

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

Constitutional
Case No. 21/1761 SC/CNST

BETWEEN: MP Anatole Hymak and MP Kenneth Natapei
First Applicants

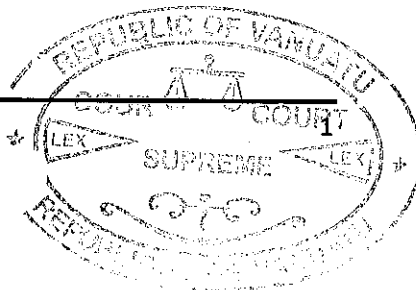
AND: MP Bob Loughman Weibur
MP Alatoi Ishmael Kalsakau
MP Jay Ngwele
MP Marc Ati
MP James Bule
MP Silas Bule
MP Johnny Rasou Koanapo
MP Seoule Simeon
MP Jack Norris Kalmet
MP Esmon Simon
MP Willie Pakoa Satearoto
MP Willie Daniel Kalo
MP Bruno Leingkon
MP Samson Samsen
MP Edward Nalyal
MP John Mark Reuben
MP Joshua Pikioune
MP Wesley Rasu
MP John Still Taribwetu
MP Mark Melsul
MP Assang Sanik
MP Nakou Natuman
MP John Roy Neil
MP Fabiano Stevens
MP Lulu Zachias
MP Robin Kapapa
MP Bakoa Kaltonga
MP Edmond Julun
MP Anthony Harry
MP Xavier Harry
Second Applicants

AND: Honourable Gracia Shadrack
First Respondent

AND: Republic of Vanuatu
Second Respondent

Date of Hearing: 3 June 2021
Before: Justice V.M. Trief
In Attendance: Applicants – Mr C. Leo & L.J. Napuati
First Respondent – Mr N. Morrison
Second Respondent – Mr T. Loughman

JUDGMENT

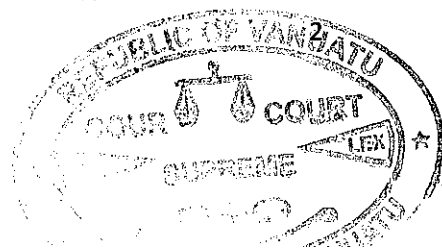


A. Introduction

1. The Applicants Members of Parliament lodged a motion for the removal of the First Respondent Hon. Gracia Shadrack (the 'Speaker') as Speaker of Parliament and to elect a new Speaker of Parliament. The Speaker, citing Standing Order 44, ruled that the motion required 7 days' notice and stated that it would be debated on 8 June 2021.
2. By the Urgent Constitutional Application, the Applicants allege that the Speaker's ruling infringed articles 21(3) and 43(1) of the Constitution. Declarations and orders are sought.
3. The Second Respondent Republic of Vanuatu abides the order of the Court.

B. Background

4. On 28 May 2021, a motion to remove the Speaker of Parliament and to elect a new Speaker was delivered to the Clerk of Parliament. The motion referred to Standing Order 43(1) as the rule under which it was made. The mover and seconder of the motion are the First Applicants Hon. Anatole Hymak, the Leader of Government Business and Hon. Kenneth Natapei respectively.
5. The Second Applicants constitute the majority of the Members of Parliament.
6. By letter dated 29 May 2021 to Mr Hymak, the Clerk of Parliament confirmed that he had registered the Motion delivered on 28 May 2021 as Written Motion No. 11 of 2021 (the 'Motion') and served it on all Members of Parliament.
7. By letter dated 31 May 2021 to the Clerk, Mr Hymak acknowledged the Clerk's letter and confirmed that the Motion be listed for debate on 1 June 2021.
8. When Parliament convened on 1 June 2021, after various points of order were raised, the Speaker ruled that the Motion was not yet mature and would be listed for debate on Tuesday 8 June. A motion of no confidence in the Prime Minister is also listed then.
9. By the Urgent Constitutional Application, the Applicants contend that by his ruling on 1 June 2021, the Speaker has infringed articles 21(3) and 43(1) of the Constitution in relation to them.
10. The following orders are sought:
 - A. *A Declaration that the ruling of the Speaker of Parliament dated 1 June 2021 infringed the rights of the First and Second Applicants under Article 21(3) and 43(1) of the Constitution in relation to the election and or removal of the Speaker by Parliament.*
 - B. *A Declaration that the ruling of the Speaker of Parliament dated 1 June 2021 was in breach of Standing Order 20(2) by refusing to allow the debate of the motion against him.*
 - C. *An Order that the First Respondent convene Parliament immediately so as to consider the Motion number 11 of 2021 moved by the Honourable Anatole Hymak and seconded by Honourable Kenneth Natapei and supported by the Second Applicants.*



D. *Costs against the Respondent.*

E. *Any further orders as the Court deems fit.*

11. The supporting sworn statements filed are of Mr Hymak [**“Exhibit A1”**] and Hon. Alatoi Ishmael Kaisakau, Deputy Prime Minister [**“Exhibit A2”**].

