

IN THE COURT OF DISPUTED RETURNS
HIGH COURT CIVIL DIVISION
SUVA

CASE NUMBER: HBM 61 of 2021

BETWEEN: **VILIAME GAVOKA**

PLAINTIFF

AND: **MOSESE BULITAVU**

1st DEFENDANT

AND: **THE SPEAKER OF PARLIAMENT**

2nd DEFENDANT

AND: THE ATTORNEY – GENERAL OF FIJI

3rd DEFENDANT

Appearances: Mr. R. Vananalagi for the Plaintiff.
Mr S. Sharma and Ms. F. Ravusoni for the 1st Defendant.
Mr. S. Sharma (Solicitor General), Mr. J. Sherani and Mr. S. Kant for the 2nd and 3rd Defendants.

Date of Hearing: 6 September, 2021.

Date of Judgment: 10 September, 2021.

JUDGMENT

Introduction

1. On 20 August 2021, Plaintiff filed Originating Summons – Expedited Form seeking certain declaration and Orders.

2. On 23 August 2021, Plaintiff filed Amended Originating Summons seeking following declaration and order:-

“1. **A DECLARATION** that the First Defendant’s seat as a Member of Parliament has become vacant and/or deemed vacant;
2. **AN ORDER** that the First Defendant’s seat as a Member of Parliament be vacated and/or deemed vacant immediately.”
3. The Amended Originating Summons was called on 31 August 2021, when parties were directed to file Affidavits/Submissions and the Amended Originating Summons was adjourned to 6 September 2021 at 2.30p.m. for hearing.
4. Following Affidavits were filed on behalf of the parties.

Plaintiff

- (i) Affidavit in Support of the Plaintiff sworn and filed on 20 August 2021;
- (ii) Affidavit in Reply of Plaintiff to the Affidavit in Opposition of First Defendant sworn and filed on 3 September 2021.

First Defendant

Affidavit in Opposition of First Defendant sworn and filed on 2 September, 2021.

Second Defendant

Affidavit in Response of Jeanette Emberson sworn and filed on 2 September, 2021.

5. Plaintiff and First Defendant filed Submission as directed by this Court.
6. On 6 September 2021, on the Plaintiff’s Application this Court by consent, the Plaintiff was granted leave to discontinue this action against the 2nd and 3rd Defendants and accordingly, this action against 2nd and 3rd Defendants was dismissed and struck out with no order as to costs.

Background Facts

7. On 6 August 2021, the Party Leader and General Secretary of Social Democratic Liberal Party (“**SODELPA**”) wrote to the Speaker of Parliament (“**the Speaker**”) giving notice that “in accordance with Section 63(1)(h), and (3) of the Constitution of the Republic of Fiji (“**the Constitution**”) Mosese Bulitavu’s seat became vacant immediately on receipt of the letter of notification (“**the Notice**”) for failing to follow SODELPA’s directives in voting against the 2021-2022 Budget (“**the Budget**”) and iTaukei Land Trust (Budget Amendment) Bill No. 17 of 2021 (“**Bill No.17**”) tabled in July sitting of Parliament.
8. On 7 August 2021, the First Defendant wrote to the Speaker informing the Speaker that he disputes the validity of the directive issued by SODELPA in relation to the Budget and Bill No. 17, and that even if there was a directive, voting was by acclamation and as such he did not cast an individual vote.
9. On 10 August 2021, the First Defendant again wrote to the Speaker setting out a chronology of events in relation to SODELPA’s discussion with respect to July sitting of Parliament.
10. On 13 August 2021, the Speaker wrote to the Plaintiff as Party Leader of SODELPA informing him that, the First Defendant wrote to the Speaker disputing the validity of the directives and since he was unable to make a determination on how First Defendant voted on the Budget and Bill No. 17, he was not satisfied that the contents of the Notice are accurate and as such the Notice was treated as not being received by the Speaker’s Office.
11. The Speaker also informed Plaintiff and that if SODELPA believed that the First Defendant acted contrary to directives issued by SODELPA then only SODELPA was at liberty to file proceedings in this Court,

Preliminary Issue

12. The First Defendant by his Counsel raised the issue that Management Board of SODELPA did not resolve to authorise the Plaintiff as Party Leader to attend to all matters in this proceedings as provided for in authority dated 6 August 2021, which is annexed to Plaintiff's Affidavit in Support and as such Plaintiff does not have standing to institute this proceedings.

