

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

Constitutional Case No. 822 of 2015

BETWEEN: HAM LINI VANUAROROA, JOE
NATUMAN, RALPH REGENVANU, BOB
LOUGHMAN, PHILIP BOEDORO,
KALTALIO SIMEON, RICHARD MERA,
TESEI JOHN NAWAI, ALFRED MAOH,
DANIEL NALET, GILLION WILLIAM, DAVID
TOSUL, JAMES BULE, BRUNO
LEINGKONE, NATO TAIWIA, ESMON
SAIMON, CHARLOT SALWAI, KALVAO
MOLI, ALFRED CARLOT, GEORGE ANDRE
WELLS, JOHN LUM, RICHARD NAMEL,
MAKI SIMELUM and PETER VUTA

First Applicants

AND: KENNETH NATAPEI

Second Applicant

AND: PRESIDENT OF THE REPUBLIC OF
VANUATU

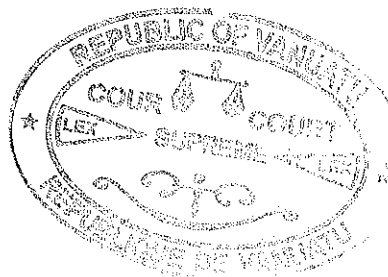
First Respondent

AND: THE REPUBLIC OF VANUATU

Second Respondent

Coram: Judge Aru

Counsel: Mr. E. Nalyal and Mr. R. Warsal for the First and Second Applicants
Mr. I. Kalsakau and Mr. A. Godden for the First Respondent
Ms. F. Williams for the Second Respondent



JUDGMENT

Introduction

1. The National Parliament was dissolved by the President of the Republic of Vanuatu on 24 November 2015. The effect of the dissolution is that the life of Parliament came to an end and so were the terms of members of Parliament.
2. The Applicants who were members of Parliament prior to the dissolution now challenge the President's decision to dissolve Parliament by filing an Urgent Constitutional Application on the 1 December 2015. This was supported by an undertaking as to damages and a sworn statement of urgency. A number of sworn statements filed in support were deposed by Mr. Joe Natuman, Mr. Kenneth Natapei, Mr. Esmon Sae, Mr. Ralph Regenvanu, Mr. Charlot Salwai and Mr. Alfred Carlot.
3. The relief sought by the Applicants are:-
 - 1) A declaration that the purported dissolution of Parliament by the President on 24 November 2015 was unconstitutional, null and void and of no effect;
 - 2) A declaration that the constitutional rights of the First and Second Applicants as members of Parliament and as citizens have been infringed;
 - 3) An order that Parliament shall meet in its second ordinary session on 14 December 2015 as summoned by notice dated 19 November 2015.



Grounds

4. A number of grounds were raised which in brief are that:-

- 1) the Council of Ministers (COM) was not properly constituted to advise the President to dissolve Parliament;
- 2) No advice was provided by the COM to the President to dissolve Parliament;
- 3) The President had no powers to dissolve Parliament as he had no advise from the COM;
- 4) The exercise of discretion by the President under Article 28 (3) was irrational and unsustainable;
- 5) The Speaker had issued notices to members of Parliament to meet in the Second Ordinary session of Parliament and Article 21 1) was infringed in relation to them when Parliament was dissolved;
- 6) In relation to the second Applicant, he was not able to be sworn in as the new member of Parliament for Port Vila when Parliament was dissolved;
- 7) Included in the agenda for the Second Ordinary Session of Parliament was a bill for the budget to be debated. As a result of the dissolution Article 25 was infringed in relation to the Applicants as they were not able to debate the budget.



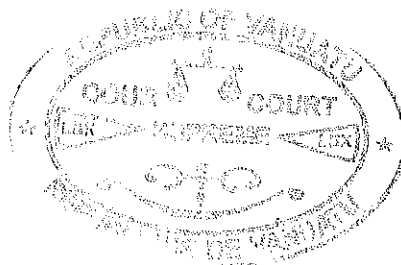
5. At the conference I enquired into matters raised in the Constitutional Application. Mr. Nalyal informed the Court that his Urgent application is made pursuant to Article 53 1) of the Constitution, that the applicants say that a provision of the constitution has been infringed in relation to them which is primarily the dissolution of Parliament by the President pursuant to Article 28 (3) of the constitution although they also allege infringements of other provisions of the constitution as well.

