Vanuatu

Korman v Natapei

[2010] VUCA 1

Court of Appeal
Saksak, Dawson and Fatiaki JJ
22 January 2010

(1) Constitutional law – Parliament – Member – Vacation of seat – Absence – Statute providing that member to vacate seat if absent from three consecutive sittings of Parliament without Speaker's permission – Speaker announcing that member's seat vacated – Whether Speaker bound by rules of natural justice – Whether member having right to be heard prior to Speaker's decision – Constitution of the Republic of Vanuatu 1980, arts 5, 54 – Members of Parliament (Vacation of Seats) Act (Cap 174), s 2(d).

(2) Constitutional law – Parliament – Member – Vacation of seat – Absence – Practice and procedure – Statute providing for vacation of seat by member – Interpretation – Practice that permission presumed in absence of contrary indication by Speaker – Whether such practice capable of constituting interpretive aid to statute – Standing Orders of Parliament, SO 10(2) – Members of Parliament (Vacation of Seats) Act (Cap 174), s 2(d).

(3) Constitutional law – Parliament – Member – Vacation of seat – Absence – Statute providing that member to vacate seat if absent without Speaker's permission – Whether request for permission could be sought and granted orally – Whether such request to be in writing – Members of Parliament (Vacation of Seats) Act (Cap 174), ss 2(d), (g), 4(1).

In November 2009 the appellant, the Speaker of Parliament, announced that the respondent Prime Minister's seat in Parliament had been vacated owing to the latter's absence from three consecutive sittings of Parliament without having obtained the appellant's permission. Section 2 of the Members of Parliament (Vacation of Seats) Act (Cap 174) ('the Act') provided that: 'A Member of Parliament shall vacate his seat ... (d) If he is absent from three consecutive sittings of Parliament without having obtained from the Speaker ... the permission to be or remain absent.' Article 54 of the Constitution conferred jurisdiction on the Supreme Court 'to hear and determine any question' as to whether a member of Parliament 'has vacated his seat or has become disqualified to hold it'. The respondent applied to the Supreme Court and successfully challenged the decision of the Speaker to vacate his seat on the basis that he had the prior permission of the Speaker to be absent from sittings of Parliament. The Speaker appealed to the Court of Appeal, submitting: (1) that the Chief Justice had erred in law in finding that

a there was a breach of the respondent's right to protection of the law under art 5(1)(d) of the Constitution when, under the circumstances, the respondent was unseated automatically by operation of law, (2) the Chief Justice had erred in law in failing to find that SO 10(2) of the Standing Orders of Parliament ('The Speaker shall ... ensure that Standing Orders, practices and procedures of Parliament are respected and observed by all Members') b complemented s 2(d) of the Act, thereby imposing a fetter on the constitutional power of Parliament to create its own 'practices and procedures' by holding that oral information was sufficient for the purpose of s 2(d) and (3) the Chief Justice had erred in failing to place any weight on the evidence presented by the Speaker that it was the practice and procedure of c Parliament that a member would write to the Speaker prior to being absent from sittings of Parliament.

HELD: Appeal dismissed.

(1) It was common ground that s 2(d) of the Act did not require any form of prior warning or notice to be given to a member before his seat was vacated. d Equally, the section did not exclude the application of art 5(1)(d) of the Constitution, which guaranteed the right to the protection of the law. It followed that the Speaker was bound to apply the principles or rules of natural justice in the exercise of his powers and in the discharge of his functions as Speaker, especially where a consequence of his actions might result in a member losing his seat in Parliament. Section 2(d) of the Act set e out two preconditions that had to be fulfilled before a member's seat was vacated by operation of law: the member was absent from three consecutive sittings of Parliament and such absenteeism was without the permission of the Speaker. However, in the circumstances it was not appropriate to seek to apply the rules of natural justice with reference to the respondent being given f a right to be heard prior to the Speaker making a decision under s 2(d), which was clear: a seat of a member of Parliament was vacated if the Speaker decided that the preconditions set out in that section had been met. Given the existence of the unconditional protection afforded to an unseated member of Parliament by art 54 of the Constitution, which clearly gave the Supreme Court jurisdiction to determine whether a member had vacated his or her g seat, s 2(d) was not to be construed as requiring the observance of the principles or rules of natural justice in every circumstance in which a member's seat in Parliament was vacated (see paras [6]–[10], [14]–[16], [18], [20]–[23], [44], below). *Boulekone v Timakata* (1 October 1986, unreported), Van SC, and *Tari v Natapei* [2001] VUCA 18 considered.

