

BETWEEN: Gillion Kalotiti William
Petitioner

AND: Principal Electoral Officer
First Respondent

AND: Nato Taiwia
Second Respondent

Date of Judgment: 22nd day of April, 2016 at 3:00 PM

Published Reasons: 23rd day of April, 2016

Before: Vincent Lunabek – Chief Justice

In Attendance: Mr Edward Nalyal for Petitioner

Mr Kent Ture and Samy Aron for First Respondent

Mr Godden Avock for Second Respondent

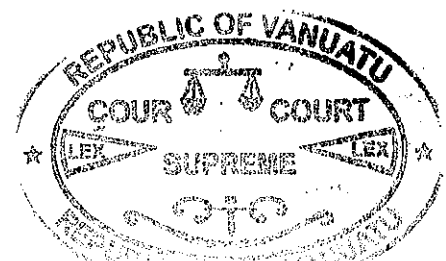
JUDGMENT

Introduction

1. Before the Court is an election Petition filed by the Petitioner pursuant to section 62 of the Representation of People Act [Cap 146] (“the Act”).

Background

2. The Petitioner was a voter and a candidate at the Parliamentary elections held on 22 January 2016. The Petitioner contested the elections held in the Constituency of Efate Rural.
3. The First Respondent is the Principal Electoral Officer (P.E.O). The PEO has such powers and functions relating to such registration and election as

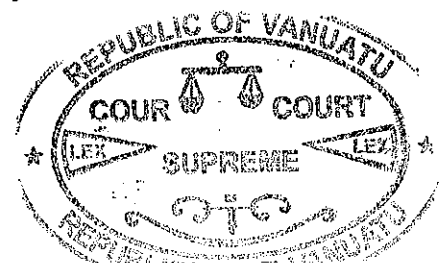


prescribed by Parliament (Article 20 (2) Constitution). The P.E.O is responsible for the organisation and administration of elections subject to the powers of the Electoral Commission under the Constitution and this Act (s.2 (1) of the Act). The PEO is responsible for the registration of electors and the conduct of elections and in particular maintenance, preservation and security of all electoral records (s.3(1) (2) (k) of the Act. These electoral records include the tally sheets recording the number of votes cast for each candidate for an election.

4. The Second Respondent was a voter and candidate at those Parliamentary elections of 22 January 2016. He was also contesting the elections in the Constituency of Efate. He was declared elected to the fourth and last Parliamentary seat of the Efate Rural Constituency.
5. The Electoral Commission (E.C) published the results of those elections in the Gazette on the 1st February 2016. The E.C declared that the Petitioner received a total votes of 831 and the Second Respondent received a total votes of 840 and was declared successfully elected as the 4th Member of Parliament representing the Constituency of Efate Rural.

The Petition

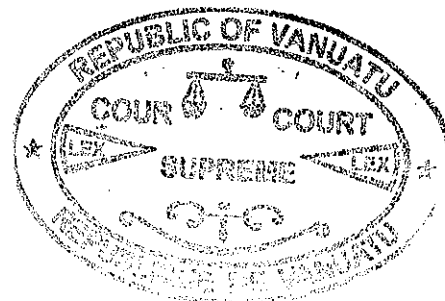
6. On 19 February 2016, the Petitioner presented his petition before the Supreme Court with supporting sworn statements.
7. The Petitioner claims that he has obtained a majority of lawful votes of 845 more than the Second Respondent, Nato Taiwia with only 840 and that he should be declared elected instead of the Second Respondent on the elections of Efate Rural Constituency held on 22 January 2016.



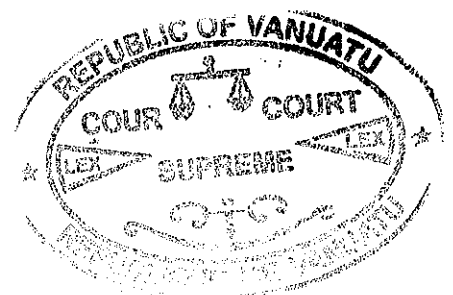
8. The Petitioner is seeking an order of the Court for examination of votes cast pursuant to section 62 of the Act and any other orders, the Court considers just.

The Foundation of the Petition

9. The Court was satisfied that the Petition filed by the Petitioner has a foundation (see Minutes and Orders of the Court dated 11 March 2016).
10. The Petition which the Petitioner presented to the Supreme Court on 19 February 2016 is inclusive of the sworn statements filed in support of it. The Petitioner had complied with the requirements of section 57(1) of the Act and the Election Petition Rules. It is noted that one sworn statement in support of the Petition that was filed outside the statutory period of 21 days is rejected.
11. It must be understood that election petitions are serious matters. They challenge the wishes of the majority of electors in an election petition. Those whose instigate any challenge must comply with the mandatory pre-requisites under ss57 (1) (2) and 58 (1) of the Act and the Elections Petitions Rules made consistently to the Act. This include the requirements to plead all the material and relevant facts sufficient to constitute a ground upon which the petition is disputed (s.58 (1) of the Act and Rule 2.3 (1) (b) (c) of the Election Petition Rules.
12. The first sworn statement filed which was presented with the Petition on 19 February 2016 was that of the Petitioner Gillion Kalotiti William. (see R.2-3(2) (a)).



