

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

Constitutional Case No. 07 of 2008

**BETWEEN: THE HONOURABLE MOANA KALOSIL
CARCASSES**

Applicant

AND: THE REPUBLIC OF VANUATU

Respondent

Coram: *Chief Justice Vincent Lunabek*

Counsels: *Mr. Nigel Morrison for the Applicant*
Messrs. Ishmael Kalsakau and Frederick Gily for the Respondent

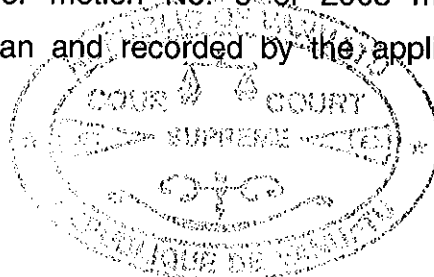
Date of Hearing: *3 December 2008*

Date of Decision: *4 December 2008*

JUDGMENT

This is a Constitutional Application filed on 2 December 2008, by Honourable Moana Kalosil Carcasses, Member of Parliament, against the Respondent, the Republic of Vanuatu. The Applicant applies for:-

1. A declaration that the Honourable Speaker's closing of the second ordinary session of Parliament on 28 November 2008 was in breach of the Constitutional rights of the applicant;
2. An order that the Honourable Speaker reconvene the second ordinary session of Parliament so as to consider motion No. 3 of 2008 moved by the Honourable Maxim Carlot Korman and recorded by the applicant being a



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motion of no confidence against the Prime Minister of the Republic of Vanuatu, the Honourable Edward Nipake Natapei;

On 2 December at 2.00 p.m. o'clock the Court held a first conference pursuant to relevant provisions of the Constitutional Application Rules. The Court was satisfied that the Application has to be dealt with as a matter of urgency based on:-

- Importance of constitutional question raised;
- Involving law-making process of Parliament;
- Nature of constitutional relief sought; and
- As a matter of public interest.

The relevant part of the Constitutional Application Rules are abridged. The Respondent was directed to file and serve a response to the application and any sworn statement in support of the response. The Constitutional Application was listed and heard on 3 December 2008 at 2.00 p.m. o'clock.

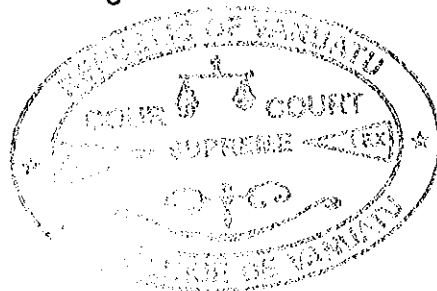
The Constitutional Application is advanced on two grounds:-

First, the applicant considers that a provision of the Constitution of the Republic of Vanuatu has been infringed in relation to him.

Second, the Supreme Court has jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution as provided for by Article 53 (2) of the Constitution.

In response to the Applicant's Constitutional Application, the Respondent says:-

First, no provision of the Constitution has been infringed.



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Second, whilst it is accepted as trite law that the Court has jurisdiction to determine the matter, it is only in the context where an infringement of a right has occurred which has not occurred in this matter.

The main issue raised in this case can be broadly defined as:-

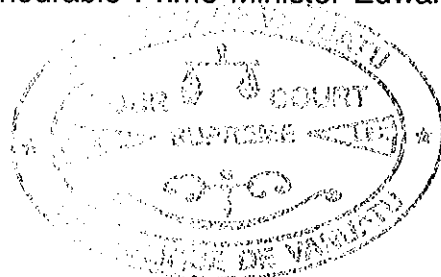
“When the Honourable Speaker closed the second ordinary session of Parliament on Friday 28 November 2008 was that an infringement of the constitutional rights of the Applicant?”

The answer to the main issue will be provided in the answers the Court is asked to give to the following specific questions:-

1. Was Parliament still seized of business when it was adjourned by the Speaker at approximately 5.00 p.m. on Thursday 27 November 2008?
2. Was Parliament still seized of business when the second ordinary session for 2008 was closed by the Speaker at approximately 8.30 a.m. on Friday 28 November 2008?
3. Was the closure of the second ordinary session on Friday 28 November 2008 lawful?
4. Was there an infringement of the constitutional rights consequent on the closure on 28 November 2008?

