

IN THE MATTER OF NATIONAL ELECTION FOR
PARLIAMENT FOR MALEKULA
CONSTITUENCY

BETWEEN: Fabian Gary Hababat Vinbel and Gregoire
Nibtik

Petitioners

AND: Sanik Asang

First Respondent

AND: Principal Electoral Officer

Second Respondent

AND: Electoral Commission

Third Respondent

AND: Commissioner of Police

Fourth Respondent

Date of Hearing: 21st April 2023

Before: Justice RLB Spear

Counsel: Mr D. Yawha for the Petitioners

Mr S. Kalsakau for the First Respondent

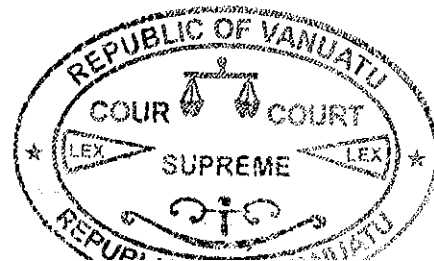
Mr F. Gilu, Solicitor General for the Second and Third Respondents

Date of Decision: 3rd May 2023

Decision

Introduction

1. National general elections were held in Vanuatu on 13th October 2022. This Election Petition relates to the election of the first respondent (Mr Asang) as one of the seven successful candidates for the Malekula polling district.



2. The two petitioners were also candidates in that election for Malekula. They were the two highest polling unsuccessful candidates.
3. The Commissioner of Police was initially included as a party to this proceeding (as Fourth Respondent) ostensibly to ensure there was proper disclosure of matters within the Commissioner's control. I have no understanding as what relevance the Commissioner of Police could have to this proceeding. I proposed to counsel that the Commissioner of Police be struck out the proceedings and there was no objection to that course. The Fourth Respondent is accordingly struck out of this proceeding.

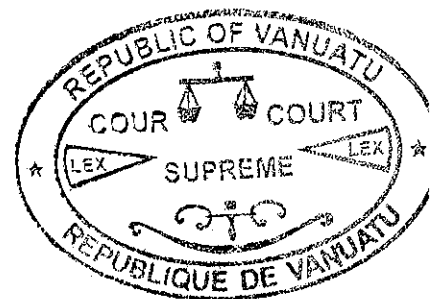
Background

4. The Election of Mr Asang is challenged on the basis that he was not eligible to stand as a candidate in the Elections for Malekula and that the Court should accordingly declare his election void.
5. The petition is not opposed in substance by the second and third respondents with Mr Gilu confirming that his involvement is confined to providing assistance to the Court to the background to this dispute and to respond to any criticism made of either the Principal Electoral Officer or the Electoral Commission.
6. Mr Asang opposes the petition and asks that the Court exercise its discretion not to declare his election void.
7. Substantial evidence has been filed in this case but in the end there is no dispute as to the facts and accordingly there was no request to cross-examine any of the witnesses.
8. At the commencement of the hearing, it was accepted that Mr Asang was subject to a suspended term of imprisonment at the time that he applied to be a candidate in the election and at the time of the election. Mr Asang was accordingly not eligible to stand as a candidate for election pursuant to s. 24(1)b) of the Representation of the People's Act [Cap 146] – (the " Act")
9. It was also accepted by counsel that a person who was not eligible to stand as a candidate for the election to parliament under section 24 (1) was similarly "not qualified" for the purposes 61(c) of the Act. I shall return to that in due course.
10. This case had already received some attention from the Court of Appeal¹. That appeal was brought by Mr Asang on the limited basis of whether the decision of the primary Judge at that time, on Mr Asang's strike out application, was affected by apparent bias.
11. It is unnecessary to have further regard to that Court of Appeal decision
12. Section 23 of the Act provides relevantly:

"24. Eligibility of candidates

Subject to section 23, a person shall be eligible to stand as a candidate for election to Parliament if he –

¹ Asang v Vinbel & Nibtik & ors CAC 22-56 17th February 2023



(a) ...

(b) *has not received a sentence including a suspended sentence of a term or terms of imprisonment which has not ended*

(c) ...

(ca) *is a person who is not in default of payment of any rates, charges or other debts due to the Government agency as defined in the Public Finance and Economic Management Act [CAP 244] for a period exceeding 2 months after the same becomes due*

(d) – (e) ...”