Issue

6. At the conference, it was accepted that the main issue is whether Parliament was lawfully dissolved by the President on the 24 November 2015. The other orders sought were therefore consequential to the determination of this very issue.
7. The Respondents were then directed to file their response and sworn statements in support with written submissions and the matter was set down for hearing at 900 am on Thursday 10 December 2015.
8. The First Respondent in their response denied that the Applicants were entitled to the orders sought. They filed a sworn statement deposed by Fr. John Colerdige Sovan. The Second Respondent also adopted a similar position in their response and filed sworn statements deposed by Mrs. Nadine Alatoa and the Prime Minister, Mr. Sato Kilman.

Background

9. The essential background facts are not in dispute and are set in chronological order below:-



- 9 October 2015- Fourteen (14) members of Parliament were convicted in Criminal Case No. 73 of 2015;
- 15 October 2015 - The COM met and resolved that Parliament should be dissolved and for the Prime Minister to inform the President accordingly to dissolve Parliament;
- 15 October 2015- Mr. Alfred Carlot was removed by the Prime Minister as a Minister;
- 16 October 2015- Mr. Kenneth Natapei the Second Applicant was declared by the Electoral Commission to be the winning candidate following the by-election in the Port Vila constituency;
- 16 October 2015- The Prime Minister related the COM advice to the President to dissolve Parliament;
- 22 October 2015- The Fourteen (14) convicted members of Parliament were sentenced to imprisonment in Criminal Case No. 73 of 2015;
- 19 November 2015- The Speaker of Parliament summons Parliament to meet in its Second ordinary Session;
- 20 November 2015- Court of Appeal in Criminal Appeal Case No.12 of 2015 dismisses the appeals



against conviction and sentence by the 14 convicted members of Parliament;

- 24 November 2015- The President dissolves Parliament.

Law

10. The Constitution of the Republic of Vanuatu provides as follows:-

- *Article 53 (1) and (2)*

"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.

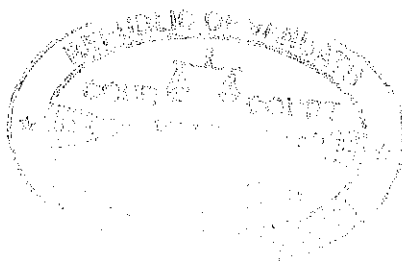
..... "

- *Article 28 (1), (2), (3) and (4) provides:-*

"28. Life of Parliament

(1) Parliament, unless sooner dissolved under paragraph (2) or (3), shall continue for 4 years from the date of its election.

(2) Parliament may at any time decide, by resolution supported by the votes of an absolute majority of the members at a special sitting when at least



three-fourths of the members are present, to dissolve Parliament. At least 1 week's notice of such a motion shall be given to the Speaker before the debate and the vote on it.

(3) The President of the Republic may, on the advice of the Council of Ministers, dissolve Parliament.

(4) General elections shall be held not earlier than 30 days and not later than 60 days after any dissolution.

....."

- *Article 2*

"2. Constitution supreme law

The Constitution is the supreme law of the Republic of Vanuatu."

- *Article 4 (1)*

"4. National sovereignty, the electoral franchise and political parties

(1) National sovereignty belongs to the people of Vanuatu which they exercise through their elected representatives.

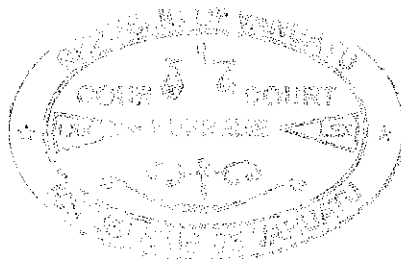
....."

- *Article 21 (1)*

"21. Procedure of Parliament

(1) Parliament shall meet twice a year in ordinary session.

....."



- *Article 39 (1)*

"39. Executive power

- (1) *The executive power of the people of the Republic of Vanuatu is vested in the Prime Minister and Council of Ministers and shall be exercised as provided by the Constitution or a law.*

....."

- *Article 40*

"40. Council of Ministers

- (1) *There shall be a Council of Ministers which shall consist of the Prime Minister and other Ministers.*

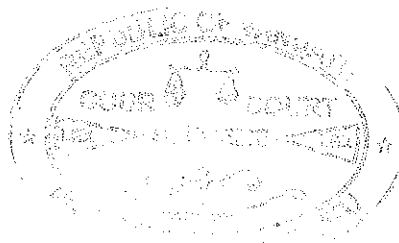
- (2) *The number of Ministers, including the Prime Minister, shall not exceed a quarter of the number of members of Parliament.*

11. Section 15 of the Government Act [CAP 243] provides:

"15. Advice from Attorney General and Director-General of Finance

- (1) *The Council must not consider a submission unless the Council has available to it advice from the Attorney General on the legal implications of the submission.*

- (2) *The Council must not consider a submission unless the Council has available to it advice from the Director-General of the Ministry of Finance and Economic Management on the financial implications of the*



submission and whether the submission complies with the principles of responsible fiscal management.

