

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

**CIVIL CASE No.199 OF 2002**

State Law Office

AG 15/84/02

**BETWEEN: BARAK TAME SOPE MAUTAMATE**  
of Ifira Island, South Efate in the  
Republic of Vanuatu:

**Plaintiff**

**AND: THE SPEAKER OF PARLIAMENT,  
Hon. Henry Taga TARIKAREA**  
C/- Parliament House, Port Vila in the  
Republic of Vanuatu.

**Defendant**

**Coram:** Vincent LUNABEK, CJ

*Mr. Kalkot Mataskelekele for the plaintiff*  
*Messrs. M. B. Edwards and A. K. Loughman for the defendant*

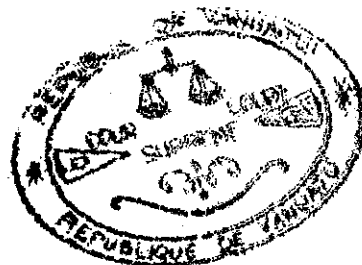
• **Date of Hearing:** 4<sup>th</sup> February 2003.

**Date of Judgment:** 13<sup>th</sup> February 2003.

**JUDGMENT**

This is an Originating Summons of the plaintiff dated 12<sup>th</sup> December 2002 and filed on 13<sup>th</sup> December 2002. The plaintiff in this action is Mr. Barak Tame Sope Mautamate of the Island of Ifira, South Efate in the Republic of Vanuatu. The defendant is the Speaker of Parliament, Hon. Henry Taga Tarikarea. In this Summons, the plaintiff seeks for the following declarations:-

1. That the plaintiff still remains a duly elected Member of Parliament by virtue of the legal effect of the Presidential pardon;
2. That the Speaker of Parliament forthwith permit the plaintiff to attend the current Parliament sittings;
3. Costs; and



4. Other and further orders as the Court may deem fit.

At the outset, the facts are not in dispute. The plaintiff files an affidavit date 14 December 2002 in support of the Summons. The substantive parts of which are struck out as irrelevant. The plaintiff was duly elected a Member of Parliament on 2<sup>nd</sup> May 2002. He was convicted by the Supreme Court of offences of forgery on 19<sup>th</sup> July 2002 and sentenced on the same date to a term of 3 years imprisonment.

On 5<sup>th</sup> November 2002, the plaintiff filed Notice of Appeal and a Notice of Motion to enlarge time to appeal against the sentence at the Court of Appeal Registry in Port Vila.

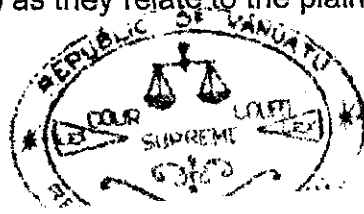
On 13<sup>th</sup> November 2002, His Excellency the President of the Republic pursuant to Article 38 of the Constitution pardoned the plaintiff of the offences (sic) for which he was convicted.

On 12<sup>th</sup> December 2002, the plaintiff by counsel filed this Originating Summons. On 13<sup>th</sup> December 2002, the plaintiff's counsel filed a notice of appointment to hear the Originating Summons as a matter of urgency.

This Court sat and heard the application for urgency on 16<sup>th</sup> December 2002 and refused the application because there is no urgency shown by the plaintiff. The matter was then set for hearing on 4<sup>th</sup> February 2003 at 9 a.m.

On 4 February 2003, the plaintiff asks the Court to determine three questions. They are set out below:-

1. Does the Presidential pardon granted to the plaintiff on 13<sup>th</sup> November 2002 completely pardon the plaintiff of his conviction and/or sentence imposed by the Supreme Court on July 19<sup>th</sup>, 2002?
2. What effect in law if any did the Presidential pardon have on the provisions of the Members of Parliament (vacation of seats) Act [CAP.174] in particular the provisions of Section 3 (1) as they relate to the plaintiff?



3. Given the Presidential pardon does Mr. Sope Mautamate still remain a Member of Parliament or has his parliamentary seat become vacant under the terms of [CAP.174]?

The defendant says that the only issue is:

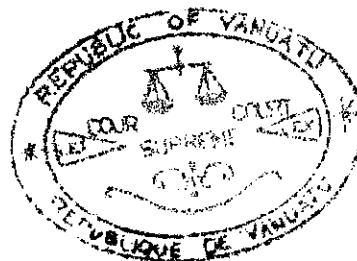
Is the plaintiff's parliamentary seat restored by virtue of him being pardoned by the President of the Republic of Vanuatu under Article 38 of the Constitution?

