

**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: 29 March 2023
Before: Justice V.M. Trief
Counsel: Petitioner – Mr K.T. Tari
First Respondent – Mr G. Blake
Second Respondent – Mrs N. Robert

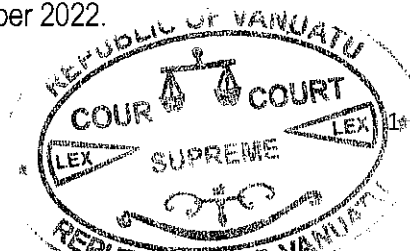
DECISION AS TO FIRST RESPONDENT'S STRIKE-OUT APPLICATION

A. Introduction

1. By Decision dated 3 February 2023, the First Respondent John Amos succeeded on his Application to strike out the Election Petition. He seeks costs from the Petitioner Willie Daniel Kalo on an indemnity basis. That is opposed.
2. The parties filed written submissions. This is the decision.

B. Background

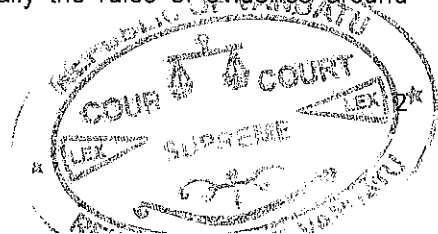
3. On 18 August 2022, Parliament was dissolved.
4. The polling day for the general election was 13 October 2022.



5. Mr Kalo and Mr Amos were candidates in the general election for the Tongoa constituency.
6. On 23 October 2022, Mr Amos was declared as the elected representative for the Tongoa constituency. He had received 568 votes; Mr Kalo 455 votes.
7. On 8 November 2022, Mr Kalo filed the Petition in this matter disputing Mr Amos' election as Member of Parliament for the Tongoa constituency. The Petition alleged 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.
8. On 16 December 2022, Mr Amos filed Application to Strike out the Petition seeking an order striking out the Petition and costs on an indemnity basis (the 'Application'). The grounds of the Application included that it was not illegal to possess a copy of any electoral roll; that Mr Kalo's evidence did not prove that Mr Amos made a donation in kind by providing transport from Port Vila to Tongoa during the prohibited period and that this resulted in votes for Mr Amos therefore affected the result of the election; and that Mr Kalo had not submitted evidence to the Court that persons voted in the election who were not entitled to vote.
9. By Decision dated 3 February 2023, I held that for the reasons set out in that decision, I agreed with the grounds of the Application and concluded that the Petition was so untenable that it could not possibly succeed at trial. It was accordingly struck out: *Kalo v Amos* [2023] VUSC 13.
10. I then held that costs must follow the event and gave the parties the opportunity to file submissions as to whether or not Mr Amos' costs be ordered on an indemnity basis.

C. Submissions

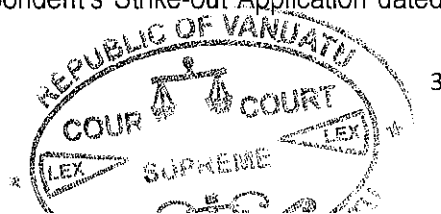
11. Mr Blake submitted that under rule 15.5(5)(d) of the *Civil Procedure Rules* ('CPR'), the Court may order costs be paid on an indemnity basis including in circumstances "where the court thinks it appropriate". Indemnity costs are sought on the basis that the claims made in the Petition amounted to a hopeless case obviously lacking any realistic prospect of success, citing *Shamin v QBE Insurance (Vanuatu) Ltd* [2017] VUSC 58, *Kramer Auscenco (Vanuatu) Ltd v Supercool Vila Ltd* [2018] VUCA 29 and *Siri v National Bank of Vanuatu Limited* [2023] VUCA 12. He submitted that Mr Kalo's claim was clearly hopeless from the start as it relied almost entirely upon inadmissible hearsay evidence which could not be rectified and in respect of the claim as to the electoral roll, that claim had no basis or merit in law, irrespective of any evidence in support.
12. Mr Blake submitted that to compound the hopelessness of the case, and despite the Petition being filed by Mr Kalo in person, he (Mr Kalo) is an experienced legal practitioner who is taken to know the law especially the rules of evidence around hearsay.



