

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

**Constitutional
Case No. 21/1872 SC/CNST**

BETWEEN: Bob Loughman Weibur

First Applicant

AND: Alatoi Ishmael Kalsakau

Second Applicant

AND: Johnny Koanapo Rasou

Third Applicant

AND; Jay Ngwele

Fourth Applicant

AND: James Bule

Fifth Applicant

AND: Willie Daniel

Sixth Applicant

AND: Willie Pakoa Satearoto

Seventh Applicant

AND: Lenkon Tao Bruno

Eighth Applicant

AND: Seule Simeon

Ninth Applicant

AND: Mark Ati

Tenth Applicant

AND: Silas Bule Melve

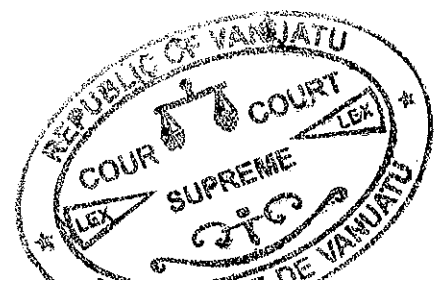
Eleventh Applicant

AND: Samson Samsen

Twelfth Applicant

AND: Edward Nalyal Molou

Thirteenth Applicant



AND: Nakou Ianatom Natuman

Fourteenth Applicant

AND: Leonard Joshua Pikioune

Fifteenth Applicant

AND: Marc Muelsul

Sixteenth Applicant

AND: Edmund Julun

Seventeen Applicant

AND: Xavier Emanuel Harry

Eighteenth Applicant

AND: Anthony Iaris Harry

Nineteenth Applicant

AND: The Republic of Vanuatu

Respondent

AND: Gracia Shadrack, Speaker of Parliament

Interested Party

Date of Hearing:

18th June 2021 9am

Date of Judgment:

18th June 2021 3pm

Before:

Justice Oliver Saksak

In Attendance:

Mr Robert Sugden and Mr Godden Avock for the Applicants

Mr Frederick Kilu for the Respondent

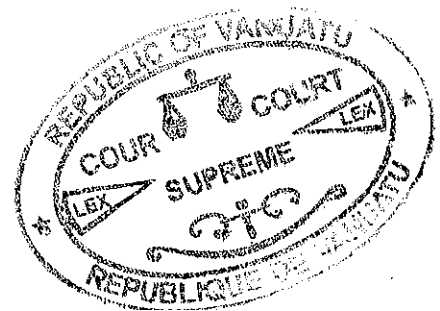
Mr Nigel Morrison and Ms Stephanie Mahuk and Mr Less

Napuati for the Interested Party(Speaker of Parliament)

JUDGMENT

Introduction

1. The Applicants filed their application pursuant Article 53 (1) of the Constitution on 9 June 2021.



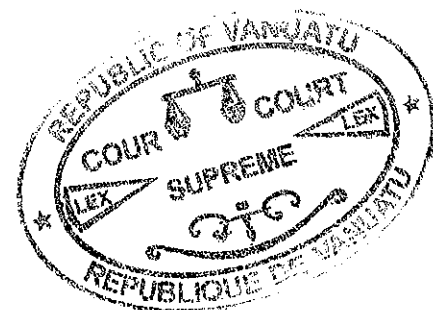
2. They allege their Constitutional rights under Articles 17 and 21 (1) of the Constitution were breached when on 8th June 2021 the Speaker of Parliament announced the seats of the 19 applicants became vacant pursuant to section 2 (d) of the Members of Parliament (Vacation of Seats) Act [Cap 174]
3. The applicant's case is that pursuant to Article 54 of the jurisdiction to declare vacant a seat of a Member of Parliament is vested only in the Supreme Court and not in the Speaker of Parliament.

Remedies Sought

4. The applicants seek-
 - (a) A Declaration that the Speaker's ruling that the 19 applicants have vacated their seats in Parliament has no legal effect.
 - (b) An Order that the Speaker takes no action of any kind, directly or indirectly, to prevent the applicants from exercising their full rights and obligations as Members of Parliament and not treat them differently from other members of Parliament.
 - (c) Costs of the proceeding.

