

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

**Civil Appeal  
Case No. 22/56 CoA/CIVA**

**BETWEEN:** **Sanick Asang**  
Appellant

**AND:** **Fabiran Gary Hanbabat Vinbel**  
**Gregoire Niptik**  
First Respondents

**AND:** **The Principal Electoral Commission**  
Second Respondent

**AND:** **Electoral Commission**  
Third Respondent

**AND:** **Commissioner of Police**  
Fourth Respondent

**Coram:** *Hon Chief Justice V Lunabek*  
*Hon Justice J Hansen*  
*Hon Justice D Aru*  
*Hon Justice V M Trief*  
*Hon Justice R White*  
*Hon Justice E Goldsbrough*

**Counsel:** *S Kalsakau for the Appellant*  
*D Yahwa for the First Respondent*  
*F Gilu for the Second to Fourth Respondents*

**Date of hearing:** *07 February 2023*

**Date of Decision:** *17 February 2023*

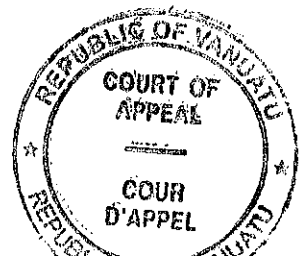
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**JUDGMENT OF THE COURT**

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1. This appeal arises in the context of an Election Petition. We note the 2<sup>nd</sup> to 4<sup>th</sup> Respondents abided the decision of the Court. In relation to the Petition itself, no right of appeal lies to this Court. However, the appeal is brought pursuant to s 38 of the Judicial Services and Courts Act Cap 270. The issue on appeal is whether the decision of the Judge on the appellant's strike out application is affected by apparent bias. The judge took the view that it was not and refused to recuse himself.

**Background**



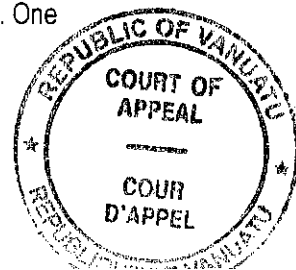
2. The appellant, who had previously been an elected member, wished to contest the general election relating to the seven seats of the Malekula Constituency. The problem confronting the appellant is that on 11 August 2021 he pleaded guilty to two charges of domestic violence and one charge of breaching the leadership code by failing to comply with and observe the law.
3. It appears the appellant and his wife were estranged. It is unnecessary to give the details leading to the two charges of domestic violence, but we note that on 6 January 2021 he assaulted his wife with a perfume bottle, and hit the complainant's head. He then grabbed a wooden broom and used it to hit her head three times, her back three times, and twice on her hand. The complainant was hurt, and broke out crying, and the appellant only stopped when the wooden broom broke into three pieces. The next afternoon he returned to his wife's house and grabbed a wooden mop which he used to hit her twice on her head, and repeatedly on her hand and backside. The Judge sentenced him to nine months' imprisonment on the two domestic violence counts and 12 months' imprisonment for breach of the leadership code. They were to be served concurrently. The appellant was also ordered to complete 50 hours of community work.
4. Importantly, the Judge concluded that the end sentence should be suspended for a period of two years. He was given the normal warning that he must remain offence-free for the next two years, or he would need to serve his sentences of imprisonment in addition to any other penalty that may be imposed on him for the further offending.
5. To give context to the matter before us S: 24 of the Representation of the People Act, Cap. 146, deals with the eligibility of candidates. Where relevant it reads:

**"24. Eligibility of candidates**

*(1) Subject to section 23 a person shall be eligible to stand as a candidate for election to Parliament if he –*

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

6. It was properly conceded by Mr Kalsakau that the end date for the purposes of s 24(1) (b) in the appellant's case was 11 August 2023, two years after the sentencing date.
7. It was also properly conceded by Mr Kalsakau, in light of the provisions of s 24(1) (b), that the appellant was not eligible to stand as a candidate.
8. There is disputed, and to some extent contradictory, evidence relating to steps taken by the appellant to determine whether or not his conviction was a bar to him standing as a candidate. He took legal advice and spoke to the deputy electoral officer about the matter. He filed a Candidate Form pursuant to Schedule 3 of the Representation of the People Act Cap 146. This form is signed as a Solemn Declaration.
9. Under "D" there are a number of questions relating to qualifications to stand for Parliament. One of these reads:



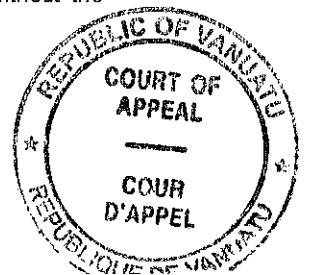
*"Have you ever been : ....Convicted of an offence carrying a sentence including a suspended sentence of a term or terms of imprisonment including a suspended sentence of imprisonment of a term or terms of imprisonment which has not yet ended".*

The appellant ticked the "No" box. Ultimately the Electoral Commission declared him as an eligible candidate. He was the 5<sup>th</sup> highest polling candidate and declared elected.