h (2) The Standing Orders of Parliament, SO 10(2), made reference to unidentified 'practices and procedures of Parliament' being respected and observed by all members of Parliament. Although counsel for the Speaker had submitted that there was a 'practice and procedure of Parliament' that required a member who intended to be absent from a sitting of Parliament to notify the Speaker in writing of his intention prior to the sitting taking place i and that, according to such 'practice', upon receipt of the written notice, permission was presumed in the absence of a contrary indication or advice from the Speaker, before such extraneous aids could be resorted to in

interpreting in s 2(d) of the Act, there had to be a clear lacuna or ambiguity in that provision and the interpretive aid itself had to be clear and unambiguous in its meaning and ambit. On the facts, the 'practice and procedure' as deposed to was itself ambiguous in its failure clearly to address the second precondition in s 2(d) and, in so far as it imposed a written requirement on the first precondition, was an unwarranted gloss on the plain and clear words of s 2(d). A 'practice and procedure of Parliament' that merely presupposed the grant of the Speaker's permission without more was inconsistent with the clear requirement of s 2(d) that the absentee member had 'obtained from the Speaker [his] ... permission to be absent' (see paras [25]–[32], [44], below).

(3) Under s 2(d) the Speaker's permission was required only if a member intended to be or was, in fact, absent from 'three consecutive sittings of Parliament' and not otherwise. In the absence of a specific statutory requirement that an application for the Speaker's permission under s 2(d) be in writing, such an application by a member, and the corresponding permission from the Speaker, to be absent from three consecutive sittings of Parliament could be orally or verbally made and granted. Other provisions of the Act in ss 2(g) and 4(1), which expressly required notification to the Speaker to be in writing, showed that the giving of written notification in the circumstances contemplated in those provisions was within the contemplation of Parliament when it enacted the Act and could have been expressly required under s 2(d) if Parliament had considered it appropriate, which plainly it did not. It followed that an application for the Speaker's permission under s 2(d) could not be restricted by requiring that such application be in writing. The appeal was therefore dismissed (see paras [35]–[44], below). *Boulekone v Timakata* (1 October 1986, unreported), Van SC, and *Sope v A-G (No 3)* [1988] VUCA 4 applied.

[*Editors' note*: Sections 2 and 4 of the Members of Parliament (Vacation of Seats) Act (Cap 174), so far as material, are set out at paras [8], [39], below. Articles 5 and 54 of the Constitution of the Republic of Vanuatu 1980, so far as material, are set out at paras [14], [20], below.

Cases referred to in judgment

Boulekone v Timakata (1 October 1986, unreported), Van SC

Carlot v A-G (No 2) [1988] VUCA 5, Van CA

Sope v A-G (No 3) [1988] VUCA 4, Van CA

Tari v Natapei [2001] VUCA 18, Van CA

Vatu v Muele [2007] VUCA 4, Van CA

Legislation referred to in judgment

Members of Parliament (Vacation of Seats) Act (Cap 174), ss 2(d), 4(1)

Constitution of the Republic of Vanuatu 1980, arts 2, 5, 16–17, 19(4), 21–22, 27, 54

Other source referred to in judgment

Standing Orders of Parliament, SOs 10(2), 11(2), 38

Appeal

The appellant, Maxime Carlot Korman, the Speaker of Parliament, appealed against the judgment of Lunabek CJ on 5 December 2009 ([2009] VUSC 147) quashing the appellant's declaration on Friday 27 November 2009 that the parliamentary seat of the respondent, Nipake Edward Natapei, was vacant. The facts are set out in the judgment of the court.

