IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Constitutional Jurisdiction)

Civil Appeal
Case No. 21/2996

BETWEEN: **HON. GRACIA SHADRACK, MP**
Appellant

AND: **BOB LOUGHMAN WEIBUR**
First Respondent

ALATOI ISHMAEL KALSAKAU MAU KORO
Second Respondent

JOHNNY KOANAPO RASOU
Third Respondent

JAY NGWELE
Fourth Respondent

JAMES BULE
Fifth Respondent

WILLIE DANIEL
Sixth Respondent

WILLIE PAKOA SATEAROTO
Seventh Respondent

LENKON TAO BRUNO
Eighth Respondent

SEULE SIMEON
Ninth Respondent

MARK ATI
Tenth Respondent

SILAS BULE MELVE
Eleventh Respondent

SAMSON SAMSEN
Twelfth Respondent

EDWARD NALYAL MOLOU
Thirteenth Respondent

NAKOU IANATOM NATUMAN
Fourteenth Respondent

LEONARD HOSHUA PIKIOUNE
Fifteenth Respondent

MARC MUELSUL
Sixteenth Respondent

EDMUND JULUN
Seventeenth Respondent

XAVIER EMANUEL HARRY
Eighteenth Respondent

ANTHONY IARIS HARRY
Nineteenth Respondent

ANATOLE HYMAK
Twentieth Respondent

BODIO CARLO
Twenty-first Respondent

THE SPEAKER OF PARLIAMENT, HON. SEULE SIMEON
Twenty-Second Respondent

THE REPUBLIC OF VANUATU
Twenty-Third Respondent

Date of Hearing: **25 October 2021**

Before: **Hon. Chief Justice V. Lunabek**
Hon. Justice J. von Doussa
Hon. Justice R. Asher
Hon. Justice D. Aru
Hon. Justice G. Andrée Wiltens

Counsel: **Mr N. Morrison and Ms S. Mahuk for the Appellant**
Mr A. Jenshel and Mr S. Kalsakau for the Respondents 1-21
Mr A. Bal. for Respondent 22
Mr K. Loughman and Mr K. Ture for Respondent 23

Date of Decision: **29 October 2021**

JUDGMENT

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1. The proceedings now before this Court are brought by way of appeal from a determination made by the Supreme Court on an election petition. The

petition challenged an announcement made on 8 June 2021 by Gracia Shadrack, the Speaker of Parliament, that the first 19 respondents, all members of Parliament on the Government side ("the MPs"), had each been absent for three consecutive sittings of Parliament on 1, 2 and 3 June 2021, without having first obtained from the Speaker permission to be absent. In consequence their seats had been vacated pursuant to s.2(d) of the Members of Parliament (Vacation of Seats) Act [Cap 174] ("the Act").

2. The MPs initially filed a Constitutional Application alleging that the Speaker had no constitutional right to declare their seats vacant. That application was decided against them in the Supreme Court and then on appeal: *Weibur v The Republic of Vanuatu [2012] VUCA 40.* However the Court of Appeal recognized that the Election Petition Rules 2003 provided a process by which the MPs could challenge the factual basis on which the Speaker had reached his conclusion as to absence.

3. The election petition process was pursued. After hearing extensive evidence the Supreme Court found in favour of the MPs, holding that they had not been "absent for three consecutive sittings of Parliament" within the meaning of s.2(d) of the Act.

The Parties

4. The MPs, and two other people supporting them, were named as petitioners in the election petition. The MPs were described as the First to Nineteenth petitioners. The Twentieth petitioner was another member of Parliament whose seat had not been vacated, and the Twenty First petitioner was a member of the public from a constituency whose elected member was one of the MPs. By the time those proceedings were instituted, Mr Shadrack had resigned and been replaced as Speaker by Seule Simeon who was also the Tenth petitioner. The petition initially named as the sole respondent "Speaker of Parliament". At the first conference the Court ordered, over objection by the MPs, that Mr Shadrack be joined as a respondent. The Court also ordered that the Republic of Vanuatu be joined as a respondent. The

"Speaker of Parliament" became the First respondent, the Republic the Second respondent, and Mr Shadrack the Third respondent.

