

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

CONSTITUTIONAL CASE No. 36 of 2016

BETWEEN

WILLIE TOAMA

Applicant

-AND-

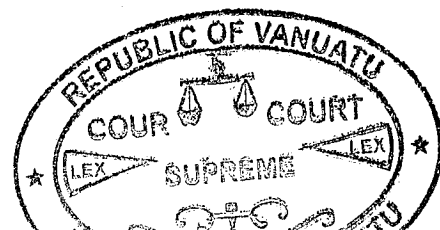
THE REPUBLIC OF VANUATU

Respondent

Before Chetwynd J
Mr Napuati for the Applicant
Ms Trief and Mr Tabi for the Respondent
Hearing 12th January 2016

Judgment

1. This matter came before me as an urgent application during the 2015/2016 recess. As the application involved the upcoming election I agreed to hear it as a matter of urgency and abridged time.
2. The Applicant is seeking enforcement of his “fundamental rights prescribed by Article 4 of the Constitution pursuant to Article 6” and is seeking relief pursuant to Articles 53(1) and 53(2). The Applicant avers his right to protection of the law under Article 5(1)(d) has been infringed and that his right to stand for election to Parliament (under Article 17(2)) has also been infringed. The wording of the Application is made a little confusing by reference to a “fundamental right” under Article 4. This slight confusion arises because the right to vote is not a fundamental right as set out in Chapter 2 of the Constitution.
3. The importance of this is that only fundamental rights (i.e. those set out in Article 5) are enforceable by reference to Article 6. In simple terms the Applicant cannot “enforce” his right to vote under Article 6. The point is somewhat academic because the Applicant also seeks redress under Article 53 in connection with his right to vote and his right to stand for election to Parliament. Article 6 is wider in scope than Article 53 because it is referable to a citizen’s guaranteed rights which have been, are being or are likely to be infringed. Article 53 refers to provisions of the Constitution having been infringed. Again in simple terms enforcement under Article 6 can be pre-emptive whereas under Article 53 it can only be reactive. The distinction is not critical in this matter because the Applicant is saying his rights **have been** infringed.



4. The salient facts can be set out shortly. The Applicant left Vanuatu in 2002 when he was appointed to be, "the First Secretary Charge t'affaires (sic) to the Vanuatu Embassy in Shanghai in China." He held that post until late last year. His evidence is that he did return to Vanuatu periodically for meetings and during times when he was on leave but, as was obviously required by his work, the great majority of his time was spent in China. He returned to Vanuatu permanently in December 2015 when he ceased to be a consular officer.

5. On his return he decided to stand for election. He discovered that his name was not on the electoral list. That meant he could neither vote nor stand for election. He wrote (through his lawyers) to the Principal Electoral Officer basically asking for his name to be added to the current electoral list. When that did not happen he wrote to the Chairman of the Electoral Commission by way of Appeal under section 14 of the Representation of the People Act [Cap 146] ("ROPA"). The Commission replied saying they upheld the decision of the Principal Electoral Officer. The Applicant then issued these proceedings.

6. There is no doubt that the Applicant was a registered voter for the year 2002. We know that because not only did he vote then, he also stood for election. His complaint is that the Principal Electoral Officer removed his name from the electoral list and didn't inform him of that fact. The Applicant, as well as the redress set out in paragraph 2 above, seeks urgent applications requiring orders that the Principal Electoral Officer re-instates his name to the electoral list so that he can both vote and stand for election on January 22nd.

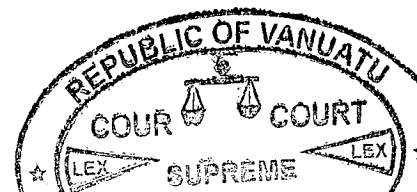
7. In my view both the application for redress under the Constitution and the urgent application are totally misguided and based on a flawed view of the law. I have carefully considered the application, the sworn statements of the Applicant and the attachments to them ¹, the written submissions filed on his behalf on 12th January and I have listened to oral submissions by Mr Napuati. I have also heard from Ms Trief with her submissions. I did ask for some small details from counsel in support of their submissions to fill some gaps in the evidence (mainly actual dates relating to the Applicant) and I requested the Respondent to provide details of the processes involved in administering the ROPA. Mr Martin James Tete has filed a sworn statement confirming what was said in submissions about those processes.

8. Turning now to the detail of the law, Article 4 of the Constitution refers to National sovereignty, the electoral process and political parties with Article 4(2) stating :-

"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"

It is plain from Article 4(2) that every citizen of Vanuatu who is aged 18 years or more is entitled to vote in Parliamentary elections but it is important to note the right

¹ Sworn statements of Willie Toama sworn 11th January 2016



or entitlement to vote is subject to such conditions or restrictions as maybe prescribed by Parliament.

9. With regard to standing for election, Article 17(2) states:-

“Subject to such conditions or restrictions as may be prescribed by Parliament every citizen of Vanuatu who is at least 25 years of age shall be eligible to stand for election to Parliament.”

