

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

Election Petition
Case No. 20/910 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 SANTO
CONSTITUENCY HELD ON 19TH OF MARCH
2020

BETWEEN: Livo Mele

Petitioner

AND: Principal Electoral Officer

First Respondent

AND: The Electoral Commission

Second Respondent

AND: Lulu Sakaes

Third Respondent

AND: Joshua Leonard Pikioune

Fourth Respondent

AND: Samsen Samson

Fifth Respondent

AND: Alfred Maoh

Sixth Respondent

AND: Fabiano Stevens

Seventh Respondent

AND: Gaetan Pikioune

Eighth Respondent

AND: Rick Tchamacko Mahe

Ninth Respondent

Date of Hearing:
Date of Decision:
Before:
In Attendance:

2nd September 2020

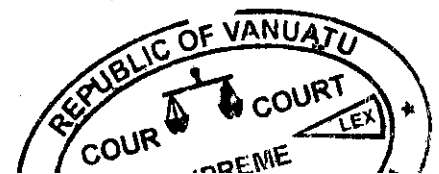
4th September 2020

Justice Oliver.A.Saksak

Mr John Malcolm and Stephanie Mahuk for Petitioner

*Mr Frederick Gilu, Solicitor General and Sammy Aron for First and
Second Respondents.*

Mr Daniel Yawha for Third, Seventh, Eighth and Ninth Respondents

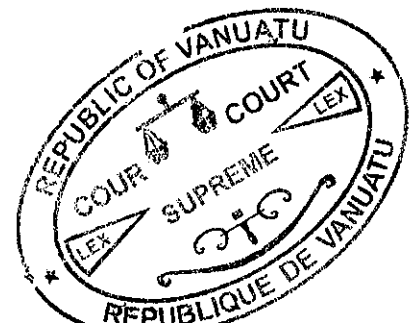


**Mr Nigel Morrison and Evelyne Blake for Fifth Respondent
Mr James Tari for Sixth Respondent
Mr Justin Ngwele for Fourth Respondent**

DECISION

Introduction

1. The Court heard counsel in relation to two applications. The first application was filed by Justin Ngwele on behalf of Joshua Leonard Pikioune, Fourth Respondent. The second as filed by Evelyne Blake on behalf of Samsen Samson, Fifth Respondent.
2. Mr Gilu, Solicitor General, Mr Yawha and Mr Tari made submissions in support of the strike out applications.
3. The application by Mr Ngwele seeks an order striking out the petition of the petitioner in its entirety on grounds that-
 - a) There is no evidence by the petitioner showing the 740 proxies alleged were improper and were casted in favour of Fourth and Third to Ninth Respondents.
 - b) The petition does not disclose any specific allegation or cause of action against the Fourth Respondent, and
 - c) The petition does not disclose any findings of non-compliance with the provisions of the Representation of the People Act [Cap.146] (the Act) in the conduct of polling to affect the result of the election of the Fourth and Third to Ninth Respondents.
4. The application by Mrs Blake seeks orders that the petition be struck out on grounds that-
 - (a) The petition has not specified the ground or grounds upon which the election of the Fifth respondent for a seat of the Santo Rural Constituency is disputed, and
 - (b) That failure is contrary to the mandatory provisions of section 58 (1) of the Act.



5. Both applicants seek orders for costs as well.

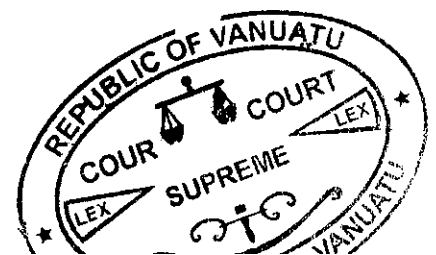
Background

6. Livo Mele filed his petition through Edward Nalyal as Counsel on 27th April 2020. I set it out fully as follows:

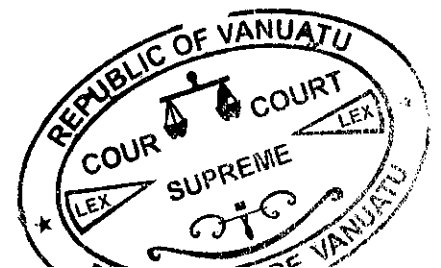
"ELECTION PETITION

I LIVO MELE ("the Petitioner") of Wailapa School Area, South Santo, was a Candidate at the election held on 19th March 2020(sic), for the Santo Rural Constituency.

