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

Civil Appeal
Case No. 16/700 CoA/CIVA

BETWEEN: EDWIN APRIMAN
First Appellant

AND: PETER PATTY
Second Appellant

AND: JAMES GAUA
Third Appellant

AND: THE REPUBLIC OF VANUATU
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Mary Sey
Hon. Justice Paul Geoghegan

Counsel: *Mr. S. Stephens for the Appellants*
Mr. S. Kalsakau for the Respondent

Date of Hearing: *6 April 2016*

Date of Judgment: *15 April 2016*

JUDGMENT

1. In July 2015 elections were held for the Luganville Municipal Council in Luganville, Santo. There were 178 candidates contesting for 13 seats. On 29 July 2015 the official results were gazetted and all three appellants were declared duly elected.

2. The election was challenged in two (2) written letters addressed to the Electoral Disputes Committee ("*EDC*") dated 22nd July 2015 and 27 July 2015. Although both letters predated the gazetting of the election results, they were properly treated by the EDC as "*... complaints intended to be election dispute petitions*". The complaints were subsequently repeated in

a formal election petition filed by the appellants' lawyer in response to concerns expressed by the EDC.

3. On 4 December 2015 the EDC, declared the election of all three appellants *"null and void"* and ordered as a cost-saving measure, that the appellants' vacant seats be filled by the runner-up candidates in each of their respective wards.

4. On 21 December 2015 the appellants issued an application for judicial review against the determinations of the EDC urging several grounds in support. The application was later properly converted into an appeal.

5. On 11 March 2016 the Supreme Court delivered its judgment dismissing the appellant's appeal and awarding the respondent costs of the appeal.

6. On 15 March 2016 the appellants filed a notice and grounds of appeal against the judgment of the Supreme Court. The appellants also filed an application for leave to appeal to this Court on a question of law pursuant to Section 30(4) of the Judicial Services and Courts Act. That provision can have no application to the present appeal in so far as it clearly refers to appeals from the Magistrate's court.

7. Having said that, the provisions of Regulation 43(4) of the Municipal Councils Elections Regulations (*"MCER"*) also makes it clear that:

   "Any decision of the Supreme Court on an appeal whether a summary dismissal or a decision after the hearing shall be final".

8. In the face of such a finality provision the jurisdiction of this Court to entertain this second appeal by the appellants was at least doubtful and counsels were invited to address this preliminary jurisdictional issue. The respondent maintains that there is no jurisdiction in this Court to

entertain an appeal from the Supreme Court's judgment which "in terms of Reg. 43(4)... shall be final".

9. Counsel for the appellants on the other hand, advanced several arguments in support of jurisdiction which may be conveniently summarized under the following headings:

   (1) The Constitution and the Judicial Services and Courts Act;

   (2) Reliance on Jimmy v. Rarua [1998] VUCA 4 and Matarave v. Talivo [2010] VUCA 3.

10. Before dealing with the arguments we make the general observation that appellate rights are created by statute and further, the denial of a second right of appeal is a common feature in legislation dealing with elections where speedy determination and finality of decisions are paramount considerations.

(1) THE CONSTITUTION and the JUDICIAL SERVICES AND COURTS ACT

11. In this regard counsel for the appellants refers to Article 50 of the Constitution and Section 48 of the Judicial Services and Courts Act as founding the jurisdiction of this Court to entertain the present second appeal. We cannot agree.

12. Article 50 of the Constitution which is directed at Parliament clearly states:

"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".

(Our underlining)

13. Plainly Article 50 differentiates between the original jurisdiction of the Supreme Court which requires Parliament (*"shall"*) to provide an appeal therefrom, and its appellate jurisdiction where Parliament is not (*"may"*) similarly constrained.

14. In the present case there can be no doubting that the Supreme Court was exercising an appellate jurisdiction. This is clear from Reg. 43 and especially sub-regulation (2), which relevantly provides after the decision of the EDC has been communicated to the petitioner and other parties:

"Any person ... may within 14 days of such decision or such further time as the Supreme Court may allow, appeal to that Court in writing giving brief reasons for his appeal".

and sub-regulation (4) provides that any decision of the Supreme Court on an appeal *"... shall be final".*

15. Although the MCER is not an enactment of Parliament, it is made by the Minister in the exercise of powers conferred by Parliament under Section 7(2) of the Municipalities Act to provide for the regulation and conduct of elections held under the provisions of the Act. The MCER are necessarily subject to the provisions of the Municipalities Act and the Constitution which, as earlier discussed, does not require a second appeal to be provided from a decision of the Supreme Court in its appellate jurisdiction.

