

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

**CIVIL APPEAL CASE No.40 OF 2015**

**BETWEEN:**           **SERGE VOHOR  
TONY WRIGHT  
JONAS JAMES**  
Appellants

**AND:**                   **PRESIDENT OF THE REPUBLIC OF  
VANUATU**  
First Respondent

**AND:**                   **THE REPUBLIC OF VANUATU**  
Second Respondent

**AND:**                   **JOE NATUMAN  
HAM LINI  
RALPH REGENVANU**  
Third Respondents

**Coram:**           *Hon. Chief Justice Vincent Lunabek  
Hon. Justice von Doussa  
Hon. Justice Raynor Asher  
Hon. Justice Daniel Fatiaki  
Hon. Justice Stephen Harrop  
Hon. Justice David Chetwynd*

**Counsel:**       *Collin Leo for Appellant  
Frederick Gilu and Kent Tari for First and Second Respondents  
Edward Nalyal for Third Respondents*

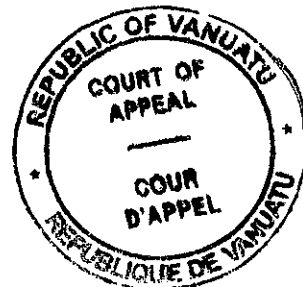
**Date of Hearing:**   16 November 2015

**Date of Judgment:** 20 November 2015

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**J U D G M E N T**

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## Introduction

[1] On 9 October 2015 Sey J in the Supreme Court of Vanuatu convicted fourteen Members of Parliament for bribery. One of those members was Marcellino Pipite, the Speaker of the House. At the time the President of Vanuatu, Father Baldwin Lonsdale, was temporarily overseas on a visit to Samoa. Under art 37(1) of the Constitution he had on 5 October 2015 temporarily appointed Mr Pipite as Speaker as Acting President. On the day after Sey J delivered her decision, Mr Pipite as Acting President signed a document pardoning himself and the other thirteen members of Parliament of the conviction.

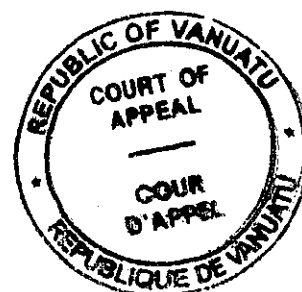
[2] It is not necessary to go through the background facts which are set out in *Kalosil v Public Prosecutor* [2015] VUCA, a decision delivered today, dismissing the appeals against conviction and sentence of the Members of Parliament.

[3] The facts relating to the pardon are not in contention. Mr Pipite signed the Instrument of Pardon on 10 October. It stated as a recital (in what was the only stated reason for the decision):

AND WHEREAS I am of the opinion that the guilt and convictions of the above persons being the Members of Parliament of the Republic of Vanuatu and some of them being Ministers of State and to maintain the stability in the Government of Vanuatu.

[4] The President returned to Vanuatu on 11 October 2015. Shortly after his return he issued a press release condemning the pardon signed by Mr Pipite as unlawful. On 16 October 2015 he issued the President's Pardon Revocation Order No 144 of 2015, in which he revoked the Instrument of Pardon.

[5] There were two applications filed. The first, Constitutional Case No 6, was an application by a Member of Parliament, Joe Natuman, together with Ham Lini and Ralph Regenvanu, for an order quashing the Instrument of Pardon signed by Mr Pipite. The second, Constitutional Case No 7, was an application by three of the Members of Parliament who had been pardoned, Serge Vohor, Anthony Wright and Jonas James, for various declarations to the effect that the revocation of the pardon was unconstitutional and unlawful.



[6] Both applications were heard by Saksak J on 20 October 2015. On 21 October 2015 he delivered a decision in which he upheld application No 6 and quashed the pardon issued by Mr Pipite as acting President. He dismissed application No 7.

[7] Messrs Vohor, Wright and James appeal both decisions.

### **The constitutional framework**

[8] Article 38 of the Constitution provides:

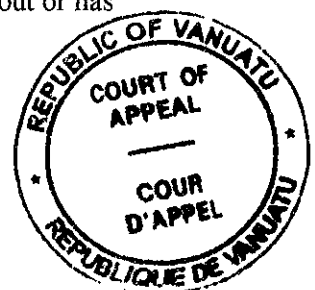
The President of the Republic may pardon, commute or reduce a sentence on a person of offence. Parliament may provide for a committee to advise the President in the exercise of this function.

