

Vanuatu

## Republic v Carcasses

[2009] VUCA 34

Court of Appeal

Robertson, von Doussa, Saksak and Dawson JJ

7, 16 July 2009

*(1) Constitutional law – Court – Jurisdiction – Parliament – Procedure – Session – Closure – Member of Parliament having submitted no-confidence motion bringing proceedings alleging closure of session in breach of constitutional rights – Whether court having jurisdiction to determine such question – Whether having jurisdiction to order reconvening of Parliament on specified date – Constitution of the Republic of Vanuatu 1980, arts 6(2), 43(2), 53(2).*

*(2) Constitutional law – Parliament – Procedure – Session – Closure – No-confidence motion – Effect – Member of Parliament submitting motion of no confidence in Prime Minister to Speaker on penultimate day of parliamentary session – Speaker closing session with no reference to no-confidence motion – Whether such closure in breach of constitutional rights – Constitution of the Republic of Vanuatu 1980, art 43(2).*

The second ordinary session of the Parliament was scheduled to be held from 17–24 November 2008. In fact, as a series of Bills were debated, the session continued until 27 November. On that afternoon, the Speaker announced that ‘there is nothing more to debate but I have some public announcements to make tomorrow. The sitting is adjourned until tomorrow morning at 8.30 am’. At 5.25 pm that afternoon a motion of no confidence in the Prime Minister was deposited at the Speaker’s office. That motion was seconded by the respondent, C, who was a member of Parliament. On the following day, the Speaker made a series of announcements and declared the second ordinary session of 2008 closed. No reference was made to the no-confidence motion lodged the previous afternoon. On 2 December 2008 C applied to the Supreme Court, seeking (i) a declaration that the Speaker’s closing of the session was in breach of C’s constitutional rights and (ii) an order that the Speaker reconvene the second ordinary session so as to consider the no-confidence motion. On 4 December 2008 the Chief Justice found that C’s rights under art 43(2) of the Constitution had been infringed and granted the application, ordering that Parliament be reconvened on 9 December 2008. Parliament was reconvened accordingly. The state appealed to the Court of Appeal against that decision.

**HELD:** Appeal dismissed.

(1) Except in respect of an alleged breach of a constitutional right, which only the courts had power to inquire into and determine, the courts would

- a not inquire into or adjudicate upon issues arising in Parliament. However, the decision under appeal did not involve the court inquiring into the processes of Parliament, which were regulated by standing orders and matters for Parliament alone. The case involved the court in ensuring that the constitutional right under art 43(2) of the Constitution were given meaning and substance by establishing that there had been a breach of that provision,
- b which entitled the respondent to relief. Furthermore, the Supreme Court had jurisdiction to set a date for the reconvening of Parliament; the court had jurisdiction to make such orders as it considered appropriate under art 6(2) of the Constitution, to enforce a constitutional right, and under art 53(2), to enforce any other provision of the Constitution that had been infringed (see
- c pp 267, 270–271, below). *A-G v Jimmy* (16 September 1996, Civil Appeal Case 7 of 1996, unreported), Van CA, *President of the Republic of Vanuatu v Korman* (9 January 1998, Civil Appeal Case 8 of 1997, unreported), Van CA, *Tari v Natapei* [2001] VUCA 18 and *Vohor v A-G* [2004] VUCA 22 applied.

Per curiam. It was common ground that, Parliament having been reconvened, the issues raised were of no more than academic interest, involving the routine application of well-established law (see p 266, below).

- d (2) Article 43 provided that a notice of motion of no confidence in the Prime Minister required at least a week's notice and had to be signed by one-sixth of the members of the Parliament. There were no other requirements or constraints and the Speaker did not have a discretion as to whether to accept the motion. Once the motion had been received by the
- e Speaker, signed by one-sixth of the members of the Parliament, it had to be actioned, subject to the week's notice requirement. Consequently, when Parliament resumed on 28 November 2008, there was a motion which had to be attended to before Parliament could be closed. Moreover, there was no requirement in art 43 that a motion of no confidence could not be given to
- f the Speaker unless Parliament would be sitting for seven days after the date it was given. Such a requirement would suspend the constitutional rights under art 43(2) for the final week of any session. The decision of the Chief Justice was correct and the appeal would be dismissed (see pp 269–270, below).