(3) The advice referred to in subsection (1) or (2) must be provided within a reasonable time before the Council meets."

Discussion

12. It needs to be said at the outset that the Courts when dealing with cases of this nature particularly where it concerns members of Parliament alleging an infringement of their rights under the Constitution, "*.....the court is not concerned with the political views or policies of any person or party. The Court is not concerned with the desirability or undesirability of any course of actions and the court considers only whether the rights and responsibilities which are enshrined in the constitution have been lawfully and properly exercised..*" (*In re the Constitution, President of the Republic of Vanuatu v Korman [1998] VUCA 3*) (*Korman*).
13. In that respect, a dissolution by the President is not immune from challenge. The Court of Appeal in *Vohor v Abiut [2004] VUCA 1 (Abiut)* confirmed what the same court said in *Korman* that "*the Court can review the dissolution of Parliament if someone argues that his constitutional rights have been infringed by such an action.*"
14. The second principle when considering the interpretation of the constitution as the supreme law is that the constitution is to be construed sui generis. In *Kilman v the Speaker of Parliament of the Republic of Vanuatu [2011] VUCA 15* the Court of Appeal re stated the principle as follows:-

*"...it is appropriate to recognise that the Constitution is the Supreme law of the Republic of Vanuatu pursuant to Article 2 of the Constitution. It is the founding document of this Sovereign Democratic State. Furthermore, the Constitution is to be construed sui generis and not as if it was an act of Parliament. This is well explained by the Privy Council in **The Minister of Home Affairs v. Fisher** (1980) AC319 at 329 where it is stated that the approach required for the construction of a constitution on the Westminster model (which the Constitution of the Republic of Vanuatu clearly is) is not to treat it as if it was an act of Parliament but,*

"...as "sui generis" calling for principles of interpretation of its own suitable to its character without necessary acceptance of all presumptions that are relevant to legislation of private law".

*We accept that this identifies the correct approach to the interpretation of the Constitution. In such an exercise, regard must be had to the Constitution as a whole and to ensure that it is a clear, workable and practicable instrument of State. We need do no more than reiterate what has been stated by this Court on previous occasions and in particular as encapsulated by this Court in **Tari v. Natapei** [2001] VUCA 18; Civil Case No. 11 of 2001 (1 November 2001)*

"The Republic of Vanuatu is a Constitutional Parliamentary Democracy. The Constitution is the foundation document. As clause 2 of ... notes, the Constitution is the Supreme law of the Republic of Vanuatu.

In Chapter 4 the Constitution provides for a Parliament. In Clauses 16, 17, 21, 22 and 27 in particular, are enumerated the important place of

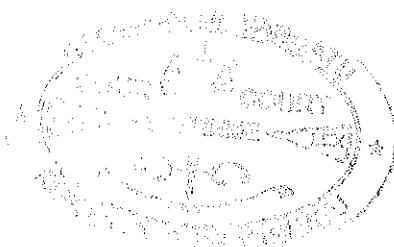


Parliament, and the rights and immunities which are attached to it and its members.

Where there is room for debate, or it is possible that ambiguity exists, assistance may be gained from a consideration of the way in which Parliaments in other places have operated in the past or operate now. But any of that is in all circumstances and at all times subject to the clear and unambiguous words of the Constitution which is the Supreme Law."

Parliament

15. National sovereignty belongs to the people of Vanuatu (Article 4) which they exercise through their elected representatives in Parliament (Article 17). The Applicants submit that the role of Parliament in the overall constitutional framework of the Republic of Vanuatu is important because that is where people exercise their national sovereignty through their elected representatives therefore any decision to dissolve Parliament must strictly adhere to the procedures as in this case Article 28 (3). In their evidence, Mr. Joe Natuman in his further sworn statement deposes at paragraphs 15 and 16 that Parliament was summoned to meet in its second ordinary session on 14 December 2015 and the opposition members of Parliament had signed a motion of no confidence (Annexure "JN15") which they intended to lodge for debate during the second ordinary session therefore Parliament should not have been dissolved.
16. The respondents on the other hand contend that Article 28 (3) was complied with and therefore Parliament was lawfully dissolved despite the summons by the Speaker for Parliament to meet in its Second Ordinary session.



