

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

Election Petition
Case No. 21/2241 SC/ELTP

BETWEEN: Bob Loughman Weibur
First Petitioner

AND: Alatoi Ishmael Kalsakau Maau'Koro
Second Petitioner

AND: Johnny Koanapo Rasou
Third Petitioner

AND: Jay Ngwele
Fourth Petitioner

AND: James Bule
Fifth Petitioner

AND: Willie Daniel
Sixth Petitioner

AND: Willie Pakoa Satearoto
Seventh Petitioner

AND: Bruno Lenkon Tao
Eighth Petitioner

AND: Mark Ati
Ninth Petitioner

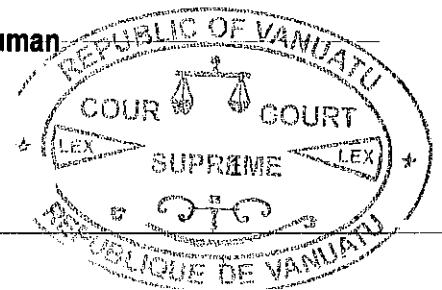
AND: Seule Simeon
Tenth Petitioner

AND: Silas Bule Melve
Eleventh Petitioner

AND: Samson Samsen
Twelfth Petitioner

AND: Edward Nalyal Molou
Thirteenth Petitioner

AND: Nakou Ianatom Natuman
Fourteenth Petitioner



AND: Leonard Hosua Pikioune
Fifteenth Petitioner

AND: Marc Muelsul
Sixteenth Petitioner

AND: Edmund Julun
Seventeenth Petitioner

AND: Xavier Emanuel Harry
Eighteenth Petitioner

AND: Anthony Iaris Harry
Nineteenth Petitioner

AND: Anatole Hymak
Twentieth Petitioner

AND: Bodio Carlo
Twenty-first Petitioner

AND: Speaker of Parliament
First Respondent

AND: Republic of Vanuatu
Second Respondent

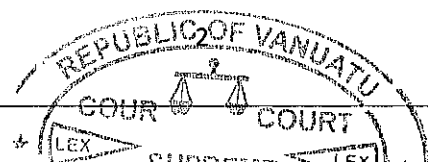
AND: Gracia Shadrack
Third Respondent

Dates of Hearing: 26-28 August 2021
Before: Justice V.M. Trief
In Attendance: Petitioners – Mr S. Kalsakau
First Respondent – Mr A. Bal
Second Respondent – Mr A.K. Loughman, Attorney General & Mr K.T. Tari
Third Respondent – Mr N. Morrison & Ms S. Mahuk
Date of Decision: 6 September 2021

JUDGMENT

A. Introduction

1. On 8 June 2021, the then Speaker of Parliament the Third Respondent Gracia Shadrack announced that the First to Nineteenth Petitioners Members of Parliament (the 'MPs')



were absent from Parliament for three consecutive sittings without his consent therefore their seats were vacated pursuant to the *Members of Parliament (Vacation of Seats) Act* [CAP. 174] (the 'Act'). The MPs initially filed a Constitutional Application; decided on appeal in *Weibur v Republic of Vanuatu* [2021] VUCA 40. Now by the Election Petition, they challenge the Speaker's conclusions as to absence without permission.

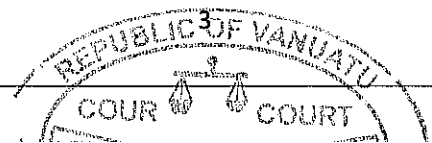
2. The First Respondent the Speaker of Parliament and the Second Respondent the State abide the order of the Court.

B. Background

3. The process described in paragraphs 3 to 13 of this judgment was provided by the sworn statements of Raymond Kalpeau Manuake, the Clerk of Parliament [**Exhibits R2 and R3**] in which he adduced into evidence emails and other documents he received, the Hansard record of the relevant debates and proceedings in Parliament and video recordings of the proceedings.
4. On 28 May 2021, a Notice of Motion to remove the Speaker and elect a new Speaker was lodged with the Speaker. The Motion was served on all MPs and the Motion was listed for debate either on 1 June, between 10.30am and 11.30am or on Thursday 3 June, between 4.00pm and 5.00pm.
5. On 31 May 2021, the mover of the Motion the Twentieth Petitioner Anatole Hymak confirmed to the Speaker that it was listed for debate on 1 June 2021 at 8.30am.
6. The Parliament sitting on 1 June commenced at 8.35am. The minute of the Parliamentary sitting on 1 June 2021 recorded that all but two of the total MPs were present at the beginning of the sitting.
7. The Minutes record during the course of the day's proceedings:

The Members of Parliament from the Government side left the Chamber.
8. The Speaker then ordered the bell to be rung for 5 minutes to re-establish a quorum. No quorum in fact was re-established and so at 9.00am the Speaker adjourned the sitting of Parliament to 2 June 2021.
9. On 2 June, Parliament resumed at 2.05pm with 50 members present. Shortly after, the Minutes record:

The Members of Parliament from the Government side left the Chamber.
10. Again, as a result of the Members of Parliament leaving the chamber, the Speaker concluded there was no quorum and so at 2.25pm, the Speaker adjourned Parliament to 3 June 2021.
11. On 3 June, the Parliament sitting commenced at 8.40am with all but two of the total MPs present. Urgent debate and motions were dealt with until 9.40am when the sitting was suspended. Parliament resumed at 10.10am and continued its consideration of the Government's Bill for the Supplementary Appropriation (2021) Act No. of 2021 in Committee stage and then the Second Reading. It passed the bill unanimously. Parliament then proceeded with a Statement by Member that was interrupted. At



10.45am, the Speaker suspended the sitting for lunch. When Parliament resumed at 2.05pm, there was no quorum. The Speaker ordered that the bell be rung for 5 minutes. It was rung but no quorum eventuated. And so, at 2.15pm, Parliament was once again adjourned.

12. On 4 June the Speaker noted the absence of some Government MPs on 3 consecutive days and said he considered it to be a very serious constitutional matter.
13. On 8 June 2021 the Speaker ruled that the MPs who he said had been absent on three consecutive sitting days (1, 2 and 3 June) had, by their actions, vacated their Parliamentary seats pursuant to s. 2(d) of the Act.

C. The Law

D. Article 15 of the Constitution provides:

15. *The legislature shall consist of a single chamber which shall be known as Parliament.*

14. Article 54 of the Constitution provides:

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

(my emphasis)

15. Section 2(d) of the Act provides:

2. *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;*

16. Section 2(d) contains 2 pre-conditions that must be fulfilled before a Member's seat is vacated: *Korman v Natapei* [2010] VUCA 14 at [18] and *Weibur v Republic of Vanuatu* [2021] VUCA 40 at [31]:

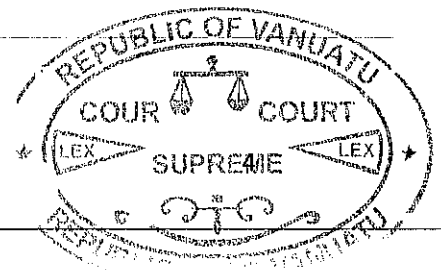
- i) The Member must be absent from 3 consecutive sittings of Parliament; and
- ii) Without having before obtaining permission from the Speaker.

17. Section 8 of the *Interpretation Act* [CAP. 132] as amended by the Interpretation (Amendment) Act No. 1 of 2010 (the '*Interpretation Act*') provides:

8. (1) *Every Act must be interpreted in such manner as best corresponds to the intention of Parliament.*

(2) *The intention of Parliament is to be derived from the words of the Act, having regard to:*

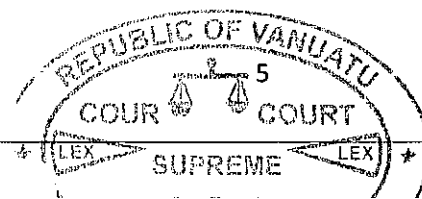
- (a) *the plain meaning of ordinary words; and*
- (b) *the technical meaning of technical words; and*



- (c) *the whole of the Act and the specific context in which words appear; and*
 - (d) *headings and any limitation or expansion of the meaning of words implied by them; and*
 - (e) *grammar, rules of language, conventions of legislative drafting and punctuation.*
- (3) *Where the application of subsection (2) would produce:*
- (a) *an ambiguous result; or*
 - (b) *a result which cannot reasonably be supposed to correspond with the intention of Parliament, the words are to receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.*
- (4) *In applying subsection (3), the intention of Parliament may be ascertained from:*
- (a) *the legislative history of the Act or provision in question; and*
 - (b) *explanatory notes and such other material as was before Parliament; and*
 - (c) *Hansard; and*
 - (d) *Treaties and International Conventions to which Vanuatu is a party.*