10. Given the conclusions we have reached and the sensible concessions made by counsel, this electoral petition will ultimately be heard on its merits in the Supreme Court. In those circumstances it is not appropriate that we say more about the disputed evidence just referred to.

### **The Election Petition**

11. The Election Petition and supporting Sworn Statements were filed within the 21-day statutory period. The Petition raises a number of matters, but the central thrust is the eligibility of the appellant to stand as a candidate.
12. The appellant filed an application to strike out the petition. The strike-out was brought on a number of grounds, including that the third respondent declared the appellant as being eligible to contest the election, and on 23 October he was declared as securing the fifth-highest lawful votes in the Malekula Constituency, and thereby secured the fifth of the seven available seats. It is said there is no evidence to substantiate the allegations brought against the fourth respondent in the election petition, and it lacked foundation as frivolous, vexatious and an abuse of process.
13. For the sake of completeness, we note S: 26 (4) of the Act states that the Electoral Commissions Declaration as to whether a candidate is valid or invalid is final. However, S : 26(5) makes it clear that the Supreme Court retains the power, after the election, to declare the election void if a candidate was disqualified or not qualified to stand.
14. The matter came before the Supreme Court, and on 18 November a decision was delivered dismissing the strike-out application and setting down the substantive case for 5 December 2022.
15. On 2 December an Urgent Application was made for the Judge to recuse himself from the case pursuant to s 38(2) Judicial Services and Courts Act Cap 270 on the grounds:
  1. *"The Judge showed apparent bias against the first respondent when he heard and dismissed his (first respondent's) strike out application by:*
    - (a) *pre-determining the first respondent's state of mind as being deceitful without the benefit of trial; and/or*



(b) *concluding that because the first respondent had deceived the Electoral Commission his standing in the general election had affected the result of the election.*"

16. The complaint is encapsulated in the sworn statement of the appellant and a correctional officer, Rosalind Vetinamoli, who is apparently the fiancée of the appellant.
17. In the appellant's sworn statement he deposes that the Judge asked his counsel in the course of the hearing why the appellant had ticked "no" in the "My Candidate" application when it asked did he have a conviction. He said his counsel responded to the effect that the answer and the tick needed to be looked at in the whole context as set out in the sworn statement as to the conviction being disclosed to the Electoral Commission, the letter and legal advice he received and other matters in the evidence we referred to earlier. He then goes on to depose that the Judge said words to the effect that the document showed he had "deceived" (said to be the Judge's exact words) the Electoral Commission in his application. Further, in the Judge's notes the term "dishonest" is used. Ms Vetinamoli was not an independent bystander, but she was present in Court and she confirmed hearing the words said. She deposed that she was left with the impression that the Judge had made up his mind that the appellant had deceived the Electoral Commission and as a result of the deceit he contested the election and affected the result.
18. There is also a complaint that in the context of a strike-out application the Judge said "Those are clear evidence of breaches of s 24(1) (b), s 26(2) (a), and s 41 (b) and s 61(1) (b) showing the petitioners have merit in their petition." We are quite satisfied the Judge was not making a factual finding at that stage. He was clearly aware this was a strike-out application, and was effectively saying there was prima facie evidence to support the allegations of the breaches in the petition.

### **Submissions**

19. Mr Kalsakau submitted that against the background of the enquiries the appellant made as to his eligibility to stand the use of the terms "deceived" and "dishonest" meant a fair minded observer, knowing all the circumstances, would have thought the judge had predetermined the decision he had to make.
20. Mr Yawha submitted to the contrary that while the language used by the judge was robust they would not lead an observer to think there was predetermination.

