

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

Election Petition
Case No. 22/3 SC/ELTP

BETWEEN: Willie Daniel Kalo
Petitioner

AND: John Amos
First Respondent

AND: Principal Electoral Officer
Second Respondent

Date of Hearing: 24 January 2023
Before: Justice V.M. Trief
In Attendance: Petitioner – Mr K.T. Tari
First Respondent – Mr G. Blake
Second Respondent – Mrs N. Robert
Date of Decision: 3 February 2023

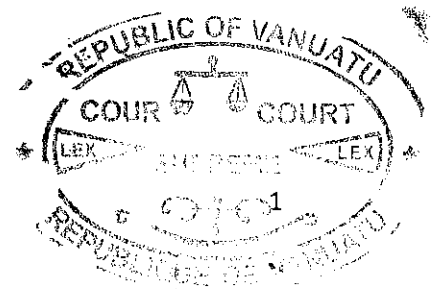
DECISION AS TO FIRST RESPONDENT'S STRIKE-OUT APPLICATION

A. Introduction

1. This is an Application by the First Respondent John Amos to strike out the Election Petition on the basis that it is so untenable that it could not possibly succeed at trial and so the Respondents should not be put to the cost of doing so.
2. Having heard counsel and having considered the parties' submissions, this is the decision.

B. Background

3. On 18 August 2022, Parliament was dissolved.



4. The polling day for the general election was 13 October 2022.
5. The Petitioner Willie Daniel Kalo was a candidate in the general election for the Tongoa constituency.
6. He was also a registered voter in that constituency.
7. On 23 October 2022, the Electoral Commission declared the results of the election, including the following results for the Tongoa constituency:

13. TONGOA CONSTITUENCY: 1 SEATS (4 CANDIDATES)

Total registered voters:	2,647
Total votes cast:	1,166
Turn out:	44%
Total void votes:	2
Total valid votes:	1,164

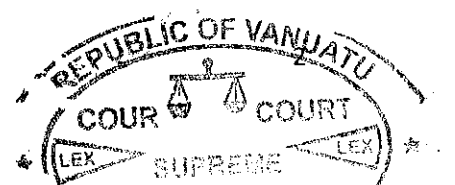
CANDIDATE	AFFILIATION	VOTES
1. Maryline A. Abel	Vanua'aku Pati	1
2. Willie Daniel Kalo	Union of Moderate Parties	455
3. Thomson Pakoa Matokal Kokona	People's Unity Development Party	140
4. John Amos	Namarakleana Movement	568

8. On 24 October 2022, the results of the election were published in the *Official Gazette* No. 81 of 2022.
9. Mr Amos was declared as the elected representative for the Tongoa constituency. He had received 568 votes; Mr Kalo 455 votes.
10. On 8 November 2022, Mr Kalo filed this Petition disputing the election of Mr Amos, Member of Parliament for the constituency of Tongoa. The Petition alleges that Mr Amos breached s. 61A(b)(ii) of the *Representation of the People Act* [CAP. 146] (the 'Act') as he made donations in kind during the prohibited period by providing transport from Port Vila to Tongoa, that this resulted in registered voters for Port Vila voting at Tongoa, and that he had a copy of the electoral roll contrary to subs. 68(5) and s. 20 of the Act.

C. The Law

11. Section 20 of the Act provides as follows:

20. (1) *As soon as practicable after the closing date for inspection provided for in section 16(1A) the Principal Electoral Officer shall determine all outstanding applications made under section 16(4) making such additions or deletions from the list as may be required as a result of such determinations.*
- (2) *Having determined all applications under subsection (1) the Principal Electoral Officer shall establish the electoral roll for each polling district before polling date.*



- (3) *The Principal Electoral Officer shall endorse 2 master copies of each roll established under subsection (2) with a certificate countersigned by another electoral officer stating the number of pages and entries in the roll.*
- (4) *One copy of each roll endorsed in the manner provided for in subsection (3) shall be sent to the Electoral Commission and 1 copy shall be retained by the Principal Electoral Officer.*