[*Editors' note:* Article 43 of the Constitution of the Republic of Vanuatu 1980, so far as material, provides: '(2) Parliament may pass a motion of no confidence in the Prime Minister. At least 1 week's notice of such a motion shall be given to the Speaker and the motion must be signed by one-sixth of the members of Parliament ...']

#### Cases referred to in judgment

- h *A-G v Jimmy* (16 September 1996, Civil Appeal Case 7 of 1996, unreported), Van CA  
*President of the Republic of Vanuatu v Korman* (9 January 1998, Civil Appeal Case 8 of 1997, unreported), Van CA  
*Tari v Natapei* [2001] VUCA 18, Van CA  
*Vohor v A-G* [2004] VUCA 22, Van CA

#### Legislation referred to in judgment

Constitution of the Republic of Vanuatu 1980, arts 2, 5–6, 21, 43(2), 52–53

**Appeal**

The appellant, the Republic of Vanuatu, appealed to the Court of Appeal against the decision of Lunabek CJ ([2008] VUSC 79, 4 December 2008) granting the application of the respondent, the Hon Moana Kalosil Carcasses, for a declaration that the closing of the second ordinary session of Parliament without hearing a motion of no confidence in the Prime Minister was unconstitutional and for an order that the Hon Speaker reconvene the second ordinary session of Parliament so as to consider that motion. The facts are set out in the judgment of the court.

*Ishmael Kalsakau* for the appellant.  
The respondent did not appear.

16 July 2009. The following judgment of the court was delivered.

**ROBERTSON, VON DOUSSA, SAKSAK and DAWSON JJ.**

The Republic of Vanuatu appeals against a decision of the Chief Justice delivered on 4 December 2008 in respect of a constitutional application which had been filed on 2 December 2008 by the respondent.

The respondent, who is a member of Parliament, had sought:

(1) a declaration that the Hon Speaker's closing of the second ordinary session of Parliament on 28 November 2008 was in breach of his constitutional rights; and

(2) an order that the Hon Speaker reconvene the second ordinary session of Parliament so as to consider motion no 3 of 2008, moved by the Hon Maxime Carlot Korman and seconded by the applicant, being the motion of no confidence against the Prime Minister of the Republic of Vanuatu, the Hon Edward Nipake Natapei.

Following an urgent hearing the Chief Justice found that the constitutional rights of Mr Carcasses under art 43(2) of the Constitution had been infringed and the declarations sought were made, including an order requiring a reconvening of Parliament at 4 pm on 9 December 2008.

It is common ground that Parliament was reconvened and the issues in the case are therefore of no more than academic interest. However, the Attorney General has argued strenuously that the court must, notwithstanding the fact that the respondent has withdrawn from the proceedings and is not represented before the Court of Appeal, hear and determine this matter because of its public importance.

We have not been persuaded that is the position and see the case as a routine application of well-established law.

The sensitive interface between the courts and Parliament has been the subject of a number of cases over many years. They include *A-G v Jimmy* (16 September 1996, Civil Appeal Case 7 of 1996, unreported), Van CA, *President of the Republic of Vanuatu v Korman* (9 January 1998, Civil Appeal Case 8 of 1997, unreported), Van CA, *Tari v Natapei* [2001] VUCA 18 and *Vohor v A-G* [2004] VUCA 22.

*a* From these previous decisions of the Court of Appeal the following principles are clear and unambiguous.

(a) All citizens at all times in all places and in all circumstances are subject to the Constitution and entitled to enjoy the protection it provides (art 2 of the Constitution).

*b* (b) Under the Constitution the courts alone have the power to interpret and determine whether there has been a breach of a constitutional right (arts 6 and 53 of the Constitution). Neither Parliament, government or any other persons or body has such powers under the Constitution.

(c) Other than in respect of an alleged breach of a constitutional right the courts will not inquire into or adjudicate upon issues arising in Parliament.

*c* Article 21 of the Constitution deals with procedures of Parliament and provides:

‘21. Procedure of Parliament

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

*d* (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.

*e* (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.’

*f* As to the relevant facts there was no dispute before the Chief Justice nor are there before us and we adopt the Supreme Court’s summary subject only to some minor editing.

- On 27 October 2008, after consultation with the Speaker, the Prime Minister, the Hon Edward Natapei, requested by letter of 27 October 2008 the calling by the Speaker of the second ordinary session of Parliament from 17 November to 24 November 2008;

*g* • On 30 October 2008, the Speaker summoned Parliament for the second ordinary session of Parliament accordingly;

- On 30 October 2008, the clerk of Parliament issued notices to each and all members of Parliament that the Parliament has been summoned to meet for the second ordinary session.