Bill Bani for the appellant.
Edward Nalyal for the respondent.
Frederick Gilu as a friend of the court.

22 January 2010. The following judgment of the court was delivered.

SAKSAK, DAWSON and FATIAKI JJ.

[1] This is an appeal from the judgment of the Hon Chief Justice delivered on 5 December 2009 ([2009] VUSC 147) in respect of an urgent constitutional application filed on behalf of the Hon Prime Minister challenging the announcement of the Hon Speaker of Parliament on 27 November 2009 that the Hon Prime Minister's seat in Parliament had been vacated owing to his absence from three consecutive sittings of Parliament without having obtained the permission of the Hon Speaker.

[2] A notice of appeal was filed on 7 December and the grounds of appeal were at a pre-trial directions hearing crystallised into three major heads as follows.

(1) That the learned Chief Justice erred in law in finding that there was a breach of the respondent's fundamental rights pursuant to art 5(1)(d) of the Constitution when, under the circumstances, the respondent was unseated automatically by operation of law.

(2) That the Learned Chief Justice made an error of law in failing to find that SO 10(2) of the Standing Orders of Parliament complements s 2(d) of the Members of Parliament (Vacation of Seats) Act (Cap 174) ('the Act') and thereby imposing a fetter on the constitutional power of Parliament to create its own 'practices and procedures' by holding that verbal information for the purpose of s 2(d) is sufficient.

(3) That the learned Chief Justice made an error of fact in failing to place any weight on the evidence presented by the appellant that it is the practice and procedure of Parliament in Vanuatu that prior to being absent from Parliament sittings, a member writes a letter to the Speaker.

[3] We record our appreciation for the helpful written and oral submissions we received from all counsel which we found to be of great assistance in our consideration of the appeal.

[4] Before turning to consider the grounds of appeal we wish to emphasise that this court in considering the appeal is not interested in or moved by the positions, personalities or politics (if any) involved in the circumstances that gave rise to this case. This court is also aware of the constitutional separation of the various functions and powers of the state between the legislature, executive and judiciary, which concept has been jealously guarded and

maintained over many years. It is a role of the court to ensure that an appropriate separation of powers is maintained

[5] It is not our intention in deciding this matter to interfere with the sovereignty or independence of Parliament in the conduct of its internal affairs, as Parliament is entitled to act pursuant to the Constitution; nor do we presume to judge the desirability or efficacy of the established parliamentary 'practices and procedures' that form an integral part of that conduct.

[6] In this regard we would reiterate what this court said in *Tari v Natapei* [2001] VUCA 18:

> 'The Republic of Vanuatu is a Constitutional Parliamentary Democracy. The Constitution is the foundation document. As clause 2 of it notes, the Constitution is the Supreme law of the Republic of Vanuatu. In Chapter 4 the Constitution provides for a Parliament. In Clauses 16, 17, 21, 22 and 27 in particular, are enumerated the important place of Parliament, and the rights and immunities which are attached to it and its members. Where there is room for debate, or it is possible that ambiguity exists, assistance may be gained from a consideration of the way in which Parliaments in other places have operated in the past or operate now. But any of that is in all circumstances and at all times subject to the clear and unambiguous words of the Constitution which is the Supreme Law.'

