

BETWEEN: Speaker of Parliament – Esmon Saemon
Appellant

AND: The President Pastor Obed Moses Tallis
Respondent

Date: 11 July 2019

Before: Justice O. Saksak
Justice J. Mansfield
Justice J.W. Hansen
Justice D. Fatiaki
Justice G.A. Andrée Wiltens

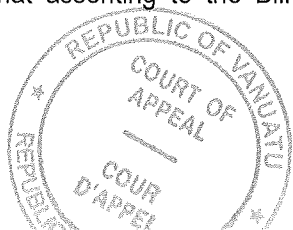
In Attendance: Mr A. Loughman, Attorney General for the Appellant
Mr G. Blake for the Respondent

Judgment: 19 July 2019

JUDGMENT

Introduction

1. This appeal concerns the validity of the Bill for Constitution (Seventh) (Amendment) No. 1 of 2019 Act (the Bill).
2. The Bill was passed by the Parliament on 29 March 2019, with 41 members supporting it and 7 members against it.
3. The Clerk of the Parliament presented the Bill to His Excellency Pastor Obed Moses Tallis, the President of the Republic of Vanuatu on 5 April 2019 for assent.
4. The President on 17 April 2019 requested a certification of the Bill pursuant to s 13 of the Acts of Parliament Act [CAP 116]. The certification was provided the same day.
5. On 26 April 2019, the President filed a Constitutional Referral, seeking the opinion of the Supreme Court on the constitutional validity of the Bill pursuant to Article 16 (4) of the Constitution because he considered that assenting to the Bill would be inconsistent with Article 86 of the Constitution of Vanuatu.



6. Article 86 of the Constitution provides:

"86. Amendments requiring support of referendums

A bill for an amendment of a provision of the Constitution regarding the status of Bislama, English and French, the electoral system, or the parliamentary system, passed by Parliament under Article 85, shall not come into effect unless it has been supported in a national referendum."

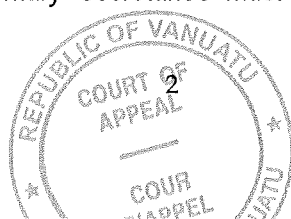
7. If Article 86 of the Constitution does apply to the Bill, because the effect of the assent of the President would have been to bring it into force by the step of Gazettal of the commencement date without it having been supported in a national referendum, that would be unconstitutional. So, the President acted wisely in referring the matter to the Supreme Court for opinion.
8. On 15 May 2019, the Chief Justice heard the referred matter. He gave judgment on 17 May 2019.
9. The Chief Justice, in a thorough and carefully considered judgment, concluded that the Bill as presented to the President for his assent is inconsistent with Articles 86 and 42 of the Constitution and should not be assented to by the President in the absence of a national referendum which met the requirements of Article 86 of the Constitution.
10. This is an appeal from that decision.
11. For the reasons which appear below, the Court of Appeal has reached the same conclusion as the Chief Justice. The Bill, in our view, falls within the scope of operation of Article 86 of the Constitution and therefore should not be assented to by the President in the absence of a national referendum supporting it.
12. The appeal is therefore dismissed.
13. It is important that the Court of Appeal explains its reasons for that conclusion.

The Bill

14. The Bill is short. Clause 1 says the Constitution is amended as set out in the Schedule. Clause 2 says the Act commences on the day on which it is published in the Gazette.
15. The Schedule provides for a new Article 46A to be added to the Constitution after Article 46. It is as follows:

"46.A Appointment and Removal of Parliamentary Secretaries

- (1) *The Prime Minister may appoint Parliamentary Secretaries from amongst the Members of Parliament.*
- (2) *The number of Parliamentary Secretaries must not exceed two-thirds of the number of Ministers.*



- (3) *The Prime Minister is to assign responsibilities for the conduct of Government to the Parliamentary Secretaries.*
- (4) *The Prime Minister may remove the Parliamentary Secretaries from office."*

16. In the President's referral of the matter to the Supreme Court, he gave reasons for doing so.
17. They were that the Bill purports to amend the Constitution regarding the parliamentary system by increasing the number of persons with responsibility for the conduct of Government from a maximum of 13 Ministers and the Prime Minister by the addition of up to a further 8 Parliamentary Secretaries; and that to amend the Constitution regarding the parliamentary system without the support of a national referendum is inconsistent with the provision of Article 86 of the Constitution.