13. Section 23 is not relevant to this case.

14. It was conceded by Mr Kalsakau that Mr Asang’s suspended sentences of imprisonment, in force at both the time that Mr Asang applied for candidature and at the time of the election, meant that he was not “eligible” to stand as a candidate for election to Parliament. He is still not eligible to stand as his 2 year suspended sentence does not expire until 11 August 2023.

15. The petition then turns on whether this Court should declare Mr Asang’s election void pursuant to section 61 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;*

(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.*

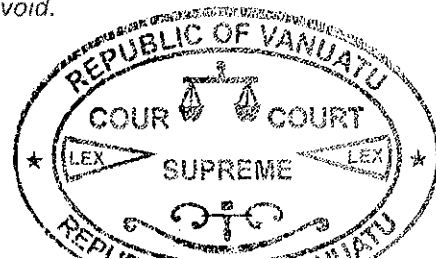
(2) *Despite subsection (1), if on an election petition, the Supreme Court finds that there has been failure to comply with any provision of this Act, but the Court further finds that:*

(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.

(emphasis mine)



The case for the Petitioners

16. Mr Yawha's argument was short and succinct - Mr Asang was not eligible to stand as a candidate in the National General Elections given that his current suspended sentence of imprisonment rendered him ineligible pursuant to s. 24(1)(b) of the Act. Accordingly, he was thereby not qualified to stand for election as a candidate pursuant to section 61 (1)(c).
17. Mr Yawha further argued that the Court had no option but to exercise its discretion to declare the election of Mr Asang void in all the circumstances given the fundamental issue as to his eligibility. Furthermore, that the saving provision by subsection 61 (2) did not assist Mr Asang as the 803 votes that he received in the election, if applied elsewhere, could well have affected the result of the election. Accordingly, it could not be said that Mr Asang candidature in the election "did not affect the result of the election".

The response by the Principal Electoral Officer and the Electoral Commission

18. Mr Kilu for the Principal Electoral Officer and the Electoral Commission did not oppose the petition as such but sought to cast a favourable light on the actions of the Principal Electoral officer and the Electoral Commission that resulted in Mr Asang being included in the list of candidates for the election. Additionally, Mr Gilu wanted to be heard on the issue of costs if the petition was allowed.
19. In that latter respect, Mr Yawha indicated that the petitioners would not seek costs against the second and third respondent if the petition was successful.
20. It is perhaps a timely to address certain undisputed facts that explain how Mr Asang came to be on the list of candidates for election given his status as a person currently subject to a suspended term of imprisonment.
21. Mr Asang was a Member of Parliament at the time that Parliament was dissolved by the President of the Republic of Vanuatu on 18th August 2022. Subsequently, the President declared that the National General Election would take place on 13th October 2022.
22. The Electoral Commission then called for any person wishing to stand for election to submit a declaration of candidature not later than 21 September 2022. Mr Asang completed and submitted his declaration of candidature form on 14th September 2022. One of the questions in the candidature form asked whether the applicant have ever been "*convicted of an offence carrying a sentence including a suspended sentence of term or terms of imprisonment which had not yet ended*". To this question Mr Asang answered "No" which, of course, was quite untrue.
23. Mr Asang then clearly had second thoughts concerning his eligibility and the declaration that he had made and on 19th September 2022 consulted a local lawyer Mrs Meresimani Markward for her advice and assistance. Mr Asang explains that Mrs Markward advised him that it would be best to seek directions from the Electoral Commission. Accordingly, Mr Asang, Mrs Markward and Mr Asang's partner then went to the Electoral Commission on the same day (19th September 2022) and met with Mr Garry Tavoia, the Deputy Principal Electoral Officer.
24. Mr Asang states in his evidence that Mr Tavoia was asked whether he considered that Mr Asang eligible to contest the election given that Mr Asang had "*a criminal conviction and sentence against*

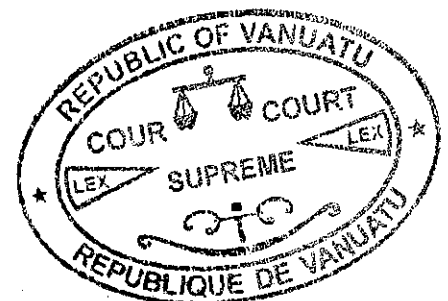


him". Mr Asang states that Mr Tavoia's advice was to the effect that there appeared to be no reason why Mr Sang could not contest the election as the sentence was below two years. If that was the advice that Mr Asang received then clearly Mr Tavoia had misinterpreted the relevant statutory provision (s. 24(1)(b) of the Act). As it happened, Mr Tavoia advised Mr Asang to re-submit his application for candidature with a covering letter from his lawyer together with a copy of the sentencing judgment and the reports of police and correctional department (I assume as presented at the sentencing hearing).

