathew Batsiua MP, and Frederick Pitcher MP.
Plaintiffs

V

The Hon Ludwig Scotty MP
1st Defendant

Returning Officer under the Electoral Act 1965
2nd Defendant

Secretary for Justice
3rd Defendant

JUDGE:	Eames, C.J.
DATE OF HEARING:	12, 14 March 2013
DATE OF JUDGMENT:	15 March 2013
CASE MAY BE CITED AS:	Keke and Others v Scotty and Others (No. 2).
MEDIUM NEUTRAL CITATION:	[2013] NRSC 3

CATCHWORDS:

Constitution – Unlawful action of Speaker in breach of Art 41(2) and Art 41(4) to refuse opportunity for Members of Parliament to debate advice of President to dissolve Parliament – Speaker purports to issue writ for general election without re-calling Parliament so as to comply with constitutional requirements of Art 41 –

Judicial Review - Application for relief by way of mandatory injunctions and declarations to enforce the Court's ruling as to the requirements imposed on the Speaker by Art 41 – Whether Court has enforcement power.

Contempt of Court - Whether breach of an undertaking to the Court – Contempt not established.

APPEARANCES:

For the Plaintiff	Mr R Kun (Pleader)

For the 1st Defendant Ms K Le Roy

For the 2nd Defendant Mr S Bliim

For the 3rd Defendant Mr S Bliim

CHIEF JUSTICE:

1 In my judgment delivered on 6 March 20131 I held that the Speaker of Parliament, the Hon Ludwig Scotty MP, had acted in breach of Art 41 of the Constitution of Nauru in denying Members of Parliament on 1 March 2013 the opportunity to debate the advice from the President to dissolve the House. As I held, the Constitution required that before the Speaker could act on the advice and dissolve Parliament he must first have given the Members the opportunity to debate a motion of no confidence moved against the President and Ministers pursuant to Art 24.

2 Before submissions commenced, the Speaker undertook, through counsel, that he: "Will abide by the decision of the Court in respect of any declaration, and that he will act in accordance with that decision". After hearing argument from counsel for the parties, I made a declaration that the Speaker had failed to follow the steps which the Constitution obliged him to take before he could dissolve the Parliament. I gave no order directing the Speaker to take or refrain from taking any action in consequence of my ruling. The plaintiffs did not request that I make any mandatory order. They say that no order was sought because they understood the undertaking to mean that the Speaker would convene a sitting of Parliament should I have ruled, as I did, that the Speaker acted unlawfully.

3 That expectation of the Plaintiffs was understandable; indeed, I also anticipated that that would be the course adopted by the Speaker. Nonetheless, there being no mandatory order sought by the plaintiffs, it was left to the Speaker to decide what action should be taken in light of my ruling that he had acted in breach of the Constitution. That approach recognised the independence and dignity of the Speaker's office.

4 The Speaker has not chosen to recall Parliament so as to comply with what I have held are the requirements of Art 41, namely, that Members be given the opportunity to debate the advice of the President to dissolve Parliament. His counsel, Ms Le Roy, advised me that the Speaker was not acting in wilful disregard of my ruling, but he believed that he lacked the power to convene a sitting of the House in order for that debate to be held. I will refer to this question, later.

5 Instead of calling a new sitting of Parliament, the Speaker on 8 March 2013, "by Authority Extraordinary", gave notice2 purporting to exercise his powers pursuant to Article 41(4) of the *Constitution* to dissolve the Twentieth Parliament. In addition, on 8 March 2013 the Speaker, by notice in the Gazette3, issued a writ under s.15(1) of the *Electoral Act* 1965 directing the Returning Officer to conduct an election on 6 April 2013. Finally, pursuant to Article 39 of the Constitution, the Speaker published notice4 of a General Election, to be held on 6 April 2013.

6 The plaintiffs now seek one or more orders seeking relief by certiorari, declarations and injunctions, thereby proclaiming the actions of the Speaker in dissolving Parliament to be void as beyond power, setting aside the writ for an election, seeking orders to compel the Returning Officer to cease taking any action towards a General Election, and directing the Speaker to convene a new

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[1] *Kieran Keke MP and Others v Ludwig Scotty MP and Others* [2013] NRSC 1

[2] GN No 174/2013, published in Government Gazette No 37 of 8 March 2013.

[3] GN No 175/2013, published in Government Gazette No 37 of 8 March 2013

[4] GN No 176/2013, published in Government Gazette No 37 of 8 March 2013

sitting of Parliament.

7 Before addressing the question whether I am empowered to, and should, make any of the orders sought by the plaintiffs, I point out that my role is to interpret and protect the constitutional rights of people under the Constitution. The Court must interpret the Constitution without concern for the personalities involved, or the impact of my ruling on any individual. I am not concerned with the political consequences of my interpretation of the Constitution. In performing its role, the Court at all times recognises the importance of maintaining the separation of powers of the State as between the Legislature, the Executive and the Judiciary.