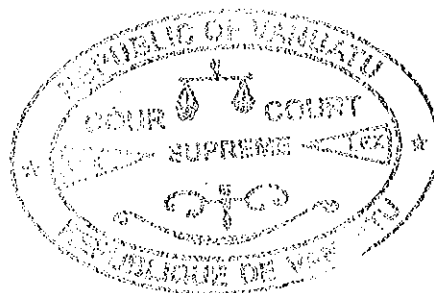
The following brief facts lead up to the present Constitutional Application:-

- On Thursday 27 November 2008, the Applicant as seconder lodged a Notice of Motion of no confidence in the Honourable Prime Minister Edward Nipake Natapei;



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- The Motion was lodged consistent with Article 43 (2) of the Constitution and particularly:-
 - (a) it was delivered to the Speaker on Thursday 27 November 2008 during the second ordinary session of Parliament of the Republic of Vanuatu 2008;
 - (b) It allowed for 1 week's notice; and
 - (c) It was signed by at least one sixth of the Members of Parliament.
- On 28 November at 9.00 am o'clock, Parliament resumed its sitting:
 - The Speaker made public statements in Parliament; and
 - closed the second ordinary session of Parliament of 2008.
- There was no ruling made on the motion in Parliament when Parliament is still in its second ordinary session of 2008.
- By letter of 28 November 2008 the Speaker advised Parliament would not be able to discuss the Motion due to:-
 - (i) the motion being lodged after the Speaker ruled on the Order of business for 28 November 2008;
 - (ii) No point of order was raised about the Motion when announcements were made by the Honourable Speaker including declaring the second ordinary session of Parliament closed on Friday 28 November 2008 ("*the decision*").



The Applicant, therefore, applies to the Supreme Court and seeks the constitutional relief referred to in the Constitutional Application on the basis that the “*decision*” of the Speaker of 28 November 2008 was unconstitutional being a breach of the Applicant’s constitutional rights for the lodgment of Motion consistent with Article 43 (2) of the Constitution.

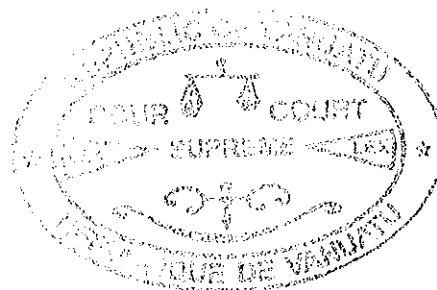
The Applicant filed a sworn statement on 2 December 2008 in support of the Constitutional Application.

The Honourable George Wells, Speaker of Parliament, filed a sworn statement on 3 December 2008 in support of the response.

There are no substantive factual disputes between the parties, save some inconsistencies or lack of reference of specific fact or event.

By perusing and considering the sworn statements of the Applicant and that of the Speaker referred to above, the following facts are accepted and established:-

- On 27 October 2008, after consultation with the Speaker, the Honourable Edward Natapei requested by letter of 27 October 2008 calling by the Speaker of the second ordinary session of Parliament to begin 17 November to 24 November 2008;
- On 30 October 2008, the Speaker summonsed Parliament for the second ordinary session of Parliament to begin 17 November to 24 November 2008;
- On 30 October 2008, the clerk of Parliament issued notice to each and all members of Parliament that the Parliament has been summoned to meet for the second ordinary session.



