

**IN THE MATTER OF:** THE CONSTITUTION of the Republic  
of Vanuatu.

**AND IN THE MATTER OF:** The Local Government Council  
Election (Procedure Rules) Order No.  
61 of 1982 (as amended)

**AND IN THE MATTER OF:** A Petition by MAXWELL  
MATSAMATSA and KAMI MITA  
Joint Petitioners

**AND:** THE ELECTORAL COMMISSION  
First Respondent

**AND:** THE SANMA PROVINCIAL COUNCIL  
Second Respondent

**Coram:** Mr. Justice Oliver A. Saksak  
Ms. Cynthia Thomas - Clerk

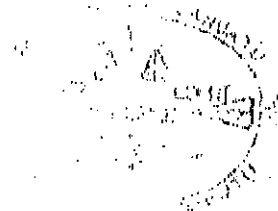
**Counsel:** Mr. Saling N. Stephens for the Joint Petitioners  
Mr. Daniel Yawha for the First and Second Respondents

**Date of Hearing:** 16<sup>th</sup> October 2002 and 7<sup>th</sup> November 2002.

## **JUDGMENT**

This is a reserved judgment. There are two petitioners. Their petition is issued jointly against the First and Second Respondents. There were initially three respondents but the Petitioners have discontinued their action against the Third Respondent.

This petition is issued under the provisions of Section 218 of the Criminal Procedure Code Act [CAP. 136]. The Petitioners claim as follows that:-



1. They were duly elected as councilors to the Second Respondent on 20<sup>th</sup> November 2000 following a declaration made by the First Respondent and published in the Gazette No. 1 of 10<sup>th</sup> January 2001.
2. The First Respondent is a statutory body established by law to be responsible for overseeing the conduct and administration of all matters relating to and including all elections to public offices nationally and at municipal and provincial levels.
3. The Second Respondent is a semi-governmental department duly established by law to be responsible for overseeing the conduct and administration of all matters relating to the dissemination of goods and services to the residents and citizens of Vanuatu living within the territorial boundary of Sanma Province.
4. The Third Respondents are politicians affiliated with Union of Moderate Parties who were political observers during the elections held on 10<sup>th</sup> November 2000.
5. On Tuesday 6<sup>th</sup> November 2001 whilst attending and participating in the full council meeting, the Respondents used the police to enter and forcefully removed them from the Council's Chambers and warned them not to re-enter the chambers as their names did not appear on the second electoral list, which was published on 30<sup>th</sup> November 2000 and gazetted on 9<sup>th</sup> July 2001.
6. The Respondents failed to give any proper notice of the purported termination of the Petitioners.
7. Each of the Petitioners were purportedly terminated without the benefit of knowing what allegation (if any) had been held against them and the petitioners were denied the opportunity to answer any allegations (if any exist).



8. The Respondents have instead permitted Moses Wayne and Bernard Vira to enter and participate as councilors in the meeting of 6<sup>th</sup> November 2001 not in accordance with the law.
9. The Respondents actions in publishing a second electoral list on 30<sup>th</sup> November 2001 was illegal and invalid as it is contrary to the provisions of the Local Government Council (Election Procedure Rules) Order No. 61 of 1982, as amended.
10. The actions and omissions by the Respondents are ultra vires the Decentralisation and Local Government Regions Act No. 1 of 1994 (as amended) and/or constitute administrative conduct that is unreasonable or undertaken for improper purposes or otherwise unlawful and should be quashed as invalid.
11. Further and/or in the alternative, by virtue of the fore-goings, there have been a breach of the Constitution of Vanuatu by the First, Second and Third Respondents in that the following fundamental rights have been breached, namely the right to the protection of the law.
12. Further and/or in the alternative, the rules of natural justice have in all the circumstances been breached.