8 In protecting the separation of powers, the Court acknowledges the sovereignty and privileges of Parliament and the important role of the independent Speaker of the House. The Court must at all times exercise care and restraint to ensure that the role of the Court does not improperly intrude on those privileges of Parliament, just as Parliament and the Executive may not interfere with the independence of the judiciary or deny its original jurisdiction under Art 54(1) to determine any question involving a provision of the Constitution.

9 The question which now arises in this case, in the context of an inter-partes action brought by Writ, is whether the exclusive right of the Supreme Court to determine any question involving interpretation of the Constitution extends to the right to grant mandatory relief enforcing its interpretation of the law, where failure to do so would deny the plaintiffs their Constitutional rights as Members of Parliament.

10 The Speaker's undertaking that he would abide by my interpretation of the law meant that no argument was pursued on his behalf that his actions which were being challenged were not open to examination by this Court, being matters solely within the privileges of Parliament. That contention has been revived in the current proceedings. I will address it first.

11 The first question to address is whether the conduct of the Speaker is immune from scrutiny by virtue of parliamentary privilege. In my respectful opinion, the correct position is stated by Barwick CJ in ***Cormack v Cope5,*** who held that:

> ". . . it is not the case in Australia, as it is in the United Kingdom, that the judiciary will restrain itself from interference in any part of the law-making process of the Parliament. Whilst the Court will not interfere in what I have called the intra-mural deliberative activities of the House, including what Isaacs J. called in Osborne v The Commonwealth (1911) 12 CLR 321, 323, "intermediate procedure" and the "order of events between Houses" (1911) 12 CLR at page 363, there is no parliamentary privilege which can stand in the way of this Court's right and duty to ensure that the constitutionally provided methods of law-making are observed."

12 The true legal situation is well described in the judgments of the Court of Appeal in Vanuatu in *Attorney General v Jimmy6* where the Court held:

> "We have already noted, and indeed emphasised, the principle that Parliament is not subject to direction by the Courts so long as its proceedings are not inconsistent with obligations placed upon it by the law from which it derives its powers. If authority is needed for that view it is provided by two cases cited for the Appellants, *Rediffusion (Hong Kong)Ltd v A/G of Hong Kong* [1970] AC 1136, and *Cormack v Cope*, [1974] HCA 28; [1974] 131 CLR 432. Both make it plain that the Courts have a duty to interfere "if the constitutionally required

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5 (1974) 131 CLR 432, at 454

6 [1996] VUCA 1 per, Vaudin d'Imecourt C.J, Thorp and Robertson JJA.

process of law-making is not properly carried out:" (per Barwick CJ in *Cormack v Cope* at 453.)

The appellants argue that the Respondents cannot complain about being refused an extraordinary session because they can have their business considered at the next ordinary session. That would amount to an effective denial of the right to require an Extraordinary Session which is given by the Constitution."

13 In *Bribery Commissioner v Ranasinghe*[7] the Judicial Committee of the Privy Council considered a claim that a Bill was invalid unless it had been preceded, as required by the Constitution of Ceylon, with a speaker's certification that it had been passed by a two-thirds majority of the House. Parliament could only make a law, so it was said, if it followed the necessary procedural steps. Their Lordships held that the certificate was a necessary part of the legislative process "and any Bill which does not comply with the condition precedent in the proviso, is and remains, even though it has received the royal assent, invalid and ultra vires". The Court added "No question of sovereignty arises. A parliament does not cease to be sovereign whenever its component members failed to produce among themselves a requisite majority . . . the minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two thirds majority"[8]. The Court therefore declared that the orders made against the respondent pursuant to the impeached legislation were "null and inoperative" on the grounds that persons appointed to the Bribery Commission that made orders against him were not lawfully appointed.

14 Lord Pearce held that:

"(A) legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates the power to make law. This restriction exists independently of the question whether the legislature is sovereign, as is the legislature of Ceylon, or whether the Constitution is "uncontrolled' as the Board held the Constitution of Queensland to be. Such a constitution can indeed be altered or amended by the legislature, if the regulating instrument so provides and if the terms of the provisions are complied with: and the alteration or amendment may include the change or abolition of those very provisions. The proposition that is not acceptable is that a legislature, once established, has some inherent power, derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different legislative process."

15 In *Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong*[9], Lord Diplock held:

"The immunity from control by the courts, which is enjoyed by members of a legislative assembly while exercising their deliberative functions is founded on necessity. The question of the extent of the immunity which is necessary raises a conflict of public policy between the desirability of freedom of deliberation in the legislature and the observance by its members of the rule of law of which the courts are the guardians. If there will be no remedy when the legislative process is complete and the unlawful conduct in the course of the legislative process will by then have achieved its object, the argument founded on necessity in their Lordships' view leads to the conclusion that there must be a remedy available in a court of justice before the result has been achieved which was intended to be prevented by the law from which a legislature which is not fully sovereign derives its powers"