Facts

5. Parliament was summoned for its ordinary session to commence sitting on 13th May 2021.
6. On 1st June 2021 the Speaker found there was no quorum and adjourned the sitting that day to 2nd June. He observed that 32 members of Parliament on the right side of the House were not physically present. He then adjourned the sitting to the afternoon of 2nd June.
7. On 2nd June 2021 after the bell was rang the Speaker again observed the 32 Members of Parliament on the right side of the House were not present physically. He then adjourned to 3rd June 2021.



8. On 3rd June 2021 in the afternoon after the bell was rang there was again a lack of quorum as 28 members of Parliament on the right side of the House were physically absent.
9. The adjournments were made in accordance with standing orders 50 (3)
10. Based on those background facts the Speaker made findings as follows-

“The absence of the Honourable Members of Parliament on the three consecutively sitting days resulted as follows,

1. *Persistently refuse to confirm to Standing Orders of Parliament.*
2. *Persistently disregard the authority of the Speaker.*
3. *Persistently obstruct the business of Parliament to be transacted.*
4. *Were absent without having obtained from the Speaker the permission to be or to remain absent.*
5. *Infringed the Constitutional right of their electorates in which they exercised through them as Member of Parliament as stipulated in Article 4 (1) of the Constitution of the Republic of Vanuatu.*
6. *Contempt of Parliament and therefore with these findings it gives effect to the operation of the Members of Parliament Vacation of Act Seat (sic) Cap.174 section 2 (d) and I quote:*

“2. Vacation of seats of members

*A member of Parliament shall vacate his seat therein –
(d) if he is absent from three consecutive sittings of Parliament without having obtained from the Speaker, or in his absence, the Deputy Speaker the permission to be or to remain absent;”*

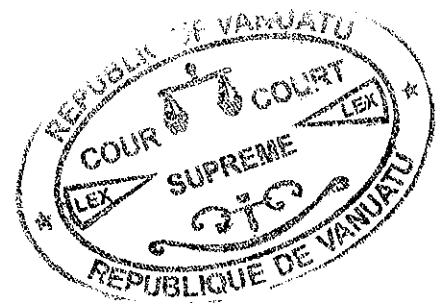
11. Having so found the Speaker in exercise of his powers under Article 22 (2) of the Constitution on 8th June 2021 that the seats of the 19 applicants in Parliament were vacated pursuant to section 2 (d) of the Members of Parliament (Vacation of Seats) Act.

Relevant Legal Provisions

12. Article 17 of Members of Parliament:

“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.



(2) Subject to such conditions or restrictions as may be prescribed by Parliament every citizen of Vanuatu who is at least 25 years of age shall be eligible to stand for election to Parliament."

13. Article 21 Procedure of Parliament

" 21. Procedure of Parliament

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

(2) Parliament may meet in extraordinary session at the request of the majority of its members, the Speaker or the Prime Minister.

(3) Unless otherwise provided in the Constitution, Parliament shall make its decisions by public vote by a simple majority of the members voting.

(4) Unless otherwise provided in the Constitution, the quorum shall be two-thirds of the members of Parliament. If there is no such quorum at the first sitting in any session Parliament shall meet 3 days later, and a simple majority of members shall then constitute a quorum.

(5) Parliament shall make its own rules of procedure.

14. Article 22 Speaker and Deputy Speakers

"22. Speaker and Deputy Speakers

(1) At its first sitting after any general election Parliament shall elect a Speaker and one or more Deputy Speakers.

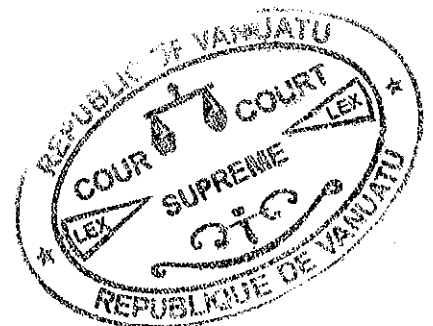
(2) The Speaker shall preside at sittings of Parliament and shall be responsible for maintaining order.

(3) The functions of Speaker may be exercised by a Deputy Speaker.