Both parties agree that the critical question is for the Court to determine the legal effect of the pardon and not whether the pardon was legally given.

Before me there is no dispute that the President had discretion to grant pardon and there is no challenge to its validity.

The power of the President to pardon is provided under Article 38 of the Constitution. I am asked to determine the legal effect of the presidential pardon of 13 November 2002 in relation to the plaintiff and in particular whether his parliamentary seat has become vacant under Section 3 of the vacation of seats Act [CAP.174].

Before I can determine the legal effect of the presidential pardon under Article 38 of the Constitution, I must bear in mind that I am dealing with a constitutional provision. I have to ascertain the clarity of that provision and its meaning. The starting point of a construction and/or interpretation of a provision of the Constitution is the Constitution itself. It is the supreme law of Vanuatu. Where there is room for debate or it is possible that ambiguity exists assistance may be gained from consideration of the cases of the commonwealth or other jurisdictions. But any of that is in all circumstances and at all time subject to the clear and unambiguous words of the Constitution which is the supreme law. (See A.C. No.11 of 2001, A.C. No.6 of 2002, and other Supreme Court decisions including CC No.124 of 1994 referred to me in Court).



Article 38 of the Constitution provides:

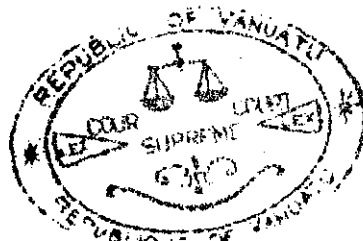
***“The President of the Republic of Vanuatu may pardon, commute or reduce a sentence imposed on a person convicted of an offence. Parliament may provide for a committee to advise the President in the exercise of this function”.*** (Emphasis added).

By Article 38, the President has authority to pardon a sentence imposed on a person who is convicted of an offence. It is clear from this Article that, the President has the power to pardon a sentence. Article 38 is silent on how and from when or what is the starting point the pardon of a sentence comes in force. It is also silent on whether the President has the authority to pardon a conviction secured by a court against a person for the commission of an offence.

Counsel for the plaintiff submitted that the legal effect of a Presidential pardon, which is a constitutional instrument, must be absolute, otherwise the power is rendered meaningless. Therefore, notwithstanding the time and date of a pardon being granted, in Vanuatu usually after the conviction of a person, the legal effect of the pardon starts at the very time the conviction and/or sentence was imposed on the convicted person. It is further submitted for the plaintiff that although he was convicted and sentenced on 19 July 2002 and, although the Presidential pardon was only granted on 13 November 2002, the pardon, in order to be absolute, or completely effective, was deemed to have come into effect on 19 July 2002, i.e. it is effective ab initio.

The above submissions must be rejected for the following reasons.

The power of pardon under Article 38 cannot be read and interpreted in isolation. It must be read and interpreted in conjunction with other provisions of the Constitution in particular Articles 5 & 6 relating to duties and jurisdictions or powers of the Supreme Court in the protection and enforcement of fundamental rights of the people and Articles 47 (1), 49 (1) and 50 in relation to the administration of justice which is vested in the judiciary, the unlimited jurisdictions and/or powers of the Supreme Court in its



original and/ or first instance and appellate levels to hear and determine civil and criminal proceedings as enshrined in the Constitution.

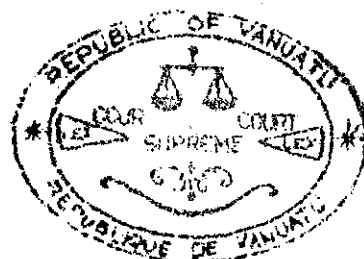
It follows that under Article 38, the President has no power to pardon a conviction secured by the Court on a person for the commission of an offence. The presidential pardon cannot make a conviction a nullity. What the pardon does is to remove the penalty/sentence imposed by the Court.

The presidential power to pardon a sentence under Article 38 of the Constitution, translates the intention of the constitutional founding fathers that the power of pardon which is the prerogative of mercy is different and must be so from the prerogative of justice. It does not, therefore, embrace the prerogative of justice. It follows, then, that only the Courts on appellate levels can quash a conviction.

I am also assisted and supported by the submissions made on behalf of the defendant's counsels and the persuasive authorities referred to and in particular the *English case of R. v. Foster (1984) 2 All ER 679*. In Foster, the English Court of Appeal held that the effects of a pardon is such as to remove from the subject of punishment whatsoever that flow from the conviction, but does not eliminate the conviction itself. I adopt and accept the decision of the English Court of Appeal in Foster as, I think, there is room for debate on the legal effect of the presidential pardon under Article 38 of the Constitution and the principles of law applied in that case will assist this Court in its judgment in the case at hand.