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[7] [1964] 2 All E R 785

[8] At 793, per Lord Pearce

[9] [1970] AC 1136 at 1157

16 In *Harris v Adeang10* Donne CJ and Dillon J cited *Cormack v Cope* and took a broad view of what constituted the privileged intra mural workings of Parliament, but they accepted that it was the Court's role to address breaches of constitutional requirements. They held:

> "Nauru's Constitution, as explained above, confers on its Parliament the power to declare its powers, privileges and immunities and to prescribe its procedures. It thus, in my view, abdicates its right to control the legislature to the extent of these privileges and immunities and *only if it can be shown that to assert them would be inconsistent with the provisions of the Constitution, could a Court refuse to uphold them.* The privilege of non-impeachment guarantees to the Parliament that its proceedings are sacrosanct and as such cannot be impeached." (My emphasis)

17 Section 26 of the *Parliamentary Powers, Privileges and Immunities Act* 1976 provides that:

> "Neither the Speaker nor any officer of the Parliament shall be subject to the jurisdiction of the Court in respect of the *lawful* exercise of any power conferred on or vested in the Speaker or the officer by or under this Act". (My emphasis)

18 The question addressed in my earlier judgment was whether the actions of the Speaker were lawful, or were in contravention of the Constitution. I ruled that his actions were unlawful.

Can the Court enforce its interpretation of the law?

19 Ms Le Roy, counsel for the Speaker, submitted that the Court does not have the right to grant relief by way of certiorari because that was an administrative law remedy and what was in debate here was not an administrative action on the Speaker's part. Initially, Ms Le Roy also contended that the Court was not empowered to issue a mandatory injunction but in the course of argument she conceded that the Court did have inherent power to issue a mandatory injunction in a case such as this, but, she submitted that it would be a remedy only to be contemplated in extraordinary circumstances, which was not the situation here.

20 Unlike the Constitutions of the Solomon Islands and Vanuatu, the Constitution of Nauru does not have any explicit provision granting power to the Court to enforce its rulings as to the legal effect of provisions of the Constitution. Those Courts have not hesitated to impose mandatory orders against the Speaker where there had been a breach of constitutional requirements.

21 The Vanuatu courts have drawn a distinction between the extent of immunities in England and those of a country governed by a written constitution. In *Natapei v Tari*11 Chief Justice Lunabek held:

> "The general rule is that Parliament is not subject to direction by the Courts so long as its proceedings are not inconsistent with obligations placed upon it by the law from which it derives its powers... It is plain that the Court has a (constitutional) duty to interfere *"if the constitutionally required process of law-making is not properly carried out"*. [Court of Appeal, decision No.7 of 1996, *Attorney General and Natapei v. Willie Jimmy and Barak Sope & Ors*].

22 In that case Lunabek CJ issued orders which included an order directing the Speaker to re-

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[10] [1998] NRSC 1, Civil Action No 13 of 1997, 27 February 1998. I note that the Paclii web site does not contain the judgment of Dillon J, only that of Donne C.J.

[11] [2001] VUSC 113, 23 October 2001, at pp 45-46, Chief Justice Lunabek

convene Parliament for the purpose of debating certain matters that had been placed before it.

23 The Papua New Guinea Constitution, like Nauru, does not contain enforcement provisions such as those in Vanuatu or Solomon Islands. That however, has not prevented the Court from holding, on many occasions, that it has power to enforce its rulings.

24 In R*e Reference to Constitution section 19(1) by East Sepik Provincial Executive*12 the Full Bench of the Supreme Court of Papua New Guinea held that the process for removing a Prime Minister, as required by the Constitution, had not been followed. The Court held that declarations made by the Speaker that Sir Michael Somare had forfeited his seat by reason of absences from Parliament was unconstitutional and invalid. It held Mr Peter O'Neill was not lawfully elected as Prime Minister, because the election was unconstitutional and invalid. The orders made by the Court included requiring that the Sir Michael Somare be restored to office as Prime Minister.

25 Injia C.J. referred to s.19(3) of the Constitution which gave the Court power to give advisory opinions as to interpretation of the Constitution, which opinions were deemed binding. He held:

> "158. Pursuant to s 19 (3) of the *Constitution*, an opinion given by this Court on the interpretation and application of a provision (s) of Constitutional law is binding. It is in the inherent power of this Court to give orders in the nature of declaratory orders or injunctions to give effect to its opinion. This power has been exercised in many instances in other constitutional cases coming under its original jurisdiction: see *OLPPAC* case. I consider this case to be an appropriate case in which that power can be exercised."

26 In my opinion, notwithstanding the absence of any provision granting express power to the Supreme Court to enforce its rulings, such inherent power must be held by the Court. Such legislative references as are relevant to that question are all consistent with that conclusion.

27 Neither the Constitution nor any other law restricts the powers of the Supreme Court to enforce its judgments and orders. The Supreme Court is deemed a superior court of record (Art 48(1)), which in addition to the jurisdiction conferred on it by the Constitution holds "such jurisdiction as is prescribed by law". The power of the Court granted by Art 54 is not deficient. That provision reads:

> **"Matters concerning the Constitution**
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> 54.-(1.) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction to determine any question arising under or involving the interpretation or effect of any provision of this Constitution.
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> (2.) Without prejudice to any appellate jurisdiction of the Supreme Court, where in any proceedings before another court a question arises involving the interpretation or effect of any provision of this Constitution, the cause shall be removed into the Supreme Court, which shall determine that question and either dispose of the case or remit it to that other court to be disposed of in accordance with the determination."

