

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

**Constitutional
Case No. 21/1285 SC/CIVL**

**IN THE MATTER: ARTICLES 6 (1) AND (2) AND 53 (1) AND (2) OF
THE CONSTITUTION OF THE REPUBLIC OF
VANUATU**

BETWEEN: Hon. Seule Simeon Davidson

Applicant

AND: Gracia Shadrack, Speaker of Parliament

First Respondent

AND: The Republic of Vanuatu

Second Respondent

Date of Hearing and Oral 29th April 2021

Decision:

Date of Judgment: 30th April 2021

Before:

Justice Oliver.A.Saksak

In Attendance:

Mr Garry Blake for the Applicant

Mr Godden Avock for the First Respondent

Mr Hardison Tabi for Second Respondent

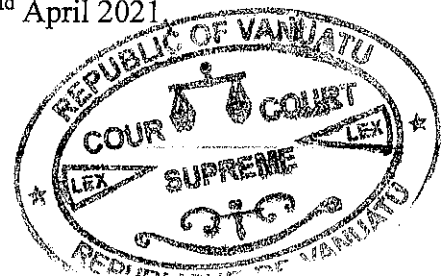
JUDGMENT

Introduction

1. This judgment provides reasons for the oral decision pronounced and issued by the Court yesterday (29th April 2021).

Reliefs Sought

2. The applicant filed a Constitutional application on an urgent basis on 27th April 2021 seeking-
 - (a) A declaration that the Ruling of the Speaker (First respondent) dated 22nd April 2021 to invoke the process under section 4 of the Members of Parliament (Vacation o Seats) Act [CAP.174] (the Act) to vacate his seat in Parliament, including the Speaker's request to the applicant to remove himself from Parliament on the basis that he was to cease to perform his functions as a Member of Parliament pending the process outlined in section 4 of the Act, is a breach of the applicant's Constitutional rights, and was therefore invalid, void and of no effect.
 - (b) An Order to quash the Speaker's ruling dated 22nd April 2021.



- (d) Any such order or further orders as the Court shall deem fit, including any consequential orders, should orders be made pursuant to any of paragraphs 1-3.
- (e) Costs of and incidental to the application.

3. There were 6 grounds as follows:

- (a) Upon the applicant having notified of his resignation from the Reunification Movements for Change Political Party (RMC) the Speaker purported to rely on sections 2 (f) and 4 of the Act to make his ruling
- (b) Those sections have been declared to be unconstitutional by the Court of Appeal in Sope v Attorney General [No. 4] [1998] VUCA 4 and therefore they could not be relied upon by the Speaker to institute a process to vacate the applicant's seat as Member of Parliament by reason of his resignation from RMC.
- (c) The effect of the ruling made with a view to the vacation for the applicant's seat infringes his Constitutional rights under Articles 5 (d), (g) and (k) and 27 of the Constitution.
- (d) Article 6 (1) of the Constitution provided the basis of the applicant's application where he considers his rights as guaranteed were, are being , are likely to be or may be infringed.
- (e) Article 53 (1) of the Constitution also provided the basis of the applicant's application seeking redress.
- (f) It is not necessary, for the proper function of Parliament or to preserve the proper quality of its members, that a Member of Parliament remain a member of the political party whose candidate he was at the election through which he became a member of parliament, and that sections 2 (f) and 4 of the At went beyond what is necessary to give effect to the requirements of the Constitution and in doing so, restrict the proper functioning of Parliament and tend to remove control of Parliamentary proceedings from the House where it should be to an outside body, namely a political party, and that in doing so create a fetter on the constitutional power of Parliament, thus breaching the applicant's constitutional rights.

Facts

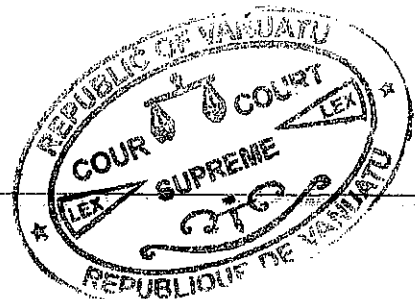
- 4. The facts are helpfully set out from paragraphs 1-22 inclusive of the applicant's sworn statement. As none of those facts are disputed or challenged by the respondent, it is unnecessary to restate them. I merely summarise those facts.



