

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Constitutional Jurisdiction)

Civil Appeal
Case No. 21/2085 CoA/CIVA

BETWEEN: **Bob Loughman WEIBUR & Eighteen Others**
Appellants

AND: **The Republic of Vanuatu**
Respondent

AND: **The Speaker of Parliament**
Interested Party

Date of Hearing: 12 July 2021

Before: Chief Justice V. Lunabek
Justice J. Mansfield
Justice R. Young
Justice D. Aru
Justice G. Andrée Wiltens
Justice V. M. Trief

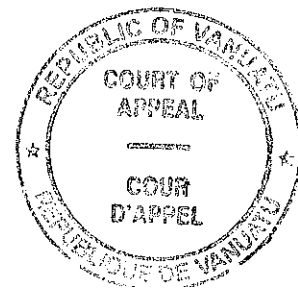
Counsel: Mr S. Kalsakau and Mr A. A. Jenshel for the Appellants
Mr F. Gilu and Mr K. Ture for the Respondent
No Appearance for the Speaker of Parliament

Date of Decision: 16 July 2021

JUDGMENT

Introduction

1. On 8 June 2021 the Speaker of Parliament declared the seats of nineteen MPs vacant pursuant to Section 2(d) of the Members of Parliament (Vacation of Seats) Act. The Speaker concluded that the MPs had been absent from Parliament for three consecutive days and in terms of Section 2(d) the seats were deemed vacated.
2. The nineteen MPs challenged that decision in the Supreme Court. Their argument was that their constitutional rights had been infringed because the Speaker had declared their seats vacant when the jurisdiction to do so was exclusively the Supreme Court's (Article 54 of the Vanuatu Constitution). The Judge in the Supreme Court concluded the process used by the Speaker in deciding the seats were vacant was correct and there were no breaches of the Appellants' constitutional rights. The application was therefore dismissed.



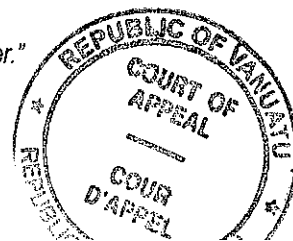
3. The MPs whose seats were declared vacant now appeal the Supreme Court decision. They submit the Supreme Court Judge misunderstood the challenge by the MPs before him. The Appellants' challenge did not raise the question of whether they were in fact absent from Parliament on the three days. They had always disputed this conclusion by the Speaker. Their challenge was to the Speaker's authority to declare their seats vacant.
4. They submit, pursuant to Article 54 of the Vanuatu Constitution, only the Supreme Court has jurisdiction to make such decisions. Further, the Supreme Court Judge wrongly concluded they had been absent from Parliament when this was a disputed fact and no hearing had been convened to test this claim of absence.

Background

5. The Vanuatu Constitution provides for at least two sessions of Parliament each year (Article 21).
6. The process described in paragraphs 7 to 17 of this judgment was provided by a sworn statement of Raymond Kalpeau Manuake the Clerk of the Vanuatu Parliament from emails and other documents received by him and from the minutes of Parliament.
7. On 28 April 2021 the Speaker of Parliament summonsed Parliament to meet for its first annual session on 14 May 2021. A number of Bills were listed for consideration by Parliament.
8. On 28 May 2021 a Notice of Motion to remove the Speaker and elect a new Speaker was lodged with the Speaker. The Motion was served on all MPs and the Motion was listed for debate either on 1 June, between 10.30am and 11.30am or on Thursday 3 June, between 4.00pm and 5.00pm.
9. On 31 May 2021 the mover of the Motion confirmed to the Speaker that it was listed for debate on 1 June 2021 at 8.30am.
10. Parliament resumed on 1 June. The Speaker's minute of the Parliamentary sitting on 1 June 2021 recorded that all but two of the total MPs were present at the beginning of the day.
11. The Minutes record during the course of the day's proceedings:

"All Members of Parliament in the Government's side left the chamber. As a result, there was a question as to whether there was a quorum in Parliament."
12. The Speaker then ordered the bell to be rung to re-establish a quorum. No quorum in fact was re-established and so the Speaker adjourned the sitting of Parliament to 2 June 2021.
13. On 2 June, Parliament resumed with 50 members present. Shortly after, the Minutes record:

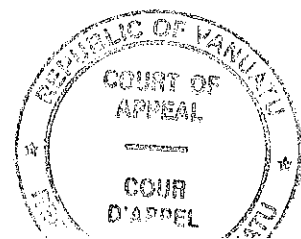
"Members of Parliament from the Government's side left the chamber."