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12 [2011] PGSC 41; SC1154 (12 December 2011) Injia CJ, Salika DCJ, Kirriwon J and Gavara- Nanu J, (Sakora J dissenting)

28 The power to "determine" any question as to the "effect" of a provision of the Constitution must carry with it the power, in appropriate circumstances, to intervene when the effect of an incorrect interpretation would be to deny a constitutional right to a person. The remedies sought in this case are discretionary, but whilst the Court might be slow to impose them in cases where the constitutional boundaries between legislative and judicial powers are uncertain, that is not this case.

29 Furthermore, it would be odd if, applying Art 54(2), the Court could "dispose of the case" if the proceeding had been transferred from another Court to the Supreme Court, but could not "dispose" of the case if it was first brought to the Supreme Court. The notion of disposing of a case must include making any orders that the Court deems appropriate. It certainly conveys no hint of limitation of power.

30 By virtue of s.43 of the *Courts Act* 1972, the Supreme Court has such powers to enforce its judgments and orders as provided by law or as may have been applied by the High Court of Justice in England as at 31 January 1968, so far as they are not inconsistent with the provisions of any Nauru Act, which would include the Constitution. The High Court of England, as at 1968, had wide power in equity to grant injunctions, being remedies available under its old equity jurisdiction13. These include restraining infringement of a statutory right (unless the Act creating the right provided for an exclusive remedy for that infringement)14.

31 There must be power of enforcement, or else a dictatorial abuse of executive power might go unchecked. I do not suggest, at all, that this was the situation in the present case. Indeed, the Speaker has accepted the correctness of my ruling on the law and has said that while he does not believe he now has power to correct the situation in this case, he will in future adopt my interpretation of Art 41. Nonetheless, a denial of powers of enforcement might in some circumstances mean that the Court would be powerless to restrain even the most egregious denials of the right of Members to move a vote of no confidence in the Government of the day.

32 The implications of adopting the interpretation that acknowledges the enforcement power of the Court are well set out in a Judgment of Connolly P. in *Speaker v Philip*15a decision of the Court of Appeal of Solomon Islands. Connolly P addressed a similar situation to what occurred in this case. The learned President held:

> "Mr. Radclyffe emphasised that section 34 does not in terms confer any right to move a motion of no confidence. True, it does not. Rather does it assume the existence of a right as being inherent in the position of a Member of the Parliament; indeed it is implicit in section 34 that this is the case. The section provides for the mandatory procedure to be followed if a resolution of no confidence is passed, and for a restriction upon the way in which such a resolution may be passed by requiring that notice of the motion has been given to the Speaker at least seven days before it is introduced. It follows there must be a right given, by necessary intendment, to all Members of Parliament to move a motion of no-confidence otherwise the mandatory consequences of the passing of such a resolution could be wholly stultified by a Standing Order made under section 62 of the Constitution effectively prohibiting the moving of motions of no confidence. Further in our opinion it is inherent in the provisions of the Constitution which establish a representative Parliamentary democracy that its members collectively and individually have the right to participate in its proceedings and to introduce

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13 *Halsbury's Laws of England* Courts and Tribunals, Lexis Nexis, par 758.

14 *Stevens v Chown* [1901] 1 Ch 894 at 904, per Farwell J.

15 *Speaker v Philip* [1991] SBCA 1; CA-CAC 005 of 1990 (30 August 1991) Coram: P Connolly, Savage JA, Goldsbrough JA

matters which they consider relevant to the proper performance of its functions. Section 62 of the Constitution contemplates reasonable regulation of the exercise of those rights but, in terms, does not contemplate their abrogation and the Standing Orders cannot be given, in conformity with the Constitution, an operation which would have that effect.

33 I note, first, that the Nauru Constitution under Art 41 does confer a right to members to move a motion of no confidence, so the remarks of Connolly, P. are even more appropriate in the present case.

34 Connolly, P. added, that should the parliamentary process be thwarted by unconstitutional action by the Speaker:

> "The result could be that the mechanism provided by the Constitution for the removal of a Government may become inoperative, and even a Government which does not have the confidence of the House may continue in an unchallenged position for many months. In our judgment, such a conclusion would be quite unsatisfactory and inconsistent with the principle for which Mr. Nori strongly and, as we think, rightly contended, that is the principle of majority rule in a Parliamentary democracy. Mr. Nori pressed us with the proposition that it is our duty to interpret the Constitution in a way which advances rather than impedes the principles of majority Government."