The plaintiff's further submission that the instrument of pardon starts to have effect not from the date of the instrument but from the very date the sentence had been imposed and in the present case, 19<sup>th</sup> July 2002, is also rejected.

Article 38 is silent on the point. The words of the instrument of pardon may be instructive in interpreting the effect of the pardon and ascertain from when or the date of its coming into effect.



The instrument of pardon, granted by the President on 13 November 2002, to pardon the plaintiff is set out below for ease of reference.

**"PARDON**

**WHEREAS** Article 38 of the Constitution provides *inter alia*, for the President of the Republic of Vanuatu to Pardon a person convicted of an offence;

**AND WHEREAS BARAK TAME SOPE** was convicted and found guilty of certain offences by the Supreme Court of the Republic of Vanuatu on 19 July, 2002 and sentenced to three years imprisonment.

**AND WHEREAS** I am of the opinion that the continued imprisonment of BARAK TAME SOPE may be injurious to his health;

In the exercise of the power conferred on me by Article 38 of the Constitution, I, **FATHER JOHN BENNETT BANI**, President of the Republic of Vanuatu, **HEREBY PARDON BARAK TAME SOPE** of the offences for which he was convicted in the Supreme on 19 July 2002.

**MADE at the State Office this 13<sup>th</sup> day of November, 2002.**

.....  
**FATHER JOHN BENNETT BANI**

**President of the Republic of Vanuatu**" (Emphasis added).

The instrument of pardon is a constitutional instrument. It was dated 13 November 2002 and published on 14 November 2002 in an Extraordinary Gazette No.9. In accordance with Section 16 of the Interpretation Act [Cap.132], I take judicial notice of it.

I note that the ground of the pardon of the plaintiff in the opinion of His Excellency the President, was that the continued imprisonment of the plaintiff may be injurious to his health.



I note further that the instrument does not show from when or the starting point the pardon starts to have effect.

I note finally that the term of the instrument was inelegantly drafted, in that it purported to give to the President of the Republic a power to pardon Barak Tame Sope of the offences for which he was convicted in the Supreme Court of Vanuatu on 19 July 2002. [Emphasis added]. This has the effect of pardoning not only the offences but also the conviction of the plaintiff and it is not possible as it is beyond the presidential power under Article 38. To save the pardon instrument of its legality, it has to be read down to its constitutional limit. To do that end, it is now read down to mean:-

***“President of the Republic, Hereby Pardon the sentence imposed on Barak Tame Sope by the Supreme Court of Vanuatu of the offences for which he was convicted on 19 July 2002.”***

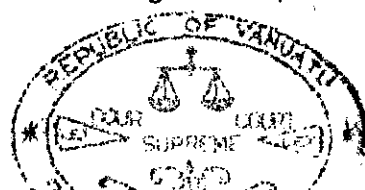
As the date of the coming into effect of the constitutional instrument of pardon is not expressly spelt out in the instrument itself, the date of its publication in the Official Gazette must be taken to be the date the maker of the constitutional instrument, here, the President intended the instrument to come into force, which is 14 November 2002.

The plaintiff submitted also by counsel that the pardon being a constitutional instrument, it overrides the effects of all other laws including the Penal Code Act [CAP.136] and the Members of Parliament (Vacation of Seats) Act [CAP.174].

These submissions must also fail and are rejected for the following reasons:-

First, it is not necessary to determine what effect the pardon has on the Penal Code Act as there is no issue in this case with respect to that Act.

Second, a constitutional instrument is subject to the law unless expressly provided for in the Constitution. The Constitution is the supreme law of Vanuatu but that does not make every instrument issued under powers granted under it above the law. The Constitution being the supreme law



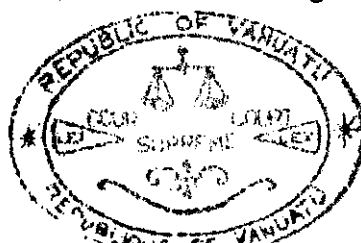
means that neither an Act of Parliament nor a decision of a Court can make law inconsistent with it. It does not mean that anything done under the Constitution overrides other laws in Vanuatu. This is also applicable to an act or decision made by an authority exercising a power given to it by the Constitution such as, the Executive and the President of the Republic.

