

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

Judicial Review Case No. 1067 of 2015

BETWEEN

**EDWIN APRIMEN and PETER
PATTY**

First Appellants

-AND-

JAMES GAUA

Second Appellant

-AND-

ELECTION DISPUTE COMMITTEE

First Respondent

-AND-

THE REPUBLIC OF VANUATU

Second Respondent

Before Chetwynd J

*Mr S Stephens for the Appellants
Mr S Kalsakau for the Respondents*

Hearing 2nd March 2016 at Luganville

JUDGMENT

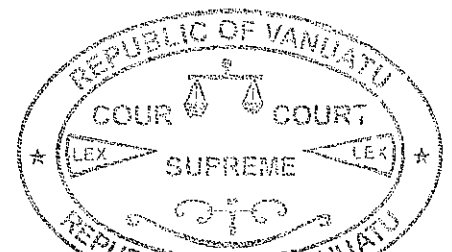
1. Although this matter is intitled as a Judicial Review, as I made plain in my Minute of 8th February, this is an appeal from the decision of the Election Disputes Committee ("the EDC"). This must be the only possible conclusion given Regulation 34 of the Municipal Council Election Regulations ("the MCER"). The Appellants lodged an application to "convert the Claim for Judicial Review to an Appeal" and a Notice and grounds of Appeal. This matter has therefore proceeded as an appeal and all the parties were *ad idem* on that issue.

2. The starting point is the MCER as amended by Order 154 ¹ which came into force in November 2013, Order 166 ² which came into force on December 2013 and Order 46 ³ which came into force on 10th June 2015. The "Dispute Election Petition" ("the Petition") which is dated 23rd October 2015 and the decision dated 4th December 2015 ("the decision") which resulted from that document are also, of course, fundamental to this appeal. Copies of the latter two documents can be found

¹ Municipal Council Election Regulations (Amendment) Order No 154 of 2013

² Municipal Council Election Regulations (Amendment) Order No 166 of 2013

³ Municipal Council Election Regulations (Amendment) Order No 46 of 2015



annexed to the sworn statement of Martin James Tete which was filed on 26th February 2016. A copy of the decision can also be found annexed to the sworn statement of Tom Wells filed 8th February 2016. A copy of the Petition is annexed to the sworn statement of Peter Patty filed 21st January 2016 (annexure B) and as MJT12 to Mr Tete's sworn statement.

3. The basic facts can be taken from the decision. Under the heading "Background" the EDC outlined the details of the Luganville Municipal Elections ("the elections") which took place on 21st July 2015. There were 178 candidates contesting 13 seats. The results were declared on 29th July and were also gazetted on that date. The 29th July becomes a crucial date because it is the trigger date for appeals.

4. Part 7 of the MCER governs the procedure for appeals. By Reg 37:

37. Time for presentation of petitions

(1) Subject to subregulation (2) an election petition shall be presented within 21 days of the publication in the Gazette of the results of the election to which the petition relates.

(2) (Not relevant)

(3) The time limit provided for in this regulation shall not be extended

In the case of the elections it appears unarguable that an election petition had to be presented by 19th August 2015. It is also plain from sub regulation 3 that the time for filing a petition cannot be extended.

5. All this begs several questions. First what does present mean, secondly to whom must the petition be presented and thirdly what is a petition? Presented must bear its normal meaning of being given to or lodged with. It must equate to the concept of filing process in civil procedure. As to the question of to whom, the answer is found in Reg 36:

36. Petitions only valid if deposit made

(1) The presentation of an election petition shall not be valid unless within the time specified in regulation 37, the person seeking to present the same lodges with the Election Disputes Committee a deposit of VT 10,000 as security for costs.

(2) Subject to subregulation (3) a deposit made under subregulation (1) shall be returned to the petitioner after the petition has been heard.

(3) The Election Disputes Committee may deduct from a deposit made under subregulation (1), the amount of any costs ordered to be paid

If the deposit has to be lodged with the EDC it would seem logical the petition needs to be lodged with the EDC as well.



6. As to what is a petition, the answer again is supplied by the MCER at Reg 38:

38. Election petitions to be in writing and copies to be served on affected persons

(1) An election petition shall be in writing and shall specify the ground or grounds upon which an election is disputed.