[9] As to the Speaker's powers, art 37 provides:

- (1) Whenever there is a vacancy in the office of the President of the Republic or the President is overseas or incapacitated, the Speaker of Parliament shall perform the functions of President under this Constitution and any other law.
- (2) When Parliament is dissolved and there is a vacancy in the office of the President of the Republic or the President is overseas or incapacitated, the Speaker of Parliament at the time of the dissolution shall perform the function of the President of the Republic under this Constitution and any other law until a new Speaker is elected.

[10] The President and other leaders (such as the Speaker) do not exercise their powers in a vacuum. Article 66 sets out duties that must be followed and provides:

- (1) Any person defined as a leader in Article 67 has a duty to conduct himself in such a way, both in his public and private life, so as not to:
  - (a) place himself in a position in which he has or could have a conflict of interests or in which the fair exercise of his public or official duties might be compromised;
  - (b) demean his office or position;
  - (c) allow his integrity to be called into question; or
  - (d) endanger or diminish respect for and confidence in the integrity of the Government of the Republic of Vanuatu
- (2) In particular, a leader shall not use his office for personal gain or enter into any transaction or engage in any enterprise or activity that might be expected to give rise to doubt in the public mind as to whether he is carrying out or has carried out the duty imposed by subarticle (1).



[11] Unsurprisingly, the President and the Speaker (as a Member of Parliament) fall under the definition of “leader” in art 67 of the Constitution.

### Standing

[12] Article 53(1) of the Constitution provides:

#### **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) The Supreme Court has jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution.

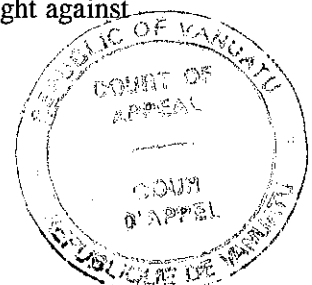
...

[13] In their written submissions the appellants raised the issue of the standing of Mr Natuman and the other third respondents to pursue a challenge to the pardon under art 53(1). The appellants did not pursue that point before us, and we think they were right not to do so.

[14] These proceedings were not brought to enforce a right arising under the common law. The application challenging the pardon was not primarily an exercise of judicial review (although it was put on that basis in the alternative). It was the exercise of the specific right to seek redress for an infringement of the Constitution as created by art 53(1). Thus it was a challenge of a type not to be found in common law countries that do not have a detailed written constitution.

[15] As leaders, challenges under art 53(1) may be brought against the President and the Speaker in respect of their actions or conduct. Sir Harry Gibbs set out the position in respect to the President in *AG v President of the Republic of Vanuatu* [1994] VUSC 2:

It is impossible to contend that the President succeeded to the position of the British Sovereign, or that his powers are to be assumed to have the same characteristics of the British Sovereign... The nature of the powers and position of the President of Vanuatu can be determined only by a consideration of the Constitution itself. No doctrine of immunity based on the position of the Crown can be imported into the Constitution of Vanuatu... It must follow that if the President acts contrary to the law, appropriate proceedings can be brought against him in the Courts of Vanuatu.



[16] The power to pardon is derived from and governed by the Constitution. It follows that under art 53(2) the Supreme Court and this Court have jurisdiction to consider the Instrument of Pardon and in doing so make any order that is appropriate to enforce the provisions of the Constitution.

[17] An application under art 53(1) is brought under Part 2 of the Constitutional Application Rules (the Rules). Rule 2.1 provides:

This part deals with Constitutional Applications, under Articles 6 and 53 (1) of the Constitution, about the infringement of individuals' rights and the redress of infringements of provisions of the Constitution.

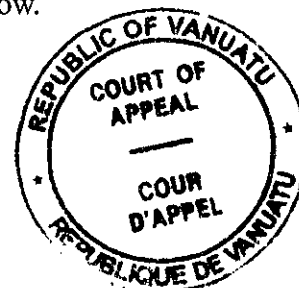
Notes:

1. The Constitution in Article 5 guarantees certain fundamental rights. Article 6 provides that anyone who considers that any of those rights have been, are being infringed or are likely to be infringed may apply to the Supreme Court to enforce that right.
2. Article 53(1) provides that anyone who considers that a provisions of the Constitution has been infringed in relation to him or her may apply to the Supreme Court for redress.