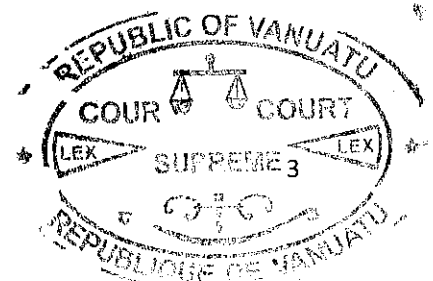
12. Sections 61 and 61A of the Act provide as follows:

61. (1) *The election of a candidate may be declared void on an election petition if it is proved to the satisfaction of the Supreme Court, that –*
- (a) *the candidate or any agent of the candidate has contravened section 61A, 61B or 61C;*
 - (b) *there has been such non-compliance with the provisions of this Act, in the conduct of polling or in any other matter that such non-compliance affected the result of the election;*
 - (c) *the candidate was at the time of his election a person not qualified or disqualified for election; or*
 - (d) *there was such irregularity in the counting of the votes as may reasonably be supposed to have affected the result of the election.*
- (2) *Despite subsection (1), if on an election petition, the Supreme Court finds that there has been failure to comply with any provision of this Act, but the Court further finds that:*
- (a) *it is satisfied that the election was conducted in accordance with the principles laid down in this Act; and*
 - (b) *such failure did not affect the result of the election,*
- the election of the successful candidate is not to be declared void.*

- 61A. (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.

13. Section 68 of the Act provides as follows:

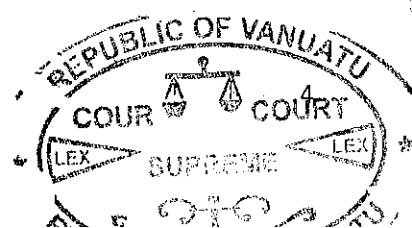
68. (1) *Subject to subsection (2) the Principal Electoral Officer shall retain for not less than 1 year all reports sent to him in accordance with this Act and all documents sent therewith including packets of counted and void votes.*
- (2) *Documents relating to an election in respect of which an election petition or any legal proceedings have been commenced shall not be destroyed until the proceedings have ended.*
- (3) *The Supreme Court when hearing an election petition or a court trying an election offence may make an order that any document retained by the Electoral Commission or the Principal Electoral Officer shall be inspected, copied or produced at such time and place and subject to such conditions as it thinks fit.*
- (4) *No order shall be made under subsection (3) unless the court is satisfied that the inspection, copying, or production is essential for the hearing of a charge of an election offence or the hearing of an election petition.*
- (5) *Except as provided by subsection (3) no person may inspect or copy any document retained by the Electoral Commission or the Principal Electoral Officer under this Act.*

D. The Application and Submissions

14. The Application to Strike out the Petition filed on 16 December 2022 seeks an order striking out the Petition and costs on an indemnity basis (the 'Application').

15. The grounds of the Application are as follows:

- a) It is not illegal or an offence to possess a copy of any electoral roll under s. 20 or subs. 68(5) of the Act;
- b) The Petitioner's evidence does not prove, even if all admissible evidence extracted from it is believed (as much of it is hearsay), that Mr Amos made a donation in kind for the purposes of s. 61A of the Act and that that affected the result of the election;
- c) The admissible evidence of the Petitioner, if accepted unchallenged, does not satisfy the test in s. 61 of the Act as the Petitioner has failed:
 - i) To establish how the alleged non-compliance with the Act affected the result of the election;
 - ii) To establish that any persons who were able to arrange free travel on Mr Amos' vessel to Tongoa during the prohibited period were in fact knowingly offered free travel by Mr Amos and voted for him after that;



- iii) To establish that without the free transport those persons would not have voted for Mr Amos; and

in each case, to a sufficient extent to establish that the result of the election would have been affected without such free transport; and

- d) The Petitioner has failed to submit evidence to the Court that persons who voted in the election were not entitled to vote and that a sufficient number of persons who were not lawfully entitled to vote in Tongoa, voted in Tongoa and that had they not voted, the number of votes gained by Mr Amos would have reduced below the number of votes lawfully gained by the Petitioner such as to affect the result of the election.

16. Mr Blake agreed with Mr Tari's submission that the common grounds for allowing a strike-out application are:

- a) If the Petition was frivolous, vexatious and it was untenable such that it could not have succeeded had it gone to trial;
- b) If the Petition did not contain a cause of action;
- c) If the Petition filed is an abuse of the Court process;
- d) If it lacks standing; and
- e) If the Petitioner did not comply with an Order of the Court.