(2) The Election Disputes Committee shall cause a copy of each election petition to be served on any person whose election may be affected by the petition and allow such person a reasonable time in which to make any submissions in writing on the hearing of the petition.

7. The Appellants first ground of appeal (the ground alleging the improper constitution of the EDC, has been abandoned) is that no petitions were filed or presented within 21 days. It is obvious on the face of it that the petition dated 23rd October 2015 is out of time. However, from the decision it can be seen that the EDC accepted that documents or "complaints intended to be election disputes petitions" had been lodged before the deadline.

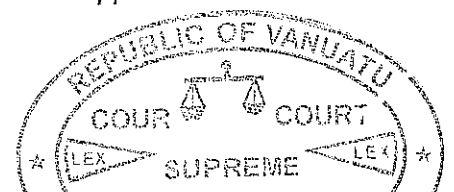
8. The first of these is annexed as MJT2 to Mr Tete's sworn statement. It is formatted as a letter addressed to the Electoral Dispute Committee in Port Vila and it is signed by representatives from four political parties, the lauko Group, the VRP, the UMP and the Green party. It has been CC'd to the Minister of Internal Affairs and to the "Four Political Leaders". It is dated 22nd July 2015.

9. The second complaint is annexed to Mr Tete's sworn statement as MJT3. It appears to be a letter from Mr Sam Hubert addressed to the Electoral Dispute Committee. It is dated 27th July 2015.

10. The Appellants say that these documents were not petitions. The documents were in writing that much is sure. The first MJT2 says *inter alia* the winning candidate in West Ward, Edwin Aprimen actually lives in Sarakat Ward and Parliament has passed an amendment saying you can only vote and contest in the place where you reside. There are other complaints not relevant to this appeal.

11. The second, MJT3, says that the winning candidate in Central Ward was announced as James Gauda. The letter has two attachments being the birth certificates of James Gauda and another candidate John Boe otherwise known as Hanington Boe. The certificates show that John Boe is the older of the two having been born on 15th October 1980. Mr Gauda was born on 11th June 1982 some 18 months later.

12. In both cases the documents are in writing and specify the grounds upon which the election is disputed. Both petitioners had a problem though. It is simply stated. Was there such a thing as an Election Disputes Committee in existence at the time the documents were presented? The answer is, quite probably not. It was not until the 1st September 2015 that the EDC whose decision is being appealed was appointed by the Minister of Internal Affairs. There was an earlier appointment in



2012⁴ but that committee, likely as not, ceased to exist by effluxion of time and by operation of the terms of reference set out in the schedule to Order No. 14 of 2012. Both petitioners did their best and it would be totally wrong to penalise them because the Minister of Internal affairs had not acted with enough foresight and only appointed a disputes committee long after the elections. It surely would have been prudent for the appointment to have been made shortly before the date of the election or at least well within the 21 days allowed for petitions to be presented. It also seems a little inappropriate for the Electoral Officers to be involved in setting up Election Dispute Committees as they may well end up being parties before a Committee. Be that as it may, when the petitioners tried to present their petitions there was probably no EDC for Luganville. The documents, or complaints, were more or less addressed correctly and they were no doubt received by someone. The evidence suggests someone from the Electoral Commission

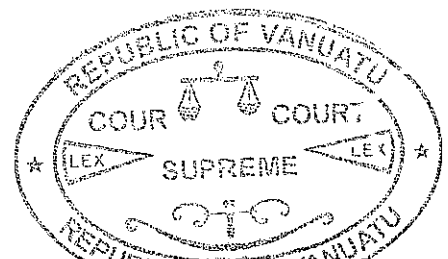
13. It should be noted that deposits had been made as required by Reg 36 and both were paid before the expiry of the 21 days from the declaration of the result.

14. I find that there is no merit in the Appellants arguments that the petitions were out of time, in the wrong format or not served or presented to the EDC. The two documents MJT2 and MJT3 satisfy the requirements of Reg. 38. Those initial petitions were perfectly valid although, as will be seen, the EDC felt clarification and legal advice would assist in their disposal.

