

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU**

Election Petition Case No. 363 /2016

(Civil Jurisdiction)

**IN THE MATTER OF THE REPRESENTATION OF THE PEOPLE ACT CAP.
146 OF 1983 AND;**

**IN THE MATTER OF A PARLIAMENT ELECTION FOR BANKS [VANUA
LAVA, MERE LAVA, MERIG & GAUA] CONTITUENCY OF 22ND JANUARY
2016**

BETWEEN: DUNSTAN HILTON

Petitioner

AND: MP JACK ARMSTRONG WONA

First Respondent

AND: ELECTORAL SERVICE COMMISSION

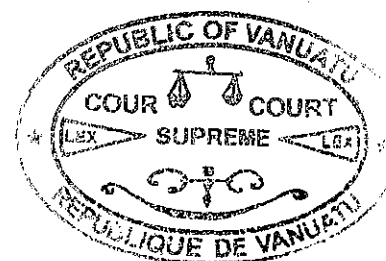
Second Respondent

Hearing: May 16th, 17th, 18th, 19th and 20th 2016

Submissions: June 27th 2016

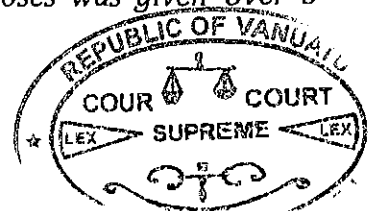
Before: Justice JP GEOGHEGAN

**In attendance: Robin Kapapa, Leon Malantugun and Wilson Iauma
for the Petitioner
Avock Godden for the First Respondent
Aron Sami for the Second Respondent (abides the
decision of the Court)**



JUDGMENT
GEOGHEGAN J - July 28th 2016

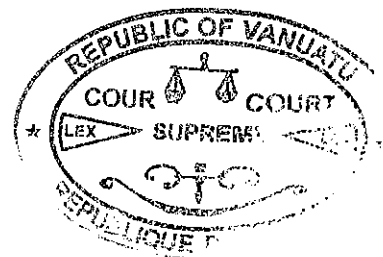
1. On January 22nd 2016, a snap general election was held throughout Vanuatu. That election included the election of a Member of Parliament representing the Vanua Lava, Gaua, Merig and Mere Lava constituency in Northern Vanuatu (the "*Torba Constituency*").
2. The declared successful candidate for that constituency was Mr Jack Wona the candidate for the Vanuatu National Development Party ("*VNDP*") with 717 votes. Runner up in the election was the Petitioner in these proceedings Mr Dunstan Hilton the candidate for the Peoples Progressive Party ("*PPP*") with 677 votes.
3. On February 19th Mr Hilton filed an election petition seeking a declaration that Mr Wona's election was void due to breaches of the provisions of sections 43, 45, 46 and 61 of the Representation of People's Act Cap. 146 ("*the Act*"). In his petition Mr Hilton made the following allegations:-
 - "a) That the First Respondent and his President (MP Christopher Emelee) of the party, namely Vanuatu National Development Party (VNDP), it's agents, servants and political campaigning team making (sic) donations of foods and other goods to the islands of Vanua Lava, Gaua, Merig and Mere Lava during the period of campaign which such period is prohibited by law to do so.*
 - b) That the First Respondent, his servants, agents and campaigning team did on the 16th of January 2016 did distributed (sic) bag of rice, tinned fishes and goods to the people of Gaua;*
 - c) That the First Respondent, his servants, agents and campaigning team did on the period of campaign distributes (sic) foods in Gaua and such distribution were made very substantially and in large amount which (sic) chief Tom Moses was given over 5*



tinned fishes whilst he was passing by the First Respondent campaigning camp area.

- d) That Mika Moses and other members were shared (sic) with carton of tinned fishes on the said dates which were prohibited to make in such cartoons (sic) of tinned fishes is to be produced to this honourable Court.
- e) That George Atkins and other members were shared with carton of tinned fishes, rice and sugar on the said dates which were prohibited to make and such cartoon (sic) of tinned fishes is to be produced to this honourable Court. It is prohibited by the Act to make such donation during that period of time. Such donations really affected the outcome and the result of the election..... such donation has influence (sic) voters to vote for the First Respondent. That the First Respondent has committed the corrupt practice of bribery during the campaign period of the said 22nd January 2016 election.
- f) That the First Respondent, his servants, agents and campaigning team including the President of the party MP Christopher Emelee did bribe Mika Moses and other members with Vt 5,000 at Gaua Island. That such bribe was made to influence the supporters of Mika Moses and the people of Gaua Island. Given the sum of Vt 5,000, in Gaua such amount is high and clearly is a bribe that affects the result of the election.
- g) That the First Respondent and his President (MP Christopher Emelee) of the party, namely the Vanuatu National Development Party, its agents and servant and political campaigning team, during the entire campaigning period distributed island dresses, distributed and hand out money and even make donation of foods and goods to the islands of Vanua Lava, Gaua, Merig, and Mere Lava which such period is prohibited by law to do so."

4. During the course of the hearing I issued a judgment regarding the admissibility of certain evidence.



5. The issues to be determined in this Judgment are the following:-
- 1) Whether the Court can permit the filing of written statements after the expiry of the 21 day period for the filing of the election petition.
 - 2) Whether the allegation set out in the election petition are established.
 - 3) If so, what remedy the Court should provide.

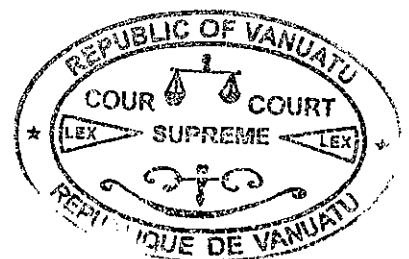
FILING OF STATEMENTS

6. Mr Wona challenges the admissibility of the sworn statements of Christopher Mackenzie dated March 2nd 2016, the Petitioner Mr Hilton sworn on March 30th 2016 and Mr Frank Dinh sworn on April 16th 2016. For Mr Wona, Mr Godden submits that the Petitioner is not permitted to file any sworn statements after the expiration of the 21 day period referred to in section 57 (1) of the Representation of the People Act. Conversely, Mr Godden, for Mr Wona, submits that such a restriction does not apply to any statements filed by or on behalf of Mr Wona.

7. Section 57 of the Act provides that:-

- "(1) Subject to subsection (2) an election petition shall be presented within 21 days at the publication in the gazette of the results of the election to which the petition relates.*
- (2) If a petition alleges a specific payment of money or other reward after an election by or on the account of a person whose election is disputed, the petition may be presented within 21 days of the alleged payment.*
- (3) The time limit provided for in this section shall not be extended."*

8. There is no dispute in this case that the statements in question were all filed outside the 21 day time limit imposed by section 57.



9. There is also no dispute that the sworn statements filed were filed consequent upon timetabling directions made by the Chief Justice. On March 8th, 2016 the Chief Justice made a number of timetabling directions in respect of these proceedings. Included in those directions were the following directions:-

"(1) The Petitioner to file and serve the balance of sworn statements (x 5) by 7 days i.e. – 15 March 2016.

(2) The first respondent to file and serve an amended defence by 15 March 2016.

(3) The first respondent to file and serve sworn statements by, on or about 29 March 2016."