The Constitution

18. The relevant provisions of the Constitution include the following:-

"CHAPTER 1 – THE STATE AND SOVEREIGNTY

1. Republic of Vanuatu

The Republic of Vanuatu is a sovereign democratic state.

2. Constitution supreme law

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

3.

4. National sovereignty, the electoral franchise and political parties

- (1) *National sovereignty belongs to the people of Vanuatu which they exercise through their elected representatives.*

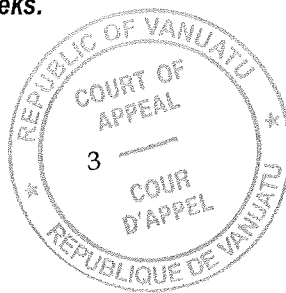
CHAPTER 4 – PARLIAMENT

15. Parliament

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

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.***
- (3) ***When a bill has been passed by Parliament it shall be presented to the President of the Republic who shall assent to it within 2 weeks.***



- (4) ***If the President considers that the bill is inconsistent with a provision of the Constitution he shall refer it to the Supreme Court for its opinion. The bill shall not be promulgated if the Supreme Court considers it inconsistent with a provision of the Constitution.***

17. *Election of members of Parliament*

- (1) *Parliament shall consist of members elected on the basis of universal franchise through an electoral system which includes an element of proportional representation so as to ensure fair representation of different political groups and opinions.*

(2) ...

- (3) *The franchise is universal, equal and secret.....*

...

CHAPTER 6 – HEAD OF STATE

33. President of the Republic

The head of the Republic shall be known as the President and shall symbolise the unity of the nation.

CHAPTER 7 – THE EXECUTIVE

39. Executive power

- (1) *The executive power of the people of the Republic of Vanuatu is vested in the Prime Minister and Council of Ministers and shall be exercised as provided by the Constitution or a law.*
- (2) *The Prime Minister shall keep the President of the Republic fully informed concerning the general conduct of the government of the Republic.*
- (3) *The President of the Republic may refer to the Supreme Court any regulation which he considers to be inconsistent with the Constitution.*

40. Council of Ministers

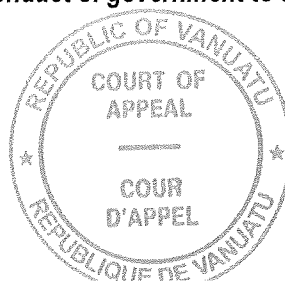
- (1) ***There shall be a Council of Ministers which shall consist of the Prime Minister and other Ministers.***
- (2) ***The number of Ministers, including the Prime Minister, shall not exceed a quarter of the number of members of Parliament.***

41. Election of Prime Minister

The Prime Minister shall be elected by Parliament from among its members by secret ballot in accordance with the rules in Schedule 2.

42. Appointment and removal of other Ministers

- (1) ***The Prime Minister shall appoint the other Ministers from among the members of Parliament and may designate one of them as Deputy Prime Minister.***
- (3) ***The Prime Minister shall assign responsibilities for the conduct of government to the Ministers.***
- (4) ***The Prime Minister may remove the Ministers from office.***



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.

44. Termination of office of Ministers

The Council of Ministers shall cease to hold office whenever the Prime Minister resigns or dies but shall continue to exercise their functions until a new Prime Minister is elected. In the case of the death of the Prime Minister, the Deputy Prime Minister, or if there is no Deputy Prime Minister a Minister appointed by the President of the Republic, shall act as Prime Minister until a new Prime Minister is elected.

45. Other times when a Minister ceases to hold office

A Minister, including the Prime Minister, shall also cease to hold office –

- (a) when, after a general election, Parliament meets to elect a new Prime Minister;**
- (b) if he ceases to be a member of Parliament for any reason other than a dissolution of Parliament; or**
- (c) if he is elected as President of the Republic or as Speaker of Parliament.**

46. Ministers to remain Members of Parliament

Members of Parliament who are appointed Ministers shall retain their membership of Parliament.