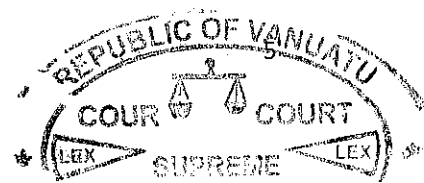
17. He summarised the grounds of the Application as the Petition being so untenable that it could not possibly succeed at trial hence the Respondents should not be put to the time and cost of filing evidence and going to trial.

18. Mr Tari submitted in response that subs. 40(2) of the Act (as follows) makes it an offence if a person fails to comply with any provision of the Act and that includes (impliedly) making copies of the electoral roll available to Mr Amos and his political party members, and that must have been through an Electoral Office officer:

40. ...

- (2) *Any person who contravenes or fails to comply with any of the provisions of this Act or any order or any lawful request made thereunder commits an offence and except where any other penalty is specifically provided shall be liable on conviction to a fine not exceeding VT20,000 or to imprisonment for a term not exceeding 12 months or to both such fine and imprisonment.*

19. He submitted that the evidence shows that Mr Amos used his shipping vessel MV Urata to make 3 trips from Port Vila to Tongoa within the prohibited period for persons travelling for free in return for voting for Mr Amos. He submitted that the election results did not show the statistics of registered votes actually residing on Tongoa before polling day but the survey conducted by the Area Secretary concluded that there were 1,043 eligible voters on the island however the official results show that 1,166 votes were cast which means there were an additional 123 voters who were not part of the survey and must have travelled to Tongoa via Mr Amos' ship during the prohibited period to vote.

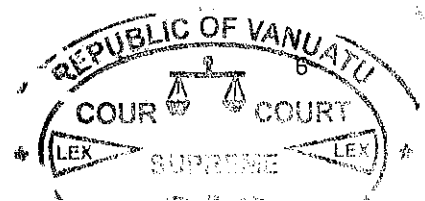


He submitted that it is very highly likely therefore that Mr Amos' provision of the 3 shipping trips affected the result of the election.

20. Finally, Mr Tari submitted that the Court had already held that there was a foundation to the Petition yet the grounds relied on for the Application were targeting the merits of the Petition therefore the Court should not allow the Application but let the facts be tested at trial.
21. Mrs Robert supported the Application. Her only submission was that the electoral roll and the electoral lists for inspection are two separate things. She submitted that the electoral lists circulated to Area Administrators for inspection purposes are not the electoral roll, as set out in the Acting Principal Electoral Officer Gary Tavo'a's ('Acting PEO') sworn statement.

E. Discussion

22. It is obvious from any reading of s. 20 and subs. 68(5) of the Act that it is not illegal to possess a copy of the electoral roll.
23. It not being illegal to do so, there cannot be any failure "to comply with any of the provisions of the Act" for subs. 40(2) of the Act, which imposes a criminal offence, to apply.
24. In any case, the Acting PEO's evidence is that the documents attached to the Petitioner's witnesses' evidence were copies of the electoral lists that were circulated to Area Administrators for inspection purposes so that persons could check whether or not they were registered to vote. They were not copies of the electoral roll. Accordingly, even if it was illegal to possess a copy of the electoral roll, there is no evidence that Mr Amos had a copy of the electoral roll nor how having a copy of the electoral roll or an electoral list affected the result of the election.
25. This ground of the Petition is untenable.
26. The next ground of the Petition is that Mr Amos breached s. 61A(b)(ii) of the Act as he made donations in kind during the prohibited period by providing transport from Port Vila to Tongoa, resulting in registered voters for Port Vila voting at Tongoa.
27. The 'prohibited period' is the period commencing at the date of dissolution of Parliament to, and including, the polling date (18 August 2022-13 October 2022) in which a candidate must not spend, allocate or otherwise disburse donations in kind to his or her constituency: subs. 61A(1) of the Act.
28. 'Donations in kind' includes transport: subs. 61A(2) of the Act.
29. There were 18 sworn statements filed in support of the Petition. However, there is no evidence in any of those sworn statements of anyone who actually benefited from any free transport.