15. Article 54 Election Disputes

"54. Election disputes

The jurisdiction to hear and determine any question as to whether a person has been validly elected as a member of Parliament, the National Council of Chiefs, and a Local Government Council or whether he has vacated his seat or has become disqualified to hold it shall vest in the Supreme Court."



16. Standing Order 13 Ordinary Sessions

"Ordinary sessions

13. (1) *Parliament must meet in two (2) ordinary sessions during one calendar year. Each session must be divided into one or more meetings as the case may be.*

(2) *The first ordinary session of Parliament must commence on the second Thursday of May in the calendar year."*

17. Standing Order 19 Bells

"Bells

19. (1) *A bell is rung to summon Members to the Chamber for a meeting, to vote, to establish a quorum, and at the adjournment of the Parliament."*

18. Standing Order 50 Quorum

"Quorum

50. (1) *A quorum is two thirds of the Members of Parliament as set down in Article 21(4) of the Constitution.*

(2) *If there is no such quorum at the first sitting in any session Parliament must meet three (3) days later, and a simple majority of Members then constitutes a quorum.*

(3) *On any sitting day, if the attention of the Speaker is directed to the fact that a quorum is not present, the Speaker orders bells to be rung until a quorum is present and, if at the end of five (5) minutes a quorum is not present, Parliament adjourns until the next sitting day without question put.*

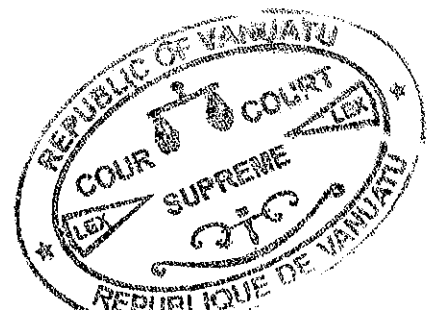
(4) *Once it has been shown, at any time, that a quorum is present, it is not in order to draw the attention of the Speaker to the absence of a quorum until the end of one (1) hour from that time."*

19. Standing Order 54 Order in the Parliament

"54. (1) The Speaker, after having called the attention of Parliament to the conduct of a Member who persists in irrelevance or tedious repetition, either in the Member's own speech or in the speeches of other Members in the same debate, may direct the Member to cease speaking.

(2) If any Member:

(a) persistently or willfully obstructs the business of Parliament; (b) is guilty of disorderly conduct; (c) uses objectionable words which the Member refuses to withdraw; (d) persistently or willfully refuses to conform to any Standing Order; (e) persistently or willfully disregards the authority of the Speaker;



the Speaker may order the Member to withdraw immediately from Parliament Chamber for the remainder of the sitting.

(3) In the case of more serious misconduct, the Speaker may name the Member and state the nature of the misconduct. Then Parliament may, on a motion moved by a
25

Member, suspend the Member so named from the precincts of the Parliament and from any meetings of parliamentary committees.

(4) The period of suspension shall be two (2) sitting days for a first offence, four (4) sitting days for a second offence within the same session, and eight (8) sitting days for a third or subsequent offence within the same session. The Member must withdraw immediately from Parliament and its precincts for the period of the suspension.

(5) In the case of grave disorder arising in the Parliament, the Speaker may leave the Chair without question put for a period not exceeding three hours.

(6) Any motion presented in accordance with paragraph 3, must be in writing, seconded, and two (2) days clear notice shall be given to the Speaker.”

20. Standing Order 96 Attendance of Members of Parliament

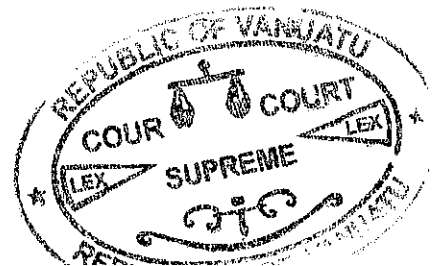
“96. (5) A Member who is absent without cause or prior permission of the Speaker must forfeit his or her entitlement to any of the allowances payable for such days of absence.”