10. The statements of Mr Hilton and Mr Din were filed on March 30th, 2016 and May 16th and 17th respectively so were well outside the timetabling directions made.

11. At a further conference on April 1st 2016 before the Chief Justice, the matter was listed for hearing. No opposition was voiced to the filing of the statements on behalf of the petitioner after February 22nd. It appears clear that the timetabling directions were made pursuant to the Representation of the People Election Petition Rules [Cap. 146] (*"the Rules"*) which is subsidiary to the principal Act.

12. Rule 2.3 of the Rules sets out what a petition must contain. It states as follows:-

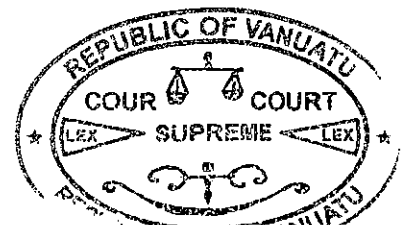
"2.3 What a Petition must contain

(1) A petition must set out:

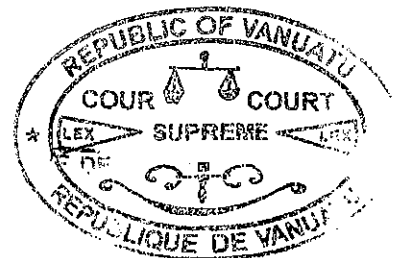
(a) Whether the person was registered to vote, or claims to have been a candidate, at the elections; and

(b) The grounds on which the election is disputed; and

(c) The facts on which the petition is based; and



- (d) *An application for an order about service of the petition.*
- (2) *The petition must have with it:*
- (a) *A sworn statement by the petitioner in support of the petition, setting out details of the evidence the petitioner relies on; and*
- (b) *Any other sworn statements that support the petition."*
13. The Election Petition Rules also provide for the holding of a first conference, the clear purpose of which is to make directions to enable the matter to proceed to a hearing as soon as possible. That includes the ability of the Court to deal with any applications to strike out the petition, to order that a person may be legally represented and to fix a date for a further conference or for a hearing. Rule 2.9 (1) (f) states that the Court may:
- "(f) Make orders about:-*
- (i) Filing and serving sworn statements by the parties and their witnesses;"*
14. Accordingly at first blush the rules clearly contemplate the filing of further statements although there appears to be a conflict between rule 2.3 (2) and rule 2.9 (f).
15. The Rules are made pursuant to section 59 (1) of the Representation of the People Act which provides:-
- "59. Rules for election disputes***
- (1) The Chief Justice may make such rules not inconsistent with this Act concerning the conduct of proceedings before the Supreme Court under this Part, the times and places of hearings and adjournment thereof as he shall consider proper.*



(2) *The proceedings of the Court shall be conducted in English, French or Bislama according to the choice of the petitioner and interpreters shall be provided by the Supreme Court.*

(3) *The proceedings of the Court shall be recorded in writing.*

(4) *A summons to a witness shall be in the form contained in Schedule 6.*

(5) *A person who without sufficient excuse –*

(a) disobeys a summons or reasonable direction of the court;

(b) hinders or obstructs the court;

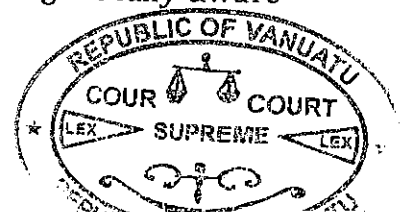
(c) gives false evidence to the court; or

(d) insults the court by word of mouth, writing, radio broadcast or in any other manner,

commits an offence and shall be liable on conviction to a fine not exceeding VT 75,000 or to imprisonment not exceeding 5 years or to both such fine and imprisonment.

(6) No person appearing before the Court during the hearing of an election petition shall be bound to incriminate himself and all such persons shall be entitled to the privileges accorded to a witness appearing before the Supreme Court when exercising its normal jurisdiction."

16. Mr Godden submits that the very clear purpose behind the restrictive time limit referred to in section 57 (3) is to ensure that issues regarding the election of the country's elected representatives are determined quickly and that it is essential that a respondent in such proceedings be fully aware



of all materials or allegations against him or her from the outset. In that regard an election petition can be placed in clear contrast to the usual type of civil proceedings which would enable parties to apply during the course of those proceedings with further and better particulars.

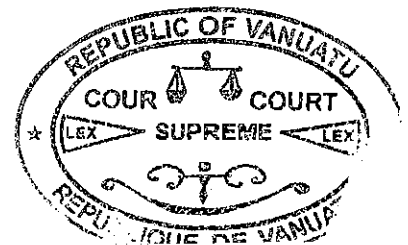
17. The mandatory nature of the time limit set out in section 57 has been repeated time and time again in many cases. In Jimmy v. Rarua [1998] VUCA 4 the Court of Appeal referred to the decision of then Chief Justice Cooke in Willie Jimmy – Civil Case 12692 Volume 1 VLR 1980 - 88 where the Chief Justice considered the meaning of section 57 (3). He stated at page 43:

“If this subsection had not been included in the section of the Act the Court may well feel inclined to grant some latitude to the Petitioner but in view of its inclusion, I hold that Parliament considered 21 days adequate to file all the grounds of the Petition. I rule that therefore that the additional grounds of the Petition being out of time cannot be argued by the Petitioner”.

18. With reference to that observation the Court of Appeal in Willie Jimmy v. Rarua stated at page 7 that:-

“We respectfully adopt and apply the reasoning of these previous cases in Vanuatu to this situation. Courts will normally follow earlier decisions unless there is good and sufficient reason to depart from their approach. In our view they contain an irresistible interpretation which we also adopt”.

19. Willie Jimmy dealt with the issue of amending an election petition outside the 21 day period stipulated in section 57 (3). This is not such a case. Rather this is a situation where further supplementary evidence in respect of the allegations already set out in the election petition is sought to be filed. In that regard some support for the respondent’s position could be drawn from the observation of the Court of Appeal in Willie Jimmy v. Rarua at page 8 that:-



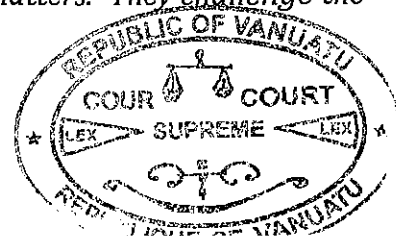
“Finally it is contended that almost all of what was included in what the Court permitted the Petitioner to amend was only to qualify what was included in the first petition.

It may well be that the degree of particularizing or better defining specific allegations already made within the 21 day period is not objectionable”.

