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

Civil Appeal Case No.7 of 1999

BETWEEN: SHEM RARUA
Appellant

AND: THE ELECTORAL COMMISSION OF THE REPUBLIC OF VANUARU
Respondent

Coram: Acting Chief Justice Vincent Lunabek
Mr. Justice J. Bruce Robertson
Mr. Justice John von Doussa
Mr. Justice Daniel Fatiaki

Counsel: Mr. Robert Sugden for the Appellant
Mr. George Boar for the Respondent
Mr. George Boar for the Attorney-General who intervened to be heard on a Constitutional issue.

Hearings: 27th September 1999
01st October 1999

JUDGMENT

Von Doussa J.: The Judgement I am about to deliver is that of Lunabek ACJ, Fatiaki J. and myself.

Following the general election of 6 March 1998, Shem Rarua who was a candidate for the Port-Vila constituency, filed an election petition dated the 24 March 1998 challenging various aspects of the election process. There have been a number of hearings both in the Supreme Court and in this Court. Eventually in a judgment dated 18 June 1999, the petition was dismissed.

A notice of appeal was filed on 15 July 1999 and listed for hearing in this session. The matter came on and was argued on the 27 September 1999. A number of fundamental issues were raised.

Section 63(2) of the Representation of the People Act (CAP 146) provides:-

> *"63. (2) There shall be no appeal from a decision of the Supreme Court under this part."*

On its face that appears to deny jurisdiction to this Court to entertain the appeal. Mr. Sugden submited that the section is unconstitutional and cannot be a fetter to this Court entertaining the appeal.

Article 49(1) of the Constitution provides:

> *"49. (1) The Supreme Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings, and such other jurisdiction and powers as may be conferred on it by the Constitution or by law."*

Article 54 of the Constitution provides:-

> *"54. The jurisdiction to hear and determine any question as to whether a person has been validly elected as a member of Parliament, the*

National Council of Chiefs, and a Local Government Council or whether he has vacated his seat or has become disqualified to hold it shall vest in the Supreme Court."

It is argued that the jurisdiction in respect of election petitions is accordingly a jurisdiction conferred by the Constitution in the Supreme Court.

Article 50 of the Constitution provides:-

"50. Parliament shall provide for appeals from the original jurisdiction of the Supreme Court and may provide for appeals from such appellate jurisdiction as it may have to a Court of Appeal which shall be constituted by two or more judges of the Supreme Court sitting together."

Mr. Sugden argued that election disputes are part of the original jurisdiction of the Supreme Court and under the Constitution (Article 50), Parliament has a duty to provide for an appeal to the Court of Appeal.

That issue was not decided in Appeal case No. 2 of 1999, the Honorable Willie Jimmy and Others -v- Shem Rarua . In that matter the Court of Appeal entered upon the issue between the parties by consent, and the jurisdictional question now before the Court was not argued.

Article 53 of the Constitution appeared to the Court after hearing argument to constitute another matter that required argument and decision.

Article 53 of the Constitution provides:-

"53. (1) Anyone who considers that a provision of the Constitution has been infringed in relation to him may, without

prejudice to any other legal remedy available to him, apply to the Supreme Court for redress.

(2) The Supreme Court has jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provision of the Constitution.

(3) When a question of concerning the interpretation of the Constitution arises before a subordinate court, and the court considers that the question concerns a fundamental point law, the court shall submit the question to the Supreme Court for its determination."

Following the hearing on 29 September 1999, this Court issued a Minute referring to those Articles in the Constitution and indicating that because the validity of a law of the Republic was in issue, the Attorney-General should be invited to be represented before this Court to make such submissions as the Attorney-General considered fit. When the matter resumed today, we had the benefit of submissions made on behalf of the Attorney-General, and we are grateful for this assistance.

The first issue is whether this Court can embark upon a hearing concerning the constitutional validity of Section 63(2) or whether Article 53 requires that we adjourn the Appeal to enable that issue to be raised by way of Constitutional Petition heard by the Supreme Court, that is by a single judge.

