

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

Election Petition
Case No. 20/892 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 BANKS
CONSTITUENCY HELD ON 19TH OF MARCH
2020

BETWEEN: Jack Armstrong Wana
Petitioner

AND: Principal Electoral Officer
First Respondent

AND: Danny Silas
Second Respondent

AND: Kenneth Woleg
Third Respondent

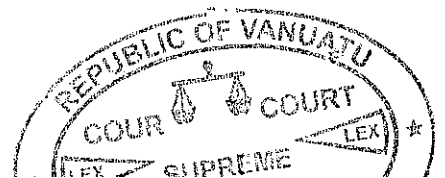
Date of Hearing: 3rd June 2020
Date of Decision: 18th June 2020
Before: Justice Oliver.A.Saksak
In Attendance: Mr Less John Napuati for the Petitioner
Ms Adeline Bani and Mr Tom Loughman for First and Third
Respondents
Mr Garry Blake for Second Respondent

JUDGMENT

1. The application by the First and Third Respondents to have the Petitioner's petition struck out is allowed with costs.

Background

2. In his petition filed on 24th April 2020 the petitioner alleged –
 - (a) That the stoppage of polling on 19th March 2020 and resuming same on 20th and 22nd March 2020 were made contrary to the National Polling Day Order No. 150 of 2019 and that the elections for the Banks Constituency should be declared void and a by-election held.



- (b) That there had been a breach of section 35 of the Representation of the People Act [CAP. 146] (the Act) by the First Respondent resulting in a non-compliance which affected the results of the elections.
 - (c) That sections 21 of the Act and Article 4(2) of the Constitution were breached by the First Respondent.
 - (d) That section 54 (d) and (g) were breached by the Third Respondent wilfully preventing 4 voters at Vatop Polling Station from voting, although they had electoral cards.
 - (e) That the First Respondent was discriminatory towards the 4 voters who were stopped from voting on 20th March 2020 at Vatop Polling Station.
3. The Petitioner filed his supporting sworn statement also on 24th April 2020 and 4 additional sworn statements on 27th April 2020 from Bule Kency, Estapas James Famo Estapas Nancy and David Blacky Joseph. All four deponents say they presented their electoral cards to the Third respondent but were disallowed voting.

Respondent's Defences

4. The First and Third Respondents denied any wilful prevention of the four voters who alleged they had cards but were not allowed to vote and said their names were not on the Electoral Roll in compliance with section 31 (2) of the Act. Further they said that the petitioner has no clear evidence to show there was wilful prevention. They said the petitioner's allegations were misconceived and baseless and should be dismissed.
5. They relied on the sworn statements of Joe Johnson Iati, Reynolds Surmat and Kenneth Woleg filed on 29th May 2020 in support of their defences.
6. The Second Respondent filed a response on 3rd June 2020 saying that the elections for Banks Constituency was conducted in accordance with the principles laid down in the Act and any alleged failure did not affect the result of the election, therefore the relief sought should be denied. He sought damages and costs thrown away against the petitioner in the event the petition is successful and there was to be a by-election.



Submissions

7. The Solicitor General filed written submissions on 8th June 2020 in support of the application and in response to the petitioner's responses filed earlier on 3rd June 2020.
8. Mr Blake filed submissions in support of the strike out application also on 8th June.

The Issues

9. The Issues as I understand them to be are-
 - (a) Was there breaches of section 21 of the Act and Article 4 (2) of the Constitution by First Respondent?
 - (b) Were there breaches of section 35 of the Act by the First Respondent?
 - (c) Was there breaches of section 52 (d) and (g) by the Third Respondent?
 - (d) Did the petitioner have evidence in support of his allegations showing the Third Respondent's actions as wilful and showing the petitioner could have had more votes had the 4 voters who were not allowed to vote at Vatop voted?
 - (e) Is the petition baseless and misconceived?