16. In this regard we are fortified by the judgment of this Court in the Matarave decision where the Court in upholding the constitutionality of a similar finality provision in the Island Courts Act and in rejecting a not dissimilar argument invoking Article 50 said:

"There is no inconsistency between these Articles (50 and 52) *and section 22 of the Island Courts Act. Article 52 requires Parliament to establish island courts, and this Parliament has done by the Island Courts Act which gives those courts original jurisdiction. Section 22 then provides for a right of appeal as required by Artcile 50. Under Article 50 it is for Parliament to*

decide if there should be a second right of appeal from the Supreme Court to the Court of Appeal, and by Section 22 (4) Parliament has decided that there should not be".

And later, where the Court observed:

"In any system of governance under the rule of law, there must be a dispute resolution system administered by courts, and this system must impose finality on the resolution of disputes at some point. Wherever that point may be in the process for the resolution of disputes, there will be both winners and losers. The losers are likely to be dissatisfied with the outcome. However finality requires that they have no further avenue available to perpetuate the disputes ... the fact that for disputes over ownership of (customary) *land the legal structures allows only one level of appeal after a hearing by the primary court established by Parliament ... does not render a limitation on further appeal unconstitutional".*

17. Plainly by the provisions of the MCER an unsuccessful candidate in a municipal election is given a single right of appeal to the Supreme Court from the determination of the EDC. Such a right is consistent with the mandatory requirements of Article 50 and in our view, provides an important finality to municipal election disputes. Parliament could have provided for a second appeal to the Court of Appeal if it had considered it desirable at the time it enacted the Municipalities Act. It did not and the absence of a second right of appeal is consistent with the discretionary limb in Article 50 of the Constitution.

18. Counsel also relied on the provisions of Section 48 of the Judicial Services and Courts Act (Chapt. 270) (*"JSC Act"*) which sets out generally the appellate jurisdiction and powers of the Court of Appeal. In particular subsection (1) provides:

"Subject to the provisions of this Act and any other Act, the Court of Appeal has jurisdiction to hear and determine appeals from judgments of the Supreme Court".

19. It is axiomatic that the existence in the Court of Appeal of a jurisdiction to hear an appeal is quite different from the existence of a right of an appellant to appeal to the Court of Appeal. This is reinforced by the introductory words in the subsection and the discretionary limb in Article 50 of the Constitution to which the provisions of the JSC Act are subject (*see:* Section 9 of the Interpretation Act). In other words if an Act of Parliament bars or prohibits a second appeal to the Court of Appeal from an appellate decision of the Supreme Court then section 48 cannot be invoked to give the Court of Appeal jurisdiction.

20. In the present case Reg. 43(4) of the MCER bars a further appeal from the determination of the Supreme Court on a municipal election appeal from the decision of the EDC.

(2) JIMMY v RARUA [1998] VUCA 4 & MATARAVE v TALIVO [2010] VUCA 3.

21. Counsel for the appellants also relies on the above decisions of this Court as instances of second appeals that were entertained by this Court despite the existence of a similar finality clause as Reg. 43(4). Having considered both judgments we are satisfied that they are readily distinguished and of no assistance in determining the present appeal.

22. In Jimmy v. Rarua, which concerned an election petition in a Parliamentary election held under the Representation of the Peoples Act [CAP. 146], and where leave to appeal to the Court of Appeal had been granted by a Supreme Court judge before the petition was determined, it was agreed by counsel in the Court of Appeal that it should be assumed that the Court of Appeal had jurisdiction to hear the appeal. This much is clear from the judgment which records that Mr. Sugden who appeared for the respondent:

"... accepted that this case, was not the appropriate time to question the constitutionality of the exclusionary provision".

and later counsel:

"... accepted that the issue on the merits in this case was of sufficient importance for him to concede that the question was properly before the Court of Appeal. If there is a need for a full argument on the approach to the proper exercise of a constitutional challenge that can arise in other proceedings. For the purposes of this case the jurisdiction was mutually agreed to exist".