It is to be noted that Article 53(1) is stated to be *"without prejudice to any other legal remedy available"* to the person who believes his rights have been infringed. It is in our view clear that the article does not purpote to vest an exclusive jurisdiction in the Supreme Court. Where a constitutional issue arises for the first time in the Court of Appeal, before a Bench comprised of

Supreme Court judges, we consider that the Court of Appeal has jurisdiction to address the issue. It would be an unnecessary, complex and futile exercise to delay this appeal whilst the issue was sent off for determination by a single judge before this Court could enter upon the same question either in this Appeal when the hearing resumed or by way of a separate appeal against whatever decision was made on the Constitutional Petition.

Moreover we agree with Mr. Sugden when he submits that this Court has to decide the Constitutional validity of Section 63(2) to determine whether it has jurisdiction to entertain the appeal.

Accordingly on the first issue, it is our view that Article 53 provides no impediment to hearing the other issues which have been canvassed before us.

The next issue which arises for consideration is whether the jurisdiction vested in the Supreme Court by Article 54 of the Constitution is part of the *"original jurisdiction of the Supreme Court"* so as to attract the provisions of Article 50 which requires Parliament to provide an appeal therefrom. And if so, whether Section 63(2) of the Act which by its terms denies such an appeal, is therefore unconstitutional.

Election disputes in the Westminster system of government have existed for as long as the system itself. In the 18th and 19th Centuries, the resolution of these disputes in the United Kingdom and its dominions and colonies were progressively transferred from Parliament, which originally decided the disputes itself, to the Court. But it was recognized from the outset that this new jurisdiction was always a unique one in which an appeal from the primary decision of the Court did not exist. In de Silva -v Attorney-General [1949] Weekly Notes 248 which is a decision of the Privy Council Lord Simonds delivering the opinion of the Board said in relation to an election dispute:

"Such a dispute as is here involved concerns the rights and privileges of a legislative assembly, and, whether that assembly assumes to decide such a dispute itself or it is submitted to the determination of a tribunal established for that purpose, the subject-matter is such that the determination must be final, demanding immediate action by the proper executive authority and admitting no appeal to His Majesty in Council. This is the substance of the authorities to which reference has been made, and it is noteworthy that in accordance with them an appeal in such a dispute has never yet been admitted."

Earlier in the case of Theberge –v- Laudry 2 App.Cas 102, Lord Cairns, delivering the decision of the Privy Council said in relation to legislation in Quebec dealing with the determination of electoral disputes by a Court :

"They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown jurisdiction, in a particular court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known."

It is against that historical and constitutional background that we turn to the Articles of the Constitution to which we have already referred.

First it is to be noted that Articles 49, 50 and 54 all appear in Chapter 8 of the Constitution under the Chapter heading "Justice". There are two opposing views as to the interpretation of those Articles. One, is that Articles 49 and 50 between them constitute an all encompassing vesting of jurisdiction in the Supreme Court and, in appropriate cases in the Court Appeal, so that in Article 49, the words *"...and such other jurisdiction and powers as may be conferred on it by the Constitution..."* refer to any other jurisdiction wheresoever arising under the Constitution, including the jurisdiction vested in the Supreme Court under Article 54.

The alternative interpretation is, that Article 54, reflecting the historical origins earlier mentioned, stands as a separate and special grant of jurisdiction that is outside the purview of Articles 49 and 50 of the Constitution. Under this interpretation, the words in Article 49 *"...such other jurisdiction and powers that may be conferred on it by the Constitution...."* are a reference to other powers or jurisdictions given to the Supreme Court by Articles of the Constitution outside of Chapter 8, and in particular the jurisdictions given by Articles 6, 16(4), 39(3) and 72. The words would not, on this interpretation, include Article 54 which stands as a completely separate grant of a special jurisdiction which does not fall within Articles 49 and 50.