13. The so-called authority is in following terms:-

“Resolution of the SODELPA Management Board made on this 6th day of August, 2021.

IT IS HEREBY RESOLVED by the Management Board that the Party Leader **HONOURABLE VILIAME GAVOKA** is authorized to attend to all matters in respect of the proceedings at the Court of Disputed Returns against the **HONOURABLE MOSESE BULITAVU** relating to his submissions and vote in support of Bill No 17 of 2021 and the 2021-2022 Budget.

Such authority shall include swearing affidavits, give evidence and represent SODELPA and its Members in the abovenamed proceedings.

This authority shall be a continuing authority until it is formally revoked in writing.”

14. First Defendant's evidence is that the majority of the members of the Management Board were not aware of the meeting that authorized Plaintiff to institute this proceedings and his request for copy of Minute of such meeting was not responded to by the General Secretary of SODELPA.
15. The Plaintiff in response did not provide any evidence of the minutes of meeting authorizing him to institute this proceedings and instead states that he has standing to institute this proceedings under section 66(5) of the Constitution.

16. This Court after analyzing the Affidavit evidence finds that SODELPA Management Board did not have a meeting as required by SODELPA's Constitution to authorize Plaintiff to commence this proceedings.
17. However, that does not stop the Plaintiff from instituting this proceedings for reasons stated below.
18. Section 66(1) (b) of the Constitution provides as follows:-
"66.-(1) The High Court is the Court of Disputed Returns and has original jurisdiction to hear and determine –
(a) – – – ;
(b) by way of a proceeding, an application for a declaration on whether the seat of a member of Parliament has become vacant."
19. Pursuant to s.66(5) of the Constitutions, proceedings under s.66(1)(b), may only be brought by **a member of Parliament**, a registered voter or the Attorney General.
20. It is clear that s.66(5) of the Constitution does not permit a party to bring proceedings under s.66(1)(b) of the Constitution and as such question of authority from the SODELPA, on the issue of representative action do not arise in this case.
21. Hence, Plaintiff as a member of Parliament has standing to institute this proceedings.

Issues for Determination

22. The main issue for determination is whether First Defendant's seat in Parliament has become vacant pursuant to s.63(1)(h) of the Constitution.
23. Section 63(1)(h), of the Constitution provides:-

"63.-(1) The seat of a member of Parliament becomes vacant if the member –

(a) – (g);

(h) votes or abstains from voting in Parliament contrary to any direction issued by the political party for which he or she was a candidate at the time he or she was

elected to Parliament, without obtaining the prior permission of the political party; or

(i) ” (emphasis added)

24. Subsection (3) provides as follows:-

“(3) For the purpose of subsection (1)(h), the seat of the member of Parliament becomes vacant only upon receipt by the Speaker of a written notification signed by the leader and the secretary of the political party notifying the Speaker that the member has voted or abstained from voting in Parliament contrary to any direction issued by the political party, without obtaining the prior permission of the political party.”

25. It is not disputed that:-

- (i) The First Defendant was a candidate of SODELPA when he was elected to Parliament;
- (ii) The Speaker received the Notice from SODELPA Party Leader and General Secretary notifying the Speaker that the First Defendant voted in respect to the Budget and Bill No. 17 of 2021 contrary to directive issued by SODELPA without obtaining prior permission of SODELPA;
- (iii) The Speaker, after receipt of letters dated 7 and 10 August 2021, from the First Defendant informed the Plaintiff that in accordance with Standing Order 142 of the Parliamentary Standing Orders, he was not satisfied that the contents of the Notice are accurate and as such the notice is treated as not having been received by his Office.

26. The question that this Court needs to answer are:-

- (i) Whether there was a directive by SODELPA that its parliamentary members vote in a particular way in respect to the Budget and Bill No.17?;
- (ii) If so, then whether the First Defendant voted or abstained from voting on the Budget and Bill No.17 contrary to the direction issued by SODELPA?.

Whether there was a directive by SODELPA that its parliamentary members vote in a particular way in respect to the Budget and Bill No.17 of 2021.