35 In a further passage that has particular relevance in the present case, Connelly P rejected the notion of applying a literal interpretation of the Constitution where that would produce an unconscionable result:

> "When one recognises the part played by section 34 in assuring that the will of the majority prevails over the Executive Government to say, as Mr Radclyffe would have it, that no constitutional right has been infringed when a Member is wrongly denied the right to move a motion of no confidence, because such a right is not spelled out in section 34, smacks of "the austerity of tabulated legalism" which the Privy Council has rejected more than once in the interpretation of Constitutions on the Westminster model, which are to be given "a generous interpretation without necessary acceptance of all the presumptions relevant to legislation of private law". See *Ong Ah Chuan v. Public Prosecutor* [1981] A.C. 648, 669h; [1980] 3 W.L.R. 855, 864F; *Minister for Home Affairs v. Fisher* [1980] A.C. 319, 329; [1979] 3 All E.R. 21, 26; *Attorney General (Fiji) v. Director* of *Public Prosecutions* [1983] 2 A.C. 672, 682f; [1983] 2 W.L.R. 275, 281g."

36 The importance of vindicating the plaintiffs' constitutional rights should not lightly be put to one side. The potential and actual impact of the Speaker's actions on their rights was significant.

37 If the Speaker had permitted debate to occur and a motion of no confidence had been adopted then the House must have elected a new President (Art 24(1)). In that event, a general election would not follow, at all. However, if a new President was not elected then after seven days Parliament would stand dissolved (Art 24(2)).

38 On the other hand, if, after debate, a motion of no confidence was not adopted then Art 41(4) requires that on the seventh day after referring the advice to the House the Speaker must dissolve the Parliament.

39 What this means is that the Speaker's action in adjourning the House as he did has denied the opportunity for those who have no confidence in the President and Ministers to remove them and replace them with a new President and Ministry. If they achieved that outcome they might have anticipated serving out the balance of the term of Parliament before a new election fell due.

40 The rights denied to the plaintiffs were not inconsequential.

41 In order to prevent potential abuses of power, I have no doubt that the founders intended that the Supreme Court would not only be the interpreter of the Constitution, but that its interpretations could be enforced, not ignored at the discretion of a Speaker, whether well or ill-motivated.

42 I conclude, therefore, that the Supreme Court of Nauru does have power, in appropriate cases, to make orders, including by way of mandatory injunctions, so as to enforce its rulings concerning the denial of a person's constitutional rights. I see no reason why, in an appropriate case, the enforcement powers would not extend to making orders in the nature of certiorari and mandamus, but it is unnecessary to finally resolve that question as, for reasons I will discuss, powers to grant declarations and mandatory injunctions are adequate for present purposes. If they were to prove inadequate then the plaintiffs could approach me for further orders. I will grant liberty to apply to all parties so as to enable either side to approach the Court for clarification, or for further orders.

Appropriate orders

43 In framing the terms of the orders, I bear in mind the observations of the Court of Appeal in Vanuatu in *Kilman v Natapei16*, where their Honours said of enforcement of the Constitution (and referring to s.6 which expressly granted power of enforcement):

> "The Court is obliged to consider all relevant circumstances in the case having regard to the need "to enforce" the constitutional provision that has been breached and, the equally important need to exercise a degree of restraint and deference towards Parliament, so that any remedy fashioned by the Court will intrude as little as possible with the continuity and orderly functioning of Parliament. This approach accords with the respect that the three branches of Government are expected to show to each other".

44 I had considered whether it was preferable that in the exercise of my discretion whether to grant the remedies sought, it might be best to adopt a pragmatic approach so that rather than setting aside the writ I should allow the General Election to proceed, thus allowing the electorate to decide who should govern. After careful consideration, I do not consider that course appropriate. The notices issued by the Speaker were all the product of an unlawful denial of the plaintiffs' rights. The orders were made without power and were void.

45 I am quite satisfied that the plaintiffs should not be confined merely to having a declaration that their constitutional rights were denied, by virtue of the actions of the Speaker. So far as is possible, the Court ought to endeavour to put right the wrong, and restore the plaintiffs to the position they would have been in had their rights been accorded to them. As Peter Mac Sporran observed in his book, Nauru: the Constitution, "the Nauruan Constitution establishes a parliamentary democracy in which the powers of the Parliament (and the Executive) are limited by the Constitution but the responsibilities of Parliament are paramount – the Executive is answerable to the Parliament"17. Art 41, which provides the constitutional mechanism for the dissolution of Parliament epitomises the principle of parliamentary democracy. Denial to a member of his right, under that Article, to challenge the President's advice to dissolve Parliament, is a fundamental denial of parliamentary democracy.

46 The obvious remedy for that denial of the rights of the plaintiffs would be requiring the Speaker to re-call the sitting of the 20th Parliament that he cut short, so as to allow the foreshadowed

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16 [2011] VUCA 24, at [23]

17 "Nauru: The Constitution", Peter H Mac Sporran, 2007, at 104.

no-confidence motion to be debated and voted on. Counsel for the Speaker submitted, however, that there are obstacles to adopting that approach. In order to understand where the suggested difficulty lies, it may be helpful, once again, to set out some of the relevant provisions of the Constitution.

