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

Constitutional
Case No. 23/2188 SC/CNST

BETWEEN: **Bob Loughman Weibur, Raso Johnny Koanapo, Simil Johnson, Esmon Saimon, James Bule, Marc Ati, Xavier Harry, Camillo Ati, Peter James Tura, Anthony Harry, John Neil Supo, Jay Ngwele, Gracia Shadrack, Marc Muelsul, Blaise Sumptoh, Justin Ngwele, Silas Melve Bule, John Still Tariqweto, Ulrich Sumptoh, Meltek Sato Kilman Livtuvanu, Lulu Sakias, Joshua Leonard Pikioune, Jack Wona, Samuel Andrew Kalpoilep, Samson Samsen**
Applicants

AND: **Speaker of Parliament of the Republic of Vanuatu**
First Respondent

AND: **The Republic of Vanuatu**
Second Respondent

***Date of Hearing Via-Zoom Link*:** **24th August 2023**

***Date of Decision Via-Zoom Link*:** **25th August 2023**

***By*:** **Justice E.P Goldsbrough**

Counsel: Applicant Mr J Ngwele in person and with him Bal, A
Blake, G and with him Blake, E for the First Respondent
Loughman, A K, Attorney General and with him Aron, S for the Second Respondent

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JUDGMENT

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1. This urgent application for relief under the Constitution was filed last week, had an initial hearing on Monday, 21 August 2023, a full hearing on Thursday, 24 August 2023 and this decision was delivered on Friday, 25 August 2023. Counsel are to be commended for their diligence in filing material by agreed directions. The issues were identified, and submissions were thus confined. That work has been of great assistance to the Court.

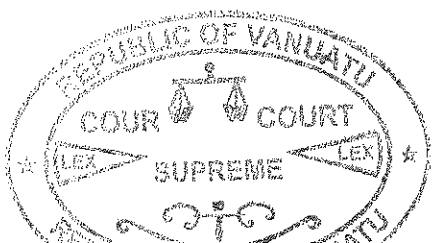
2. The Applicants are represented by one of their number, Mr. J Ngwele. As chance would have it, he is an admitted legal practitioner. He raised the question of his appearance at the close of the hearing on Monday. No other counsel objected to his appearance as a litigator in person and speaking for the remaining applicants. He was advised that, in those circumstances, he should appear in civilian dress, not the robes of counsel. At the next hearing, he appeared, without explanation or apology, in the robes of counsel. That will not happen again.

3. When addressing the question of his robed appearance, the Court also reminded him that as the applicants were not to be legally represented, the costs recoverable in the event of success would be limited.

4. There are agreed facts to this case, which are set out below, but there was a vote in Parliament on a Motion of No Confidence in the Prime Minister. The votes cast were 26 in favour, 23 against. The total number of persons entitled to vote was 51. Parliament can have 52 members, but there is currently a vacancy. The Speaker, following advice, declared the motion defeated as, in his view, there was not an absolute majority of members in favour. That decision was challenged in Parliament, and subsequently, an application seeking Constitutional relief was filed. It seeks a resolution of the question as to what constitutes an absolute majority in the circumstances.

5. An application for relief under the Constitution is to be brought under the Constitutional Procedure Rules made by order under the Judicial Services and Courts Act. They were made by order in 2003, and provide, inter alia, for an application to be filed naming the Republic of Vanuatu. This application names the Speaker of Parliament as the First Respondent and the Republic of Vanuatu as the Second Respondent. That does not accord with the Rules.

6. The Speaker sought to be a party within the proceedings in any event. His decision is at the heart of the matter, and there appears to be no reason why he may not properly be joined as a party, but it was wrong to cite him when filing the application. Given the urgency that the parties have given to this application, it will be kept from being slowed down by unnecessary formality, so the Speaker will remain the First Respondent, as he would otherwise have been made a party. It may be borne in mind in future applications.



7. The application filed is set out herewith:-

> The Applicants in reliance to Articles 6(1) and 53(1) of the Constitution seek the indulgence of the Supreme Court to grant urgent relief pursuant to Articles 6(2), 53(2) and 53 (3) of the Constitution by making the following determination:
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> 1. A DECLARATION that the constitutional rights of the Applicants pursuant to Articles 5(1)(d) and 5(1)(g) of the Constitution have been infringed;
> 2. A DECLARATION that Article 43(2) of the Constitution has been infringed;
> 3. A DECLARATION that pursuant to Article 43(2) the Applicants on 16th August 2023 had successfully passed a vote of no confidence against the Prime Minister, Alatoi Ishmael Kalsakau;
> 4. A DECLARATION that the ruling of the Clerk of Parliament and Speaker of Parliament proclaiming that the vote of no confidence had been defeated is an infringement of Article 43(2) and an infringement of the rights of the Applicants;
> 5. AN ORDER that Parliament be convened forthwith to elect a new Prime Minister;
> 6. AN ORDER that the First Respondent be personally liable for the Applicants' costs of and incidental to this application.