1. *I clam that the Third Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Respondents were not validly elected for the seats of Santo Rural Constituency of that election because:*
 2. *The facts which this Petition is based are:*
 - (i) *Over Seven Hundred and Four Proxy votes cast at the following polling stations on Santo Rural Constituency being Tamsmalum, Iapayato, Port Olry, Hogharbourm, Lorevulko, Lorethiakerkar, Suranda, Oil Mill, Banban, Kona, Fanafo, Nambauk, Peyrol, Tasiriki and Navele were not valid votes as the proxies were issued irregularly by the First and Second Respondent having not met requirements and including polling stations on Santo and there are more invalid proxies from other Polling Stations for Santo Constituency.*
 - (ii) *Mawikaloi polling station on South Santo did not vote on polling day which was 19th March but noted (sic) on March 20, 2020 which was resulted in 71 registered voters not able to vote as only 8 voters voted.*
 - (iii) *Voting at Mawikaloi on March 2020 was conducted by the First and Second Respondent not on Polling Day being March 19th 2010.(sic)*
 - (iv) *The First and Second Respondents allowed voting to proceed at Vimele Village on South Santo without a Roll Book and these voters were counted at Wailapa when Vimele was not designated Polling Station affecting 690 voters or*
 - (v) *The First and Second Respondents allowed under Aged or Minors to vote at St Pierre Polling Sation.(sic)*
 3. *The Petitioner seeks the following:*
 - (i) *For a declaration that the election of Santo Rural Election on 19th March 2020 of the Third, Fourth Fifth, Sixth, Seventh, Eighth and Ninth Respondent is void.*
 - (ii) *Cost."*
7. The First and Second Respondents filed responses on 26th May 2020 denying every allegation made by the petitioner in his petition. In paragraph 6 they say the petitioner had failed to establish any foundation that the conduct of the elections held on 19th March 2020 was irregular and further that any such purported irregularities, which they denied, had affected the election results.



8. Mr Yawha filed responses for the Third, Seventh, Eighth and Ninth respondents earlier on 15th May 2020. They all denied every allegation made by the Petitioner. At paragraph 3 they state there is no claim against them and seek an order to strike out the petition.
9. By way of a cross claim, in the event the petitioner is unsuccessful, they seek damages to be assessed and indemnity costs.
10. The petitioner sought orders for disclosures against the First and Second Respondents on 12th May 2020.
11. Mr Nalyal ceased to act for the petitioner from 1st June 2020 when he filed appropriate notice.
12. Mr Malcolm and Ms Mahuk filed notice of beginning to act on 3rd June 2020.
13. Mr Yawha's clients filed a strike out application on 20th May 2020.
14. On 12th June 2020 the Court dismissed the applications on grounds it was premature and misconceived.
15. The Fourth respondent filed his response to the amended petition on 12th June 2020 denying each and every allegation made.
16. The Fifth respondent filed his response on 22 May 2020 denying each and every allegation and says the petitioner is not entitled to any relief he seeks.
17. The directions to the respondents to file their responses were issued on 29th April 2020.
18. Mr Ngwele sought leave to file a strike out application earlier. The application was declined on 20th July 2020. Trial was fixed on that date for 2 days from 24th August 2020.
19. These trial dates were vacated due to the passing of late Adeline Bani of the State Law office. The Court adjourned the hearing of the strike out application by the Fifth respondent to 2nd September 2020.

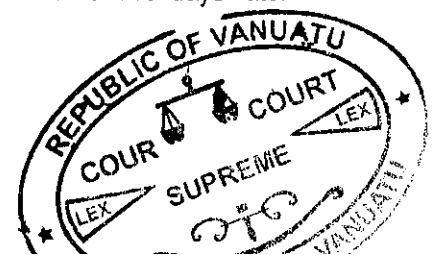


Arguments and Submissions By Respondents

20. In summary Mrs Blake argued and submitted that the petition of the petitioner does not conform to Form 1 of the Election Petition Rules in that it fails to state the grounds upon which the election of the Fifth respondent is disputed. As such counsel argued and submitted the mandatory provisions of section 58 (1) of the Act has not been met, and relying on the Rules (Order 29 of 2003) and **Jimmy v Rarua [1998] VUCA 4**, the petition should be struck out with costs.
21. Mr Ngwele argued and submitted that although petitioner has disclosed 704 proxies he had failed to set out the irregularities as required by the Rules. Counsel placed reliance on the case of **Stephen Felix v Principal Electoral Officer and others EP 20/824**.
22. Mr Tari supported the submissions made by Mrs Blake and Mr Ngwele and placed reliance on the case of **Don Ken v Gracia Shedrack EP 20/891**.
23. Mr Gilu and Mr Yawha adopted the submissions made by Mrs Blake and submitted the petition should be dismissed.