C. Submissions

12. Mr Leo referred to articles 2, 6, 21(3) and 43(1) of the Constitution. He submitted that the Clerk of Parliament had accepted the motion and that Mr Hymak had confirmed it be listed for debate on 1 June 2021 therefore the Speaker's ruling deprived the Applicants, being the majority of the Members of Parliament, from exercising their right to vote on the Motion. Mr Leo and Mr Napuati submitted that the Motion was made under Standing Order 43(1) and was on the agenda for debate. Even if that was not the applicable Standing Order, the Speaker had no power to extend the time for its debate to 8 June 2021, beyond the requisite 7 days' notice period. The 7 days' notice expires today and so the motion should be debated today.

13. In response, Mr Morrison submitted that at all times, the Speaker was discharging his duty under Standing Order 10(3) in presiding over debates in Parliament and ensuring that the Standing Orders, practices and procedures of Parliament are respected and observed by all Members. He submitted that clearly the Motion fell under Standing Order 44 and would not mature until 7 days later, on 4 June 2021. Mr Morrison submitted that in the course of this proceeding, as the 7 day requirement was now accepted, the Applicants seek Court orders for Parliament to convene today. He submitted that with respect, that is not territory that the Court should enter into when the Applicants have not exhausted the remedies available to them under Standing Order 59.

14. I thank counsel for their submissions and assistance in this matter.

D. Discussion

15. The Applicants allege that by his ruling on 1 June 2021, the Speaker infringed the following articles 21(3) and 43(1) of the Constitution:

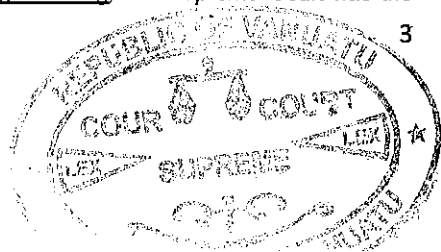
21. ...
(3) *Unless otherwise provided in the Constitution, Parliament shall make its decisions by public vote by a simple majority of the members voting.*

...

43. (1) *The Council of Ministers shall be collectively responsible to Parliament.*

16. Lunabek CJ held in *Natapei v Tari* [2001] VUSC 113, upheld in *Tari v Natapei* [2001] VUCA 18:

When the Speaker rules on procedural matters, the Court has no jurisdiction to enquire further but if that ruling interferes with constitutional right of the person involved, the Supreme Court does have the power/right to enforce that right [Article 6(1) and 53(1) of the Constitution]. Further, in order to investigate and enforce effectively the contravention/breach of a constitutional right, the Supreme Court has the right to examine the proceedings in Parliament and this extends to the actual decision made by the Speaker whether or not the ruling is correct. If it is, there will be no contravention of the members' rights. If the ruling is wrong, the Supreme Court has the



power/right to make orders, issue writs and give directions, including the payment of compensation, as it considers appropriate to enforce that right which is guaranteed and protected under the Constitution [Article 6(2) of the Constitution]. Furthermore, the Supreme Court has jurisdiction to determine the matter and to make order as it considers appropriate to enforce the contravention/breach of the provisions of the Constitution [Article 53(2)].

[my emphasis]

17. Of further assistance is the following passage of the Court of Appeal in the same judgment referred to above, *Tari v Natapei* [2001] VUCA 18:

... the starting point in determining the dispute in this Court, is the Constitution and the rights which are provided therein.

Standing Orders of Parliament, as the Constitution notes, are the rules of procedure for Parliament. Within Parliament they are supreme and must be strictly adhered to by all members of Parliament. Nothing in the Standing Orders of Parliament can vary, abdicate or interfere with the rights which are provided under the Constitution.

Clause 27 of the Constitution provides an immunity for members of Parliament in respect of opinions given or vote cast by them in Parliament in the exercise of their office. But that does not in any way lessen the duties and responsibilities placed upon them (as on every other citizen) under the Constitution.

In as much as the Standing Orders of Parliament have an effect and influence upon the Constitutional rights of all members of Parliament, in accordance with clause 6 of the Constitution any person aggrieved, is at liberty to apply to the Supreme Court. Clause 6 provides:-

- 6. (1) Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.*
- (2) The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensations, as it considers appropriate to enforce the right.*

This important provision is repeated in Clause 53 as 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.