[7] And later, in dealing with the status of the Standing Orders of Parliament, the court said:

> 'Standing Orders of Parliament, as the Constitution notes, are the rules of procedure for Parliament. Within Parliament they are supreme and must be strictly adhered to by all members of Parliament. Nothing in the Standing Orders of Parliament can vary, abdicate or interfere with the rights which are provided under the Constitution. In as much as the Standing Orders of Parliament have an effect and influence upon the Constitutional rights of all members of Parliament, in accordance with Clause 6 of the Constitution any person aggrieved, is at liberty to apply to the Supreme Court ... The Constitution does not provide that what happens in Parliament is to be treated differently than any other breaches of lawful rights guaranteed by the Constitution. It necessarily follows therefore that the Supreme Court is the body which under the Constitution is charged with determining whether rights have been infringed or responsibilities disregarded. To do that is not an interference with the sovereignty of Parliament or with the important immunity which is provided to members of Parliament. It is a necessary consequence of ensuring that all Constitutional rights are accorded the meaning and force which the Constitution itself anticipated. The appeal was first advanced on the basis that what is done in Parliament could never be looked at by the Court. That argument is in error. As the Chief Justice correctly demonstrated, the supremacy of the Constitution in this Republic necessitates that in the extreme situation where there is an undisputed breach of a legal responsibility, including the misinterpretation of the clear words of the Standing Orders of

Parliament leading to a failure to recognise fundamental rights, the Court must be available to provide the remedy which the Constitution promises.'

[8] In the final analysis this court, in this appeal, is first, last, and solely concerned with the meaning and interpretation of s 2(d) of the Act, which relevantly provides:

> '2. *Vacation of seats of members*
> 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 remain absent.'

[9] As there also appears to have been some confusion as to the jurisdiction of the Supreme Court to deal with this matter, we reiterate what the Full Court of the Supreme Court said in *Boulekone v Timakata* (1 October 1986, unreported), Van SC:

> '... the Vacation of Seats Act gives no remedy (i.e. right to institute legal proceedings) to members obliged to vacate their seats under Section 2 because the remedy appears in Article 52 (now Article 54) [of the Constitution] which reads as follows (so far as relevant). "52. The Jurisdiction to hear and determine any question as to whether a person has been validly elected as a member of Parliament .... or whether he has vacated his seat or has become disqualified to hold it shall vest in the Supreme Court." Undoubtedly the Constitution gives the Supreme Court power to determine whether the Leader of the Opposition has vacated his seat in the circumstances. In so doing it is not our duty to introduce elements into section 2(d) in order to make it less harsh. The subsection is mandatory and we cannot divine an intention in Parliament which is not expressed therein.'

We do not read art 21(5) of the Constitution as constituting a fetter or ouster of the court's jurisdiction under art 54.

[10] In *Boulekone* the Full Court, in rejecting a submission that the wording of s 2(d) created an 'absolute offence' no matter what the reason or surrounding circumstances may be, identified two instances where the court would excuse apparent breaches of the section, firstly 'where the alleged offender has absolutely no control whatever over his actions' and, secondly, 'where it was impossible for him to comply with [the section] through no fault of his own'.

[11] In this latter regard, given the uncontroverted evidence in that case that the member concerned was 'too ill not merely to attend but so ill that he could not even seek permission to be absent', the court advised the Speaker that the member was not in breach of s 2(d) and had therefore not vacated his seat.

[12] We now turn to consider the substantive grounds of appeal as set out in para [2], above.

[13] In support of the first ground of appeal counsel for the appellant submits that since the vacation of a member's seat in Parliament pursuant to

s 2(d) of the Act occurs automatically by operation of law and no further procedural step is required, presumably, on the part of the Speaker, there can be no duty imposed on the Speaker to afford the unseated member the right to be heard pursuant to natural justice principles before his seat is vacated. Counsel quotes in support the dicta of this court in the *Carlot v A-G (No 2)* [1988] VUCA 5 and *Vatu v Muele* [2007] VUCA 4.

[14] It is common ground that s 2(d) does not require any form of prior warning or notice to be given to a member before his seat is vacated. Equally, the section does not exclude the application of art 5(1) of the Constitution, which sets out the fundamental rights and freedoms of an individual, including the right to '(d) protection of the law'.