### **Discussion**

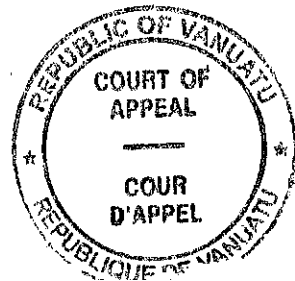
21. Section: 38 of the Judicial Services and Courts Act reads:

**"38. Disqualification**

(1) If:

(a) *a judge has a personal interest in any proceedings; or*

(b) *there is actual bias or an apprehension of bias by the judge in the proceedings;*



*he or she must disqualify himself or herself from hearing the proceedings and direct that the proceedings be heard by another judge.*

- (2) *A party to any proceedings may apply to a judge to disqualify himself or herself from hearing the proceedings.*
- (3) *If a judge rejects an application for disqualification, the applicant may appeal to the Court of Appeal against the rejection. If an appeal is made, the judge must adjourn the proceedings until the appeal has been heard and determined.*
- (4) *A judge who rejects an application for disqualification must give written reasons for the rejection to the applicant."*

22. While we can well understand the Judge using the language he did, that was perhaps more a matter that should have awaited the merits hearing of the petition. They are strong words and imply dishonesty in circumstances where the appellant took some steps to enquire as to his status as a candidate. The ticking of a box stating he had no convictions and other matters can be considered in the full context of what occurred in the disposal of the electoral petition itself.
23. Section 38 has been considered by this Court. For example, in *Matarave v Talivo* [2010] VUCA 3; Civil Appeal Case 01 of 2010 (30 April 2010), the Court applied the following test for apprehended bias at page 11:

*"The test we apply is whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the questions which the Court was required to decide."*

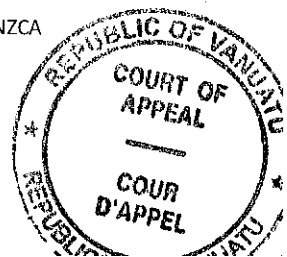
24. The Court continued:

*"Where a suspicion or apprehension of apparent bias is said to arise from particular circumstances, the test is an objective one. The test requires the Court's assessment of the perception which the circumstances would give rise to in the mind of a fair minded lay observer informed of the facts. The test is to be applied at the time when the circumstances arose. The test is not one to be applied after the judgment is delivered and with knowledge of the outcome of the case..."*

*As the passage quoted from the Supreme Court of New Zealand emphasizes,<sup>1</sup> it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the judge may be seen to be biased and that the factual enquiry should be rigorous."*

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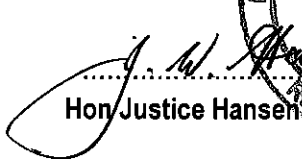
<sup>1</sup> *Saxmere Company Ltd. v. Wool Board* [2009] NZSC 72, quoting *Muir v Commissioner of Inland Revenue* [2007] NZCA 334; [2007] 3 NZLR 495; (2007) 23 NZTC 21,543; (2007) 18 PRNZ 630 (7 August 2007) at [62].



25. It is a case where it seems to us some such fair minded, fully informed lay observers, may not see bias by the use of the terms 'deceived' and 'dishonest' in the context they were used. However, equally, we consider it likely that the fair minded, fully informed lay observer could have concluded that by the use of those words that there was perceived bias on the part of the Judge and that he was prejudging the matter.
26. We stress here we are dealing with a situation of perceived bias, not actual bias, which is an important distinction. In many cases involving experienced Judges, while there may be a perception of bias there will be no actual bias. But as the section says, there does not have to be actual bias, the apprehension of bias is sufficient to lead to a Judge standing aside.
27. In those circumstances we consider that the judge should have recused himself and the appeal should be allowed.
28. In the notice of appeal, what was sought by the appellant was that the Judge be recused and the Strike Out be heard afresh in front of another Judge.
29. After an exchange between the bench and Mr Kalsakau (who received his client's consent), it was agreed that rather than a further Strike Out Application the Petition should go straight to a full merits hearing. In light of our finding on the S: 38 matter it be heard by a different judge.
30. Given the circumstances of this case, we consider on the strike-out application and this appeal, costs should lie where they fall.
31. The Court orders :
- (i) The appeal is allowed;
  - (ii) The judge is recused and the Electoral Petition is remitted to the Supreme Court heard on the merits by a different judge;
  - (iii) Costs to lie where they fall.

**Dated at Port Vila this 17<sup>th</sup> day of February 2023**

**BY THE COURT**

  
Hon Justice Hansen