8. I set out the agreed facts: -

1. At all material times the Applicants and the First Respondent were all elected Members of Parliament.
2. Mr Sanik Asang (Former Member of Parliament (MP)) was elected as a member of Parliament but on 3 May 2023 that Mr Asang's election was declared void by the Supreme Court and his seat was vacated thereby creating a vacancy in the Malekula Constituency which the Electoral Commission is addressing by way of a by – election for that vacant seat to be held on Thursday 7 September 2023.
3. Parliament consists of 52 seats pursuant Order 2 of the Representation of the People (Parliamentary Constituencies and Seats) Order 4 of 2002. There are currently 51 elected members of Parliament, with one vacant seat to be filled.
4. On 3rd August 2023 a Request, pursuant to Article 21(2) of the Constitution, to convene Parliament was received by the First Respondent, to debate a motion of no confidence in the Prime Minister Kalsakau Maau'koro and seeking the removal of the Prime Minister under Article 43(2) of the

Constitution, although neither the request nor the motion was signed by Hon. Silas Bule..

5. The First Respondent ruled that the request to convene Parliament and the motion under Article 43(2) were in order and an Extraordinary Session of Parliament was summoned to meet on Thursday 10th August 2023 at 8.30am to debate the motion of no confidence against the Prime Minister.

6. Parliament convened on 10 August 2023 but the quorum requirements of Article 21(4) of the Constitution were not met and the First Respondent adjourned the Extraordinary Session of Parliament to Wednesday 16th August 2023 at 2pm.

7. On Wednesday 16th August 2023, Parliament resumed and debated the motion of no confidence against the Prime Minister.

8. A vote by way of show of hands was undertaken and the result of the vote was that there were 26 votes in support of the motion demonstrated by the Applicants and 23 votes against with the First Respondent abstaining.

9. The First Respondent declared that the motion was not supported by an absolute majority of members of Parliament and therefore failed to meet the requirements of Article 43(2) of the Constitution to remove the Prime Minister and declared the session closed.

9. Following the agreed facts, it was not necessary for evidence to be called. Unchallenged evidence was filed on behalf of the First Respondent, providing the Court with Minutes of the proceedings in the House.

10. The first question is whether this Court is bound by the decision of the Court of Appeal in *Kilman v Speaker of Parliament of the Republic of Vanuatu* [2011] VUCA 15. There, the Court of Appeal determined that an absolute majority required for a motion of no confidence under section 43 (2) of the Constitution was 27 in a House of 52 members.

11. If this Court were asked to consider the same question, it would be bound by the precedent. Is this Court asked the same question? Parliament, at the time of this vote, had only 51 members. There was then and is now a vacancy. There is only a consideration within *Kilman* of a Parliament with 52 members, and so the situation could be said to be different. That can only be determined by answering whether Parliament is made up of 52 members regardless of vacancies or whether, when there is a vacancy (or more than one vacancy), the total number of members reduces from 52 to a lower number.

12. The Constitution is silent on how many Parliamentary Constituencies make up the total, or how many seats in Parliament. Presidential Order provides that under the Representation of the People Act [Cap 143]. Currently, by Order 4 of 2002, there are 52 constituencies. Thus, it may be said that Parliament comprises 52 members. That is the submission of the Respondents.

13. In contrast, the Constitution provides that Parliament consists of its members. Those members must be duly elected. Section 17 Provides: -

> **17. Election of members of Parliament**
>
> (1) Parliament shall consist of members elected on the basis of universal franchise through an electoral system which includes an element of proportional representation so as to ensure fair representation of different political groups and opinions.

14. Parliament does not have 52 members if there is a vacancy. Its maximum capacity, as it were, remains at 52, but its membership goes down to the actual number of members. Should the number 52 be used as membership when there are fewer members?

15. As *Kilman* did not address this issue, this Court considered that that decision does not bind it to the extent that a single or more than one vacancy can affect the number of an "absolute majority". Kilman says that an absolute majority of 52 sitting members is 26 plus 1. It did not need to address the questions now raised about vacant seats.

16. There are strong arguments for keeping the number of members at 52 even if there are not 52 actual elected members at any given time. Vacancies can occur at any time. There may be a resignation, an unexpected death or an order of the Supreme Court declaring the vacancy. Such a vacancy means that a by-election must be called. There is no provision in Cap 143 as to the time within which a by-election must be called. Whatever happens, a by-election takes time to prepare for and conduct. It is not unreasonable to expect a vacancy to last for at least three months, if not more.

17. Currently, the Council of Ministers has 13 members, including the Prime Minister. The maximum number of Ministers is to be determined by reference to section 40 of the Constitution:-

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.