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- On 6 November 2008, the Speaker received five (5) additional Private Bills from Honourable Ralph Regenvanu to be introduced in the second ordinary session of Parliament of 2008.
- By letter dated 10 November 2008 the Speaker wrote to Hon. Member Ralph Regenvanu accepting the five (5) Private Bills to be included with the Government Bills for the second ordinary session of Parliament.
- On 10 November 2008, clerk of Parliament sent copies of all the Bills including the five (5) Private Bills.
- On 13 November 2008, the Clerk of Parliament sent copies of the five (5) Private Bills to each and all Members of Parliament.
- Earlier on 10 November 2008, the Honourable Speaker received a letter from Honourable Moana Kalosil Carcasses to introduce three (3) Private Bills in the second ordinary session of Parliament.
- On 11 November 2008, the Speaker wrote a letter to Hon. Moana K. Carcasses that his three (3) Bills will be debated at the second ordinary session of Parliament with other Bills.
- On 17 November 2008, the Clerk of Parliament sent to each and all Members of Parliament copies of the said three (3) Private Members Bills.
- The list of the Bills (as amended) for the second ordinary session of Parliament is attached to the sworn statement of the Hon. George Wells, Speaker of Parliament in "GW9".
- On 25 November 2008, the Government withdrew 6 of the government Bills from the second ordinary session.



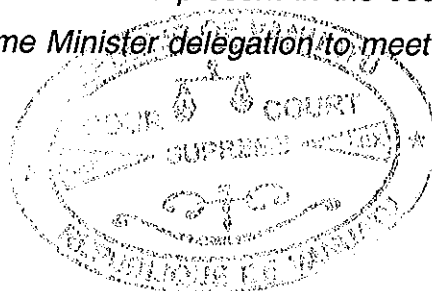
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- On 27 November 2008, Parliament sat to deal with the remaining Bills. On same date, there was a written motion to remove the second Deputy Speaker Honourable Louis Etap. On same date, after the Bills had been debated and completed, the Leader of Government Business, Honourable Peter Vuta withdrew the written motion for the removal of the second deputy speaker.
- On 27 November 2008, at about 5 p.m. the Honourable Speaker announced to the following:-

“There is nothing more to debate but I have some public announcements to make tomorrow morning. The sitting is adjourned until tomorrow morning at 8.30 a.m.”

- On 27 November 2008, the Applicant and Honourable Member Harry Iauko deposited a motion of no confidence in the Prime Minister at the Speaker’s Office at around 5.25 p.m.
- The Applicant spoke to the Honourable Speaker at that time. He explained the nature of the Motion and their intention to have the motion debated at 4 p.m. on Thursday 4 December 2008 in accord with standing order 23 which provides for written motions to be debated at that time.
- The Honourable Speaker thanked them and said he would make a ruling on the motion tomorrow morning when Parliament resumed sitting. He would subsequently provide them with written advice in respect to their motion.
- The next morning on opening the sitting for Friday 28 November 2008 at approximately 9.00 a.m., the Honourable Speaker made the following announcements:

“(i) There are European MPs and Pacific MPs present in the country. I am happy to announce that the Prime Minister delegation to meet with them



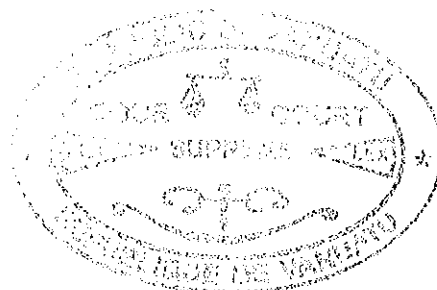
will be made of the Prime Minister, the Ministers, the Leader of Opposition, the Deputy Leader of Opposition, the MPs David Tossul, Leinavao and Carcasses.

(ii) Greetings for Xmas and New Year.

(iii) MP Christmas party will be held at the Parliament House restaurant Monday 1 December 2008.

(iv) I declare the second ordinary session of 2008 official closed."

- No reference was made to the motion lodged the previous evening.
- At approximately 2.30 pm on 28 November 2008 the Applicant received the letter referred to earlier marked being a purported ruling on the motion.
- The record of the Parliament proceedings on Friday 28 November 2008 show that the Speaker had made announcements.
- It is a fact that on 27 November 2008 a written Motion was lodged by the Applicant and another Member of Parliament to the Speaker.
- It is a fact that the Speaker had received the Motion.
- It is a fact that the Speaker said he will make a ruling on the motion on the morning of Friday 28 November 2008 when Parliament resumed its sitting at 8.30AM.
- It is a fact that the record of the Parliament Proceedings of 28 November 2008 show that there is no written Motion.
- It is a fact that the Speaker summoned Parliament for the second ordinary session of Parliament to start on 17 October 2008 to 24 November 2008.



