

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**  
(Civil Jurisdiction)

Civil Case No. 139 of 2009

**BETWEEN: RORO SAMBO**

Claimant

**AND: PRINCIPAL ELECTORAL OFFICER**

Defendant

**Coram:** Justice D. V. Fatiaki

**Counsels:** Mr. G. Boar for the Claimant  
Ms. J. Harders for the Defendant

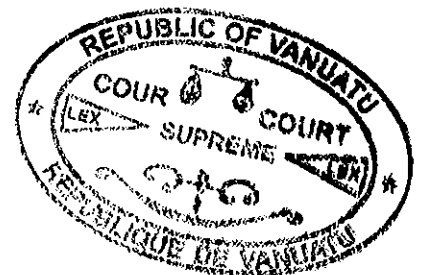
**Date of Judgment:** 19 April 2011

**JUDGMENT**

1. On 2 September 2008 a general election was held in Vanuatu and the Claimant was one of four successful candidates elected for the Efate Rural Constituency. He secured 803 valid votes.
2. The election results were challenged in an **Election Petition No. 6 of 2008** filed against the successful candidates including the claimant.
3. The Petition (which is not before the Court) alleged breaches of the provisions of the Representation of the Peoples Act [CAP. 146] as well as allegations of bribery, treating and inducing voters to vote for some of the successful candidates. The Claimant strongly denied the allegations made against him.
4. The petition was heard by the Supreme Court (Dawson J.) and judgment was delivered on 15 June 2008 declaring that the election of the successful candidates for the Efate Rural Constituency including the Claimant "... are void due to breaches of the provisions of section 61 (1) (b) and sections 45 and 46 of the Act". The Court also ordered that a by-election be held for the vacated seats for the Efate Rural Constituency (which included the Claimant's seat) "as soon as reasonably practicable".
5. For completeness, I set out Sections 60 and 61 of the Representation of the Peoples Act.

**"60. Decisions of Court in election disputes**

- (1) 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; or
  - (c) dismiss the petition and declare that the person whose election is questioned was duly elected.
- (2) The Supreme Court may make such orders as to the payment of costs by any person appearing before it as it may deem fit.

**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) The election of a candidate shall be declared void if he is convicted by a Court of committing a corrupt practice or of attempting or conspiring to commit a corrupt practice.
- (3) Notwithstanding the provisions of subsection (1) –
- (a) where upon the hearing of an election petition the Supreme Court finds that any agent of a candidate has been guilty of a corrupt practice and the Supreme Court further finds that the candidate has proved to the Supreme Court that –
    - (i) no corrupt practice was committed by the candidate himself or with his knowledge or consent or approval;
    - (ii) the candidate took all reasonable means for preventing the commission or corrupt practices at such election;



(iii) *in all other respects the election was free from any corrupt practice on the part of the candidate; and*

(iv) *such corrupt practices did not affect the result of the elections,*

*then, if the Supreme Court so decided, the election of such candidate shall not by reason of any such practice be void;*

(b) *where upon the trial of 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 it is satisfied that the election was conducted in accordance with the principles laid down in this Act and that such failure did not affect the result of the election, the election of the successful candidate shall not by reason of such failure, be void.***"

6. The Claimant although having had his election declared "void" was nevertheless awarded his costs against the Petitioners "on a standard basis". Why that award was made is not explained in the Court's decision but it could be because no adverse findings were made against the Claimant personally as the Court noted in its decision (**at para. 26**):

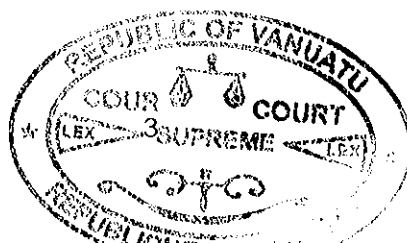
*"In its final submissions to the Court, it was accepted on behalf of the Petitioners that there was no assertions or evidence against the Fifth Respondent (the Claimant) ... (and) ... the Petitioners claims against the ... Fifth Respondent (the Claimant) were withdrawn".*

(my insertions in brackets for clarity)

7. Plainly, no misdeeds were proven or pursued against the Claimant and no adverse findings were recorded against the Claimant in the Court's decision which declared his election, void. Indeed, the Claimant's election was declared void **not** because of any actual wrong doing on his part but because of what the Court described in its judgment (**at para. 47**) as:

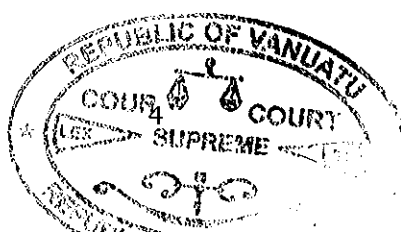
*"The combined effect of the errors made by the officers responsible for the conduct of the elections and the conduct of the Third and Fourth Respondents are such that (it) cannot be said that the successful candidates (including the Claimant) were elected as a result of a properly conducted election as it is which the bounds of possibility that other candidates might have been elected had the election been conducted in a proper manner in accordance with the principles of the Act."*

(my insertions in brackets for clarity)



8. The particular errors of the officers responsible for the conduct of the elections are more fully identified in the judgment and includes the following:
- Errors in compiling the Electoral Rolls;
  - Pages missing from Electoral Rolls maintained at polling booths;
  - Deletion of the names of registered voters;
  - Unexplained lower voting percentages at booths when compared to the national average;
  - Omission of the names of valid electoral card holders on the electoral rolls at their polling stations;
9. Significantly, no-where in the judgment is the voiding of the Claimant's election attributed solely to the errors of the election officials. Nor is the same particularized or pleaded in the claim.
10. Be that as it may, on 6 August 2009 a by-election was held for the Efate Rural Constituency and, although the Claimant stood again as a candidate, this time, he was unsuccessful. The Claimant did not challenge the results of the by-election. Without finally deciding the issue, in my view, the participation of the Claimant in the by-election might constitute a waiver on the Claimant's part of the failures and errors of the election officials that occurred in the earlier voided election. He had certainly accepted that his successful election had been nullified as a result of the decision of the Supreme Court.
11. On 21 October 2009 the Claimant issued the present proceedings against the Principal Electoral Officer (PEO) claiming damages and compensation for prospective economic loss in the sum of VT32,680,000. The claim against the Defendant is based, in large measure on Dawson J's findings of errors and non-compliance by electoral officials with the provisions of the Representation of the Peoples Act ('the Act'). The Claimant also alleges negligence by the Defendant in the performance of (unidentified) legal duties and responsibilities under the Act when conducting the election.
12. The claim may be categorized as a civil action seeking damages for breach of statutory provisions. The Defendant for its part denied any liability as well as the Claimant's entitlement to any relief.
13. Upon the Court's consideration of the pleadings and after discussion with counsels, the following preliminary issue was formulated and agreed:

***"Whether or not the Principal Electoral Officer can be sued by an unsuccessful election candidate for failure or breach of statutory duty and whether damages are recoverable for such breach or failure."***



14. Written submissions were ordered and these were filed together with case authorities. I am grateful to counsels for the assistance provided to the Court.

15. In **Cutler v. Wandsworth Stadium Ltd.** [1949] AC 398 Lord Simonds after referring to the question whether where a statutory obligation is placed on A, B who conceives himself to be damnified by A's breach of it has a right of action against him stated:

*"The only rule which in all the circumstances is valid is that the answer must depend upon a consideration of the whole Act and the circumstances, ..., in which it was enacted. But there are indicators which point with more or less force to the one answer or the other ... for instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For if it were not so, the statute would be but a pious aspiration."*

16. Quite plainly the starting point for any discussion on the preliminary question, is the relevant legislative provisions relied upon by the Claimant, namely, the **Representation of the People's Act [CAP. 146]** (*'the Act'*).

17. In this latter regard the Claimant's submission is that the Act:

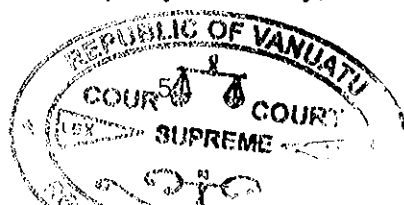
*"was enacted to regularized (sic) and targeted (sic) a specific class of people namely candidates for election to Parliament. That once a candidate is declared by the Electoral Commission to be eligible to contest an election then it is incumbent upon the Defendant to ensure that candidate interest to secure an election to Parliament within the framework of the (Act) is respected and preserved ...(whatever that may mean)*

*It is submitted that the Claimant was part of the specific class of persons declared eligible for election to Parliament. The Defendant's action and/or omission disqualify his election and it is submitted that the Defendant ought to be held accountable for any damage suffered by the Claimant visa vis Sope case".*

18. And later counsel writes:

*"Faced with no right of appeal and no material evidence and/or withdrawal of the Petition claim against him in the Sope case the Claimant as no other legal avenue for redress. But justice must be done."*

19. Counsel for the Defendant, equally forcefully, submits that:



*"The Act does not specifically or by implication confer a private right of action for breach of statutory duty against the Defendant or other electoral officers.*

*Breach of a statutory duty may give rise to a civil action only when the claimant can show that Parliament intended that the relevant provision should confer a private right of action sounding in damages."*

20. Defence counsel also properly concedes that the judgment of Dawson J. "located a number of instances of non-compliance with the Act". Furthermore "... section 20 of the Act makes it clear that the establishment of electoral rolls is the responsibility of the Principal Electoral Officer". Lastly, "The Act provides for the registration of voters and elections to Parliament. The intention of the Act, among other things, could be said to be to provide for the proper conduct of elections. A breach of the duties imposed on (the Defendant) could not give rise to a claim for economic loss of an unsuccessful election candidate. The type of damage claimed is outside the scope of the Act."