20. As against that however, some guidance may be drawn from the Rules. As set out in paragraph [10] herein rule 2.3 sets out what a petition must contain.
21. In support of a restrictive approach to the filing of statements in support of a petition a number of cases have dealt with statements filed outside the 21 day period. In Job Andy v. Electoral Commissioner & Tasso (Electoral Petition Case No. 16/238 SC/ELTP), an electoral petition had been filed with the sworn statement in support of the petition. The Court was advised that other sworn statements supporting the petition would be filed within the statutory time limit for 21 days referred to in section 57 (3). Ultimately those statements were filed outside the statutory time limit. In dismissing the petition the Chief Justice stated:-

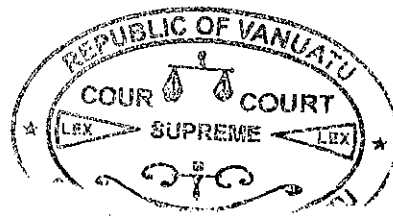
“In my judgment, the petition filed by the Petitioner although it may have a foundation, it is incomplete and it not validly presented by the petitioner within the mandatory prerequisites under section 57 (1) of the Act and the requirements of rules 2.3 (2) (b) and 2.5 (1) of the Election Petition Rules. The Petition as envisaged under section 57 (1) of the Act [Cap. 146] is the Petition presented (filed) inclusive of the sworn statements that support the petition as provided in the Election Petition Rules.

The Election Petition Rules are made consistently with the provision of the Representation of the People Act [Cap. 146] and in particular sections 57, 58 and 59. The Election Petition Rules must be read and applied consistently with the provisions of the Act as those rules provide and require. Election Petitions are serious matters. They challenge the



wishes of the majority of electors in an election petition. Those who instigate any challenge must comply with the mandatory prerequisites under sections 57 (1)(2) and 58 (1) of the Act [Cap. 146] in the Election Petition Rules. See Jimmy v. Rarua [1998] VUCA 4: Leinevao Tasso v. Ioan Simon Omawa and Others, Election Petition No. 1 of 2008: Election Petition Case No. 16/397 SC/ELTP and others."

22. The authorities examining the legislative provisions and rules regarding the filing of Petitions have emphasized the mandatory nature of section 57 (3) and have traditionally approved the filing of petitions and statements in a way which is consistent with the need to resolve election petitions swiftly and efficiently. This is of course consistent with the need to provide certainty in circumstances where the election of an individual to Parliament is challenged. Although the Chief Justice made timetabling directions for filing further statements I am of the view, with respect, that he was not correct in doing so. Regrettably, this issue was not raised when he was dealing with the matter and it would have been of considerable assistance had the Respondent done so at that time. Notwithstanding that however, I am satisfied that the provisions of the Act taken together with the Election Petition Rules require all statements in support of a petition to be filed within the time period stipulated by section 57 (3).
23. For that reason I rule that all statements filed by the Petitioner after the 21 day period are inadmissible.
24. But does that ruling apply to the statements filed by or on behalf of Mr Wona, the Respondent? I am of the view that it does not. While the legislation and the Rules emphasize the need for a Petitioner to act with haste they do not place the same obligations on a Respondent. Rule 2.8 of the rules require a Respondent to file a response within 14 days of being served with the application. There is a provision under rule 2.9 for the holding of a conference where the Court is able to make timetabling directions regarding the filing of further affidavit evidence. While reference

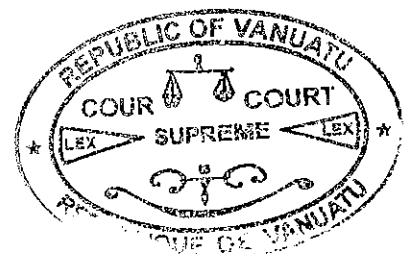


to "*parties*" in rule 2.9 (1) (f) (i) is unfortunate the essential point is that the Respondent in an election petition is not subjected to the same stringent time restraints as an applicant. In addition the reference to "*parties*" in rule 2.9 (1)(f)(i) would give a Petitioner the right to file sworn statement in reply if that were necessary. That is a very different from a statement setting out allegations upon which the petition relies. In that regard, while the statement of Mr Hilton dated March 30th, 2016 is referred to as a statement in reply it is based on the fresh allegations of Mr Din and accordingly I would not have permitted it to be taken account of even allowing for the interpretation of rule 2.9(1)(f)(i) that I have just referred to.

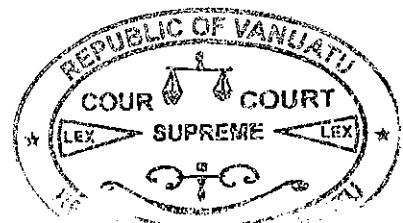
25. For that reason I rule that the statements filed by the Respondent after the relevant twenty-one day period are admissible.

THE EVIDENCE

26. There were six VNDP campaign team camps in total within the TORBA province. One of those camps was in Gaua, one was in Mere Lava and four were in Vanua Lava. Because of the remoteness of the location all supplies for the camps were brought in by boat and were then off-loaded and distributed to each camp. A significant quantity of goods were involved in this exercise.
27. Mr Wona stated that the food allocated was for the sole consumption of the campaign team stationed inside the four camps. The food was not distributed to any other person. He stated that on January 15th, every campaign team had reached their respective village destinations with their allocated food. He stated that all food unloaded for the campaign camps were labelled "*VNDP Vanua Lava*" and that the food divided among the campaign teams did not include CS Sugar as alleged by other persons.

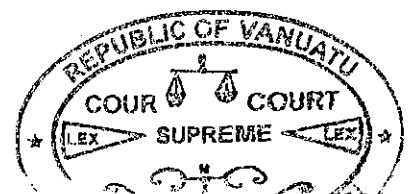


28. The Coordinator for the 2016 VNDP campaign team and ration manager in the camp was Mr Hanslow Maxwell (also referred to in this judgment as "*Father Anslow*"). Mr Maxwell lived on Gaua Island. He provided a statement that the camp site was located at Salnolo airport community approximately 50 metres from the airport terminal and the Gaua market house buildings. He contended that the campaign team's goods and rations were strictly managed. He did concede however that there were three occasions on which food and cash was provided to third parties.
29. The first occasion was when he offered Tom Moses two tins of sardines. He described Mr Moses as his father in law by marriage and he offered the tins of sardines as a gesture of appreciation for help which Mr Moses' wife had rendered in the cleaning and removal of tall manioc stalks from the camp site, the carrying of water of water to Mr Maxwell's home, the paying of kava for Mr Maxwell and his wife (there was no dispute that Mr Moses owned a kava bar) the giving of cooked food and raw vegetables to his family and usage of water from Mr Moses' home by his wife and children well before the campaign and during the campaign period. He attributed this gesture to the family relationship rather than for any political purpose. He said that the support received from Mr Moses had primarily been due to the fact that Mr Maxwell's missionary duties as an Anglican church priest had meant that he was financially unable to build a well for his family.
30. The second occasion was when he gave a carton of tinned fish to his father's friend Mr Batiek as an acknowledgment of the relationship between the two families and the assistance which had been provided to his sick father.
31. The third occasion, related to an agreement with a student in the village, Zeth Atkin for the use of his sound system for hire at 500 vt per day. The sound system was required for campaign purposes. Mr Maxwell said that he entered into this agreement on January 5th 2016. He said that Mr Zeth had come to his home on January 12th demanding payment and was given 1,200 vt in cash but because there was a shortfall in the amount owed, Mr



Maxwell followed him to his home and agreement was then reached that payment would be made in the form of food items equivalent to 500 vt every evening from thereon. On January 16th, Zeth came to the camp at approximately 5:30 am demanding payment and stating that he would take back his sound system. Accordingly, at approximately 8 am Mr Hanslow dropped off some food as a payment to Zeth's mother with the final payment being made on January 24th at around 2 pm along with the return of the sound system. Three payments of food in lieu of cash were made and it was the evidence of Mr Maxwell that Zeth's father Mr George Atkin was not present when any of those payments were made.