The majority of this Court is of the view that the latter of those interpretations is the correct one and that the *"extremely special"* jurisdiction conferred under Article 54 is not subject to provisions of Article 50. It follows that Parliament is not under a Constitutional obligation to provide a right of appeal from the determination of the Supreme Court in election petition matters. It also follows in the view of the majority on this point that Section 63(2) of Representation of the People Act is not unconstitutional. We add however that if and when there is a review of the Constitution, this is a matter that could perhaps be addressed to put the question beyond doubt.

The conclusion that Section 63(2) is a valid enactment is sufficient to dispose of this appeal. However, as the conclusion is that of a majority only of the Court, we propose to consider an issue argued in the substantive appeal which we consider would lead to the appeal failing in any event.

The Petition was dismissed by the Honorable Justice Saksak for several reasons. First, he held that the petition was defective as it failed to name or join as respondents the candidate or candidates whose election the petitioner wished to challenge. Secondly, he held that the petition failed, contrary to the requirement of Section 58 (1) of the Representation of the People Act [CAP 146] ("the Act") to give particulars of the laws, rules, orders or regulations that it was alleged had not been complied with. Thirdly, although there was evidence of electoral irregularity in three instances, his Lordship held that the irregularity had not been shown to have affected the result of the election. Fourthly, it was held that the Court lacked the jurisdiction to make the declarations sought to the effect that the electoral commission was incompetent.

In our view it is appropriate that we address the first of those questions, namely that the petition was fundamentally defective because it failed to name as respondents the candidate or candidates whose election the petitioner wished to challenge.

The petition, in the form in which it came on for hearing, named the present Appellant as the petitioner and the Electoral Commission as the sole respondent. The petitioner sought declarations: -

1. That the election in the Port Vila constituency is invalid and therefore null and void;
2. That there be a fresh re-election in the Port Vila constituency;
3. That the respondent is incompetent;

4. Such further declarations and/or orders as the Court shall deem fit.

The petition did not name any successful candidate in the Port Vila constituency as a respondent. The petitioner alleged non-compliance with relevant laws, rules, orders and regulations in the conduct of the election and pleaded that the electoral commission had acted in contravention of the law: -

i) in purporting to permit persons who are not registered in one particular polling station to cast their vote; and

ii) by failing to disregard the votes that did not tally with the electoral roll list.

These particulars failed to indicate how these irregularities would affect the election of any particular candidate.

The special jurisdiction of the Supreme Court to determine election disputes arises under Article 54 of the Constitution, and provisions for electoral petitions to bring electoral disputes before the Supreme Court are enacted in Part XVI of the Act. Neither the Constitution nor the Act contains an express provision that states that a candidate whose election is challenged must be named as a party to the petition. Section 58 of the Act provides that:

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

2) *The Supreme Court shall cause a copy of each election petition to be served on any person whose election may be affected by the petition and allow such person a reasonable time in which to make any submissions in*

writing on such petition and an opportunity to be heard on the hearing of the petition.

Mr. Sugden has argued that Section 58 (2) has the effect that a petitioner need not name particular successful candidates. Rather, once a petition has issued then the Supreme Court must decide whose election may be affected, and notify them. It is then up to the person or persons who are notified to decide whether they will participate in the proceedings. Counsel submits that the petition in the present case that named only the electoral commissioner was not defective because of the non-joinder of the six successful candidates in the Port Vila constituency.

For reasons that follow we do not accept those submissions. In our opinion, the petition that came on for hearing before his Lordship was fundamentally defective and was correctly dismissed on that ground.

We have already noted that historically in the Westminster system of government, election disputes were determined by Parliament itself. This however was found to be unworkable and the function was transferred to the Courts: see Erskine May "Parliamentary Practice" 18th Ed. 29/30 and Strickland -v- Grima [1930] AC 285 and Senanayake -v- Navaratne [1954] AC 640. The Constitution of Vanuatu follows the same course. By giving jurisdiction to the Supreme Court it follows that election disputes will be resolved according to the general laws which govern the conduct and procedure of a Supreme Court trial where the special procedures in the Act and in rules made thereunder fail to deal with a particular point of procedure.