...

CHAPTER 8 – JUSTICE

47. The Judiciary

(1) The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom.

...

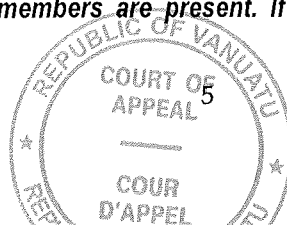
CHAPTER 14 – AMENDMENT OF THE CONSTITUTION

84. Bills for amendment of Constitution.

A bill for an amendment of the Constitution may be introduced either by the Prime Minister or any other member of Parliament.

85. Procedure for passing Constitutional amendments

A bill for an amendment of the Constitution shall not come into effect unless it is supported by the votes of no less than two-thirds of all the members of Parliament at a special sitting of Parliament at which three-quarters of the members are present. If there is no such quorum at the first sitting,



Parliament may meet and make a decision by the same majority a week later even if only two-thirds of the members are present.

86. Amendments requiring support of referendums

A bill for an amendment of a provision of the Constitution regarding the status of Bislama, English and French, the electoral system, or the parliamentary system, passed by Parliament under Article 85, shall not come into effect unless it has been supported in a national referendum."

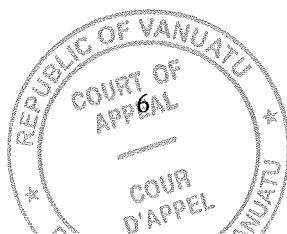
The Relevant Legislation

19. In the course of submissions other legislative provisions were referred to as having relevance to the question to be decided.
20. As noted, under the Acts of Parliament Act [CAP 116] the President's assent to a Bill is necessary by s 1 (1) and the Bill becomes an Act of Parliament by that assent pursuant to s 1 (2).
21. Section 13 of that Act provides for the certification by the Speaker of those Bills requiring support of a special majority or a special quorum present or requiring a national referendum.
22. In the case of the Bill, the Speaker's certification was to the reflect that the Bill satisfied Article 85 of the Constitution in that:-
 - a) three-quarters of the Members were present, namely 50; and
 - b) not less than two-thirds of the Members supported the Bill, as it was passed by 41 votes in favour and 7 against.

The certification did not refer to Article 86 of the Constitution.

The President's function

23. Before turning to the contentions on this appeal, it is also important to note that the President's role under Article 16 (4) of the Constitution is an important one. It is not a political one. Nor is it a discretionary decision. Once the President has formed an adverse view about a relevant Bill not complying with the Constitution, it is his duty to refer it to the Supreme Court for opinion.
24. The President, as was said in *President of the Republic of Vanuatu v. Speaker of Parliament* [2000] VUSC 43, Civil Case 051 of 2000 (11 August 2000), represents the constitutional check and balancing element between the function of the Executive Government and the function of the Legislative Government on the law making process.
25. We adopt what the Chief Justice said concerning referral also to the decision in *Timakata v. Attorney-General* [1992] VU Law Rep 9; [1980-1984] Van LR 575 (1 November 1992).



Consideration

26. The starting point must be the words of Article 86 of the Constitution.

27. The relevant words of Article 86 are:

"A bill for an amendment of the Constitution regarding.... the parliamentary system, passed by Parliament under Article 85, shall not come into effect unless it has been supported in a national referendum."

28. As we have noted, all the submissions acknowledge that the result of this appeal turns on whether the Bill is one *"regarding the parliamentary system"*. To put it another way, does the proposed Article 46A introducing the capacity to appoint Parliamentary Secretaries from amongst the Members of Parliament, (limited in numbers, effectively to 8) who have the responsibilities for the conduct of Government as assigned by the Prime Minister, fall within a provision *"regarding the parliamentary system"*.

29. The Speaker through his counsel accepted, very properly, that *"the parliamentary system"* as prescribed by the Constitution includes both the establishment of the Legislature and the establishment of the Executive.