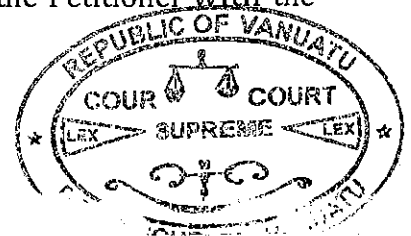
32. In respect of both Mr Moses and Mr Batiek Mr Maxwell stated that those gifts had come from his own private rations which he had brought with him from Port Vila to Gaua.
33. With reference to the election results Mr Maxwell provided a "*statistics report*" provided to the party showing the membership voting statistics. 307 members were registered for the VNDP party between December 11th and 17th in 2015. The total VNDP votes cast in the 2016 election amounted to 149. That indicated in itself that some 158 members registered for the VNDP either did not vote or voted for other parties. There were significant drops in numbers in some areas with one of the most significant drops being experienced in the Salnolo airport area in Gaua where the VNDP camp was set up, with 2015 membership for VNDP being recorded as 60 while only 25 votes were cast in that area in the 2016 election.
34. The Petitioner's case is not assisted by the fact that the Court was advised that the Petitioner would not be relying on the sworn statements of Mr John Vira and Mr Christopher Mackenzie in the prosecution of his petition. Both statements contain broad allegations of wide spread bribery and in the case of Mr Mackenzie annexed police statements from individuals purportedly supporting those allegations. I made rulings regarding the admissibility of those documents and the hearsay evidence contained in the



statements of Mr Vira and Mr Mackenzie. What is of note however is that those statements included statements by two persons Eloy Alfred and Serah Dudley both of whom gave unchallenged evidence for the Respondent. In the case of Mr Alfred his evidence was that Mr Mackenzie told him that he must go to see the police and he did so. The police officer asked him if he "saw the money" and he replied that he did not but was required to sign a statement in circumstances where he could not read or write either English or Bislama. He confirmed that he had told Mr Mackenzie that he had not seen any money. He also referred to being threatened if he came to Port Vila to give evidence in this case. The sworn statement of Ms Dudley was that she had been forced to make a statement to the police and did not understand what she was signing.

35. While the Petitioner no longer relies on Mr Mackenzie's evidence and while I have ruled that the statements attached to his statement were inadmissible there must be significant concern around the fact that they were filed in any event given the unchallenged evidence of Mr Alfred and Ms Dudley. The Petitioner could have challenged the serious allegations made by Mr Alfred and Ms Dudley but has chosen not to do so. That raises serious doubts regarding the integrity of the petition filed.
36. It is necessary first and foremost to consider the evidence and to determine whether the allegations made are established.
37. The burden of proving the allegations remains on the Petitioner with the standard of proof being the civil standard of the balance of probabilities. This issue was the subject of discussion in Sope v Principal Election Officer[2009] VUSC 62 and Kalsakau v. Principal Electoral Officer and Regenvanu and Others [Election Petition Case No. 20/2012]. It is sufficient to refer to the judgment of Spear J in Kalsakau where he stated at paragraph 23 that:-

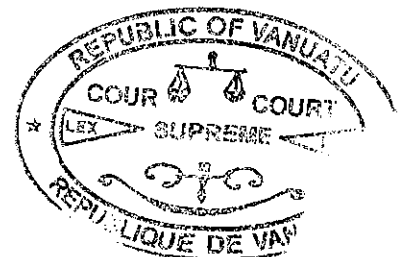
"It is unfortunate that the standard of proof in civil cases has been The burden of proving the allegations remains on the Petitioner with the



standard of proof being the civil standard of the balance of probabilities. That issue was the subject of discussion in Sope v. Principal Election Officer *approached as if it fluctuates. It does not fluctuate. Instead, it responds to the seriousness of the allegations required to be proven. The more serious the allegation, the greater scrutiny the Court should give to the evidence in question. As appears in the extract from a decision of the Supreme Court of New Zealand in Z v. Dental Complaints Assessment Committee below, ".....It is not the position that flexibility is "built into" the civil standard, thereby requiring greater satisfaction in some cases. Rather the quality of the evidence required to meet that fixed standard may differ in cogency, depending on what is at stake."*

ALLEGATION A

38. It is alleged that the First Respondent and his President and agents made "donations of foods and other goods to the Islands of Vanua Lava, Gaua, Merig and Mere Lava during the period of campaign with such period as prohibited by law to do so".
39. This allegation really includes the allegations set out in paragraphs (b), (c), (d), (e) and (g) of the petition in the sense that it was the thrust of the petition that Mr Wona's campaign team had liberally distributed food and other items during their visit to the Torba constituency. Allegations (b), (c), (d), (e) and (g) are really subsets of this broader allegation. It has not helped the Petitioner's case that much of the evidence given on behalf of the Petitioner contains broad speculative statements on the part of the Petitioner's witnesses which do not assist the Court in determining what occurred.
40. Putting aside the evidence of Mr Hilton who could not give any direct evidence of any corrupt practise or impropriety the evidence for the

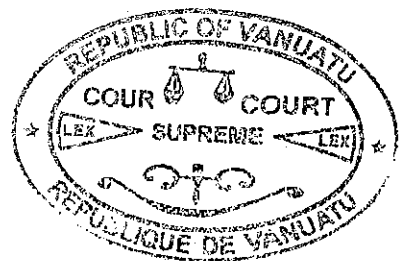


Petitioner is therefore that contained in the sworn statements of Johnson Moses, Mika Moses, Charles Bice, Terry Jack, George Atkin and Tom Moses.

41. There is no evidence that supports this very broad allegation with the exception of the island of Gaua which I shall refer to separately. There is simply no evidence of donations of food and other goods to the islands of Vanua Lava, Merig and Mere Lava during the period of the campaign. The evidence satisfies me that for this campaign to be operated within this particular constituency required careful planning and the consignment of significant amounts of food to campaign camps so that campaign team members could be fed. All of the evidence in this case is focused upon what occurred in Gaua and not on other islands and there is insufficient evidence to find this allegation established with, as I have said, the exception of Gaua.

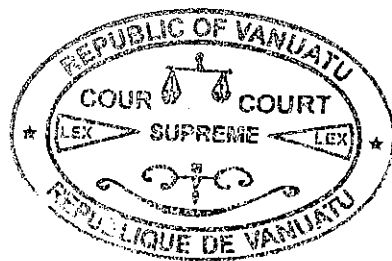
ALLEGATION B

42. It is alleged that on January 16th 2016 the First Respondent and his agents distributed "*bag of rice, tinned fishes and goods to the people of Gaua*". This allegation is a very wide allegation and the evidence simply does not satisfy me that this has occurred. The allegation suffers because of its lack of specificity and its failure to identify specific individuals who could be said to have benefitted in the way alleged. What I am satisfied of is that when the campaign boat was anchored offshore the necessary goods for sustenance of the campaign team were brought from the shore to the camp.
43. Mr Charles Bice provided a sworn statement in which he asserted:-
- "(3) *That I was there and witnessed the campaigning team for VNDP taking these goods and walking along the road near the Wongrass bungalows.*
- (4) *That my house and family were also shared and given tin- fishes. That almost all the area around the airport in Gaua was given good and especially tin-fishes.*



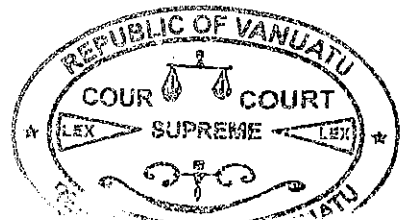
(5) Furthermore that I also witness Father Anslow who was the chair of the team near the camp giving tin-fishes to Chief Tom Moses. The camp was near the main road and people passing by such as Chief Tom at that time was given tin-fishes".