25. Mrs Markward, in her evidence, confirms Mr Asang's account of events and further stated that she send a letter the same day (19th September 2022) to the Electoral Office by confirming that Mr Asang was currently a subject to a term of imprisonment suspended for a period of 2 years from 11th August 2021.
26. Mr Tavoia asserted in his evidence that he had made it clear to Mr Asang and Mrs Markward that the question of whether he was eligible to contest the election rested with the Electoral Commission and not the Electoral Office. He acknowledged that he had advised that the declaration of eligibility should be corrected by a letter from Mr Asang's lawyer.
27. The first list of candidates for Malekula published on 1st October 2022 did not include Mr Asang's name. That prompted an enquiry to be made of Mr Tavoia by Mr Asang who ascertained that this was because Mr Asang has some unpaid charges with Parliament which is another eligibility issue.²
28. Mr lati was the Principal Electoral Officer. Mr lati confirmed in his evidence that Mr Asang's name was published in the second list of candidates following settlement of amounts owed by Mr Asang to Parliament.
29. Mr lata also acknowledged receiving a report from the Commissioner of Police on all the candidates for the forthcoming national general elections. That report clearly identified that Mr Asang had been convicted of two charges of domestic violence and intentional assault as well as a further charge of breaching the Leadership Code. Furthermore, a certificate of conviction and sentence was annexed to the report that confirmed that, on 11 August 2021, Mr Asang received sentences of imprisonment suspended for two years.
30. It is clear the Mr Asang's attempts to correct his false declaration and obtain clarification as to his eligibility to contest the election was either ignored or overlooked by the Electoral Commission notwithstanding Mr Asang's approach to the Deputy Principal Electoral Officer, the subsequent letter sent by Mrs Markward and the report provided by the Commissioner of Police to the Electoral Commission.
31. While Mr Asang should not have made that false declaration relating to his sentence, it is also clear that he took relatively prompt and appropriate steps to have the record corrected. It was accordingly a failure in the part of the Electoral Commission not to pick up on the details of Mr Asang's criminal conviction and sentence particularly as the Electoral Commission has an eligibility assessment and screening responsibility arising in particular by s. 26 of the Act that provides it with the power to declare a candidature invalid:

"26. Declaration of invalidity of candidature by Electoral Commission

² Section 24(ca) Representation of the People Act



- 1) *When a declaration of candidature has been delivered and a deposit paid in compliance with section 25 the candidate shall stand sponsored for election unless and until the Electoral Commission declares the candidature invalid or evidence is given to the satisfaction of the Electoral Commission that the candidate has died, or the candidate withdraws by notice in writing given to the Principal Electoral Officer.*
- 2) *The Electoral Commission shall only declare a candidature invalid if –*
 - (a) *the candidate or his sponsors do not have the necessary qualifications or are disqualified; or*
 - (b) *the declaration of candidature is not sponsored as provided in section 25(2).*
- 3) *Where the Electoral Commission decides that a candidature is invalid it shall so endorse the declaration of candidature giving reasons for the decision.*
- 4) *The decision of the Electoral Commission that a candidature is valid or invalid shall be final and shall not be questioned in any proceedings whatsoever.*
- 5) *Nothing in this section shall prevent the Supreme Court declaring the election of a candidate void after the election on the grounds that he was not qualified or was disqualified for election."*

32. It was argued by Mr Gilu and Mr Kalsakau that the power of the Electoral Commission to declare a candidature to be invalid by section 26 (2), was expressly qualified (as it could apply relevantly in this case) as relating only to a candidate that "(does) not have the necessary qualifications or (is) disqualified"³ and that does not apply to a candidate who is not eligible to be a candidate pursuant to s.24 (b) – as is the case with Mr Asang. That is, that Mr Asang was neither disqualified, nor did he not have the necessary qualifications, although counsel were unable to assist me with what was intended to be meant by "necessary qualifications

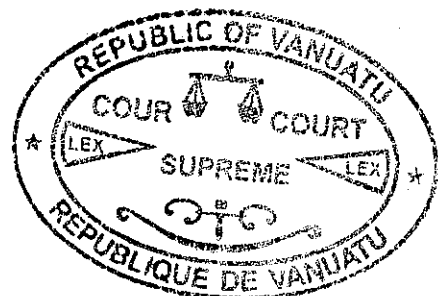
33. The argument as to disqualification in this context, at least as I have tried to understand it, is that the Electoral Commission is confined just to the various categories prescribed by s.23. Mr Asang is not disqualified by s.23.

