

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

Judicial Review
Case No. 23/1078 SC/JUDR

BETWEEN: Eric Puyo Fiesta
First Claimant

AND: Tarsong Shem
Second Claimant

AND: Jenny Regenvanu, Joseph Lagiola, Anthea
Arukole, Alfred Namas, Marie Louise Milne,
William Aron, Andrien Malepsis, Davis
Nambaru and Melanie Shem
Third Claimants

AND: Port Vila City Council In Right of the Lord
Mayor
Defendant

Before: Justice Oliver A. Saksak
Counsel: Mr Kent T Tari for Claimants
Mr Edward Nalyal for Defendant
Date of Hearing: 23rd August 2023
Date of Judgment: 7th September 2023

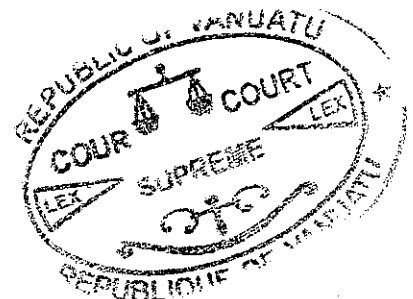
JUDGMENT

Introduction

1. In this proceeding the First and Second claimants challenge the lawfulness of the vacation of their seats as elected councilors of the Port Vila City Council as the defendant (the Council).

Background

2. It was claimed by the defendant that the First claimant had absented himself from three consecutive meetings of the Council held on 12, 13, and 14 December 2022 without obtaining the prior permission of the Council.



3. As for the second claimant it was claimed that he too had absented himself from attending three consecutive meetings held on 1, 2 and 8 June 2023 without first obtaining the prior permission of the Council.
4. Subsequent to those absences the Mayor wrote a letter to the First claimant on 30th May 2023 advising him that pursuant to section 10 (e) of the Municipalities Act [CAP 126] the First claimant had vacated his seat. Similarly on 8th June 2023 the Mayor also wrote to the Second claimant advising him that he too had vacated his seat pursuant to section 10 (e) of the Act.
5. The First and Second claimants claim those decisions were unjustified, unreasonable and unlawful and should be declared null and void and of no effect.
6. The First and Second claimants also claim that the decision made by the Defendant at its meeting held on 23rd June 2023 to not include them in that meeting for reason that their seats had been vacated be quashed as being unjustified, unreasonable and unlawful and be declared null and void and of no effect.

Issues

7. The issues for determination are-
 - a) Did the First Claimant absent himself from 3 consecutive meetings of the Council without obtaining prior permission?
 - b) Did the Second claimant absent himself from attending 3 consecutive meetings of the Town Planning Committee on 29th May 2023, 1st, 2nd and 8th June 2023?

Relevant Laws

8. Section 10(e) of the Municipalities Act [CAP 126] states:-

"10. Vacation of office

If any councillor –

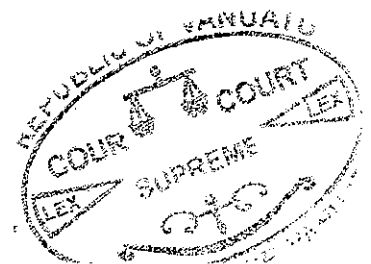
(a) Not Applicable.....;

(b)Not Applicable.....;

(c)Not Applicable.....;

(d)Not Applicable.....;

(e) fails to attend 3 consecutive meetings of the council or of any committee of the Council of which he is a member, unless he has obtained the prior permission of the council to absent himself throughout such period, he shall cease to hold office as a councillor."



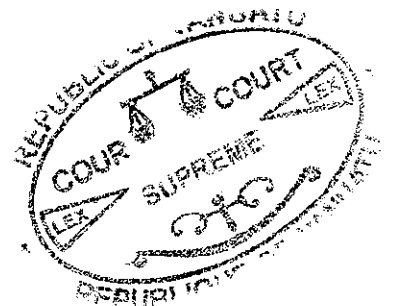
Discussion

9. From the evidence of Mr Kiel the Mayor it is common ground that the Council met on 12, 13, 14 December 2022.
10. The Minute of Monday 12 December 2022 records an apology from Mr Puyo Festa as he was receiving medical treatment in Australia.
11. It is recorded in the Minutes also that Mr Kiel questioned the Town Clerk about the apology and the explanation and clarification made by Mr Sakita. However the meeting fell short of making any decision or resolution about Mr Puyo Festa' absence that day or any decision or resolution calling for the provision for the documentation as to his travelling, appointments and other matters connected therewith.
12. It is also common ground that the Minutes of meetings held on 13 and 14 December 2022 record that Mr Puyo Festa was absent from those two meetings and there were no apology or explanation for the absences.
13. Mr Puyo Festa's evidence was that he had sought permission to be absent from the meetings to attend to his medical check-up in Australia. He annexed as " EPF2" a chain of emails dated 2 and 3 November 2022. On 2nd November 2022 Mrs Ingrid Festa sent an email to Mr Sakita, the then Town Clerk headed"

*" Mr Eric Puyo Festa absence on the territory until end of November 2022.
Good Morning Mr Peter Sakita,
I will not be returnable until the end of this month because I need more time for my check-up. I hope that I will be back before the end of November 2022.
My apologies for the in convenience.
Kind regards,
Eric Puyo Festa."*