44. Mr Bice is a member of the opposition PPP party. Under cross examination he acknowledged and confirmed that the food that he saw being carried was being carried into the camp and that the persons who were carrying the food were members of the VNDP team. It is apparent from his evidence that the food that they were carrying to the camp was being carried from the boat which had brought the VNDP team and was anchored offshore. He also conceded under cross examination that he did not see any distribution of goods but that he "*could see that all of the families around us had the same sort of things*". Given that he stated that the VNDP camp was approximately 50 metres from his home, it is therefore surprising that he did not see any food or other items being distributed if that was what was happening. He also retreated from that part of his sworn statement in which he had asserted that "*people passing by such as Chief Tom at that time was given tin-fishes*". I did not find his evidence persuasive.
45. What has been acknowledged however is that there was relative freedom of movement in the campaign camp at Gaua. The evidence in that regard satisfies me that VNDP supporters entered the camp and were fed at the camp. I am satisfied that those persons were not "agents" as defined by Section 61C(2) but were simply supporters. I reject the contention of the Petitioner that this involved large numbers of people with liberal provision of food by the First Respondent. The evidence simply does not come close to establishing that, even on the standard of proof which applies here. I instead accept the evidence tendered on behalf of the First Respondent that between twenty and twenty-five persons per day entered the camp, that they were often the same people each time and that those numbers included children. On the face of it however, such activity was in breach of Section 61A.



ALLEGATION C

46. It is alleged that the First Respondent and his agents *"distribute foods in Gaua and such distribution were made very substantially and in large amount which chief Tom Moses was given over 5 tinned fishes while he was passing by the first respondent campaigning camp area"*.
47. Mr Tom Moses swore a statement that on January 16th he was walking past the airport and saw the VNDP team at their camp. He stated that the Chairman (Father Anslow) called him and gave him over 5 cans of tinned fish. Mr Moses stated that:-
"I knew he must be doing this to other people".
48. Quite how Mr Moses knew that that was the case is anyone's guess as Mr Moses gave no other evidence about that. But in my assessment it did show an inclination on the part of Mr Moses along with his evidence under cross examination to be prepared to give damaging evidence against Father Anslow. My impression of Mr Moses was not favourable. The impression gained under cross examination was that he seemed to have a personal vendetta against Father Anslow which was demonstrated by his spontaneous reference to the fact that Father Anslow had stolen Vt 15,000 *"from the community"*.
49. There is no question that Mr Moses was given tinned fish by Mr Maxwell. Mr Maxwell does not deny that. What he does say however is that those tinned fish came from his personal allocation of two cartons which were brought to Gaua for his family. He emphasized that the tinned fish he provided to Chief Moses, which he maintains, and I accept, were no more than two tins of fish, were from his own personal supply and he denied that they were intended to bribe Mr Moses. During the course of his evidence before the Court, Mr Maxwell became visibly upset when asked about the relationship between he and Mr Moses. He explained that what had been

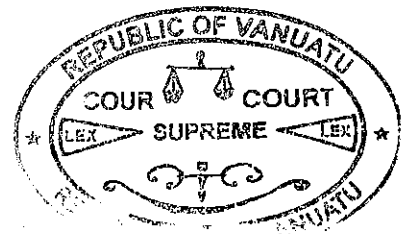


said in the evidence had deeply affected his family and especially his wife and children. He acknowledged that in hindsight perhaps providing the fish was an unwise step taking into account the views now expressed by other parties but was adamant that they were not given as a bribe.

50. I did not find Mr Moses to be a particularly compelling witness and his objectivity appeared to me to be affected by his personal animosity towards Mr Maxwell. Where there is a conflict between the evidence of Mr Maxwell and Mr Moses and I prefer the evidence of Mr Maxwell. I am satisfied that the goods provided to Mr Moses were not provided by the election candidate and they were not part of any campaign team supplies. I am satisfied that they were the personal property of Mr Maxwell and that what was done by him was done personally and as part of recognising the assistance which Mr Moses has provided to his family. I am supported in the view that they were Mr Maxwell's personal property by the fact that the photo exhibits provided in evidence clearly showed a carton labelled with Mr Maxwell's name rather than the "VNDP" label affixed to other supplies.
51. It would be a different issue if Mr Maxwell were distributing this property to random voters but that is not what occurred here. While the timing was poor and while Mr Maxwell accepted in cross examination that it may have been viewed in a different way by others that does not mean that the provision of those goods was in contravention of section 61A and I find that it was not.

ALLEGATIONS D AND E

52. It is appropriate that these allegations be dealt with together as they contain a common theme.
53. Allegation D alleges that *"Mika Moses and other members were shared with carton of tinned fishes on the said dates which were prohibited to make and such carton of tin fishes to be produced to this honourable Court"*.

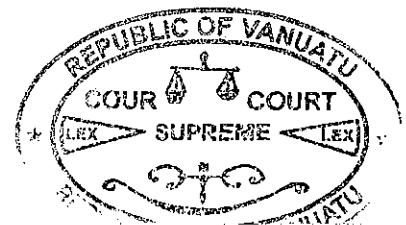


54. Allegation E alleges that George Atkins *"and other members were shared with carton of tinned fishes, rice and sugar on the said dates which were prohibited to make."*

55. Mr George Atkin gave evidence by sworn statement that on January 14th at approximately 6 am he was at Wongrass Bungalow and saw the VNDP campaigning team taking 4 bags of rice and 4 white bags of clothes and cartons. He stated that he saw Mr Bice on the side of the road at the Bungalow and walked over to him and told him that that was not allowed during this period. He stated that Mr Bice confirmed that. He stated at paragraph 6 of his sworn statement that:-

"Many of those cartons were shared among us. I also ate the tin-fishes given to my family. That Father Anslow also took these goods to my house. This was during the campaign period on the 16th January 2016 at around 1 pm."