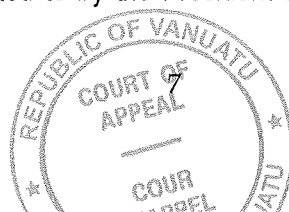
30. The submission on the part of the Speaker was quite precise.

31. It was that under Chapter 7 of the Constitution, the executive power of the Republic was by Article 39(1) vested in the Prime Minister and the Council of Ministers. Article 40, then prescribed that the Council of Ministers consisted of the Prime Minister (elected by Parliament under Article 41, and the Ministers appointed by the Prime Minister under Article 42. Article 42(2) said the Prime Minister shall assign responsibilities *"for the conduct of government"* to the Ministers.

32. Therefore, it was argued, that is where the executive power and responsibilities of the Republic lay. The Bill therefore could not and did not alter that state of affairs. The final step in the argument was that, consequently, the Bill allowing for the appointment of Parliamentary Secretaries did not affect the *"parliamentary system"* of a Parliament and an Executive.

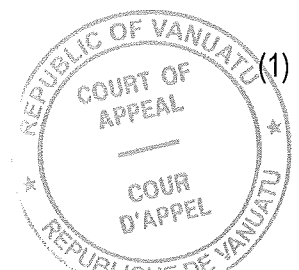
33. We have carefully considered that contention, including the refinements and nuances with which it was developed in argument. We do so, on the basis that *"the parliamentary system"* must include all the processes of electing Members of Parliament and then of electing the Prime Minister and the appointment of those who can, and do, exercise the Executive functions of government: see: *Vohor v. Attorney General* [2004] VUCA 22. At present those persons are the Ministers, limited in number by Article 40 (2).

34. We do not accept that the argument by the Speaker is correct. As our introduction notes, we have come to the firm conclusion that the Bill is *"regarding the parliamentary system"* of the Republic. It should not, therefore, be assented to by the President unless and until it has been supported in a national referendum.

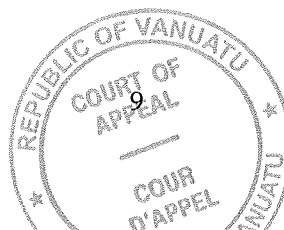


35. There are a number of reasons for that conclusion.
36. First, and obviously, the Bill is to amend the Constitution and is to be inserted into Chapter 7 headed 'The Executive'.
37. It was accepted by counsel for the Speaker that the Bill, by reason of its content, had to be in that Chapter of the Constitution. It could not go sensibly into any other Chapter of the Constitution. It could not go, for example, into Chapter 9 – The Public Service – because it did not provide for the Parliamentary Secretaries to be appointed to the public service with the security of tenure such a position carries.
38. Then, if it is properly in Chapter 7 dealing with the Executive, that prompts the question: why is it there? The obvious answer is because it is regarding the executive arm of government.
39. That obvious answer is supported by the text of the Bill. The executive power of the people of the Republic is "*the conduct of government*", subject of course to the Parliament itself. So much is clear by the express words in Article 42 (2) of the Constitution. The Prime Minister is to assign the "*responsibilities for the conduct of government*" to the Ministers. The Bill says that a Parliamentary Secretary is also to have "*responsibilities for the conduct of Government*" as assigned by the Prime Minister: see: clause 46A (3) of the Schedule of the Bill.
40. The direct identity of language indicates that the responsibilities of government may be assigned by the Prime Minister to the Ministers or to one or more Parliamentary Secretaries.
41. Hence, not only does the Bill relate to the parliamentary system as prescribed by the Constitution, but it directly does so by providing for the Prime Minister to more widely spread the "*responsibilities for the conduct of government*" to Members of Parliament other than to the Ministers.
42. In addition, Chapter 7 of the Constitution was clearly and carefully drawn to limit the number of Ministers to not more than one quarter of the members of Parliament: Article 40(2). The Council of Ministers – that is the Prime Minister and the Ministers under Article 40(1) – is then only a relatively small proportion of all the Members of Parliament. They are to have the "*responsibilities for the conduct of government*". Presently the number is 14 including the Prime Minister.
43. The Bill, by providing for additional Parliamentary Secretaries of up to two-thirds of the number of Ministers will permit up to 8 Parliamentary Secretaries. In turn, that means it provides for up to 21 Members of Parliament who may be assigned "*responsibilities for the conduct of government*", in addition to the Prime Minister.
44. One fallacy, in our view, of the argument presented on behalf of the Speaker is to have emphasized the composition of the Council of Ministers. The Bill does not change the composition of the Council of Ministers, but in important respects it –

