

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Appellate Jurisdiction)

APPEAL CASE No.8 OF 1997

**IN THE MATTER OF THE
CONSTITUTION OF THE
REPUBLIC OF VANUATU**

**Between : The President of the
Republic of Vanuatu**
First Appellant

And : The Attorney General
Second Appellant

**And : Maxime Carlot Korman
MP and 31 Others all
being Members of
Parliament**
Respondents

Coram : Hon. Justice Bruce Robertson
Hon. Justice John von Doussa
Hon. Chief Justice Sir John Muria

Counsel : Mssrs Ishmael Kalsakau and Bill Bani for the Appellants
Mssrs John Ridgway and Edward Nalial for the Respondents

JUDGMENT

On 29th November 1997, 31 Members of Parliament filed a Constitutional
Petition in the Supreme Court at Vila pursuant to the provisions of Article
53 of the Constitution and section 218 of the Criminal Procedure Code Act

[CAP 136]. The Respondents were the Speaker of Parliament, His Excellency the President of the Republic and the Attorney General as the Representative of the Republic of Vanuatu.

"On the 25th November 1997, 11 duly elected Members of Parliament had handed to the Speaker a Notice of Motion pursuant to Article 43(2) of the Constitution indicating no confidence in the Prime Minister the Hon. Serge Vohor Rialuth.

On 26th November 1997, the Speaker acknowledged receipt of the Notice, ruled that it was in order and advised that it would be placed on the agenda for business for the 1997 Ordinary Session of Parliament to be debated on Thursday the 4th of December 1997.

"On the 27th November 1997, the Second Ordinary Session of Parliament commenced at about 8.45am. It was shortly thereafter adjourned to recommence in the afternoon. During that afternoon sitting the Leader of Government business announced that all Government Bills tabled for debate would be withdrawn. Thereafter the Speaker made a ruling that there being no other Government business, the Second Ordinary Session of Parliament for 1997 was closed.

In the meantime, at 10 o'clock in the morning of 27th November, 10 Ministers attended a Council of Ministers' Meeting. Not present were Honourable Barak Sope and Honourable Sato Kilman. Subsequently on 28

November they received letters of termination dated the 26th November 1997 indicating that they were no longer Ministers.

At that Council of Ministers' Meeting it was decided by 8 votes to nil with 2 abstentions that the Government should withdraw all Government Bills at the afternoon Session of Parliament that day and that they would request the President of the Republic of Vanuatu to dissolve Parliament.

His Excellency the President, having receiving the advice of the Council of Ministers, proceeded to dissolve Parliament that day.

There was a hearing in the Supreme Court on the 4th December and that day the learned Acting Chief Justice granted the relief sought mainly :

- 1) A declaration that the ruling of the Speaker of Parliament dated 27th November 1997 declaring the Second Ordinary Session of Parliament closed was null and void and of no effect.
- 2) A declaration that the purported dissolution of Parliament by the President dated 27th November 1997 was unconstitutional and null and void and of no effect.
- 3) A declaration that the Second Ordinary Session of Parliament had not closed and Parliament was still sitting.
- 4) A declaration that the constitutional rights of the 31 Petitioners and each of them had been infringed.

Subsequently, Orders were made on the 4th December the effect of which was to hold the status quo with respect to Ministers, Parliament and its continuing existence pending the hearing of this appeal. The trial Judge prior to Christmas delivered Full Written Reasons for Judgment.

In that the Acting Chief Justice identified two questions which required to be answered by the Court :

- 1) Was the decision of the Speaker of Parliament dated 27th November to close the Second Ordinary Session of Parliament affecting and infringing a provision of the Constitution in relation to each and all of the Petitioners as Members of Parliament. To this question he answered yes.
- 2) Was the purported dissolution of Parliament by the President of the Republic dated 27th November 1997 unconstitutional and null and void and of no effect. To this he also answered yes.

The appeal was initially filed in respect of both of those questions but later the Speaker of Parliament (who had been one of the initial Respondents) indicated on the 22nd December 1997 that he did not wish to appeal the Order in respect of his ruling. The issue of the answer to that question remained a live matter in respect of the other Appellants' case.

- To the extent it is necessary to express a view on this aspect of the appeal we respectfully agree with the conclusion reached in the Supreme Court.

- The principles applicable were discussed by this Court in the *Attorney General & Others -v- Willie Jimmy & Others Appeal Case No. 7 of 1996*.