27. The Plaintiff's Affidavit evidence is that:-

- (i) On or about 21, 22 and 23 July, 2021 respectively, there was a joint discussion ("**the Forum**") between SODELPA-NFP members of Parliament via zoom and in person to share views on the Budget and Bill No.17 and to prepare opposing submissions to the Bill;
- (ii) General consensus and accord to Forum was to oppose the Bill and the Budget;
- (iii) First Defendant was part of the Forum;
- (iv) On or about 26 July 2021 at around 8.00am, a meeting was held amongst SODELPA Member's of Parliament for almost an hour to confirm their stance on Bill No.17 and the Budget ("**the Brief meeting**");
- (v) First Defendant joined the Brief Meeting via zoom with other members who were unable to attend physically;
- (vi) Further to the Forum and the Brief Meeting a Memo was circulated by SODELPA President to SODELPA Members of Parliament to vote against Bill No.17 and the Budget ("**the Internal Memo**").
- (vii) First Defendant neither advised nor indicated to the Forum, the Brief Meeting and in regards to the Memo that he would be voting in support of Bill No.17, or that he would abstain from voting on Bill No.17, nor did he seek permission of Members of SODELPA, to vote in support of Bill No.17.

28. The First Defendant's response is that:-

- (i) The Forum between SODELPA and NFP was to provide better understanding of the Budget and consequential Bills with various experts being invited to attend and enhance the knowledge of the Members of the Opposition.
- (ii) There was no general consensus and accord at the Forum to appose the Budget and Bill No.17.

29. What is said by the First Defendant is somewhat corroborated by SODELPA Parliamentary Leader in his letter dated 9 August 2021, to L. Duru, General Secretary

of SODELPA (“**the General Secretary**”) in response to flying minute on a motion to institute disciplinary proceedings against the First Defendant.

30. The Plaintiff in his Affidavit in Reply stated that on 20 July, 2021, he made a Public Statement on preparation for the Forum which was emailed by the General Secretary to The President, Vice President, Party Leader, Leader of Oppositions, Members of the Management Board. Members of Parliament and Party Members on 21 July 2021.

31. Part of the email reads as follows:-

“The Party Leader has issued a statement (attached herein) in relation to the withdrawal of Bill 17 of 2021.

Party President has today called on each one of us to stand together and oppose the Bill. He has requested that we reach out to our iTaukei landowners and highlight with them the implications of this bill and the sneaky way it has been introduced into Parliament. We are also currently working on setting up an online petition against the Bill.”

32. As to the Brief Meeting First Defendant states that:-

- (i) It was an informal meeting which takes place prior to commencement of Parliament sitting where matters are discussed and senior members encourage and give confidence to new Members;
- (ii) No directive was issued at the informal meeting on 26 July 2021, and he never advised his voting preference as they were not asked about it.

33. The First Defendant’s version in respect to the Brief Meeting is corroborated by Vukidonu Qionibaravi’s letter dated 30 August 2021, to the First Defendant. Paragraph two of that letter reads as follows:-

“Please be advised that the Parliamentary Caucus of the Social Democratic Liberal Party (SODELPA) did not meet on Monday 26th July 2021, or Tuesday 27th July 2021 the first two days of the Budget Sitting, as the Hon. Leader of Opposition felt it more

appropriate for Members of Caucus to concentrate on finalizing their responses to the National Budget announcement delivered in the first two days of the Sitting.”

34. In respect to undated Internal Memo by SODELPA President and the General Secretary addressed to Ratu Naiqama Lalabalavu, Leader of Opposition (Annexure “VG2” of Plaintiff Affidavit in Support), First Defendant states as follows:-

- (i) Pursuant to clause 16.3 of SODELPA Constitution, Leader of Opposition is to notify about the directives to all members in writing;
- (ii) Neither the members nor him received any directive from the Leader of the Opposition;
- (iii) Resolution at paragraph 3.1.20 of the Minute of Meeting dated 26 February 2021, Management Board which reads “___ vote was taken on the motion that Party President and General Secretary to provide directive on behalf of the party to Parliament” is ambiguous and not in line with Clause 16.3 of SODELPA Constitution.

35. Clause 16.3(a) of SODELPA Constitution provides as follows:-

“16.3(a) – The Party Leader/Parliamentary Leader receives the directives of the Party from the **Management Board** and ensures that this communicated in writing to all Members of Parliament.” (emphasis added).