And they seek the following reliefs:-

- (1) A declaration that the second electoral list published by the First Respondent on 30<sup>th</sup> November 2000 and gazetted on 9<sup>th</sup> July 2001 is null and void and therefore of no legal effect.
- (2) A declaration that the purported termination of the Petitioners by the Respondents was not done in accordance with the law and therefore was unlawful, invalid and of no legal effect.



- (3) An order reinstating the Petitioners and Applicants to their previous offices within the Second Respondent Council.
- (4) The award of compensation to the Petitioners for breaching their constitutional rights in a sum to be assessed.
- (5) Such other relief as the Court sees fit.
- (6) Costs.

The Petitioners relied on their sworn affidavits in support of their claims. They also gave oral evidence on which they both were cross-examined by counsel for the Respondents on 16<sup>th</sup> October 2002. The Respondents did not produce any evidence on 7<sup>th</sup> November 2002. Mr. Yawha sought an adjournment to call evidence from two persons who had not previously sworn or deposed to any affidavits. I refused the application for adjournment. The Respondents had ample time to have filed any affidavits from 16<sup>th</sup> October 2002 so as not to take the other side by surprise. I then proceeded to hear oral submissions on 7<sup>th</sup> November 2002. I have considered those submissions in the light of the evidence from the Petitioners. I deal with each claims from paragraphs 1 through 12 at pages 2 and 3 of the Petitioners follows:-

1. On the issue of the election, declaration and publication of the Petitioners' names in Gazette No. 1 of 10<sup>th</sup> January 2001.

The evidence of the Petitioners show an extraordinary gazette No. 1 of 10<sup>th</sup> January 2001. It is in evidence as Annexure "A" to Maxwell Matsamatsa's affidavit.

It is notified as follows:-

*"Publication of the results of the Local Government Councils elections held on 10<sup>th</sup> November, 2000."*

It is true that the joint petitioners were declared elected on 20<sup>th</sup> November 2000 in gazette No. 1 of 10<sup>th</sup> January 2001. But the results in that gazette as regards the Santo



constituency were declared by this Court null and void and of no effect by this Court on 17<sup>th</sup> May, 2001.

The Joint Petitioners were not made parties to Civil Case No. 14 of 2001. Their evidence was it appears, that they were not aware. Both of them shook their heads in cross-examination when they were asked whether they had knowledge of Moses Wayne challenging the election results.

It appears from their evidence that the joint petitioners had heard rumours about the declaration of 17<sup>th</sup> May 2001. When asked whether he believed the rumours Mr. Matsamatsa said he did not. When asked further by Mr. Yawha whether or not he checked out the information Mr. Matsamatsa only shook his head. He hesitated to answer for a moment.

Moses Wayne filed his proceedings in Civil Case No. 14 of 2001 on 10<sup>th</sup> May 2001. The gazette was published on 10<sup>th</sup> January 2001. It was not a petition challenging the results. It was an application seeking judicial review. The Electoral Commission had conceded that they had made an error in publishing a wrong declaration and agreed to abide by an order directing the Commission did by publishing gazette No. 19 of 9<sup>th</sup> July 2001.

The declaration was made on 30<sup>th</sup> November, 2000. The Joint Petitioners filed their petition only on 5<sup>th</sup> February 2002 some 10 months after the first results were declared null and void on 17<sup>th</sup> May, 2001.

Had they taken steps to check out on the truth of what they say were rumours, they would have found out that it was the truth and would have done something earlier. But they did not. They applied to be joined as parties to Civil Case No. 14 of 2001. That application was refused on the grounds that those proceedings are spent. They are now res-judicata. Therefore the petition cannot succeed on this issue.

2. There appears to be no issue that the First Respondent is responsible for overseeing the conduct and administration of all matters relating to elections. However to put the record

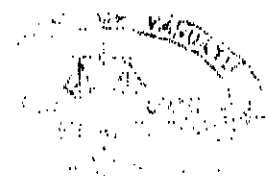


straight the Electoral Commission is not established by statute. It is established by the Constitution.

