

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

**Civil Appeal**  
**Case No. 23/2567 COA/CIVA**

**BETWEEN: TARSONG SHEM**  
Appellant

**AND: PORT VILA CITY COUNCIL IN RIGHT OF THE**  
**LORD MAYOR**  
Respondent

**Date of Hearing:** 8 November 2023

**Coram:** *Hon. Justice Dudley Aru*  
*Hon. Justice Viran M. Trief*  
*Hon. Justice Richard White*  
*Hon. Justice Mark O'Regan*  
*Hon. Justice E.P. Goldsbrough*  
*Hon. Justice William K. Hastings*

**Counsel:** *Tari, K.T for the Appellant*  
*Nalyal, E for the Respondent*

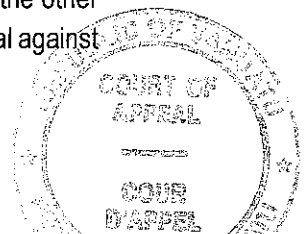
**Date of Judgment:** 17 November 2023

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**JUDGMENT OF THE COURT**

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1. Tarsong Shem was elected a Port Vila City Council member in July 2022. At a meeting of that Council, in September 2022, he was appointed a member of the Town Planning Committee (the Committee). With a previously unblemished attendance record, he missed a Committee meeting held on 29 May 2023. Further meetings of the Committee were held on 1, 2 and 8 June 2023, which he also did not attend. On the same day as the last-mentioned meeting, a letter was written to him by the Mayor of Port Vila City Council telling him that he was no longer a councillor because he had missed, without permission, four consecutive meetings of the Committee without obtaining permission in advance. The provisions of section 10 of the Municipalities Act [Cap 126] were also set out in the letter.
2. This indication from the Mayor of the Port Vila City Council, and its subsequent confirmation at a meeting of the full Council on 23 June 2023 resulted in Tarsong Shem (the Appellant) bringing a claim for Judicial Review together with another who is not a party to this appeal. That other person had also been declared to have ceased to hold office as a councillor by virtue of section 10 (e) of Cap 126. At first instance, the other person was successful. As the Appellant was not successful, he filed an appeal against



the decision made in the Supreme Court. This is the decision of the Court of Appeal following that appeal.

### The Appeal

3. In the notice and grounds of appeal, there are only two grounds set out and both of those grounds refer to the same issue. There is a conflict in the evidence that the trial judge resolved in favour of the Respondent about notice of meetings, and having made a finding on that, the trial judge went on to make a further finding that notice of other adjourned meetings was not necessary. Taken together, those findings resulted in the trial judge dismissing the Appellant's application for judicial review.
4. Port Vila City Council is a statutory body governed by the Municipalities Act [Cap 126]. After an election, the Council exists for four years. Duly elected members remain members for that term unless one or more of the provisions of section 10 apply to them. There are eight situations set out in section 10 but only 10 (e) applies in this appeal.
5. Section 10(e) provides: -

**10. Vacation of office**

*If any councillor –*

...

*(e) fails to attend 3 consecutive meetings of the council or of any committee of the council of which he is a member, unless he has obtained the prior permission of the council to absent himself throughout such period,*

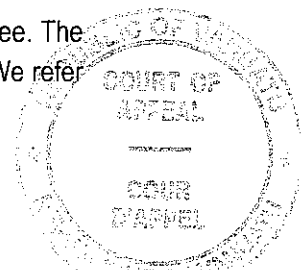
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*he shall cease to hold office as a councillor.*

6. This provision was the subject of findings of the trial judge, which are challenged on this appeal.
7. In paragraph 30 of his judgment, the judge at first instance said: -

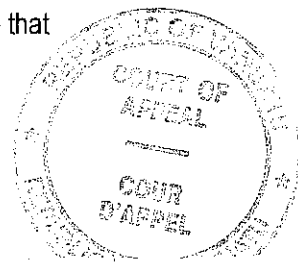
*"Mr Shem said in evidence he was not notified about those meeting. However, the evidence of Samuel Iani contradicts what Mr Shem said about lack of notice. From Mr Iani's evidence I am satisfied that the notice in relation to all those meetings beginning on 26th May 2023 was that annexed as "SI2". There was no need for a separate notice for the meetings of 1st, 2nd and 8th June 2023. I am satisfied on the evidence that Mr Shem was aware of those meetings but he absented himself without apology from the meetings of 1st, 2nd and 8th June 2023. He therefore absented himself from 3 consecutive meetings and pursuant to section 10 (e) of the Municipalities Act, his seat had been vacated."*

8. Mr. Iani was at the relevant time the Chairman of the Town Planning Committee. The exhibit "SI 2" was a notice of a meeting of the Committee on 26<sup>th</sup> May 2023. We refer



to this as the 26<sup>th</sup> May Notice. The 26<sup>th</sup> May Notice did not refer to any other proposed meetings of the Committee.