[18] Mr Natuman was a leader as defined in the Leadership Code and the Constitution. As a leader and Member of Parliament he had a legitimate interest in maintaining good Parliamentary standards, and specifically in ensuring that other leaders who were Members of Parliament did not breach the Leadership Code Act, the Constitution and their Parliamentary obligations. Here he had the right to challenge the exercise of a power by a Member of Parliament, alleged to have been in breach of article 66, as it related "to him" as a Member. So did his co-applicants, the third respondents Messrs Lini and Regenvanu.

[19] Mr Pipite's pardon of himself and of the other members of Parliament also affected Mr Natuman personally as he was the complainant in the criminal proceedings which led to the convictions, and had a legitimate interest in ensuring that the convictions that he had helped initiate were not thwarted by an unlawful act.

[20] Therefore, like Saksak J, we see no issue of standing. Indeed, given the flagrant abuse of power said to be involved in this case, and the severe consequences for the community if such abuses are not stopped, the threshold for standing was low.



[21] The remaining question in this appeal is straightforward. Was it shown on the balance of probabilities that the pardon involved an infringement of the duties placed upon the President under art 66?

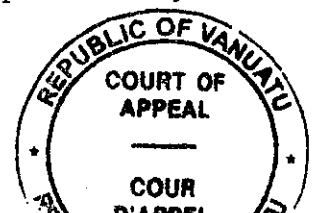
**Was there an infringement of Article 66?**

[22] Section 24 of the Leadership Code Act [CAP 240] provides a definition of “conflict of interest”. A leader has a conflict if the leader or a member of his or her close family “benefits from the action”. “Benefit” is defined under s 8(a) as including a benefit “...derived indirectly by a person”. Mr Pipite had been convicted of bribery. He was at risk of imprisonment and losing his seat and position. Plainly he would have benefited directly from a pardon which would absolve him of the conviction, and enable him to continue to enjoy the status and salary of a Member of Parliament.

[23] Under art 66(1)(a) of the Constitution, Mr Pipite had the duty to conduct himself so as not to place himself in a position in which he had or could have had a conflict of interest, or in which the fair exercise of his public duties might be compromised. Moreover, his duties as a leader required him under s 13(1)(a) of the Leadership Code Act to “comply with and observe the law”. Mr Pipite plainly breached the law, by breaching his duty not to place himself into a position of conflict and by acting not in accordance with law. It is difficult to imagine a more serious and obvious conflict of interest, and a more palpable failure of a leader to recognise his responsibilities to Parliament and his nation, than for a leader to pardon himself and others in the same position.

[24] Any such pardon by an acting President was an act which demeaned the position of President and indeed the Speaker in breach of art 66(1)(b) and directly called his integrity, in the sense of his commitment to act in the interests of Vanuatu rather than himself, into question under art 66(1)(c). Also, his action breached art 66(1)(d) by greatly diminishing the respect for and confidence in the integrity of the Government of the Republic of Vanuatu and its commitment to the rule of law.

[25] We agree also with Saksak J’s conclusion that Mr Pipite in not pardoning Willie Jimmy Tapangararua displayed unequal and unfair treatment of a person in the same position. Mr Tapangararua had also been convicted, but unlike the other Members of Parliament who were charged with bribery, had pleaded guilty. Saksak J put it this way:



Clearly there was unequal treatment under the law and the applicants are entitled to expect to see that is done. There is a clear principle that justice must not only be done but it must be seen to be done. That is not so here. No one is and can be above the law. Only God is.

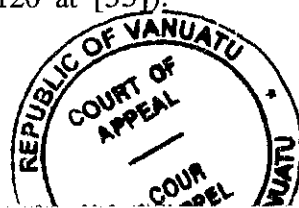
[26] It is necessary to record that we do not agree with Saksak J that the power to pardon a conviction can be exercised by the President only, and not the Speaker as acting President. He considered that there was a distinction between the exercise of the President's "functions" as defined in art 37 which can be delegated to the Speaker, and the "power" of pardon conferred by art 38 which cannot. We have difficulty in discerning a difference between these two exercises. That is especially so given the wording of art 38 which states that Parliament may provide for a committee to advise the President in the exercise of "this function". If there were to be limitations on the Speaker's powers when acting as President it could be expected that they would have been set out in art 38. There are no such limitations.

[27] The third respondents submitted that it was not possible to pardon before sentence, relying on the words of art 38. The issue was considered in *Sope v Republic of Vanuatu* [2004] VUCA 20 where it was held that the President may pardon a person convicted of an offence, or as a separate exercise commute or reduce a sentence. We respectfully agree, and consider that a convicted person can be pardoned before sentence. The power to pardon set out in art 38 can be read disjunctively from that which follows, the commuting or reducing of sentence. There is a power to pardon convictions, and a power to commute or reduce sentences.