14. Again, as a result of the Members of Parliament leaving the chamber, the Speaker concluded there was no quorum and so Parliament was adjourned by the Speaker to 3 June 2021.
15. On 3 June, Parliament convened with sufficient MPs for a quorum. The sitting was suspended at 10.45am. When Parliament resumed at 2.05pm on 3 June, there was no quorum. The Speaker ordered that the bells be rung. They were rung but no quorum eventuated. And so, Parliament was once again adjourned.
16. On 4 June the Speaker noted the absence of some Government MPs on three consecutive days and said he considered it to be a very serious constitutional matter.
17. On 8 June 2021 the Speaker ruled that nineteen MPs who he said had been absent on three consecutive sitting days (1, 2, and 3 June) had, by their actions, vacated their parliamentary seats pursuant to Section 2(d) of the Members of Parliament (Vacation of Seats Act). Other objectionable behaviour arising from the conduct of certain MPs was also identified by the Speaker but are not relevant to this appeal.
18. A constitutional application was then filed in the Supreme Court by the MPs whose seats had been vacated by the Speaker. Urgency was sought and granted in the Supreme Court.
19. The constitutional application was based on Articles 17 and 21(1). It alleged the Speaker, in declaring the seats vacant, had exceeded his powers. The Appellants submitted that by virtue of Article 54 only the Supreme Court could declare a parliamentary seat vacant.

The judgment

20. The Judge in the Supreme Court said that given the Speaker was responsible for maintaining order in Parliament (Article 22) his role included "*monitoring and determining*" whether the two (2) pre-conditions set out in Section 2(d) of the Members of Parliament (Vacation of Seats) Act had been fulfilled. The Speaker had undertaken this task when he said that nineteen MPs had been absent for three consecutive days. This was the proper function of the Speaker, the Judge concluded. As a result, vacation of the seats followed as a matter of law. The Judge stressed that the Speaker had not vacated the MPs' seats. The seats were "*vacated*" by operation of law through Section 2(d) given the Speaker was satisfied that the two pre-conditions in Section 2(d) were met.
21. The Judge then went on to say that it was also his task to determine if the MPs had in fact been absent in terms of Section 2(d). The Judge said the MPs had brought no evidence to the Supreme Court to challenge or rebut the Speaker's findings as to their absence. And accordingly, the Judge said there was no reason to set aside the Speaker's conclusion because it had not been challenged by any evidence.



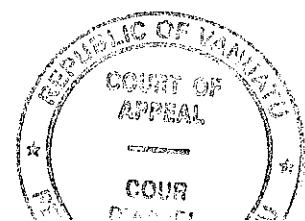
22. He, therefore, dismissed the constitutional application as disclosing no breach of Articles 17 and 21.

