

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**

(Civil Jurisdiction)

**CONSTITUTIONAL CASE No.02 OF 2013**

IN THE MATTER OF ARTICLE 53 OF THE CONSTITUTION OF THE  
REPUBLIC OF VANUATU

**BETWEEN:** THE HON. NIKAPE EDWARD NATAPEI MP  
First Applicant

**AND:** HON. SERGE VOHOR and other 27 Members  
of Parliament  
Second Applicants

**AND:** THE HON. GEORGE ANDRE WELLS, Speaker  
of Parliament  
First Respondent

**AND:** REPUBLIC OF VANUATU  
Second Respondent

**Coram:** V. Lunabek CJ

**Counsel:** Mr Nigel Morrison for the Applicants  
Messrs Frederick Gilu (Acting Attorney-General) and Avock Godden of  
State Law Office for the First and Second Respondents

**Date of hearing:** 22 March 2013 – 4.00pm o'clock

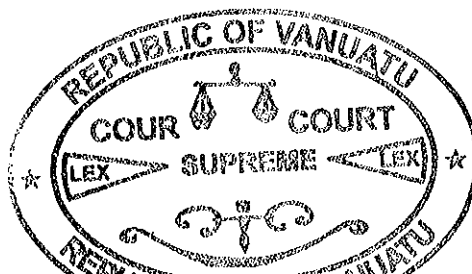
**Date of judgment:** 22 March 2013 – 11.00pm o'clock

**REASONS FOR ORAL JUDGMENT  
OF 22 MARCH 2013**

**INTRODUCTION: NATURE OF APPLICATION & REMEDY SOUGHT**

Before the Court is a Constitutional Application dated 22<sup>nd</sup> March 2013 and filed on the same date. It is filed by twenty eight (28) Members of Parliament of the Republic of Vanuatu (as First and Second Applicants). The Applicants represent an absolute majority of the Members of Parliament. The Constitutional Application applies for the following:

1. A Declaration that the Honourable Speaker's closing of the first Ordinary Session of Parliament on 21<sup>st</sup> March 2013 was in breach of the Constitutional rights of the Applicants.



2. An Order that the Honourable Speaker reconvenes the first Ordinary Session of Parliament so as to consider the motion number 1 of 2013 moved by the First Applicant the Honourable Nipake Edward Natapei and Seconded by the Honourable Ralph Regenvanu such motion number 1 remained to be considered by Parliament after the resignation of the Honourable Prime Minister Sato Kilman Livtunvanu and that is for the immediate election of a new Prime Minister.
3. The reconvening of Parliament in accordance to Order 2 above be at a time and date to be fixed by this Honourable Court.
4. Costs.

## **GROUNDS FOR APPLICATION**

The Constitutional Application is advanced on two (2) grounds:

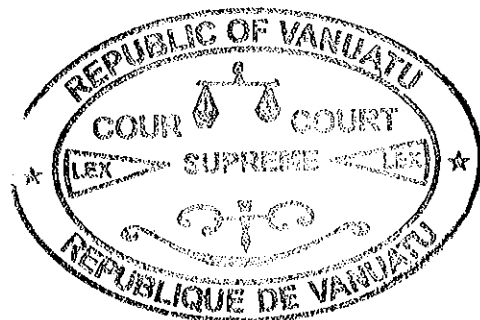
- First, the Applicants consider that a provision of the constitution of the Republic of Vanuatu has been infringed in relation to them.
- Second, the Supreme Court has jurisdiction to determine the matter and to make such orders as it considers appropriate to enforce the provisions of the Constitution as provided for by Article 53(2) of the Constitution.

The Application is supported by a sworn statement of Honourable Nipake Edward Natapei filed 22 March 2013.

## **APPLICATION AS TO URGENCY OF CONSTITUTIONAL APPLICATION**

An application as to urgency of the Constitutional Application is filed today 22 March 2013 at 10.00am o'clock with a sworn statement in support by Evelyne Roberts of Ridgway Blake Lawyers of Port-Vila, Vanuatu. The said sworn statement provides the following bases of urgency of the Constitutional Application:-

1. Any time delays in hearing the application will defeat the merits of the application.
2. The public at large are unsettled in circumstances where there is no Prime Minister elect and the resolve of that situation is currently not scheduled until good Friday 29 March 2013.