Submissions

21. Mr Sugden spoke to his written submissions filed at 15:30pm on 16/06/21.

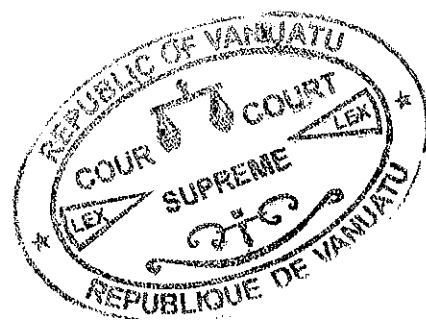
22. First Counsel referred to the universal franchise stipulated in Article 4 of the Constitution which recognises and grants citizens rights to a voice in the choice of who their representatives in Parliament should be. Once that choice is made there must not be any departure but only in exceptional circumstances and only after the exercise of extreme care and of impartial judgment as to whether those exceptional circumstances exist that a Member of Parliament should vacate their seats.

23. Counsel argued that whilst the obvious choice of which member of Parliament was to decide when people’s choice of a representative in Parliament was to be set aside would be the Speaker in view of his constitutional role of keeping order and presiding over



sittings, however being elected as such by a majority in Parliament and therefore likely to align himself with the Government of the day, he is unlikely to exercise impartial judgment.

24. For that reason Mr Sugden argued the people of Vanuatu decided to go outside Parliament to find a decision maker who would be impartial on the question of whether exceptional circumstances had arisen whereby a representative chosen by the people should vacate his seat in Parliament. And Mr Sugden submitted the people's choice was contained in Article 54 of the Constitution.
25. Mr Sugden therefore submitted the Speaker's decision to vacate the applicant's seat in Parliament on 8 June 2021 was incorrect. He submitted only the Supreme Court had that jurisdiction. Counsel submitted that the Speaker's decision was a breach of Articles 17, 21, 16 and 53 (1) of the Constitution.
26. Mr Sugden further submitted that the Members of Parliament (Vacation of Seats) Act [CAP 174] does not have any effect on the interpretation of the Constitution.
27. Counsel made references to section 2 (f) and 4 of the Members of Parliament (Vacation of Seats) Act and acknowledged these have been declared unconstitutional by the Court of Appeal in **Sope v Attorney General** CAC 6 of 1988 and argued section 4 cannot be interpreted consistently with Article 54. Mr Sugden does however acknowledged there are no difficulties in interpreting section 2 (d) of the Act consistently with Article 54 of the constitution. This defeats Mr Sugden's earlier argument that the Members of Parliament (Vacation of Seats) Act cannot have any effect on the interpretation of Article 54 of the Constitution.
28. Next Mr Sugden submitted that **Korman v Natapei** [2010] VUCA 1 where the Court of Appeal said " *section 2 (d) (of Cap 174) vacates a seat of a Member of Parliament if the*



Speaker decides that the precondition set out in that section have been met” was made per incuriam and therefore does not constitute precedent.

29. Mr Sugden next submitted the Speaker’s role under Article 54 is to commence an ordinary civil action in the Supreme Court to seek a declaration pursuant to section 2 (d) of the Act in order to discharge the onus of proof placed on him.
30. Finally Mr Sugden submitted the proper course of the Speaker was to apply standing order 54 (1) and Standing Order 96 (5)
31. Mr Gilu filed written submissions on 18/06/21 at 8:35am by way of assistance to the Court. The position of the State is that it would abide any Orders of the Court.
32. Counsel referred to Articles 16, 17, 21, 22, 53, 54 of the Constitution and to section 2 (d) of the Members of Parliament (Vacation of Seats) Act.
33. Counsel referred to the case of **Boulekone v Timakata** [1980-1994] VLR 228 and **Korman v Natapei** [2010] VUCA 14 in support of the submissions that Article 21 (5) of the Constitution cannot be read as a fetter or ouster of the Court’s jurisdiction under Article 54 of the Constitution and that pursuant to Standing Order 10 (1) and (3) the Speaker has the duty to announce a seat of a member of Parliament vacant when he fulfils the requirements of section 2 (d) of the Act.
34. Counsel raised the following questions:
 - (a) If the Speaker meets the pre requisites, is he required to bring the matter to the Court?
 - (b) Is the Speaker bound by natural justice in the exercise of his powers and duties?