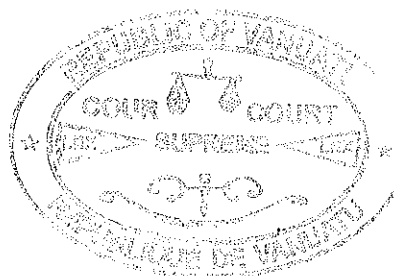
17. The respondents position is supported by what the Court of Appeal said in *Korman* and confirmed in *Abiut* that:-

".....a course of action which had the effect of denying Members of Parliament their right "to express an unfavourable opinion in the Government leadership" cannot be elevated to a priority over the right of the Council of Ministers to advise the President that Parliament should be dissolved and the constitutional right of a President (having received such advice) to exercise the responsibility vested in him under the Constitution. We are of the view that the right of the people of Vanuatu to democratically express their view in the election of a new Parliament must be accorded the priority. Article 43 is not one of those Articles which is specifically covered by Article 5. The right which Members of Parliament have under Article 43, is a right which exists only if Parliament exists. It is to allow the tail to wag the dog to suggest that the rights of the Members of Parliament ought to be accorded priority over the rights of the people to elect a new Government when the President, having exercised the provisions of the Constitution, has determined that Parliament should be dissolved."

(emphasis added)

Article 28 (3) – Power to dissolve Parliament

18. The effect of what the Court said in *Korman* and in *Abiut* referred to above, is that the rights of members of Parliament to attend Parliament or debate a motion of no confidence against the Government cannot override the rights of the COM to advise the President to dissolve Parliament. The latter is the priority if it is invoked as is now the case. Therefore the primary focal point for the purposes of this case is how Article 28 (3) of the Constitution was applied which led to the dissolution of Parliament by the President. Article 28 (3) states:-



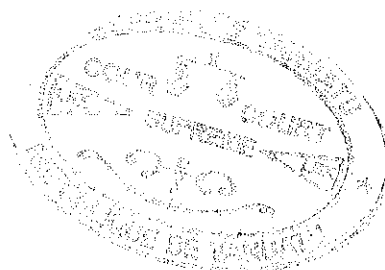
"The President of the Republic, may on the advice of the council of Ministers, dissolve Parliament."

19. The state of the evidence as filed which is relevant for consideration in relation to Article 28 (3) is first, Mrs. Nadine Alatoa in her first sworn statement filed on 8 December 2015 deposes that she is the COM Secretary and says that she was at the COM meeting on 15 October 2015 when the COM resolved that Parliament be dissolved. She said after that meeting she served the Prime Minister with a copy of the decision. Annexure "NA4" to her sworn statement is the agenda for the COM meeting on 15 October 2015 and agenda item J was the submission for the dissolution of Parliament. The minutes of that COM meeting are annexed as Annexure "NA5" which shows that ten (10) Ministers were in attendance at that meeting with two (2) officials being Mrs. Alatoa, as the COM Secretary and the Acting Attorney General. The minutes reflect that after discussing the submission, a motion was moved by the Minister of Finance and seconded by the Minister of Climate Change and the COM approved the submission in the following terms:-

"Appruvum blong Praem Minista I advasem Presiden blong Ripablik blong hemi dissolvem Palamen olsem we I stap long Japta 4, Atikel 28 (3) blong Konstitusen."

(Approved for the Prime Minister to advise the President of the Republic to dissolve Parliament as provided under Chapter 4 Article 28 (3) of the Constitution.)

(translation added)



20. Annexure "NA6" to the sworn statement of Mrs. Alatoa is her letter to the Prime Minister dated 15 October 2015 advising the Prime Minister of the COM decision.
21. The Prime Minister, Mr. Sato Kilman also filed a sworn statement on 9 December 2015. In his evidence he deposes at Paragraphs 3 to 6 of his sworn statement as follows:-

".....

2.I make this statement from matters within my own knowledge and from the records of the Prime Minister's Office, unless other wise stated.

3. On 15 October 2015, the Council of Ministers (COM) during its meeting and in particular on the submissions in regard to dissolution of Parliament approved that the Prime Minister would relay to H.E the President the COM's advice that he dissolve Parliament. A true copy of the submission paper to the COM is attached and marked as "SKL1" and the COM minutes is attachment "NA5" to the sworn statement of Nadine Alatoa filed herein.

4.It was during the COM that I learned that Alfred Carlot had signed a motion of no confidence against me as the Prime Minister. After the COM meeting, I removed Hon Alfred Carlot as a Minister. A copy of the instrument of removal is attached as and marked "SKL2".