Sessions of Parliament

40.-(1.) Each session of Parliament shall be held at such place and shall begin at such time, not being later than twelve months after the end of the preceding session if Parliament has been prorogued, or twenty-one days after the last day on which a candidate at a general election is declared elected if Parliament has been dissolved, as the Speaker in accordance with the advice of the President appoints.

(2.) Subject to the provisions of clause (1.) of this Article, the sittings of Parliament shall be held at such times and places as it, by its rules of procedure or otherwise, determines.

Prorogation and dissolution of Parliament

41.-(1.) The Speaker, in accordance with the advice of the President, may at any time prorogue Parliament.

(2.) The Speaker shall, if he is advised by the President to dissolve Parliament, refer the advice of the President to Parliament as soon as practicable and in any case before the expiration of fourteen days after his receipt of the advice.

(3.) For the purposes of clause (2.) of this Article, and notwithstanding Article 40, the Speaker shall, if necessary, appoint a time for the beginning of a session, or for a sitting, of Parliament.

(4.) Where the Speaker has, under clause (2.) of this Article, referred the advice of the President to Parliament, and no resolution for the removal from office of the President and Ministers under Article 24 is approved after the date on which the advice was so referred, he shall dissolve Parliament on the seventh day after that date.

(5.) The President may withdraw his advice at any time before the Speaker has dissolved Parliament and where the President so withdraws his advice, the Speaker shall not dissolve Parliament.

(6.) Notwithstanding the preceding provisions of this Article, where a resolution for the removal from office of the President and Ministers is approved under Article 24, the Speaker shall not-

(a) prorogue Parliament; or

(b) dissolve Parliament,

during the period of seven days after the day on which the resolution is approved.

47 In the first place, Ms Le Roy submitted that it would only be if the Speaker had failed to perform a duty imposed on him pursuant to Article 41(4) that he would be amenable to a mandatory injunction. She submitted that by referring the President's advice to Parliament he had performed that duty, and all that remained was to dissolve Parliament after seven days, as he had done. Thus, no order was appropriate, she submitted. However, during the course of submissions Ms Le Roy conceded that the duty had not been discharged in accordance with this Court's judgment in *Kieran*

Keke MP and Others v The Hon Ludwig Scotty MP, wherein I held that the duty under Article 41(4) required the Speaker to permit debate on the advice from the President regarding dissolution of the Parliament. In light of this concession, there could be no doubt that the Court was empowered to grant a mandatory injunction. Ms Le Roy submitted that even so, such a remedy would only be available in extraordinary cases. In my view, this case merited such an order, if one could be framed in terms consistent with the Constitution.

48 The orders initially sought were in the following terms:

a) A declaration that the Dissolution of the Twentieth Parliament purportedly made by the Speaker on 8 March 2013 is void and of no effect.

b) A writ of certiorari issue to remove into this Court, for the purpose of it being quashed, the decision made by the Speaker to dissolve the Twentieth Parliament.

c) A writ of certiorari issue to remove into this Court, for the purpose of it being quashed, the writ issued by the Speaker dated 8 March 2013 to call a General Election of Members of the Parliament of Nauru.

d) An injunction, both interlocutory and permanent, restraining the Respondents from taking any steps to conduct a General Election pursuant to the writ issued by the Speaker on or about 8 March 2013.

e) That so much of the proceeding as alleges a contempt of Court be adjourned to the Court for directions.

f) Such further or other order as to the Court seems fit.

g) Costs.

49 In the course of argument on 12 March 2013, Mr Kun formulated some alternative orders, having regard to a potential difficulty created by Art 41 in attempting to put right the breach of the constitutional rights of the plaintiffs by the adjournment of the House. One proposed order, formulated on the run, as it were, was in terms such as this:

"A mandatory injunction requiring the Speaker to convene a session of the 20th Parliament by 14th March 2013".

50 The reference to a date 14 days after the President's advice was referred to Parliament anticipated another argument advanced on behalf of the Speaker. The difficulty which Ms Le Roy submitted confronts any attempt to order that a sitting be convened or re-convened, so that the debate on the President's advice might be permitted to take place, is that the Speaker's power to call a sitting, pursuant to Art 41(3) is said to be governed by the requirement of Art 41(2). That requires, she submitted, that not only must the President's advice be presented to Parliament within 14 days of the Speaker receiving the advice, but any debate on that advice must also be concluded before the expiration of 14 days from the time when the President's advice was received by the Speaker.

51 The advice from the President was received by him on 27 February 2013. Accordingly, the 14 day time period expired on 13 March 2013. If Ms Le Roy's argument was correct then the Speaker lacks power to set right his denial of the plaintiffs' rights. It was impossible for Parliament to be convened by 13 March 2013.

52 In my opinion, however, the 14 day time limit in Art 41(2) relates only to the actual delivery

of the advice by the Speaker to the Parliament (that being the sense in which "refer" is used in Art 41(2)). It does not impose a 14 day time on the debate that is obliged to be permitted by Art 41(4).