13. Finally, Mr Blake submitted that Mr Amos was put to considerable costs in engaging counsel to answer the list of claims in the Petition and the 18 sworn statements relied upon, submit the strike-out application and attend hearings. Costs billed to Mr Amos amount to VT500,000 + VAT being 14.5 hours of time at VT35,000 (excl. VAT) per hour, and he seeks an order in that sum.
14. Mr Tari submitted that the Court's finding that there was a foundation for the Petition under rule 2.6 of the *Election Petitions Rules* ('EPR') defeated all circumstances of seeking costs on an indemnity basis. He submitted that *Shamin, Kramer and Siri* were all distinguishable.
15. He also submitted that Mr Kalo was never properly advised that his evidence was hearsay, citing *Fountain Selected Meds (Sales) Pty Ltd v International Produce Merchants Pty Ltd* [1988] FCA 202, and that at no given time did Mr Amos give notice to Mr Kalo that if his pleadings and evidence were not rectified or withdrawn that indemnity costs would be sought. He submitted that costs be on the standard basis.

D. Discussion

16. By Mr Tari's own submission, one of the common grounds for allowing a strike-out application was, "If the Petition was... untenable such that it could not have succeeded had it gone to trial".
17. In the Decision dated 3 February 2023, I found that all of the grounds of the Petition were untenable and simply could not have succeeded had it gone to trial. It is obvious from any reading of the Act that it is not illegal to possess a copy of the electoral roll. Therefore, this ground of the Petition as to the electoral roll had no basis in law, irrespective of any evidence in support.
18. The remaining grounds of the Petition relied almost entirely upon inadmissible hearsay evidence. There was no evidence in any of the 18 sworn statements filed of anyone who actually benefitted from free transport provided by Mr Amos hence there was no evidence of any connection between transport to Tongoa and voting for Mr Amos. A number of the witnesses purported to identify 43 persons alleged to have benefitted from Mr Amos' free transport but as none of those 43 persons gave evidence, the evidence from Mr Kalo's witnesses was inadmissible hearsay. Finally, a 'survey' conducted on Tongoa was relied on to show that persons who voted in the election were not entitled to vote. However, there was no evidence from anyone who had conducted the 'survey' therefore that evidence from Mr Kalo's witnesses was also inadmissible hearsay.
19. In summary, the claims made in the Petition amounted to a hopeless case which lacked any realistic prospect of success.
20. Mr Tari submitted that the Court's finding that there was a foundation for the Petition defeated all circumstances of seeking costs on an indemnity basis. However, I would repeat para. 41 of the Decision as to First Respondent's Strike-out Application dated 3 February 2023:



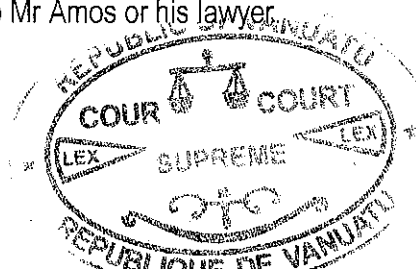
Mr Tari's submission runs counter to the provisions of the EPR. Rule 2.6(1) of the EPR requires the Petitioner to satisfy the Court at the first hearing that there is a foundation for the petition. If the Court is not satisfied that there is a foundation for the petition, the Court must strike out the 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.