Discussion

35. First on the application by Mr Morrison and Ms Mahuk on their application to cease to act as solicitor for the Interested Party, the Court allowed leave for both Counsel to remain in Court but that following their instructions they should remain silent. Mr



Napuati was also given leave to remain at the hearing on behalf of the Speaker. He had not filed any notice of beginning to act presumably until Mr Morrison as Ms Mahuk's application was allowed. Following instructions no submissions were filed for the Interested Party.

36. The issues raised by the applicants:

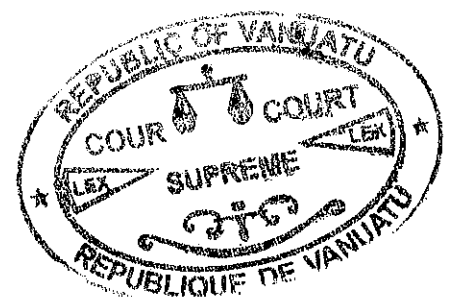
- (a) Whether only the Supreme Court has the jurisdiction to hear and determine the question of whether a Member of Parliament has vacated his seat and not the Speaker?
- (b) Whether it is the Speaker who institutes proceeding in Court under Article 54 to seek declarations that Members of Parliament vacate their seats?
- (c) Whether the rights of the Applicants in Articles 17, 16, 21 and 53 have been breached?

37. In answer to the jurisdiction point the Court in the cases of **Boulekone v Timakata** and **Korman v Natapei** are clear authorities that only the Supreme Court has the jurisdiction to determine the issue of whether a member of Parliament has vacated his seat in Parliament. In **Boulekone's** case the Court said:

"We do not read Article 21 (5) of the Constitution as constituting a fetter or ouster of the Court's jurisdiction under Article 54."

38. In answer to the second issue raised by the applicants, it would be absurd and inconsistent with precedents to adopt the novel step submitted by the applicants. The Speaker, by Article 22 of the Constitution is responsible for maintaining Order in Parliament. The Court of Appeal in **Korman v Natapei** recognised that role which includes the duty to adhere to rules of natural justice but also includes his primary role in monitoring and determining whether the two (2) preconditions set out in section 2 (d) of the Act have been fulfilled. The Court of Appeal said:

"[17] It is correct that the vacation of seats in Parliament pursuant to section 2(d) occurs by operation of the law. It does not necessarily follow that the Speaker has no prior role or function at all in the vacation of a defaulting member's seat."



39. The Court further said:

“[18] Section 2 (d) of the Act sets out two preconditions that must be fulfilled before a member’s seat is vacated, namely the member must be absent from three consecutive sittings of Parliament and such absenteeism was without the permission of the Speaker Plainly the Speaker has a primary role in the monitoring and determination of whether both preconditions are fulfilled in respect of any member of Parliament and it is only when both preconditions are fulfilled that a member’s seat is vacated by “operation of law” and not otherwise.”

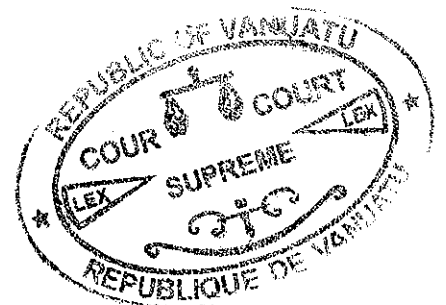
“ [19] That is the proper underlying context within which it can be said that the vacation of a defaulting member’s seat occurs automatically by operation of law pursuant to section 2 (d) of the Act. In other words subject to the fulfilment of both preconditions of Section 2(d), there is nothing inevitable or “automatic” in the vacation of a member’s seat in Parliament.

We accept it could be said there was a breach of common law principles or rules of natural justice. However, in the particular circumstances of this case, it is not appropriate to see to apply the rules of natural justice with reference to the respondent being given the right to be heard prior to the Speaker making a decision under section 2 (d). The relevant statutory provision and rights preserved by the constitution are already clear.