53 The 14 day time limit cannot attach to Art 41(4). I say this for several reasons.

54 In the first place, as I have ruled, the process required under Art 41(4) requires two steps to be taken in a referral process. The first step is the mere delivery to Parliament of the President's advice. The second step, also part of the referral process under that sub-section, is allowing the conduct of a debate in the House, concerning the Speaker's advice.

55 It is only the first step in the referral process that Art 41(2) is concerned with. The intention of the framers was to ensure that the President's advice to dissolve the House was not put on the back burner, but was referred to the House in a sitting commencing within 14 days of the advice having been received by the Speaker from the President.

56 Art 41(4) imposes its own deadline, which is a seven day time limit for debate on the advice (including debate about adoption of a motion of no-confidence). If a no-confidence motion is not approved within seven days of the commencement of debate - at the sitting called for the purpose of Art 41(4) - then the Speaker must dissolve Parliament.

57 Were Art 41(2) interpreted in the manner for which Ms Le Roy contends, it would mean that a Speaker could delay calling a session until the 14th day after he received the President's advice (arguing that it was not practicable to do so sooner), and the Members would have one day, at best, to debate the matter18. That cannot have been the intention, and the express introduction of a 7 day time limit in Art 41(4) supports the interpretation that I prefer.

58 In this case the Speaker did comply with the 14 day time limit for delivery of the advice to Parliament. The 14 day time limit does not apply to the debate under Art 41(4). Thus, if I have power to order that the Speaker appoint a time for a sitting, then the fact that 14 days has elapsed since the Speaker received the President's advice is of no importance.

59 The question then becomes, "Do I have power to order the Speaker to convene a sitting?"

60 The purported dissolution of Parliament on 8 March was beyond power, the pre-conditions of Art 41(4) not having been met. The Speaker's purported dissolution was of no effect.

61 The adjourned sitting had come to an end, by virtue of the definition of "sitting" in Art 81, which defines a sitting as "a period during which Parliament is sitting without adjournment". However, there is yet to be compliance with the requirements of Art 41(4). Although the sitting of 1 March has concluded, the opportunity for debate is yet to occur. Parliament not having been dissolved, the first stage of the referral process remains in place, namely, referral - i.e. delivery- of the advice to Parliament. The Speaker can exercise his power under Art 41(3) to call a sitting, for the purpose of ensuring the necessary second step of the referral process occurs. His powers under Art 41 are not spent; his duty has not been discharged until he has given the House the opportunity to debate the President's advice.

62 In my opinion, I have the power, by mandatory injunction, to direct the speaker to call a sitting, so as to afford the plaintiffs their right under Art 41(4) to debate the President's advice.

63 In addition to compelling the Speaker to appoint a time for a sitting, as is his duty under Art 41(3) – a duty still awaiting discharge, because the plaintiffs have not yet had the benefit of a sitting

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[18] Standing Orders might reduce the prospect of such delaying tactics, but the Constitution itself would not.

in which debate was permitted - other enforcement actions are appropriate.

64 The calling of an election for 6 April 2013 was a direct product of the denial of the plaintiffs' rights. They contend that had their rights been honoured they might well have achieved a change of government, without the calling of a General Election.

65 Appropriate declarations should be made, and also consequential orders by way of injunctions, to declare void and of no effect the purported dissolution of Parliament, and likewise the writ for a General Election on 6 April 2013.

66 I make the following orders:

(1) I declare that the dissolution of the 20th Parliament by the Speaker contained in Gazette Notice No. 174 of 2013, which purported to dissolve Parliament under Article 41(4) of the Constitution of Nauru, was void and of no effect, as it failed to comply with the constitutional requirements of Article 41 as held by this Court in *Kieran Keke MP and Others v The Hon Ludwig Scotty MP* [2013] NRSC 1.

(2) I declare that the purported Writ for a General Election and command by the Speaker to the Returning Officer to cause elections to be made under section 15(1) of the Electoral Act 1965, contained in Gazette Notice No. 175 of 2013, were void and of no effect, as Parliament was not lawfully dissolved.

(3) I declare that the purported Notice of General Election issued under Article 39 of the Constitution of Nauru, contained in Gazette Notice 176 of 2013, was void and of no effect, as Parliament was not lawfully dissolved.

(4) I direct the Returning Officer to cease forthwith taking any steps towards the conduct of a General Election on 6th April 2013 pursuant to the Writ for an Election issued by the Speaker on 8 March 2013.

(5) Pursuant to my inherent powers under Art 54 of the Constitution, I direct the Speaker of Parliament, the Hon Ludwig Scotty MP, to appoint a time for a sitting of Parliament, to commence not later than 28 days from this day, to enable Members of the House, under Art 41(4), to consider and debate the advice of the President of the Republic of Nauru that was referred to the House by the Speaker on 1 March 2013.

Contempt of Court

67 Counsel for the plaintiffs contended that the Speaker had acted in breach of an undertaking to the Court, made through counsel, on 5 March 2013. Such a breach constitutes contempt of Court, he submitted.