Third, the Members of Parliament (Vacation of Seats) Act [CAP.174] is a valid law as it is not inconsistent with the Constitution. In this case, counsel for the plaintiff does not challenge the constitutional validity of the Members of Parliament (Vacation of Seats) Act [CAP.174] and in particular Section 3(1) of the Act. Section 3(1) of the Act is a valid provision as conceded by counsel on behalf of the plaintiff.

The plaintiff's counsel further submitted that Section 3 of the Members of Parliament (Vacation of Seats) Act [CAP.174] was legally deemed to have never come into play in the plaintiff's case because the plaintiff legally, did not have 3 years sentence imprisonment (by virtue of the pardon). This argument cannot stand and must fail.

It is important to understand that the Presidential pardon cannot override nor stay the operation of an Act of Parliament, unless the Constitution as the supreme law expressly so provides to this effect.

The pardon does not have a retroactive effect. It pardons the penalty of conviction from the time it is granted. The pardon does not remove the conviction. The plaintiff was convicted and was sentenced to three years imprisonment. He served his imprisonment sentence from 19 July 2002 to 12 November 2002. He was, then, pardoned on 13 November 2002. It is the un-served period of the three years sentence, at the time of the pardon, which has been pardoned. If the submission of the plaintiff stands, then, it will be dangerous because it will create a legal fiction. The conviction still stands and the President has no power to set it aside. The effect of pardon is to make the plaintiff, a new man and to give him a new credit from the date the pardon was granted. The pardon does not have retrospective effect of undoing what was done. The pardon does not mean acquittal.





Section 3 of the Members of Parliament (Vacation of Seats) Act [CAP.174] provides:

*“3.(1) If a member of Parliament is convicted of an offence and is sentenced by a court to imprisonment for a term of not less than 2 years, he shall forthwith cease to perform his functions as a member of Parliament and his seat shall become vacant at the expiration of 30 days thereafter:*

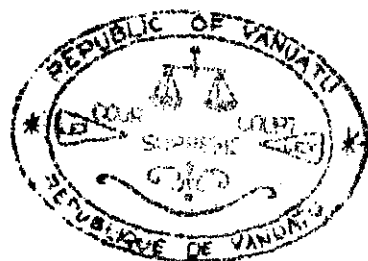
*Provided that the Speaker, or in his absence, the Deputy Speaker, may at the request of the member from time to time extend that period for further periods of 30 days to enable the member to pursue any appeal in respect of his conviction, or sentence, so however that extensions of time exceeding in the aggregate 150 days shall not be granted without the approval of Parliament signified by resolution.*

*(2) If at any time before the member vacates his seats his conviction is set aside or a punishment other than imprisonment is substituted, his seat in Parliament shall not become vacant as provided by subsection (1), and he may again perform his functions as a member of Parliament.*

*(3) For the purpose of subsection (1) no account shall be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of, a fine.”*

By perusing the language of section 3 of the Act, it is clear that the plaintiff has lost his Parliamentary seat on 19 August 2002 by operation of that section.

The fact that the plaintiff has lost his Parliamentary seat under Section 3(1) of the Act, is not a penalty of the conviction. The loss of the seat was merely a consequence flowing from his conviction. The penalty imposed on the plaintiff for his offence was three years imprisonment, not loss of his Parliamentary seat. This follows from Section 3 of the member of Parliament (Vacation of Seats) Act [CAP.174].



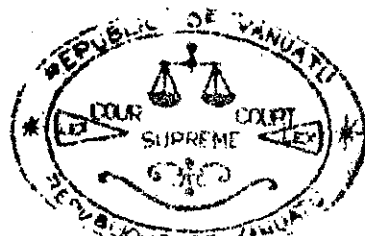
Finally, I accept the defendant's submissions that it was the fact of the conviction and a sentence of imprisonment of not less than 2 years being imposed that resulted in the plaintiff losing his seat. As Foster's case held the conviction remains even though the plaintiff has been pardoned from serving the remainder of his sentence.

The operation of subsection 3(1) of the Act is clear. If a member of Parliament is convicted and sentenced to more than two years imprisonment then subject to the proviso in subsection 3(1) and subsection 3(2) the loss of his or her seat is automatic after 30 days. Neither the proviso in subsection 3(1) nor subsection 3(2) applied in this case so the plaintiff automatically lost his seat on 19 August 2002.

The proviso of subsection 3(1) does not apply because no extension was ever sought from the speaker. Nor was one granted.