(our underlining)

Given the above **Jimmy's** case provides no authority for counsel's submissions.

23. We next deal briefly with the **Matarave** case which concerned applications for leave to appeal against a Supreme Court judgment delivered on an appeal from an Island Court in a matter concerning disputed customary ownership of land. The relevant finality and exclusionary provision in Section 22 of the Island Court Act provides:

"An appeal made to the Supreme Court shall be final and no appeal shall lie therefrom to the Court of Appeal."

24. In its judgment the Court of Appeal noted that besides errors of law and procedure alleged in the draft notices of appeal, two appellants had alleged that circumstances exist which give rise to a reasonable apprehension of bias on the part of the presiding Judge and the assessors who heard and determined the appeals.

25. In particular, the Court of Appeal identified the following questions for disposal of the appeals before the Court namely:

"(a) Do the terms of s. 22 (4) of the Island Courts Act prevent this Court in all circumstances, however exceptional or serious alleged errors by the Supreme Court might be, from entertaining an appeal from the decision of the Supreme Court where the Supreme Court has exercised the

function committed to it under s.22 (1) of the Island Courts Act to hear an appeal from an Island Court?

(b) Are there circumstances which can render the apparent exercise of the function granted to the Supreme Court under s.22 (1) an invalid exercise of the function? If so, was there apprehended bias on the part of the judge or an assessor in such a case?

(c) If yes, to the preceding question, does the evidence placed before this Court establish apprehended bias on the part of the judge or the assessors?

(d) If apprehended bias is established what remedy is available, and when should a court exercise its power to grant a remedy?"

26. For present purposes it is only necessary to refer to the Court's answer to question (a) where it said:

"This question in substance raises the meaning s.22 (1) of the Island Courts Act. Stated bluntly, we consider this statutory provision means exactly what it says: the decision of the Supreme Court is final and cannot be the subject of an appeal to the Court of Appeal. However, the limitation imposed by s.22 (4) is in relation to an "appeal made to the Supreme Court". This requirement is only met if the body hearing the appeal is a court validly constituted by a Supreme Court judge and two or more assessors appointed by the judge as required by s.22 (2). That requirement will not be met if any one of those persons is subject to any matter that disqualifies them from exercising their statutory functions. Moreover, the "matter" the subject of the appeal must be one concerning disputes as to the ownership of land (see: s,22(1)(a)), that is, a particular area of land identified by the disputants as the land subject to the dispute. It follows that if the court which purports to exercise the appellate functions under s.22 (1) (a) is not properly constituted, or if the court properly constituted purports to decide custom ownership of land which is not subject to the dispute submitted to the Island Court, the court will not be validly exercising its statutory function. For example, if the court was constituted only by a judge and one assessor, the court would not be validly exercising the statutory function. Nor would it be if it purported to decide ownership of land outside the area of the disputed land the subject of the appeal."

Having identified that qualification the Court of Appeal then considered the evidence in support of the allegation of apprehended bias against the presiding Judge and concluded that a finding of apprehended bias was inevitable and was sufficient to invalidate the decision of the Supreme Court. The Court of Appeal declared the Supreme Court decision void and the appeal was directed to be heard afresh by another Judge and assessors. The Court also reaffirmed the exclusionary effect of Section 22 (4) when it dismissed the applications for leave to appeal *"as this Court has no power to entertain an appeal on the merits of the decision."*

27. In the present appeal there is no similar allegation of apprehended bias made against the Supreme Court judge nor has it been suggested that the Court was improperly constituted when it determined the appeal against the decision of the EDC. Furthermore an examination of the grounds of appeal clearly indicates that the appellants are challenging the merits of the decision of the EDC which cannot be entertained.

28. For the foregoing reasons we are satisfied there is no right of appeal. Costs to the respondent to be taxed on a standard basis if not agreed.

DATED at Port Vila this 15 day of April, 2016

BY THE COURT

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Hon. Vincent Lunabek

Chief Justice