[15] In *Boulekone* the Full Court of the Supreme Court in discussing the meaning and ambit of the expression said:

> 'Without repeating it in detail one can say that it specifies the essential requirement of a fair hearing by anyone facing an allegation, that is to say, the principles of natural justice as known, and understood in the free and democratic world will be applied by the tribunal considering the allegation. All tribunals in Vanuatu are accordingly bound by the rules of natural justice whether they are administrative in function or purely judicial. Parliament is the highest Court in the land and is equally bound to apply the principles or rules of natural justice.'

[16] It follows that the Speaker, as the presiding official in sittings of Parliament constitutionally charged with responsibility for maintaining order, is also bound to apply the principles or rules of natural justice in the exercise of his powers and in the discharge of his functions as Speaker, especially where a consequence of his actions might result in a member losing his seat in Parliament.

[17] It is correct that the vacation of a member's seat in Parliament pursuant to s 2(d) occurs by operation of law. It does not necessarily follow that the Speaker has no prior role or function at all in the vacation of a defaulting member's seat.

[18] Section 2(d) of the Act sets out two preconditions that must be fulfilled before a member's seat is vacated, namely the member must be absent from three consecutive sittings of Parliament and such absenteeism was without the permission of the Speaker. Plainly the Speaker has a primary role in the monitoring and determination of whether both preconditions are fulfilled in respect of any member of Parliament and it is only when both preconditions are fulfilled that a member's seat is vacated by 'operation of law' and not otherwise.

[19] That is the proper underlying context within which it can be said that the vacation of a defaulting member's seat 'occurs automatically by operation of law' pursuant to s 2(d) of the Act. In other words, subject to the fulfilment of both preconditions of s 2(d), there is nothing inevitable or 'automatic' in the vacation of a member's seat in Parliament.

[20] We accept it could be said that there was a breach of the common law principles or rules of natural justice. However, in the particular circumstances of this case, it is not appropriate to seek to apply the rules of natural justice

with reference to the respondent being given a right to be heard prior to the Speaker making a decision under s 2(d). The relevant statutory provision and rights preserved by the Constitution are already clear. Section 2(d) vacates a seat of a member of Parliament if the Speaker decides that the preconditions set out in that section have been met. As stated in para [9], above, pursuant to *Boulekone*, the outcome of that decision is mandatory. But pursuant to art 5(1)(d) of the Constitution every citizen is entitled to '(d) protection of the law'. Further, art 54 of the Constitution confers jurisdiction upon the Supreme Court 'to hear and determine any question' as to whether a member of Parliament 'has vacated his seat or has become disqualified to hold it'.

[21] In this case the respondent challenged the decision of the appellant to vacate his seat on the basis that the second precondition in s 2(d) had not been met. In other words, the respondent says he did have the prior permission of the Speaker to be absent from sittings of Parliament. The respondent is entitled to challenge the basis of the Speaker's decision pursuant to the right given him under art 54 of the Constitution.

[22] Counsel for the respondent submits that it is in the monitoring and determination of the fulfilment of the preconditions of s 2(d) that the Speaker failed to afford natural justice to the respondent. The Chief Justice puts it somewhat differently when he said in his judgment:

> 'This case presents good facts in support in which the Speaker should object or give notice to [the Respondent] that he will be making the declaration or announcement to the effect he made on 27th November 2009. In the present case [the Appellant] failed to provide an opportunity to [the Respondent] to respond to the Announcement (or declaration) before he made the announcement ...'

[23] Having regard to the form in which s 2(d) of the Act is drafted and mindful of the earlier dicta of this court as to its mandatory effect and operation, and, given the existence of the unconditional protection afforded to an unseated member of Parliament by art 54 of the Constitution, we do not construe s 2(d) as requiring the observance of the principles or rules of natural justice in every circumstance in which a member's seat in Parliament is vacated.

[24] We turn next to consider ground 2 of the appeal, which relates to the status of the Standing Orders of Parliament, parliamentary 'practices and procedures' and their relationship (if any) to the interpretation of s 2(d) of the Act.