15. At some stage the initial petitions were amended and unified in the one petition; that is the petition. There is no evidence or argument on how that came about except for what Mr Tete says at paragraph 16 of his sworn statement. What he says has not been disputed. It would seem the EDC asked for "better pleadings". There are no rules of procedure for the EDC that I have been made aware of and so provided the Committee complied with the "rules" of natural justice there can be no complaint they made such a request. Of course the petition is dated well after the 19th August and so it was not presented within the time frame dictated by Reg 37. However there is nothing to prevent a petition, or in this case petitions, being amended. The EDC did not feel there was a problem and refer to the petition merely as a "formal Petition". I note that whilst the two initial petitions were drawn up by lay persons the formal petition was drafted by a legal practitioner. This no doubt because of the request from the EDC following its meeting on 2nd October 2014 as stated by Mr Tete. The important questions are was the petition served on the Appellants and were they given, "*a reasonable time in which to make any submissions in writing on the hearing of the petition*".

16. Mr Aprimen does not say when he received a copy of the petition although he acknowledges he was given a copy. There is a copy of a letter from the Chairlady of the EDC dated 16th November which accompanied what she referred to as the "proper updated copy" Both Mr Patty and Mr Gaua say they received a copy on 16th November. It is unclear whether copies of the initial petitions were copied to the Appellants. From the papers before the Court there seems to have been a hearing over 3 days the 23rd November to 26th November. The Appellants had at least a clear week to make written submissions. Whilst that is not a particularly generous

⁴ Luganville Municipal Election Dispute Committee Order No. 14 of 2012



amount of time it is not a ridiculously short amount of time to prepare. It is noted that Mr Stephens filed a response for the Appellants on 26th November. I find that the Appellants did have reasonable time to respond. I would have to say though that the majority of the response from Mr Stephens missed the point of the petitions, more of which later.

17. I turn now to the appeals. It is essential to grasp that only three of the persons affected by the EDC's decision have appealed against it. They are Mr Gaua, Mr Aprimen and Mr Patty.

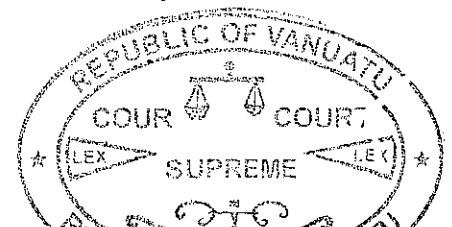
18. Mr Gaua's appeal is the easiest to deal with. The EDC had to decide whether Mr Hanington Boe should have been declared a duly elected councilor over Mr James Gaua for the reasons that Mr Boe is older than Mr Gaua given the fact that both Mr Gaua and Mr Boe obtained the same number of votes after contesting within the same ward. The EDC correctly identified the relevant provision in Regulation 25 of the Election of Candidate Rules which is Schedule 3 to the MCER. The Regulation was amended by the amendment order 154 of 2013 but not so as to affect Mr Boe and Mr Gaua. The Amendments relate to the introduction of candidates for reserved seats and neither Mr Boe nor Mr Gaua were such candidates. They were candidates for a general seat in a ward. As such Reg 25 as amended is perfectly clear:

25 Declaration by Minister of election of eldest candidate

(1) If two or more candidates for a general seat in a ward receive the same number of votes so that if one of them only had received that number of votes he would have been declared elected under rule 23, the Minister is to declare the eldest elected.

It is a simple matter of proof. By the letter dated 27/7/15 to the EDC (MTJ3) with its copied birth certificates the authorities should perhaps have realised that Mr Boe was older than Mr Gaua. Perhaps the letter did not arrive in time for the declaration on 29th July. However, the EDC were correct in principle to say on the evidence before them that, *".....that the Electoral Commission has wrongly declared Mr James Gaua to be the winning candidate"*. Presumably what should have happened is the Electoral Commission would report back to the Minister of Internal Affairs and the Minister would then declare the eldest candidate to be elected. Despite that rather minor difference between me and the EDC I would have to say the decision declaring the election of Mr James Gaua void was correct as was the decision that Mr Hanington Boe be declared the duly elected candidate. The only submissions made by the Appellants in regard to the appeal as it affects Mr Gaua is that the original complainants are not petitioners and a John Mavutu "who purports to dispute the election of James Gaua" was not a candidate. I have dealt with the first submission earlier (see paragraph 13 above) and I do not understand the second. The appeal against that part of the decision is dismissed.