14. Mr Sakita responded on 3rd November 2023 as follows:

*" Re: Mr Eric Puyo Festa absence on the territory until end of November 2022.
Bonjour Ingrid,
I write to confirm your email regarding Mauteteta's absence from duty to attend his .. medial check up.
Approval is hereby granted until such time he returns back to the country.
Wish him well
Kind Regards,"*



15. I find that notice and approval was given by Mr Sakita but it was specifically for the month of November 2022.
16. The meetings Mr Puyo Festa had not attended were held on 12, 13 and 14 December 2022.
17. There was no evidence by Mr Puyo Festa that he had complied with section 10 (e) of the Act either by giving notice (by email as he did in November) or by seeking specific permission to be absent from those three meetings due to his appointment with doctors for his medical checkup and or treatment.
18. In his evince Mr Puyo Festa disclosed his air tickets as Annexure " EPF1" showing that he flew out of Port Vila on 11th December 2022 and returned on 23rd December 2022. During this period he said in his oral evidence he was receiving medical treatment in Australia for skin cancer.
19. Mr Sakita no doubt was aware of this fact that is why he recorded an apology on behalf of Mr Puyo Festa in the Minute of 12 December 2022 with an explanation that he was receiving medical treatment in Australia.
20. The Minutes of meetings of 13 and 14 December 2022 however fell short of that apology and explanation. The same apology and information should have been recorded on behalf of Mr Puyo Festa fo the meetings held on 13 and 14 December 2022.
21. Mr Sakita had discretion to grant approval to Mr Puyo Festa on 3rd November 2022 to be absent until his return to Vanuatu pursuant to section 19 (3) of the Municipalities Act which states that:

"PART 5 – OFFICERS AND STAFF

19. Municipal clerk

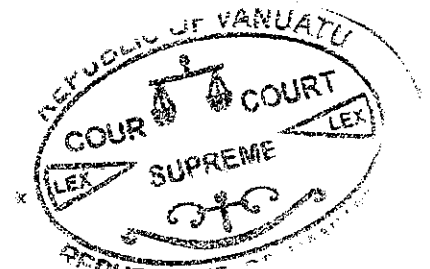
(1) Not Applicable.....

(2)Not Applicable.....

(3) The clerk may, subject to the general directions of the council, exercise the powers of the council and all acts done by him in the exercise of such powers shall be considered to have been done by the council.

(4) Not Applicable....."

22. In the circumstances, I find and I am satisfied that Mr Puyo Festa was only absent from 2 meetings of the Council on 13th and 14 December 2022 without obtaining prior permission in accordance with section 10 (e) of the Act. I am satisfied that as an apology was provided by the



Clerk for the 12th December 2022 Council meeting, he had a valid excuse for being absent on that date.

23. In essence, Mr Puyo Festa had only absented himself twice and not three times as asserted by the Defendant.

24. I therefore find that Mr Puyo Festa's seat was not and has not been vacated.

The Second Claimant- Tarsong Shem

25. As regards Mr Shem it was alleged he absented himself from the meetings of 29 May 2023, and from 1st, 2nd and 8th June 2023.

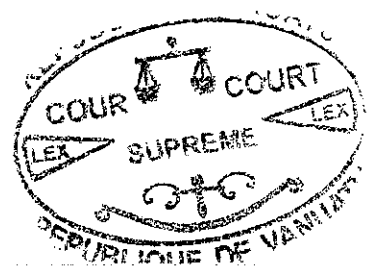
26. From the evidence of Mr Kiel according to the Minutes of meeting of 29th May 2023 it is recorded that Mr Shem was absent, however the reason for that absence was that he had to attend his son's Court case in the Magistrate's Court.

27. From Mr Shem's evidence he said he had sought permission from the Deputy Town Clerk, Mr Robert Avio to attend Court that day and permission was granted. This is recorded in the minute and Mr Avio did not give evidence to challenge or rebut this evidence.

28. For the meeting held on 1st June 2023 Mr Shem's evidence was that deliberately absented himself from the meeting because he was being pressured by Mr Kiel to withdraw his name from the impending motion of no confidence in the Mayor. That was not a good excuse to be absent that day.

29. For the meeting of 2 and 8 June 2023 the Minutes record that Mr Shem was absent from these two meetings. He did not give any apology or explanations to comply with the requirement of section 10 (e) of the Act.

30. Mr Shem said in evidence he was not notified about those meeting. However the evidence of Samuel Iani contradicts what Mr Shem said about lack of notice. From Mr Iani's evidence I am satisfied that the notice in relation to all those meetings beginning on 26th May 2023 was that



annexed as" SI2". There was no need for a separate notice for the meetings of 1st, 2nd and 8th June 2023. I am satisfied on the evidence that Mr Shem was aware of those meetings but he absented himself without apology from the meetings of 1st, 2nd and 8th June 2023. He therefore absented himself from 3 consecutive meetings and pursuant to section 10 (e) of the Municipalities Act, his seat had been vacated.

The Results

31. The claim by the First claimant is successful. I therefore declare that the decision made on 30th May 2023 advising that his seat was vacant is unlawful, null and void and of no effect. Consequently the defendant's decision made on 23rd June 2023 not to include the claimants in that meeting is declared unlawful, is null and void and of no legal effect.
32. The claim by the Second claimant fails and is dismissed.
33. The Third claimants have no cause of action against the Defendant.
34. The Defendant shall pay the First claimant's costs of this action on the standard basis as agreed or taxed.

DATED at Port Vila this 7th day of September 2023

BY THE COURT


Oliver A. Saksak

Judge

