

BETWEEN: Donald Restuetune

Petitioner

AND: Mark Ati

First Respondent

AND: Electoral Service Commission

Second Respondent

Date of Hearing and

18th May 2020

Decision :

Issued Date:

19th May 2020

Before:

Justice Oliver.A.Saksak

In Attendance:

Mrs Marisan P Vire for the Petitioner

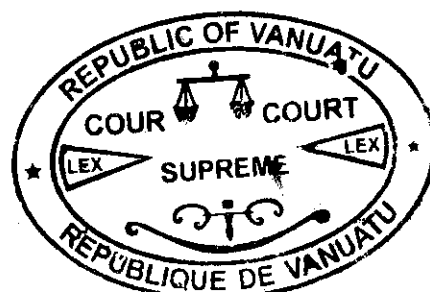
Mr James Tari for First Respondent

Ms Christine Lahua for Second Respondent

DECISION

Background

1. The petitioner filed his petition on 27th April 2020. He claimed that the First Respondent was not validly elected because he gave out money and food as bribes for people to vote for him. He sought a declaration that the First Respondent's election be declared invalid.
2. The Petitioner filed a sworn statement in support of his petition and 4 others by Angela Palaud, Denis Palaud, Anna Bulewak and Elvis Bule.
3. When these case was called for first hearing on 30th April the Court gave liberty to the petitioner to file additional statements by 6th May and for the respondents to file their responses and statements by 15th May.
4. Mrs Vire filed 3 other statements on 15th May 2020 from Roslyne Roriri, Pierick Tom and Francisco Kai
5. Mr Tari filed a response to the petition on 13 May denying the allegations made against him and filed an application to strike out the petition on the same date, but at 11:30am earlier than his response filed at 3:40pm. He filed a statement in support of his response and application at 11:30am.



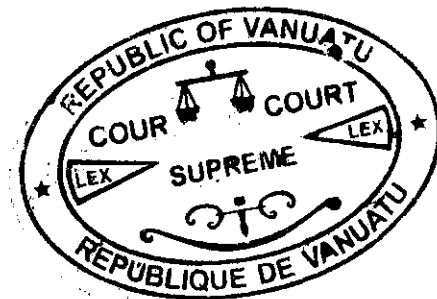
6. The Attorney General filed a response at 9:20am on 15th May 2020 stating the allegations are against the First Respondent and they would abide court orders except as to costs. They placed reliance on Sections 61A, 61 C and 45 of the Representation of the People's Act [CAP.146] (the Act)

Application for leave to file amended Petition

7. Mrs Vire filed an application seeking leave to extend and shorten time to file an amended petition on 18th May 2020. Along with this application Mrs Vire filed a response to the strike out application and an amended election petition at 10:00am.
8. Mr Tari filed written submissions at 2:40pm on 18th May 2020.

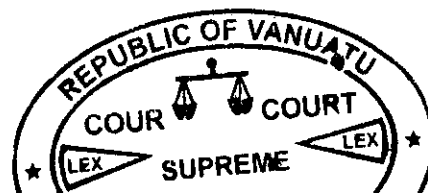
Arguments and Submissions

9. Mrs Vire relied on Rule 18.1 of the Civil Procedure Rules as the basis for seeking leave to extend and shorten time.
10. Mrs Vire argued that (a) the substance of the petition requires determination not only to benefit the petitioner but to protect voters' constitutional rights in casting their votes independently, and (b) the initial petition was prepared by the Petitioner himself with assistance of another lawyer who had ceased acting, and that it was not properly done. Counsel relied on the case of Lop v Isaac [2009] VJUSC 23.
11. Mr Tari objected strongly to the application for leave to extend time. Counsel argued firstly that Rule 18.1 of the CPR was not applicable. He submitted that the relevant rule for application is Rule 2.3 (2) of the Election Petitions Rules. Secondly Mr Tari submitted that section 57 (1) of the Act provides for the time period of 21 days for the filing of election petitions and that subsection (3) prohibits any extension of time. Counsel submitted the Court has no power to extend the time beyond the period of 21 days enacted by Parliament. He submitted the application should be dismissed.
12. In relation to the application to strike out the petition Mr Tari relied on the grounds stated in the application filed on 13th May and on the written submissions filed on 18th May 2020.
13. Ms Lahua agreed with the submissions made by Mr Tari and supported the submission that subsection (3) of section 57 does not allow any extension of time.