5. The applicant is currently a Member of Parliament who was appointed and has held a Ministerial position as Minister of Education since April 2020.
6. He contested the general elections for the Epi Constituency on 19th March 2020. He won one of the 2 seats for that constituency. He contested under the RMC Party as a member of the Party. After the elections the applicant made a choice to establish himself with the majority group led by the current Prime Minister to form the Government. He was one of the 2 members of RMC who had taken that choice.
7. Following that decision and move the applicant was asked to resign from the RMC Party or if he did not, the party would cause his seat in Parliament to be vacated. The applicant resigned. He wrote to the Speaker on 5th November 2020 informing of his resignation.
8. On 9th February 2021 the applicant was approached and told to reconsider his resignation and to perform a custom ceremony and return to RMC Party. He wrote a letter on the same day indicating he wished to revoke his earlier resignation.
9. On 10th February 2021 the President of RMC responded to his letter advising that the applicant was no longer a member of RMC.
10. On the same date the President wrote to the Speaker requesting the Speaker to invoke the legal process in sections 2 (f) and 4 of the Act.
11. On 12 February 2021 the applicant replied to the President accepting his removal from RMC Party and informing the President he was affiliating with the G12 Block of members within Parliament with effect from the date of the removal.
12. On 22nd April 2021 the speaker at the adjourned sitting of the Extra Ordinary Session of Parliament, addressed Parliament of the circumstances and made a declaration under section 2 (f) of the Act that the applicant had resigned from RMC and therefore invoked the process set out in section 4 of the Act, giving the applicant 30 days period to take legal proceeding to challenge the allegation that he had resigned from RMC Party. In the event of failure, the applicant would vacate his seat in Parliament at the end of the 30 days period and thereafter a by-election would be conducted for the Epi Constituency.

Evidence

13. The applicant filed his evidence by sworn statement dated 27th April 2021 in support of his application filed on the same date.



Relevant Laws

14. Article 5 (1) of the Constitution provides;

“5. Fundamental rights and freedoms of the individual

(1) The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health –

(a)

(b)

(c)

(d) protection of the law;

(e)

(f)

(g) freedom of expression;

(h) freedom of assembly and association;

(i)

(j)

(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.”

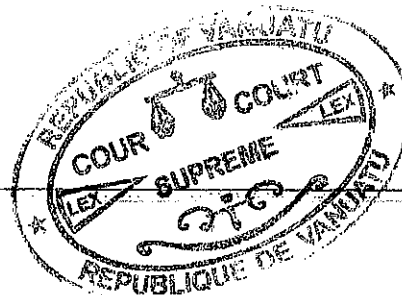
15. Article 6 (1) of the Constitution provides:

“6. Enforcement of fundamental rights

(1) Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.”

16. Article 27 of the Constitution provides:

“27. Privileges of members



(1) No member of Parliament may be arrested, detained, prosecuted or proceeded against in respect of opinions given or votes cast by him in Parliament in the exercise of his office.

(2) No member may, during a session of Parliament or of one of its committees, be arrested or prosecuted for any offence, except with the authorisation of Parliament in exceptional circumstances."

17. Article 53 (1) of the Constitution provides:

"53. Application to Supreme Court regarding infringements of Constitution

(1) Anyone who considers that a provision of the Constitution has been infringed in relation to him may, without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress.."