The Application as to Urgency of Constitutional Application is listed in the Supreme Court at Dumba this morning at 11.00am o'clock.

The Attorney-General (Acting) agrees and consents to urgency of the Constitutional Application. The relevant time requirements under the Constitutional Application Rules are abridged and consequential directions and orders are made for the Attorney-General to file and serve responses to the Constitutional Application and sworn statements in support before 4.00pm o'clock this afternoon. The Constitutional Application is listed for hearing urgently at 4.00pm o'clock today 22 March 2013.

### **THE RESPONSES TO CONSTITUTIONAL APPLICATION**

The Attorney-General filed the following responses with a sworn statement of Leon Teter, the Assistant Clerk of Parliament in support.

Upon the query from the Court, Mr Frederick Gilu informed the Court that the Republic of Vanuatu (Second Respondent) shall be bound by any order made by the Court. It follows that the Responses to the Constitutional Application are advanced by the Attorney-General on behalf of the First Respondent Speaker.

It is said that the Respondents say that the decision of the Speaker to close the first Ordinary Session of Parliament on 21 March 2013 has not breached any constitutional provision in relation to the Applicants.

It is conceded that on Tuesday 12 March 2013, Hon. Edward Nipake Natapei MP, Hon. Serge Vohor MP, Hon. Ralph Regenvanu MP, Hon. Willie Jimmy Tapangararua MP, Hon. Joe Natuman MP, Hon. Philip Boedoro MP, Hon. Kaltalio Simeon MP, Hon. Joe Tesei MP, Hon. Peter Vuta MP, Hon. Gillion William MP, Hon. Alfred Maoh MP, Hon. Daniel Nale MP, Hon. Nato Taiwia MP, Hon. Esmon Sai MP, Hon. David Tosul MP and Hon. Jerome Ludvaune MP lodged a Notice of Motion of No Confidence in the Honourable Prime Minister Sato Kilman Livtunvanu on the office of the Speaker.

- It is accepted that on 13 March 2013, the First Respondent wrote to the Applicants acknowledging receipt of the motion.
- It is accepted that the First Respondent had notified the Applicants that Parliament will debate the motion of no confidence against the Prime Minister



during this 2013 First Ordinary Session of Parliament on 21 March 2013 at 4.00pm.

- It is accepted that prior to the debate of the motion of no confidence, the Honourable Prime Minister Sato Kilman Livtunvanu tendered his resignation to the Office of the Speaker of Parliament at 3.36pm.
- It is accepted that the only agenda for Parliament to discuss and decide on was the motion of no confidence against the Prime Minister.
- It is said that the resignation of the Prime Minister renders the motion of no confidence redundant.
- It is said that the First Respondent Speaker then closed the First Ordinary Session of Parliament. It is said that after closing the First Ordinary Session of Parliament, the First Respondent informed Parliament that he will issue summons to Members of Parliament requesting Parliament to meet in an extraordinary session of Parliament to elect a new Prime Minister.
- It is said that on 22 March 2013 the First Respondent issued summons to Members of Parliament to attend Parliament on 29 March 2013 to elect a new Prime Minister.
- It is said that since the Prime Minister has resigned, the motion of no confidence is redundant.
- It is said that an election of a Prime Minister as envisaged under Article 43(2) of the Constitution is consequential upon a successive vote on the motion under Article 43(2) of the Constitution.
- It is said that on 21 March 2013, the motion was never dealt with pursuant to Article 43(2) of the Constitution.
- It is said that in the circumstance of the resignation of the Prime Minister the ordinary course is for Members of Parliament to exercise their rights to elect a Prime Minister under Article 41 of the Constitution.
- It is said that as Speaker of Parliament, the First Respondent had exercised his prerogative under Article 21(2) to request Parliament to meet to elect a new Prime Minister.
- It is said that the First Respondent Speaker ruled that there was no other business for Parliament to deal with at the First Ordinary Session, thus, proceeded to close the First Ordinary Session of Parliament.