36. This Court notes that:-

- (i) No minutes of the Management Board Meeting of SODELPA was led in evidence to show that Management Board passed a resolution for its Parliamentary Members to vote against the Budget and Bill No. 17;
- (ii) Resolution passed at SODELPA Management Board Meeting held on 26 February 2021, and noted at paragraph 3.1.20 of the Minutes of such meeting is not in accordance with clause 16.3(a) of SODELPA Constitution;
- (iii) No evidence has been led to establish that the Party Leader/Parliamentary Leader communicated in writing any directive by the Management Board of

SODELPA to its Members of Parliament to vote against the Budget and Bill No.17 or not to abstain from voting against the Budget and Bill No.17.

37. This Court notes with interest that the Internal Memo from the Party President and General Secretary of SODELPA to the Leader of Opposition (Annexure VG2 of Plaintiff's Affidavit in Support) is not dated.

38. The Plaintiff at paragraph 12 of his Affidavit in Support states as follows:-

“12. Further to the above there was also a directive and in a form of an Internal Memo (**the Memo**) that was circulated by email to the SODELPA Members of Parliament by the SODELPA Party President to vote against the Bill including the Budget. I attached hereto a self explanatory copy of the Memo marked as “**VG-2**”.

39. No email has been produced in evidence to prove that when the Internal Memo was emailed to the Leader of Opposition and SODELPA Parliamentary Members.

40. This Court is of the view that the reason the Internal Memo was not dated is that it was issued after the First Defendant made his statement in Parliament on 26 July 2021. In his letter dated 7 August 2021, to the Speaker, First Defendant states as follows:-

“While it is true that the SODELPA President and GS wrote a letter on Tuesday 27th July 2021 to all Members of the SODELPA Caucus, purporting to give a directive to Members of Parliament, I had already delivered my oral response to the Budget on 26th July.”

41. This Court finds action of Plaintiff in putting forward the Internal Memo without stating when it was issued to be misleading and unhelpful.

42. After analyzing the Affidavit evidence and hearing Submissions from Counsel for the Plaintiff and the First Defendant this Court finds that:-

- (i) No directive was issued by the Management Board of SODELPA for its Members of Parliament to vote against the Budget and Bill No.17 during the Forum, the Brief Meeting or via the Internal Memo;
 - (ii) No directives was received by the Party Leader or Parliamentary Leader of SODELPA from the Management Board of SODELPA;
 - (iii) If any such directive was received by the Party Leader/Parliamentary Leader then it was not communicated in writing to all SODELPA Members of Parliament;
 - (iv) Since no directive was issued at the Forum, the Brief Meeting or under the Internal Memo, the First Defendant was not obliged to either advise or indicate that he would be voting in support of the Budget and Bill No.17 or he would abstain from voting;
 - (v) In view of that what is stated at preceding paragraph, that there was no need for First Defendant to seek permission from Members of SODELPA that he would vote in support of the Budget and Bill No.17 or he would abstain from voting.
43. Even though, this Court held that there was no directive issued by Management Board of SODELPA and that no directive was communicated to the SODELPA Members of Parliament in writing by the Party Leader/Parliamentary Leader, this Court for sake of completeness will deal with next question.
44. It must be noted that the answer to next question would have been the reason for this Court's decision if this Court found that Management Board of SODELPA issued a directive for its Member of Parliament to vote against the Budget and/or Bill of No.17 or not to abstain from such manner of voting and that directive was communicated to SODELPA Members of Parliament in writing.

Whether the First Defendant voted or abstained from voting on the Budget and Bill No.17 contrary to the direction issued by SODELPA?

45. Section 63(l)(h) of the Constitution provides:-

“63.-(1) The seat of a member of Parliament becomes vacant if the member –
(a) – (g);

(h) *votes or abstains from voting in Parliament contrary to any direction issued by the political party for which he or she was a candidate at the time he or she was elected to Parliament, without obtaining the prior permission of the political party; or*

(i) *.....”*

46. The Plaintiff refers to the First Defendant’s submissions made to Parliament when addressing the motion on the Budget and Bill No.17 and referred to the Hansard Report of 26 July 2021.

47. The First Defendant in supporting the Budget in Parliament stated as follows:-

“The Budget needs to rebuild the nation in a pandemic. Are we focusing on rebuilding our nation or are we focusing on trying to create more division? This is very important time that we need unity _ _ _ _”

48. He further went on to state that:-

“_ _ _ _ Budget to me is something that is very bold, there are decisive decisions that have been made by the Government and this to me is a Budget that will rebuild our nation and with those words, Sir, I would say that I support this Budget.”

