

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

Election Petition
Case No. 20/824 SC/EP

IN THE MATTER OF: THE REPRESENTATION OF THE PEOPLE ACT
1983 AND ITS AMENDMENTS

AND: IN THE MATTER OF NATIONAL GENERAL
ELECTION FOR PARLIAMENT FOR PORT VILA
CONSTITUENCY HELD ON 19TH OF MARCH
2020

BETWEEN: Stephen Dorrick Felix
Petitioner

AND: Principal Electoral Officer
First Respondent

AND: Regenvanu Ralph
Second Respondent

AND: Kalsakau Ishmael
Third Respondent

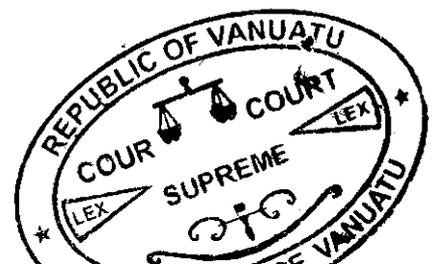
AND: Harry Anthony
Fourth Respondent

AND: Natapei Kenneth
Fifth Respondent

AND: Sumptoh Ulrich
Sixth Respondent

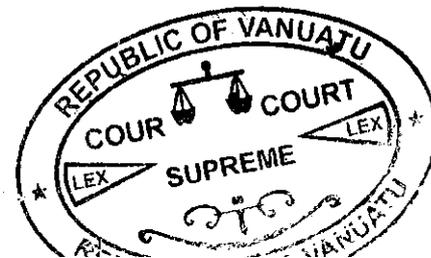
Date of Hearing: 22nd June 2020
Date of Judgment: 25th June 2020
Before: Justice Oliver.A.Saksak
In Attendance: Mr Godden Avock for the Petitioner
Mr Sammy Aron and Lennon Huri for First Respondent
Mr Garry Blake for Second Respondent
Mr Sakiusa Kalsakau for Third Respondent
Mr Justin Ngwele for Fourth Respondent
Mr Edward Nalyal for Fifth Respondent
Mr Daniel Yawha for Sixth Respondent

JUDGMENT



Background

1. The petitioner alleged in his amended petition filed on 21st April 2020 that-
 - (a) The first respondent had breached the rules in schedule 5 of the Representation of the People Act [CAP.146] (the Act) by –
 - (i) Allowing persons to vote without their names on the register.
 - (ii) Allowing persons to vote even when they did not reside in Port Vila Constituency.
 - (iii) Allowing persons to vote using cards belonging to persons whose names were not registered on the roll for their respective polling stations.
 - (b) The First Respondent had breached section 31 (2) of the Act by allowing 1,978 more votes than there appeared on the electoral list which were 20,399.
 - (c) The First Respondent breached section 20 (1) and (2) of the Act by not establishing an electoral list for each polling station.
 - (d) As a result of these breaches there were 1,323 votes not accounted for.
2. As against the Fifth Respondent the petitioner alleged an agent collected over 100 electoral cards on 18th March 2020 whom he alleges were not registered to vote.
3. As against the Sixth Respondent the petitioner alleged he was not eligible to stand for candidature because he had outstanding debts with the Port Vila Municipality which he failed to disclose to the Electoral Office.
4. The Respondents denied all allegations. Out of the 6 respondents the First, Fifth and Sixth Respondents filed applications seeking orders that the petition be struck out on the basis that there is insufficient evidence or at all by the petitioner to show who the 1, 978 or 1,323 voters he alleges were unaccounted for were his supporters or could have voted for him. And with respect to the Sixth Respondent there is no evidence his debt is outstanding.



Facts

5. The facts are quiet simple. The petitioner stood for elections on 19th March 2020 within the Port Vila Constituency. There were a total of 38 candidates who contested for 5 seats in the National Parliament. There were a total of 51, 381 voters registered. Only 18, 543 voted. There were 122 void votes,- leaving the total valid votes at 18, 421. The turnout at voting was 35.77%.

6. The official results declared and published in the Gazette on 8th April 2020 show as follows-
 - (a) Ralph Regenvanu- 1,987 votes (Second Respondent)
 - (b) Ulrich Sumpthoh- 1,819 votes (Sixth Respondent)
 - (c) Ishmael Kalsakau- 1,581 votes (Third Respondent)
 - (d) Anthony Harry- 1, 466 votes (Fourth Respondent)
 - (e) Kenneth Natapei- 1, 255 votes (Fifth Respondent)

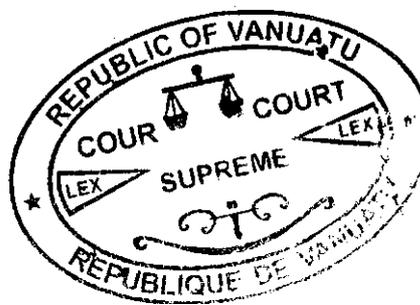
7. The petitioner had 1, 159 votes.

Reliefs

8. He seeks-
 - (a) A declaration that the elections for the Port Vila Constituency was void and that all 5 seats be declared vacant and a by- election be held.

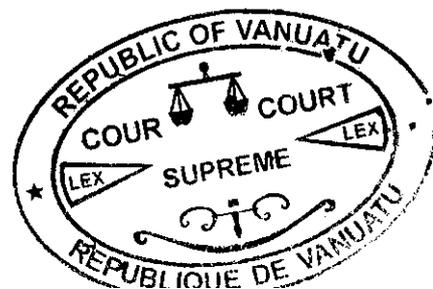
 - (b) That the Fifth Respondent's election be declared void and his seat be declared vacant and that the Petitioner be declared a winning candidate for the Port Vila Constituency.

 - (c) That the Sixth Respondent's election be declared void and his seat be declared vacant and that the Petitioner be declared a winning candidate for the Port Vila Constituency.

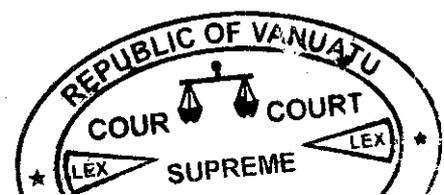


Discussion

9. The petitioner filed 28 sworn statements in support of his petition on different dates and a large volume of annexures as BJ2 contained in Folders 1, 2, 3, 4, 5 and 6. These contained papers in relation to Anaburu Polling Station, Dumbea Hall, Ex-Fol, Port Vila, NTM, Townhall, Noumea and Fresh Wota and Anglican/ Vila City/ Beverly Hills and Chiefs Nakamal Polling Stations.
10. The issues are (a) whether in this volume of evidence the petitioner has established a clear foundation for his petition capable of him succeeding or proving (a) the First Respondent did not comply with the provisions of the Act, and (b) such non-compliance affected his result of the elections. And secondly, whether or not his petition is complete with the evidence warranting the petition going forward for a trial hearing, or should it be struck out at this stage?
11. Mr Avock submitted firstly that the Principal Electoral Officer had admitted in his sworn statement filed on 29th May 2020 that there were electors who were allowed to vote whose names were not in the electoral roll kept at the polling stations but were allowed to vote because their names were registered in the roll recorded in the database. Secondly, that Elizabeth Iauko in her statement filed on 2nd June 2020 and David Talo in his statement of 11th June 2020 and Enneth Damassing in her statement dated 2nd June 2020 all confirmed that there were some electors in that category allowed to vote at NTM, Vila North and Beverly Hills Polling Stations. Further that the petitioner's evidence dated 8th May 2020 attaches a copy of the Live Counting of the Electoral Commission in which the Commission admitted that there are problems with the Polling Stations of Town Hall, Dumbea Hall, Anamburu and Vila North.
12. The clip of the Live Counting is not relevant evidence because simply the petitioner failed to include the Electoral Commission as a Respondent in his petition. Secondly the admission by the Principal Electoral Officer and the confirmations made by Elizabeth Iauko, David Talo and Enneth Damassing do not assist the petitioner's case because they all refer to "some" electors or votes. They do not state exact numbers. The Court is not assisted by "some" rather the numbers are important because it is from those numbers the petitioner would show the results of the election were affected.

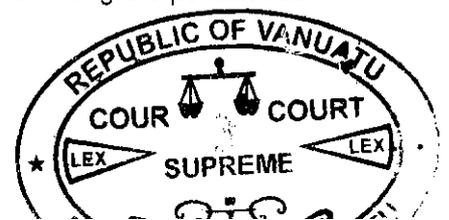


13. From all the evidence the petitioner produced by himself or his witnesses including the documents disclosed in the 6 folders numbered 1-6 , the petitioner has not been able to identify from the proxy cards, or electors whose photographs are attached, as persons who were his supporters and were affiliated to his political party. And further more none of those persons had deposed to sworn statements in support of the petition because if they did, they would be doing so in breach of section 65 of the Act and Article 4 (2) of the Constitution.
14. The Petitioner as submitted by Counsel, has a higher duty of proof on the balance of probabilities as established in **Taranban v Boedoro** [2004] VUSC 15 and in the **Sope Case EP No. 6 of 2008**. When he alleged that 1,325 votes were unaccounted for, it was his duty to show by relevant and admissible evidence that this was so. He had to produce evidence to show of the voters allowed to vote by proxy were his supporters and who were allowed to vote but had no names on the roll, and to which of these 5 respondents these persons were politically affiliated with and were supporters of. The numbers were important to know so as to ascertain whether the petitioner could have obtained more votes to reach the numbers of the 5 elected respondents, or to decrease his number and increase their votes, or to allocate the other losing candidates some of the votes.
15. It was a difficult exercise and huge task. The Petitioner carries a heavy burden of proof especially with 5 winning respondents.
16. For the petitioner to succeed against each of the 5 winning respondents he had to show evidence of how many of those 1325 votes he alleged were unaccounted for voted for Mr Regenvanu, Mr Sumtoh, Mr Kalsakau, Mr Natapei and Mr Harry to reduce their votes and to increase his votes to more than any of their votes. And to defeat Mr Regenvanu the petitioner had to show that out of the 1,978 votes he alleged, 886 would have been his votes, for Mr Sumptoh he needed 660 votes, for Mr Kalsakau, he needed 442 votes, for Mr Harry, he needed 307 votes and for Mr Natapei, he needed 96 votes. Regrettably the petitioner has no such evidence.
17. The 1978 more votes the petitioner alleges were more than the 18, 543 who actually voted. Again of these, the petitioner had to show by relevant evidence how many of them were his supporters to be able to increase his number of votes to affect any of the respondents' number



of votes. He had no evidence of any unofficial result taken by his observers at each polling station to show or give some indications that some of these persons were his supporters.

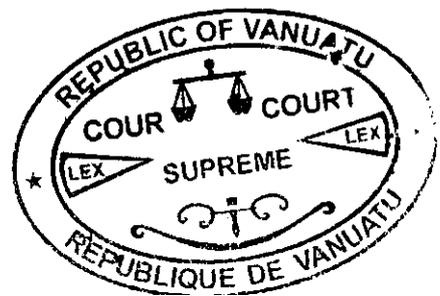
18. The 1978 votes were adequately explained by the First Respondent Mr Iati. It was the result of the omission of the NTM Polling Station which perfectly accords with the statistics provided in paragraph 5 of this judgment which are taken directly from the Gazette dated 8th April 2020.
19. Even if the number of 1978 votes allowed because they had valid cards but their names were not in the roll kept at a polling station, section 31 (2) gives discretion to the Principal Electoral Officer to allow them to vote and exercise their rights given in Article 4 (2) of the Constitution. To not allow them to vote only because they had no name on the roll would be to disfranchise them from that right. But the evidence is that a call was made to the Principal Electoral Officer for a second check with the roll maintained in the database. Only when it was confirmed their names appeared on that roll in the database, they were allowed to exercise their rights to vote. That is a proper exercise of discretion permitted by section 31 (2) which uses the word "May". This subsection is not a prohibition provision; it is rather a discretionary provision to cater for this very situation which arises on polling days which from past elections are not uncommon.
20. Furthermore even if 1978 votes were allowed under section 31 (2) of the Act to bring the number of actual voters up to 20,399, instead of 18,421, does it matter when the registered voters for the Port Vila constituency was 51,831? The turnout rate at 35.77% indicates it was less than half and it was a poor turnout. The complaint about the 1978 votes would only be a valid one had it been 1978 or 1323 votes more than the 51,831 registered. Only then would something be terribly wrong with the polling to raise questions and petitions. None of the remaining 33 candidates who lost raised any complainants or petitions. And that makes the merits of this petition doubtful.
21. The petitioner argued that the Gazette should have been revoked and republished with the new figures to rectify the situation. Again it was the Commission that published the Gazette and the Commission has not been made a respondent in this petition. Therefore that argument is untenable.
22. The argument that this Court had made a decision on 20th April 2020 finding the petition had foundation is correct but it was and is only a prima facie finding.



23. It is subject to the production of relevant admissible evidence in support of the allegations made in the petition to make it complete or incomplete, and to warrant the case going forward for trial or to attract applications to strike out at this point, to save costs and time.
24. Despite there may be foundation as found, the merits of the case can only be assessed on the available evidence before the Court. And upon all the evidence filed by the petitioner which are voluminous, clearly the evidence is lacking to show (a) the First Respondent did not comply with the provisions of the Act and (b) that such on-compliance affected the results of the elections of all the 5 respondents named. That is the problem with this petition.

Sixth Respondents' application

25. The Sixth Respondent applied for the petition to be strike out on the basis the petitioner has not shown he has an outstanding debt with the Government or any Government agency.
26. Mr Avock argued that he has produced summonses for Yalu Sawia, Peter Sakita and Garry Tavoia to be cross-examined in relation to these debts alleged which should be issued warranting a trial hearing.
27. The petitioner's pleadings are contained in paragraphs 23-28 of his petition. No amounts of money are specified. No persons are named. His pleadings are defective.
28. Paragraphs 27 refers to a debt with the Municipality of Port Vila. No actual amounts are pleaded. But the evidence of the Sixth Respondent as confirmed by Jeffrey Yapon is that he cleared all his debts as of 13th February 2020. The letter dated 27th April 2020 on the Letterhead of the Municipality and stamp is conclusive evidence that the Sixth Respondent has no outstanding debts and he was lawfully declared a candidate for the 2020 General Elections. There is no further need to go to trial over matters that have already been resolved. In effect the Petitioner has not established any course of action against the Sixth Respondent and as such the petition ought to be struck out as against the Sixth Respondent.



Second, Third and Fourth Respondents

29. The pleadings in respect of the Second, Third and Fourth Respondents also fall short of disclosing any course of action against these respondents and the petition should be struck out as against these respondents.

Fifth Respondent

30. As against the Fifth Respondent, he secured 1255 votes. The petitioner secured 1,159 votes. The difference between them is 96 votes. The pleadings against the Fifth Respondent are contained in paragraphs 18-21 of the petition. They are general in nature and do not specify the number of electoral cards he alleges were collected by Yalu Sawia, his agent on 18th March 2020. The petitioner alleged over 100 cards were collected. However Mr Sawia refuted that number in his sworn statement filed on 18 May 2020 who deposed to seeing a file with 30-40 cards in it. But he denied collecting them or filling out any cards for any voters prior to 19th March 2020. As such the allegation against the Fifth Respondent has not been made out and the petition against him should fail on that basis.

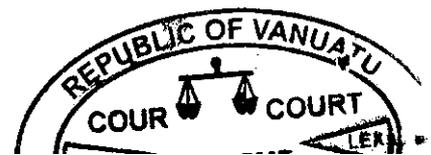
First Respondent

31. The pleadings made against the First Respondent are contained in paragraphs 4-17 inclusive of the petition.

32. In paragraph 4 of the petition the complaint or allegation is about non-compliance with schedule 5 of the Act and in particular in-

- (a) Allowing people to vote without their names on the register.
- (b) Allowing people residing out of Port Vila to vote, and
- (c) Allowing people to vote using other people's cards not registered on the roll. The result is that 1,978 votes were allowed, bringing the valid votes to 20,399 instead of 18,421.

33. I have considered these earlier in the judgment but reconsidering the allegations in light of the pleadings in paragraph 4(1) (i), (ii) and (iii) no specific numbers are provided. In the evidence filed by deponents of statements in support of the petition, there are no certainty with numbers. But even with the numbers given, how do we know which of those persons would have voted for the petitioner and which for the other respondents and the other 33 or so remaining candidates? It was incumbent on the petitioner to produce cogent evidence to show that out of



the numbers given by deponents of sworn statements filed in support of his petition a portion of them would have voted for him so as to disturb or affect the numbers of votes secured by the 5 named respondents who were declared winners. Simply the petitioner has no evidence to reinforce his pleadings and allegations.

Other Issues

34. That brings me to the final question: Is the petition complete with the necessary and relevant admissible evidence establishing a foundation for a trial hearing? And accepting the submissions, oral and written by counsel for the First, Fifth and Sixth Respondents as supported by counsel for the Second, Third and Fourth Respondents, the petitioner lacks evidence. That effectively means that his petition is incomplete and does not have the foundation to warrant a trial hearing. This issue is therefore answered in the negative.

35. For completeness I must examine the reliefs sought by the petitioner in his amended petition dated 27th April 2020. They are stated as follows:-

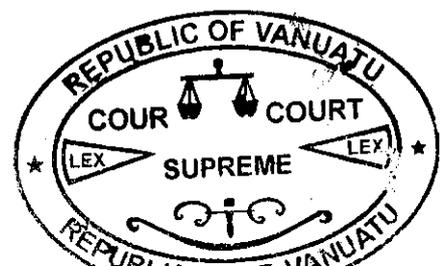
"1. *An Order that the General Elections of the Port Vila Constituency be declared void and all seats in the Port Vila Constituency becomes vacant and a by-election be held to fill such vacancy;*

2. *An order that the Fifth Respondent Election be declared void and his seat be declared vacant and that the Petitioner be declared a winning candidate in the Port Vila Constituency;*

3. *An Order that the Sixth Respondent Election be declared void and his seat be declared vacant and that he petitioner be declared a winning candidate for the Port Vila Constituency.*

4. *Costs"*

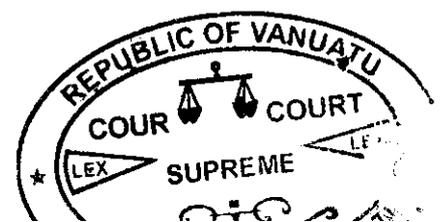
36. Firstly these reliefs sought in 1, 2 and 3 are confusing. Secondly they are inconsistent and not in accord with the pleadings or allegations raised.



37. For the petitioner to get the orders sought in 2 and 3 of his reliefs he needed to have pleaded section 62 of the Act by seeking an examination of votes cast and a recount. He has failed to do that.
38. Furthermore it would simply be impractical to declare him a winner to occupy the seats of the Fifth and Sixth Respondents at the same time or simultaneously. Those reliefs are therefore erroneous and the petitioner could not get those orders, even if the trial proceeded.
39. That leaves the order sought in paragraph 1. That calls for a by- election. And this is a high call. It requires a high standard of proof on his part as to the evidence required. Mr Avock acknowledged this at paragraphs 5.2, 5.3, 5.4 of his written submissions. The cases of **Lop v Isacc** [2009] VUSC 23 and **Taranban v Boedoro** [2004] VUSC 15 and **Sope EP.6 of 2008** are cases on point on this aspect of burden of proof.
40. Further the cases of **Job Andy v Electoral Commission & Tasso EP 16/238** and **Jimmy v Kilman** [2013] VUSC 5 are cases that call and demand seriousness on the part of petitioners to comply with the mandatory pre requisites under section 57 (1) and (2) and 58 (1) of the Act.
41. The Petitioner in this case has failed to file these relevant evidence to support his pleadings and allegations within the 21 days required by section 57 of the Act. There is no evidence to show he would have had some of the 1, 978 or 1, 323 votes he alleges were allowed in excess or were unaccounted for to show that the results as published by the Electoral Commission on 8th April 2020 were or could be affected. There is simply no such evidence. There may be some evidence to show some non-compliance by the First Respondent but that is not enough to affect the results of the election to warrant a by-election for the Port Vila Constituency.

The Result

42. The applications by the First, Fifth and Sixth Respondents as supported by the Second, Third and Fourth Respondents are allowed. The petition of the petitioner is defective and incomplete. Accordingly it is dismissed in its entirety.



43. Although the petition is dismissed, it does raised valid complaints in paragraph 1 (a) and paragraph 32 of the judgment, which must be addressed seriously by the First Respondent so that the same mistakes (if they were made) should not be repeated in 2024 and future general elections.

44. I will hear counsel further as to costs.

DATED at Port Vila this 25th day of June 2020

BY THE COURT


OLIVER A. SAKSAK

Judge

