

BETWEEN: Gracia Shadrack

Applicant

AND: Seoule Simeon

First Respondent

AND: Republic of Vanuatu

Second Respondent

**Date of Trial :** 30<sup>th</sup> November, 1<sup>st</sup> and 6<sup>th</sup> December 2019  
**Date of Oral Decision:** 6<sup>th</sup> December 2019 @ 3:30pm  
**Date of Written Decision** 12<sup>th</sup> December 2019  
**Before:** Justice Oliver.A.Saksak  
**In Attendance:** Robin Tom Kapapa for the Claimant  
Nigel Morrison for the First Respondent  
Frederick Gilu and Hardison Tabi for Second Respondent and as  
Friend of the Court

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## JUDGMENT

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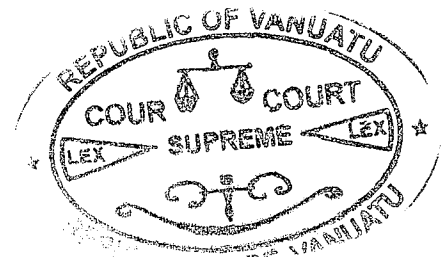
### Introduction and Background

1. The Claimant filed an urgent constitutional application pursuant to Rule 2.2, 2.3, and 2.4 of the Constitutional Applications Rules and under Articles 6, 53(1) and (2) and 54 of the Vanuatu's Constitution, on 29<sup>th</sup> November 2019 at 2:45pm.
2. Article 6 states:-

***"6. Enforcement of fundamental rights***

*(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 compensation, as it considers appropriate to enforce the right."*



Article 53 states:

**“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”*

Article 54 states:

**“54. Election disputes**

*The jurisdiction to hear and determine any question as to whether a person has been validly elected as a member of Parliament, the National Council of Chiefs, and a Local Government Council or whether he has vacated his seat or has become disqualified to hold it shall vest in the Supreme Court.”*

3. The Claimant challenged the declaration made by the Speaker of Parliament (First Respondent) on Wednesday 27<sup>th</sup> November 2019 that pursuant to section 2 (d) of the Members of Parliament (Vacation of Seats) [ CAP 174] that the Claimant's seat in Parliament had been vacated because he had absented himself from three (3) consecutive sittings of Parliament without first obtaining permission to be or to remain absent.
4. Section 2 of the Members of Parliament ( Vacation of Seats) Act provides for vacation of seats of members of Parliament as follows-

*“ A member of Parliament shall vacate his seat therein-*

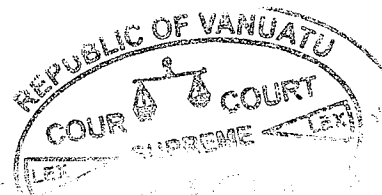
*(d) if he is absent from three consecutive sittings of Parliament without having obtained from the Speaker, or in his absence, the Deputy Speaker the permission to be or to remain absent....”*

5. The claimant alleged that the Speaker's declaration was made in breach and violation of his constitutional rights under Articles 5(1) (d), 17 and 22 of the Constitution. Article 5 states-

**5. Fundamental rights and freedoms of the individual**

*(1) The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health –*

- (a).....;
- (b) .....
- (c) .....
- (d) *protection of the law;*



Article 17 states-

**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) 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.*

Article 22 states-

**22. Speaker and Deputy Speakers**

*(1) At its first sitting after any general election Parliament shall elect a Speaker and one or more Deputy Speakers.*

*(2) The Speaker shall preside at sittings of Parliament and shall be responsible for maintaining order.*

*(3) The functions of Speaker may be exercised by a Deputy Speaker.*

6. The claimant sought orders/declarations that-
- a) The decision of the Speaker made on 27<sup>th</sup> November 2019 was unconstitutional and of no legal effect.
  - b) The decision of the Speaker was invalid, void and of no legal effect.
  - c) The decision made violated and infringed the claimant's rights in Articles 5 (1)(d), 17 (1) and 22 of the Constitution.
  - d) In the alternative, that the Speaker had failed to comply with the laws that regulate the vacation of seats of members of Parliament.
  - e) Costs be paid to the claimant.

**Facts**

7. The claimant is an elected Member of Parliament for Malekula constituency since 2016. He holds the position of the Second Deputy Speaker.
8. On 14<sup>th</sup> November 2019 Parliament was called for its Extra-Ordinary session scheduled on 25<sup>th</sup> November 2019. The first sitting of Parliament commenced at 8:30am on Monday 25<sup>th</sup> November. When the Roll was called, the Claimant was absent. Parliament was however requested for time to study the several Bills before presentation for debates. Parliament adjourned to Tuesday 26<sup>th</sup> November.
9. On Tuesday 26<sup>th</sup> November 2019 Parliament started sitting at 8:30am. When the Roll was called, the claimant was absent. Parliament continued until 5:00pm when it adjourned. There was a



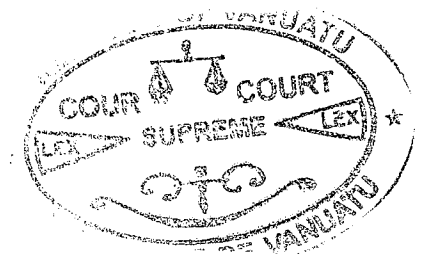
number of Bills to be debated therefore Parliament suspended its Standing Orders and allowed another sitting outside of the sitting times prescribed in Standing Order 16.

10. Parliament resumed at 5:15pm on Tuesday 26<sup>th</sup> November 2019 for its third sitting. It continued until 8:00pm. The claimant was absent also from this sitting.
11. On Wednesday 27<sup>th</sup> November 2019 at 10:00am the Speaker of Parliament received the claimant's letter attaching a medical certificate obtained on 25<sup>th</sup> November giving three days sick leave to the claimant due to body pains and flu. The Speaker was informed over the telephone about this letter and consulted the Clerk of Parliament, Mr Raymond Manuake.
12. The Clerk of Parliament advised the Speaker about section 2 (d) of the Member of Parliament ( Vacation of Seats) Act and upon checking the Rolls of Parliament, confirming the claimant had absented himself from 3 consecutive sitting of Parliament.
13. The Speaker noted the letter by the Claimant was a notification and not a permission to be absent or to remain absent from a sittings of Parliament.
14. On Wednesday 27<sup>th</sup> November 2019 when Parliament resumed its fourth sitting a motion was made for the Speaker's decision that the Claimant's seat in Parliament had become vacant. Subsequently the Speaker declared the Claimant's seat vacant pursuant to section 2(d) of the Members of Parliament ( Vacation of Seats) Act.
15. The Claimant challenges that decision or declaration on the basis of his letter and medical certificate issued on 25<sup>th</sup> November 2019.

### The Evidence

16. The Claimant filed sworn statement on 29<sup>th</sup> November in support of his claim. He attached both the medical certificate and his letter to the Speaker. The certificate was issued by a Nurse Practitioner from Welu Dispensary situate at Centre point House, Port Vila. It states:

*“ Medical Certificate 25 M/39 years  
Re: MP Gratiem Shadrack  
Seen with G/Body Pain/Flu fever.  
And unfit to work for three (3) days  
From 25/11 to 27/11/019  
N/P (signed...)”*



17. The letter states-

" Monday 25<sup>th</sup> November 2019  
Hon. Seule SIMEON, MP  
Speaker of Parliament  
Parliament House  
Port Vila  
REPUBLIC OF VANUATU

Dear Hon. Speaker

Absent on Sick Leave (3 days)

This is to notify your high office that, I Honourable Gracia SHEDRACK, Second Deputy Speaker of Parliament was absent on Monday 25<sup>th</sup> November 2019 on Medical sick leave for 3 days ( 25-27 November 2019). In accordance with section 2(d) of the Member of Parliament ( vacation of seats) Act (CAP. 174). I hereby wish to notify your high office on my above absence.

Please find attached my sick leave

I thank you for understanding and cooperation to this above matter.

Yours faithfully,

Hon. Gracia SHEDRACK MP  
Second Deputy Speaker"

CC- Mr Raymond Kalpeau MANUAKE, Clerk of Parliament.  
Mr Albano Lolten, Parliamentary Finance Officer  
File."

18. In his evidence in chief the claimant identified and confirmed his medical report and his letter as quoted in the preceding paragraph.

19. He was cross- examined by Mr Morrison as follows-

**QUESTIONS**

You went to dispensary?

When, what time?

Doctor?

What did you have?

When did you prepare letters?

When was that?

It is dated 25<sup>th</sup> November?

**ANSWERS**

Yes

8-9:00am on Monday 25/11/019

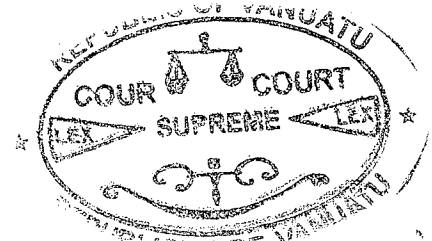
A qualified nurse

Pain in my muscles

Prepared at Secretary's Office in Parliament on

Tuesday 26<sup>th</sup> November

Yes , based on sick leave



You backdated it to Monday to make it consistent with certificate?	Yes
When did you receive sick note?	Monday 25 <sup>th</sup> November
So on Monday you have those 2 documents sick note and a letter?	Yes I put in sick leave on Monday
You say sick leave delivered on Monday, not letter but the note?	Yes
What did you do with the note?	I gave it to a family member to take it to Parliament.
Who did you give it to?	To Tony my tawian ( brother-in law)
What time?	9:00-10:00am
Did you see it again after that?	Yes
When did you see it again?	On Tuesday when we made the letter . Tuesday afternoon I went to sign it.
You had a copy of it?	No, I did not hold a copy
You made letter and attached a copy of the note?	Yes
Where did you get the copy from?	From Albano- original with him
What did you do with letter and the note?	I took a copy and attached it to letter I gave it to Stephanie to deliver.
Who is Stephanie? Other name?	Not known
She works in the Library?	Yes

20. Counsel read paragraph 5 of the Claimant's statements to him. Also read paragraph 5 and asked:

**QUESTION**

**ANSWER**

What does the letter mean?

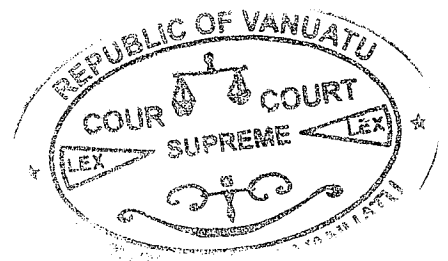
I mean my medical certificate

That is not true, is it?

I mean my medical certificate

Who was it delivered to?

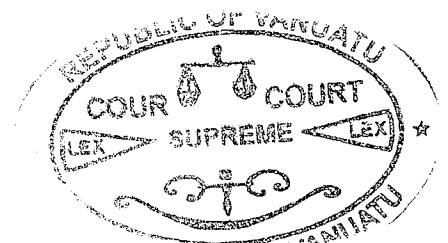
Albano



That is not to the Speaker?	Every office belongs to the Speaker
You don't know what happened after that when you gave it to Albano?	(shakes his head)
Refer to paragraph 5. You said something you did not know?	I mean the medical certificate
You delivered to Albano?	In my conscience that was an office of the Speaker.
You say you gave it to Albano who occupy one of the Speaker's offices?	Yes
Refer to paragraph 5- Delivery of medical certificate to Albano?	Yes
And envelope on Tuesday with letter backdated with medical note given to Stephanie?	Yes
Were they closed or open?	She stamped and sealed them
Have you seen statements of the respondents?	(Shakes head)
You seen statement of John Nalwang?	( Shakes head)
Do you know him?	Yes
Shown statement of John Nalwang with the envelope- is that the envelope?	Yes, Stephanie wrote on it.
John Nalwang, the Speaker and the Clerk say the envelope was delivered on Wednesday morning, what do you say?	That is what he said in his ruling.

21. In re-examination Mr Kapapa asked-

<b>QUESTION</b>	<b>ANSWER</b>
Who is Stephanie?	She is the Clerk's secretary, her office is beside my office.
Who receives letters?	Stephanie did.
Letter received on Tuesday?	Stephanie prepared the letter for me.



When was sick leave received? On Monday

Why did they pass it to Albano? Albano's Office is just by the reception.

22. Albano Loten gave evidence for the claimant. He identified and confirmed his sworn statement filed on 1<sup>st</sup> December 2019.

23. He was cross-examined by Mr Morrison as follows:-

**QUESTION**

**ANSWER**

Referred to paragraph 2 and read: Who delivered the sick note to you on 25 November?

Anthony Iauko, the councillor

Was it in an envelope or just loose?

Just handed to me loosely.

Where were you when he gave it to you?

In my office

You are the Finance Manager of Parliament?

Agree

As such who is your immediate superior?

Assistant Corporate and the Clerk

What happened to it ( the sick note) after that?

I put it in my folder- I took it that it was for the purpose of allowances.

Purpose was to pay allowances as should?

Yes

When you received the note on Monday was that your understanding of the note then?

Yes

What happened to it later?

The Police came and took it from me.

When was that when the police came to take it?

It was after the Speaker had made the declarations

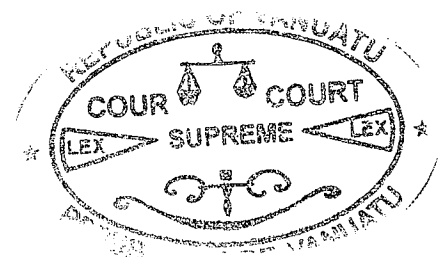
Did you take it out at anytime to deal with it?

It stayed in the folder only

MP Shadrack told the Court he made a copy of the note on Tuesday 26 November: Do you know anything about that?

I recall he came to take a copy on Tuesday or Wednesday.

24. Mr Kapapa did not re examine this witness.



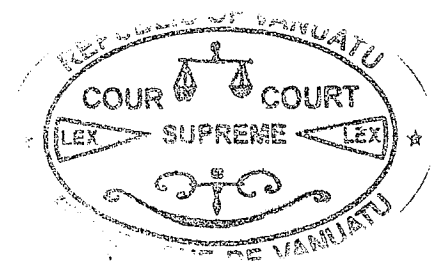


25. MP Ronald Warsal deposed to a sworn statement on 1<sup>st</sup> December 2019 and a further statement was filed on 6<sup>th</sup> December 2019 in support of the Claimant. Mr Warsal was not required for cross-examination. His statement of 1<sup>st</sup> December was relevant only to the practice in Parliament. His further sworn statement was objected to by Mr Morrison on 2 grounds, first that it is hearsay and secondly that it was filed outside of the time directed by the Court on Sunday 1<sup>st</sup> December 2019 with no opportunity to the defendants to respond.
26. I accepted Mr Morrison's submissions and disallowed the further sworn statement of Mr Warsal filed on 6<sup>th</sup> December to be part of the Claimant's evidence in support of his claim.
27. Georgie Carlo, Emile Kalanu and Jimmy Allan also filed sworn statements on Sunday 1<sup>st</sup> December 2019 after 3:00pm. They were not required for cross-examination by Mr Morrison.

### **First Defendant's Evidence**

28. The First Respondent gave oral evidence confirming his sworn statement filed on 1<sup>st</sup> December 2019. Mr Kapapa cross-examined him as follows:-

<b>"QUESTION</b>	<b>ANSWER</b>
Refer to paragraph 4, 25 <sup>th</sup> November 2019 was the first sitting of Parliament?	Yes
The only person not in Parliament was Albano?	Second Deputy Clerk Ephraim was not present, only one was present
You and your officers were in Parliament that day?	Yes
How long have you been in this position?	Since last Parliament in September ( not sure)
Stephanie is the Clerk's secretary? Her office on the left?	My office is situate towards Convention Centre, Albano's office facing towards the road.
Your received pressure from Government to do what you did?	No I did not say that, I asked him ( Claimant) how he came to my house lying he was a prosecutor. He gave me a document and left in a taxi.
MP Killion made decision and you made the declaration?	Yes, he is the Leader of Government Business
To remove Shedrack you gave him authority to do it?	No, I took decision after consultation with the Clerk. He advised me to follow the Act.



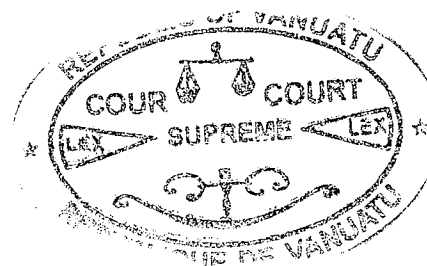
That Government pressed you is true?	No Shedrack said he was a prosecutor threatening to put me in jail if I did not turn up in Court.
Clerk said you discussed it at 10:00am – what do you say?	Yes, that is the time they advised me when they got the letter. That was outside the chamber.
Did you ring Shadrack to answer his letter?	NO, act requires me to give my permission.
You did not consult AG?	Clerk only advised me after 3 consecutive sittings had passed.
Why did you not give him an opportunity to answer?	The only person I need to address is the Leader of Government Business. I asked him what the next business was then he went off on the topic of vacation of seat.
Is it true Government whip introduced motion?	Yes
Is your decision biased?	No
You agree you did not give opportunity?	I followed the Act”

29. In re examination Mr Morrison asked-

<b>“QUESTION</b>	<b>ANSWER</b>
Do you know Stephanie Mahit?	Yes
Where she works?	Library
Is she part of your team?	Separate”

30. John Nalwang the First Political Advisor to the Speaker gave evidence first confirming his sworn statement filed on 5 December 2019. Then he was cross-examined by Mr Kapapa as follows:-

<b>“QUESTION</b>	<b>ANSWER</b>
When did you start with the Speaker?	September
Do you know most of the officers?	No
Do you know what Mr Jimmy said that one of the MPs would lose his seat?	Yes this was posted it was done on Monday or Tuesday.
That means the Speaker had known this earlier?	No, only on Wednesday
Jimmy said on 27 <sup>th</sup> November 2019 he told	I don't remember



you MP Shadrack would be sacked in the afternoon?

So you did not know what was happening?

I never knew until we received letter on 27<sup>th</sup> November.

So letter is not true?

Can't remember"

31. There was no re-examination by Mr Morrison.

### **Submissions**

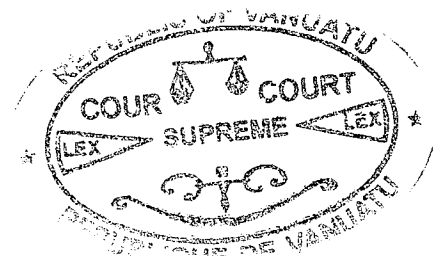
32. The Attorney General representing the Republic as Second Respondent filed written submissions as Friend of the Court at 9:00am on 6 December 2019 before the hearing commenced. Mr Gilu handed up –
- a) The Members of Parliament ( Vacation of Seats) Act CAP. 174
  - b) Parliament ( Administration) Act CAP.306
  - c) Boulekone.v. Timakata [ 1986] VLR 13,
  - d) Carlot .v. AG ( No. 2 )]1988] VLR 21, and
  - e) Vatu v Muele [ 2007] VUCA 4

The purpose of these submissions and case laws and legislations was to assist the Court make its determination as to the issues raised.

33. Mr Kapapa filed closing submissions at 1:30pm on 6<sup>th</sup> December 2019 after an opportunity was given after the hearing.
34. Mr Morrison handed up a synopsis of submissions for the First Respondent prior to hearing oral submissions at 2:00pm on 6 December 2019.

### **Oral Decision**

35. After considering those submissions I delivered an oral decision at 3:30pm on 6 December dismissing the Claimant's constitutional application with costs in favour only of the First Respondent. I now publish the reasons in the following manner-



## Discussion

36. First , in my oral decision I posed the following questions with the answers-

- “(i) Did the Claimant obtain from the Speaker to be absent from Parliament sittings on Monday 25, 26, and 27 November 2019 as required by section 2 (d) of the Act? The answer is “NO”*
- “(ii) Did he notify the Speaker of Parliament of his absence? The answer is No, despite his best efforts, the medical certificate was delivered to the wrong person instead of to the Speaker.*
- “(iii) Was he absent from 3 consecutive sittings? The answer is yes, on Monday, Tuesday morning and afternoon, and the night sittings.*
- “(iv) Did the Speaker lawfully declare the Claimant’s seat vacant? The answer is yes, pursuant to section 2(d) of the Act.”*

## My findings

- “(a) No constitutional rights of the claimant as alleged had been infringed or breached by the Speaker’s action.*
- “(b) As such the claimant’s constitutional application failed and was dismissed.*
- “(c) The claimant will pay the standard costs of the speaker as agreed or taxed.*
- “(d) No cost order in favour of the second respondent.”*

37. In relation to the first question, clearly from the evidence the claimant never sought permission from the Speaker to be absent from the sittings of 25, 26, and 27 November 2019. Section 2 (d) of the Act makes it mandatory for the claimant to seek such permission. He clearly failed to do so.

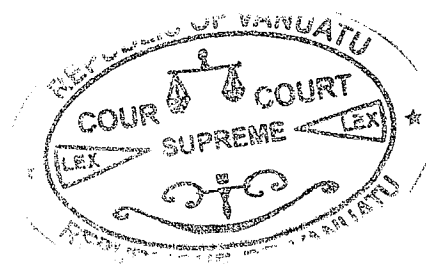
38. The second question was whether the claimant notified the Speaker?

The letter written on Tuesday 26 November and backdated to 25 November was indeed a notification letter. It may have been made following the practice now being followed but it fell short of being a permission as the legal prerequisite under section 2 (d) of the Act. The case of Vatu v Muele [2007] VUCA 4 lends support to this view.

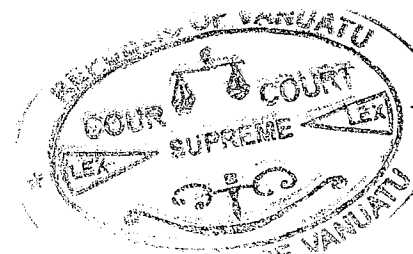
39. Mr Kapapa raised 3 issues in his written submissions. The first was whether the letter by the claimant to the Speaker amounted to sufficient notice? The answer to that is that although by practice it may be sufficient, in law it falls short of the requirement of section 2 (d) of the Act. In my considered view it would have been sufficient notice if the claimant had said in his paragraph 2 as follows:-

*“On the basis of the medical sick leave certified for 3 days, and in accordance with section 2 (d) of the Members of Parliament ( Vacation of Seats) Act [ CAP 174] , I hereby notify you of my absence on Monday 25<sup>th</sup> November and seek your permission to be absent from the sittings of 26 and 27 November 2019.*

*Please let me know of your permission as soon as possible by calling me on telephone no.....”*

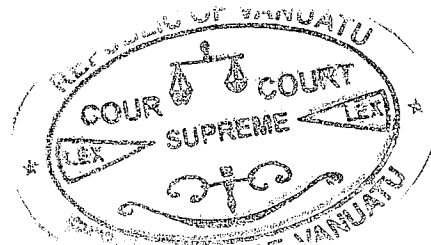


40. The argument by Counsel that the letter of 26 November 2019 backdated to 25 November was sufficient notice due to the current practice may sound fine but section 2 (d) of the Act does not require a notice, it requires a permission. Therefore the current practice ought to be formalised to be in accord with the legal requirement.
41. I found the claimant was dishonest when in evidence he told the Court he and Stephanie made the letter on Tuesday 26<sup>th</sup> but he produced a letter that did not bear the date on which it was made. It appeared to me he was not prepared to tell the truth until Mr Morrison asked him specifically about the date 25 November, when he said it was backdated to reflect the date of the medical certificate.
42. And for the letter to amount to sufficient notice according to practice, it should have been served on the Speaker straight away and directly on 26 November 2019 when it was written. The evidence is that the claimant left the letter with Stephanie to deliver with no specific instructions as to when she should do so. Stephanie never gave evidence orally or by sworn statement to support or confirm the claimant's story.
43. More importantly the medial sick leave of 3 days. The claimant was the Second Deputy Speaker. Could it be that as such he did not think it was necessary to serve his medical certificate on the Speaker that is why he instructed his brother in law to deliver it only to the Finance Manager? It was not clear from the evidence but assuming that was his case, then in my view he is awfully under a misapprehension of the requirement of section 2(d) of the Act. That might have been a possibility had the Speaker been absent on 25, 26 or 27 November 2019. But it is common knowledge the Speaker was present at all times on those dates.
44. Further it seemed strange that on Monday 25 November the Claimant was seen sick and given 3 days sick leave, but a day later on Tuesday 26 November he returned to Parliament Offices to seek a copy of his medical certificate from Mr Albano Lolten and to prepare the letter he backdated to Monday 25 November. So was he really very sick so as to rely on the principles in the Boulekone Case? That was a case of total incapacity, so it is distinguished from the Claimant's case. He was well enough to be within the Parliament precincts to attend sittings. Instead he prepared a letter attaching a copy of his medical certificate and then entrusted its delivery to a librarian when he himself as Second Deputy Speaker could have used his privilege as such to approach the Speaker in person and notify him directly and seek his permission orally to be absent from the sittings of 26 and 27 November based on the medical certificate. But he left the delivery to Stephanie with no instructions as to when and to whom it should have been delivered. That is gross neglect of duty and responsibility by the claimant and he cannot shift the blame to the Speaker or to any of his other officers. He himself must bear the blame and its consequences.
45. From the evidence of John Nalwang Stephanie Mahit only delivered the letter to him on Wednesday 27<sup>th</sup> November and at about 10:00am there was a consultation meeting with the Speaker and the Clerk. Both the Speaker and Clerk confirmed this evidence. Without Stephanie's



evidence in support of the Claimant's evidence, his evidence lacks credibility and cannot be believed.

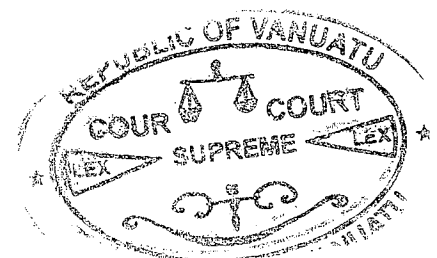
46. For those reasons the letter of 26 November with a medical certificate attached was not sufficient notice as it was not served or delivered directly on the Speaker, and even if it was delivered on 27<sup>th</sup> November 2019, the claimant had already absented himself from 3 consecutive sittings without the requisite permission pursuant to section 2 (d) of the Act.
47. Mr Kapapa contradicted himself in his submissions in that while at paragraph 23 he conceded there is no dispute the claimant was absent so the first pre requisite of section 2 (d) of the Act was met, at the end of paragraph 25 he submits the claimant was not absent from 3 consecutive sittings. Those submissions are inconsistent.
48. From the evidence the Rolls indicated clearly the Claimant was absent from 3 consecutive sittings of Parliament, therefore the submission at the end of paragraph 25 is untenable and is rejected.
49. The medical certificate issued and relied upon by the claimant remained questionable in the circumstances where (a) the date at the top is incomplete where only the number " 25" is stated, (b) the claimant said in evidence he went to Parliament on Tuesday 26 November to retrieve a copy of his medical certificate from Albano Loten and to prepare his letter with Stephanie and (c) without the evidence of the nurse who issued did not confirm that the claimant attended in fact and was examined and confirmed sick. Without that evidence which was the obligation of the claimant, the cloud of doubt remains as to its credibility and its truth.
50. Next there was the letter of 26 November backdated to 25 November. This document too is questionable and remains in a cloud of doubt for the following circumstances, (a) that It was prepared by Stephanie Mahit in the absence of her evidence confirming it. (b) it was copied to the Clerk and Albano Loten when Mr Albano did not mention it in his evidence that he ever saw his copy of the letter and (c) why was the letter not delivered immediately on Tuesday 26 November after it was prepared but its delivery was delayed until Wednesday 27 November. That was a day later and could only have been reasonable explanation for non-delivery if the Speaker's office was situated in another building away from the Parliament complex itself. But the evidence is that the claimants' office, the Speakers, Clerk's and Finance Manager's offices are within the same complex and some next door to each other. Yet despite all that, it took a day to deliver the letter and then it was delivered not to the Speaker himself as it should have been proper and legal under section 2(d), but rather on his First Political Advisor, Mr Nalwang.
51. And then there was Albano Loten's evidence where he explained the purpose of why the sick certificate was delivered. It was in his words for the purposes of claiming for the sitting allowances for the three days sick leave and not for seeking permission to be absent. That explains why Mr



Lolten kept the certificate tacked away in his folder until it was retrieved by the claimant on 26 November.

52. Then the second issue raised by Mr Kapapa was whether the Speaker's lack of objection or silence in response to the letter amounted to his acceptance and permission? Mr Kapapa placed reliance on the case of Korman.v. Natapei CAC 29 of 2009.
53. From the evidence of the Speaker, the Clerk and John Nalwang, the silence is due to the fact that the letter was not delivered and opened and read until 10:00am on Wednesday 27 November. Second, when it was opened and read, the Speaker's evidence in paragraph 12 of his sworn statement which was unchallenged, was that the letter was written in the past tense. Therefore it was explaining the claimant's absence from Parliament sittings and not a letter seeking his permission to be absent from 3 consecutive sittings. And thirdly, the letter was received a day after the claimant had already absented himself from 3 consecutive sittings. So why should the Speaker have responded under those circumstances? Why should the Speaker have given the claimant the opportunity to be heard under the circumstances where (a) the Speaker was duty bound to apply section 2 (d) of the Act and (b) the claimant had failed or omitted to act quickly and reasonably in the circumstances he was faced with at the time.
54. In the case of Natapei v Korman and others [2009] VUSC 147 ( CC 8/2009) the facts and circumstances were different from the claimant's case in that the Speaker was orally informed by the Claimant that he would be absent from Parliament sitting due to his official overseas trip. This was acknowledged and an announcement was made in Parliament of this absence resulting in some government business being postponed until his return. The Court held that to be sufficient notice. The Speaker was aware and informed. He did not object. The Court held that lack of objection equals permission.
55. In the claimant's case the Speaker was not informed and was not aware of the claimant's sickness or certificate until 27 November 2019. That was a day after the claimant had absented himself from 3 consecutive sittings of Parliament.
56. The Court of Appeal in 1988 in the case of Carlot and others v AG ( No. 2) 1988 VUCA 5 set out clearly the purpose and rationale for section 2(d) of the Act when it said:

*" the Constitution intends that the Republic shall be governed by Parliament. Parliament can only function if members attend. There is nothing unconstitutional in a provision designed to ensure that Parliament does function and that a person elected to parliament does what he is elected to do attend Parliament. If he fails to do so, it is reasonable that he should be replaced by somebody who will. There is no procedure laid down in the Constitution for that, so parliament must provide it. It did so in the 1983 Act. The power to unseat in proper circumstances is constitutional. Each individual ground for that may be examined to see whether it is unconstitutional.*



Section 2 (d) is designed to ensure attendance by members. That purpose complies with the constitution because its object is to make parliament effective. Its terms may appear harsh, but if the principle is valid, it is not the business of the Court to interfere with the detail. In our view section 2 (d) complies with the Constitution and is valid."

It affirmed in Re: Boulekone ( 90 of 1986) that in these circumstances vacation of the seat occurs automatically by operation of law. Once a member of Parliament has been absent from three consecutive sittings without consent, no further procedural step is required. The seat is vacant."  
( my underlining for emphasis).

57. The learned Chief Justice considered these trite principles in Natapei v Korman CC 8 of 2009 and said this:-

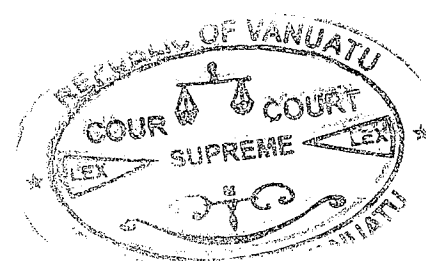
"It is important to understand that in entertaining a Constitutional Application and in granting the relief sought in such Application, the Supreme Court could not be interfering in any matter the exclusive province of Parliament but would be interfering and upholding the Constitution. The interpretation of the Constitution and the granting of relief is self-evidently not a function of Parliament but the responsibilities entrusted to the Court by the people of the Republic of Vanuatu through the Constitution. As such it is not for the Court to interfere in the internal arrangements of the Parliament but members of Parliament can never act so as to deny to others ( including the Speaker or other members of Parliament) rights which are provided under the Constitution.

So where there is no breach of the Constitution the Courts have no power to inquire into the validity of the legislative Assembly's internal proceedings or the actions of the Speaker in these proceedings...."

(Underlining for emphasis)

58. These principles were applied when after inquiring into the facts and evidence, I found there were no breaches of the claimant's constitutional rights as alleged, and therefore I decided orally to dismiss the application of the claimant on 6 December 2019.

59. Therefore to answer the second issue raised by Mr Kapapa in the circumstances of the claimant's case, the Speaker had no obligation under section 2(d) of the Act to take any other procedural step, for instance to respond to the letter or to give him the opportunity to be heard. The Speaker was satisfied the claimant had absented himself for three consecutive sittings of Parliament without first obtaining his permission. The pronouncement or declaration was made on the floor of Parliament was in accordance with section 2(d) of the Act. There was therefore no breach of any of the Claimant's rights to natural justice. Therefore the Court cannot interfere with the decision or declaration of the Speaker. The issue is answered in the negative.





60. In Korman v Natapei [ 2010] VUCA 14 the Court of Appeal having regard of the form in which section 2(d) of the Act is drafted and mindful of the earlier dicta of the Court as to its mandatory effect and operation and having regard to the unconditional protection afforded to an unseated Member of Parliament by Article 54 of the Constitution, the Court said:

*“ We do not construe section 2(d) as requiring the observance of the principles or rules of natural justice in every circumstance in which a Member’s seat in Parliament is vacated.”*

One such clear circumstance is where, as in this case, there has been no breach of rights as alleged. The right of the claimant in Article 54 of the Constitution, I agree with Mr Gilu, must be read in conjunction with Article 5(1)(d) and (e). As such the election of a person to parliament to occupy a seat therein is but a privilege. It is not an absolute right but a qualified right with its obligations and responsibilities. If a Member of Parliament fails his duties and responsibilities expected of him and by not complying with some legal obligations required of them, then they stand risk and possibility of being unseated by the Speaker of Parliament by operation of section 2(d) of the Members of Parliament ( Vacation of Seats Act).

That is precisely what occurred in the Claimant’s case.

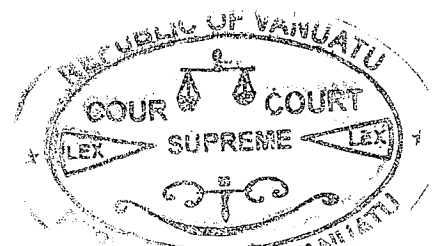
61. The third issue raised was whether the claimant’s rights under Articles 5(1) (d), 17(1) and 22 of the Constitution were infringed?

In my oral decision I found no such breaches. As such it is trite law the Court cannot interfere with the decision of the Speaker to unseat the claimant on 27 November 2019. This issue is answered also in the negative.

62. Finally Mr Kapapa appeared to be making some issue out of the evidence by sworn statements of Jimmy Allan, Georgie Calo and Emile Kalanu, that the Speaker was politically pressured by the Government to make his decision.

63. Regrettably this is not a matter that the Court should be at all concerned about. Whatever the political rightness or wrongness or overtones or connotations politics may add to the case that is not a matter the Court should concern itself with. The Chief Justice in Natapei.v. Korman [2009] VUSC 147 stated the importance of repeating this role of the Court for ongoing and continuing education of society in this nation building process by quoting and adopting the approach taken by Megarry VC in John v Rees ( 1962) 2 All ER 363 where he said at page 367:-

*“ I must make explicit what all lawyers will recognise as implicit, but which those who are not lawyers may not fully appreciate. I am not in the least concerned in this case with the rightness or wrongness or the desirability or undesirability of any political or other unit. My concern is merely to see that those concerned in these proceedings obtain justice according to law, irrespective of politics.”*




64. I too adopt this same approach so that I must ignore the evidence by sworn statements of Jimmy Allan, Georgio Calo and Emile Kalanu as irrelevant and inadmissible on the basis also that they are hearsay evidence.

65. For all the reasons given the Claimant's constitutional application failed and was accordingly dismissed on 6<sup>th</sup> December 2019, with costs.

**DATED and ISSUED at Luganville this 12<sup>th</sup> day of December 2019.**

**BY THE COURT**

  
**Oliver.A.Saksak**  
Judge