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- It is also a fact that the Speaker has closed the second ordinary session of Parliament on 28 November 2008 in the morning just after he made his announcements but not on 24 November 2008.

THE LAW

The relevant provisions of the law are set out below:

The Constitution

Article 2 provides:-

"2. Constitution supreme law

The Constitution is the supreme law of the Republic of Vanuatu."

Article 15 provides:-

"15. Parliament

The legislature shall consist of a single chamber which shall be know as Parliament."

Article 16 provides:-

"16. Power to make laws

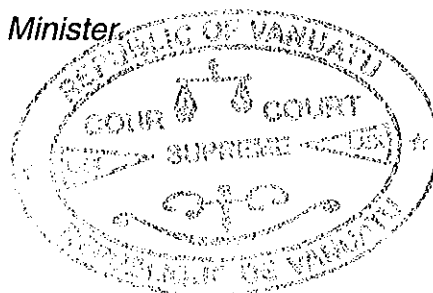
- (1) Parliament may make laws for the peace, order and good government of Vanuatu.*
- (2) Parliament shall make laws by passing bills introduced either by one or more members or by the Prime Minister or a Minister.*

...."

Article 21 provides:-

"21. Procedure of Parliament

- (1) Parliament shall meet twice a year in ordinary session.*
- (2) Parliament may meet in extraordinary session at the request of the majority of its members, the Speaker or the Prime Minister*



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- (3) Unless otherwise provided in the Constitution, Parliament shall make its decisions by public vote by a simple majority of the members voting.
- (4) Unless otherwise provided in the Constitution, the quorum shall be two-thirds of the members of Parliament. If there is no such quorum at the first sitting in any session Parliament shall meet 3 days later, and a simple majority of members shall then constitute a quorum.
- (5) Parliament shall make its own rules of procedure.”

Article 22 provides:-

“22. Speaker

- (1) ...
 - (2) The Speaker shall preside at sittings of Parliament and shall be responsible for maintaining order.
- ...”

Article 40 provides:

“40. Council of Ministers

- (1) There shall be a Council of Ministers which shall consist of the Prime Minister and other Ministers.”

Article 43 provides:-

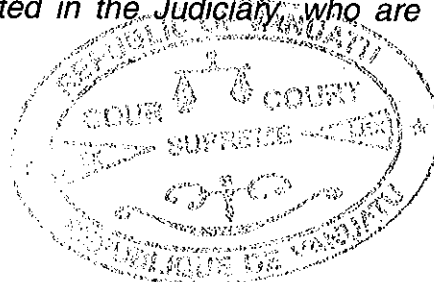
“43. Collective responsibility of Ministers and votes of no confidence

- (1) The Council of Ministers shall be collectively responsible to Parliament.
- (2) Parliament may pass a motion of no confidence in the Prime Minister. At least 1 week's notice of such a motion shall 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.”

Article 47 provides:

“47. The Judiciary

- (1) The administration of justice is vested in the Judiciary, who are subject only to the Constitution and the law.”



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Article 49 says:-

"49. The Supreme Court

(1) *The Supreme Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings, and such other jurisdiction and powers as may be conferred on it by the Constitution or by law.*

Article 53 provides:-

"53. Application to Supreme Court regarding infringements of Constitution

(1) *Anyone who considers that a provision of the Constitution has been infringed in relation to him may, without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress.*

(2) *The Supreme Court has jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution.*

Standing Orders of Parliament

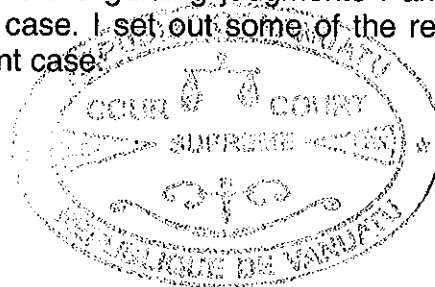
Relevantly, Order 17(2) of the Standing Orders of Parliament, provides for Order of business during an Ordinary Session which business does include:

"2.(d) Announcements by the Speaker

The following cases are the relevant authorities:

1. Attorney-General v. Jimmy, CAC No.7 of 1996
2. In the Constitutional President v. Korman, CAC No.8 of 1997
3. Natapei v. Tari
Supreme Court Case No.35 of 2001
4. Vohor v. Attorney-General, CAC No.24 of 2004

These judgments of the Court of Appeal are the guiding judgments I am bound to follow and I will apply them in the present case. I set out some of the relevant and important passages I will apply in the present case:



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(At pp.7 & 9 – in AG v. Jimmy (1996) VUC1, CAC 7 of 1996, it is stated:

“We have already noted, and indeed emphasized, the principle that Parliament is not subject to direction by the Courts so long as its proceedings are not inconsistent with obligations placed upon it by the law from which it derives its powers. If authority is needed for that view it is provided by two cases cited for the Appellants, Rediffusion (Hong Kong) Ltd v. A/G of Hong Kong [1970] ac 1136, and Cormack v. Cope, [1974] 131 CLR 432. Both made it plain that the Courts have a duty to interfere “if the constitutionally required process of law-making is not properly carried out.”

...

“We do not believe that the technicalities of the Common Law, and the limitations upon the English Courts’ power to direct the King which for good and sufficient historical reasons these Courts recognize, have any relevance to the proper interpretation of the Constitution of Vanuatu. The power expressly given to the Court by Articles 6 and 53 to enforce the provisions of the Constitution makes reference to other approaches unhelpful.

It would be wrong in principle to limit the plain terms of those articles by reference to the ancient history of a very different society, and on that account to stultify the intention of the Constitution that the Court should play a significant role in supporting the rights created by the Constitution.”

At page 12 of the judgment of the Court of Appeal in the case of Tari, it is stated:

“This important provision is repeated in Clause 53 set out above. 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.

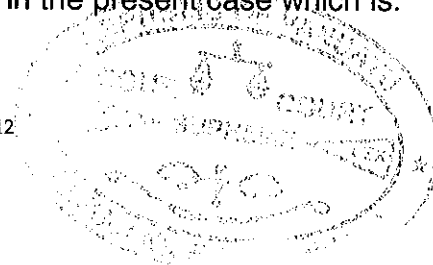
It necessarily follows therefore that the Supreme Court is the body which under the Constitution is charged with determining whether rights have been infringed or responsibilities disregarded.

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.”

At page 4 of the Korman decision it is stated:

“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”.

I remind myself again of the ultimate issue in the present case which is:



"When the Hon. Speaker closed the second ordinary session of Parliament on Friday 28 November 2008 was that an infringement of the constitutional rights of the Applicant?"

The answer to the ultimate question depends on the interpretation to be given to Article 43(2) of the Constitution which says:

*"Parliament may pass a motion of no confidence in the Prime Minister. **At least 1 week's notice of such a motion shall 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." (**Added emphasis are my own**)*

The Learned Attorney-General submits, in essence, that the notice to be given to the Speaker falls short of the requirement under Article 43(2) of the Constitution given the session was due to close the next day, and the Speaker is lawfully entitled to be given seven (7) clear days notice.

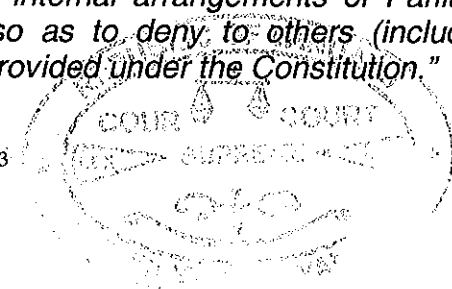
It is my view that this interpretation is not right. The meaning to be given to the expression "At least 1 week's notice of such a motion shall be given to the Speaker..." under Article 43(2), must mean "At least 1 week's notice of such motion shall be given to the Speaker when Parliament is still in session" **and** the motion must also be signed by one sixth of the members of Parliament. The "notice criteria" must be read together with the second, which is "signature criteria" by one sixth of the members of Parliament for Article 43(2) of the Constitution to be meaningful and effective.

