

BETWEEN: Speaker of Parliament of the Republic of
Vanuatu
Appellant

AND: Bob Loughman Weibur, Raso Johnny
Koanapo, Simil Johnson, Wesley Rasu,
Esmon Sai, James Bule, Marc Ati, Xavier
Harry, John Neil Supo, Jay Ngwele, Gracia
Chadrack, Marc Muelsul, Blasie Sumtoh,
Justin Ngwele, Silas Melve Bule, John Still
Tariqwetu, Ulrich Sumtoh, Meltek Sato Kilman
Livtuvanu, Lulu Sakias, Joshua Leonard
Pikioune, Jack Wona, Samuel Andrew
Kalpoileb and Samson Samsen
First Respondents

AND: Republic of Vanuatu
Second Respondent

Before: Hon. Chief Justice V. Lunabek
Hon. Justice Sir B. Robertson
Hon. Justice J. Mansfield
Hon. Justice O. Saksak
Hon. Justice D. Aru
Hon. Justice V.M. Trief

In Attendance: Mr G.M. Blake and Mrs E. Blake for the Appellant
Mr J. Ngwele and Mr A.E. Bal for the First Respondents
Mr A.K. Loughman and Mr S. Aron for the Second Respondent

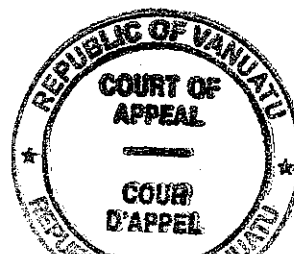
Date of Hearing: 31 August 2023

Date of Decision: 4 September 2023

JUDGMENT OF THE COURT

A. Introduction

1. This is an appeal from the Supreme Court on a Constitutional case. It raises a short but important issue about the meaning of Article 43(2) of the Constitution, namely the meaning of the expression 'absolute majority of the members of Parliament'.
2. Article 43 of the Constitution provides:



43. (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.*
3. The circumstances in which the issue arises are agreed.
4. The first respondents are all elected members of Parliament, following the last general election. There were 52 members elected, in accordance with Article 17 of the Constitution, and the Presidential Order 4 of 2002, under the *Representation of the People Act* [CAP. 146], prescribing that there are 52 seats to be filled in each general election. The Speaker of the Parliament is of course also a member of the Parliament.
5. Article 17 provides:
17. (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) *Subject to such conditions or restrictions as may be prescribed by Parliament every citizen of Vanuatu who is at least 25 years of age shall be eligible to stand for election to Parliament.*
6. As is apparent, it does not set out the number of members or seats or constituencies; that is a step taken from time to time by the Electoral Commission under the enactment referred to.
7. Following the election, one of the elected members had his seat vacated and his election was declared void by the Supreme Court: *Vinbel v Asang* [2023] VUSC 38; Election Petition Case No. 3048 of 2022 (3 May 2023). There is a by-election currently set for 7 September 2023 to elect a replacement member. In the meantime, there are, and have been, only 51 elected members of Parliament.
8. Following a request to the Speaker pursuant to Article 21(2) of the Constitution to convene Parliament to entertain a motion of no confidence in the Prime Minister and seeking the removal of the Prime Minister under Article 43(2), Parliament convened on 10 August 2023, and adjourned to 16 August 2023. On that date there were 26 votes in favour of the motion.
9. The issue arises whether the 'absolute majority of the members of Parliament' in Article 43(2) required there to be 26 votes to support the motion (the present first respondents).



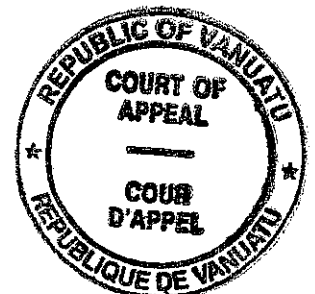
There were 23 votes against the motion, one abstention, and the Speaker did not vote. That accounts for the 51 members referred to.

10. The Speaker ruled that the motion was lost because it was not supported by an absolute majority of the members of Parliament. He took the view that, as the election had been for 52 members, an absolute majority required 27 votes (half of 52 plus one). The first respondents took the view that, as there were only 51 elected members at the time, an absolute majority was 26, and that 52 was greater than the number of elected members at the time.
11. The first respondents' Constitutional application to the Supreme Court was successful. The primary judge accepted the contention of the first respondents by judgment given on 25 August 2023. Consequently, he determined that the Constitutional rights of the first respondents had been infringed by an incorrect ruling of the Speaker, and that the vote of no confidence against the Prime Minister had been passed in accordance with Article 43(2) of the Constitution. He also ordered that Parliament be 'convened forthwith' to elect a new Prime Minister in accordance with the prescribed process under the Constitution.