68 Mr Kun submitted that the terms of the undertaking were that the Speaker would call a session of the House in the event that I ruled that he had denied the plaintiffs their rights under Art 41.

69 Counsel for the Speaker submitted that the failure of the Speaker to call a sitting of the House, in response to my ruling as to Art 41, was in no way intended to be in contempt of the Court. The Speaker, I was told, accepted my ruling that his actions had breached the rights of the plaintiffs under Art 41, and confirmed that in future sessions of Parliament he would act in accordance with my declaration as to the correct meaning of Art 41. Counsel for the Speaker submitted, however, that the reason the Speaker did not convene a session was because it was his honestly held belief that his

power to do so under Article 41(3) had been exhausted, notwithstanding that the requirements of Article 41(4) had not been complied with. The Speaker believed, therefore, that he had no further power to call a sitting of the house.

70 The understanding the Speaker had as to the limitation of his powers to call a session of Parliament was not fanciful. A serious argument to that effect was advanced by Ms Le Roy. In addition to believing his power under Art 41 was spent, he believed that he did not have authority to convene a session except with the advice of the President.

71 For the reasons discussed above, the Speaker was wrong as to those matters. The foundational requirement for dissolving Parliament after 7 days had not arisen; the necessary opportunity to debate the advice had not been given. In addition, the Speaker's power to convene a session, which was coupled with a duty to do so, in discharge of the rights of the members under Art 41(4), had not yet been exercised. Insofar as advice of the President was required for any of those steps under Art 41, it had already been delivered to the Speaker by the President on 27 February 2013. That advice had not been withdrawn under Art 41(5).

72 The submission made as to the Speaker's innocent intentions is consistent with the affidavit of Mr Matthew Batsiua MP in this matter, dated 11 March 2013, where he refers to a conversation with the Speaker following the judgment in *Kieran Keke MP and Others v The Hon Ludwig Scotty MP* wherein the Speaker informed him that there was little he could do to remedy the situation, as it was up to the President to advise him of a new sitting date.

73 Having regard to these matters, I could not be satisfied that the Speaker acted with a guilty mind, that is, was intentionally acting in contempt of my declaration as to Art 41.

74 In any event, a court would not make an order which carries a sanction of punishment for contempt of court, where it is sought on an application for judicial review, if a declaration would suffice.19

75 Where failure to comply with an undertaking is said to have occurred in contempt of court it is essential that the precise terms of the undertaking are known. In this case the undertaking was given in somewhat hurried circumstances. At the outset of the first hearing Mr Bliim, the Solicitor General, sought and was given leave to appear as amicus curiae. He advised the Court that he had sought from the Speaker, through the Speaker's counsel, his agreement to give an undertaking to the Court. Mr Bliim was sure that the terms of the undertaking that he announced were that the Speaker would abide by my ruling and would act in accordance with it, should I rule that the Speaker had acted contrary to Art 41. Mr Bliim said he was very careful to get the terms right, however the transcript of the hearing, when first read, did not contain the second part of the undertaking, i.e. a promise to act in accordance with my ruling. The typed Court transcript did not show such words, but parts of the transcript at this point were said to be "inaudible".

76 On playing the tape of the hearing, however, the inaudible sections were able to be understood. The words of the undertaking were that he: "Will abide by the decision of the Court in respect of any declaration and that he will act in accordance with that decision". That is not the same language that Mr Kun understood to have been used in the undertaking. As noted earlier, and before the tape was checked again, Mr Kun submitted that the terms of the undertaking were that the Speaker would call a session of the House, in the event that I ruled that he had denied the plaintiffs their rights under Art 41. As the tape recording demonstrates, those were not the terms of the undertaking that was given.

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[19] See Halsbury's Laws of England, "Judicial Review", "Sanctions and Remedies", Lexis Nexis, par 757

77 I accept the plaintiffs who were in court at the time believed, reasonably enough, that the undertaking amounted to a promise to call a session of the House, should I rule that the Speaker had acted unlawfully. I also accept that it was only because of that understanding that they agreed not to pursue remedies for mandamus and prohibition that had been claimed in their writ.

78 It is unfortunate that some uncertainty still exists about the undertaking, but in these circumstances there is no prospect that I would make a finding that the Speaker had acted in contempt of court. For such a finding the Court must be satisfied that the terms of the undertaking were clear and unambiguous, that the Speaker had proper notice of the terms given to the Court, and the Court must be satisfied beyond reasonable doubt that there was an intentional contempt.20 I cannot reach that degree of satisfaction.

79 I therefore dismiss the application to have the Court declare the Speaker to be in contempt of court.

80 I will hear the parties as to costs and any other orders.

81 Given that there may be some issues arising requiring clarification of these orders, I will grant all parties liberty to apply, upon notice to the Court and other parties.

Geoffrey M Eames AM QC
Chief Justice
15 March 2013

[20] *Wright v Jess* [1987] 2 All ER 1067; *Witham v Holloway* (1995) 183 CLR 525 at 534.