5. In the appeal proceedings in this Court, the appellant is Mr Shadrack, and the 21 original petitioners have become of the First to Twenty-First respondents. The Speaker of Parliament and the Republic are named as the Twenty-Second and Twenty-Third respondents.

Parliamentary processes and relevant events

6. The parliamentary processes and events in the days relevant to the dispute were put before the Supreme Court through two sworn statements from Raymond Kalpeau Manuake, the Clerk of Parliament, in which he identified emails and other documents he received, the Hansard record of the relevant proceedings in Parliament and the video recordings thereof. The summary of these matters which the Supreme Court recorded in its judgment is not in dispute and records the essential factual background on which the arguments presented by the parties in this Court are based. We set out that summary, taken from paragraphs at [4] to [13] of the judgment:

> 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.*

7. In opposition to the petition, Mr Shadrack sought to expand the factual material which the court should consider through additional evidence from himself, Norris Jack Kalmet and Ralph Regenvanu; but the court rejected this evidence as irrelevant.

The applicable law

8. Article 15 of the Constitution provides:

> *14. The legislature shall consist of a single chamber which shall be known as Parliament.*

9. 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 Chiefs, 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.*

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;*

10. Under s.2(d) of the Act a seat is vacated automatically by force of law if the prescribed absences occur: *Boulekone v Timakata [1980-1984] VLR 228; Carlot v Attorney-General [no 2] [1988] VULawRp 21* and *Korman v Natapei [2010] VUCA 4.*

The reasons of the Supreme Court

11. In argument the MPs contended that although they had left the Chamber on 1 and 2 June 2021 they were still present within the precincts of Parliament and therefore they were not absent from the sitting within the meaning of s.2(d) of the Act. This proposition was rejected by the Court which held that absence from a sitting in Parliament meant an absence from the Chamber, not from the wider precincts.

12. Earlier Court decisions in which s.2(d) of the Act had been considered concerned situations where a member of Parliament had been absent for whole days, and did not assist in deciding whether "absence" meant absence for the complete duration of a sitting or included an absence for part only of a sitting.

13. The Court accepted the MPs' argument that the plain meaning of the ordinary word "absent" produced an ambiguous result. It could cover either situation. Accordingly, the Court considered s.8(3)(b) of the Interpretation Act [CAP 132] was activated and that the Court should give to 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." The learned judge concluded:

> *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.*
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> *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.*

14. The 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. It followed therefore that the MPs' seats had not become vacant.

15. On the construction of s.2(d) given by the court there was no need for it to consider an alternative argument presented by the MPs that they were absent on 2 and 3 June with the tacit permission of the Speaker. The judgement of the Court concluded "There is no order as to costs".

Issues raised before this Court

Appeal by Mr Shadrack:

16. The appellant's grounds of appeal contend that

    a. the Supreme Court erred in rejecting as irrelevant evidence from the three witnesses earlier named:
    b. The Court erred in holding that "absent" meant an absence for the entirety of the sitting. The court should have held that the absences of the MPs for parts of the relevant days constituted absences within the meaning of s.2(d). The Court should have held that absence is *"being absent and remaining absent from a Sitting so as to affect the quorum and the transacting of business of Parliament"*. The MPs were absent from Parliament on parts of 1, 2 and 3 June 2021 and their absences in fact affected the quorum and the transaction of business.
    c. The Court should have addressed the issue of tacit permission and held that no permission was given.

17. The appeal should therefore be allowed and a declaration made that the MPs' seats had been vacated.

Cross Appeal and Notice of Contention by the MPs:

    a. The First to Twenty First respondents, by their cross-appeal, contended that the appeal is incompetent as there is no right of appeal under Art 54 of the Constitution, or alternatively, that the Supreme Court erred in joining Mr Shadrack as a party to the election petition and even if hi

joinder was proper his role was akin to that of *amicus curiae*, a role that gives no right of appeal.

b. The Supreme Court erred in making no order for costs. The Court failed to hear the parties on this issue and failed to give reasons. Costs should have been awarded against Mr Shadrack.

c. The arguments regarding presence at Parliament as opposed to presence in the Chamber and tacit permission were also re-agitated.