B. Consideration

12. The Court received considerable assistance from the detailed submissions of counsel for the parties.
13. The Court is mindful that it is necessary to respect the Constitutional separation of the functions and powers of the Parliament, the Executive and the Judiciary. In this instance, it is a shared ground that the review of the ruling of the Speaker required an interpretation of Articles 17 and 43 of the Constitution, and that it was appropriate for the Court to undertake that task.
14. The appellant relied on the decision of this Court in *Kilman v Speaker of Parliament of the Republic of Vanuatu* [2011] VUCA 15; CAC No. 09 of 2011 (13 May 2011) (*Kilman*) as setting out appropriate principles for the proper construction of the Constitution. In particular reference was made to the passages at [10] and [11] of *Kilman* in the following terms:
 10. ... the Constitution is to be construed *sui generis* and not as if it was an act of Parliament. This is well explained by the Privy Council in **The Minister of Home Affairs v Fisher** (1980) AC319 at 329 where it is stated that the approach required for the construction of a constitution on the Westminster model (which the Constitution of the Republic of Vanuatu clearly is) is not to treat it as if it was an act of Parliament but,

“... as “*sui generis*” calling for principles of interpretation of its own suitable to its character without necessary acceptance of all presumptions that are relevant to legislation of private law”.



11. ... In such an exercise, regard must be had to the Constitution as a whole and to ensure that it is a clear, workable and practicable instrument of State. We need do no more than reiterate what has been stated by this Court on previous occasions and in particular as encapsulated by this Court in **Tari v Natapei** [2001] VUCA 18; Civil Case No. 11 of 2001 (1 November 2001):

“... Where there is room for debate, or it is possible that ambiguity exists, assistance may be gained from a consideration of the way in which Parliaments in other places have operated in the past or operate now. But any of that is in all circumstances and at all times subject to the clear and unambiguous words of the Constitution which is the Supreme Law.”

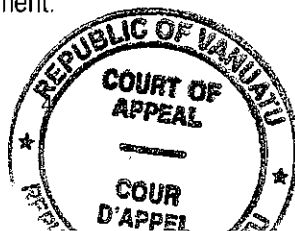
15. We also note the perceptive comments of the Chief Justice in that case at first instance: *Kilman v Speaker of Parliament of the Republic of Vanuatu* [2011] VUSC 35; Constitutional Case No. 02 of 2011 (30 April 2011) at [14] and [15] where his Lordship said:

14. *Before I consider the arguments and submissions of counsel of the respective parties, I wish to emphasize that this Court in considering those is not interested in or moved by the positions, personalities, or politics (if any) involved in the circumstances that gave rise to this case. This Court is also aware of the Constitutional separation of the various functions and powers of the State between the Legislature, Executive and Judiciary which concept has been jealously guarded and maintained over many years. It is a role of the Court to ensure that an appropriate separation of powers is maintained and this at all times.*

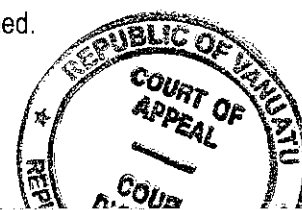
15. *It is not the Court's intention in deciding this matter to interfere with the sovereignty or independence of Parliament in the conduct of its internal affairs as Parliament is entitled to act pursuant to the Constitution; nor does the Court presume to judge the desirability or efficacy of the established parliamentary “practices and procedures” that form an integral part of that conduct.*

16. Beyond those matters of principle, we do not consider that the Court of Appeal in *Kilman* is of particular significance in the resolution of the present issue. In that case, also concerning the expression ‘absolute majority of the members of Parliament’, there were clearly 52 elected members of Parliament, without there being any complexity by a vacancy in any seat, so the application of the expression to the facts was straightforward. The present issue did not have to be considered. We respectfully agree with the primary judge on that question.

17. In the course of submissions, it was accepted by counsel that Article 43(2) required specific attention to that expression in the Constitution generally. The answer does not lie in treating that particular Article independently of other provisions in the Constitution. Principally, the focus then moved to Article 17, also set out above. It is in that chapter of the Constitution headed Parliament.



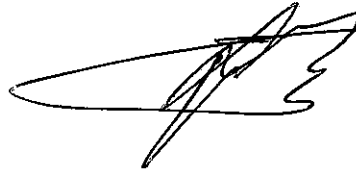
18. We also agree with the primary judge that the words 'members of Parliament' in Article 43(2) refer to the currently elected members of Parliament, that is, 51 persons by reason of the vacancy, rather than 52 persons including the vacancy. The fact that Article 17(1) commences with the words: "*Parliament shall consist of members elected on the basis of universal franchise...*" does not routinely mean that the elected members of parliament at any one time are necessarily to number 52 (or such other number as may be prescribed by Presidential Order under the *Representation of the People Act*). It is inevitable that there will be periods when the number is less than that number, whether through death or unfitness for office on grounds of health or from disqualification or ineligibility of the candidate elected or from resignations. In such events, the number of elected members of Parliament will in fact be less than 52. There will be a by-election to return the number of elected members to 52. While Article 17 contemplates that the number as fixed by the process of election will routinely be (at present) 52, it does not operate on the presumption that at all times and in all circumstances, there must be 52 elected members of Parliament.
19. The use of the word 'absolute' in Article 43(2) is not a word which conveys that requirement. It is descriptive of the voting requirement to support any motion of no confidence in the Prime Minister. It is to be applied against the number of the members of Parliament. Where, as here, at the time there were 51 members of Parliament, the absolute majority was reached by 26 votes, as there were 51 eligible votes and 26 is in excess of the absolute majority. It is not a majority of those present, or of those voting (for example, compare Article 21).
20. The requirement for an 'absolute majority' is also used in the Constitution in Article 28(2), Article 70(6) and Schedule 2(1) (Article 41).
21. Article 28(2) identifies the circumstances in which Parliament may be dissolved. Article 70(6) refers to the circumstances in which a state of emergency may be terminated. Schedule 2(1) refers to the election of the Prime Minister.
22. There is nothing in those provisions which suggests that the measure of an 'absolute majority' should be other than all the elected members of Parliament. In each instance, as in Article 43(2) there is good sense in applying the measure of being an absolute majority to the number of elected members of Parliament, rather than to the potential number of elected members of Parliament. It is an expression to ensure that the proposed motion should have the support of a majority of all the elected members of Parliament, rather than some lesser number of members of Parliament.
23. There are other expressions in other Articles of the Constitution which would accommodate a greater or lesser number of elected members' support, recognising that there will be many circumstances when not all the elected members of Parliament will be present: see for example Articles 21(3), 21(4) to constitute a quorum, Article 70(1) to declare a state of emergency, Article 85 concerning a bill to amend the Constitution itself, and Article 93. They indicate that the Constitution has carefully addressed a range of circumstances in which the will of Parliament should be determined.



24. In the light of that analysis, we see no reason to depart from the conclusion we have reached. Indeed, it fortifies that conclusion, as the focus in all respects is directed to the nature of the decision to be made and the extent to which the will of the Parliament may be expressed by the elected members of Parliament. It does not at any point suggest that the will of the Parliament should not be expressed by the elected members of Parliament because their decision should be measured against a state of affairs which does not at the time exist (the potential number of elected members of Parliament).
25. We do not consider that Article 40(2) prescribing a formula for determining the maximum number of Ministers by reference to the number of elected members of Parliament supports the contention of the Speaker. If the number of elected members of Parliament reduces by a vacancy, as occurred here, that may have an effect on the available number of Ministers. But it should not be thought that the maximum number of Ministers should not be fixed by reference to the number of elected members of Parliament, or that it is unrealistic to adjust that number by reference to the number of elected members of Parliament from time to time. To the contrary, there appears to be considerable sense in restricting the number of Ministers by reference to the number of elected members of Parliament, rather than to some other measure (such as the potential number of elected members of Parliament).
26. The fact that the formula is prescribed seems to support the conclusion that we have reached, as otherwise the number of Ministers might be a measurably greater number than the ratio which the Constitution contemplates.
27. Accordingly, we have concluded that there was no error in the decision of the primary judge. The appeal is dismissed. The orders of the primary judge stand.
28. As there was no cross appeal on the order for costs made by the primary judge, nor any submissions on the topic, we follow the course adopted by the primary judge. There will be no order for costs of the appeal in favour of the first respondents. The second respondent participated to the extent of adopting a neutral position on the issue, but otherwise being of assistance to the Court. There will also be no costs of the appeal in favour of the second respondent.

DATED at Port Vila, this 4th day of September 2023

BY THE COURT



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Hon. Chief Justice Vincent Lunabek