"23. Persons disqualified from being Parliamentary candidates

(1) The following persons shall not be qualified as candidates for election to Parliament -

- (a) The President of the Republic*
- (b) Judges and magistrates*
- (c) members of the police force*
- (d) members of the National Council of Chiefs, any member of the District Council of Chiefs, Island Council of Chiefs and Area Council of Chiefs, who holds the position of chairman, vice-chairman, secretary or treasurer of these councils*
- (e) public servants*
- (f) members of the teaching service; and*
- (g) members of the Citizenship Commission*

(2) ..."



³ s. 26(2)(a) Representation of the People Act

34. However, it is not just those disqualified under s.23 that can have their candidature declared invalid by the Electoral Commission. The relevant provision⁴ addresses both disqualification and those without the “necessary qualifications”. What can that term, “necessary qualifications” mean other than that the candidate is “eligible” to be a candidate with eligibility covered by s.24. Certainly, “necessary qualifications” is not addressed or defined elsewhere in this part of the Act (Part 12 – CANDIDATES FOR ELECTION) which includes ss. 23, 24 and 26 and where it could be expected to be defined if it was to have a different meaning than “eligibility”.
35. Sections 23 and 24 are perfectly in accordance with the Article 4 of the Constitution that permits Parliament to pass a law that imposes conditions or restrictions on the right of citizens of the Republic over 18 years to vote.

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.

(3) Political parties may be formed freely and may contest elections. They shall respect the Constitution and the principles of democracy.

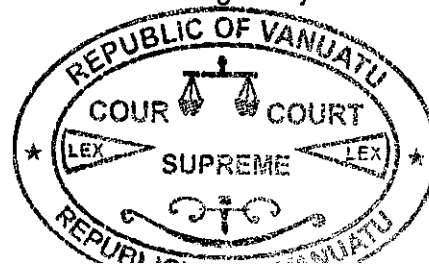
(emphasis mine)

36. The eligibility criteria in s. 24 can surely be read as defining the “necessary qualification”. The section is expressed in a positive way as defining those who are eligible to vote by a mixture of inclusions and exclusions.
37. The Electoral Commission clearly has a duty to screen all candidates to determine whether they were either disqualified or not otherwise eligible to be a candidate. That has to be considered a most important duty. However, despite the advice about Mr Asang’s sentence given to the Deputy Principal Electoral Officer, the letter subsequently sent that same day to the “Electoral Office” by Mr Asang’s lawyer confirming that advice, and the report from the Commissioner of Police, the Electoral Commission either overlooked the advice or misunderstood either the Act or its responsibilities and duties under the Act.
38. The election proceeded with 27 people standing for the 7 available seats for Malekula. The return by the Electoral Commission was that a total of 15, 354 valid votes were cast out of the total number of 28,307 registered voters. Mr Asang stood for the National United Party and received 803 votes which placed him fifth on the list of 7 successful candidates. The petitioners were the two highest polling unsuccessful candidates with Mr Vinbel receiving 691 votes and Mr Nimitik 680 votes.

The further response by Mr Asang

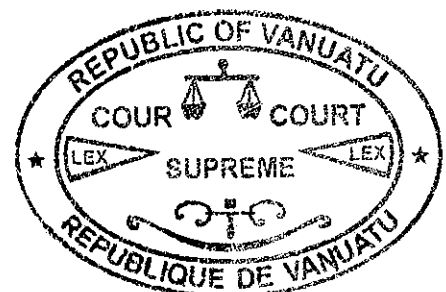
39. Mr Kalsakau focused his submissions primarily on the attempts made by Mr Asang to correct the position following the false statement made in his declaration of candidature. Mr Kalsakau argued that even though Mr Asang was ineligible, he had been led to believe that he was eligible by electoral

⁴ S.26(2)(a) Representation of the People Act



officials. I do not accept that necessarily to be so but, even if that was the case, it does not alter the issue of his eligibility. He was not eligible to be a candidate no matter what advice he might have received.