21. It is envisaged in the EPR that after the Court has found that there is a foundation for a petition, it must still determine any strike-out application filed after that. There is nothing in the EPR or in the *Civil Procedure Rules* to prevent a respondent from seeking indemnity costs in respect of that application. I reject Mr Tari's submission.
22. Rule 15.5(5)(d) of the CPR provides that the court may order costs be paid on an indemnity basis in circumstances where "the court thinks it appropriate."
23. Mr Tari submitted that the cases relied on by Mr Amos - *Shamin*, *Kramer* and *Siri* - were all distinguishable. *Shamin* was a Supreme Court case. In *Kramer Auscenco (Vanuatu) Ltd v Supercool Vila Ltd* [2018] VUCA 29 at [13], the Court of Appeal ordered costs on an indemnity basis, referencing that "the appeal was a hopeless case, with absolutely no prospects of success". The Court of Appeal also ordered indemnity costs in *Siri v National Bank of Vanuatu Limited* [2023] VUCA 12 at [33] stating that, "This was a hopeless claim."
24. The facts in *Shamin*, *Kramer* and *Siri* are different from the present matter however they are all matters in which the court concerned held that the appeal or claim advanced were hopeless cases and ordered that costs be paid on an indemnity basis. They are relied on and I accept them as precedent for this Court similarly to order that costs be paid on an indemnity basis in the circumstances of a hopeless case.
25. Mr Tari also submitted that Mr Kalo was never properly advised that his evidence was hearsay and that at no given time did Mr Amos give notice to Mr Kalo that if his pleadings were not rectified or withdrawn that indemnity costs would be sought. Mr Tari cited *Fountain Selected Meds* at [21] in which Woodward J of the Australian Federal Court stated as follows:

I believe that it is appropriate to consider awarding "solicitor and client" or "indemnity" costs, whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts for the clearly established law.

(my emphasis)

26. With respect, Mr Tari has misconstrued the cited passage from *Fountain Selected Meds*. Contrary to his submission, the responsibility to properly advise his client that his evidence was hearsay lay with Mr Tari as Mr Kalo's lawyer, not with Mr Amos or his lawyer. At no time did that responsibility shift to Mr Amos or his lawyer.



27. There is also no merit in the submission that at no given time did Mr Amos give notice to Mr Kalo that if his pleadings and evidence were not rectified or withdrawn that indemnity costs would be sought. The Application clearly stated that Mr Amos was seeking an order striking out the Petition and costs on an indemnity basis. The Application also set out the grounds for the application including that there is no legal basis of one ground of the Petition and that hearsay evidence was relied on to prove the remaining grounds of the Petition.
28. The Application was filed on 16 December 2022. It was heard on 25 January 2023. It was open at all times up until the hearing of the Application for Mr Kalo to withdraw the Petition or evidence due to its unrealistic prospects of success. That did not occur.
29. Instead, the Application was strenuously opposed. Mr Tari relied on the Petitioner's submissions filed on 23 January 2023. There was no acceptance in those submissions that there was no legal basis for the 'electoral roll' ground of the Petition nor acceptance that the Petitioner's evidence was inadmissible hearsay. Mr Kalo's case was run as if the law of evidence as to hearsay did not exist.
30. Mr Tari's submission that if given notice, Mr Kalo could have rectified his evidence is also devoid of merit as a petitioner cannot file any further evidence after the expiry of the 21-day limit in subs. 57(1) of the Act: *Nalyal v Naling* [2016] VUSC 62 and *Andy v Electoral Commission* [2016] VUSC 69. The Application was filed well after the expiry of that limit. Mr Kalo could not file any evidence after that including to rectify any part of his evidence.
31. The Petition and the evidence relied on constituted a hopeless case with no prospect of success.
32. For the reasons given, Mr Kalo is to pay Mr Amos' costs of the proceeding on an indemnity basis.

E. Result and Decision

33. The Petitioner is to pay the First Respondent's costs of the proceeding on an indemnity basis, which costs are fixed at VT500,000, within 28 days.

**DATED at Port Vila this 6th day of April 2023
BY THE COURT**


Justice Viran Molisa Trief