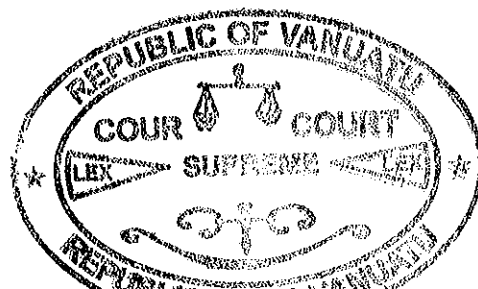
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- It is therefore said that the First Respondent had afforded the Applicants the opportunity to exercise their rights to elect a new Prime Minister on 29 March 2013.
- Finally, it is said that the Applicants are not entitled to the relief sought.

## BRIEF FACTS

The facts of this case are not in dispute. They are summarised as follows:

1. On Tuesday 12<sup>th</sup> March 2013, the First Applicant lodged a Notice of Motion of no confidence in the Honorable Prime Minister Sato Kilman Livtunvanu and seeking immediate election of a new Prime Minister.
2. The motion was lodged consistent with Article 43(2) of the Constitution and particularly:
  - a) It was delivered to the Speaker on Tuesday 12<sup>th</sup> of March 2013 for the first ordinary session of Parliament of the Republic of Vanuatu 2013;
  - b) It allowed for 1 weeks notice;
  - c) It was signed by at least one sixth of the Members of Parliament.
3. The Speaker of Parliament notified the Applicants that the Notice of Motion will be debated by Parliament on 21 March 2013 at 4.00pm o'clock.
4. Parliament sat in the first ordinary session of 2013 on the 21<sup>st</sup> of March 2013 to debate the motion.
5. The Speaker announced that he had received a letter from the Honorable Prime Minister tendering his resignation.
6. The Speaker then said as a result of receiving the Honorable Prime Minister's resignation, motion number 1 of 2013 was no longer valid and, as there was no business to be dealt with, he was intending to close the sitting and the session.
7. The First Applicant protested that despite the Honorable Prime Minister's resignation, only part of the motion number 1 of 2013 was extant and the remaining part of the motion requiring immediate election of a new Prime Minister remained to be dealt with.
8. The Speaker ruled the motion was not in order and proceeded to close the first ordinary session of 2013 after saying he was summoning the parliament to sit on Friday 29<sup>th</sup> of March 2013 to elect a new Prime Minister.



## ISSUES

The following are the issues to be determined by the Court:

1. Was Parliament still seized of the business when the first ordinary session of 2013 was closed by the Speaker at approximately 4.30pm on Thursday 21 March 2013?
2. Was the closure of the first ordinary session on Thursday 21 March 2013 lawful?
3. Was there an infringement of the constitutional rights consequent on the closure on 21 March 2013?

## THE LAW

The following are the relevant provisions of the Constitution:

- Article 2 of the Constitution provides:  
**"2. Constitution Supreme Law**  
*The Constitution is the supreme law of the Republic of Vanuatu."*

Article 43(1) (2) is the back bone of the Parliament democratic system of government. It provides:

### **"Collective responsibilities of Ministers and votes of no confidence**

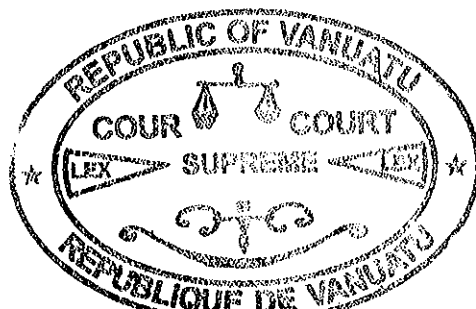
- (1) The Council of Ministers shall be collectively responsible to Parliament.
- (2) Parliament may pass a motion of no confidence in the Prime Minister. At least 1 week's notice of such a motion shall be given to the Speaker and the motion must be signed by one-sixth of the members of Parliament. If 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. [underlined mine]

Article 53(1) and (2) of the Constitution

### **"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."*

## SUBMISSIONS OF COUNSEL



Mr. Nigel on behalf of the Applicant submit in substance that the closing of the first ordinary session of Parliament by the Speaker on 21 March 2013 was unlawful as it infringes the constitutional rights of the applicants to debate and vote on the motion of no confidence in the Prime Minister and elect a new Prime Minister. He submits that the motion of no confidence in the Prime Minister is still alive.