19. Looking at the decision of the EDC relating to Mr Aprimen, the EDC say the main ground was that, *"Mr Edwin Aprimen who had contested for a seat in the West Ward as a National United Party ("NUP") candidate should have been disqualified from contesting because at the time of the election he never resided within the boundary of West Ward. It is alleged that at all material times Mr Edwin Aprimen lived at Sarakata Ward area."*



20. The EDC correctly identified the law relating to this issue. The Municipalities Act [Cap 129] was amended by the Municipalities (Amendment) Act No. 29 of 2014 by the insertion of a new section 6A. It states quite simply:

6A Ward for contesting

A person may only contest as a candidate in a Municipal election, in the ward in which he or she is registered to vote in.

It is important to note that the new section 6A does not mention residence. However residence is an issue in the qualification to vote. That proviso is in the Municipalities (Qualification, Disqualification and Registration of Electors) Regulations. The original regulations were found in Order No. 10 of 2001. However an important amendment was passed by the Regulations for the qualification, disqualification and registration of electors (Amendment) Order No. 47 of 2015 which came into force on 10th June 2015. The original clause 2 of the 2001 regulations was repealed and a new clause 2 substituted:

2 Eligibility for registration as an elector

(1) A person is eligible for registration as an elector within a ward of a municipality if he or she:

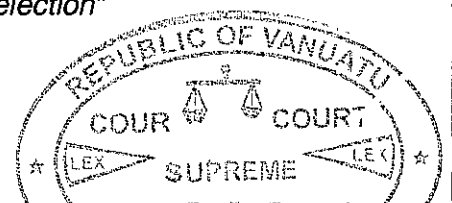
(a) has been a resident of the ward in which he or she is being registered to vote in for the past 3 months before the date of registration: and

(b) is a citizen: and

(c) is or will be 18 years of age on or before 1 July of the year in which the electoral list for registered voters is being prepared

(2) To avoid doubt, a person can be registered as an elector only in the ward in which he or she has been residing in for the past 3 months before the date of registration.

21. The EDC heard submissions and received evidence "*intended to prove that the Electoral Office failed to conduct proper inquiry as to the status of Candidate to make sure they were eligible before endorsing their names as candidates. This resulted in Mr Edwin Aprimen and Mr Peter Patty contesting in wards that they do not reside.*" The First and Second Respondents in the Petition (and that would include the Appellants in this cases) say that the irregularities were not their fault. The said that the recent changes in the law contributed and that voters did not observe new changes. The EDC made a finding (No. 5) that "*The Committee found the Electoral Office may have failed to properly scrutinize the eligibility of candidates and as a result Mr Edwin Aprimen and Mr Peter Patty have both wrongly contested in the wards they do not reside in....*" The EDC went on, "*The Committee finds also that Mr Aprimen and Mr Peter Patty also bear a certain degree of responsibility of failing to make sure to get good understanding of what is required of them under the new amendments and how this may affect them in contesting the election*"



22. In this appeal the Appellants submit that on 3rd and 7th July the Electoral Commission declared the Appellants as qualified candidates in the then upcoming Luganville Municipal Elections. The Appellants argue that once such a declaration is made the Appellants eligibility to stand as candidates is valid and effective until challenged and declared null and void by way of Judicial Review. The Appellants also argue that their "qualifications" to contest the election are not even raised in the petition.

23. I cannot accept those submissions. We are here dealing with an appeal from an Election Dispute Committee finding. As indicated earlier, once an election has taken place Regulation 34 comes into operation:

34. Elections only to be challenged under these rules

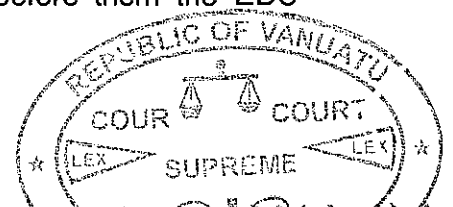
(1) The validity of any election to the Municipal Council may be questioned by a petition brought for that purpose under these rules and not otherwise.