*h* • On 6 November 2008, the Speaker received five additional private Bills from the Hon Ralph Regenvanu to be introduced in the second ordinary session of Parliament of 2008.

- By letter dated 10 November 2008 the Speaker wrote to the Hon Ralph Regenvanu accepting the five private Bills to be included with the Government Bills for the second ordinary session of Parliament.

*i* • On 10 November 2008, the clerk of Parliament sent copies of all the Bills including the five private Bills.

- On 13 November 2008, the clerk of Parliament sent copies of the five private Bills to each and all members of Parliament.

• Earlier on 10 November 2008, the Speaker received a letter from the Hon Moana Kalosil Carcasses to introduce three private Bills in the second ordinary session of Parliament.

• On 11 November 2008, the Speaker wrote a letter to the Hon Moana Kalosil Carcasses advising that his three Bills would be debated at the second ordinary session of Parliament with the other Bills.

• On 17 November 2008, the clerk of Parliament sent to each and all members of Parliament copies of the said three private Bills.

• On 25 November 2008, the government withdrew six of the government Bills from the second ordinary session.

• On 27 November 2008, Parliament sat to deal with the remaining Bills. On the same date, there was a written motion to remove the Second Deputy Speaker, the Hon Louis Etap. On same date, after the Bills had been debated and completed, the Leader of Government Business, the Hon Peter Vuta, withdrew the written motion for the removal of the Second Deputy Speaker.

• On 27 November 2008 at about 5 pm, the Hon Speaker announced the following:

‘There is nothing more to debate but I have some public announcements to make tomorrow morning. The sitting is adjourned until tomorrow morning at 8.30 am.’

• On 27 November 2008, a motion of no confidence in the Prime Minister was deposited at the Speaker’s office at around 5.25 pm, which was seconded by the respondent.

• Mr Carcasses spoke to the Hon Speaker at that time. He explained the nature of the motion and the intention to have the motion debated at 4 pm on Thursday 4 December 2008 in accordance with standing order 23, which provides for written motions to be debated at that time.

• The Hon Speaker thanked Mr Carcasses and said he would make a ruling on the motion tomorrow morning when Parliament resumed sitting. He would subsequently provide written advice in respect to their motion.

• The next morning on opening the sitting for Friday 28 November 2008 at approximately 9 am, the Hon Speaker made the following announcements:

(i) There are European MPs and Pacific MPs present in the country. I am happy to announce that the Prime Minister delegation to meet with them will be made of the Prime Minister, the Ministers, the Leader of Opposition, the Deputy Leader of Opposition, the MPs David Tossul, Leinavao and Carcasses.

(ii) Greetings for Xmas and New Year.

(iii) MP Christmas party will be held at the Parliament House restaurant Monday 1 December 2008.

(iv) I declare the second ordinary session of 2008 officially closed.’

• No reference was made to the motion lodged the previous evening.

• At approximately 2.30 pm on 28 November 2008 Mr Carcasses received a letter which purported to be a ruling on the motion.

• The record of the Parliament proceedings on Friday 28 November 2008 shows that the Speaker made announcements.

*a* • The Speaker had summoned Parliament for the second ordinary session of Parliament to start on 17 November 2008 to 24 November 2008.

• The Speaker closed the second ordinary session of Parliament on 28 November 2008 in the morning after he made his announcements but not on 24 November 2008.

*b* In the Supreme Court the Chief Justice addressed four questions which had been fashioned with the assistance of counsel. They were:

1. Was Parliament still seized of business when it was adjourned by the Speaker at approximately 5 pm on Thursday 27 November 2008?

Answered: Yes.

*c* 2. Was Parliament still seized of business when the second ordinary session for 2008 was closed by the Speaker at approximately 8.30 am on Friday 28 November 2008?

Answered: Yes.

3. Was the closure of the second ordinary session on Friday 28 November 2008 lawful?

Answered: No.

*d* 4. Was there an infringement of the constitutional rights consequent on the closure on 28 November 2008?

Answered: Yes.

Having had the benefit of further argument the matter really now falls into a narrower compass and the first critical issue is whether Parliament was in session on the morning of Friday 28 November.