49. In respect to Bill No.17 the First Defendant in his address to Parliament stated:-

“I agree with the Amendment given the need to move that way. We do not only look at this from the view that this is for the indo-Fijian tenants because some sitting iTaukei tenants who want to venture into business will also benefit from this, and that is my argument. Given that sometimes the processing at the bank takes a while, this quickens the approval processes much faster and also the disbursement of loans.

On the other hand, I see the no-consent issue as not a problem because even after it goes to the bank, the bank still makes those assessment and if there are breaches within that, it will always contact back to iTLTB and iTLTB will do their internal inspection and the administrative role that they play. So, there should not be any fear around that from

my view because there are sufficient measures in place in the current mechanism within iTLTB that handles all that.

I am speaking from my perspective as I have said as a landowner moving into entrepreneurship for the last 20 years, we are encouraging everyone, for all landowners to use their resources and use the policies in place to get the funding so that we can accelerate into the business sector – that is where the ball game is and where we can lift our status.”

50. The Plaintiff’s evidence is that he as Party Leader together the Leader of Opposition in their addresses strongly opposed the motion to pass the Budget and Bill No.17.
51. Mere fact, that First Defendant spoke in support of the Budget and Bill No.17 does not establish that he voted in support of the Budget and Bill No.17 or abstained from voting.
52. There is no provision in the Constitution which makes the seat of a Member of Parliament vacant if the member speaks in support of or against a motion before Parliament.
53. Also there is nothing wrong for Members of Parliament to speak for or against a motion as long as they do so responsibly and to contribute to the debate constructively.
54. Coming to the question as to whether First Defendant voted in support of the Budget and/or Bill No.17 it is prudent to look at the manner of voting.
55. On 26 March 2020, the Speaker informed Parliament that given the COVID-19 pandemic and in exercise of his powers under Standing Orders 20 he made certain decisions, on one of which was:

“(b) that all voting will be done by acclamation whereby after putting the Motion to Parliament, the Honourable Speaker would ask first for all those in favour of the Motion to indicate so orally with a “Aye” and then ask all those opposed to the motion to indicate so verbally with “Nay.”

56. On 26 May 2021, the Business Committee of Parliament (**“the Business Committee”**) decided that Parliament continue to vote on Parliamentary proceedings by acclamation which position Business Committee would continue to review.
57. On 25 May 2021, the Speaker informed Parliament of Business Committee’s decision to allow virtual sitting of Parliament and voting on all parliamentary proceedings to continue by acclamation.
58. On 22 July 2021, Lynda Tabuya Member of the Opposition wrote to the Speaker seeking the Speaker’s indulgence that “all votes during the budget debate process and all Consequential Bills be called/determined by a division and not by acclamation.”
59. On 27 July 2021, the Speaker replied to Lynda Tabuya’s letter and informed her that he determined that “the Parliament will uphold the decision of the Business Committee and therefore there will be no changes to the process of acclamation in Parliament.”
60. The First Defendant’s position from the letter he wrote to the Speaker on 7 August 2021, has been that since the voting on the Budget and Bill No.17 was by acclamation with individual members votes not being polled or there being no division of vote called there is no evidence to show how he voted in regards to Budget and Bill No.17 or that he abstained from voting.
61. The Plaintiff in response to the First Defendant’s claim that there is no evidence to say how he voted states as follows:-
- “5(a) It is obvious that it cannot be ascertained if he voted or not because of the method of voting by acclamation which is why Hon Tabuya requested for the same to be by way of role vote;”
62. This Court, therefore finds that Plaintiff has failed to provide sufficient evidence that First Defendant voted in support of the Budget or Bill No.17 or abstained from voting.

Miscellaneous

63. Counsel for the First Defendant submitted that this Court is functus on the grounds that, Court cannot adjudicate on or scrutinize the Parliamentary proceedings and in particular about submissions made by Members of Parliament as there is no specific provisions in the Constitution which empowers the Court do so and relied on the case authority of **Babla v Prasad and Another** (1998) 44 FLR 184 in which his Lordship Chief Justice Tuivaga (as he then was) in dealing with application by Babla, Member of Parliament seeking declaration that his suspension from Parliament by the Deputy Speaker and House of Representatives for two consecutive meetings was unlawful together with ancillary declaration stated as follows:-

“I am satisfied that the inquiry into Babla’s conduct by the Privileges Committee of the House and the findings thereof are part of the internal proceedings of the House. As such this court cannot inquire into them. The court has no jurisdiction to do so.”