(2) Every election petition shall be heard by the Election Disputes Committee.

There is no doubt in my mind that Judicial Review is not appropriate as suggested by the Appellants. The petition is a challenge to the validity of the election of the Appellants to the Luganville Municipal Council. The only way, once the election has taken place, to challenge the validity is by a petition to the Election Disputes Committee.

24. As for the second submission, MJT2 which was superseded by the petition raised the qualification of Mr Aprimen to stand as candidate in the West Ward. It is also raised as ground 1 in the petition. The EDC also raised the question of Mr Patty's eligibility although it does seem that there is no specific mention of Mr Patty in the petition. In his sworn statements Mr Patty mentions and exhibits his electoral card which confirms his residence as Sarakata. That seems to confirm that he was not eligible to stand for election in Central Ward. Mr Aprimen (and Mr Patty for that matter) also says in his sworn statement that the amendment that came into force did not affect him because he was already registered West Ward in 2006. This completely ignores the fact that the electoral lists are compiled every year. It does not matter what happened in 2006 both Mr Patty and Mr Aprimen were unable to satisfy the EDC that they were properly registered in the area or ward where they had resided for 3 months prior to registration in 2015. The electoral lists do not last forever; they exist from year to year.

25. The EDC considered all the evidence presented to it. It properly considered the effect and importance of Reg 41(3). The Committee members fortunately did not accept the First and Second Respondents arguments about the standard or burden of proof. Though it is not part of this appeal it seems clear to me the First and Second Respondents confused the standard of proof required when there are allegations of illegal practices by candidates or their agents with the proof required in matters such as decided by the EDC. Discussions of the nature of proof required in election fraud can be found in Solomon Island cases such as *Nuaiasi v Maneniaru* HCSI 344 of 2010, *Haipo v Keniasina* HCSI 343 of 2010, *Fono V Finuala* HCSI 335 of 2010 and *Inoki v Tran* [2012] SBHC 49. In the matter before them the EDC



considered quite properly whether they found on balance of probabilities the irregularities had affected the result of the election. The EDC found they had not.

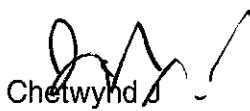
26. The EDC fairly made findings on the matters now before this court. Those findings were set out as No. 4 and No. 5. I can see no discernible error in law was made by the EDC in arriving at the conclusion it did.

27. The only matter outstanding is that set out as ground 5 (i) of the Appellants' submissions. They say the EDC did not consider or give weight to the Response filed on their behalf before the EDC on 26th November. I have briefly touched on this point earlier (see paragraph 15). Quite frankly there is very little weight or consideration that can be attached or given to the response. The EDC did consider paragraph 1 and clearly by its comments felt the "complaints" were acceptable as petitions. The EDC later sought amendments to them and advised the complainants take legal advice so that the issues were made clearer. Clauses (ii) and (iii) seem completely to miss the mark because the EDC was not sitting as a Magistrates' Court. Clause (iv) is also wide of the mark because there was no need to show "wrong doings". Receipts were provided concerning payments of deposits. Clause (v) is irrelevant and again seems to be based on the erroneous assumption that the EDC had not been properly constituted.

28. The appeal must fail. The appeal is dismissed. The decision of the EDC, in so far as it relates to the appeal, is confirmed. It should be noted that some elements of the EDC's decision were not appealed. The practical effect is that the whole of the decision of the EDC still stands. The effects of the decision on the Appellants have been set out in correspondence (see the letters etc attached to the sworn statement of Mr Tom Wells) and so I have no need to make any further orders. The costs of the appeal shall be paid by the Appellants to the Respondents to the appeal. The costs shall be taxed by the Master of the Supreme Court on a standard basis if they are not agreed.

29. Before leaving this appeal I should mention that as this should have been an appeal from the very beginning the proper parties from the petition should have been named. Rather than delay the appeal being heard by ordering amendments and re-service I dealt with it as presented. I am certain that in doing so no prejudice was suffered by the Appellants and none by those parties who should have been named but were not.

Dated at Luganville this 11th day of March 2016


Chetwynd