5.Following the COM meeting on 15 October 2015, I received from the Secretary of the COM the COM decision in relation to COM's advice that the President dissolves Parliament . A true copy of the COM decision is attachment "NA6" to the sworn statement of Nadine Alatoa filed herein.

6. Following the COM meeting and COM decision dated 15 October 2015, on 16 October 2015 I attended the President's Office with my letter to H.E the President in relation to the dissolution of Parliament and the COM decision ("NA6"), and related to him the advice of the COM to



dissolve Parliament. A true copy of my letter is attached and marked "SKL3.

....."

22. The last paragraph to the Prime Minister's letter of 16 November 2015 to the President states:-

*".....
In light of the above valid points and arguments and pursuant to Chapter 4 Article 28 (3) of the Constitution of the Republic of Vanuatu, the Council of ministers has unanimously approved on Thursday 15 October 2015 for the dissolution of Parliament with immediate effect. [Vide attachments] Attached hereto is an instrument for dissolution of Parliament prepared by the office of the State Law.*

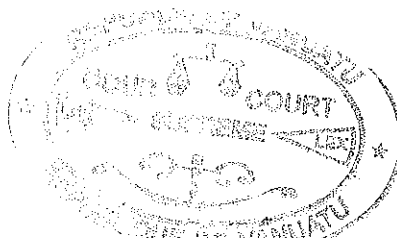
Yours faithfully

Hon Meltek Sato Kilman Livtuvanu (MP)

Prime Minister"

(emphasis added)

23. The next piece of evidence is that of Father John Coleridge Sovan. He filed a sworn statement of 9 December 2015. He deposes in his sworn statement that he is the President's Principal Private Secretary. He says that the Prime Minister met with the President on 16 October 2015 and annexes as Annexure "A" to his sworn statement a letter dated 16 October 2015 that was sent by the Prime Minister to the President advising of the COM resolution on 15 October 2015 for the President to dissolve Parliament.
24. Fr. Sovan further deposes in his sworn statement that prior to the dissolution, the President also met with the Applicants on four occasions. He annexes at



Annexure "C" to his sworn statement the instrument of dissolution and at Annexure "D" the President's public address to the nation. The instrument of dissolution of Parliament states:-

"In exercise of the Powers conferred on me by Article 28 (3), I His Excellency WOMTELO REV. BALDWIN JACOBSON LONSDALE, President of the Republic of Vanuatu, on the advice of the Council of Ministers, dissolve Parliament.

This instrument commences on the day on which it is made.

Made at Port Vila this 24th day of November, 2015

(sign)

*His Excellency WOMTELO REV. BALDWIN JACOBSON LONSDALE
President of the Republic of Vanuatu."*

(emphasis added)

25. In his public address to the nation , the President stated as follows:-

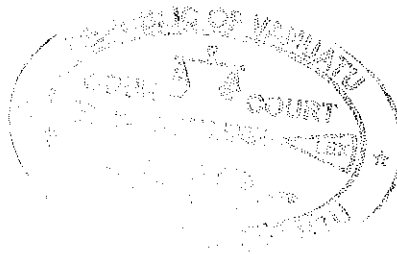
"Fellow sitisens, good day long yumi everiwan long Vanuatu stat long Hiu long Torres long North, iko kasem Matthew mo Hunter Islands long South. Tudei, mi kambak wan moa taem long Radio blong mekem Pablik Address blong mi long situeson we mi bin livim wetem Kavman moa Opposition blong kam antap wetem wan amikebol solution, afta 14 MP's I bin sentenced mo oli bin ko long Correctional Sentas long 22nd October, 2015. Afta long wan manis, 2 days Vanuatu I no lukim yet wan new Kavman we yumi everi wan I bin stap hope from. Mi bin mekem best blong helpem tuketa saed blong foketem ol differences blong tufala



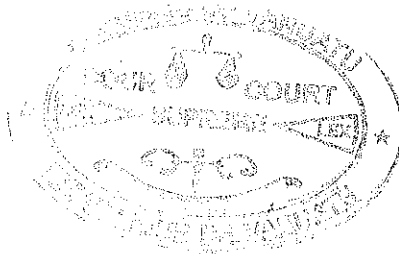
mo fomem wa kavman blong servem nasonal interest blong ol pipol blong yumi, be kam kasem tudei, situeson I stap sem mak nomo.