He submits that Article 43(2) of the Constitution creates a right to defeat a Prime Minister and to elect a new Prime Minister. He contended that on 21 March 2013, Parliament sat on that day to debate the motion and vote for a new Prime Minister as envisaged in the said Notice of Motion. A total of 51 Members of Parliament were present with the intention to vote on the motion.

He refers to Articles 43(2) and 53(1) and (2) of the Constitution and the following case authorities to support the application.

- **Tari v. Natapei** [2001] VUCA 18  
Civil Appeal Case 11 of 2001
- **Attorney General v. Jimmy** [1996] VUCA 1  
Civil Appeal Case 07 of 1996
- **In re the Constitution, President of the Republic of Vanuatu v. Korman**  
[1998] VUCA 3  
Civil Appeal Case 08 of 1997
- **Carcasses v. Republic of Vanuatu** [2008] VUSC 79  
Constitution Case 07 of 2008
- **Republic of Vanuatu v. Carcasses** [2009] VUCA 46  
[2010] 2 LRC 264

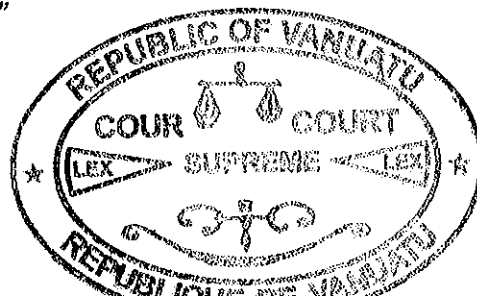
At page 12 of the **Tari decision** it states:

*"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 different 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.*

*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 states:



*"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."*

At page 14 of the **Moana Carcasses Supreme Court decision** it states:

*"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 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."*

At page 2, page 8 and page 9 respectively of the **Republic versus Moana Carcasses**, Appeal Court decision it states:

*"... [We] see the case as a routing application of well-established law."*

*"Whatever the position it does not affect or alter the fact that the Constitution prescribes a position with regard to motions of no confidence. Nothing can alter or abrogate that position. There was a breach in this case so the respondent was entitled to relief. This case concerns only the court ensuring (as it is required to under art 53 of the Constitution), that the constitutional rights under art 43(2) are given meaning and substance."*

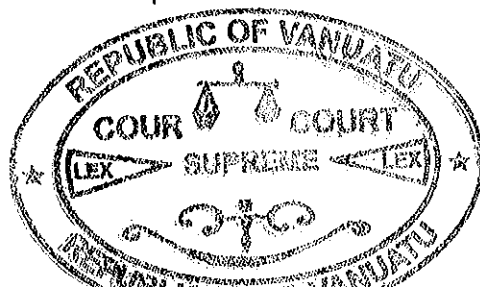
*"Equally, once the Supreme Court is satisfied and makes a determination that a provision of the Constitution has been infringed, the Supreme Court has jurisdiction also to make such order as it considers appropriate to enforce the provisions of the Constitution: art 53(2) of the Constitution. Setting the next date for Parliament to meet, as an effective enforcement process of the constitutional breach, is part of the Supreme Court's jurisdiction under art 52(2) of the Constitution."*

## **STANDING ORDERS**

Standing Order of Parliament Order 17(2) provides for Order of Business during an ordinary session which business does include:

- 2(d) Announcement by the Speaker
- 2(f) Tabling of documents.

Standing Orders of Parliament Order 9 provides for procedure of when office of Prime Minister becomes vacant.





- (1) If the Prime Minister wishes to resign he shall send a written notice thereof to the Speaker. Such notice shall state the date on which the resignation shall take effect.
- (2) The Speaker shall report to Parliament any notice given by the Prime Minister pursuant to paragraph (1) or any vacancy in the office of Prime Minister at the opening of the sitting after the notice has been given or the vacancy occurs.
- (3) Whenever a notice has given under paragraph (1) of there is a vacancy in the office of Prime Minister, Parliament shall as soon as possible elect a Prime Minister in the manner provided by Standing Order 8.