### **Judicial review**

[28] We have no doubt that relief was also available to Mr Natuman and the other respondents by way of judicial review. The power to grant judicial review in Vanuatu arises from the continuation of British and French law that applied on independence under art 95(2) of the Constitution, and is expressly recognised in r 17.4 of the Rules. Rules 17.4(1)(a) and (b) provide for the making of a declaratory order, a mandatory order, a prohibiting order, and a quashing order, about a decision.

[29] The jurisdiction arises from the position of the Supreme Court having, as it has been put in the United Kingdom in relation to that country, "a constitutional role ... as the guardian of standards of legality" (*R(Cart) v Upper Tribunal* [2011] QB 120 at [35]).



There is no doubt that it applies to the exercise of a public function such as the exercise of a pardon. As was stated by this Court in *Public Prosecutor v Willie* [2004] VUCA 4 at 8:

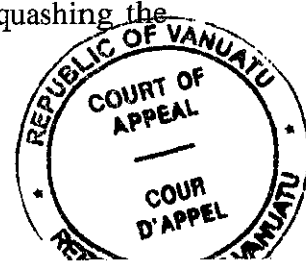
Within any country which is committed to the rule of law, notwithstanding the general terms of the [Pardon] Article, there is not a power which can be exercised except in a way which is consistent with the entire constitutional framework. It is not a power which is beyond the purview of the Court to review and assess its exercise for legality.

[30] Mr Pipite has provided no affidavit, and we infer from his conduct, on the balance of probabilities, that he pardoned himself and the others after considering an irrelevant matter, namely his own future as a Member of Parliament, and theirs. His reference to maintaining “the stability in the Government of Vanuatu” was plainly an irrelevant consideration. It is plain that the stability of the Republic had no relevance to the decision of a leader to pardon himself and others who had been recently convicted of bribery. Indeed, the stability of the country, in particular the maintenance of the rule of law, requires that leaders are not readily absolved from such a serious abuse of office.

[31] We also agree entirely with Saksak J applying the well-known principle encapsulated in *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 KB 223 that a Court will intervene where a decision is so unreasonable that no reasonable person exercising the power could have come to it. For all the reasons we have set out, the decision of the Speaker to pardon himself and other offenders was a clear misuse of public power and a flagrant breach of art 66 of the Constitution. It was “so outrageous in its defiance of logic [and] accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it” (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374).

### **Other matters**

[32] The powers of a Court when faced with a transgression of the Constitution in the exercise of a power by a leader are not defined. The Rules of Procedure at r 17.1(b) provide for various remedies on judicial review including the power to make a declaratory order and to quash the decision under review. We have no doubt that the same powers can be exercised if there has been an infringement of the Constitution. We propose to dismiss the appeal, and uphold the orders made by Saksak J declaring the Instrument of Pardon to be in breach of the Constitution and of no force and effect, and his order quashing the pardon.





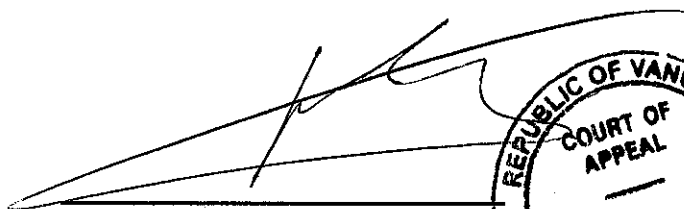
[33] The pardon being quashed, there is no need for us to consider the other part of the appeal which related to Saksak J upholding the revocation of the pardon and dismissing application no 7. We dismiss that aspect of the appeal as well, but without considering its merits.

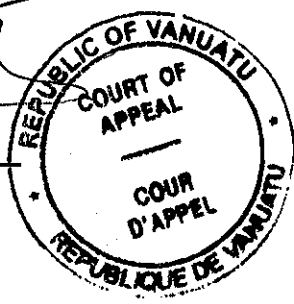
**Result**

[34] The appeal is dismissed. *with costs on a standard basis.*

**DATED at Port-Vila this 20<sup>th</sup> day of November, 2015**

**BY THE COURT**

  
Vincent LUNABEK  
Chief Justice



The seal is circular with the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom. In the center, it reads "COURT OF APPEAL" and "COUR D'APPEL" separated by a horizontal line.