18. With a membership of 52 in Parliament, that number of members within the Council of Ministers is within the Constitutional maximum. At any number less than that, it is not.

19. Should that practical question determine how the Constitution is interpreted? Section 17, cited above in paragraph 12, is quite clear: Parliament consists of duly elected members, not seats. Surely, the words are to be given their clear and unambiguous meaning unless the result is, for some reason, unworkable or absurd?

20. Having 13 Ministers, the maximum number lawfully available, is the equivalent of driving at the maximum speed limit. Just because the top prescribed speed is 60 kph does not dictate that the driver must always attain that speed.

21. Section 43 of the Constitution provides: -

43. **Collective responsibility of Ministers and votes of no confidence**

(1) The Council of Ministers shall be collectively responsible to Parliament.

(2) Parliament may pass a motion of no confidence in the Prime Minister. At least 1 week's notice of such a motion shall be given to the Speaker and the motion must be signed by one-sixth of the members of Parliament. If it is supported by an absolute majority of the members of Parliament, the Prime Minister and other Ministers shall cease to hold office forthwith but shall continue to exercise their functions until a new Prime Minister is elected.

22. There is no issue about the motion, the number of votes cast, and where those votes lay. Twenty-six members voted in favour of the motion and twenty-three against. One member was absent on medical grounds, and one abstained. The abstention came from the Speaker. It is not in issue in this application that the Speaker is entitled to vote as a member if he chooses.

23. So, should the absolute majority be 26 (one-half of 52) plus 1, following the *Kilman* decision, or should the calculation reflect the actual membership of 51? At an odd number, the division by two results in less than a whole number. When rounded up to a whole number, adding one is unnecessary to make it higher than the other. Twenty-five and one-half must be either 25 or 26. At 25, to become an absolute majority, the additional *Kilman* one is needed, but at 26, no addition is necessary as the contrasting number will be 25.

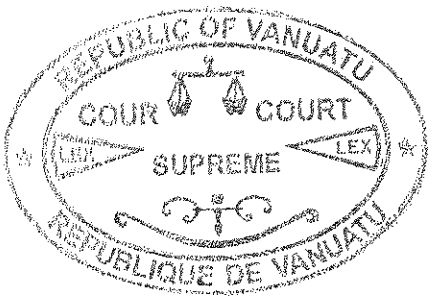
24. It would be wrong to suggest that this Court is redefining the definition of an absolute majority. That was defined in *Kilman* and remains so when Parliament has fifty-two members. If necessary, this Court is asked to add a refinement to consider membership of less than fifty-two.

25. Regarding an absolute majority, all parties agree that the starting point is the number of members, not the number of members who vote. A simple majority can reflect the number of people who actually voted, but not an absolute majority.

26. Having considered the options, it seems to this Court that, as ever, the Constitution takes precedence over any subordinate legislation as the supreme, or *mama*, law. I agree with the principles of interpreting the Constitution set out in *Kilman* and referred to in submissions from the 1st Respondent. Section 17 is clear and unambiguous. There is, therefore, no need to pray in aid subordinate legislation. That clear and unambiguous meaning does not produce absurdity.

27. The result does not have the effect, as submitted by the 1st Respondent, of disenfranchising those who the former member for Malekula once represented. He lost the right to vote in Parliament when his seat was declared vacant. He cannot now be given a voice on any matter in Parliament. The ghost of his former membership should not be allowed to haunt the corridors of the present house.

28. In summary, this Court concludes that the actual number of members of Parliament when this vote was taken is the relevant number on which an absolute majority should be based. That absolute majority, with fifty-one



members, is twenty-six. The correct decision following the vote was that the motion was carried.

29. It is the view of this Court that the applicants have shown that their Constitutional rights, as set out in the application filed on 17th August 2023, have been infringed by the decision of the 1st Respondent and that they are entitled to the relief sought. An order will issue to that effect. That order, however, will include a stay to allow any party seeking to appeal this decision to do so before any further steps are taken to carry out or enforce the order. The circumstances that flowed from the 2011 decision in *Kilman* at first instance, then overturned on appeal, show the need for this.

30. Counsel were asked to submit on the question of a stay if the Applicants were successful. It is clear that, whichever way this Court decided the case before it, the matter would be taken on appeal. That is entirely proper. But the effect of the order, were it to be overturned on appeal, is too disruptive to countenance until certainty is achieved. The stay, therefore, will be effective immediately and will remain in force subject to a notice of appeal being filed before 15:00 hrs on Monday, 28 August 2023. After that, the appeal is to be prosecuted with reasonable diligence. Liberty to the parties is given to lift the stay should the conditions not be met.

31. Costs of the application, limited to actual costs of the proceedings and not to legal representation, are awarded to the Applicants.

DATED at Port Vila this 25th day of August, 2023.

BY THE COURT

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Edwin Goldsbrough
Judge of the Supreme Court