Responses of the Speaker and the Republic of Vanuatu:

18. Both these parties helpfully identified issues that could arise for the Court's consideration, but raised no issues beyond those identified in the submissions of the other parties. Both said they would abide the orders of the Court and took no active role in the prosecution of the appeal.

Competency of the appeal

19. We deal first with the MPs' challenge to the competency of the appeal. The election petition invoked the jurisdiction of the Supreme Court vested in it by Art 54 of the Constitution. Relying upon the majority decision of this Court in *Rarua v The Electoral Commission [1999] VUCA 13,* counsel for the MPs argued that under Art 54 the Supreme Court was exercising a unique jurisdiction of an extremely special nature from which, for historical and practical reasons, no appeal is allowed.

20. Seeking to apply *Rarua* to a case such as the present that concerns the vacation of the seat of an elected and serving member of Parliament misunderstands the decision.

21. In Rarua the dispute concerned the validity of the declared outcome of an election which Mr Rarua challenged by election petition. His petition having failed in the Supreme Court he sought to appeal to this Court. However, s.63(2) of the Representation of the People Act [Cap 146] provides that there shall be no appeal from a decision of the Supreme Court concerning the outcome of an election. The issue before this Court concerned the

Constitutional validity of that prohibition. Counsel for Mr Rarua argued that by virtue of Art 49 and Art 50 of the Constitution an appeal lay from every decision of the Supreme Court given in its original jurisdiction and s.63(2) was inconsistent with that right. It was in this context that the Court considered the history in Western Parliamentary systems regarding electoral disputes, a history that emphasised the need for quick, final determination of election disputes so that the membership of a parliament following an election was settled without delay. That history led the majority of the Court to hold that in the special situation of election disputes, Parliament was not under a constitutional obligation to provide a right of appeal from a decision of the Supreme Court, and upheld the validity of s.63(2).

22. Article 54 deals with two quite separate situations. First it deals with whether a person has been elected as a member of Parliament, the Malvatumauri Council of Chiefs and a Provincial Government Council; that is the validity of the election process necessary to determine the composition of the relevant institution. Secondly, Art 54 deals with whether a person duly elected has at some point in time thereafter ceased to hold office – whether he has vacated his seat or become disqualified to hold it. The historical and special considerations that led the Court to uphold s.63(2) applied only to the first limb of Art 54. Once a person is duly elected to one of the specified institutions quite different considerations apply. As this Court observed in *Weibur v Republic of Vanuatu [2021] VUCA 40 at [58]* the removal of an elected member is a matter of great importance to Vanuatu's democracy.

23. In our opinion, the majority decision in *Rarua* is to be understood as limited in its scope to the first limb of Art 54, and to its essential ratio, namely that s.63(2) of the Representation of the People Act is a valid enactment. It is to be noted that since *Rarua* this Court has entertained an appeal from an election petition concerning whether a member of Parliament had vacated his seat: *Korman v Natepei [2010] VUCA 1.*

24. The challenge to competency based on the *Rarua* decision fails.

25. The second limb of the incompetency argument is that Mr Shadrack should not have been joined as a respondent to the election petition, and even if properly joined should not have been allowed to adduce evidence, nor should he now be allowed to appeal.

26. The Election Petition Rules 2003 provide for two different forms of petition, one dealing with the validity of elections to Parliament (Part 2) and another dealing with vacating a seat and disqualification to hold a seat (Part 3). The division of the rules in this way reflects the two different limbs of Art 54. Part 3 of the rules applies here. Rule 3.4 provides:

> ***Parties***
>
> *3.4 (1) The parties to proceedings under this Part are:*
>
> *(a) the petitioner; and*
>
> *(b) if the petitioner is not the member whose seat is affected by the petition, the member; and*
>
> *(c) the Speaker of the Parliament, unless the Court orders otherwise; and*
>
> *(d) anyone else the Court orders at any time to become a party.*
>
> *(2) The parties to the proceedings other than the petitioner are called the respondents.*