Article 43 of the Constitution is one of the most crucial Articles of the Constitution relating to parliamentary democracy. Article 43(1) provide for the collective responsibility of the Council of Ministers to Parliament. The constitutionally required procedure for the executive responsibility to Parliament is the motion of no confidence under Article 43(2) of the Constitution which must be operational and effective.

In the case of Korman based on similarities of facts with the present case, the Court of Appeal found and stated (at p.3):

"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, 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."



Once a Motion has been received by the Speaker when Parliament is still in session and the motion is in accord with Article 43(2) of the Constitution, the Speaker is incompetent 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 Applicant went to Parliament on Friday 28 November 2008 with the expectation that a ruling will be made on the motion. The Applicant was expecting a motion to be addressed or at least placed before Parliament for its consideration. It is a business of Parliament that Parliament addresses the motion before it is closed. However, it did not occur in this case.

If the motion has been received by the Speaker after a proper closure of the second ordinary session of 2008, then, it would not be valid because in such a situation, the request for Parliament to meet and debate such a motion must be a request by the majority of the Parliament members, the Speaker or the Prime Minister under Article 21(2) of the Constitution.

The closing of the second ordinary session of Parliament on 28 November 2008 without debating the motion is a denial of a constitutional right in relation to the Applicant under Article 43(2) of the Constitution. The closure of Parliament on Friday 28 November 2008, infringed the constitutional right of the Applicant. The closure of Parliament by the Speaker on Friday 28 November, is, therefore, unlawful.

The Applicant is entitled to the constitutional relief sought in the Constitutional Application filed 2 December 2008.

My answers to the four (4) specific questions asked are as follows:

Q.1: Was Parliament still seized of business when it was adjourned by the Speaker at approximately 5PM on Thursday 27 November 2008?

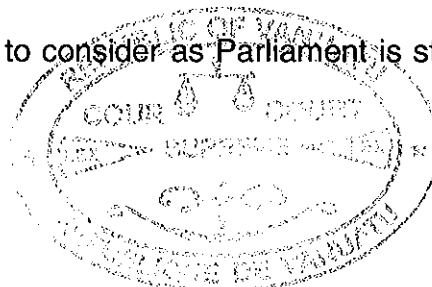
A.1: Yes

- Motion received by the Speaker in accordance with Article 43(2) of the Constitution; and
- Announcements made by the Speaker

Q.2: Was Parliament still seized of business when the second ordinary session for 2008 was by the Speaker at approximately 8.30AM on Friday 28 November 2008?

A.2: Yes

- The motion has been received on 27 November 2008 by the Speaker.
- On 27 November 2008, Parliament is still in its second ordinary session.
- On 27 November 2008 when Parliament resumes its sitting, the Speaker made announcements.
- The written motion is for Parliament to consider as Parliament is still in its second ordinary session.



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Q.3: was the closure of the second ordinary session on Friday 28 November 2008 lawful?

A.3: No.

- The closure of the second ordinary session was made while the written motion is still before Parliament to address as 1 week notice has been given to the Speaker to debate the motion on Thursday 4 December 2008 at 4.00PM o'clock.

Q.4: Was there an infringement of constitutional rights consequent on the closure on 28 November 2008?

A.4: Yes. The constitutional right of the Applicant under Article 43(2) has been infringed in relation to him

On the basis of the above considerations, the Court makes the following Orders and Declarations:

1. A Declaration that the Honourable Speaker's closing of the second ordinary session of Parliament on 28 November 2008 was in breach of the constitutional rights of the Applicant, is granted.
2. An Order that the Honourable Speakers reconvene the second ordinary session of Parliament so as to consider Motion No.3 of 2008 moved by the Honourable Maxime Carlot Korman and seconded by the Applicant being a motion of no confidence against the Prime Minister of the Republic of Vanuatu, the Honourable Edward Nipake Natapei.
3. The reconvening of Parliament in accordance with Order 2 above to be at 4.00PM Tuesday the 9th December 2008.
4. The Applicant is entitled to his costs to be determined or agreed.

DATED at Port-Vila this 4th day of December 2008

BY THE COURT

**Vincent LUNABEK
Chief Justice**