Again it can be seen that anyone who is a citizen aged over 25 is eligible to stand for Parliament but again that right is subject to such conditions or restrictions as may be prescribed by Parliament.

10. In both the case of the entitlement to vote and the eligibility to stand for Parliament, Parliament *has* prescribed conditions and restrictions and they are set out in the Representation of the People Act [Cap 146] (as amended). In order to vote one must be a registered voter, that is to say your name must appear in the electoral list. If your name is not in the list you are disqualified from voting. In order to stand for Parliament one must not be disqualified from voting. There are other criteria which would act as an impediment to standing for Parliament ² but they are not relevant in this matter. This decision is limited to and dependent on the question of the appearance of the Applicant’s name, or rather non-appearance of his name, in the electoral list.

11. Section 9 of ROPA states:-

“(1) A person shall be eligible for registration in the electoral list for the polling district in which he is a resident at the time of the preparation of the electoral list if he –

(a) is a citizen; and

(b) will have attained 18 years on or before the qualifying date.”

The section makes it crystal clear that in order to be a registered voter a person must be a citizen of Vanuatu aged over 18 and resident in Vanuatu.

12. That begs the question of how one gets on the electoral list. ROPA defines ³ the electoral list as the list drawn up in accordance with Parts 5, 6 and 7. According to s. 6 in Part 5, the list is drawn up for each constituency by a registration officer appointed by the Principal Electoral Officer. By section 6(2) of ROPA the registration officer, *“shall each year draw up electoral lists”*. The Electoral Office has a process which usually starts in January of each year. At that time registration officers visit each household in the constituency for which they were appointed ⁴. They obtain details of the residents in each household. This process usually lasts from January to March each year ⁵. That information is later compiled into the electoral list ⁶. It is then

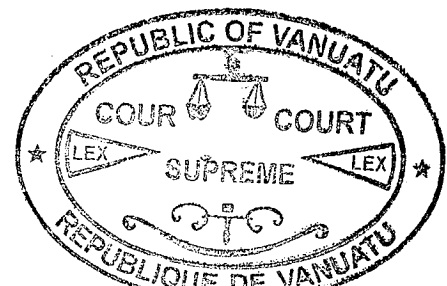
² Representation of the People Act s. 23

³ Representation of the People Act s.1

⁴ See paragraph 11 of the sworn statement of Mr Martin James Tete.

⁵ Paragraph 15 *ibid*.

⁶ Paragraphs 14, 16 and 17 *ibid*



made available for inspection. Section 16 of ROPA requires the electoral list to be made available to the public each calendar year during a period of not less than 14 days ending on 15th June. Anyone who is eligible for registration but who has been left off the list can then make an application during the inspection period to be included⁷.

13. What is apparent from the provisions as set out in ROPA is that the electoral list exists from year to year, from 1st July, the qualifying date as set out in s. 9(6), to 31st June the following year. We know the Applicant was on the electoral list for the Tanna constituency in 2002 but just because he was on the list in 2002 does not mean he remains on the list indefinitely. If a person is a registered voter in a constituency one year but ceases to be a resident in that constituency during the registration period the next year, he ceases to be eligible to be on the electoral list for that constituency. There are detailed provisions in ROPA which cover the situation when a person moves around the country. At s 10 of ROPA it is provided that:-

10. Registration of person from outside polling district

(1) When a registration officer is satisfied that a person is resident in a polling district which is outside the registration area for which he is carrying out a registration and that that person has not been registered, and is otherwise eligible to vote, he shall provide him with an application to be registered in the polling district of his place of residence.

(2) An application under subsection (1) shall be in the form and contain the particulars provided for in Part 2 of Schedule 1.

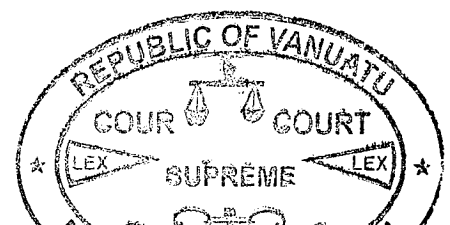
(3) A registration officer may require an application under subsection (1) to be accompanied by such evidence as may be reasonable.

(4) A registration officer shall assist an applicant to complete his application form, sign it as a witness and forward it to the registration officer of the polling district nominated by the applicant and in which that officer is satisfied the applicant is entitled to be registered.

(5) If a registration officer on receiving an application under subsection (1) is also satisfied that the applicant named therein is entitled to be registered in the polling district nominated by him he shall register the applicant and inform the applicant accordingly.

14. However these provisions can only assist persons who are registered voters. In the Applicant's case he simply ceased to be on any electoral list. It is not a situation where he was removed from the lists. He was (presumably) a resident in the Tanna Constituency when the list was compiled in 2002. He was therefore eligible to be registered as a voter and was so registered in 2002. He was on the list

⁷ Representation of the People Act section 16.



for 2002. When he ceased to be resident in Tanna he ceased to be eligible to be a registered voter for that constituency or polling district. Sometime, according to his evidence in 2002, the Applicant took up his post in China. Therefore when the registration process began in 2003 and by operation of law, his name was not included in the new list of voters being compiled for that period. It could not be included because he was not resident in Tanna and was therefore ineligible for registration. His name was not removed from any list because if he was ineligible for registration his name could not be included on any list in the first place.