10. The Relevant Legal Provisions

- (a) *"4. National sovereignty, the electoral franchise and political parties*

(1) *National sovereignty belongs to the people of Vanuatu which they exercise through their elected representatives.*

(2) *The franchise is universal, equal and secret. Subject to such conditions or restrictions as may be prescribed by Parliament, every citizen of Vanuatu who is at least 18 years of age shall be entitled to vote."*

- (b) *Article 28 (4) of the Constitution,*

28. Life of Parliament

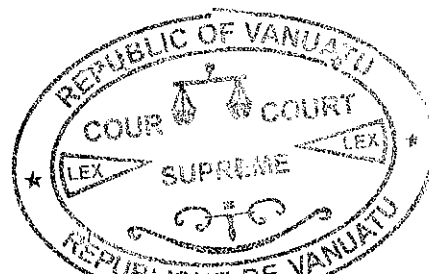
(1)

(2)

(3)

(4) *General elections shall be held not earlier than 30 days and not later than 60 days after any dissolution.*

(5)"



(c) **Section 21 of the Act,**

"21. Polling day

Subject to article 28(4) of the Constitution polling day shall be a day fixed for an election or the commencement of an election by the President acting on the advice of the Prime Minister given after consultation with the Electoral Commission and the Principal Electoral Officer."

(d) **Section 31 (2) of the Act,**

"31. Electoral rolls to be in polling stations and voters only to vote if therein and have electoral cards

(1)

(2) No person may vote unless his name is contained in the roll of electors of the polling district of the station at which he presents himself for voting, and he produces a valid electoral card issued to him."

(e) **Section 35 (1), (2) and (3) of the Act,**

"35. Suspension and stopping of poll

(1) Where polling is interrupted at a polling station in such circumstances that in the opinion of the returning officer, it is temporarily impossible to continue he may suspend the poll and recommence it when he considers polling may continue undisturbed.

(2) Where there has been a suspension and reopening in accordance with subsection (1) polling shall continue after the time fixed for ending the poll for the period of the suspension unless the returning officer is satisfied that every elector on the roll has cast his vote.

(3) When circumstances arise which in the opinion of a returning officer make it impossible to continue with a poll within a reasonable time whether or not polling has already been suspended under subsection (1) he shall declare the poll stopped and inform the Principal Electoral Officer of the declaration who shall immediately forward a report thereon with any comments he may have to the Electoral Commission."

(f) **Section 52 (d) and (g) only of the Act,**

"52. Offences by election officers

Any election officer having any duty to perform under this Act, who –

(a).....

(b)

(c)

(d) wilfully prevents any person from voting at a polling station at which he knows or has reasonable cause to believe such person is bound to vote; or

(e).....

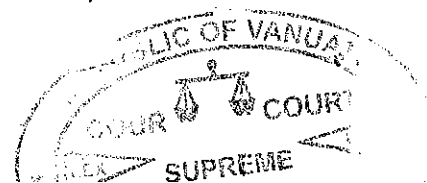
(f)

(g) without reasonable cause acts or omits to act, in breach of his official duty,"

(g) **Section 61 (a) and (b) only of the Act,**

"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) bribery, treating, undue influence or other misconduct or circumstances whether similar to those herein before enumerated or not, have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;

(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;”

(h) Section 65 of the Act.

“65. No person required to reveal his vote

No person who has voted in an election shall in any proceedings be required to state for whom he has voted.”

Discussion

11. The Petitioner has not sought for a recount of the votes despite he lost the election by a very narrow margin of only 1 vote. Instead he seeks a by-election which places on him a heavier burden of proof on the balance of probabilities.