Part XVI of the Act comprises Section 54 to 65. Section 54 provides that the validity of any election may only be questioned by petition brought under the Act. Section 55 specifies who may bring a petition, and includes a person claiming to have been a candidate (which covers the entitlement of the

Appellant to present a petition). Section 56 requires a deposit. Section 57 imposes an important time limit that was discussed by this Court in Civil Appeal Case No. 2 of 1999 which arose from amendments which his Lordship allowed the Appellant to make to the petition which is the subject of this appeal.

Section 57 requires that the petition be presented within 21 days of publication of the results of the election. This requirement is mandatory, and the Court of Appeal has held that Section 57 prevents new grounds of challenge to an election being introduced by amendment after the 21 days time limit has expired.

Section 58 has already been set out. Section 59 provides that the Chief Justice may make rules not inconsistent with the Act concerning the conduct of the proceedings before the Supreme Court under Part XVI. Rules under this section have been made, see: the Election Petition Rules 1998. It will be necessary to return to these rules after completing the review of Part XVI. Section 59 also makes provisions for procedural aspects of the hearing of a petition, but does not address the question of who are the proper parties to be joined in the election petition.

Section 60 (1) provides:

> *" On hearing a petition the Supreme Court may:*
>
> *a) declare the election to which the petition relates is void;*
> *b) declare a candidate other than the person whose election is questioned was duly elected;*
> *c) dismiss the petition and declare that the person whose election is questioned was duly elected. "*

Section 60(2) empowers the Supreme Court to make orders for costs.

Section 61 sets out the grounds for declaring elections void. It provides the grounds on which *"the election of a candidate may be declared void on an election petition"*.

In our opinion it is clear from Sections 60 and 61 that Part XVI contemplates that a petition disputing an election will concern the election of a particular candidate, and when the Act speaks of declaring an election void, it is referring to the election of a particular candidate, not to the election process for either a constituency or for the whole parliament. If a petition seeks to challenge the election of all members of a constituency, the petitioner challenges not one election, but each of the elections of each of the candidates who were successful. A similar construction has been given in the United Kingdom to the Representation of the People's Act 1949 on which the Vanuatu Act is based: see Gunn -v Sharpe [1974] 1 QB 808 at 818.

Sections 62 to 65 are not relevant to the question now under discussion.

The Election Petition Rules 1998 do not expressly state that the successful candidate whose election is challenged must be named as a respondent to a petition, but the Rules are drawn on the assumption that this will be the case: see rules 7 and 37.

It should also be noted that rules 3 and 4 (4) which prescribes forms reflect the construction of Part XVI that an election dispute concerns the election of a particular candidate.

The Election Petition Rules make detailed provision for election petition, and the manner which they will be heard. It will rarely be necessary to look beyond the Act and the Election Petition Rules to ascertain the procedures to

be followed. However, in the exceptional case where there is ambiguity in how the Act or Election Petition Rules should be applied, or if they are silent altogether on a point, then recourse to the general procedural rules of the Supreme Court will be necessary.

A fundamental rule of procedure in the Supreme Court is that a person whose rights in respect of the subject matter of the action will be directly affected by any order which may be made in the action must be joined as a party. This rule is based on the need to prevent injustice by there being an adjudication upon the matter in dispute without the person whose rights will be affected being a given proper opportunity to be heard. See Pegang Mining Co Limited -v- Choong Sam[1969] 2 MLJ 52 and News Limited -v- Australian Rugby League [1997]139 ALR 193 at 298.

Plainly the person whose rights and status will be most directly affected by the order sought in the petition challenging an election will be the successful candidate. Even in a case where the election of that person is disputed on the ground that other people caused irregularities to occur in the voting process, the successful candidate, in our opinion, must be joined as a respondent. This course has been followed in other election petitions under the Act: see Civil Case 29 of 1998, Nikenike Vurobaravu -v- Josias Moli and Electoral Commission, civil case 30 of 1998 Peter Salemalo -v- Paul Ren Tari and Electoral Commission, and Civil Case 31 of 1998 Shem Nakaut -v- Iaris Naunun -v- Morking Stephen, Willie Posen and Electoral Commission. It is also the course that was followed in two English cases to which Mr. Sugden refers in his submissions namely Morgan -v Simpson [1974]1 QB 344 and Gunn -v- Sharpe.