The evidence established that the Speaker had considered that it was in order and necessary to close the Session of Parliament in compliance with a precedent which have been set by the House in May 1997. On that occasion the Government withdrew all its bills and a private Member's bill was also withdrawn. Notwithstanding this the Speaker adjourned Parliament to consider a Motion of No Confidence which was set for debate on a future date. Prior to that date the House overruled the Speaker's decision holding that as all bills by the Government and private Members had been withdrawn, even although a Motion of no Confidence was awaiting a debate, the Session of Parliament should be closed to avoid unnecessary expense.

- It is not for the Court to interfere in the internal arrangements of Parliament but Members of Parliament can never act so as to deny to others (including other Members of Parliament) rights which are provided under the Constitution.

Article 43(2) provides :

“Parliament may pass a motion of no confidence in the Prime Minister. At least 1 week's notice of such a motion will be given to the Speaker and the motion must be signed by one sixth of the members of Parliament. If it is supported by an absolute majority of

the members of Parliament, the Prime Minister and other Ministers shall cease to hold office forthwith but shall continue to exercise their functions until a new Prime Minister is elected.”

Once a Motion has been accepted and a date has been set down for its hearing the Speaker is not competent to close Parliament on the basis that there is no business to deal with because that in effect is denying members of Parliament a Constitutional right.

The other issue which has been critical and vigorously argued before us relates to the action of the President in dissolving Parliament on the 27th November 1997.

Article 28 of the Constitution provides :

- “(1) *Parliament, unless sooner dissolved under paragraph (2) or (3), shall continue for 4 years from the date of its election.*

- (2) *Parliament may at any time decide, by resolution supported by the votes of an absolute majority of the members at a special sitting when at least three-fourths of the members are present, to dissolve Parliament. At least 1 week’s notice of such a motion shall be given to the Speaker before the debate and the vote on it.*

- (3) *The President of the Republic may, on the advice of the Council of Ministers, dissolve Parliament.*

- (4) *General elections shall be held not earlier than 30 days and not later than 60 days after any dissolution.*
- (5) *There shall be no dissolution of Parliament within 12 months of the general elections following a dissolution under subarticle (2) or (3)."*

It is clear that a Parliament will exist for 4 years unless [not less than 12 months after a general election, following a dissolution under subarticle (2) or (3),] Parliament, by an absolute majority of at least three-fourths of the members present or the President on the advice of the Council of Ministers, dissolves it.

It is this later provision which is critical in this case.

- In the amended grounds of appeal, the Appellants contended that the trial Judge had erred in law in holding that the Court has jurisdiction to review the decision of the President to dissolve Parliament.

We reject that submission. The power of the President to dissolve Parliament is, in this Republic, exclusively contained within a provision of the Constitution. *Re the Constitution of the Republic of Vanuatu 1980-1988/1 Van. L. R. 393*. It must be open to any person to argue that their constitutional rights have been infringed by such action and to seek relief from the Court by way of constitutional petition either pursuant to Article 6 or Article 53 of the Constitution. We reject any suggestion that any action

• which is taken pursuant to a specific power contained in the Constitution is beyond the jurisdiction of the Court to review. *Attorney General -v- President of the Republic of Vanuatu Civil Case No. 124 of 1994.*

* The second ground of appeal was in the alternative namely that if the Court found that there was jurisdiction to review the decision of the President on the facts the Supreme Court had erred in concluding that the discretionary power had not been lawfully exercised.

We do not find it necessary to enter into an extensive analysis of the factual situation. Article 28(3) provides a discretion to the President which is subject only to his first receiving advice from the Council of Ministers. Although there were initial questions raised about the validity of the meeting of the Council of Ministers the learned Chief Justice found that there had been advice received from the Council of Ministers. Such finding is not challenged (as it effectively could not be) before this Court.

In the normal course of events, one would anticipate that the President on this fundamental issue would accept the advice which was tendered to him. In this case it was contended by the Petitioners and found by the Supreme Court that there were two matters which the President failed to take into account before he exercised his discretion. These were :-

- 1) The existence of the outstanding of Motion of No Confidence ;

2) The fact that an absolute majority of the members of Parliament wished to debate a Motion of No Confidence.

We have already indicated that we agree with the Acting Chief Justice that the Speaker was in error in closing the session when there was outstanding a Notice of No Confidence. One has to accept however that at the time he made that decision the Speaker would have believed it was required of him because of the May decision of Parliament. Even if this was a vital factor which the President should have weighed in determining whether to act on the advice of the Ministers he would have been obliged to consider that the Speaker's decision was in conformity with the existing ruling of Parliament.