The appeal

23. The essence of the Appellants' appeal grounds and written submissions claimed the Speaker had no constitutional authority to declare the seats vacant. That jurisdiction, by virtue of Article 54 of the Constitution, was solely for the Supreme Court. Where the Speaker believed Section 2(d) had been infringed the Speaker's obligation was to apply for a ruling from the Supreme Court. It would then be for the Supreme Court to decide whether Section 2(d) had been infringed. Such a process would allow MPs suspected of a Section 2(d) breach to dispute the facts relied upon by the Speaker to establish consecutive absences in three days.
24. And so, the Appellants submitted their constitutional rights under Article 17 (as MPs elected through the electoral system) and Article 21 (using parliamentary process in conflict with Article 54) were breached and the Judge was wrong to dismiss their application.
25. The second and third grounds of challenge were that the Supreme Court Judge wrongly embarked on an assessment as to whether or not the MPs were in fact absent from Parliament as the Speaker had concluded.
26. The Appellants' case was that the Judge was told by counsel before the hearing that the MPs did not concede absence from Parliament and would dispute the Speaker's factual findings as to absence. The Appellants say that they stressed that their application before the Supreme Court was not based on a dispute as to absence and so whether they were or were not absent from Parliament was not a matter for the Supreme Court to decide in the constitutional application before it.
27. They submitted therefore, the Judge was in error when he undertook an assessment as to the factual basis of the Speaker's conclusions as to absence and himself reached a conclusion about absence from Parliament. The Appellants said that it was wrong in law and unfair of the Judge to decide this factual issue when they had expressly excluded it from argument and where they had in fact no opportunity to call evidence disputing absence.

Discussion

28. However, in oral submissions before us, counsel for the Appellants accepted the Judge had been correct to dismiss the constitutional petition because he found no breach of Articles 17 and 21. The Appellants accepted that the Speaker was entitled, as he did, on 8 June, to reach a conclusion about absence and was within his authority to observe that the statutory criteria for vacation of a parliamentary seat had been met. And so, by virtue of Section 2(d) the parliamentary seats were then vacated.

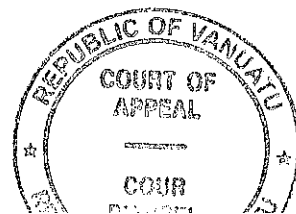


29. We are also satisfied that the process the Speaker followed, which ultimately resulted in the vacation of the seats, was appropriate and authorised by law.
30. Section 2(d) of the Members of Parliament (Vacation of Seats) Act provides:
- "2 Vacation of seats of Members –*
- A Member of Parliament shall vacate the seat they are in –*
- (d) if he is absent from three consecutive sittings in Parliament without having obtained from the Speaker, or in his absence, the Deputy Speaker the permission to be or to remain absent."*
31. This section identifies the circumstances under which a seat in Parliament is declared vacant. An MP must be absent for three consecutive sittings in Parliament without having before obtained permission of the Speaker to remain absent.
32. This Court and the Supreme Court have had occasion to consider Section 2(d) and its intersection with Article 54. This Court in *Korman v Natapei* [2010] VUCA 1 and in *Bulekone v Timakata* [1980-1984] VLR 228 (a full Court of the Supreme Court) confirmed the Supreme Court's exclusive jurisdiction to decide electoral cases, including vacation of seats. The Courts confirmed that once absence from Parliament without permission was established by the Speaker, Section 2(d) operated to vacate the seat held by the relevant MP.
33. The process for maintaining order in Parliament is through Parliament Standing Orders and the application of any relevant Acts of Parliament (here the Members of Parliament (Vacation of Seats) Act). The Speaker in turn through each day's parliamentary Minutes records relevant events.
34. We consider it is the Speaker's function to determine whether an MP is absent on three consecutive sittings. Keeping a record of MP presence (or otherwise) in Parliament is an important function of the Speaker's role under Article 22.
35. If the Speaker concludes an MP has been absent on three consecutive sittings, then he should declare that to be his conclusion. It is also appropriate for him to record that the MP who has been absent is, by the operation of Section 2(d), required to vacate his seat. As the Judge in the Supreme Court said the Speaker did not declare the seats vacant, that occurred by the operation of Section 2(d).
36. In summary, therefore, the Speaker was entitled to make his declaration that particular MPs had been absent from Parliament for three consecutive days. As a result of that declaration, in law, the MP was obliged to vacate his seat by virtue of Section 2(d).
37. There may be occasions when the Speaker is uncertain about whether in fact there has been qualifying absences under Section 2(d) or there may be other reasons for uncertainty about the



Section 2(d) qualifying events. In those circumstances, the Speaker may decide not to make any declaration as to absence but may apply to the Supreme Court to resolve the factual uncertainty. The Speaker would then have obtained a ruling from the Supreme Court about any qualifying absences from which, depending on the finding, seat vacation may follow.