E. Election Petition and Responses

18. By the Election Petition, the MPs claim that they have not vacated their seats and request determination under art. 54 of the Constitution. They allege that they were not absent from 3 consecutive sittings of Parliament on 1-3 June 2021 within the meaning of s. 2(d) of the Act. Alternatively, if absence is determined by the Court, that they were absent on 2 and 3 June with the tacit permission of the Speaker.
19. The MPs also allege that although they left the Chamber on 1 and 2 June 2021, they were still present within the precincts of Parliament therefore they were not absent from the sitting within the meaning of s. 2(d) of the Act.
20. By his Response, the Third Respondent alleged that the MPs were absent from 3 consecutive sittings of Parliament within the meaning of s. 2(d) and denied that there was any "tacit permission" for their absence given by him.
21. The First and Second Respondents stated in their Responses that they would abide the Order of the Court.
22. The issues arising are:
- i) Is the absence from a sitting of Parliament an absence from the Chamber or from the wider precincts of Parliament? **[Issue 1]**
 - ii) Were the MPs 'absent' from the 1-3 June 2021 sittings within the meaning of s. 2(d) of the Act? **[Issue 2]**
 - iii) Did the MPs have the tacit permission of the Speaker to be absent on 2 and 3 June 2021? **[Issue 3]**

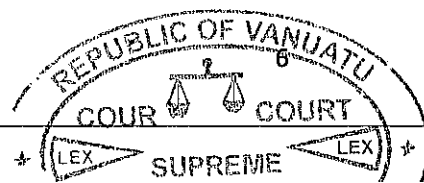


F. The Evidence

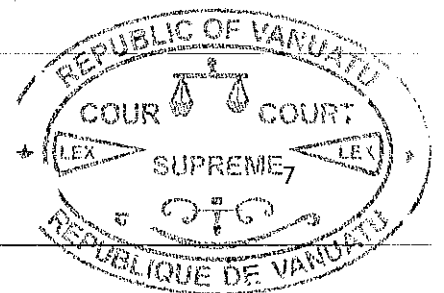
23. The MPs relied on the evidence of 9 witnesses in chief, 4 of whom were required for cross-examination. They called 4 further witnesses in response.
24. The Third Respondent called 3 witnesses.
25. The evidence in relation to alleged bias in the sworn statement of the Thirteenth Petitioner Edward Nalyal Molou [**“Exhibit P10”**] and Mr Shadrack [**“Exhibit R4”**] were not relevant to the issues in this proceeding. I disregarded that evidence. Similarly, any evidence as to selective application of s. 2(d) on Members who shared similar circumstances to the MPs was irrelevant and I disregarded it.
26. The Second Respondent called Mr Manuake, the Clerk of Parliament. The Clerk of Parliament is responsible for keeping the Minutes of the Proceedings of Parliament: Standing Order 11(1) and subs. 15(2) of the *Parliament (Administration) Act* [CAP. 306].
27. The Hansard record adduced into evidence by Mr Manuake, [**“Exhibit R3”**], was challenged on the basis that it had not been sent to Members of Parliament within 30 days after the conclusion of the session, contrary to Standing Order 12(2). However, Standing Order 12(3) provides that a copy of any part of Hansard containing any speech by a Member is to be sent to that Member for correction of any grammatical or other minor technical error. No corrections could be made as to meaning, emphasis or substance. Accordingly, I accepted Mr Manuake’s evidence as the best evidence before the Court of the relevant proceedings of Parliament. The Hansard record was corroborated by the video recordings also adduced into evidence, [**“Exhibit R2”**].
28. Mr Kalsakau submitted that on 3 June 2021 there is no doubt that a sitting occurred during the first period until the ‘adjournment’ for lunch (relying on Mr Hymak’s evidence) and then that the Speaker did not subsequently take his seat after lunch therefore there was no sitting that the MPs could have been “absent” from. This is patently incorrect on the facts. The Hansard record is clear that at 10.45am, Parliament was suspended for lunch. That was not an adjournment. Further, both Hansard and the video recording confirm that the Speaker took the Chair when Parliament resumed after lunch. These submissions are rejected.