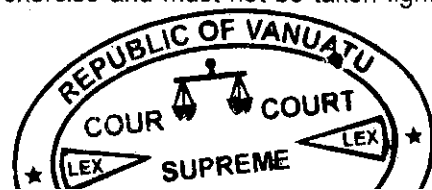
Consideration and conclusions

- A. On Application for Leave to Extend Time to file Amended claim.
14. I accept and agree with Mr Tari that Rule 18.1 of the CPR is not applicable and is the wrong basis.
15. The rules regulating election petitions are the Election Petition Rules 2003. These rules do not provide for extensions or shortening of time. The reason for this is because of section 57 of the Act that places a strict time limit of 21 days for filing petitions. And subsection (3) states clearly that there shall be no extension. That is trite law and it overrides the rules even if there was such a provision. This is sufficient to dismiss the application and the petition itself.
16. Mrs Vire filed an amended petition on 18th May 2020 and gave 2 reasons: (a) the protection of voters' constitutional rights to vote independently and (b) the initial petition not prepared properly.
17. The constitutional argument is out of place. The second reason is unacceptable. The petitioner had a lawyer who assisted him in preparing the petition. That is the very reason why it should have been prepared properly and if it was not, it is the lawyer and the petitioner themselves who must take the blame and responsibility. It cannot be used as an excuse to have the second bite at the same cherry.
18. Mrs Vire relied on the case precedent of Lop v Isaac [2009] VUSC 23. Counsel was unable to assist the Court in relating the facts of this case and the reasons for the grant of leave to amend the petition.
19. Mr Tari attached the case of Paul Jerry Boe v Principal Electoral Officer and others EP 8/2012 to his written submissions. Paragraph 11 makes reference to the case of Lop v Isaac where the Chief Justice said:
" if the Court accepts these allegations and evidence in support, it is then a defacto substantive amendment of the petition by adding new grounds after the 21 days period and so is contrary to section 57 and 58 of the Representation of the Peoples Act [CAP 146]"
20. Mrs Vire argued that the amended petition is not a new one to fall under section 57 but merely an amendment of the initial petition filed on 27th April 2020. This argument is untenable. It is exactly what the Chief Justice said in Lop's case that cannot be allowed as it is contrary to section 57 and 58 of the Act.
21. Comparing the initial petition filed on 27th April with the amended one filed on 18th May the former states one allegation with 4 sets of facts and 1 remedy. The latter seeks 5 orders and 6 grounds. Those make the petition a completely new petition. And it has been filed well outside of the 21 days prohibited by section 57 (1) of the Act and there cannot be granted any



extension of time. The petition names the Electoral Service Commission as the Second Respondent. There is no reference in the Law to anybody called the Electoral Service Commission. So it is defective

22. In paragraph 4 of the amended petition allegations of bribery and corruption are made against the First Respondent. Those incidents are alleged to have occurred on 6th, 9th and 18th March 2020. It is alleged the First Respondent paid cash to certain people ranging from VT 1,000, VT 2,000 and VT 10,000 including the giving of 5kg rice.
23. Mrs Vire filed some sworn statements in support of those allegations, 4 on 27th April and 3 others on 15th May.
24. In section 57 (1) of the Act the 21 days is of the publication in the Gazette of the official results of election. The other 21 days period is in subsection (2) which states a petition alleging specific payments of money or other reward may be presented within 21 days of the alleged payment.
25. The dates on which payments are alleged to have been made were 6th, 9th and 18th March 2020. These fall outside the 21 days period in subsection (2) of section 57 of the Act. And subsection (3) prohibits any extension of time.
26. For those reasons the application for leave to extend time is declined and is dismissed.
27. Mrs Vire sought clarification whether having dismissed the application for leave and the amended petition whether the petitioner could adopt a fall-back position to maintain his initial petition filed on 27th April.
28. Mr Tari submitted the initial petition should fall also as the consequence of the dismissal of the leave application and the filed amended petition. Counsel relied on his written submissions filed on 18th May.
29. I accept those submissions. The initial petition in itself is incomplete. It does not meet the requirement of Rule 2.3 (1) (b), (c) and (2) (a) and (b). The sworn statements of Agela Palaud and Denis Palaud depose to the payment of VT 10,000 and 5kg rice on 18th March 2020. The statement of Anna Bulewak deposes to the giving of VT 1,000 on 11th March 2020 and Elvis Bule deposes to the payment of VT 1,000 on 12th March 2020.
30. As held earlier, those dates fall outside the 21 days period in section 57 (2) of the Act making the petition a late one.
31. Even if the petition was filed in time with 7 additional votes added to the 844 scored by the Petitioner, it would bring his total to 851 leaving the First Respondent still winning by 20 votes. Therefore there would be no need to disturb the results declaring the election invalid and ordering a bye-election. Bye –elections are very costly exercise and must not be taken lightly



but very seriously. That is the reason why they must be done properly and within the strict time limits fixed by the Act.

32. For those reasons the initial petition filed on 27th April 2020 is also dismissed and the petitioner is Ordered to pay the respondent's costs. I order that the VT 20.000 paid by the petitioner as deposit be forfeited and paid instead to the respondents within 7 days from the date of this order-
- a) VT 10.000 to the First Respondent, and
 - b) VT 10.000 to the Second Respondent through the State Law Office.

The Chief Registrar is Ordered to effect these payments.

DATED at Port Vila this 18th day of May 2020

BY THE COURT


OLIVER.A.SAKSAK

Judge

