

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

Civil Appeal
Case No. 24/3908 COA/CVA

IN THE MATTER OF: AN APPEAL FROM THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

BETWEEN: GRACIA SHADRACK, ALATOI ISHMAEL
KALSAKAU, SILAS MELVE BULE, JAY
NGWELE, JEAN BAPTISTE TAMA, MARC
MUELSUL, BLAISE SUMTOH
First Appellants

AND: SAMUEL ANDREW KALPOILEB, JESSE LUO,
ANTHONY HARRY, NAKO NATUMAN, GLORIA
JULIA KING, ANATOL HYMAK, JACK WONA,
LULU SAKAES, JUSTIN NGWELE, BASIL
BULEBAN, SILAS BULE, MELTEK SATO
KILMAN LIVTUNVANU
Second Appellants

AND: BOB LOUGHMAN WEIBUR, DON KEN, MARC
ATI, CAMILLO ATI, JOHN STILL TARIQUETU,
PETER TURA, JAMES BULE
Third Appellants

AND: MOLI NIKENIKE VUROBARAVU
MOLINAVANUA acting in the capacity of the
President of the Republic of Vanuatu
First Respondent

AND: CHARLOT SALWAI TABIMASMAS in his
capacity as the caretaker Prime Minister of the
Republic of Vanuatu
Second Respondent

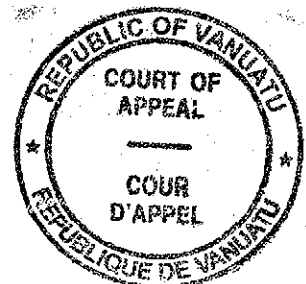
AND: SPEAKER OF PARLIAMENT
Third Respondent

AND: REPUBLIC OF VANUATU
Fourth Respondent

Date of Hearing: 27 December 2024

Coram: Hon. Justice J. Mansfield
Hon. Justice D Aru
Hon. Justice V M Trief
Hon. Justice E. P. Goldsbrough
Hon. Justice M A MacKenzie

Counsel: Mr A. Godden and Mr S. Kalsakau for the Appellants
Mr A. Kalmet for the First Respondent



*Mr D. K. Yahwa for the Second Respondent
Solicitor General, Mrs F. Samuel and with Mr T. Loughman for the Third and
Fourth Respondents*

Date of Decision: 27 December 2024

Date of reasons: 28 January 2025

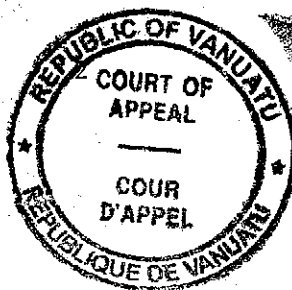
REASONS FOR JUDGMENT

Result

1. At the completion of the hearing of this appeal on 27 December 2024, we announced that the appeal is dismissed, and that we would publish reasons for our decision at a later date. These are our reasons for our decision. We made no order as to costs.

Introduction

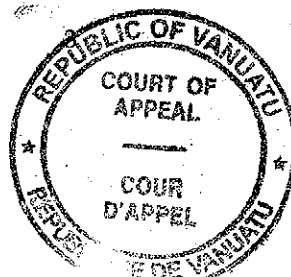
2. This appeal concerned the validity of a decision made by the First Respondent, the President of the Republic, on 18 November 2024 to dissolve Parliament under Article 28(3) of the Constitution of the Republic. The effect of the dissolution is that the life of Parliament came to an end.
3. The Appellants confirmed at the appeal hearing that the factual background as detailed by the Chief Justice at paragraph 21 was not in dispute. We adopt that brief summary of facts, as follows:
 - (a) Following summons for Parliament to meet for its 2024 Second Ordinary Session, Parliament was summoned to meet on 7 November 2024;
 - (b) On 7 November 2024, Parliament convened, however it did not transact its business due to passing away of one of the staff of the Parliament Secretariat, accordingly Parliament was adjourned to 12 November 2024;
 - (c) On 7 November 2024, the Office of the Speaker of Parliament received Motion No. 7 of 2024 – Motion to move the Electoral College to resolve to pass a motion to remove the President of the Republic of Vanuatu;
 - (d) On 12 November 2024, the Office of the Speaker of Parliament received Motion No. 8 of 2024 – Motion to move Parliament to resolve to pass a motion of no confidence in the Prime Minister;
 - (e) On Tuesday 12 November 2024, Parliament met and continued with its business until Friday 15 November 2024;