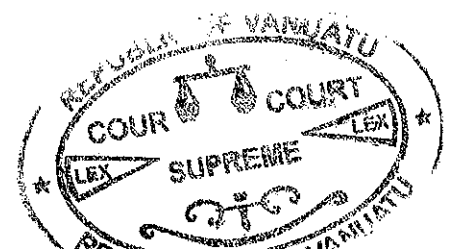
Section 2 (d) vacates a seat of a member of Parliament if the Speaker decides that the preconditions set out in that section have been met....”

40. Applying those to the facts of this case, on 8th June 2021 the Speaker acted under Article 22 (2). He made findings, one of which is paragraph 6 that there was a contempt of Parliament giving effect to the operation of section 2 (d) of the Act.

41. The Speaker then made the announcement that the 19 applicants had vacated their seats in Parliament.



42. As such it cannot be said that it was the Speaker who vacated their seats. Their seats became vacated by operation of law when the Speaker was satisfied the two pre conditions in section 2 (d) were met.
43. The action of the Speaker cannot be said to be incorrect. He did the appropriate thing. The applicants have brought on the challenge as they are entitled to do under Article 54 of the Constitution. That has always been the practice since Boulekone's in 1988. It would therefore be absurd to change that course and adopt a novel route as submitted by Counsel for the applicants.
44. It is now for this Court to determine whether the applicants have vacated their seats in Parliament.
45. The applicants brought their proceedings alleging breaches of Articles 17 and 21 of the Constitution. It was incumbent on them to produce evidence to substantiate those allegations of breach.
46. The applications did not plead Articles 16 and 53 of the Constitution but have made submissions in respect of them. That is quite improper.
47. The applicants have no evidence to challenge or rebut the Speaker's findings that they were absent from three consecutive sittings on 1st, 2nd and 3rd June 2021.
48. Counsel for the applicants took a dangerous path in choosing to seek only the interpretation of Article 54 of the Constitution on its own without reference to section 2 (d) of the Act.
49. Article 54 is headed "**Election disputes**". Where a question is brought to the Court for hearing and determination where the dispute concerns vacation of seats, it is inevitable to determine the issue in isolation without making reference to the relevant legislation that concerns the vacation issue. Here the vacation of seats of 19 applicants are challenged.



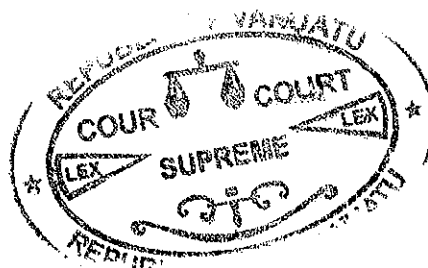
Therefore it follows logically and sensibly that section 2 (d) of the Act must be referred and determined.

50. In relation to the issue of natural justice, the Speaker was not obliged to adhere to the rules of natural justice in the circumstances of the case as held by the Court of Appeal in the Korman v Natapei case.

Findings

51. I therefore find as follows:

- (a) It is correct to say only the Supreme Court has the jurisdiction to hear and determine whether a member's seat in Parliament has been vacated. However the triggering factors have to be the satisfaction by the Speaker who is charged with maintaining Order in Parliament pursuant to Article 22 that the two pre conditions in section 2 (d) of the Act were fulfilled.
- (b) The Speaker was satisfied the two pre conditions were met. Therefore I find he correctly made the announcements he did on 8th June 2021 that the 19 applicants had vacated their seats.
- (c) It is not incumbent nor required of the Speaker to institute proceeding to prove the case against the 19 applicants.
- (d) Section 2(d) of the Act was activated by Operation of law; it was not the Speaker's decision. He was not obliged to take any other course as submitted by the applicants.
- (e) The Speaker was not bound by rules of natural justice in the circumstances of this case.
- (f) There have been no breaches of the applicant's rights under Articles 17 and 21 of the Constitution.



(g) It is not necessary to depart from the practice and precedents established by the cases of Boulekone's and Natapei's.

Result

52. This Constitutional application is dismissed.

53. The seats of the 19 applicants in Parliament have been vacated by operation of section 2 (d) of the Members of Parliament (Vacation of Seats) Act.

54. As this is a public interest case, there will be no order as to costs.

DATED at Port Vila this 18th day of June 2021

BY THE COURT


OLIVER.A.SAKSAK

Judge