56. Mr Atkin is a member of the Natatok party and was on the campaign team of that party. Under cross examination he acknowledged the food that he saw was taken to the camp. He acknowledged that he did not see any food being distributed to houses but then asserted that Mr Wona's team shared food and that he saw a lot of people coming and they were holding onto food but that he could not name who they were. Given the relatively small population in that area that is somewhat surprising. More troubling however was that Mr Atkin then acknowledged under cross examination by Mr Godden that he had gone with the campaign team of the Natatok party to Mere Lava on January 13th and had returned on January 18th. It would therefore not have been possible for him to see food distributed on January 14th. This did not stop Mr Atkin from then asserting that he saw food being distributed on January 13th as he was preparing to leave with his campaign team. Because of the apparent confusion in Mr Atkin's evidence I asked him a number of questions to try and reconcile the clear conflicts in his evidence. I put it to Mr Atkin very clearly that he could not have been at



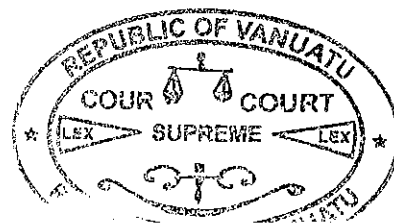
Wongrass Bungalow on January 14th if he was on Mere Lava. He asserted that his statement was correct. When I put it to him directly that he may not be telling the truth he simply failed to make any comment in response. I found Mr Atkin's evidence on this particular issue to be very concerning. In addition, he acknowledged that Father Anslow had not taken the tin-fishes to him personally. While he asserted that that had occurred on January 16th at around 1 pm, the clear inference from his statement being that he had witnessed that personally he could not have done so if he was not on the island. He acknowledged also that the VNDP had hired his son's sound system but that he did not know the payment arrangement which had been reached with his son. He acknowledged that he did not know whether the food given was payment for the sound system or not. I considered Mr Atkin's evidence to lack credibility particularly given the obvious position that he could not have been in two places at once.

57. Mr Johnson Moses swore a statement alleging that:-

"(2) I saw an agent of Jack Armstrong Wona and chairman of the campaign team Father Anslow giving a bag filled with rice, tin-fishes and sugar to the home of George Atkin. I saw this with my very own eye.

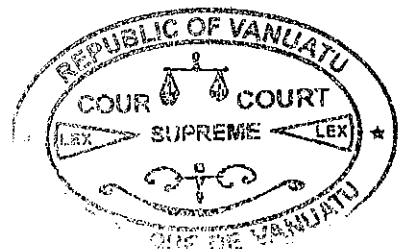
(3) Not only that but it was distributed to many people around Gaua by the VNDP team".

58. Mr Moses is also a member of the PPP Party. He acknowledged that he was campaigning with Mr Hilton on Mere Lava for part of the time in question, although he declined to provide precise dates. He acknowledged however that he was with Mr Hilton until January 17th when Mr Hilton flew to Gaua. He acknowledged that he was away for 3 days and yet for some reason he declined to agree with Mr Godden's suggestion that that must have meant that he went to Mere Lava sometime on January 14th or 15th. He also stated that he could not remember the exact date of the election. He maintained that he saw Father Anslow give food to Mr Atkin consisting of a big bag of flour that was left at "George's feet". This would be in contrast with Mr



Atkin's evidence which suggested that he had received tin-fish. When it was put to Mr Moses that Father Anslow had delivered food as part of a commercial arrangement regarding the hiring of a stereo sound system from Mr Atkin's son, Mr Moses simply asserted that if that was their agreement then it constituted bribery and was illegal.

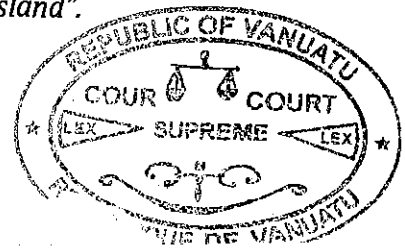
59. There is simply no persuasive evidence of these allegations. One of the concerning aspects of this case is the number of generalised allegations which have been made by witnesses giving evidence for the Petitioner. Such evidence included allegations that rice, tinned fish and sugar were distributed to "*many people around Gaua.*" The evidence in this case falls well short of establishing that there was wide spread distribution of goods as alleged. If goods were distributed in that way then witnesses should have provided sworn statements and the Court should have heard their evidence. No such witnesses were brought forward. Much of the evidence was of a general and hearsay nature and of very poor quality.
60. There is no doubt that there is evidence of persons being seen carrying bags of rice or cartons of tinned fish. There is very clear evidence of those goods being carried by campaign members to the campaign camp. However the evidence is a long way from establishing that these were distributed in some kind of general and random way to prospective voters. The allegation is not established.
61. The evidence does not establish that Mika Moses or other persons were provided with a carton of tinned fish. While Mr Moses certainly asserted that, it was adamantly denied by Mr Maxwell who denied providing fish to either Mr Moses or to the Natatok Party. Given the reservations I have regarding Mr Moses' credibility, which I refer to in addressing Allegation F, below, I prefer the evidence of Mr Maxwell and I find that this allegation is not proved.



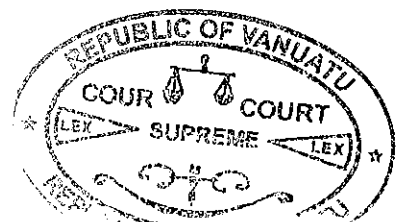
62. What is established however is that Mr. Atkins son was given cash or goods in kind for the hireage of a stereo system and that that took place within the prohibited period. Accordingly, it constitutes a breach of Section 61A.

ALLEGATION F

63. This involves an allegation that *"the first respondent, his servants, agents and campaigning team including the President of the party MP Christopher Emelee did bribe Mika Moses and other members with 5,000 Vt at Gaua Island."* First and foremost, there was no evidence presented that anyone other than Mr Emelee had allegedly given anyone other than Mr Moses the sum of 5,000 Vt. The incident was said to have occurred on January 13th, at approximately 9 pm. Mr Moses stated that he was invited by Mr Emelee to go and meet him at the camp. When he arrived at the camp, Mr Emelee greeted him and shook his hand. After a while he shook his hand a second time and invited Mr Mika to a *"much darker place where there is no light and away from the people and he shook my hand again but this time I can feel a paper placed in the palm of my hand. It was a Vt 5,000 note"*.
64. Mr Mika alleged that Mr Emelee told him at the same time that Mr Mika must ensure that the Peoples Progressive Party didn't win the election and that Mr Wona must win. He stated that his uncle, Terry Jack witnessed the Vt 5,000 given to him by Mr Emelee and Mr Jack suggested that he use it to buy kava and to drink with their supporters. While Mr Moses stated that he was *"badly influence by his action which influences us to support his candidatee"*, there is no evidence that he actually voted for Mr Wona, and there was no further evidence about the alleged influence.
65. In Mr Jack's sworn statement he stated that he witnessed Vt 5,000 being given to Mr Moses by Mr Emelee and that he was standing very close. His sworn statement also included a statement:-
"That every supporter was influenced by this action and many voted for VNDP party because of his bribery actions in Gaua Island".

