

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

**Constitutional Appeal
Case No. 21/60 COA/CIVA**

IN THE MATTER OF: Articles 6(1) and (2), and 53(1) and (2)
of the Constitution of the Republic of Vanuatu

BETWEEN: Hon. Charlot Salwai Tabimasmass, Hon.
Marcelino Telukluk, Hon. Rick Mahe Tchamako,
Hon. Ulrich Sumptoh, Hon. Francois Batick,
Hon. Jotham Napat, Hon. Matai Seremaiah,
Hon. Job Andy, Hon. Bakoa Kaltonga, Hon. Ian
Wilson, Hon. Ralph Regenvanu, Hon. John
Sala, Hon. Alfred Maoh, Hon. Andrew Napuat,
Hon. Kilion William, Hon. John Salong, Hon.
Danny Silas, Hon. Boe Reve Ephraim, Hon.
Julun Edmond, Hon. Gaetan Pikioune, Hon.
Stevens Fabiano Nano, Hon. Lulu Sakaes
Appellants

AND: The Parliament of the Republic of Vanuatu
First Respondent

AND: Hon Gracia Shadrack, Speaker of Parliament
Second Respondent

AND: The Republic of Vanuatu
Third Respondent

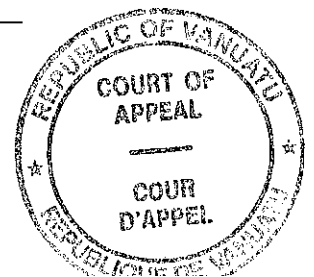
Coram: Hon. Chief Justice V Lunabek
Hon. Justice J Mansfield
Hon. Justice J W Hansen
Hon. Justice O Saksak
Hon. Justice D Aru
Hon. Justice G Andrée Wiltens

Counsel: G Blake for the Appellants
A K Loughman, Attorney General for the First and Third Respondents
J Tari for the Second Respondent

Date of Hearing: 8 February 2021

Date of Judgment: 19 February 2021

JUDGMENT OF THE COURT

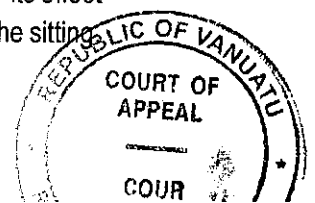


A. Introduction

1. The appellants constitute all members of the Opposition following the recent election. Having been suspended from Parliament for two days, the appellants issued proceedings in the Supreme Court alleging their constitutional rights had been breached. They sought an order quashing the ruling of the first respondent excluding the appellants from Parliament for two sitting days; a declaration that in all the circumstances, Parliament sitting beyond 5 p.m. on Tuesday 16 June 2020 was improper and inconsistent with the Standing Orders of Parliament, specifically Orders 16, 23 and 46; and a declaration that Motion 6 of 2020 was not "mature", and accordingly unable to be heard on Tuesday 16 June 2020 as, having been lodged on Saturday 13 June 2020, there had not been "two clear days" given to the Speaker as required by Standing Order 40(6).
2. At the commencement of the appeal, Mr Blake advised that ground 2 of the appeal, dealing with the maturity of the motion and the meaning of "two clear days" was abandoned, and we need say nothing further about that.