We do not accept that there was evidence that the President did not turn his mind to this issue. His comment in the radio speech that he had "to find a solution to the present crisis" is consistent only with turning his mind to the fact that yet again there was a Motion of No Confidence. But in any case the position which Parliament itself had created in May meant that those who wished to challenge the Government's confidence would have to first require the Speaker to summon an extraordinary Session at which a vote of no confidence could be debated. Considering that difficulty it could not be said that the President was wrong to conclude that a dissolution of Parliament was an appropriate course for him to follow in the circumstances.

On the 27th November only 11 Members of Parliament had signed the Motion of No Confidence. That was all that was required under the Constitution. What others indicated later cannot be given a retroactive

effect. There was no evidence available on 27 November about the views of other members of Parliament.

We do not see a sharp conflict between the provisions of Article 43 and the provisions of Article 28 of the Constitution which played such a large part in the Supreme Court hearing and decision. In our judgment a course of action which had the effect of denying Members of Parliament their right “to express an unfavourable opinion in the Government leadership” cannot be elevated to a priority over the right of the Council of Ministers to advise the President that Parliament should be dissolved and the constitutional right of a President (having received such advice) to exercise the responsibility vested in him under the Constitution. We are of the view that the right of the people of Vanuatu to democratically express their view in the election of a new Parliament must be accorded the priority. Article 43 is not one of those Articles which is specifically covered by Article 5. The right which Members of Parliament have under Article 43, is a right which exists only if Parliament exists. It is to allow the tail to wag the dog to suggest that the rights of the Members of Parliament ought to be accorded priority over the rights of the people to elect a new Government when the President, having exercised the provisions of the Constitution, has determined that Parliament should be dissolved.

We have heard lengthy and comprehensive submissions from both sides in this matter. However in our view it is not established on any basis that it was improper and unreasonable for His Excellency to accept the advice which was tendered and act in accordance with it.

An argument was advanced about the link between the actions of the Speaker in closing the session of Parliament and the actions of the Council of Ministers in recommending that the Parliament be dissolved. Clearly from the available records this was the intention of the Council of Ministers but such a link in their plan is not determinative of the validity of the President's exercise of discretion.

A number of times in the judgment under appeal reference was made to the fact that His Excellency the President gave no evidence about any of the surrounding circumstances. In our view, it was proper for the President to stand aside from the litigation and no adverse inference should be drawn from it. His Excellency has a constitutional role to play in this sort of matter. This he has done. It will rarely be appropriate for the President himself to give evidence or to become involved as an active party in this type of proceeding. The position of the President is more a kin to that of a Judge who is cited as a party. The Attorney General should in the exercise of the statutory functions under the Law Officers Act [CAP 118] argue the position but the office holder should abide the decision of the Court.

There was an argument advanced that the President had in fact not exercised his discretion because he had considered that he was under an order from the Government and obliged to act in accordance with that order. The contents of the radio message which the President made shortly after dissolving Parliament are not consistent with that submission. Although the speech contains a reference to the President having "*received an order from the Office of the Prime Minister*" those words must be read in their total

context. He also spoke of the need *“to find a solution to the present crisis”* and subsequently His Excellency noted that *“having been requested to dissolve Parliament and given my right to do so under the Constitution I hereby declare Parliament officially dissolved.”* The speech read as a whole indicates a proper appreciation and exercise of the constitutional provision.

As was made clear in the decision of the Acting Chief Justice in a case such as this the Court is not concerned with the political view or policies of any person or party. The Courts are not concerned with the desirability or undesirability of any particular course of action. The Court considers only whether the rights and responsibilities which are enshrined in the Constitution have been lawfully and properly exercised and whether the law as created by Parliament has been given effect.

Article 28(3) vests a wide and extensive discretion in the President. There is a heavy burden on anyone who asserts that there has been an improper exercise of that discretion. We are not satisfied that the Petitioners discharged that burden in the Supreme Court. Where the Constitution provides such a wide and unfettered discretion it is necessary to show that in legal terms the decision taken by the President was irrational and unsustainable. That has not been established on the evidence presented.

Accordingly, we are satisfied that the Appeal must succeed.

In accordance with the request from both parties we now declare that the dissolution of Parliament by the President was lawful, proper and

constitutional. It is to be deemed to have taken place on this date the 9th January 1998. Not later than 7 days from today the President should declare the date of the General Election after having received advice from the Prime Minister thereon. The Prime Minister will first have to consult with the Electoral Commission and the Principal Electoral Officer as required by Section 21 of the Representation of the People Act [CAP 146].

DATED AT PORT-VILA, this 9th DAY OF JANUARY 1998

BY THE COURT

.....
J. Bruce ROBERTSON, J.A.

.....
John W. von DOUSSA, J.A.

.....
Sir John MURIA, J.A.