9. The first matter concerns whether notice was required to be given of those meeting dates not specified in the 26<sup>th</sup> May notice. It appears that nothing took place on 26<sup>th</sup> May other than to adjourn the meeting to 29<sup>th</sup> May 2023, which was the date set at the previous meeting of 23<sup>rd</sup> May 2023 for the Committee to resume.
10. The Appellant agrees that he knew of the meeting of 29 May 2023. In his evidence, he testified that he sought permission to be absent from that meeting because he had other pressing business. That request, he says, was directed to the Acting Town Clerk, Robert Avio who had written the 26<sup>th</sup> May Notice. His evidence continued that his apology was accepted. That evidence was not challenged and was accepted as such by the trial judge. The Appellant's absence on 29<sup>th</sup> May 2023 could not be one of the three consecutive meetings referred to in section 10(e) as it was with permission.
11. There is nothing in the 26<sup>th</sup> May Notice which gives any indication of subsequent meeting dates. It appears that the 1st, 2nd and 8th June meetings were nothing more than continuations of the same Committee meeting, which had not completed all agenda items. There was evidence before the trial judge that attempts were made to make the Appellant aware of these subsequent meeting dates, but he found that no separate notice was required.
12. This brings into focus the second related ground of appeal. The trial judge further found that, based on the evidence, the Appellant knew of those meetings. It is agreed that the Appellant knew of the meeting of 1<sup>st</sup> June and deliberately decided not to attend. There is evidence from Lisa George, the Clerical Officer for the Committee that she telephoned the Appellant to tell him of the meeting of 2<sup>nd</sup> June 2023, which supports the trial judge in his finding that the Appellant knew of the 2<sup>nd</sup> June 2023 meeting, but the evidence of the 8<sup>th</sup> June meeting notice falls short when Lisa George says that she tried to contact the Appellant by telephone, but the telephone was not answered. She gave no further evidence of attempts to contact the Appellant about that meeting.
13. Thus, the trial judge could not properly find as a fact that the Appellant had notice of the meeting on 8<sup>th</sup> June 2023 based on that evidence. As Samuel Iani said, it was important that the Appellant be told of the 8<sup>th</sup> June 2023 meeting because that would be the third consecutive meeting that he had missed, and the risk of losing his seat would arise. He, himself, tried and failed to contact the Appellant that day by telephone.
14. Section 10 (e) speaks of a failure to attend meetings of the Council or a Committee of the Council. The consequences of a failure to attend three consecutive meetings are severe. A person who has been duly elected as a member of the council will lose his or her seat. Those members of the public who voted for that member during the election will be deprived of that choice, and a further by-election will be required to replace that ousted member. That is not a step to be taken lightly.

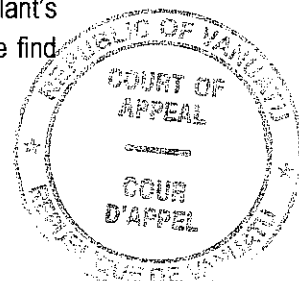


## Discussion

15. As the parties to the appeal seem to agree through their actions, it is necessary for those responsible for arranging or calling meetings to give members notice. There are requirements for agendas to be set out in a notice and distributed. In this instance, written notice of the beginning of the Committee meeting was given. For those not present when arranged, notice of subsequent meetings was given or attempted. If a member were present on 23<sup>rd</sup> May 2023, they would know that 29<sup>th</sup> May was the next meeting date, and so on. But a notice of resumption was necessary for those who missed a meeting. It is not in issue on this appeal that each meeting was a separate meeting for the purposes of this legislation.
16. We agree that a necessary step to precede a failure to attend is notice. If the Appellant was not notified of a particular meeting, he cannot be said to have failed to attend that meeting. Failure implies, in this instance, prior knowledge. In *Ingram v Ingram* (1938) SR (NSW) 407 at 410, Jordan CJ pointed out that the word 'fail' may have at least three possible meanings: (1) simply the omission to do a thing in question, irrespective of any reasons; (2) an omission by reason of some carelessness or delinquency; but not an omission caused by impossibility; (3) an omission to do the thing including by impossibility arising from some clause being included and others being excluded.
17. In relation to the failure to attend on 8<sup>th</sup> June 2023, the people who attempted to telephone the Appellant with notice of the meeting gave evidence that they failed. No further evidence was put forward on behalf of the Respondent to suggest a different way that notice of the meeting had been communicated. Other than the bare assertion in his sworn statement that the Appellant (indeed every member) had been notified of all the meetings, there is no evidence to confirm that assertion. Here, the Appellant admits receiving notice for the meetings on the 29<sup>th</sup> of May and the 1<sup>st</sup> and 2<sup>nd</sup> of June 2023.
18. We cannot, therefore, agree with the trial judge when he finds that the Appellant had been notified of the meeting of 8<sup>th</sup> June 2023 and that, having been given notice, he failed to attend. We note that he was not present at the meeting, but, in our view, failure to attend involves being aware of the requirement to attend. If the requirement to attend has not been established, in this instance by a failure to give notice, the fact that a member does not attend does not amount to a section 10 (e) failure. That, in our view, disposes of this appeal.

## Decision

19. The appeal is allowed, and the trial judge's decision to dismiss the appellant's application for judicial review and the associated costs award are quashed. We find



that the appellant did not fail to attend three consecutive meetings of the Committee, and therefore, his application for judicial review of the decision that he has vacated his seat is allowed, and the declaration that he had vacated his seat made by the Mayor on 23<sup>rd</sup> June 2023 is set aside. He remains a duly elected member of the Port Vila City Council.

20. A purported cross-appeal filed by the Respondent on the afternoon prior to this hearing was also considered by this Court. It sought to appeal the decision made by the trial judge concerning the claimant who was successful at trial. That party is not a party to this appeal, and the appeal against the decision in his favour does not form part of this appeal. If the Respondent seeks to appeal that part of the decision, it is a matter for him, but it should be commenced by way of a notice of appeal for which an enlargement of time will now be necessary. Having invited counsel for the Respondent to explain his reasoning for the 'cross appeal' we hereby dismiss the purported cross appeal as incompetent.
21. Costs of and incidental to the appeal are to be paid by the Respondent to the Appellant in the sum of VT100,000.

**DATED at Port Vila this 17<sup>th</sup> day of November, 2023.**

**BY THE COURT**

  
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**Hon. Justice Dudley Aru**