A consequence of the rule that a person whose rights would be directly affected by the order sought must be joined is that if the person is not joined,

and before the Supreme Court as a party when the petition is heard, the order claimed in the petition cannot be made.

Having regard to the importance to the general procedural rule that parties whose interest might be directly affected must be parties to the proceedings, we do not think that section 58(2) of the Act should be interpreted as abrogating the rule in a case of an electoral petition. If there were no need to name as respondent the candidate whose election is under challenge, it would not in every case be clear on whom the Supreme Court was to cause a copy of the petition to be served. The present case serves as an example. The petition does not specify how it is said that the election of any of the candidates in the Port Vila constituency might be affected. Such an effect will not occur where the irregularity concerns either an insufficient number of votes in favor one or more unsuccessful candidates, or against the successful candidates, to bring about a different result. The generality of the petition in this case, because it does not specify the nature and extent of the irregularities alleged, gives no means of identifying which if any of the successful candidates could be under threat. The Supreme Court, if it were required at the time the petition is commenced, to determine which of the successful candidates could be affected by the petition, might take a different view to that held by the petitioner, if indeed the generality of the petition enabled any view on the topic to be formed.

In election matters it is important that disputes be determined quickly. This has been stressed time and again at the highest level: see Senanayake -v- Navaratne [1954] AC 640 and Arzu -v- Arthurs [1965] 1 W.L.R. 675. Certainty as to parties to be served is important, as uncertainty is likely to cause delay. Certainty will be achieved by requiring the petitioner to name as respondent or respondents the successful candidate or candidates whose election is under challenge.

We think the better view is that Section 58(2) is an express recognition that in electoral matters, even though they are matters of general public importance which affect the whole community, a successful candidate against whom an election a petition is lodged is to be served and allowed a reasonable time in which to make written and oral submissions. On this view, *"any person whose election may be affected by the petition"* means any successful candidate who is named as a respondent to the petition. When it is alleged that voting irregularity has occurred throughout a constituency, only those successful candidates in the constituency who are named as respondents need to be served. If other successful candidates are not named as respondents , they are not under threat that their election will be declared void.

The Election Petition Rules are also drawn on this view of Section 58(2). The Rules are the means by which the Supreme Court "causes a copy of each election petition to be served on any person whose election may be affected by the petition". Rule 14 provides for personal service, and for substituted service of a petition. Rule 15 deals with evasion of service. Rule 14 commences as follows:

"Every petition and notice of the nature of the security shall be served by the petitioner on the respondent. The service of a petition shall be personal on the respondent..."

Finally, the Appellant seeks to rely on Order 17, rule 11, of the High Court (Civil Procedure) Rules 1964. That rule provides:

"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as

may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added..."

For reasons we give shortly, it is doubtful if O.17,r 11 has any application to elections petitions as there are provisions in rule 40 of the Election Petition Rules, and Section 218 of the Criminal Procedure Code [CAP 136] which cover the same ground. We shall however deal with the submission.

Order 17, rule 11, is in terms common to post-Judicature Act rules of court. The rule is intended to give effect to the abolition of the plea in abatement. The history and construction of a similar rule is discussed in News Limited-v-Australian Rugby League at 297-301. The rule recognizes that in a post-Judicature Act rules of court necessary parties to proceedings can be joined after the proceedings are commenced to enable all issues in dispute between the parties to be resolved at trial. The rule is not intended to overcome the requirement that any person whose rights will be directly affected by the orders claimed must be joined as a necessary party before the adjudication of those rights occurs. The rule is to enable missing parties to be joined before trial, but the rule does not give validity to orders made in an action that is not properly constituted at the time of trial.