15. Of course a person's freedom of movement is a fundamental right guaranteed by the Constitution (Article 5(1)(i)). However, there is no conflict between the provisions of ROPA and that right because, as has been set out above, section 10 of ROPA makes adequate provision for both maintaining the right to freely move around the Country and the right to vote under Article 4(2).

16. There is also adequate provision in ROPA to cover the situation such as that the Applicant found himself in. ROPA provides:-

" 11. Registration of overseas voters

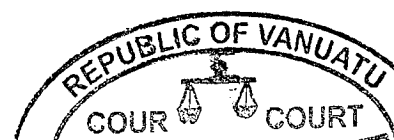
(1) A citizen who has attained 18 years but who is unable to apply to a registration officer in Vanuatu for registration in an electoral list by reason of being outside Vanuatu may apply to the Principal Electoral Officer by completing and submitting to the Officer the form contained in Part 3 of Schedule 1.

(2) Where the Principal Electoral Officer is satisfied that a citizen who has made an application under subsection (1) is resident overseas and is eligible for registration he shall register him in the overseas electoral list and inform him accordingly.

(3) The Principal Electoral Officer when he registers a person in accordance with subsection (2) shall register him in the part of the overseas electoral list relating to the constituency in which in his opinion he would have voted had he not been overseas."

17. The Applicant did not avail himself of those provisions for the whole of the 13 years he worked in China. Instead he claims he was unable to inspect the Register. He goes further and says that it was not really necessary that he be able to inspect the list because the Principal Electoral Officer had an obligation to travel to China and tell him that he was no longer included on any electoral list. That proposition is as impractical as it is preposterous. The obligation was on the Applicant to check the lists from year to year. Whilst the Principal Electoral Officer may have some obligation to inform the public that cannot extend to his having to contact every person whose name was included on an electoral list one year but not on a subsequent year.

18. Because the Applicant's name was not removed from the electoral list compiled in 2015 he has no right to insist the Principal Electoral Officer now includes his name in that list. He is outside of the inspection period which ended on 15th June

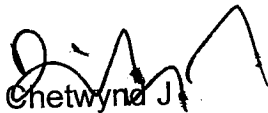


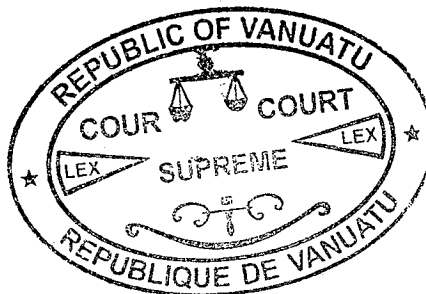
2015. He is not eligible to be included in any list for any constituency because he was not resident in Vanuatu in the qualifying period for this year of registration. Because his name was not removed from the list he has no right to appeal in accordance with s15 of ROPA. There is nothing about the behaviour or actions of either the Principal Electoral Officer or the Electoral Commission which entail any infringement of any right given to the Applicant by the Constitution. The urgent application must be dismissed. I would also add that there is absolutely no prospect of this application succeeding in any shape or form and accordingly (and pursuant to Rule 2.8 (a) of the Constitutional Applications Rules 2003) it is struck out. As is normal, costs should follow the event and the Applicant shall pay the costs of the Respondent, such costs to be taxed on a standard basis by the Master of the Supreme Court if not agreed.

19. Before leaving this matter I have to say that I do not agree with counsel for the Applicant that this case can be distinguished from the case of *Joe lautu v The Republic*⁸. In my view *lautu* is on all fours with the present matter. It is not correct to say that in *lautu* the Applicant's name was never on the electoral list. From my reading of the case His Lordship the Chief Justice found that the Applicant used to vote by proxy⁹. If he had a proxy vote he must have been a registered voter. If I had not made the findings set out above I would have dismissed this present case for the same reasons set out by the Chief Justice when he dismissed *lautu*. I concur wholeheartedly with what was said by His Lordship in *lautu*.

20. Before I leave this case I should explain that because of the urgency in this case I informed counsel yesterday that I would distribute my judgment in unsigned form and by Email. I feel that is only right given that the election is merely a week away and the problems that would be inherent in any delay in my publishing my reasons. However I am mindful of r. 2.11(2) of the Constitutional Applications Rules 2003 and I will formally read my judgment in open Court at 11:30 am this morning 13th January 2016. I will not require or expect counsel or any parties to be present. They are of course welcome, as is any member of the public. I will make signed and stamped copies of these reasons available to counsel, the parties and the public immediately following the handing down of my judgment.

Dated 13th January 2016


Chetwynd J.



⁸ *lautu v. Republic of Vanuatu* [2009] VUSC 149; Constitutional Case 07 of 2009 (20 November 2009)
⁹ Second paragraph of page 3 *ibid*