*e* The answer to that question is beyond argument. The Speaker on 27 November adjourned the session until the following morning. The Speaker had indicated that there would be an adjournment after some public announcements but what happened in the intervening period could not be ignored by the Speaker.

*f* The second critical issue is whether Parliament was lawfully closed on 28 November.

Mr Kalsakau's arguments in support of his contention that the closure was lawful were premised on two propositions:

*g* (a) A notice of motion of no confidence lodged under art 43 is ineffective unless or until the Speaker rules that it has been validly filed and it is placed on the agenda.

We are unable to accept that addition to the clear words of the Constitution. Article 43 requires that a notice of motion of no confidence shall be given with at least a week's notice and shall be signed by one-sixth of the members of Parliament. There are no other requirements and no other constraints.

*h* Counsel made reference to earlier cases where there has been mention of the motion having been accepted by the Speaker. That was nothing more than a description of what had historically occurred in those particular cases. The Speaker does not have a discretion as to whether to accept such a motion. Once the motion is received by the Speaker, signed by one-sixth of the members of Parliament, it must be actioned, subject to the week's notice requirement.

*i* Consequently, when the Parliament resumed on Friday morning there was

a motion which had to be attended to before the Parliament could be closed. a

(b) The second premise of argument of the Attorney General was that a motion of no confidence under art 43 cannot be given to the Speaker unless Parliament will be sitting for seven days after the date it is given.

We are not unmindful of the problems which the Attorney General was able to draw to our attention as to how the constitutional right might be manipulated but we cannot accept that such an additional requirement can be justified or found in the reading of the constitutional provision. b

The effect in practice of this argument would be that for the final week of any session the constitutional rights provided in art 43(2) would be suspended. That in and of itself is objectionable. Further the position is impractical because one can never be sure when the session is going to end. c

As the narrative demonstrates this session was to be from 17–24 November. In fact it continued until 28 November. It might have ended sooner had the business been disposed off or Bills had been withdrawn at an earlier time. It would be impossible to determine in advance when the session would end so as to ascertain when the week would run.

If a motion of no confidence is received by the Speaker which complies with art 43(2) while Parliament is in session then the session must continue until such time as that motion can be considered and determined. d

It is clear from the narrative that Parliament had not been closed prior to 28 November. On that date there was a notice of motion which required the attention of Parliament and which prevented a closure taking place until it had been disposed of. e

This decision does not involve the court inquiring into the processes of Parliament. Counsel drew attention to a number of standing orders of Parliament dealing with matters such as sitting hours, points of order, procedures for challenging the Speaker and the like. They are all matters for Parliament alone. It may be the case that under the standing orders the respondent could have taken action but that is not for us. Whatever the position it does not affect or alter the fact that the Constitution prescribes a position with regard to motions of no confidence. Nothing can alter or abrogate that position. There was a breach in this case so the respondent was entitled to relief. This case concerns only the court ensuring (as it is required to under art 53 of the Constitution), that the constitutional rights under art 43(2) are given meaning and substance. f

We are satisfied that the Chief Justice was correct in his assessment. His decision was a simple application of the principles which have been enunciated in the earlier decisions. g

Some mention was made in the papers of whether it was appropriate for the court to indicate the date on which Parliament was to reconvene. At the hearing that matter was not pressed. It was accepted by the Attorney General that in the course of the hearing in the Supreme Court there has been discussion as to the practicalities which would need to follow if the Chief Justice reached a decision that there was a breach of the Constitution. The order relating to the date was a simple response to that and beneficial to all in the circumstances. h

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*a* There is no question about the court's jurisdiction to set a date on which Parliament was to reconvene.

However, for the avoidance of doubt it should be noted that once the Supreme Court is satisfied and makes a determination that the constitutional right under art 5 has been, is being, or is likely to be, infringed, the Supreme Court has jurisdiction to determine the matter and may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce that right: art 6(2) of the Constitution.

*b* Equally, once the Supreme Court is satisfied and makes a determination that a provision of the Constitution has been infringed, the Supreme Court has jurisdiction also to make such order as it considers appropriate to enforce the provisions of the Constitution: art 53(2) of the Constitution. Setting the next date for Parliament to meet, as an effective enforcement process of the constitutional breach, is part of the Supreme Court's jurisdiction under art 52(2) of the Constitution.

*c* The appeal is dismissed.

*d*