- (f) On 18 November 2024, Parliament was scheduled to debate Government Bills, however Parliament was adjourned to 19 November 2024 due to lack of quorum;
 - (g) On 18 November 2024 around 11:30am the Council of Ministers (COM) met and resolved to advise the President to dissolve Parliament;
 - (h) On the same date 18 November 2024, the Prime Minister wrote to the President communicating the COM's decision; and
 - (i) Later on 18 November 2024, the President dissolved Parliament and forwarded to the Office of the Attorney General the Instrument of dissolution for gazettal and around 4:30pm the office of the Attorney General published in the Gazette No. 9 of 2024 the instrument of dissolution.
4. The decision to dissolve Parliament was made on the advice of the Council of Ministers, constituted under Article 40(1) of the Constitution as the Prime Minister and other Ministers.
5. Article 28 of the Constitution provides:

28. Life of Parliament

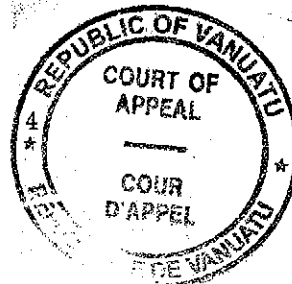
- (1) *Parliament, unless sooner dissolved under paragraph (2) or (3), shall continue for 4 years from the date of its election.*
 - (2) *Parliament may at any time decide, by resolution supported by the votes of an absolute majority of the members at a special sitting when at least three-fourths of 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).*
6. It is accepted that the Council of Ministers made their decision to provide that advice under Article 28(3), and that – subject to the matters referred to below, the President was entitled to act on that advice.
7. The issue at first instance before the Chief Justice, and on this appeal, is whether in the particular circumstances, the President could lawfully have made that decision.



8. The Appellants contended at first instance, and on this appeal, that the President could not exercise the power under Article 28(3) of the Constitution because there was before the Parliament a motion to impeach the President. That motion was presented to the Speaker on 7 November 2024. It required two weeks' notice pursuant to Article 38(3) of the Constitution. The Speaker had accepted the impeachment motion and had commenced arrangements to have the motion presented to the Electoral College
9. The impeachment motion was signed by the proposed mover Gracia Shadrack (one of the Appellants) and 18 other Members of the Electoral College, who were also Members of Parliament.
10. The Appellant also referred to a further Notice to the Speaker given on 12 November 2024. It was a motion of no confidence in the Second Respondent, the Prime Minister.
11. The submissions of the Appellants did not contend that the motion of no confidence in the Prime Minister had any particular significance to the validity or invalidity of the decision of the President which they impugned in their Constitutional Application.

The Contentions

12. The Appellants' entitlement to have brought their Constitutional Application, and this appeal, under Articles 6(1) and 53(1) of the Constitution is not in issue.
13. Their contention primarily was that the President was not entitled to dissolve the Parliament because he had a conflict of interest, having regard to the impeachment notice, and the effect of his decision was to benefit him directly because he would then avoid the impeachment process and its outcome.
14. The Appellants accepted that the earlier decisions of the Court of Appeal in *President of the Republic v Korman* [1998] VUCA 3 and in *Vohor v Abiut* [2004] VUCA 1 had decided the exercise of the President's power to dissolve Parliament under Article 28(3), entitled the President to dissolve Parliament notwithstanding unfinished business before the Parliament, including a motion of no confidence in the Prime Minister.
15. However, they contended that those decisions did not apply precisely to the present circumstances where there was before the Speaker a motion of the Electoral College to impeach the President and to have the President removed from office, so sought to distinguish both cases factually. Therefore, they argued, the President's decision in the present circumstances is irrational and unsustainable as described in *Korman* [1998] VUCA 3 (above) where this court said:-



"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."

16. Alternatively, or additionally, they contended that the decisions referred to should be qualified or refined in the following terms:

"When faced with a pending Motion for Impeachment, a President should decline to exercise his power under Article 28(3) until the conclusion of the Motion, but if he does, he must clearly demonstrate with convincing evidence that his exercise was exclusively in the public interest and not influenced by personal benefit, conflict of interest or improper motive."

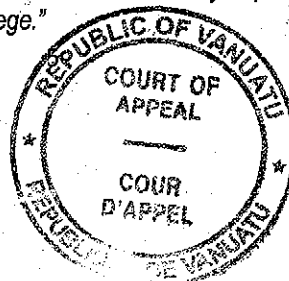
17. That proposed formulation imposes, or seeks to impose, an evidentiary onus on the President to justify his decision. It is not an onus which is evident from the Constitution itself. For reasons set out below, we do not consider that it is either necessary or desirable to adopt that formulation. Indeed, where the Constitution itself specifies the grounds of impeachment, it would be inappropriate to seek to refine them. Each occasion of alleged 'gross misconduct or incapacity' must be addressed in its particular circumstances.