3. The Second Respondent is a semi-governmental department and there is no issue about it.
4. The Third Respondents have been discharged by the Petitioners as parties to this petition and therefore this claim is no longer in issue.
5. That on 6<sup>th</sup> November 2001 the Police forcefully removed the Petitioners from council chambers. On their own evidence it is apparent that no force was used against them. The Petitioners did not join the Police as parties to their petition. The petition cannot succeed on this issue.
6. That the Respondents failed to give any proper notice for the purported termination of the petitioners.  
From their own evidence it appears that the Petitioners had attended at least three meetings of the Council firstly on or about 22<sup>nd</sup> November 2000; secondly in May 2001 and thirdly on 5<sup>th</sup> November 2001. They were told not to participate further on 6<sup>th</sup> November 2001. They could have been told that in May 2001. The Respondents did not present any evidence to rebut this issue. The Petitioners had legitimate expectations to be informed of the Orders of 17<sup>th</sup> May, 2001 by the Respondents to put them to knowledge that they were no longer elected councilors. It is true they were not parties to that proceedings but they were adversely affected and they should have been informed formally by the Respondents about the effect of the Order of 17<sup>th</sup> May, 2001. The petition succeeds only on this issue.
7. That the Petitioners were terminated without the benefit of knowing what allegations were made against them (if any). What I have said in relation to Issue 6 above applies equally to this issue.



8. That the Respondents permitting Bernard Vira and Moses Wayne participating in the meeting of 6<sup>th</sup> November 2001 was not in accordance with the law.  
What I have said in relation to Issue 1 apply to this issue and conclude that the petition cannot succeed on this issue.
9. That the Respondents actions in publishing a second electoral list on 30<sup>th</sup> November 2001 was illegal and invalid. Firstly no gazette was published on this date. Secondly this issue had not been substantiated by evidence of the petitioners. The petition cannot succeed on this issue.
10. That the action and omissions by the Respondents are ultra vires the Decentralisation and Local Government Regions Act No. 4 of 1994 (as amended) and/or constitute administrative conduct that is unreasonable or undertaken for improper purposes or otherwise unlawful.  
It was submitted that this was a matter that required Part VII of the Act to have been followed. That it was a matter for the Election Dispute Committee. I find no evidence showing a dispute. Therefore Part VII of the Act is irrelevant.  
The petition cannot succeed on this issue.
11. That the Petitioners constitutional right to the protection of the law was breached. Article 5 (2) of the Constitution relates to the right to protection of the law in criminal proceedings. There is no evidence of any breaches of the constitution against the right of the petitioners. Their petition cannot succeed on this issue.
12. In the alternative, that the rules of natural justice were breached.  
The petitioners had a right to be afforded natural justice but there is no evidence that they had any grievances which they had brought to the First Respondent in order for that right to be exercised. There was no opportunity to create an environment in which the Respondents could exercise that right.  
The petition fails on this issue.

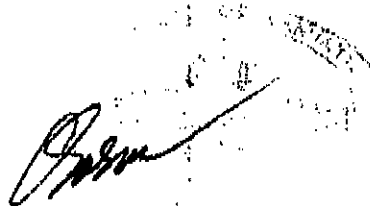


For the foregoing reasons the following orders are hereby issued:-

- (1) The declaration sought by the Petitioners in paragraph 1 of the petition is refused.
- (2) The declaration sought by the petitioners in paragraph 2 of the petition is refused in relation to declaring the petitioner's termination to be unlawful and invalid.  
The Petitioners are however entitled to payments in lieu of notice for which they were entitled to before their termination. The amount of such notice is to be further assessed by the Court.
- (3) The Petitioners are not entitled to an order for re-instatement.
- (4) The Petitioners are not entitled to any award of compensation for breach of their constitutional rights.
- (5) There will be no order as to costs. Each party will meet their own costs.

**Dated at Luganville, this 18<sup>th</sup> day of November 2002.**

**BY THE COURT**



**Oliver A. SAKSAK**  
Judge.