Subsection 3(2) does not apply because neither the conviction nor the sentence had been set aside within 30 days of his conviction. The plaintiff well after the 30 days elapsed, has been pardoned. It is clear from the wording of subsection 3(2) that if a member's seat has become vacant under subsection 3(1), then, even if his conviction or sentence is subsequently set aside, his seat in Parliament is not restored.

The same must be the case with a Presidential pardon. As the pardon was granted after the plaintiff had lost his seat in Parliament the granting of the pardon cannot reinstate it. On the reasoning in Foster's case, the conviction has not been set aside so even if it had been granted prior to the plaintiff's seat being vacated, that alone would not have been sufficient for the seat not to have been automatically vacated. If the pardon had been granted prior to the vacating of his seat the court would have had to decide whether the pardon amounted to the setting of aside of the sentence. This is not the case here. If it did then his seat would not have been vacated. However, as the pardon came after the seat was vacated the pardon, even if it is seen as setting aside the sentence, it was too late his seat had been vacated and could not be restored by the pardon.



The plaintiff as a result of his conviction and sentence automatically lost his seat in Parliament on 19 August 2002. The pardon he was granted on 13 November 2002 did not re-instate his seat in Parliament. The Act does not provide any mechanism for a member to have his or her seat restored once it has been vacated under Section 3. Section 3 is self-executing and once a seat has become vacant under it the seat cannot be restored. A member who has lost his or her seat under Section 3 of the Act must be reelected to Parliament if he or she wishes to take a seat in Parliament again. The effect of conviction is the imprisonment. As a result of imprisonment for three years the plaintiff lost his Parliamentary seat pursuant to Section 3 of the Act.

The declarations sought by the plaintiff are refused. The defendant is entitled to the costs of the proceedings against the plaintiff.

**My answers to the questions posed are as follows:**

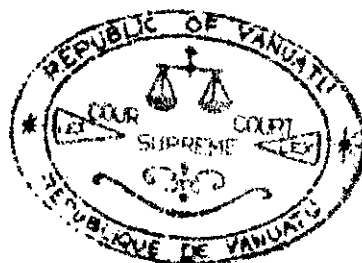
1. Answer to question 1:

No. The Presidential pardon is a full or complete pardon but only from the date of the pardon. The Presidential pardon granted to the plaintiff on 13 November 2002 pardons the plaintiff of his un-served part of his sentence which starts on 14 November 2002. The pardon has no retroactive effect. There is no power to pardon the conviction of a person under Article 38 of the Constitution.

2. Answer to question 2:

The way the question is framed is too general. It does not warrant a specific answer. In the practical context of the present case, there is no effect of the Presidential pardon on the provisions of the Members of Parliament (Vacation of Seats) Act [CAP.174] as they relate to the plaintiff. The plaintiff well after the 30 days elapsed, has been pardoned on 14 November 2002, whereas Section 3(1) of the Act [CAP.174] operates and affects the plaintiff by the loss of his parliamentary seat as at 19 August 2002.

3. Answer to question 3 is:



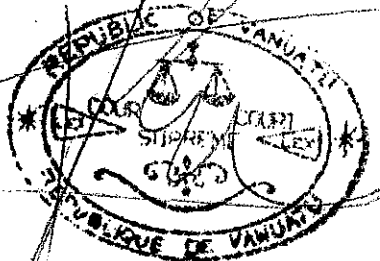
No. The plaintiff does not remain a member of Parliament. The plaintiff has lost his Parliamentary seat on 19 August 2002 by operation of Section 3 of the Act [CAP.174]. His Parliamentary seat is not restored by virtue of him being pardon by the President of the Republic of Vanuatu under Article 38 of the Constitution.

**The Court makes the following ORDERS:**

1. THAT, the declaration sought in point 1 of the Summons is refused.
2. THAT, the declaration sought in point 2 of the Summons is refused.
3. THAT, the costs of the action are awarded in favour of the defendant against the plaintiff and they are determined at 160,000 Vatu.
4. THAT, the plaintiff agrees to pay the total amount of 160,000 Vatu by three (3) installments as set out below:-
  - (a) the plaintiff shall pay the first installment of 50,000 Vatu by 28 February, 2003; and
  - (b) the plaintiff shall pay the second installment of 50,000 Vatu by 31 March, 2003; and
  - (c) the plaintiff shall pay the third installment of 60,000 Vatu by 30 April, 2003.

**DATED at PORT-VILA this 13<sup>th</sup> DAY of FEBRUARY 2003**

**BY THE COURT**



**Vincent LUNABEK  
Chief Justice**