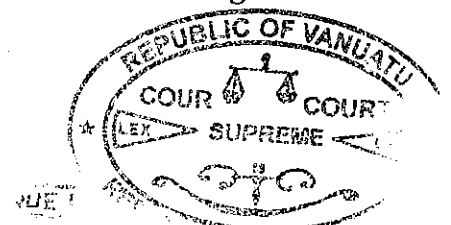


66. Mr Emelee adamantly denied giving Mr Moses Vt 5,000 or any money at all. He stated that because he was the Deputy Prime Minister at that time, he was accompanied by two police officers and two VNDP security officers who maintained strict security protocol. He stated that approximately 9 pm Mr Moses came and asked one of the security officers to see him. He greeted Mr Moses and told him that they were having light refreshments and local fruits and that he could join them if he wished. He stated that Mr Moses was drunk at that time and that at no time did he ever take Mr Moses to any dark spot or give him money as alleged. In addition, his two close personal protection officers and his two VNDP security officers were with him at all times. He acknowledged the presence of Mr Jack but said that he was approximately seven metres away from him at that time.
67. Sworn statements were filed by Mr Emelee's two personal protection officers Corporal Albert Frank and Sergeant Donald James as well as Mr Emelee's two private security officers, Mr Johnny Felix and Mr Stanley Elfric. All sworn statements confirmed that from the time Mr Emelee left the ship to the time he returned at approximately 9:30 that evening all four were in close proximity to him. Corporal Frank stated that he and Sergeant Donald provided security in accordance with the rules and procedures of the Close Personnel Protection Unit. All four statements denied that Mr Moses had ever been alone with Mr Emelee in the way that was alleged. Both Mr Felix and Mr Elfric referred to Mr Moses being affected by kava. While I have referred to all four statements, Mr Felix was not available for cross-examination. I accordingly do not take into account the evidence in his statement.
68. Under cross examination Mr Moses acknowledged that prior to the 2016 elections he had been part of the VNDP. He had held a position in the VNDP as political commissar. He subsequently joined the Natatok Party. A candidate from that party had also contested the election. Mr Moses stated that when he entered the camp he saw no security officers. He said that he



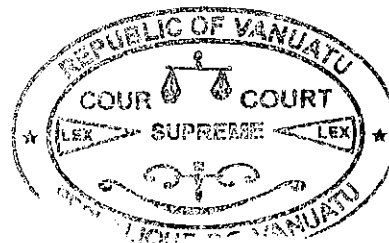
had met up with a boy called Seul who told him that his "*father*" wanted to see him and who took him into the camp. That was not included in his sworn statement. He stated that he was hugged by the Deputy Prime Minister on two occasions. This also varied from his sworn statement where he stated that Mr Emelee shook his hand on two occasions. After Mr Emelee hugged him for the second time he then took him to a place where the light was "*not so bright*" and shook his hand placing money in his hand at that time. Subsequently, on answering questions from the Bench Mr Moses stated that Mr Emelee hugged him when he arrived at the camp and before he and Mr Terry left and that is when Mr Emelee gave Mr Moses the money. When it was put to Mr Moses that he had not referred in his statement to being hugged twice he stated that "*maybe [he] had forgotten*". He acknowledged having had a shell of kava before coming to the camp but denied that he was drunk.

69. Under cross examination Mr Terry maintained that when Mr Moses was speaking with Mr Emelee there were no other persons standing close to Mr Emelee. He gave evidence that Mr Emelee and Mr Moses hugged only once but that was the occasion when Mr Emelee gave Mr Moses money. When it was put to him that Mr Moses had stated he and Mr Emelee had hugged twice, the second time being in darkness Mr Jack, did not agree with that proposition. He also stated that when Mr Emelee and Mr Moses hugged that they were standing "*in the light*". Having said under cross examination that he saw them hugging in the light, that he could see the money being put in Mr Moses hands, and even commenting that the money was new, he then retreated from that position and stated that he "*heard some paper*". Mr Jack stated that he was standing behind Mr Emelee at that time.
70. Both Mr Frank and Mr Elfric were cross-examined. Cross examination focused principally on the time that the ship arrived in Gaua. Neither witness was cross examined in respect of their assertion that at the time Mr Moses met with Mr Emelee, Mr Emelee was in the presence of his security detail. Their evidence was not shaken in cross examination. Sergeant



James was not required for cross examination and accordingly his evidence was completely unchallenged.

71. Even putting aside the issue of Sergeant James unchallenged evidence, I prefer the evidence of Mr Emelee and his security detail to the evidence of Mr Moses and Mr Jack. As referred to, the evidence of Mr Moses and Mr Jack was inconsistent in significant details and I do not accept it. While they both contended that they were standing close together Mr Moses contended that he was hugged twice while Mr Jack maintained he was hugged once. Mr Jack's evidence suggested Mr Moses was hugged in a well-lit area while Mr Moses asserted it was in darkness. Mr Jack at first said he saw the money but then retreated from that evidence. Mr Moses did not mention being hugged at all in his sworn statements. Quite apart from those inconsistencies, I regard it as extremely unlikely that not one of Mr Emelee's security staff would have been close by at the time. I do not find the allegation of alleged bribery of Mr Moses to have been established.
72. During the course of the hearing there was cross examination by Mr Kapapa relating to various sums which were provided to the families of campaign team members to enable them to attend to the costs of living while their family members were absent on campaign together with sums allocated for the purposes of attending to the costs of transportation which included the costs of shipping. Mr Emelee acknowledged that various sums were distributed by the executive of the party to meet the costs of campaigning. Mr Emelee referred to the particularly high costs of campaigning in the Torba Constituency given that transportation is undertaken by sea, that the cost fuel is between 280 Vt and 300 Vt per litre and that a boat can use up to 140 litres for one trip between islands.
73. In his submissions Mr Kapapa submitted that this was a breach of the Act and referred to the decision of the Supreme Court in Boe v. Principal Electoral Officer [2013] VUSC 87 where it was held that sending the sum of

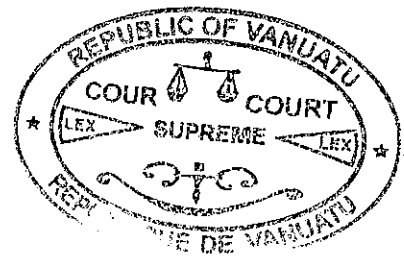


Vt 34,000 for monies owed for the use of a boat during the prohibited period was in breach of section 61A (1)(b)(ii) of the Act.

74. I do not propose to deal with such evidence in a determination of this matter. I decline to do so because these issues were not particularized in the electoral petition. There is a very clear onus on any petitioner to specify the allegations which have been relied on in the electoral petition. The matters which I have just referred to and which were relied on by Mr Kapapa in his submissions as evidence of breaches of the Act were not referred to in any way in the particulars of the petition. In my assessment it would be quite wrong to permit the petitioner to rely on these allegations now.

DISCUSSION

75. There is no dispute as to the relevant chronology in these proceedings. That chronology is as follows:-
- 1) November 24th 2015 - Dissolution of Parliament.
 - 2) January 7th 2016 - Political Campaigns commence.
 - 3) January 19th 2016 - Political Campaigns close.
 - 4) January 22nd 2016 - Election Day.
 - 5) February 1st 2016 - Publication of Election Result in the Official Gazette.
76. Regrettably the Petition presented on behalf of the petitioner is badly drafted and, in my assessment does not take into account the 2012 amendment to the Representation of the People Act.
77. The petition seeks a declaration that the election at the Constituency of Vanua Lava, Gaua, Merig and Mere Lava Island on January 22nd 2016 is void *"due to the breaches of the provisions of section 61, 45, 46 and 43 and other provisions mention thereof"*.