(1) creates a new category of persons called "*Parliamentary Secretaries*" who may be appointed under the heading of The Executive in Chapter 7 of the Constitution;




- (2) provides for Parliamentary Secretaries to be assigned “responsibilities for the conduct of government”; and
- (3) extends the possible number of Members of Parliament who may be responsible for the conduct of government beyond the number presently provided for in the Constitution.
45. The Court's function in a matter such as this is only to ensure that the Constitution is adhered to. It is not concerned with the internal operations of the Parliament, or of the Executive arm of government, so long as they operate in accordance with the prescriptions in the Constitution. The Court must give meaning and substance to the constitutional prescriptions and rights: see: *Carcasses v. Republic of Vanuatu* [2008] VUSC 79; *Republic of Vanuatu v. Carcasses* [2009] VUCA 46; *Natapei v. Wells*, Const. Case 2 of 2013, 22 March 2013 per Lunabek CJ at 8. In *Natapei* at 11 the Chief Justice said that, in the context of that case, Article 43 was part of “the backbone” of the Parliamentary system of government regime of checks and balance of powers established in the Constitution between the Government [Executive] and Parliament. That description is equally suitable to the structure of the Executive arm of government, including those who may exercise those executive functions.
46. The decision in *Vohor v. Attorney General* [2004] VUCA 22 also concerned a proposed amendment to the Constitution. It concerned the Constitution (Fourth Amendment) Act No. 1 of 2004. That Act included provisions that, in effect, required an elected Member of Parliament to vacate his or her seat if that member changed political parties during the term of the Parliament. Of immediate relevance is that it also amended Article 40 (2) of the Constitution by providing for the number of Ministers not to exceed one third, rather than one quarter, of the members of Parliament. There was no national referendum to support that change.
47. The Chief Justice held that all aspects of the amending Act were, in the circumstances, invalid. On appeal, the Court of Appeal upheld that decision.
48. On that proposed amendment to Article 40 (2), the Court rejected an argument similar to that presented on behalf of the Speaker in this matter, that the amendment did not affect the fundamental status of the “parliamentary system”. To the contrary, the Court said in that case that it was clear that changing the ratio of Ministers to Members was “regarding the parliamentary system”, and so the amending Act required a national referendum before it could be valid.
49. As we have concluded, the Bill also affects the ratio of those Members who may exercise the executive functions of government, by a significant increase in them. We see no difference in principle between the reasoning in *Vohor* and our reasoning in this matter.
50. Counsel for the Speaker also referred to *Kalpokas v. Vohor* [1998] VUSC 55, concerning the validity of a range of contracts of employment entered into between the then Prime Minister and the named individuals. There were two relevant categories of contractors: Ministers of the Republic, and secondly political advisers. The contracts were not under the terms of those applicable to public servants.



51. It was held that the employment contracts with Ministers of the Government were not valid, as they contained terms inconsistent with the Constitutional provisions relating to Minister. The contracts with political appointees were valid.
52. That case does not support the argument of the Speaker. Clearly, it was decided on different facts. The invalidity of the contracts with Ministers was based on inconsistency with the Constitution. The position of political appointees is quite different. They are not Members of Parliament. They do not exercise Executive government functions.
53. For those reasons, the appeal is dismissed. The conclusion that the Bill should not be assented to by the President in the absence of a national referendum supporting it (as required by Article 86 of the Constitution) is correct.
54. There is no order as to costs of the appeal.

Dated at Port Vila this 19th day of July 2019.

BY THE COURT


.....
Justice John Mansfield.