In cases to which O.17, r 11 applies, the problem of non-joinder cannot be overcome by serving notice of the proceedings on non-parties who might be affected, and then leaving it to them to decide if they will apply to be joined, or otherwise participate in the hearing. Such an attempt was rejected in News Limited-v- Australian Rugby League. The Full Court of the Federal Court of Australia stressed at 299 that the giving of such notice cannot extend the

jurisdiction of the Court to make orders which offend the test stated in the Pegang Mining case, and that it is for the party prosecuting the proceedings to choose the necessary parties to enable the Court to make the orders sought in the proceedings.

Rule 40 of the Election Petition Rules provides:

> *"No proceedings under these Rules shall be defeated by any formal objection"*

Section 218 of the Criminal Procedure Code, dealing with the special jurisdiction of the Supreme Court in Constitutional matters, relevantly provides:

> *"(1) Every application to the Supreme Court for the exercise of its jurisdiction under Articles 6, 53(1), 53(2), and 54 of the Constitution shall be by petition and shall be valid no matter how informally made.*
>
> *(2) The Supreme Court may on its own motion or upon application being made therefor by any party interested in the petition summon the petitioner before it to obtain any further information or documents it may require.*
>
> *(3) The petitioner shall, within 7 days of the filling of his petition in the Supreme Court or within such longer period as the Court may on application being made therefor order, cause a copy of the petition together with copies of supporting documents filed in relation to such petition to be served on the party or on all those parties whose actions are complained of.*
>
> *(4) Any party who is served with a copy of the petition in pursuance of subsection (3) may without prejudice to any other legal remedy available to such party apply to the Supreme*

Court for an order dismissing the petition on the ground that the petition is without foundation or vexatious or frivolous.

(5) Unless the Supreme Court shall be satisfied in the first instance that the petition is without foundation or vexatious or frivolous, it shall set the matter down for hearing and enquire into it. It shall summon the party or parties whose actions are complained of to attend the hearing."

The effect of these provisions is that an election petition informally drawn is not automatically and incurably bad. As under O.17, r 11, the petition can be amended and necessary parties added after it is filed. To this end, the Supreme Court has power under Section 218(2) to call in a petitioner and obtain information needed to cure any deficiencies. However, it is of fundamental importance to recognize that the Representation of the Peoples Act is a special Act that applies to the exclusion of the general provisions of Section 218 of the Criminal Procedure Code in election matters where the two are inconsistent, and that both Section 218 and rule 40 must be read subject to the strict time limit in Section 57(1) of the Act. Whilst an election petition informally made will be valid, it must undergo all necessary amendments within the 21-day time limit to ensure that all grounds relied on are stated, and every successful candidate whose election is challenged is named as a respondent. This strict time limit is common to election disputes throughout the Westminster system as it is recognized that in the public interest there must be finality to the election outcome at an early date.

Counsel argued that the petition should not have been dismissed as an oral application had been made on the 3rd December 1998 by the Appellant to the effect that those of the six successful candidates who were not then before the Court should be joined as parties to the petition. This submission was made in the course of an application by two respondents then named in the petition, to have the petition against them struck out. His Lordship ordered that the

proceedings against these two respondents be struck out, and did not make an order that the successful candidates be joined. These events provide no answer to the Appellant. The submission was made some 8 months after the 21-day time limit in Section 57 had expired and it was then too late to make a new claim against someone who was not already a party to the petition. As a procedure to challenge the elections of each of the six candidates for the Port Vila constituency, the petition was defective from the out set as those candidates were not each named as respondents. By the time the petition came on for hearing, no candidate was named as a party. In our opinion, his Lordship was correct to dismiss the petition because this defect meant that the Court had no jurisdiction to make the orders, which the petitioner sought.

If the appeal were competent, it must fail on this ground. In these circumstances it is inappropriate for this Court to consider other grounds of appeal which seek to challenge his Lordship's findings in respect of alleged irregularities in the voting process followed in a number of polling stations.

DATED AT PORT-VILA, this 7th OCTOBER 1999

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Vincent LUNABEK, ACJ	John von DOUSSA, J	Daniel FATIAKI, J