40. Mr Kalsakau then focuses his submissions on section 61 again arguing that the Court should exercise its discretion under section 61(1) not to declare the election of a candidate to be void notwithstanding the issue of eligibility that arises in this case.
41. To declare the election of a candidate void under s. 61(1) is of course a matter for this Court's discretion – "*The election of a candidate may be declared void ...*". In this respect, Mr Kalsakau sought assistance from the *Kalsakau* case⁵ which was an election petition case relating to the 2012 elections. That case, however, involved allegation of conduct that, it was argued, resulted in an unsafe election result. It involved allegations that include bribery, intimidation of people at polling stations, providing treats to people on the Election Day and such like so the case required a determination of various factual matters in respect of those complaints or allegation. I noted in that case that the burden proof in the allegations remained on the petitioner and to the civil standard of the balance of probabilities.
42. *Kalsakau* was a case that involved issues quite different to those before me in this case. In *Kalsakau*, there were disputed allegations of corrupt practice which I found were not proven to the satisfaction of the Court such that the election of the candidates for Port Vila should be considered void.
43. In this case, there is no factual dispute required to be resolved. Either Mr Asang was eligible and thus qualified or he was not. He was, however, not eligible and thus he was not qualified to be a candidate at this national general election. It would be curious indeed for this Court effectively to circumvent the eligibility criteria arising by section 24(b) by deciding not to declare an election void in these circumstances. This particular eligibility criterion is as clear and unambiguous as whether a candidate has attained 25 years of age (s. 24(d)) and whether the candidate is a citizen (s.24(e)).
44. Furthermore, it is trite to say but a discretion of this nature must be exercised judicially. It cannot be exercised arbitrarily or capriciously, nor because of any feelings of sympathy or prejudice. The discretion here must be exercised in a manner that recognises that, while the Constitution provides for universal suffrage, Parliament has the constitutional authority to impose restrictions and conditions on that right to vote and it has done so particularly by s. 23 and 24 of the Act. While there might well be occasions where the Court considers that non-compliance with a provision of the Act, particularly a mild or otherwise innocuous act, does not require the election of a candidate to be declared void, it is difficult to see how that could occur when the eligibility issue arises in such a clear cut way as it has in this case.
45. Mr Kalsakau then turned to section 61 (2) and argued that what failures there may have been to comply with any provisions on the Act had not been established as having affected the result of the election. I also do not accept that submission. Clearly, there has been a failure to comply with section 24(1)(b) of the Act in relation to the eligibility of Mr Asang to be a candidate in the election. By s.61(2), this Court is directed not to declare the election of a successful candidate to be void in those circumstances if:



⁵ Kalsakau v Principal Electoral officer 2013 VUSC 1999

- a. The Court 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.

46. The simple position is that there are no principles laid in this Act as to how an election should be conducted. That notwithstanding, there is no evidence that the election was conducted otherwise in accordance with the provisions of the Act and that it was, in all other respects, a fair election.
47. However, the 803 votes that were cast for Mr Asang in the election clearly had at least the potential to affect the result of the election. That is, it cannot be said that failure did not affect the result of the election.
48. For these reasons the Court is not prohibited from declaring the election of Mr Asang to be void by s61(2).

Conclusion

49. I accordingly find that Mr Asang was not a person who was qualified to stand in the election for Malekula and I declare that his election is void.
50. The outcome of this decision creates a vacancy in the polling district of Malekula which the Electoral Commission will now proceed to address by way of a by-election for that vacant seat. This is not a case where the next high polling candidate should be declared elected to fill that vacant seat given the tight voting numbers.
51. Costs would usually have follow the event. I note, however, that the petitioners do not seek costs against either Principal Electoral officer or the Electoral Commission. Furthermore, Mr Asang, while he was wrong to make the false declaration – at least false in that one respect - he certainly did all he could to correct that error. It is difficult to understand how the Electoral Commission could have failed to appreciate at an early time that Mr Asang was ineligible.
52. This is a case where I consider that costs should lie where they fall. However, if any party seeks costs and that is not agreed between counsel then any party seeking costs is to file a detailed memorandum as to costs sought within 14 days with any response submissions within a further 7 days. Issue on costs will be then determine on the papers without a hearing.

Dated at Port Vila this 3 day of May 2023

BY THE COURT


Justice R.L.B. Spear