G. Objections to Third Respondent’s Evidence

29. Mr Morrison and Mr Kalsakau agreed that the sworn statements filed by the Third Respondent be received into evidence subject to the MPs’ objections to that evidence, and it would be entirely in my discretion to place due weight on them, accept them or reject them.
30. I record in relation to the evidence of each of the witnesses called:
 - a. Norris Jack Kalmet, Member of Parliament [**“Exhibit R5”**] – whether or not the boycotts by the Government side were deliberate and planned by the MPs in concert to disrupt transacting of any business in Parliament was not relevant to the issues in this proceeding. I disregarded that evidence. I also disregarded the legal conclusions expressed by Mr Hymak and evidence objected to as being beyond his knowledge.



- b. Mr Shadrack [**“Exhibit R4”**] – as already stated, I disregarded the evidence as to alleged bias. I also disregarded the legal conclusions expressed.
 - c. Ralph Regenvanu, Member of Parliament and Leader of the Opposition [**“Exhibit R6”**] – whether or not the transacting of Parliamentary business was disrupted and the evolution of the Standing Orders were not relevant to the issues in this proceeding. I disregarded that evidence. I also disregarded the legal conclusions expressed.
- H. Issue 1: Is the absence from a sitting of Parliament an absence from the Chamber or from the wider precincts of Parliament?
- 31. Mr Nalyal [**“Exhibit P10”**], the Third Petitioner Johnny Koanapo Rasou [**“Exhibit P2”**], the Fourth Petitioner Jay Ngwele [**“Exhibit P3”**] and the Ninth Petitioner Marc Ati [**“Exhibit P4”**] evidenced that after the MPs left the Chamber on 1 June 2021, they gathered on the Parliament terrace to consult with their lawyers.
 - 32. Mr Kalsakau submitted that the preferable interpretation of s. 2(d) is that it refers to absence from the precincts of Parliament. He submitted that there is no reason to interpret s. 2(d) so as to confine it to the Chamber, the Chamber not being a place or concept coterminous with “Parliament” and that had Parliament intended that absence from the Chamber would activate s. 2(d), it could easily have said so.
 - 33. This can be shortly disposed of. Article 15 of the Constitution provides that the legislature shall be known as Parliament and that it will consist of a single chamber. The wording of art. 21(4) of the Constitution indicates that there is a “sitting” although there may be no quorum. On each day when Parliament assembles and the Speaker takes the chair, there is a sitting: *Carlott v Attorney General [No. 2]* [1988] VULawRp 21 at p. 4 per the Court of Appeal.
 - 34. The sitting can only continue if there is a quorum. Quorum is established by the Members of Parliament present at the sitting. Standing Order 19(1) provides that a bell is rung to summon Members to the Chamber for purposes including to establish a quorum. Standing Order 19(2) provides that for a quorum, one continuous bell is rung for up to 5 minutes or until a quorum is formed.
 - 35. It follows that the Members must be present within the Chamber to establish a quorum. Accordingly, absence from a sitting must refer to absence from the Chamber. I reject the submissions to the contrary.
- I. Issue 2: Were the MPs absent from the 1-3 June 2021 sittings within the meaning of s. 2(d) of the Act?
- 36. The facts are largely undisputed. Parliament’s sittings on 1, 2 and 3 June 2021 constituted three consecutive sittings. The MPs were present at the commencement of the sittings on 1 and 2 June 2021, and then left the Chamber. They were present for the morning period of the 3 June 2021 sitting at which a Government bill was debated and passed and then absent for the afternoon period.