Mr. Frederick on behalf of the Respondents submits that once a resignation letter from the Prime Minister is received by the Speaker, then, there is no longer any need to consider the motion as the motion became redundant. He submits that an election of Prime Minister as envisaged under Article 43(2) of the Constitution is consequential upon a successive vote on the motion under Article 43(2) of the Constitution. He finally submits that the motion was never dealt with pursuant to Article 43(2) of the Constitution. There was no case authority cited in support of the submissions made on behalf of the Respondents to assist the Court in its determination of the constitutional issues raised.

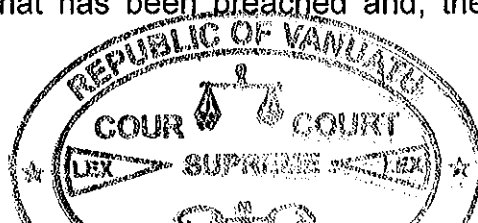
### **APPLICATION OF THE LAW**

As in any constitutional case of this type, it is the Constitution that the Court is asked to consider, interpret and apply. Three preliminary points are to be made:

First, the role and duty of the Courts are to uphold and maintain the supremacy of the law and the Constitution is the supreme law of the Republic of Vanuatu. It is a generous and purposive Constitution.

Second, where rights guaranteed under the Constitution or provisions of the Constitution are infringed, the remedial powers of the Supreme Court are set out by the Constitution itself under Articles 6(1) & (2); 49(1) and 53(1) & (2) of the Constitution.

Third, the Court is required to maintain a balance between the need to "enforce" the constitutional provision that has been breached and, the need to



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exercise a degree of restraint and deference towards Parliament. [*Kilman v. Natapei* [2011] VUCA 24; Civil Appeal of 2011 (22 July 2011)].

In the present case, a Motion of no confidence in the Prime Minister Hon. Sato Kilman Livtunvanu was before Parliament for debate and vote on 21 March 2013 at 4.000pm.

On the same date of 21 March 2013, Prime Minister Hon. Sato Kilman Livtunvanu resigned as Prime Minister of the Republic of Vanuatu.

In his resignation letter, the Prime Minister provides the reasons for his resignation in the following terms:

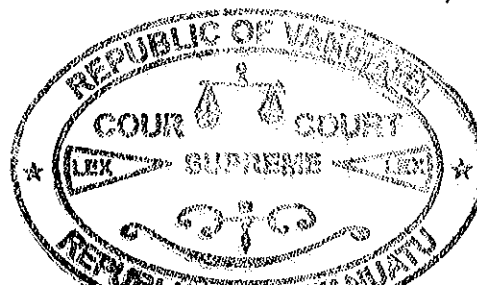
*“My reasons are as follows:*

- 1. It would seem to me that my government for whatever reason no longer controls the majority in this august House because of the movement of some Members from the Government side to the Opposition.*
- 2. In accordance with proper protocol and in accordance with Point 1, I feel it only fair, prudent and proper that in this situation, I tender my resignation and allow the Parliament to choose another Prime Minister.”* [See Attachment marked “LT5” of sworn statement of Leon Teter, Assistant Clerk of Parliament filed 22 March 2013].

The First Respondent Speaker of Parliament received the Prime Minister’s resignation letter on the same date at 3.36pm o’clock [see “LT5” of sworn statement of Leon Teter]. It was less than one hour before the time set for Parliament to debate the motion.

The Speaker made announcement of the resignation letter of the Prime Minister to Members of Parliament who assembled in Parliament [51 Members present] to debate and vote on the motion of no confidence on 21 March 2013 at 4.05pm.

The Speaker then closed the first ordinary session of Parliament without allowing Parliament to debate the motion and elect a new Prime Minister on 21 March 2013. Was the closure of the first ordinary session of Parliament on 21 March 2013, lawful?



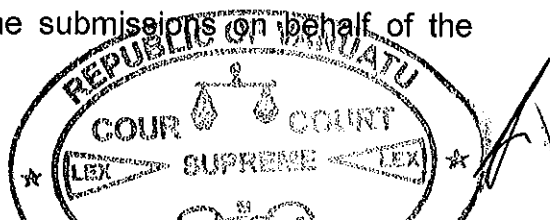
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Before I answer to this question, I need to emphasize again on the essence of the parliamentary democratic system of government under the Constitution of the Republic.