30. There is therefore no evidence of any connection between transport to the island and voting for Mr Amos let alone any evidence directly from any person that they received free transport from Mr Amos.
31. The evidence of Daniel Kakae, Samuel Willie, Moses Philip, Jeremiah James, Roy Joel, Simbolo John, John Robea, Apia Joseph Pierre and Annie Edward purported to identify 43 persons alleged to have benefitted from free transport provided by Mr Amos. However, none of the identified persons gave evidence. Therefore that evidence from those Petitioner's witnesses is unsubstantiated hearsay.
32. Even if the Court were inclined to consider that evidence, it is undermined by Mr Tavoas's evidence which set out in relation to each of the identified persons, whether or not they were registered to vote at Tongoa and whether or not they voted. A number of them were not registered to vote. Of those who were registered, only 11 of them actually voted at Tongoa.
33. The difference in votes between that received by Mr Amos (568) and Mr Kalo (455) is 113 votes. Even if the 11 identified persons who actually voted were given free transport by Mr Amos in order to vote for him (which there is no evidence of), 11 votes could not affect the result of the election at all.
34. This ground of the Petition is also untenable.
35. The remaining aspect of the Petition is to the effect that persons who voted in the election were not entitled to vote and that a sufficient number of persons who were not lawfully entitled to vote in Tongoa, voted in Tongoa.
36. Reference was made in the evidence of Willie Abel Roy and Max Willie to a 'survey' conducted by the (unidentified) Area Secretary of Tongoa which concluded that there were 1,043 eligible voters who were on Tongoa just before polling date. Mr Tari contrasted this with the gazetted election results that 1,166 total votes were cast and submitted that this meant that there were an additional 123 voters who were not part of the survey conducted by the Area Secretary but could have travelled to vote in the snap election within the prohibited period.
37. However, there was no evidence from the Area Secretary or anyone else who conducted the 'survey'. Accordingly, that part of the evidence from Willie Abel Roy and Max Willie is unsubstantiated hearsay.
38. In addition, the gazetted election results show that there were 2,647 total registered voters for the Tongoa constituency. That is the total number of persons who were registered as voters and thus entitled to vote in Tongoa, not the number from the 'survey' in the Petitioner's evidence.
39. For the reasons given, the remaining aspect of the Petition is also untenable.
40. Finally, Mr Tari submitted that the Court has held that there was a foundation to the Petition therefore it should let the election petition case proceed to trial.



41. Mr Tari's submission runs counter to the *Election Petitions Rules* (the 'EPR'). Rule 2.6(1) of the EPR requires the Petitioner to satisfy the Court at the first hearing that there is a foundation for the petition. If the Court is not satisfied that there is a foundation for the petition, the Court must strike out the petition. If not struck out, the Court must fix a date for the first Conference in the proceeding and write this date on the petition: rule 2.6(2)(c). At the first Conference, the Court may deal with any applications to strike out the petition: rule 2.9(1)(a). The EPR therefore envisages that even after the Court has held that there is a foundation for the petition, it may deal with a strike-out application. Accordingly, there is no merit to that submission.
42. For the reasons given, I agree with the grounds of the Application and conclude that the Petition is so untenable that it could not possibly succeed at trial. It will be struck out.
- F. Result and Decision
43. The First Respondent's Application to Strike out the Petition is **granted**.
44. The Election Petition filed on 8 November 2022 is **struck out**.
45. Costs must follow the event. The Petitioner is to pay the Second Respondent's costs on the standard basis as agreed or taxed by the Master. Once settled, the costs are to be paid within 21 days.
46. The First Respondent sought costs on an indemnity basis. Accordingly, the First Respondent is to file and serve submissions as to why costs should be ordered on an indemnity basis **by 4pm on 17 February 2023**.
47. The Petitioner is to file and serve submissions in response as to costs sought on an indemnity basis **by 4pm on 3 March 2023**.
48. The Court will make its decision on the papers after that as to whether or not the Petitioner is to pay the First Respondent's costs on an indemnity basis.

DATED at Port Vila this 3rd day of February 2023
BY THE COURT


Justice Viran Molisa Trief