First Issue

12. The first issue is whether section 21 of the Act and Article 28 (4) of the Constitution were breached. This is a legal issue. The facts are not in dispute. His Excellency the President fixed by Order No. 150 of 2019 that 19th March 2020 was to be the polling day for the purpose of general election in the Republic of Vanuatu.
13. By necessary implications from the language of the definition of “Polling day” in section 1 read together with section 21 and Article 28 (4) of the Constitution and in conjunction with section 35 of the Act, polling can extend beyond the day fixed as polling day depending on the prevailing circumstances on the polling day itself, but provided only that the extension does not fall outside the 60 days stipulated in Article 28 (4) of the Constitution.
14. It is common knowledge that the Banks Constituency consists of separate Islands of Vanua Lava, Mota Lava, Gaua, Mere Lava, and Merig. And they are separated by vast stretches of Seawater. It is common knowledge also as deposed to by Mr Iati in his sworn statement that Tropical Cyclone Gretel was causing strong winds and very rough seas in the northern waters of Vanuatu on 15th and 16th March 2020. These hampered and delayed the RVS Tukuro from sailing in time from Port Vila until 17th March and arriving at Merelava only on 19th March 2020. That explains adequately the reasons for suspending elections from 19th March to 20th March and further to 22nd March 2020. And those dates fall on the 58th 59th and 60th day within the



requirements under Article 28 (4) of the Constitution. And those 2 extra days still fell within the definition of “**polling day**” in sections 1 and 21 of the Act.

15. In answer to the first issue, there was no breaches of sections 1 and 21 of the Act and Article 28 (4) of the Constitution.

Second Issue

16. The second issue whether or not there was a breach of section 35 of the Act, the delay in RVS Tukuro arriving in time on Merelava, Gaua and Merig was due to natural weather conditions, what is commonly known as “**acts of God**”. Therefore no blame could be attributed to the First Respondent as it was beyond his control and responsibility. This issue is answered as “**No**”.

Third Issue

17. The third issue whether the refusal by the Third Respondent to allow 4 voters at Vatop Polling Station a wilful act contrary to section 52 (d), and without reasonable cause contrary to section 52 (d), of the Act? The first and Third Respondents do not deny this had occurred. However they contend these 4 voters had no names appearing on the Electoral Roll. And they relied on section 31 of the Act. That section of the law is clear. Only voters who have electoral cards and their names appear in the roll of electors can vote. The case of **Kalsakau v Principal Electoral Officer** [2012] VUSC 20 is clear authority on this point.
18. Mr Napuati argued that it was the responsibility of the First Respondent to make sure these 4 voters' names were included in the roll of electors. Counsel relied on **Sope v Principal Electoral Officer** [2009] VUSC 62. Whilst this argument may be correct, it is not altogether true. The voter who has a card also has the responsibility of ensuring that his name appears in the roll to be consistent with the issuance of the card. Section 16 (3) of the Act requires that:
“ Any person who is eligible for registration in the electoral list but whose name has not been included in the list may make an application before the end of the inspection period of the inclusion of his name on the list.” (My underlining for emphasis).
19. From this provision the responsibility for making sure a voter's name is on the list rests on the voter. The period allowed is stated in section 16 (1) as not being less than 14 days in each calendar year ending on or before 15th day of June. On 15th December 2019 when they 4 witnesses said their cards were issued, this was a closed period. That explains why their



names were not entered in the roll and could not be even on 15th December 2019. It would have been unlawful to do so.

20. The evidence of the 4 voters namely Bule Kency, Estapas James Famo, Estapas Nancy and David Blacky Joseph are all the same and are very suspicious. They all say the Polling Officer issued their cards on 15 December 2019 but failed to specify who the Polling Officer was and where it was made. Jean Kenneth Woleg the Presiding officer categorically denied ever issuing any cards to these 4 persons, but confirmed their names were not included in the rolls and that being the reason why he refused them from voting. Their evidence fall short of disclosing any applications they made as required by section 16(3). The case of **Sope** therefore does not assist the petitioner's case.

21. Electoral Cards can only be issued after a person eligible for them are qualified under section 9 of the Act. The 2 requirements are that (a) they must be citizens and (b) they must be 18 years old on or before the qualifying date. There is no evidence by the petitioner or the 4 persons who deposed to sworn statements in support of the petition that they each went through the process in section 9 of the Act.