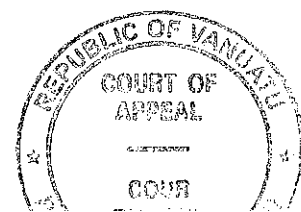
38. In this case, the Speaker saw no such uncertainty. We see no reason why he could not reach the conclusion he announced on 8 June. In those circumstances, while his pronouncement as to vacation may not have had the force of law, the law provided for vacation of the seats once the Speaker had reached his factual conclusion. In saying this, we do not intend to express any view about the accuracy or correctness of the Speaker's factual conclusions. Our conclusion is that on the basis of information before the Speaker, it was open to him to conclude qualifying absence and to observe that the provisions of Section 2(d) meant the seats were vacated.
39. The Republic of Vanuatu submitted that the appropriate process where the Speaker concludes that there has been relevant absences from Parliament, is for him to apply to the Supreme Court for confirmation that those facts exist or otherwise so that a conclusion can be reached about whether the mandatory provisions of Section 2(d) are engaged. For the reasons we have given, we do not think that process is required in every case. In the vast majority of cases we consider the process used by the Speaker on this occasion will be appropriate. The rights of MPs affected by this decision are protected by the right of an MP to a Supreme Court challenge to the factual conclusions of the Speaker.
40. The appeal, therefore, with respect to the Judge's decision to dismiss the petition relating to claimed breaches of Articles 17 and 21 is itself dismissed.
41. The second and third grounds of appeal challenged the Judge's decision to go on to consider whether the Speaker was justified in reaching the decision he did about absence of Members of Parliament. This was a factual inquiry.
42. We are satisfied this ground of appeal must succeed.
43. Counsel for the Appellants had made it clear at the outset of the Supreme Court proceedings that they did not accept the findings of the Speaker on absence. That position was recorded in a Minute by the Judge arising from a pre-trial conference on 14 June 2021. In the Minute the Judge noted the application before the Court involved: "*purely a legal question*". The Court made orders that the Appellants and Respondent were to file written submissions. There was no order for the filing of any evidence. That Minute made it clear that the issue before the Supreme Court was solely the question of whether as a result of the Speaker's actions, he had breached Articles 17 and 21.
44. The Appellants' case alleging breaches of Articles 17 and 21 was not premised on any challenge to the Speaker's conclusion about absence. It focused on the proposition that it was not for the Speaker to make such a declaration. And so, their case was that the Speaker had acted unconstitutionally in announcing his conclusions as to MPs absence and observing that Section 2(d) was engaged and that the seats were vacant.



45. We accept that the issue of whether the Speaker's factual conclusions as to absence was not before the Supreme Court. It was therefore an error for the Judge to have proceeded as he did as if that was an issue to be resolved by him. The Judge was aware that the Appellants challenged the factual findings of the Speaker but had deliberately not called evidence relating to that challenge because the issue was not raised by their limited constitutional challenge.
46. Our conclusion, therefore, that the Judge exceeded the bounds of the case before him is by itself sufficient to allow this aspect of the appeal.
47. We wish to make further remarks about what we consider to be an appropriate process where, as here, the Speaker concludes absence under Section 2(d) is established and a parliamentary seat is vacated to ensure those MPs affected by such a result have access to the Supreme Court to challenge such a conclusion. We are satisfied that the MPs in such a situation are entitled, should they choose, to challenge the factual basis on which the Speaker reached his conclusion about absence before the Supreme Court.
48. The Election Petition Rules 2003 provide a process for an MP to challenge vacation for absence in the Supreme Court. Part 3 of the Rules (Vacationing Seat and Disqualifying to Hold Seat rules) at R 3.1 provides for: "*proceedings about whether a person is validly elected to Parliament has vacated his or her seat*".
49. We understand that such a challenge has been filed in the Supreme Court and significant exchange of evidence has already taken place. We consider the Supreme Court and the parties should now proceed urgently to a hearing of this petition.