37. Mr Kalsakau submitted that an MP could not be described as absent from a sitting when he had also been present at that sitting. Accordingly, they were not absent within the meaning of s. 2(d).
38. Mr Kalsakau further submitted that reference to the plain meaning of the ordinary word "absent" produces an ambiguous result when applied to the facts in this case because it is not apparent whether the intention of Parliament was that 'absent' be interpreted as 'totally absent' or 'partially absent'.
39. Mr Kalsakau submitted that if 'absent' was interpreted to mean any period of momentary absence from the sitting, this would produce results that could not reasonably be supposed to correspond to the intention of Parliament because:
- i) It is common for Members to move in and out of the Chamber during a sitting and such movements are not such as the Act should be understood to be intended to inhibit. He relied on the evidence of the First Petitioner Bob Loughman Weibur, Prime Minister ["**Exhibit P1**"] and the Second Petitioner Alatoi Ishmael Kalsakau, Deputy Prime Minister ["**Exhibit P8**"] to that effect. He also referred to Mr Regenvanu's evidence ["**Exhibit R6**"] that it is a "common practice" for MPs to attend for the beginning of the sitting day and not return – or not return for the second period;
 - ii) Boycotts of Parliament are not uncommon and should not be the subject of judicial interference, any mischief arising from the practice being able to be addressed by Parliament itself under Standing Orders: *Tabimasmās v Parliament* [2021] VUCA 16 at [24] and [38]; and
 - iii) The results would be generally absurd for example, a Member leaving the Chamber to visit the bathroom on Monday, to take an important phone call on Tuesday and arriving late in the morning on Wednesday must be taken to have vacated their seat. Even more absurd would be to require Members to interrupt sittings to seek permission for such an "absence", and for that request to be considered. It would also result in irrelevant, absurd and inappropriate (in the sense that parliamentary procedure is a matter reserved to Parliament under the Constitution) inquiries by the Speaker or the Court into the length and/or reason for absence. Surely given the separation of powers, Parliament would not have intended that the Court be required to make such enquiries.
40. In the circumstances, Mr Kalsakau submitted, s. 8(3)(b) of the *Interpretation Act* is activated and the Court must give s. 2(d) such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act, according to its true intent, meaning and spirit. In doing so, the Court could pursuant to subs. 8(4) of the *Interpretation Act* consider the legislative history of the Act, its explanatory note and Hansard to ascertain the intention of Parliament. He submitted therefore that the proper construction of s. 2(d) requires an absence from the entirety of a sitting.
41. Mr Morrison submitted that even though the MPs attended at the commencement of the 1 and 2 June 2021 sittings, from the moment they left the Chamber they were absent from the sittings within the meaning of s. 2(d). Further, that by not attending Parliament for the afternoon period on 3 June 2021, from that point on the MPs were absent from



that sitting within the meaning of s. 2(d). Those absences were recorded in the minutes of the proceedings of Parliament. Mr Morrison and Ms Mahuk cited *Carlot v Attorney General* [No. 2] [1988] VULawRp 21 at p. 2 and submitted that the effective functioning of Parliament required that its Members attend for the duration of a sitting. Accordingly the partial attendances of the MPs on 1-3 June 2021 against the backdrop of the Constitution and the Standing Orders should be deemed to be absences.

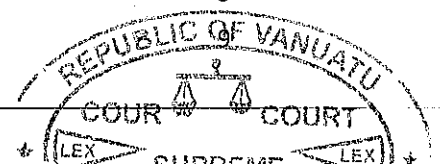
42. In earlier cases concerned with s. 2(d) of the Act, the relevant Members were absent from the entirety of 3 consecutive sittings therefore the question did not arise whether the word, 'absent' in s. 2(d) was intended by Parliament to refer to absence from the entirety of the sitting or to a partial absence. On the facts of this case, the MPs were present at each sitting of Parliament and then left the sitting. I must therefore determine that very question.
43. Subsection 8(1) of the *Interpretation Act* provides that every Act must be interpreted in such manner as best corresponds to the intention of Parliament.
44. First, I have regard to the plain meaning of the ordinary word, 'absent'. I accept Mr Kalsakau's submission that reference to the plain meaning of the ordinary word "absent" produces an ambiguous result when applied to the facts in this case because it is not apparent whether the intention of Parliament was that 'absent' be interpreted as 'totally absent' or 'partially absent'.
45. Given that ambiguous result, I accept Mr Kalsakau's further submission that s. 8(3)(b) of the *Interpretation Act* is activated and I must give s. 2(d) such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act, according to its true intent, meaning and spirit.
46. The long title of the Act includes, relevantly, 'To make provisions for... the vacation of seats by members of Parliament in certain circumstances.' That stated purpose of the Act is to make provision for the vacation of seats by Members of Parliament in certain circumstances.
47. The Court of Appeal stated in *Carlot v Attorney General* [No. 2] [1988] VULawRp 21 at p. 2 in relation to the object of the Act that:

... The Constitution intends that the Republic shall be governed by Parliament. Parliament can only function if members attend. There is nothing unconstitutional in a provision designed to ensure that Parliament does function, and that a person elected to Parliament does what he is elected to do attend Parliament. If he fails to do so, it is reasonable that he should be replaced by somebody who will. There is no procedure laid down in the Constitution for that, so Parliament must provide it. It did so in the 1983 Act.