Arguments and submissions by Petitioner

24. Ms Mahuk responded in opposition to the application for strike out. In summary counsel argued that-
- (a) Leave to file an application was declined on 20th July 2020.
- (b) The Court had determined on 29th April 2020 the petitioner had established foundation for filing his petition and that a full hearing was warranted. Counsel submitted time had lapsed to appeal those procedural declarations.
- (c) The strike out application is interlocutory in nature and based on **Miller v NBV [2006] VUCA 1** the applicants had to satisfy the requirements of Rule 7.3 (2) of the Civil Procedure Rules No. 49 of 2002 and Rule 1.4 (2) of the Election Petition Rule 2003.
- (d) The Fifth Respondent's contest of the formulation for the petition some 116 days later without raising the argument earlier is an abuse of process.



(e) The grounds of the petition are apparent although not expressly assigned as such in the petition and therefore there was no doubt in the respondent's mind that the facts were grounds under section 61 (1) of the Act. Further that as the respondents had filed responses, there was no confusion as to the grounds.

25. Ms Mahuk filed written submissions in objection to the strike out application on 24th August 2020, together with a memorandum raising matters that needed to be addressed by the Court prior to dealing with the petition.

26. Ms Mahuk conceded the onus of proving irregularities rests on the petitioner but submitted the petitioner has filed the evidence showing there were up to 1,351 irregular proxies. Counsel submitted these are sufficient to affect the results of election as regards the Third respondent, Sakias Lulu.

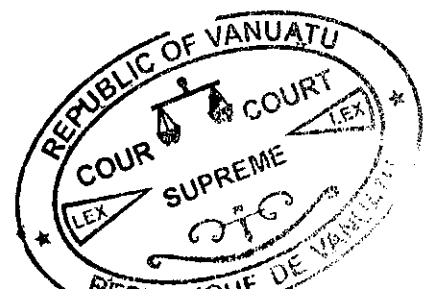
27. Counsel further submitted discovery took some 3 months with costs to the petitioner that it would be prejudicial at this stage to strike out the petition without a full hearing.

28. Ms Mahuk conceded the petitioner cannot substantiate the facts stated in paragraphs 3 (ii), (iii), and (iv) raised in the memorandum filed on 24th August 2020. Only the ground in paragraph 3 (i) was maintained.

Discussion

29. Two particular sections of the Act have been raised in submissions. The first is section 58 (1) which states:

“(1) An election petition shall be in writing and shall specify the grounds or grounds upon which an election is disputed....”



30. The second is section 61 which states:

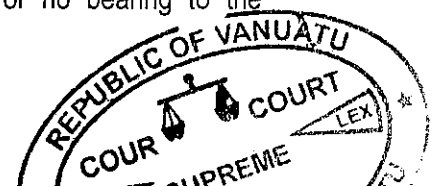
"61. Grounds for declaring election void

(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)

(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;....."*

31. The submissions by Mrs Blake was that section 58 (1) of the Act is a mandatory provision and the petitioner failed to specify his grounds in the petition in conformity with Form 1 of the Election Petition Rules. I accept that submission. The petition filed on 24th April 2020 by the Petitioner states only facts and falls short of stating the grounds as well. Form 1 in the Rules provides for an alternate by the use of "**AND/OR**". The alternate form was more preferable because of the multiplicity of the polling stations alleged there were breaches or irregularities in the conducts of polling. The petitioner filed a complex petition and therefore it was mandatory that he specified the irregularities occurring in each polling stations he named in his paragraph 2 (i). As it is, the Petition is too general and is without grounds. The grounds in my view should include section 61 (1) (b) of the Act. Rule 2.2 (2) requires the petition to be in Form 1.
32. The memorandum filed by counsel on 24th August 2020 in paragraph 3 attempts to formulate the grounds which should have been included in the petition filed on 24th April 2020. But this is very late in time. Rule 2.3 (1) of the Rules requires the petitioner to set out the grounds and the facts in his petition. He had not done so fully.
33. The argument by Ms Mahuk that the facts stated under paragraph 2 were clear and that there was no confusion as they raised issues under section 61 (1) (b) of the Act is untenable and is rejected. And section 61 (1) is not pleaded anywhere in the petition. There are many mistakes and typing errors in the petition which have not been corrected. These leave the respondents and the Court confused as to what the grounds of the petition are.
34. Next it was argued that the application could not be entertained as leave was previously declined by the Court on 20th July 2020. This argument has little or no bearing to the



petitioner's position. The refusal was made then because disclosures had not been completed and so the Court held the application to be premature and misconceived. It was not a bar to any subsequent application after disclosures had been completed.

35. Next it was argued the application should fail because the Court had concluded on 29 April 2020 when the petitioner had established a foundation for his petition. This argument is untenable.