B. Background

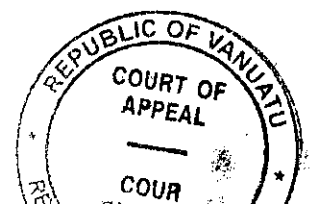
3. The first ordinary sitting of the Vanuatu Parliament was scheduled for 11 June 2020.
4. By and large the background facts are undisputed. Since March 2020, Vanuatu, like most countries around the world, had been under a state of emergency due to the serious health risks posed by Covid-19. The state of emergency had been declared variously by the President and by the Minister of Climate Change (the Minister designated to be the responsible minister for Vanuatu's Covid-19 response). Like many countries, part of the Vanuatu response to Covid-19 was to require isolation and quarantine for persons arriving in, or returning to, Vanuatu.
5. On the morning of 10 June 2020, the appellants were advised of the possible entry into a Covid-19 isolation/quarantine area by the Hon. Bruno Leingkone, the Minister of Climate Change. They sought further information. As a consequence, the appellant Hon. Jotham Napat telephoned the Director of Public Health, who confirmed that Minister Leingkone had gone inside the Coco Beach Resort where repatriates were being kept in quarantine. The Director of Public Health confirmed the Minister had entered the area without the necessary authorisation from the Ministry of Health, which was the institution responsible for all health-related matters under the rules of the Covid-19 State of Emergency.
6. The next day, 11 June, the Daily Post published a story that the Minister had entered the quarantine area; the Minister appeared at Parliament to take up his place in the House; and the applicants refused to go into the chamber of Parliament for the sitting on the basis of unknown or existing health risk, as the Minister was present. Such refusal is colloquially called a 'boycott' and appears to have occurred in the past for a variety of reasons. Its effect is to prevent Parliament from sitting because there is not a quorum for the start of the sitting.



7. That same day, appellant and Leader of the Opposition, Hon. Ralph Regenvanu, wrote to the Speaker requesting Ministry of Health's certification that MPs' attendance in the chamber the following week, in the presence of the Minister, would not pose a health risk to the members. The Speaker carried out enquiries and, on 12 June, provided a written response to Mr Regenvanu, confirming that the presence of the Minister of Climate Change in the chamber presented no health risk to the members. We are satisfied on the evidence the appellants did not know until 12 June that the Minister of Climate Change did not present any risk of spreading Covid-19.
8. On Saturday 13 June, Motion 6 of 2020 was registered, seeking the suspension of the appellants for failing to attend Parliament on 11 June.
9. On Monday 15 June, the appellants received a copy of the motion, and on 16 June the delayed sitting of the first ordinary session of Parliament resumed, which the appellants attended. The President made his address, after which the Speaker announced that Parliament was adjourned until 4 p.m.
10. Parliament resumed at 4 p.m., with the Prime Minister delivering his response to the President's address. Mr Regenvanu, as Leader of the Opposition, commenced to deliver his response. At 4.55 p.m. the Deputy Prime Minister moved a motion under Standing Order 16(2) for Parliament to continue after 5 p.m.
11. When the sitting resumed, the Speaker ruled that Motion 6 was mature and tabled for debate. On an oral motion, it was moved to Motion 1.
12. Following two hours of debate, during which the appellant, Mr Napat, apologised to the Minister of Climate Change following a statement from the Prime Minister that the Government side would not consider withdrawal of notice for suspension until such an apology was tendered for anything that may have been said or caused hurt to the Minister of Climate Change or his family. Mr Regenvanu also apologised to the Minister. Following those apologies an adjournment was granted to allow the Government caucus to consider the withdrawal of the motion. When Parliament resumed, the motion was put and passed but it reduced the period of suspension from four to two days. It passed by 29 votes.

C. The Supreme Court Judgment

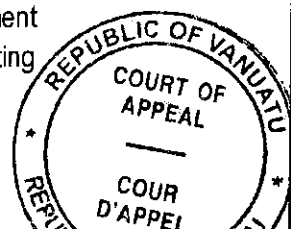
13. The Judge correctly noted that two issues arose, being:
 - (i) Was Motion No. 6 of 2020 and its determination giving rise to the suspension of the Applicants [Appellants] from Parliament for two days a breach of their Constitutional rights, and
 - (ii) Was the sitting of Parliament beyond 5pm on 16 June 2020 in accord with the Standing Orders of Parliament?