...

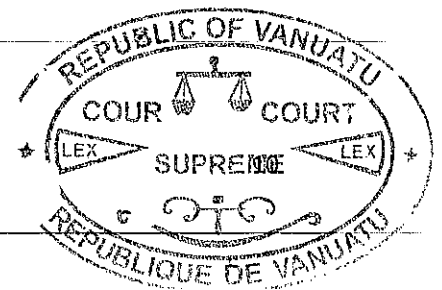
Section 2(d) is designed to ensure attendance by members. That purpose complies with the Constitution because its object is to make Parliament effective.

48. Section 2(d) having been designed to ensure attendance by members with the object of making Parliament effective, I look then to the results if I were to interpret the word, 'absent' in s. 2(d) to mean any period of momentary absence from the sitting. I accept that to do so would result in generally absurd results such as a Member being declared to have been absent from 3 consecutive sittings and his seat vacated due to his leaving



the Chamber to visit the bathroom on Monday, to take an important phone call on Tuesday and arriving late in the morning on Wednesday. This would have the even more absurd consequence of requiring Members to interrupt sittings to seek the Speaker's permission for such an "absence", and for that request to be considered. It would lead to irrelevant and absurd inquiries by the Speaker into the length and/or reason for absence. These are results which I consider cannot reasonably be supposed to correspond with the intention of Parliament.

49. I also accept the submission that parliamentary procedure is a matter reserved to Parliament under the Constitution. It would be therefore be inappropriate and contrary to the principle of separation of powers for the Courts to undertake inquiries into the length and/or reason for a Member's temporary absence from a sitting of Parliament. I consider that this too is a result which cannot reasonably be supposed to correspond with the intention of Parliament.
50. Accordingly, I consider that the fair and liberal construction and interpretation of the word 'absent' in s. 2(d) as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit is that it requires an absence from the entirety of a sitting.
51. Applied to the facts of this case, the MPs were not absent from 3 consecutive sittings and therefore their seats have not been vacated. I will so declare.
52. If I am wrong and the word, 'absent' in s. 2(d) should be interpreted to mean a partial absence, I consider that in attending the morning period of the 3 June 2021 sitting at which a Government bill was debated and passed, the MPs enabled Parliament to be effective in accordance with the object of the Act, notwithstanding their subsequent absence from that sitting. Accordingly they were not absent from 3 consecutive sittings within that meaning of s. 2(d) and their seats have not been vacated.
53. I note that the MPs' attendance at the 3 June sitting is in contrast to their attendance at the 1 and 2 June sittings at which they essentially attended, made known their collective intention to leave the sitting and then did so. Given the short passage of time from the commencement of the sitting to their departure, the ringing of the bell to re-establish the quorum and then the adjournment of Parliament – on 1 June 2021, from 8.35am to 9.00am, and on 2 June 2021, from 2.05pm to 2.25pm – the inevitable inference is that the Members of Parliament on the Government side had discussed and agreed beforehand their course of action and carried it out by exiting the Chamber as they did therefore boycotting Parliament. In doing so, they prevented the effective functioning of Parliament because there ceased to be a quorum and Parliament had to be adjourned.
54. This case is a reminder that Parliament can only function if members attend. Members of Parliament are accordingly expected to attend sittings of Parliament or face the application of s.2(d) of the Act.
- J. Issue 3: Did the MPs have the tacit permission of the Speaker to be absent on 2 and 3 June 2021?
55. Given my answer to Issue 2, I need not determine this issue.



K. Result and Decision

56. For the reasons given, it is declared that the First-Nineteenth Petitioners' seats have not been vacated.
57. There is no order as to costs.

**DATED at Port Vila this 6th day of September 2021
BY THE COURT**

UMTrief
Justice Viran Molisa Trief