18. It is proper for courts to approach challenges to the workings of Parliament with caution. But that is not to say the Court will not intervene in appropriate circumstances: *Tabimasm v Parliament* [2021] VUCA 16 at [26].
19. Importantly, as set out above from *Natapei v Tari* [2001] VUSC 113 and *Tari v Natapei* [2001] VUCA 18, in order to investigate and enforce effectively the contravention/breach of a constitutional provision, the Supreme Court has the right to examine the proceedings in Parliament and this extends to the actual decision made by the Speaker whether or not his ruling is correct. If correct, there will be no contravention as alleged.
20. However, if the ruling is wrong, the Supreme Court has jurisdiction to determine the matter and to make order as it considers appropriate to enforce the contravention/breach of the provisions of the Constitution, pursuant to article 53(2) of the Constitution.



21. The Motion at the heart of this case is a motion for the removal of the Speaker and for the election of a new Speaker. That is a matter entirely for Parliament. It is Parliament who elects the Speaker and it is Parliament who removes the Speaker.
22. Article 21(5) of the Constitution provides that Parliament shall make its own rules of procedure. Those rules are set out in the Standing Orders of Parliament (the 'Standing Orders'). The Standing Orders as at 20 June 2020 were tendered by consent, [**“Exhibit R1”**].
23. What are the provisions of the Standing Orders in relation to the removal of a Speaker and election of a new Speaker?
24. Standing Order 20(2) provides for the order of business at a sitting of Parliament:

20.

(2) *Except at the first sitting of an ordinary session or for an extraordinary session, the business of each sitting day is transacted in the following order:*

- (a) *The Prayer;*
- (b) *Reading of the agenda by the Speaker;*
- (c) *Confirmation of minutes;*
- (d) *Business having precedence;*
- (e) *Announcements by the Speaker;*
- (f) *Presentation of Petitions;*
- (g) *Statements by Ministers;*
- (h) *Tabling of documents;*
- (i) *Urgent debates;*
- (j) *Business to be transacted on that sitting day pursuant to Standing Order 27;*
- (k) *Announcement of Order of Bills for the next sitting day;*
- (l) *Closing Prayer.*

[my emphasis]

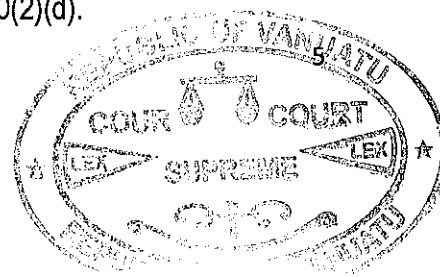
25. The Clerk prepares the agenda for each sitting day: Standing Order 20(1).
26. The agenda for the sitting on 1 June 2021 [Annexure “AH4” to the sworn statement of Anatole Hymak, **“Exhibit A1”**] reflected the order of business in Standing Order 20(2).
27. The fourth item of business, as set out in Standing Order 20(2)(d), was “Business having precedence”. Such business is provided for in Standing Order 21 as follows:

21. *The following matters take precedence on any sitting day and must be listed for debate immediately following the reading of the agenda by the Speaker:*

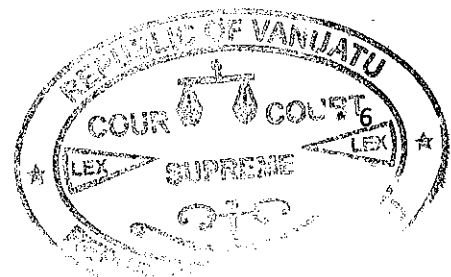
- (a) *No confidence in the Prime Minister;*
- (b) *No confidence in the Speaker;*
- (c) *Dissent from a ruling of the Speaker;*
- (d) *Condolence or congratulatory motion.*

[my emphasis]

28. It is accepted that a motion of no confidence in the Speaker is business having precedence in accordance with Standing Order 21(b). Therefore it will be the fourth item on the agenda for a sitting day (besides the first sitting day of an ordinary session or for an extraordinary session), as required by Standing Order 20(2)(d).