Consideration

18. One issue which arose was as to the validity of the impeachment motion itself. The Chief Justice held that the impeachment motion was not invalid, and remained alive, notwithstanding the dissolution of Parliament. As we now explain, this Court takes a different view as to the validity of the impeachment motion. We have determined that the motion was not in order.
19. Article 36 of the Constitution provides for the term of office and removal of the President. It is in the following terms:

"36. Term of office and removal of President

- (1) *The term of office of the President of the Republic shall be 5 years.*
- (2) *The President of the Republic may be removed from office, only for gross misconduct or incapacity, by the electoral college provided for in Article 34 on a motion introduced by at least one-third of the members of the college and passed by at least two-thirds of its members, when at least three-fourths of its members, including at least three-fourths of the chairmen of the Local Government Councils, are present.*
- (3) *At least 2 weeks' notice of the motion provided for in subarticle (2) shall be given to the Speaker.*
- (4) *If there is no quorum at the first sitting as provided in subarticle (2), the electoral college may meet and vote on the motion provided for in subarticle (2) a week later even if there is only a quorum of two-thirds of the members of the college."*

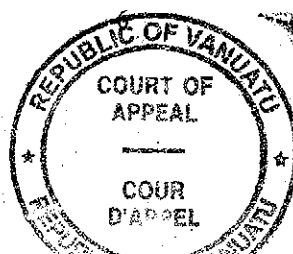


20. The grounds of 'gross misconduct or incapacity' alleged in the notice of impeachment notice, as described in the Appellants' submission referred to instances of coercion by the President in 2023 to withdraw a motion of no confidence under the threat of dissolution, secondly 'questionable and subsequent abrupt' appointments and terminations of key public officials, thirdly the failure to consult 'constitutionally mandated stakeholders' in the appointment of an Acting Ombudsman, and finally 'concerns' about his physical and mental health.
21. As was observed in the course of submissions, those allegations would need to be sufficiently particular for the President to be able to respond to them, and – where they were put in issue – the Electoral College would need to adopt a process to determine their validity and their significance. It is not possible on the present material to anticipate how that process would unfold.
22. More importantly, as the relevant motion must be adopted by the Electoral College for consideration, it is necessary to determine whether the impeachment motion was valid. The Electoral College comprises the Members of Parliament and the 6 Presidents of the Provincial Government Councils. Article 34 of the Constitution provides:

"34. Election of President

- (1) *The President of the Republic shall be elected, in accordance with Schedule 1, by secret ballot by an electoral college consisting of Parliament and the chairmen of Local Government Councils.*
- (2) *When a vacancy in the office of the President of the Republic arises, election to that office shall be held within 3 weeks of the vacancy arising, or in the event of a vacancy arising when Parliament is dissolved, within 3 weeks after the first meeting of the new Parliament."*

23. The Electoral College comprises 58 members. The motion to the Speaker and to be considered by the Electoral College requires the support of at least one third of the Members, or 20 persons (more than 19 persons). As recorded above, the motion presented to the Speaker was supported by 19 Members of Parliament, but that is less than one third of the membership of the Electoral College.
24. The Appellants contended that in giving notice of the impeachment motion to the Speaker, as required by Article 36(3), support of at least one third of the members of the Electoral College was not required. We do not accept that contention. We consider that subarticles (2) and (3) must be read in conjunction. That is because subarticle (3) sets out that notice of the motion provided for in subarticle (2) must be given to the Speaker. Subarticle (2) records that the motion to remove a President must be introduced by at least one third of the members of the Electoral College. Therefore, at the time notice of the motion is given to the Speaker, it must have at least one third support of the members of the Electoral College. It is a significant constitutional step to remove a President, and to suggest that a notice of a motion to remove a President could be initiated by a lesser number of members than provided for in subarticle (2) is illogical, and could lead to a



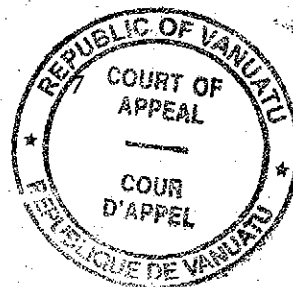
situation where, for example, one member of the Electoral College gives notice of an impeachment motion to the Speaker, and expects a constitutional process to be actioned. The impeachment motion was invalid as it should have been signed by 20 members of the Electoral College, not 19. Thus, the Speaker was wrong to hold that the motion was in order.