36. Section 56 of the Act provides for the criteria in deciding whether a petition is or is not valid. These are whether-

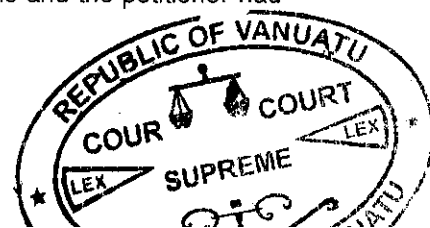
- (a) It was filed with 21 days of publication- section 57 (1)
- (b) A deposit of VT 20.000 was paid.
- (c) The petitioner was a candidate at the election he challenges- section 55 (b).

These are only preliminary matters establishing the foundation at the first hearing –Rule 12.6 (1).

37. This was as it were only the first hurdle. The other hurdles are set up by sections 58, 59 and 61 of the Act. These depend on the form of the petition and the evidence filed in supporting the facts and grounds raised and alleged. If the requirements are not met, there is an expectation under the Rules that applications could be made as appropriate and necessary during the course of the management of the case, even up to the hearing of the petition.

38. It certainly could not have been the intention of the Rules that after a foundation was made out, there could not be a strike out application thereafter. If that was the position the Rules would not have allowed for Responses (Rules 2.8 and a conference (Rule 2.9) after the first hearing. Rule 2.9 (1) (a) states that at the first conference the Court may deal with any applications to strike out the petition. The use of the word **“first”** implies there would likely be other conferences, as happened in this case. The term **“may”** is discretionary. The term **“any applications”** is in the plural and does not necessarily limit an application to only one.

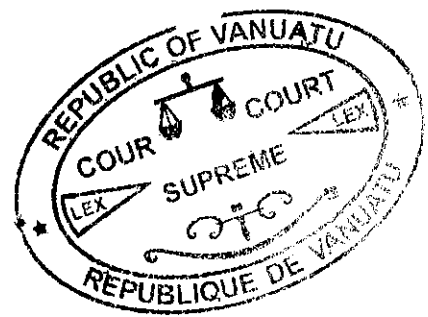
39. Next, the argument that the application was interlocutory and did not comply with the requirements of Rules 7.3 (2) of the Civil Procedure Rules and 1.4 (2) of the Election Petition Rules is also untenable. The petitioner was served with the applications and the petitioner had more than 3 days before the hearing.



40. Finally, that the application was filed 116 days after the petition was filed and that it is an abuse of process. For the reasons given in the preceding paragraphs, the argument is unsustainable and is rejected.
41. One aspect of the petitioner's argument is that his petition is supported by evidence collected as a result of 3 months of disclosures and that given the time and costs he had incurred, to strike out his petition at this point would be prejudicial to him.
42. That argument is also unsustainable. The petitioner made a choice to file a complex petition challenging the validity of all the winning candidates for the Santo Rural Constituency. He would have done better to have challenged only one of the winning candidates. Having done so, by filing a petition making general allegations without grounds as required by law and the rules, and without the specifics or particulars of his allegations for each polling stations, he faced the risks of (a) gathering the necessary evidence he needs (b) a lengthy management and hearing, and, (c) the possibility of multiple applications for strike out by 9 respondents. He therefore cannot shift the blame to the respondents.
43. Some Counsel made references to **Saby Natonga's** case but no copies of the case was made available to the Court for easy reference.


The Result

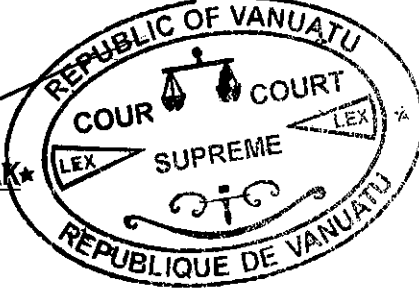
44. The applications for strike out of the petitioner's petition by the Fourth and Fifth Respondents as supported by the First, Second, Third, Sixth, Seventh, Eighth and Ninth Respondents are allowed.
45. The petition of the petitioner has not met the mandatory requirements of section 58 (1) of the Act. Accordingly it is dismissed in its entirety.



46. As a public interest case there will be no order as to costs. Each party bears their own costs.

DATED at Port Vila this 4th day of September 2020
BY THE COURT


OLIVER A. SAKSAK★
Judge



The seal of the Supreme Court of Vanuatu is circular. The outer ring contains the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom. Inside the ring, the words "COUR" and "COURT" are positioned on either side of a central scale of justice. Below the scales, the word "SUPREME" is written in a larger font. Two small triangles containing the word "LEX" are located on the left and right sides of the seal. A decorative flourish is at the bottom center of the seal.