Articles 43(1) & (2) and 28(3) constitute the backbone of the Parliamentary democratic system of government regime of checks and balance of powers established in the Constitution between the Government and Parliament.

In simple terms, the government is collectively responsible to Parliament. The government's collective responsibility to Parliament is initiated and governed by the Procedure of motion of no confidence in the Prime Minister of the country as set out under Article 43(2). It is the right of the members of Parliament to defeat a Prime Minister and to elect a new Prime Minister for the formation of a government in a Parliamentary System of Government. Article 43(1) & (2) of the Constitution provides for it. The corollary of this government collective responsibility to Parliament is the dissolution of Parliament by the President on the advice of the government through the Council of Ministers (Article 28(3)). This is what I think is the essence of the parliamentary democratic system of Government established in the Constitution of which, Article 43(2) is one of its essential procedures that a Speaker of Parliament must respect and comply with it in the exercise of his functions as a Speaker when presiding over debates on a motion of no confidence in a Prime Minister of the Republic. [See **Tari v. Natapei** [2001] VUCA 18; **Attorney General v. Jimmy** [1996] VUCA 1; **President of the Republic of Vanuatu v. Korman** [1998] VUCA 3; **Carcasses v. Republic of Vanuatu** [2008] VUSC 79; **Republic of Vanuatu v. Carcasses** [2009] VUCA 46].

In the present case, I find it difficult to understand the submissions made on behalf of the Respondents to the effect that because of the resignation of the Prime Minister, the Motion of no confidence in the Prime Minister became redundant and, because the motion was not dealt with by Parliament and as a vacancy existed in the Office of the Prime Minister, the Speaker is therefore empowered to close the First ordinary session of Parliament and summon Parliament in another session to elect a new Prime Minister. I do not see a problem with the power of the Speaker to summon Parliament under Article 21(2) of the Constitution when a Prime Minister resigns from office on health or personal or family grounds. This is not such a situation in this case. In the circumstance of the present case, the submissions on behalf of the



Respondents could not be sustained. They are rejected for the following reasons:-

First, if the motion of no confidence in the Prime Minister is redundant due to the resignation of the incumbent Prime Minister and a vacancy, thus, occurring in the Office of the Prime Minister, it is for Parliament when so assembled and still in session on 21 March 2013 to decide to elect a new Prime Minister under Article 43(2).

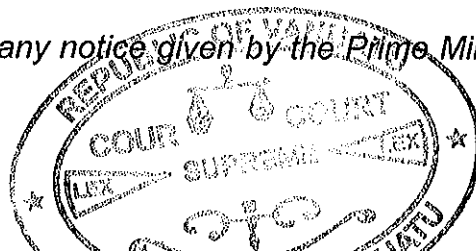
Second, the resignation is directly tied up to the motion of no confidence in the Prime Minister as explained by the then Prime Minister Hon. Sato Kilman in his resignation letter of 21 March 2013: "...my government no longer controls the majority of this august house... I tender my resignation to allow Parliament to choose another Prime Minister." The resignation in such a circumstance amounted to a "de facto" successful vote of no confidence in the Prime Minister Sato Kilman while Parliament assembled to debate and vote on it. The motion then became extant. However, the remaining part of the motion required immediate election of a new Prime Minister by Parliament under Article 43(2). It was still alive before Parliament when in session and it was for Parliament to deal with it. This was a normal course of event to follow under Article 43(2). I accept the submissions made on behalf of the Applicants to this effect.

Third, to accept the submissions of the Respondents would encourage resignation by a Prime Minister whenever a motion of no confidence in the said Prime Minister is before Parliament and his resignation would be designed or used to defeat the constitutional rights under Article 43(2).

The circumstance of this case is beyond the competence of the Speaker as an officer of Parliament to close the first ordinary session without allowing Parliament to elect a new Prime Minister by using the resignation of the incumbent Prime Minister as a basis to defeat the constitutional rights of the Applicants under Article 43(2).