Cross Appeal

50. The Respondent filed a cross appeal. The challenge was essentially a complaint that the Supreme Court Judge had misunderstood a submission by the Republic. They say that the Judge at [33] of his judgment recorded the Respondent's submission as supporting the proposition that the Speaker had a duty to announce a parliamentary seat as vacant when the requirements of Section 2(d) had been met.
51. We record that the Respondents in fact posed the question in their submissions "*can it be suggested that a declaration or an announcement from the Speaker suffice to fulfil the requirements of Section 2(d) of the Members of Parliament (Vacation of Seats) Act?*"
52. And so, we accept no firm submissions as recorded in the Supreme Court judgment at [33] was made by the Respondents.
53. Given there was no cross appeal point which went to the Supreme Court decision, the cross appeal is dismissed but we record the error in the Supreme Court judgment.



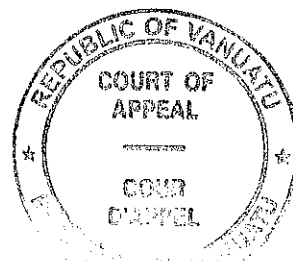
54. In summary:

- (a) the appeal against the Supreme Court's finding that the Appellants' rights under Articles 17 and 21 had not been breached is dismissed.
- (b) the appeal against the Supreme Court's decision to determine whether the Appellants had vacated their seats is allowed. Accordingly, the Supreme Court's conclusions arising from this determination are set aside.
- (c) the Judge erred in proceeding to consider whether the Speaker's conclusion as to absence without permission was correct when this was not an issue before the Supreme Court.
- (d) the Speaker was entitled to announce on 8 June 2021 that he was satisfied that the MPs were absent from Parliament for three consecutive days without his consent and that by operation of Section 2(d) the relevant seats were vacated.
- (e) the MPs affected by the Speaker's statement that their seats had been vacated are entitled (as they now have) to challenge the Speaker's conclusions as to absence without permission in the Supreme Court by an electoral petition.
- (f) the cross appeal is dismissed. We have noted the Respondent's corrected submissions in this decision.
- (g) No costs are awarded given the public importance of these proceedings.

55. We wish to make some further comments with regard to these proceedings.

56. We consider it unfortunate that the Appellants in the Supreme Court made an application alleging breach of Articles 17 and 21 and then subsequently made an application challenging the Speaker's conclusions as to absence by electoral petition in the Supreme Court.

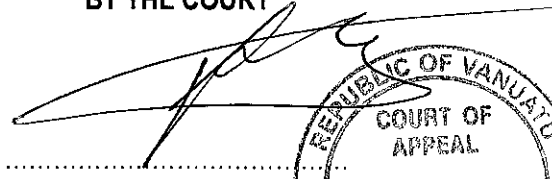
57. We appreciate the process for constitutional petitions and electoral petitions are different. However, even if separate filings are made, consolidation of the two sets of proceedings into one hearing would have facilitated an early resolution of all issues. The alternative is some form of hybrid application, which would satisfy both the requirements of a constitutional application and the requirements of an electoral petition. The present case before this court and the Supreme Court could be an illustration of a hybrid application. If the Judge in the Supreme Court made orders for the Appellants and the Respondents to file factual evidence on the absence or not of the three consecutive sitting absences so as to allow the judge to hear the constitutional application and the vacation of seats challenge once and for all.



58. The possible removal of a duly elected MP through the operation of Section 2(d) is a matter of great importance to Vanuatu's democracy. Uncertainty about who is or is not an MP has the capacity to disrupt Parliament's work. And so, a straightforward speedy process to resolve any disputed issues in the Supreme Court relating to elections is of paramount importance. Separate sets of proceedings dealing with the same broad issue, removal from Parliament, does not assist in a straightforward speedy resolution.
59. We have set out in this judgment what we consider to be the appropriate process in cases involving vacation of seats through the operation of Section 2(d). The use of this procedure should facilitate the speedy resolution of such cases before the Supreme Court.

DATED at Port Villa this 16th day of July 2021

BY THE COURT


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**Hon. Chief Justice
Vincent Lunabek**