Taem mi stap kwaet plante blong prey mo seekim maen blong God long Politikol situeson blong yumi, we yumi se; "Long God yumi Stanap", motto ia hemi no realised long ol Kaontri blong yumi. Concern we hemi stap naoia long Vanuatu, se taem Kavman wetem Opposition I stap raorao from ol posision long Kavman, situeson blong livelihood blong pipol I continue blong affected. Yumi stap experiencem tudei, ol Natural Disastas we I bin affectem yumi mo I stap affectem yumi yet.

- 1. After long Cyclone Pam long 13th mo 14th March 2015, Vanuatu hemi no fully recovered yet. Vanuatu I just start blong go insaed long Recovery plan blong hem nomo, El Nino too hemi hitim yumi bakegen. Plante pipol blong yumi I stap safa yet long tufala Natural Disastas ia yet, Politikol Impasse I hitim yumi we I lukim 14 MP's I bin sentenced blong go long jail, mo saed ino gat namba blong servem ol Pipol blong Vanuatu.*
- 2. Impact blong Climate change long sea level rise too hemi continue blong affektem ol Pipol blong yumi , mo Kavman.*
- 3. Servis Delivery iko long ol pipol blong yumi hemi slow mo hemi no effective.*
- 4. Dry Sison or Drought hemi stap hitim yumi fullwan naoia, mo hemi affecktem plante Communities long Kaontri, we plante aeland ino gat sef Water mo ino gat inaf kakai. Samfala Pikinini I bin passaway finis long Tanna mo sam narafala Province long North.*



5. *Tudei, taem mi stap givim address ia long Neson, Meteorological Department I stap soundem alarm long Kaontri, se bai I save gat 6-7 cyclone long sison ia, mo I save gat tu or tri cyclones I save hitim Vanuatu , mo pawa blong hem yumi no save yet.*
6. *Follem Political Instability long Vanuatu we hemi wan Man-Made Disaster, whole neson hemi kam olsem ol victim blong issue ia, mo Service delivery I no save ko long ol pipol from lack blong Good Governance Principles mo quality blong strong Lidaship.*
7. *2015 Vanuatu I bin go through finis tufala elections long Luganville Municipality, mo Port Vila Bye-Election long 15th October, mo long 17th December bambai Sanma Province I holem Election blong hem. Wetem ol Elections ia, cost blong ranem ol Elections ia hemi expensive.*
8. *Wetem 14 Former MP's we oli stap long jail naoia, after oli lusum seat blong olgeta olsem ol MP's long 21st November 2015, bambai I gat nid blong holem wan Bye Election. Cost blong Bye-election blong 14 MP's, I save costem kaontri long ova 50 million vatu. After samfala manis, bambai I gat General Elections we bambai hemi save kostem ova long 280 million Vatu.*
9. *Taem mi stap givim address blong mi ia, mi andastan se I gat summon blong kolek Parliament long 14 December 2014, mo wan Urgent Constitutional Application we hemi bin serviced I kam long offis blong mi yesterday 23rd November 2015, mi bin givim longfala taem finis, mekem se mi disaet long option we mi givimnaot naoia.*



Follem ol issues ia, mo afta long careful Consideration long samfala Consequences we I stap affectem current Political situeson blong Vanuatu olsem;

- *Unity blong neson blong yumi; follem stampa toktok long Japta 1 blong Constitution, Article 4, sub- Article (1) we hemi talem olsem; "National sovereignty belongs to the people of Vanuatu which they exercise through their elected representatives";*
- *Public interest, Pablik Order mo welfare blong Majority blong Pablik long Vanuatu;*
- *Cost blong Neson sapos Dissolution hemi no save happen from tuketa saet I no save fomen wan Kavman;*
- *Olgeta risons blong Advaes blong Council of Ministas we I bin kol for Dissolution we mi bin holem taet kasem tudei;*
- *Options blong Parliament hemi mas dissolve mo ko long General Election follem Article 28 (4) blong Konstituson we I mas happen within 30 days mo not later than 60 days, bambai hemi helpem Vanuatu moa sapos yumi enta long General Elections;*
- *Instability blong term blong Kavman we I stat long 2012 kam kasem tedei we Kaontri hemi witnessem 4 Prime Ministas finis,*
- *Mo follem toktok blong Electoral Ofis we hemi talem se Ofis hemi gat mane blong ranem General Elections anytaem nawia iko; mi mekem decision olsem:*

Follem Article 28 (3) blong Constitution blong Ripablik blong Vanuatu, we hemi talem olsem; "The President of the Republic may, on the advice of the Council of Minister dissolve Parliament", we hemi discretionary Pawa blong mi olsem President, mo follem last part blong Article 5 (1) long Constitution we hemi tokbaot; "the Legitimate Public Interest in Public Order and Welfare of the people of Vanuatu",