25. Next, it is important to note that the impeachment motion, even if the one third membership support for the presentation of the motion is shown to exist, would not be successful unless the proposed motion were passed by at least a two third majority. There is nothing to indicate that level of support for the impeachment motion.
26. Rather than simply dismiss the appeal on that ground, however, there are two important reasons why the appeal should be unsuccessful.
27. The first is that the proposed impeachment motion is not more than what it purports to be: a set of allegations which, or some of which, (if established) might amount to gross misconduct or incapacity. The making of an allegation is not routinely a reason for the person about whom the allegation is made to disqualify herself or himself from adjudicating an issue or making a decision which would otherwise be within that person's functions. It is not uncommon for judicial officers to be met with allegations of bias or other impropriety, sometimes demonstrably in an attempt to avoid that judicial officer from hearing the issues in the particular case.
28. In this instance, that is the basis of the alleged conflict of interest. The allegations referred to extend to some time in the past. There is no apparent reason why they came to be made at the time they were made or came to canvas such an extensive range of conduct. There may be good reason for the timing of the allegations, but it is not apparent in the material.
29. The Court, of course, is not concerned with political views or policies. We reiterate what the Chief Justice said in his reasons for judgment at para 24:

"Before I proceed further, I must remind myself of the statements made by the Courts in these type of cases since 1996: -

"... the court is not concerned with the political views 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."

30. Our function is to determine whether the circumstances relied on by the Appellants demonstrate the President was not entitled to make the decision which he did on 18 November 2024. As this Court said in *Korman*, there is a heavy burden on anyone who asserts that has been an improper exercise of the discretion vested in the President by Article 28(3):



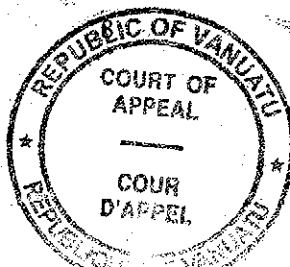
"Article 28(3) vests a wide and extensive discretion in the President. There is a heavy burden on anyone who asserts that there has been an improper exercise of that discretion. We are not satisfied that the Petitioners have discharged that burden in the Supreme Court. Where the Constitution provides 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".

31. We respectfully agree with the analysis of the Chief Justice that the circumstances overall do not demonstrate that the President exercised his powers under Article 28 for an improper purpose or in circumstances where he was acting unlawfully to have made that decision.
32. The second of the two matters we refer to is complementary to what we have just said.
33. It was one of the Appellants' submissions that Article 66 prescribes a standard of conduct which the President (a leader: see Article 67) did not meet.
34. Article 66 provides:

"66. Conduct of leaders

- (1) *Any person defined as a leader in Article 67 has a duty to conduct himself in such a way, both in his public and private life, so as not to –*
 - (a) *place himself in a position in which he has or could have a conflict of interests or in which the fair exercise of his public or official duties might be compromised;*
 - (b) *demean his office or position;*
 - (c) *allow his integrity to be called into question; or*
 - (d) *endanger or diminish respect for and confidence in the integrity of the Government of the Republic of Vanuatu.*
- (2) *In particular, a leader shall not use his office for personal gain or enter into any transaction or engage in any enterprise or activity that might be expected to give rise to doubt in the public mind as to whether he is carrying out or has carried out the duty imposed by subarticle (1)".*

35. The important matter to note is that there is no conduct on the part of the President which is shown to have breached that code of conduct. He did not bring the impeachment allegations. That was the conduct of the Appellants. He is not shown to have used his office for personal gain. We agree with the Chief Justice's determination that this case is factually distinct from *Vohor v President of the Republic of Vanuatu* [2015] VUCA 40, and for the same reasons.
36. One final matter is that we agree with the Chief Justice's finding that it cannot be said that the President acted irrationally or unsustainably in deciding to dissolve Parliament the same day he



received the Council of Ministers' advice. Any submission to that effect is conjecture and the evidence did not discharge the heavy burden required.

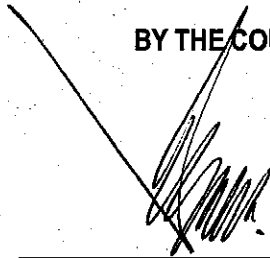
37. Article 36(2) is not one of those Articles specifically covered by Article 5 of the Constitution. Once it is accepted that the decision to dissolve Parliament was a valid exercise of the President's discretion under Article 28(3), the appeal cannot succeed because Parliament has been dissolved and the Appellants' rights under Articles 43(2) and 36(2) cannot take priority over the rights of the people to elect a new Government.

Conclusion

38. For those reasons, we agree with the decision of the Chief Justice that the dissolution of Parliament by the President on 18 November 2024 was not unconstitutional, and was not irrational and/or unsustainable, although we take a different view as to the validity of the impeachment motion, for the reasons set out above.
39. We accordingly dismiss the appeal.
40. There is no order as to costs.

DATED at Port Vila, this 28th day of January, 2025

BY THE COURT



Hon Justice Dudley Aru