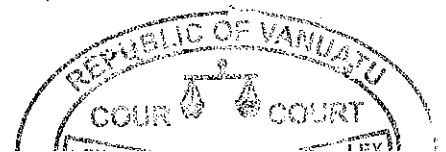
22. That made the issuance of their electoral cards suspicious. And where their names did not appear in the electoral roll it made their case even more suspicious. The decision by the third Respondent in not allowing these 4 persons to vote was therefore not a wilful act or an unreasonable act, rather it was a legal and a lawful act, permitted by section 31 of the Act. This issue is therefore answered as **"No"**.

Fourth Issue

23. The fourth issue is also answered as **"No"** basically for the same reasons given for the third issue.

Other Issues

24. The other issue is about the alleged breaches or denials of the 4 persons' constitutional rights to vote pursuant to Article 4(2) of the Constitution. It is all very well arguing about fundamental rights while forgetting about the fundamental duties. It was these persons' duties to first obtain their electoral cards in accordance with the qualifications in section 9 of the Act. And it was their duties as well to make sure their names were on the electoral roll pursuant to section 16



(3) of the Act. Having failed those duties, they could not complain about denial of their rights under those circumstances. Their arguments on this point are therefore untenable and are rejected.

25. Further, pursuant to Article 4 (2) of the Constitution, section 33 (1) and section 65 of the Act voting is secret. As such none of those 4 persons who complained about not voting could reveal who they could have voted for had they been allowed to do so. And the Petitioner has no independent evidence showing these persons would have voted for him.

26. Furthermore these 4 persons are not the petitioners in this case. They are merely witnesses. They could have filed a petition under section 55 (a) of the Act but they must show they are registered voters. Alternatively as individuals, they could have filed a constitutional case but no such case has been brought. See lautu v Republic [2009] VUSC 149.

Final Issue

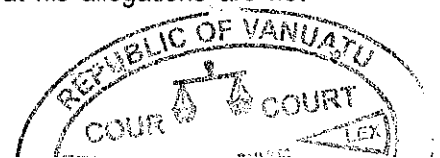
27. The final issue: Whether or not the petition was baseless and misconceived so that it should be struck out at this point?

28. From the beginning the petition was validly filed pursuant to section 56 of the Act because (a) it was filed within the 21 days permitted under section 57 and (b) a deposit fee of VT 20,000 was paid upon filing.

29. The submissions about negligence on the part of the First Respondent is untenable and is rejected for reasons first, these 4 persons are not the petitioners and (b) there are no pleadings and evidence in support of it. This submission is rejected.

30. But that is only the starting point in the process. The allegations made in the petition can only be determined as to its foundation and strength if the allegations are based on facts and there is the evidence in support of these facts. Further the allegations must be legally founded on the relevant statutory provisions. If the facts or allegations raised are not supported by sufficient evidence or are not legally supported, then it attracts an application for strike out.

31. So it is with this petition. The Respondents apply for a strike out because they contend (a) the petitioner lacks the evidence to support his allegations, and (b) that his allegations are not



supported by law and are legally baseless. I accept the Respondent's submissions on these aspects of the issues and reject the submissions made on behalf of the petitioner.

32. For those foregoing reasons I allow the application and accordingly strike out the petition of the petitioner at this point to save further time and costs to all the parties.

33. The Respondents are entitled to costs against the petitioner which I fix at VT 100.000 divided equally between the First and Second Respondents at VT 50.000 each. There is no cost to the Third Respondent. I order that the deposit fee of VT 20.000 be forfeited and paid as follows:-

- (a) VT 10.000 to the First Respondent, and
- (b) VT 10.000 to the Second Respondent through counsel.

The balance of VT 80.000 shall be paid within 21 days from the date of this order.

DATED at Port Vila this 18th day of June 2020

BY THE COURT


OLIVER.A.SAKSAK

Judge