- *after we Ofis blong mi I bin exhaustem everi avenue blong tekem Kaontri blong yumi I kambak long normalcy bakegen,*
- *mo afta we everi efforts mo ol attempts blong faenem possibol solution afta failed dialogues mo negotiations wetem tuketa saed;*
- *mo olsem we mi bin talem long las Address blong mi se, Dissolution hemi save kam Olsem las Resort;*
- *mo blong putum bak intergrity blng neson blong yumi, mo safeguardem Sovereignty blong Kaonri blong yumi, mo alloem Kaontri I nomo go thru long continued Politikol Instability,*
- *Mo givim bak Confidens long ol Donor Partners mo ol Investas blong yumi; hemi givim mi mandate blong eksaaem pawa ia.*

Follem pawa we hemi vested wetem Ofis blong mi olsem President blong Ripablik, mi stap tekem taem ia tudei blong announsem se tudei 24th November 2015, mi stap Dissolvem Parliament blong Ripablik blong Vanuatu.

Thank yu tumas."

COM advice to the President invalid

26. The first ground of challenge was that the COM advice to the President was invalid. The Applicants submitted that section 15 of the Government Act was breached when the COM met to consider the Submission for the dissolution of Parliament pursuant to Article 28 (3) without any advice from the Attorney General and the Director General of Finance. This submission clearly undermines the supremacy of the constitution and is rejected. There is no



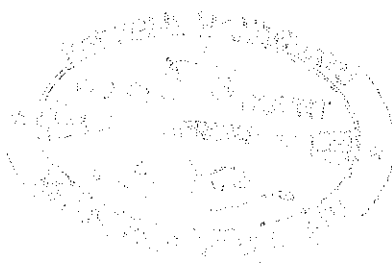
ambiguity in the reading of Article 28 (3). In *Korman* the court of appeal stated that:-

"Article 28(3) provides a discretion to the President which is subject only to his first receiving advice from the Council of Ministers."

27. Even if the Applicants submission is accepted, the issue before the COM was a legal issue and the Acting Attorney General was present in the meeting and gave legal advice.
28. The Minutes of the COM meeting on the 15 October 2015 record the COM decision for the President to dissolve Parliament. It also records the presence of the Acting Attorney General (the principal legal advisor to the Government) who was there and advised that the President has a discretionary power to dissolve Parliament upon the advice of the COM.

COM meeting of 15 October 2015 not properly constituted

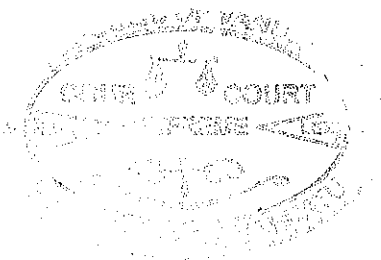
29. The second ground of challenge is that the Applicants submit that the COM meeting of 15 October 2015 was not properly constituted as only ten (10) members attended the meeting instead of all the Ministers. Secondly it was submitted that five of the ministers who attended the meeting were convicted in the bribery case Criminal Case No 73 of 2015.
30. The argument is rejected. The evidence shows that there was a COM meeting on 15 October 2015 with 10 Ministers which is more than half of the members out of 13 in attendance including the Prime Minister. The fact that five were convicted in the bribery case is of no significance as they were still members of



Parliament at that stage and remained as Ministers. They were yet to be sentenced.

The President infringed Article 28 (3) in dissolving Parliament

31. Thirdly, the Applicants submit that the President infringed Article 28 (3) of the constitution in dissolving Parliament. It was submitted that when he received the advice from the COM he should have acted immediately but waited for 5 weeks. Furthermore it was submitted that he considered other factors such as the Government of national Unity and waited until the appeal against sentence of the convicted members of Parliament were dismissed then he dissolved Parliament. It was also submitted that the President was conflicted in his decision due to his exchange of pigs with the Prime Minister.
32. The First Respondent submits that the evidence about the custom ceremony in which pigs were exchanged cannot be elevated to a status more than a mere appreciation of the prevalence of custom in Vanuatu society. I accept this submission.
33. The Prime Minister in his evidence at paragraphs 8 to 13 confirms that the reasons for the exchange of pigs was to settle their differences with the President over the cancellation of their meeting on 26 October 2015 and the adverse coverage by the media over the cancelled meeting.
34. As to the timing to act, Article 28 (3) does not set a timeframe as to when the President should act after receiving advice from the COM to dissolve Parliament. Therefore the suggestion that the President should act immediately or the same day or a day after is flawed. The Court of Appeal in *Korman* confirmed that the President has a wide discretion when it said:-



"Article 28(3) vests a wide and extensive discretion in the President. There is a heavy burden on anyone who asserts that there has been an improper exercise of that discretion."