21. Claimant's counsel for his part, lays emphasis on the assertion that the Representation of the People Act was enacted (in part), in the words of Diplock LJ, in **Lonrho Ltd. & Others v. Shell Petroleum Co. Ltd. & Others** [1981] 2ALL ER 456 (at p.46):

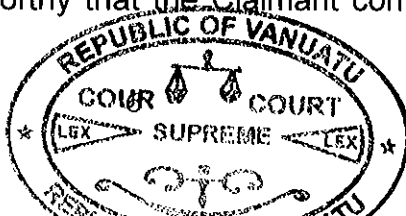
*"... for the benefit or protection of a particular class of individuals as in the Factories Act and similar legislation."*

22. Whilst I recognize the beneficial and protective nature of the welfare legislation, exemplified in the above passage, it is difficult to categorize the Representation of the People Act as coming within that category.

23. I am also mindful that such protective feature alone, does not necessarily entitle a breach of the provisions of the Act to be the subject of a civil claim for damages as Lord Jaunsey of Tullichette observed in **R v. Deputy Governor of Parkhurst Prison exp Hague** [1990] UKHL8 (at p. 24):

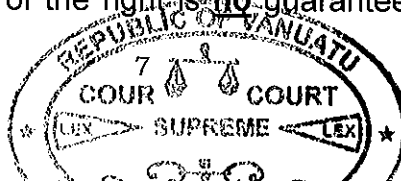
*"The fact that a particular provision was intended to protect certain individuals is not of itself sufficient to confer private law rights of action upon them, something more is required to show that the legislature intended such conferment."*

24. In this latter regard Claimant's counsel has **not** identified any particular duties or provision(s) of the Act which it is said was intended to benefit or protect the Claimant **and** had been breached by the election officials. Furthermore it is note-worthy that the Claimant contested the by-election



ordered for the Efate Rural Constituency seat and, only after he was unsuccessful in the by-election, did he issue the present proceedings.

25. With those preliminary remarks, I turn next to consider the Act.
26. Before examining the Act however, it is convenient to consider the fundamental constitutional provisions that apply to elections for Parliament, namely: **Article 17** which deals with the election of members of Parliament through an *'electoral system'* and prescribes minimum qualifications for a candidate seeking to stand for election to Parliament; **Article 18** which establishes an Electoral Commission; **Article 19** which establishes the Public Service position of a Principal Electoral Officer; and **Article 20** which sets out the general functions of the Electoral Commission and the Principal Electoral Officer. In general terms the **Electoral Commission** has *"responsibility for and shall supervise the registration of electors and the conduct of elections to Parliament ..."* and the **Principal Electoral Officer** (who is answerable to the Electoral Commission) has *"... such powers and functions relating to such registration and elections as may be prescribed by Parliament"*. Additionally reference may be made to **Article 4** which provides:
- (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."*
27. These Articles, collectively, make it clear that the right to vote at elections and the right to contest parliamentary elections as a candidate are critical elements in the formation of a Parliament in Vanuatu, and, subject to certain non-derogable minimum requirements, both rights are subject to legislative conditions and restrictions.
28. The Articles also envisage the creation of *"an electoral system"* which is *"universal, equal and secret"* and which regulates and controls the exercise of those critical elements. Indeed parliamentary elections would prove unmanageable and chaotic in the absence of some form of organization or regulatory process.
29. I accept that the right to be a candidate in parliamentary elections is an indispensable element in the formation of a Parliament, but equally, the existence and exercise of the right is ~~no~~ guarantee, that a candidate will



be successful in being elected to Parliament in a contested election or by-election.