[25] The appellant's counsel submits that in the exercise of its power and duty under art 21(5) of the Constitution, Parliament has established the Standing Orders of Parliament which came into effect on 1 January 1982, and enacted the Act which commenced on 3 January 1984. Furthermore, SO 10(2) makes reference to unidentified 'practices and procedures of Parliament' being respected and observed by all members of Parliament.

[26] In this latter regard counsel forcefully submits that there is a well-known and firmly established 'practice and procedure of Parliament' that requires a member who intends to be absent from a sitting of Parliament

to notify the Speaker in writing of his intention prior to the sitting taking place.

[27] The 'practice', however, does not require the absenting member to request or seek the Speaker's permission in his written notice, nor was it part of the 'practice' for the Speaker to actually grant his permission to an absenting member who had given him the requisite written notice. Indeed, according to the established 'practice', upon receipt of the written notice, permission was presumed in the absence of a contrary indication or advice from the Speaker.

[28] We accept that both the Standing Orders and the established 'practice and procedure of Parliament' may be seen as complementing the provisions of s 2(d) and, in limited circumstances, could assist in its interpretation, but, before such an extraneous aid can be resorted to, there must be a clear lacuna or ambiguity in s 2(d) and the interpretive aid must itself be clear and unambiguous in its meaning and ambit. Finally, it must not be inconsistent with the clear wording and intention of the statutory provision being construed.

[29] After careful deliberation we unanimously reject counsel's submission that the above-mentioned 'practice and procedure' dealing with the giving of written notice to the Speaker of a member's intention to be absent from a sitting of Parliament can be prayed in aid in construing s 2(d).

[30] The 'practice and procedure' as deposed in the sworn statements is itself ambiguous in its failure to clearly address the second precondition in s 2(d) and, in so far as it imposes a written requirement on the first precondition, is an unwarranted gloss on the plain and clear words of s 2(d).

[31] The absence of a member from any sitting of Parliament is self-evident at the particular sitting(s) which the member is absent from and independently verifiable from the Minutes of the Proceedings of Parliament which are recorded and kept by the Clerk of Parliament (see SO 11(2)). Such absenteeism is patent with or without a written notice from the member concerned or a formal announcement from the Speaker, as occurred in the present case.

[32] Equally, such absenteeism may or may not be with the permission of the Speaker and a 'practice and procedure of Parliament' that merely presupposes the grant of the Speaker's permission without more is inconsistent with the clear requirement of s 2(d) that the absentee member must have '... obtained from the Speaker [his] ... permission to be absent'.

[33] The third and final appeal ground relates to what might be conveniently summarised as the evidential ground. Specifically, the appellant complains that the Hon Chief Justice failed to place any weight on the sworn evidence confirming the existence of the 'practice and procedure of Parliament' that prior to being absent from any parliamentary sitting, a member writes a letter to the Speaker.

[34] There is no substance in this particular complaint. The Hon Chief Justice clearly dealt with the matter in the following paragraphs of his judgment, where he said:

'The sworn statements of the First Respondent Speaker attaches copies of written requests by Members of Parliament to the Speaker of Parliament for absence to Parliament sittings. This is what is referred to as Parliamentary Practices and procedures. It is submitted for the First Respondent, the request must be in writing as part and parcel of the parliament practices and procedures. It is to be noted that if the said requests constitute parliamentary practices and procedures for a member of Parliament to absent himself, the said practices and procedure reduce the effect of Section 2(d) of the Member of Parliament (Vacation of Seats) Act of 1983 [Cap 174] into a single written notice whereas Section 2(d) provides for the obtaining of the Speaker's. The permission means a request from a member and the response from the Speaker approving or rejecting the request of absence. The first Respondent confirms his understanding of his permission under Section 2(d) of the Act when he said (sworn statement of 4 December 2009 at paragraphs 7, 8, 9, and 10: "7. I can say that the practice has been that prior to his absence, a member notifies the Speaker in writing but not by word of mouth. 8. That a member will send a letter to the Speaker notifying the Speaker in advance of his absence, that's all. 9. In my experience during my first tenure as Speaker, receipt of that letter from a member suffices. That is, I will not need to actually reply to the member saying 'yes you can be excused'. 10. The fact alone that the letter is received prior to the sittings concerned suffices." Apart from the request or information being "written" or "verbal" it is difficult to understand and appreciate the substantial difference between this course of event suggested by the First Respondent in his sworn statement of 4 December 2009 at paragraph 7, 8, 9, and 10 referred to above and the position of the Applicant in the present case.'