18. Section 2 (f) of the Members of Parliament (vacation of seats) Act provides for vacation of seats of members –

"2. Vacation of seats of members

A member of Parliament shall vacate his seat therein –

(f) if having been a candidate of a party and elected to Parliament he resigns from that party;"

19. Section 4 (1) of the Act provides for vacation of seat where a member resigns from a party-

"4. Vacation of seat where member resigns from party

(1) Where circumstances such as referred to in section 2(f) arise, the leader in Parliament of the party as a candidate of which the member was elected, shall so inform the Speaker in writing of those circumstances, and the Speaker shall, at the sitting of Parliament next after he is so informed, make a declaration that the member has resigned from the party."

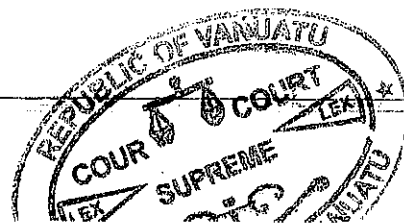
Discussion

20. All three legal counsel agreed that facts are not in dispute.

21. The applicant accepts and does not challenge that the has resigned from the RMC party and that section 2 (f) requirement has been made out.

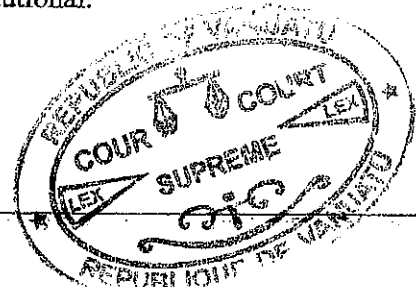
22. However his legal arguments and submissions were that-

(a) On the basis of the Court of Appeal ruling in Sope vs Attorney General [No. 4] [1988] VLR 4, Sections 2 (f) and 4 of the Act are unconstitutional and cannot be invoked by the Speaker to declare his seat



vacant and remove him from Parliament. In doing so, the applicant's right in Article 5 (1) (d), (g), and (k) have been infringed.

23. The second respondent submitted one issue of whether or not sections 2 (f) and 4 of the Act can be invoked when a Member of Parliament resigns from the party he/she was elected in? Based on the authority of the Sope case, the State submitted sections 2 (f) and 4 of the Act have been declared by the Court of Appeal as unconstitutional and they cannot be invoked in the circumstances of the applicant.
24. Mr Avock submitted the case of Sope was distinguishable on its facts and the five elected members had not resigned as members of their party when they signed a motion of non-confidence.
25. Mr Avock then submitted that in view of Articles 4 (1) and (3) and 17 of the Constitution when the applicant resigned from RMC Party, he no longer represented his electors thus infringing the sovereign power given to the electors who voted for him.
26. Mr Avock finally submitted the applicant's rights under Articles 5 (1) (d), (g), (k) and 27 of the Constitution were not infringed by the action of the Speaker.
27. From the evidence of the applicant which is unchallenged, he changed his affiliation on 12th February 2021 by affiliating with the G12 Block in Parliament and he informed the RMC President of this by letter. The Speaker acknowledged in his Declaration (Annexure G) that the applicant had declared his political affiliation with the Rural Development Party (RDP) on 29th March 2021. There was and is no mystery about his change of Political affiliation. Furthermore the First Respondent did not produce any evidence from the voters or electors showing any disloyalty to the applicant even after his resignation from the RMC Party. The submission by Mr Avock that Articles 4 and 17 of the Constitution were infringed by the applicant when he resigned from the RMC Party is not substantiated by any evidence and therefore those submissions are rejected.
28. The case of Sope is indeed distinguished on its facts but the similarity is that section 2 (f) and section 4 of the Act were determined by the Court of Appeal and held to be unconstitutional. That ruling is binding on this Court.
29. It does not matter that it has been some 30 years since 1988 when the ruling was made and the provisions of the Act have not been repealed by Parliament. In similar vein, the ruling and declaration remains unchanged since 1988 that sections 2 (f) and 4 of the Act are inconsistent with the proper functioning of Parliament and as such are unconstitutional.



30. The Court of Appeal in disagreeing with the primary judge in Sope's case said the Court was not entitled to speculate on matters of voting for a particular person based on allegiance without evidence and concluded that-

" In each constituency for whatever reason, a member is elected to Parliament, not a party."