30. In this latter regard Parliament in 1982 enacted the **Representation of the Peoples Act [CAP. 146]** "to provide for registration of voters and elections to Parliament". The Act has **70** sections divided into **17** parts and deals comprehensively with electoral system elements including the registration of voters; the establishment of electoral rolls; the conduct of elections; the eligibility, declaration and publication of lists of candidates for election; the furnishing of election reports; election petitions for challenging the validity of an elections; and the creation and penalties for election offences. On that structural analysis alone, the **6** provisions dealing with candidature for elections constitutes but a small proportion of the Act and the numerous other matters dealt with in it.
31. The scheme of the Act indicates that it is intended, in part, to give effect to the two fundamental rights recognized in the Constitution as well as to establish an "electoral system" within which those rights may be exercised in an environment which upholds and protects those rights in an orderly and transparent manner.
32. I accept that **Part 12** of the Act which deals with candidates for election could be said to have been enacted for the benefit or protection of a particular class of individuals, namely, persons seeking to become candidates for election to Parliament, which would include the Claimant. For my part however, I view **Part 12** as enacted for the benefit and protection of voters to ensure that the candidates that they vote for are properly qualified to stand for election and have a reasonable chance of winning. In other words the provisions of **Part 12** exist to ensure that a vote when cast, is not wasted on a candidate who is not qualified to contest the election.
33. In the present case however, no complaint has been made by the Claimant of any breach of the provisions of **Part 12** (as there could not have been) nor did Dawson J. identify any such breaches in his judgment.
34. Even if the Claimant was able to establish a breach of the provisions of **Part 12** of the Act which damnified him, the remedy for such breaches rests, exclusively, with the Electoral Commission to determine (see: Sections 26 and 27) or in a criminal prosecution of the delinquent officers concerned and would, in my view, militate against the recognition or acceptance of a right in the Claimant to bring a civil action for breach of the provisions of **Part 12**.
35. In **David Naunga and Others v. Telecom (Vanuatu) Ltd.** Civil Appeal Case No. 30 of 2010 (delivered 8 April 2011) where the appellants were awarded damages for loss of salary and employment benefits occasioned by a short-notice given by the defendants employer under **Section 67** of the **Employment Act**, the Court of Appeal said *inter alia*:





"18. Dawson J. did not explain in his decision the cause of action that gave rise to the section 67 damages award, save to observe that the claimants would have been in employment 21 days longer and received their employment benefits for that time, if the 30 days notice had been given, and that Telecom could not profit from its oversight.

19. We are not persuaded that these factors alone could establish a cause of action for this head of claim. Section 67 does not contain any words suggesting that a failure to give the full notice will give rise to a claim in damages. At section 67(3) it is contemplated that in special circumstances where it is not reasonably practicable to comply with the 30 day period, a lesser but reasonable period of notice may be sufficient. This is some indication that the requirement is procedural and does not give rise to substantive rights. Rather, such a failure can be seen to give rise to the offence provisions at section 78 of the Act."

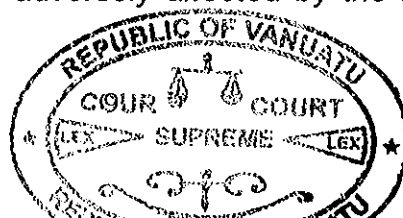
36. In **X (minors) v. Bedfordshire CC** (1995) 3 ALL ER353 Lord Browne-Wilkinson says (at p. 364):

*"The principles applicable in determining whether such statutory cause of action exists are now well established ... The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private cause of action .... If the statute provides no other remedy for its breach and the parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action".*

(my underlining for emphasis)

37. And later, in words that are equally applicable to the Representation of the People Act, his lordship said (at p. 365):


*"Although regulatory ... legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general. Thus legislation regulating the conduct of betting (and I would include parliamentary elections) or prisons did not give rise to a statutory right of action vested in those adversely affected by the breach of the statutory provisions".*



38. In my view, the failures and breaches of the election officials gives rise specifically to the offences detailed in **Section 52** of the Representation of the People Act headed: **Offences by Election Officers** which provides the exclusive means of addressing those failures and breaches *ie.* by prosecution for a criminal offence which is subject to heavy penalties including imprisonment. This means of enforcement militates against a private right to claim damages for such breaches.
39. Furthermore, a reading of sections 60 and 61 of the Representation of the People Act makes it plain that failures on the part of election officials, to comply with the provisions of the Act do **not** necessarily lead to a voiding of the election at which the failures occurred, if the Court finds "*that the election was conducted in accordance with the principles laid down in this Act and such failure did not affect the result of the election*". [**see**: Section 61(3)(b)]. The existence of this possibility is a further indicia that Parliament did not intend that a failure on the part of election officials would inevitably give rise to a cause of action.
40. For the foregoing reasons the Court's clear and emphatic answer to the preliminary issue posed earlier at paragraph 13 is: "**NO**".
41. There being no remaining issue for determination the claim is accordingly dismissed in its entirety with costs to be taxed if not agreed.

**DATED at Port Vila, this 19<sup>th</sup> day of April, 2011.**

**BY THE COURT**

  
**D. V. FATIAKI**  
Judge.