The facts of **Babla** case are distinguishable for the reason that there is specific provision in the Constitution giving this Court jurisdiction to deal with the relief sought by the Plaintiff.

64. The issue that this Court has to determine in this proceeding is whether the First Defendant’s seat in Parliament became vacant under s.63(1)(h) of the Constitution which provision talks about Members of Parliament voting or abstaining from voting contrary to his or her party’s directive.

65. s.66(1)(b) gives this Court original jurisdictions to hear and determine:-

(a) — —;

(b) by way of a proceeding, an application for a declaration on whether the seat of a member of Parliament has become vacant.”

66. In view what is stated at paragraphs 64 and 65 of this Judgment, this Court holds that First Defendant’s submissions on section 73 of the Constitution is not relevant for determination of the issues in this proceedings.

67. In arriving at its decision, this Court:-

- (i) Has **not** taken into consideration the Statements or opinions expressed by SODELPA Party Members or Third Parties in social media or local news media; and
- (ii) Except for what is stated at paragraph 29 of this Judgment, has not taken into consideration the flying minutes on motion for SODELPA to take disciplinary actions against the First Defendant.

Conclusion

68. This Court makes following findings:-

- (i) No directive was issued by the Management Board of SODELPA in terms of SODELPA's Constitution for its Member of Parliament to vote against the Budget and Bill No.17;
- (ii) If, any directive was issued, then it was not communicated to SODELPA Members of Parliament in writing by the Party Leader/Parliamentary Leader as required under Clause 16.3(a) of SODELPA's Constitution;
- (iii) Even if this Court held, that there was such a directive which was communicated to the First Defendant, no evidence was led to establish that the First Defendant either voted in support of the Budget and Bill No.17 or abstained from voting.

Costs

69. As between the Plaintiff and the First Defendant, this Court takes following into considerations:-

- (i) The Plaintiff and the First Defendant filed Affidavits and Submissions;
- (ii) The Plaintiff relied on Submissions filed and did not make oral Submissions;
- (iii) The First Defendant in addition to Submissions filed made oral submissions;
- (iv) This action was instituted after the Speaker informed Plaintiff as SODELPA Party Leader that the Speaker treated the Notice as not being received by his Office and that if SODELPA believed that there was directive which the First

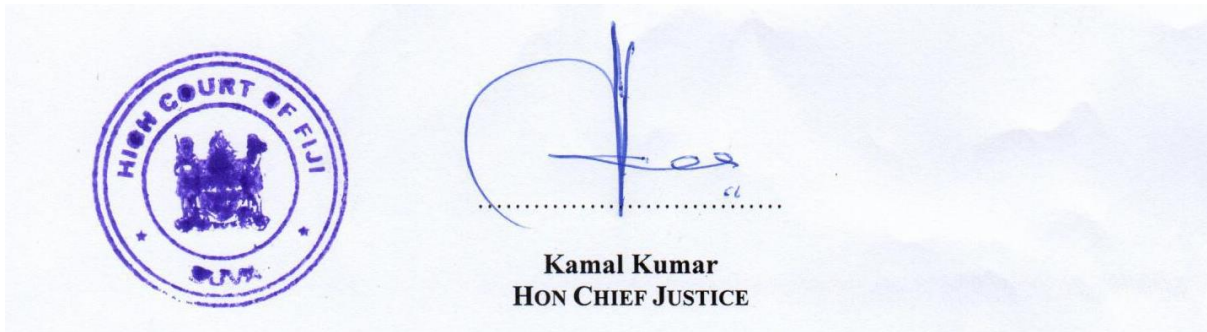
Defendant did not follow then SODELPA was at liberty to institute proceedings in this Court.

70. In view of what is stated at preceding paragraph it is just and fair that each party bear their own cost of this proceedings.

Orders:

71. This Court make following Orders:-

- (i) This action is dismissed and struck out;
- (ii) Each party do bear their own costs.



At Suva
10 September 2021