78. Section 61 of the Act provides:-

"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 61 (A), 61 (B) or 61 (C);"

(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

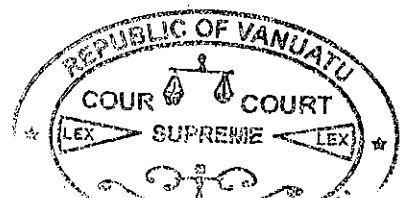
(b) such failure did not affect the result of the election,

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

79. The difficulties presented by the 2012 amendment to the Act were referred to by Spear J in Kalsakau v. Principal Electoral Officer & Ors. (Election Petition Case No. 20/2012, 26 July 2013) where he stated at paragraphs 125 and 126:

"125. This case illustrates just how difficult it is now to have an election overturned by way of an election petition. A petitioner is required to establish that the non-compliance with the Act, the prohibited gifts or such like must have had an effect on the outcome of the election. That will in most cases be very difficult indeed to prove particularly given the short period of time that a petitioner has to define the scope of his or her petition.

126. One of the more far-reaching consequences of the 2012 amendments was the repeal of s.61(2). That provided that the election of a candidate subsequently convicted of an offence of corrupt practice (personification, bribery, treating and undue influence) shall be declared void. This leaves the consequences of committing such an offence to be the penalties specified in s. 48 of a fine not exceeding Vt 100,000 or to imprisonment for a term not exceeding five years or both. There is now no means by the Act to overturn the election of a candidate unless it is proven that this



must have had an effect on the outcome of the election under s.61 as amended."

Section 61A provides:-

"61A 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 source of funding, whether in the form of:

(i) cash donations; or

(ii) donations in kind,

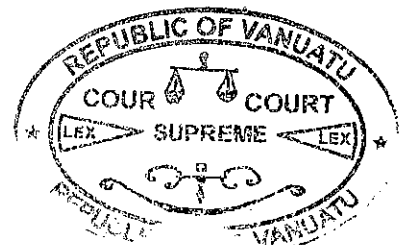
from the period commencing at the end of the life of Parliament or at the date of the dissolution of Parliament under subarticle 28(2) or (3) of the Constitution, to and including, the polling day.

(2) For the purposes of this section,

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

Section 61B provides:-

"61B Exceptions on polling day



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."

Section 61C provides:-

"61C Exception during the campaign period

(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 in an area or village for the purposes of holding a campaign in that chiefs or persons village or area; or

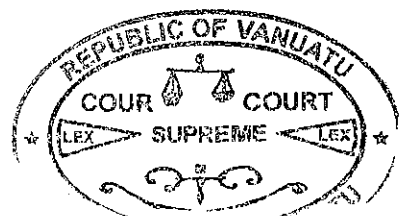
(b) provide food, drink, entertainment, transport or accommodation only to his or her agents; or

(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."

80. It is submitted on behalf of Mr Hilton that Mr Wona has breached section 61 (c) of the Act. With respect to Mr Kapapa that argument is misconceived.



Section 61C sets out exceptions to section 61A, which themselves are subject to paragraphs 46 (a) and (b). Once a Petitioner has established certain prohibited acts pursuant to section 61A it is for the Respondent to establish that those Acts come within section 61C and therefore are lawful exceptions. The same may be said with reference to section 61B. While the Petitioner clearly alleges a breach of section 61B there is absolutely no evidence of what occurred on polling day and accordingly section 61B is not relevant to this enquiry.

81. The firm focus falls upon section 61A.

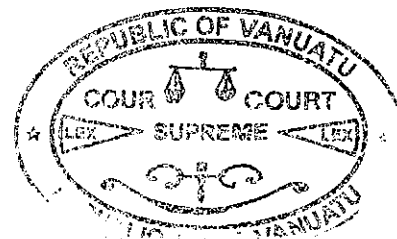
82. While submissions on behalf of the Petitioner referred to sections 45 and 46 of the Act which refer to bribery and treating it is clear that the 2012 amended has rendered that submission redundant. As was referred to by Spear J in Kalsakau v. Principal Electoral Officer and Ors. :-

“86. *So, gone is the reference back to the corrupt practices (bribery, treating and suchlike) defined in s. 48.*

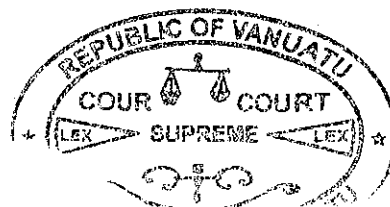
87. *What must accordingly be proven by the petitioner in this respect is not bribery or treating as such but the giving of cash or donations in kind to any members of the constituency in which he is a candidate during the defined period – s.61A.”*

83. In this case there was no dispute that the defined period is November 24th to January 21st 2016. However, the evidence itself firmly focuses not on the whole period but events which are alleged to have occurred between January 16th and January 18th, 2016.

84. In that regard I have found that there are two instances of a breach of Section 61A of the Act as set out in this judgment. My assessment of those breaches is that they could not be described as “corrupt” in the usual sense of that word. Given what was alleged by the Petitioner they may be considered as relatively minor breaches, In having reached this conclusion I again repeat that matters such as this must be resolved by evidence and not by speculation. Most of the material presented by the Petitioner could be placed firmly in the latter category.



85. In the event of the Court finding that the candidate has acted contrary to section 61A of the Act makes it clear that the Court cannot declare the election of the successful candidate void unless the Court further finds that:-
- a) The election was conducted in accordance with the principals laid down in the Act – section 61A (2)(a); and
 - b) The conduct of the candidate did not affect the result of the election – section 61A (2)(b).
86. As to the issue of the election being conducted in accordance with the principles laid down in the Act, the primary difficulty is that the Act contains no express statement of principles. This was a matter referred to by Spear J in Kalsakau where he stated at paragraph 29:
- “The Act is devoided of any expressed statement of principles. The Act is more a prescription as to how national elections are to be conducted. While the Courts can certainly extract principles from a consideration of the provisions of the Act, section 61(2)(a) is quite explicit that it is the principle “laid down in this Act” that must be considered. That suggests that Parliament had in mind an express statement of principles which would be for the guidance of the Courts when considering the construction and application of the Act. However, no such statement exists.”*
87. In such circumstances it is not possible to have regard to the principles laid down in the Act and I respectfully agree with the observation of Spear J that it might well be that summary consideration of section 61 is required.
88. Given the conclusions I have reached regarding the evidence there is no proper basis upon which I could conclude that the breaches I have referred to affected the result of the election and I am satisfied that they did not do so. No cogent evidence was provided to the Court that the result of the election was affected and while Mr Kapapa placed reliance on the Supreme




Court decision in Lop v. Isaac & Ors. EPCS of 2008 and invites me to find parallels with this case I decline to do so. The cases are quite different and were decided before the 2012 amendment, which as was recognised by Spear J in Kalsakau renders it difficult to have an election overturned on an election petition. In addition, the Chief Justice observed in Lop that:-

"The distribution of 600 saucepans, spades and access to voters of 2004 and others in various villagers, places and communities from 23 July to 10 August 2008 in the manner described or widespread or extensively prevailed that it may be reasonably supposed to have affected the result of the election. The admission evidence of the first respondent of the distribution, the manner, the large quantity and the timing while the general elections are imminent, constitute reasonable basis for making the supposition that they have affected the result of the election of 2 September 2008 on the Constituency of Tanna".

89. The findings in this case are significantly different and for the reasons set out here in the petition is dismissed and I declare the First Respondent duly elected.
90. The respondents are entitled to costs and costs are to be agreed within 21 days failing which they are to be taxed.

DATED at Port Vila this 28th day of July, 2016

BY THE COURT


JP GEOGHEGAN
 Judge