31. In any event the Court of Appeal saw this as a side issue. The basic issue was:

" Whether it is necessary for the proper functioning of Parliament, or to preserve the proper quality of its members, for a Member of Parliament to remain a member of a political party whose candidate he was at the election. The only possible answer to that question : NO"

32. The Court of Appeal went further to hold that-

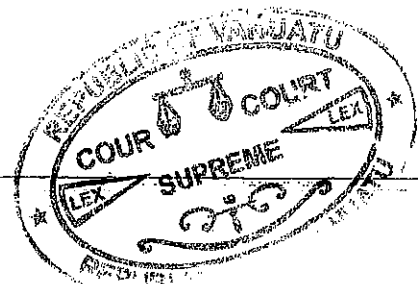
" Section 2 (f) of the 1983 Act goes beyond what is necessary to give effect to the requirements for the Constitution. Infact is restricts the proper functioning of Parliament. It tends to remove control of Parliamentary proceedings from the House, where it should be, to an outside body. However reputable that body may be, it is a fetter on the constitutional power of Parliament."

33. Having said that, the Court of Appeal held *" that section 2 (f) of the Members of Parliament (Vacation of Seats) Act 1983 is unconstitutional. It follows that section 4 of the Act is also unconstitutional."*

34. The evidence in this case is that the President of RMC instigated the process by letter dated 10th February 2021 by writing to the Speaker requesting him to invoke the legal process in section 4 (1) – (5) of the Act pursuant to section 2 (f). That is exactly what the Court of Appeal said in the passage quoted in paragraph 32 above should not happen. The constitutional power of Parliament was therefore fettered by such actions and it was an unconstitutional action when it was acted upon by the Speaker.

35. Having removed the applicant from Parliament in his capacity as Member of Parliament, and as a Minister of State in the circumstances that it occurred, the applicant's rights under Article 5 (1) (d), (g) and (k) were, have and are being infringed. And I so find, and I am satisfied those rights have been breached.

36. In his response to the application Mr Avock also addressed the issue of separation of powers by making reference to Article 16 of the Constitution to argue that it is for Parliament to amend the Act despite the Court of Appeal ruling in Sope's case. Counsel submitted that as long as the provisions of sections 2 (f) and 4 of the Act are and have not been repealed, they remain the law which should be applied.



37. Vanuatu indeed has a democratic system which acknowledges and operates on the doctrine of separation of powers between the Legislature, Executive and the Judiciary. Under Article 47 (1) of the Constitution the Judiciary is charged with the responsibility for upholding the Constitution and acts as a check on the power of Parliament to pass legislation and to ensure any legislations passed do not conflict with or are inconsistent with the Constitution.
38. The Courts have recognized the jurisdiction to review and rule upon the constitutionality of proceedings in Parliament. This occurred in Natapei v Tari [2001] VUSC 113 and on appeal in Tari v Natapei VUCA 18.
39. It does not matter that sections 2 (f) and 4 of the Act have not been repealed even after the Court of Appeal's declaration. They should have been repealed. Despite those provisions have not been repealed those provisions remain unconstitutional as they are inconsistent and should accordingly be repealed. The fact those provisions have not been repealed does not change the position those provisions are unconstitutional. To continue to use the provisions in circumstances such as this will always result in unnecessary litigations, as the conclusions to be reached would always be the same in light of the Court of Appeal ruling in the Sope case.
40. It is for those reasons the application was allowed and the declarations and orders made.
41. Costs was awarded on an indemnity basis in favour of the applicant to be paid by the Office of the Speaker. It is clear from Annexure "G" at paragraph 8 that the Speaker received advice from the Attorney General's Office but chose not to follow it. Had he done so, this case could not have come to the Court as it has. It has been unwarranted and unnecessary. Costs must therefore be awarded on an indemnity basis in favour of the applicant.

DATED at Port Vila this 30th day of April 2021

BY THE COURT


OLIVER A. SAKSAK

Judge