The function of the Speaker is to preside over Parliament debates and business of Parliament in accordance with the Constitution and the Standing Orders of Parliament. Standing Order 9(2) & (3) of the Standing Orders of Parliament provide that-

"(2) *The Speaker shall report to Parliament any notice given by the Prime Minister*



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*pursuant to paragraph (1) or any vacancy in the office of the Prime Minister at the opening of the sitting after the notice has been given or the vacancy occurs.*

- (3) *Whenever a notice has been given paragraph (1) of there is a vacancy in the office of the Prime Minister, Parliament shall as soon as possible elect a Prime Minister in the manner provided by Standing Order 8."*

In the present case, the Speaker did not allow Parliament to elect a new Prime Minister in accordance with Article 43(2) of the Constitution and as soon as possible as provided by Standing Orders 9(3) of the Standing Orders of Parliament on 21 March 2013.

The First Respondent Speaker decided instead to close the First Ordinary Session of Parliament of 2013 and to summon Parliament for another date and time for the election of a new Prime Minister. The Speaker did not provide the reasons for setting another date and time for the election of a new Prime Minister. Again, in the circumstances of this case, this is a matter for Parliament to decide as the motion before Parliament required immediate election of a new Prime Minister.

The closing of Parliament on 21 March 2013 was unlawful, and it infringed the rights of the Applicants under Article 43(2) Constitution. The case authorities cited by Counsel of the Applicants in their submissions support the conclusion reached by the Court in this case.

My answers to the issues raised are as follows:

Q1: Was Parliament still seized of the business when the first ordinary session of 2013 was closed by the Speaker at approximately 4.30pm on Thursday 21 March 2013?

A1: Yes.

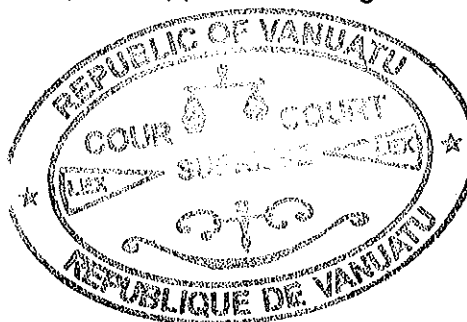
Q2: Was the closure of the first ordinary session on Thursday 21 March 2013 lawful?

A2: No.

Q3: Was there an infringement of the constitutional rights consequent on the closure on 21 March 2013?

A3: Yes.

Consequently, Orders and Declarations sought by the Applicants are granted.


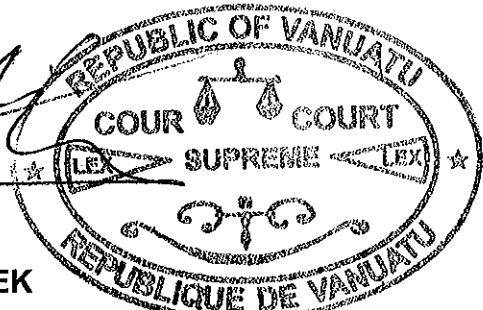


## ORDERS

1. A Declaration that the Honourable Speaker's closing of the first Ordinary Session of Parliament on 21<sup>st</sup> March 2013 was in breach of the Constitutional rights of the Applicants.
2. An Order that the Honourable Speaker reconvenes the first Ordinary Session of Parliament so as to consider the motion number 1 of 2013 moved by the First Applicant the Honourable Nipake Edward Natapei and Seconded by the Honourable Ralph Regenvanu such motion number 1 remained to be considered by Parliament after the resignation of the Honourable Prime Minister Sato Kilman Livtunvanu and that is for the immediate election of a new Prime Minister.
3. The reconvening of Parliament in accordance to Order 2 above shall be on Saturday 23<sup>rd</sup> March 2013 at 10.00am o'clock in the morning.
4. The Applicants are entitled to their costs to be agreed or assessed.

**DATED at Port-Vila this 22<sup>nd</sup> day of March 2013**

**BY THE COURT**

  
  
The seal is circular with the text 'REPUBLIC OF VANUATU' at the top and 'REPUBLIQUE DE VANUATU' at the bottom. In the center, it features a scale of justice and the words 'COUR SUPREME COURT' and 'LEX SUPREME LEX'.

**Vincent LUNABEK**  
Chief Justice