27. The election petition initially named only the "Speaker of Parliament" as the respondent. Mr Shadrack by that time was no longer the Speaker. Nevertheless, counsel for Mr Shadrack appeared at the first conference hearing and argued that the Court should join him on its own motion on the basis that he would be a contradictor. Rule 3.7(1)(e) permits the joinder of a new party at a conference hearing. As noted earlier, the Court added both Mr Shadrack and the Republic of Vanuatu. Minutes of that conference record:

> *In the particular circumstances of this case, where the current holder of the office of Speaker of Parliament is also a Petitioner (Tenth Petitioner), I am satisfied that the presence as a party to the preceding of Mr Gracia*

Shadrack (the 10th Petitioner's immediate predecessor as Speaker of Parliament and who made the decision which led to the filing of the Election Petition) is necessary to enable the Court to make a decision fairly and effectively in the proceeding. Accordingly, I order that Mr Shadrack be added as a party to this preceding, "Third Respondent": rules 3.4(1)(d) and 3.7(1)(e) Election Petition Rules and rules 3.1 and overriding objective of the Civil Procedure Rules.

28. Both the Election Petition Rules and the Civil Procedure Rules referred to contain very broad powers to join persons as parties. It is not entirely clear for what reason Mr Shadrack was joined. Counsel for the MPs now argues that as the minute says the joinder was "necessary" this indicates that the joinder was made under Civil Procedure Rule 3.2(1) that provides that the Court may order that a person become a party *if the person's presence as a party is necessary to enable the court to make a decision fairly and effectively in the preceding.* By reference to authority under this rule it is argued that the joiner was not necessary as Mr Shadrack had no legal interest in the outcome, and no legal interest to be protected. Rather he was joined to give him a role akin to *amicus curiae* or intervener, a role that traditionally gives the joined party a limited role in the proceedings and no right of appeal.

29. The minute makes no reference to CPR 3.2(1) and we do not understand the use of the word "necessary" in the context of the minute to refer to that rule. Rather we understand the minute to record that having regard to the circumstances including that the Speaker named as respondent was also a petitioner and the petition concerned Mr Shadrack as a member of Parliament and his reputation as past Speaker he should in the interest of fairness become a party as permitted under the broad powers in the rules referred to in the minute. The circumstances also include that the petitioners included two people whose interests in the outcome would be less than those of Mr Shadrack, and the Republic was not intending to take an active role as contradictor.

30. We are not persuaded that the there was any error in the exercise of discretion to join Mr Shadrack as a party and as one without any limit to his role in the proceedings. Having been thus joined as a party we consider he is entitled to appeal from the Supreme Court decision. If there were any doubt about that we think that doubt is removed by the fact that there is now a claim in this Court that he be ordered to pay the costs of the Supreme Court proceedings which he is entitled to defend.

31. Both challenges as to competency therefore fail.

Absence

32. The central issue in this appeal is the proper construction and interpretation of s.2(d) of the Act and in particular the meaning of "absent" in the expression "absent from three consecutive sittings of Parliament". In the Supreme Court the learned judge considered the meaning of the word in the context of s.2(d) was ambiguous and after considering the object of the Act held that the meaning that best ensured that object was one requiring an absence from the entirety of a sitting.

33. We agree with this conclusion. In context we consider two and only two interpretations of "absent" are possible. Either there must be an absence for an entire sitting, or an absence for some lesser period, part of a sitting. The possibility of two meanings creates an ambiguity, and the choice between the two possibilities is to be resolved by the application of a s.8(3)(b) of the Interpretation Act [Cap 132] ... *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.*

34. The obvious object and intent of the Act is to better ensure the attendance of the members for the effective functioning of Parliament: *Carlot v Attorney General [No2] [1988] VULawRp 21 at p2*. The intent and spirit of the sub-section must be to further that end, and in a way that recognises the day-to-day workings of Parliament and the duties and obligations of its members. The

evidence demonstrated that, for numerous personal and business reasons, members frequently are absent from sittings for periods of time, some short, some not so short, but less than for the entirety of a sitting. The MPs argue that to construe s.2(d) to mean any absence during a sitting would produce an absurd result. This was accepted in the Supreme Court: see para [48] of the judgement earlier set out. We agree.