14. In considering the first point, the Judge accepted it was trite law that other than in respect of an alleged breach of the Constitution, the Courts will not enquire into or adjudicate upon issues arising in Parliament.
15. The Judge referred to the decision of the Chief Justice in *Natapei v Tari* [2001] VUSC 113, and then turned to consider the individual rights that were said to be breached.
16. In considering that, the Judge referred to evidence of previous boycotts that did not result in suspension but pointed out that the circumstances of those other cases were not before the Court. The Judge said therefore she was unable to compare the circumstances of suspension in this case with previous cases. The Judge concluded that the appellants' rights to protection of the law and freedom of expression had not been infringed.
17. In the findings, the Judge referred to the fact that the Speaker alleged the suspension of the appellants was a temporary measure to punish the opposition for boycotting Parliament without lawful reason. The Judge concluded that she could not say, given the Covid-19 and health impact matters, that the applicants boycotting Parliament was "without lawful reason".
18. She was also not persuaded by the appellants' argument that in calculating the two days required to make a motion 'mature', one should ignore Saturdays and Sundays. She did this on the basis there was no such mention or definition of "clear days" in the Constitution, and it was unhelpful to look at other legislation that so defined "clear days" as excluding Saturdays and Sundays. We do not need to address this issue, given Mr Blake's abandonment of the point.

D. Submissions

19. Mr Blake submitted that the democratic process protected by the Constitution entitled opposition Members of Parliament to be present and to take a full part in the business of the House, including asking written and oral questions, moving motions and exercising their votes. He submitted the unchallenged evidence before the Judge of what the appellants were hoping to achieve during the sessions, including on the days when they were serving their suspension. That evidence shows the members of the opposition intended to play a full and active part in exercising their constitutional rights as Members of Parliament. It included a motion that the Prime Minister and other senior officials receive a reduced salary given the economic impact of Covid-19 on Vanuatu.
20. Mr Blake further submitted that, given the legitimate Covid-19 related health concerns, the response of suspension of all the appellants was disproportionate, and could have been only for the purpose of preventing the appellants playing their proper role in Parliament. We find that latter submission goes too far because, apart from the notes of the debate, we have no clear evidence that there were no other motives at play by those Members of Parliament in Government, given the long history of boycotts being used to prevent Parliament sitting because it created a vacuum in relation to the quorum.



21. Mr Blake also submitted that Standing Order 40(4) refers to member "singularly", and not members. He said the order did not entitle Parliament to suspend the whole of the opposition within one motion. It could only be done by a number of separate motions. He submitted the standing orders were to be interpreted strictly.
22. Mr Tari said that the appellants had no legitimate health concerns as, on the day in question, 11 June, they went and collected their parliamentary allowances. He said if they were really concerned about a health risk from the Minister, that would not have occurred. However, the evidence relied on by Mr Tari falls well short of allowing such a conclusion to be drawn. We do not know the circumstances in which they drew their salaries, whether they were masked, whether they carried out proper social distancing norms, whether they went singularly or as a group, and whether the Minister had been to that part of the Parliament building previously, or while the opposition members were present.
23. Mr Tari went on to submit that Order 40(4) gave Parliament the right to suspend all of the appellants. He said it was not for the Court to intervene, and he supported the ruling of the Judge.

E. Discussion

24. The starting point for the consideration was correctly set out at paragraph 29 of the decision:

"29. I repeat the words of Lunabek CJ in *Natapei v Tari* [2001] VUSC 113; upheld in *Tari v Natapei* [2001] VUCA 18:

"When the Speaker rules on procedural matters, the Court has no jurisdiction to enquire further but if that ruling interferes with a constitutional right of the person involved, the Supreme Court does have the power/right to enforce that right [Article 6(1) and 53(1) of the Constitution]. Further, in order to investigate and enforce effectively the contravention/breach of a constitutional right, the Supreme Court has the right to examine the proceedings in Parliament and this extends to the actual decision made by the Speaker whether or not the ruling is correct. If it is, there will be no contravention of the members' rights. If the ruling is wrong, the Supreme Court has the power/right to make orders, issue writs and give directions, including the payment of compensation, as it considers appropriate to enforce that right which is guaranteed and protected under the Constitution [Article 6(2) of the Constitution]. Furthermore, the Supreme Court has jurisdiction to determine the matter and to make orders as it considers appropriate to enforce the contravention/breach of the provisions of the Constitution [Article 53(2)]."

25. Of further assistance is the following passage of this Court in the same case:

"... the starting point in determining the dispute in this Court, is the Constitution and the rights which are provided therein.



Standing Orders of Parliament, as the Constitution notes, are the rules of procedure for Parliament. Within Parliament they are supreme and must be strictly adhered to by all members of Parliament. Nothing in the Standing Orders of Parliament can vary, abdicate or interfere with the rights which are provided under the Constitution.

Clause 27 of the Constitution provides an immunity for members of Parliament in respect of opinions given or votes cast by them in Parliament in the exercise of their office. But that does not in any way lessen the duties and responsibilities placed upon them (as on every other citizen) under the Constitution.

In as much as the Standing Orders of Parliament have an effect and influence upon the constitutional rights of all members of Parliament, in accordance with clause 6 of the Constitution any person aggrieved, is at liberty to apply to the Supreme Court. Clause 6 provides:-

6. (1) *Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.*
- (2) *The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right.*

This important provision is repeated in Clause 53 as set out above. The Constitution does not provide that what happens in Parliament is to be treated differently than any other breaches of lawful rights guaranteed by the Constitution."

26. It is also necessary to further refer to the decision of the Chief Justice in Natapei:

"yes because the effect of the suspension infringes the constitutional rights. When the Speaker misinterprets and misapplies the Standing Orders of Parliament, the effect of such misinterpretation and misapplication of the Standing Orders of Parliament which results in suspension affects the constitutional rights of a Member of Parliament in Parliament."

So, it is proper for courts to approach challenges to the workings of Parliament with caution. But that is not to say the Court will not intervene in appropriate circumstances.

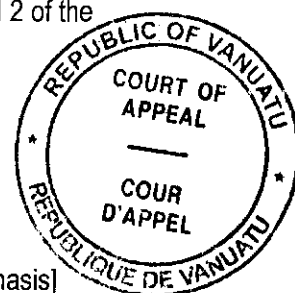
27. We consider the starting point for the consideration of this appeal is Articles 1 and 2 of the Constitution, which read as follows:

1. Republic of Vanuatu

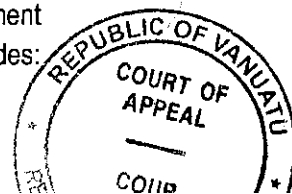
The Republic of Vanuatu is a sovereign democratic state.

2. Constitution supreme law

The Constitution is the supreme law of the Republic of Vanuatu." [Our emphasis]



28. It is easy to sound glib or trite in speaking of the importance of democratic rights. However, those rights have been hard-won, and in a country as young as Vanuatu, will be first and foremost in the minds of its citizens.
29. Essentially, pursuant to Article 4, the franchise is universal, with every citizen of Vanuatu over the age of 18 years being entitled to vote. Parliament may prescribe some conditions or restriction. Importantly, Article 4(3) states:
- "Political parties may be formed freely and may contest elections. They shall respect the Constitution and the principles of democracy." [Our emphasis]*
30. The democratic system of government essentially recognises that the majority of members electing a Prime Minister are the Government, and those who do not vote for the Prime Minister are the opposition. Once a government is sworn in, it is critical in the democratic system that the opposition, in representing those citizens who elected them, fully exercises their rights in Parliament. That is the right that includes holding the Government to account, to lodge written questions, to ask oral questions where permitted by the rules of Parliament, to put forward motions, to take a full part in the debate and to exercise their right to vote. Essentially, the Members of Parliament exercise this role on behalf of the citizens who elected him or her to Parliament.
31. In the circumstances of the present Government, which currently holds a sizeable majority, it is almost certainly able to pass its legislative program. So, it could be said that the absence of the opposition from Parliament will not affect the legislation the Government puts forward. However, we consider that a much too narrow view. Critical to democracy is the holding of the Government to account, and the right to freely express in Parliament contrary views in the course of questioning, debates, and voting.
32. As Mr Blake submitted, this is crucial in Vanuatu because citizens throughout the nation listen to the sittings on radio and television, and they are also entitled to understand why the opposition is objecting to matters put forward by Government in an open and free debate, so as to keep them fully informed and able to form their own opinions.
33. Mr Blake further made the point that the timing of the exclusion of the entire Opposition was significant. Mr Regenvanu's sworn statement set out that had there been no suspension, the Opposition were poised to address one motion and six written questions already submitted to the Clerk of Parliament. The suspension meant the motion was unable to be tabled and the written questions went unanswered. The opportunity to deal with such matters is limited to twice a year. Accordingly, the suspension materially affected the ability of the Opposition to hold the Government to account in relation to those matters.
34. The Second Respondent sought to rely on his ability to control the processes of Parliament as provided for in Standing Order 40 as enabling the suspensions. Sub-order (4) provides:

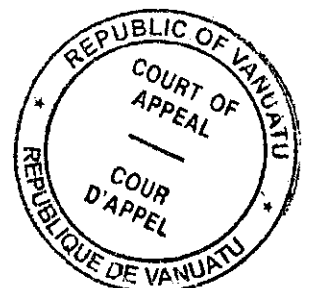


"(4) Parliament may, on a motion moved by a Member, suspend any Member from the service of Parliament for such period indicated in the motion. A Member who is suspended shall not be admitted to Parliament during the period of suspension." [Our emphasis]

35. What eventuated does not come within the ability of the Speaker to control Parliament. Mr Blake submitted that the Standing Order empowering Parliament to suspend a "member" is specifically stated in the singular. Indeed, the word 'member' in the singular appears three times in Order 40(4). As Standing Orders are to be interpreted strictly (*Tari v Natapei*) we consider that there is force in this argument that Order 40(4) does not extend to a right in the one motion to suspend the entire opposition.
36. Further, the country was under a state of emergency because of the Covid-19 pandemic. The responsible Minister, wrongly and without authorisation, had entered an isolation/quarantine facility. In the absence of any other information, the real and present threat that he could be a carrier of Covid-19 is all too obvious. There were valid reasons, until the reassurance there was no health risk was received from the Ministry of Health, for the appellants not to take their seats in the Chamber. This reassurance was not forthcoming until the 12 June. In those circumstances, the suspensions were a no more than a belittling of recognised democratic norms.
37. The suspension for 2 sitting days of the entire Opposition, in our view, is tantamount to the Government breaching Articles 1, 2 and 4 of the Constitution. The suspension had the effect of undermining the democracy of the Republic of Vanuatu. Further, the individual constitutional rights of each of the members of the Opposition were simultaneously breached.
38. We note the Judge's comments that she did not have full information regarding previous boycotts to carry out a comparative exercise. We do not think that is necessary. Each case of this sort must be judged in accordance with their own circumstances. We have found on the facts of this case that there was good reason for the Opposition to behave in the manner they did. It may well be that in previous cases of boycott, such justification did not exist. While this interferes with the business of Parliament by making it impossible to sit because of a lack of quorum, the Constitution is alive to this and makes provision in Article 21(5) for Parliament to deal with it.
39. We note that the appellants have served their period of suspension, and it could be said that the complaints they have are no longer alive. We do not accept that, because of the importance of this case to the democratic process. However, it does mean the declarations originally sought are no longer appropriate.

F. Result

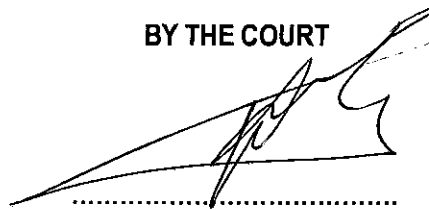
40. The appeal is allowed.



41. We declare that in passing Motion 6 (later Motion 1) and thereby suspending the whole of the Opposition for 2 sitting days the Parliament of the Republic of Vanuatu breached Articles 1, 2 and 4 of the Constitution. At the same time the appellants' guaranteed constitutional rights under Articles 5(d), (g), (k) and 27(1) of the Constitution were also breached.
42. In the circumstances there will be no order as to costs.

DATED at Port Vila, this 19th day of February 2021

BY THE COURT



.....
Honourable Vincent Lunabek
Chief Justice