[35] Plainly the Hon Chief Justice did consider the evidence and concluded, correctly in our view, that—

> 'the said practice and procedure reduce the effect of section 2(d) of the Member of Parliament (Vacation of Seats) Act [Cap 174] into a single written notice whereas permission means a request from a member and the response from the speaker approving or rejecting the request of absence.'

[36] We note, without comment, that the 'practice and procedure' requires written notice from a member of his intention to be absent from a sitting of Parliament but no reciprocal requirement for the grant of permission by the Speaker. The 'practice and procedure' also does not clearly address the very real possibility that a member may be absent without permission from two consecutive sittings of Parliament without his seat being vacated. In other words, it is not the mere absence without permission that is the mischief that s 2(d) seeks to address, but the absence without permission from 'three consecutive sittings of Parliament'.

[37] In our reading of s 2(d) the Speaker's permission is only required if a member intends to be or is, in fact, absent from 'three consecutive sittings of

Parliament' and not otherwise. The absence without permission of a member from one or two sittings of Parliament are not circumstances capable of resulting in his or her seat being vacated.

[38] In the absence of a specific statutory requirement that an application for the Speaker's permission under s 2(d) must be in writing, we are satisfied that an application by a member for, and the corresponding permission from the Speaker, to be absent from three consecutive sittings of Parliament can be orally or verbally sought and granted.

[39] We are fortified in our view by the clear requirement in s 2(g) of the Act that a member who resigns his seat in Parliament must do so '*by writing* under his hand addressed to the Speaker ...' (our emphasis). In similar vein, where a member resigns from his party in Parliament, the leader of the party is required in terms of s 4(1) of the Act to '*inform* the Speaker in writing of those circumstances' (our emphasis) and the Speaker, in turn, is obliged to make a declaration to that effect at the next sitting of Parliament.

[40] Plainly, the giving of written notification in the enumerated circumstances was within the contemplation of Parliament when it enacted the Act and could have been expressly required from an absenting member under s 2(d) if Parliament had considered it appropriate. Plainly Parliament did not.

[41] In *Boulekone* the Full Court of the Supreme Court in construing s 2(d) foreshadowed the possible acceptance by the Speaker of oral hearsay as to the state of illness of the absentee member in that case when it said:

> 'No doubt such a critical illness of the Leader of the Opposition would be known to many people. It may or may not have been within the knowledge of several members. Had they voiced that information the Speaker may not have vacated the member's seat ...'

[42] Finally, this court in *Sope v A-G (No 3)* [1988] VUCA 4, in rejecting the lower court's view that the only method in which a lack of quorum in a parliamentary sitting can be established is the procedure set out in SO 38, said:

> 'In our opinion Article 19(4) of the Constitution sets out what the quorum must be. *That Constitutional requirement cannot be restricted by requiring proof in a particular way.* It is an issue of fact which can be proved in any way that other material facts can be proved in a Court of Law.' (Our emphasis.)

[43] Likewise in this case the application for the Speaker's permission under s 2(d) cannot be restricted by requiring such application to be in writing.

[44] For the foregoing reasons the appeal was dismissed with no order as to costs. In conclusion, we commend the Attorney General's chambers for providing counsel to the appellant in this important case for the clarification of s 2(d).