(emphasis added)

President's exercise of Article 28 (3) power was irrational

35. The final ground of challenge by the Applicants is they submit that the President's exercise of discretion was irrational. It was submitted that the features of irrationality or unreasonableness in the President's exercise of discretion under Article 28 (3) were as follows:-

- There was a delay of 5 weeks from 16 October to 24 November 2015 when the President received the COM's advice to dissolve Parliament;
- The President accepted and acted upon the COM advice to dissolve Parliament when he knew that the COM consisted of convicted MPs;
- The President was concerned about the budget yet he dissolved Parliament;
- The President knew that Parliament was summoned to meet in its second ordinary session;
- The President knew that the Government was a minority Government;

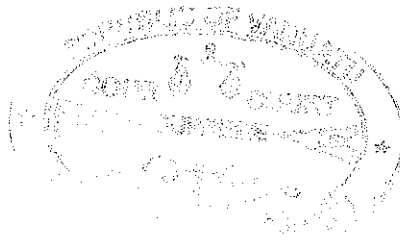


- The dissolution of Parliament was not compatible with the President's speech;
- The President knew that Kenneth Natapei was yet to be sworn in;
- The President waited for the outcome of the bribery case before dissolving Parliament.

36. In *Korman* the court said *"Where the Constitution provides such a wide and unfettered discretion it is necessary to show that in legal terms the decision taken by the President was irrational and unsustainable"*. The court reiterated this position again in *Abiut* that:-

"Provided that he lawfully performed the functions of the President under the Constitution, and provided that the decision which he made was not irrational or unsustainable or that he was not acting in a conflict of interest situation under Article 66 (1) (a) in his performing of the functions, his actions cannot be challenged, in our view."

37. The President's speech details the factors he took into account. In their oral submissions, the Applicants stressed that dissolving Parliament was a serious matter. The speech in my view indicates that the President turned his mind to the seriousness of dissolving Parliament and took careful consideration of the factors he mentions in his speech which when read as a whole the speech indicates a proper appreciation and exercise of discretion by the President.
38. I am therefore not satisfied that the Applicants have discharged the burden that there has been an improper exercise of discretion.



Findings

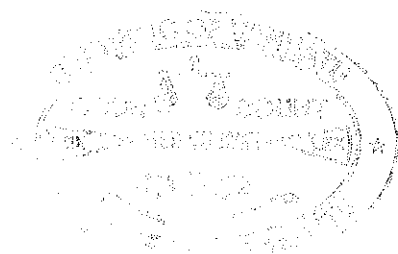
39. I therefore make the following findings that:-

- 1).The COM was lawfully constituted on 15 October 2015 when it resolved to advise the President to dissolve Parliament;
 - 2).That the COM advice was delivered to the President on 16 October 2015 by the Prime Minister in his letter of the same date when he met the President;
 - 3).The President in exercise of his discretion upon the advice of the COM dissolved Parliament on 24 November 2015.
40. Having made the above findings, the main issue as to whether Parliament was lawfully dissolved by the President on 24 November 2015 must be answered in the positive, that yes, Parliament was lawfully dissolved by the President on 24 November 2015 upon the advice of the COM. The other orders sought and grounds raised are consequential upon the determination of this one issue, therefore having determined that Parliament was lawfully dissolved, I need not consider the rest of the grounds and the orders sought.

Conclusion

41. The orders I make are as follows:-

- 1) The Applicants Constitutional Application is hereby dismissed.

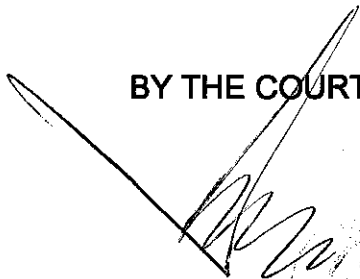


2) The First and Second Respondents are entitled to costs on a standard basis to be paid by the Applicants jointly and severally and to be taxed failing agreement.

42. A final observation that I would make is that given the circumstances and the time frame set for general elections to be held, I would urge all counsels and parties that should you intend to appeal this decision that you do exercise your appeal rights within forty eight (48) hours irrespective of the statutory appeal period so that the urgency is managed and any appeals filed are appropriately dealt with.

DATED at Port Vila, the 16 day of December, 2015

BY THE COURT



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D. ARU
Judge