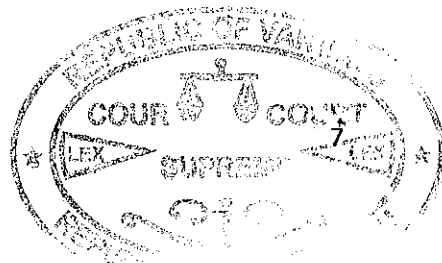
29. The Motion was delivered to the Clerk of Parliament on 28 May 2021. The Applicants contend that the motion should have been debated on 1 June 2021 when the First Applicants Mr Hymak and Mr Natapei were ready to move and second it.
30. The Motion referred to Standing Order 43(1) as the rule under which the motion is made:
43. (1) *A Member who wishes to move a written motion must give written notice by delivering to the Clerk a copy of the motion in French and English signed by the Member and by one other Member acting as seconder, not less than two (2) days before the day on which the Member intends to move the motion.*
31. Even though the Motion referred to Standing Order 43(1), it is accepted that the Motion was for the removal of the Speaker and for the election of a new Speaker. Motions of no confidence are specifically provided for in Standing Order 44(1):
44. (1) *A Member who wishes to move a motion of no confidence must give written notice by delivering to the Clerk a copy of the motion in French and English signed by the Member and by one other Member acting as seconder, not less than seven (7) days before the day on which the Member intends to move the motion.*
[my emphasis]
32. Clearly it is Standing Order 44 which applied to the Motion. Mr Leo and Mr Napuati agreed with that proposition that I put to them.
33. The requisite period of notice of not less than 7 days expires today, 4 June 2021. Accordingly, the Speaker was correct in his ruling on 1 June 2021 that the Motion was not yet mature. The Motion was not ready for debate by Parliament on 1 June 2021 therefore there has not been any infringement of article 21(3) of the Constitution.
34. Applicants' counsel submitted that Standing Order 44(1) must be read in such a way that the Motion must be debated as soon as 7 days expires. I disagree, with respect, with such reading of Standing Order 44(1). That rule provides for a period of notice of "not less than 7 days". It does not say only "7 days". Therefore the Speaker correctly listed the Motion for debate after the expiry of at least 7 days' notice pursuant to Standing Order 44(1). The submission is rejected.
35. The Speaker listed the Motion for Tuesday 8 June 2021, that is, 4 days after the expiry of the minimum 7 days' notice prescribed in Standing Order 44.
36. Applicants' counsel cited the passage in the Court of Appeal's judgment in *Attorney-General v Jimmy* [1996] VUCA 1 at p. 9/10:
- ... Standing Order 14(5) provides that "no less than 7 days" notice must be given. We agree with Mr Waddy's submission that any period of notice substantially longer than 7 days would generally be inappropriate.*
[my emphasis]
37. Four days later cannot be said to be a substantially longer period. Applicants' counsel could not argue otherwise.



38. The Motion has not been removed from the purview of Parliament to make its decision on by public vote by a simple majority of the members voting. The Speaker has correctly ruled in accordance with Standing Order 44(1) that on 1 June 2021, the Motion was not yet mature. He has acted in accordance with the Standing Orders to list it on Tuesday 8 June 2021. It is at that time that Parliament is to make its decision on the Motion in accordance with article 21(3) of the Constitution – by public vote by a simple majority of the members voting. No infringement of article 21(3) of the Constitution has been made out.
39. The other article of the Constitution allegedly infringed – article 43(1) – concerns the collective responsibility of the Council of Ministers to Parliament. The circumstances do not disclose any infringement of that provision of the Constitution.
40. In the circumstances, the Urgent Constitutional Application must be declined and dismissed.
41. Finally, I note Standing Order 59 which provides as follows:
59. *The ruling of the Speaker as to any question related to the application or interpretation of these Standing Orders must not be challenged except on a written motion made in accordance with Standing Order 43.*
42. The Speaker's ruling on 1 June 2021 related to the application or interpretation of the Standing Orders. Standing Order 59 therefore applies. It provides that such ruling must not be challenged except on a written motion made in accordance with Standing Order 43. It is accepted that the Applicants have not challenged the ruling by way of a written motion made in accordance with Standing Order 43.
43. There was a suggestion that the Speaker concluded his ruling by stating that it was made under Standing Order 59 therefore it could not be challenged, which is why the Applicants sought redress directly from the Court. With respect, there is no evidential basis for that assertion in the Hansard record of the 1 June 2021 proceedings in Parliament, [**“Exhibit R1”**]. Paragraph 15 of that Hansard record sets out that the Speaker referred to Standing Order 59 and stated that a ruling of the Speaker must not be challenged except on a written motion.
44. For the avoidance of doubt, it is not for the Court to usurp the Applicants' right of challenge under Standing Order 59 which is in the Applicants' own hands to exercise. Within Parliament, the Standing Orders are supreme and must be strictly adhered to by all members of Parliament.

E. Result

45. The Urgent Constitutional Application is declined and dismissed.
46. Costs should follow the event. The Applicants are to pay the First Respondent's costs which are summarily assessed at VT60,000, to be paid within 21 days.



47. There is no order as to costs of the Second Respondent.

**DATED at Port Vila this 4th day of June 2021
BY THE COURT**

VM Trief
.....
Viran Molisa Trief
Judge