35. In support of his appeal counsel for Mr Shadrack argues that the required absence is *being absent and remaining absent from a Sitting so as to affect the quorum and the transaction of business of Parliament*. To achieve such a meaning would require the notional addition of words which are not in the Act, and would introduce both quantitative and qualitative considerations into the application of a s.2(d) – how long an absence would be sufficient having regard to the circumstances of the particular sitting and what was the purpose of the absence. Considerations of this type would add complexity which is not in the words of s.2(d), and would confuse the attainment of the object of the Act. Moreover, whilst the proposed meaning could work where a substantial group of members was absent at the same time, s.2(d) would have no application if a single member were absent even for many days beyond three. This proposed interpretation of the Act cannot be accepted.

36. In our view Parliament must have intended the alternative meaning of absence from the entirety of three consecutive sittings. We agree with the trial judge. While that may encourage undesirable absences by MPs, that can be resolved by penalties imposed by legislation, or possibly Parliament's standing orders. In the end, MPs must answer to their electorates for their performance in Parliament. The mischief of untoward absences over three days by MPs is less than the mischief of MPs peremptorily losing their seats in Parliament through intermittent absences.

<u>Remaining issues unnecessary to decide</u>

37. On the construction and interpretation we give to s.2(d) of the Act, absent means absent whatever the background or motive. The disputed evidence was

directed to possible bias on the part of Mr Shadrack, the motives of the MPs in absenting themselves at times during the relevant Sittings, the nature of boycotts and the role of the Standing Orders in regulating attendances of members during Sittings. It was correctly rejected at trial as irrelevant.

38. As the MPs were not absent for entire sittings on 1, 2 and 3 June 2021 the possibility of their absence with tacit permission does not arise. Nor is it necessary for this Court to consider whether absence from a sitting of Parliament is an absence from the Chamber or from the precincts of Parliament.

Cross-appeal on costs

39. In their pleadings both the MPs and Mr Shadrack had claimed costs. These claims were not addressed during final submissions at trial. The published judgement concluded: "There is no order as to costs". The cross-appeal complains that the order was made without giving the MPs an opportunity to address the issue of costs, and no reasons were given in the judgement for there being no order as to costs.

40. We consider the Court was in error in both respects. Costs in a lengthy trial will be significant and the parties should be given the opportunity at some point in the process to make submissions about them. Further, when an order dealing with costs is made in a contentious matter short reasons at least should be given sufficient to explain why the order is made when the order departs from the general rule that costs are payable by the unsuccessful party.

41. As these errors occurred it is appropriate that this Court deal afresh with the costs in the Supreme Court. The MPs succeeded and they now contend that they should receive an award of costs.

42. The events at Parliament that led up to the Election Petition dispute gave rise to widespread public interest which carried into the Court proceedings. The resolution of this dispute through the Court was an important demonstration of democracy at work. The public interest nature of the proceedings and the

public roles of those involved in our opinion justified a departure from the general rule, and we think this was a case where it was appropriate not to award costs to any party. We consider the order made was correct even though proper practices were not followed at the time.

Costs of the appeal and cross-appeal

43. Once the dispute was resolved in the Supreme Court, the public interest would have been satisfied had the matter been left at that stage. The decision by Mr Shadrack to appeal, and that of the MPs to cross-appeal became more of a private pursuit of personal interests. At the appeal level, we think the ordinary rules as to costs between the parties should apply. On the one hand, Mr Shadrack has lost the appeal, but on the other hand the MPs have lost the challenge to competency of the appeal, the issue of joinder and lost the cross-appeal as to costs. Broadly weighing these outcomes we consider Mr Shadrack should be ordered to pay the MPs cost in this Court fixed at Vatu 75,000. They are to be paid within 21 days.

44. There will be no order as to costs concerning the Twenty-Second and Twenty-Third respondents who hold public offices and have taken no active part in the proceedings in this Court.

Orders

a) Appeal dismissed;
b) Cross-appeal dismissed;
c) The appellant (Mr Shadrack) to pay the First to Twenty First respondents (the MPs) costs of the appeal fixed at Vatu 75,000 within 21 days.

DATED at Port Villa this 29th day of October 2021

BY THE COURT

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Chief Justice V. Lunabek

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU