

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

**ELECTION PETITION NO. 07 OF 2012**

**IN THE MATTER OF THE REPRESENTATION OF  
THE PEOPLE'S ACT CAP 146 OF 1983 (AS  
AMENDED)**

**AND**

**IN THE MATTER OF A PARLIAMENTARY  
ELECTION FOR TONGOA CONSTITUENCY HELD  
ON 30 OCTOBER 2012**

**BETWEEN: WILLIE REUBEN ABEL TITONGOA**  
**First Petitioner**

**AND: ERICK PAKOA**  
**Second Petitioner**

**AND: JOHN VACHER AMOS**  
**First Respondent**

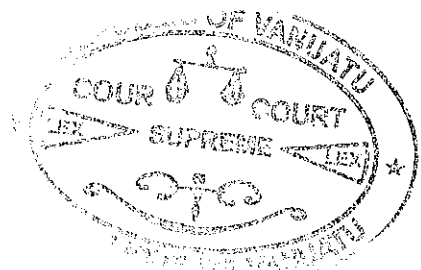
**AND: ELECTORAL COMMISSION**  
**Second Respondent**

**Coram:** Justice Mary Sey

**Counsel:** Mr. Robin Tom Kapapa for the Petitioner  
Mr. George Boar for the First Respondent  
Mr. Fred Gilu for the Second Respondent

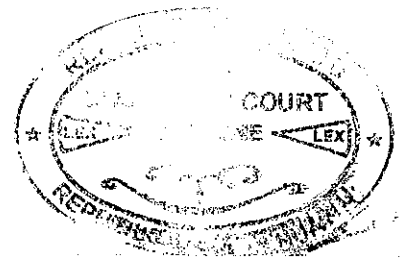
**Date of Hearing:** 8 - 10 July 2013

**Date of Judgment:** 16th August 2013



## JUDGMENT

1. This is an Election Petition filed by the Petitioner pursuant to Section 54 of the Representation of the People's Act [CAP 146] (as amended) ("the Act") which provides that the validity of any election to Parliament may be questioned only by a Petition brought before the Supreme Court for that purpose under that Act.
2. The Petitioner was an unsuccessful candidate in the 30<sup>th</sup> October 2012 National General Elections in Tongoa Constituency which has one contested seat. The Petitioner is the third runner up to Erick Pakoa, with a total number of 323 votes. Mr Pakoa obtained a total of 335 votes but he is not an active Petitioner in this action. The difference between the Petitioner's votes of **323** and the First Respondent's votes of **364** is **41 votes**.
3. The Petitioner has brought this Petition against the First and Second Respondents alleging breaches of Sections 45, 46, 47, 61(A), 61(B) and 61(C) relating to the offences of bribery, treating and undue influence.
4. The Petitioner's reliefs are as follows:
  - "1. *That the declaration that the First Respondents election on the 30<sup>th</sup> October 2012 at the Constituency of Tongoa Island are void due to breaches of the provisions of section 61, 45, 46, and other provision mentions thereof.*
  2. *That a declaration that a by-election pursuant to Section 22 of the Representation of the People's Act be held in Tongoa Island Constituency (Electoral) as soon as reasonably practicable, in*



*relation to the one seat of Parliament for this electoral as a result of the above declaration.*

3. *That a declaration that the conduct of the Second Respondent in running the election in Tongoa is null and void and commits fundamental breaches of the Representation of the People's Act and warrants the declaration in (2) above.*

4. *Costs*

5. *Any other orders seem just by the Court."*

5. The Petition arises from allegations of breaches of Section 45 of the Representation of the People's Act. It is alleged that the Respondent's election to Parliament should be disqualified on the grounds of –

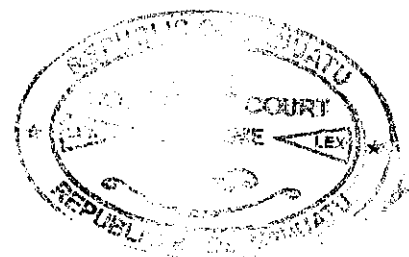
- (a) Bribery
- (b) Promises made
- (c) Permanent residence in one place but registered to vote in another place.

### **Allegations**

6. The following are the allegations against the First Respondent:

That the First Respondent and his wife Cindy Vacher Amos voted at Pele Polling Station but they have never resided on Tongoa Island throughout the registration period of January to June/July of 2012.

That on 23<sup>rd</sup> October 2012, at Itakoma Tongoa, when all Political Parties with nine (9) Candidates were Campaigning, Mr. Berry Fred Masoerangi was campaigning for Mr. John Vacher Amos, Peoples



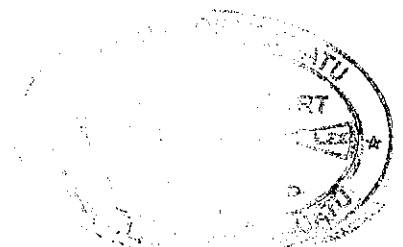
Progressive Party Candidate and made promises that Mr. John Vacher Amos was buying a ship from Korea and that the ship would service those who voted him into Parliament by providing free shipping Service in the month of June and December every year between Tongoa and Port Vila.

That Mr. Berry Fred Masoerangi's campaign speech constituted an election offence under the provisions of Section 45 of the Representation of the People's Act (CAP 146).

That similar promises were made by Mr. Berry Fred Masoerangi at Lumbukuti Village on Wednesday 24<sup>th</sup> October 2012.

That on the evening of 29<sup>th</sup> October 2012, after the official campaign period had closed at midnight on Saturday 27<sup>th</sup> October 2012, the following persons, who are supporters of John Vacher Amos, Simeon Toara, Jeffrey Amos, Kalo Sandy and Alick Pakoa all of Kurumape Village organised a big meeting at the house of Mr. Johnny Abel at Kurumape Village at about 8pm and made political and campaign speeches to the people at Kurumape Village asking them to vote for John Vacher Amos.

That on Sunday 28<sup>th</sup> October 2012, John Vacher Amos visited Chief Samuel Korah Ben Matariliu, Acting Paramount Chief of Panita Village, and his family and promised to give money for school fees for Chief Matariliu's grandson and further that he would donate cooking pots to the family of Samuel Koran Ben Matariliu but that they would have to vote for him at Silimaui Polling Station, Lumbukuti Village, Tongoa.

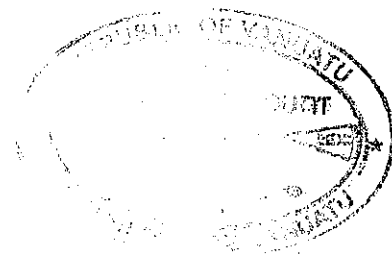


That on 30<sup>th</sup> October 2012, at Itakoma Polling Station, an elderly lady with eye sight problem asked to vote for Melanesian Progressive Party Candidate, Mr. Willie Reuben Abel Titongoa, but the presiding officer, Michael Atuary removed the ballot paper with the photo of John Vacher Amos and put it into the envelope and handed it to the elderly woman to drop into the ballot box.

That on 29<sup>th</sup> October 2012, John Vacher Amos gave vt 2000 (two thousand vatu) cash to Alick Malo of Lumbukuti Village, Tongoa with two solar lights and asked him to hand over one of the solar lights to Eileen Woi Tapauliu and the other to Amos Lokin both of Lumbukuti Village, Tongoa and to ask them and their families to vote for him on the 30<sup>th</sup> October 2012 at Silimaui Polling Station, Lumbukuti, Tongoa.

#### **First Respondent's Response to Petitioner**

7. The First Respondent responded that he and his wife Cindy Amos have a house on Pele Village, Tongoa. During registration period from January to July 2012, they were in Tongoa when the registration officer came around to register the names of eligible people to vote and it was during that time their names were entered in the roll to vote on Tongoa at Pele Village.
8. The First Respondent denied that they bribed Alick Malo with VT2,000 and solar lights and further denied that the ship was his main political campaign agenda to convince people to vote for him. He further contended that Berry Fred Masoerangi was in fact responding to rumours that Chiefs from various villages were making enquiries and he was there to clarify those rumours. T



9. The First Respondent further argued that there is insufficient evidence to back up the allegations which do not fall within Section 61 (i) of the Act to justify disqualifying him as duly elected member to Parliament. In any event, a promise to do something is not a corrupt practice to justify declaring an election void.

10. **THE LAW:**

**Section 45 of the Act provides for Bribery as follows:**

*"(1) A person commits the offence of bribery:*

*(a) If he directly or indirectly by himself or by other person:*

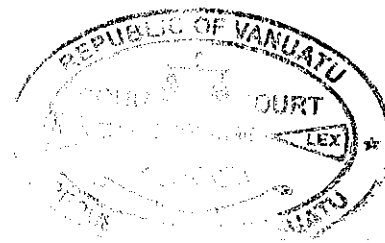
*(i) Gives any money or procures any office to or for any voter or to or for any other person on behalf of any voter or to or for any other person in order to induce any voter to vote or refrain from voting;*

*(ii) Makes any such gift or procurement to or for any person in order to induce that person to procure, or endeavor to procure, the election of any candidate or the vote of any voter;*

*Or if upon or in consequence of any such gift or procurement he procures or engages, promises or endeavors to procure the election of any candidate or the vote of any voter;*

*(b) If he advances or pays any money or causes any money to be paid to or to the use of any to other person with the intent that such money or any part thereof shall be expended in bribery at any election, or knowingly pays any money or causes any money to be paid to any person in discharge or repayment of any money wholly or in part expended in bribery at any election;*

*(c) If before or during an election he directly or indirectly, by himself or by any other person on his behalf, receives, agrees or contracts for any money, gift, loan or valuable consideration or any office, place or*



*employment for himself or for any other person for voting or agreeing to vote or from refraining or agreeing to refrain, from voting;*

- (d) *If after an election he directly or indirectly by himself or by any other on his behalf receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting.*
- (2) *For the purposes of subsection (1) of this section:*
- (a) *References to giving money including references to giving, lending, agreeing to give or lend, offering, promising and promising to procure or to endeavor to procure any money or valuable consideration; and*
- (b) *References to procuring office include references to giving, procuring, agreeing to give or procure, offering, promising and promising to procure or to endeavor to procure any office, place or employment."*

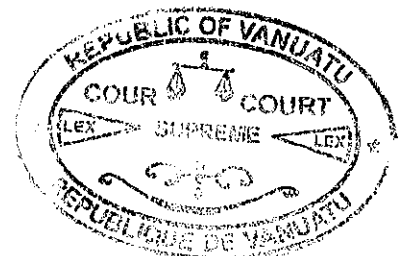
**Section 46 of the Act provides for Treating as follows:-**

*A person commits the offence of treating:*

- "(a) *If he corruptly by himself or by any other person either before, during or after an election directly or indirectly gives or provides or pays wholly or in part the expenses of giving or providing any food, drink or entertainment to or for any person-*
- (i) *For the purpose of corruptly influencing that person or any other person to vote or refrain from voting; or*
- (ii) *On account of that person or any other person having voted or refrained from voting or being about to vote or refrain from voting;*
- (b) *If he corruptly accepts or takes food, drink or entertainment offered in the circumstances and for the purpose mentioned in paragraph (a) of this section.*

**Section 47 of the Act provides for undue influence as follows:-**

- (a) *he directly or indirectly by himself or by any other person on his behalf-*



- (i) *Makes use of or threatens to make use of any force, violence or restrain; or*
- (ii) *Inflicts or threatens to inflict by himself or by any other person any temporal or spiritual injury, damage, harm or loss upon or against any person, in order to induce or compel that person to vote or refrain from voting, or on account of that person having voted or refrained from voting; or*

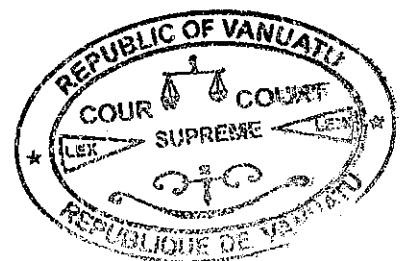
**Section 60** of the Act sets out the decisions the Supreme Court may make on hearing an election petition, which are:-

- "(a) declare the election to which the petition relates as void;*
- (b) declare a candidate other than the person whose election is questioned was duly elected; or*
- (c) dismiss the petition and declare that the person whose election is questioned was duly elected."*

**11. Section 61 - Grounds for declaring election void**

*"(1) The election of a candidate may be declared void on an election petition if it is proved to the satisfaction of the Supreme Court, that -*

- (a) the candidate or any agent of the candidate has contravened section 61A, 61B or 61C;*
- (b) there has been such non-compliance with the provisions of this Act, in the conduct of polling or in any other matter that such non-compliance affected the result of the election;*
- (c) the candidate was at the time of his election a person not qualified or disqualified for election; or*
- (d) there was such irregularity in the counting of the votes as may reasonably be supposed to have affected the result of the election.*





(2) *Despite subsection (1), if on an election petition, the Supreme Court finds that there has been failure to comply with any provision of this Act, but the Court further finds that:*

(a) *it is satisfied that the election was conducted in accordance with the principles laid down in this Act;*

*and*

(b) *such failure did not affect the result of the election,*

*the election of the successful candidate is not to be declared void."*

12. **Section 61A of the Act (as amended) provides as follows:-**

**"Cut-off date for using representation allowance, any money or donations in kind**

(1) *A candidate for election must not spend, allocate or otherwise disburse to the constituency in which he or she is a candidate, any money, whether in the form of:*

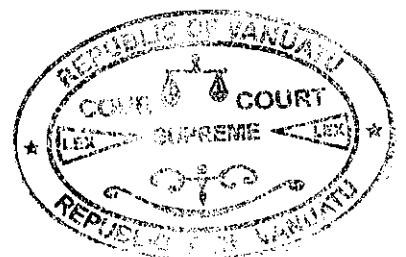
(a) *His or her representation allowance – if the candidate is a member of Parliament; or*

(b) *Any money obtained from any other sources of funding whether in the form of:*

(i) *Cash donations; or*

(ii) *Donations in kind,*

*from the period commencing at the end of the life of Parliament or at the date of the dissolution of Parliament under sub-article 28(2) or (3) of the Constitution, to and including, the polling day.*



(2) For the purposes of this section:

**Donation in kind** includes, but is not limited to, for or food products, transport, transport fares, machinery, cooking utensils, building materials and furniture."

13. **Section 61B of the Act provides for Exceptions on polling day as follows:-**

"Despite section 61A and subject to paragraphs 46(a) and (b), a candidate may, without the intention of corruptly influencing any person, provide food, drink, transport and accommodation to any person on the polling day."

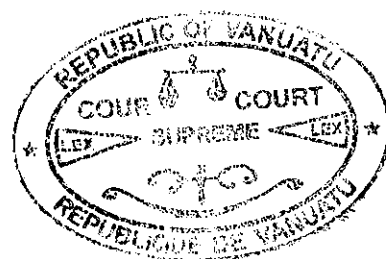
14. **Section 61C of the Act provides for Exception during the election period as follows:**

"(1) Despite section 61A and subject to paragraphs 46(a) and (b), a candidate may during the campaign period;

(a) Present a gift of a custom mat or an amount not exceeding VT1,000 or both, to a chief or any person of similar authority or in an area or village for the purposes of holding a campaign in that chiefs or persons village or area; or

(b) Provide food, during, entertainment, transport or accommodation only to his or her agents; or

(c) Provide entertainment to the public for the purposes of entertaining the public during his or her campaign rally.



- (2) *For the purposes of this section, an agent of a candidate is a person approved by a candidate as a member of that candidate's campaign team.*
- (3) *To avoid doubt, this section applies only during the campaign period declared by the Electoral Commission for purposes of this Act."*

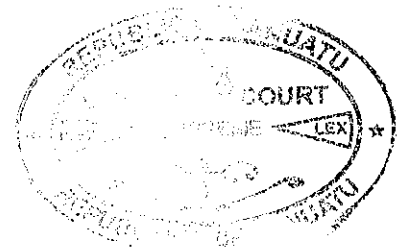
### **Burden and Standard of Proof**

It is well settled that the burden of proving the allegations remains on the petitioner and it is on a higher standard of proof on the balance of probabilities. See **Lop v Isaac** [2009] VUSC 23; Election Petition Case 05 of 2008 (6 April 2009) where the Chief Justice said:

*"The Petitioner has the burden of proof. The burden of proof necessary to establish whether an act of bribery or corrupt practice had been committed by the First Respondent is a civil standard of proof. That is on balance of probabilities and I agree ... that the standard of proof is a higher standard than in normal civil cases."*

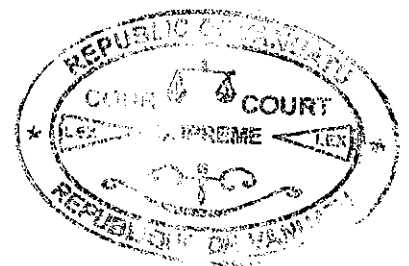
See also Saksak J. in **Taranban v Boedoro** (2004) VUSC 15, CC No. 149 of 2004 (3 December 2004) and the recent decision of Spear J. in **Kalsakau v Principal Electoral Officer** [2013] VUSC 99; EP 20-12 (26 July 2013).

*The balance of probability standard means that a Court is satisfied an event occurred during the defined period from and inclusive of 3 September 2013 to and inclusive of the polling day on 30 October 2013.*

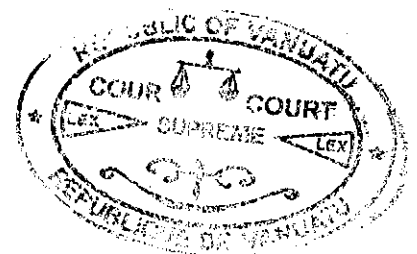


### **Summary of Evidence**

15. The evidence of John Amos and Berry Fred Masoerangi established that:
  - a. In 2010, John Amos, a business man intended to purchase a ship from Korea to service the island of Tongoa.
  - b. Ship was not part of the PPP political agenda to campaign for.
  - c. At a certain village on Tongoa (14 Villages on Tongoa) questions were asked about rumours that John Amos intended to purchase a ship and Berry Fred Masoerangi addressed those rumours.
  
16. As regards the 2000 Vatu John Amos gave to Alick Malo, what must accordingly be proven by the Petitioner in this respect is not bribery or treating as such, but the giving of cash or donations in kind to any members of the Constituency in which he is a candidate during the defined period – s.61A from and inclusive of 3 September 2013 to and inclusive of the polling day on 30 October 2013. I accept that the First Respondent did give the cash to Alick Malo. However, Under Section 61 (1) (A) of the Act, bribery, treating, undue influence or other misconduct or circumstances must have so extensively prevailed that they be reasonably supposed to have affected the result of the election. This is not the case in this instance.
  
17. As regards the allegation as to residence, the Principal Electoral Officer, Mr. Martin Tete, filed a sworn statement on the election processes with relevant dates to assist the Court. The contents of his sworn statement is not challenged by the parties in the Petition.



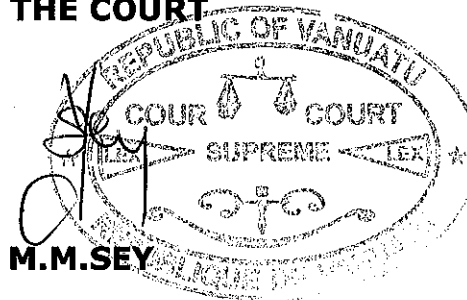
18. The uncontroverted evidence of John Amos and his witness is that he has a residence at Pele Village and Efate. As a business man, he travels frequently to Pele Village on Tongoa and back to Port Vila. His evidence is that he and his wife Cindy Amos were in Tongoa when the registration officers came around to update the electoral roll. It was at this time that the registration officer registered their names to vote at Pele Village Polling Station. If a person travels on business trip to and from the islands where he has residence, then it is a matter of choice for that person to decide where he or she intends to register to vote. It is the person's choice. That is the practice that has been allowed to continue to this date. I accept this evidence as correct.
19. It is submitted, therefore, that pursuant to Section 61 (1) (a) and Section 61 (3) (b) the election on Tongoa complied with the election principles laid down in the Act and that a minor breach (which is not admitted) cannot invalidate the First Respondent's election to Parliament. The First Respondent has 41 votes difference to that of the Petitioner.
20. The allegation in respect of the blind lady who needed assistance at the polling booth has not been proved. The Petitioner contended that the presiding officer, Michael Atuary removed the ballot paper with the photo of John Vacher Amos and put it into the envelope and handed it to the elderly woman to drop into the ballot box. No cogent evidence was adduced to substantiate what was alleged by the Petitioner.



21. On the whole, there is insufficient evidence to back up the Petitioner's allegations which do not fall within Section 61 (1) of the Act to justify disqualifying the First Respondent as a duly elected member to Parliament. In any event, a promise to do something is not a corrupt practice to justify declaring an election void. In the result, I find that the Petitioner has not in any way established that the non-compliance with the Act had an effect on the outcome of the election.
22. For these reasons, the petition is hereby dismissed.
23. The Respondents are entitled to costs on a standard basis to be agreed or taxed.

**DATED at Port Vila, this 16<sup>th</sup> day of August, 2013.**

**BY THE COURT**



**M.M.SEY**

**Judge**