13. In his sworn statement, he deposes that the E.C declared that he has received a total of 831 votes. He deposes that the unofficial results for Efate Rural Constituency showed that he had obtained 14 votes at Malatia Polling station which were miscounted by the E.C. He annexed as "GKW2" a statement from Shefa Province showing the unofficial results for the Efate Rural Constituency which shows that he received 14 votes at Malatia Polling station. He said the Shefa Province coordinated the elections for Efate Rural Constituency. He deposes that if those 14 votes at Malatia polling station were counted, he would have received a total of 845 votes and placed him above the Second Respondent, Nato Taiwia, who received a total of 480 votes, which in turn would mean he would be placed 4th among the elected candidates for Efate Rural Constituency for the fourth and last Parliamentary seat for Efate Rural Constituency.
14. These are details of the evidence the Petitioner relies on to support his Petition.
15. The second sworn statement is that of one Robin Kaltonga of Siviri Village, North Efate, filed on 19 February 2016. He deposes that he is a teacher at Malatia school, North Efate. He was polling clerk 1 out of the 4 polling clerks at Malatia Polling station, North Efate, on the elections day on 22 January 2016. He deposes he recalled that after 4.30pm on 22 January 2016 he and other polling clerks and the presiding officers at Malatia polling station counted the votes of each candidate. He deposes that he confirmed that candidate Gillion Kalotiti William did receive some votes at Malatia Polling station which they counted at the end of voting on 22 January 2016.



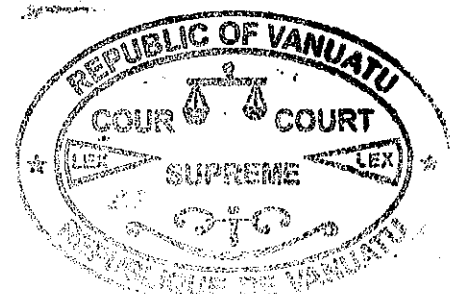
16. The third statement was filed on 19 February 2016 by one Charley John. He deposes he was an observer of Ground and Justice Parti (GJP) at the time of voting. He annexed the copy of the notes he made when he recorded the votes obtained by the candidates when the polling officers counted the votes. He recorded that Gillion K. William had 14 votes. He recalled that after voting, at about 4.30pm on 22 January 2016, the polling officers at Malatia polling station counted the votes and he said he heard they said Gillion K. William had received 14 votes.
17. The last sworn statement filed with the Petition on 19 February 2016 was that of one Joana Steele of Tanoliu village, North Efate. She is a teacher at Ulei Junior Secondary School, North Efate. She was polling clerk 3 out of 4 polling clerks at Malatia Polling station, North Efate on elections day on 22 January 2016. She recalled that after 4.30pm on 22 January 2016 she and the other polling clerks and presiding officers at Malatia Polling Station counted the Votes of each candidate. She confirmed that candidate Gillion Kalotiti William of the Graon and Justice Party (GJP) did receive votes at Malatia Polling station they counted at the end of voting on 22 January 2016.

The Law on Examination of Votes Cast

18. Section 62 is the relevant provision of the Act [Cap 146]. It provides:

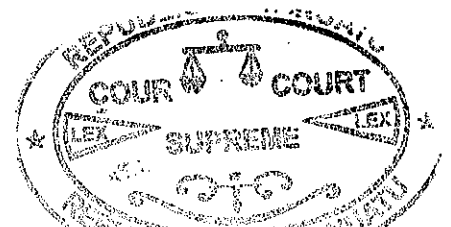
“62. Examination of Votes Cast

When on an election petition the election is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes the Supreme Court may direct an examination of the counted and void votes and of the counting of votes.”



Process of Examination of Votes Cast

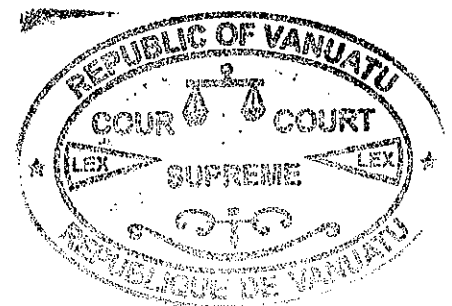
19. As it was not appropriate for the Court to involve itself directly to the examination and counting of Votes Cast, the Court issued detailed guidelines directions setting up an examination process.
20. An Examination Committee was appointed to proceed with the examination of votes cast pursuant to s.62 of the Act.
21. An examination process was directed to guide the committee to proceed with the examination of counted and void votes and of the counting of votes in respect to the Petitioner and the Second Respondent.
22. The Committee is directed and required to submit a report to the Supreme Court on the process of examination and the Committee's findings on the examination of counted and void votes and examination of the counting of votes. The Report must be a confidential one and must be provided in a sealed envelope to the Supreme Court. (See detailed Court Orders dated 11 March 2016).
23. The Examination Committee provided a report to the Supreme Court on 18 April 2016 in a confidential sealed envelope. The report was signed by Counsel for the Petitioner, Counsel for the First Respondent, Counsel for the Second Respondent and the Principal Electoral Officer (Acting) as the Supervising Officer during the exercise of the examination of votes cast pursuant to s.62 of the Act.
24. On 19 April 2016, Counsel and parties are notified to attend a conference before the Supreme Court at 10.30am. A copy of the Report was distributed



to parties through their respective Counsel. They are invited to make comments or submissions on the process of the Examination and the findings of the Examination Committee pursuant to the orders dated 11 March 2016.

Findings of the Examination Committee

25. The report shows that the examination of votes cast in respect to the Petitioner and the Second Respondent at the elections of 22 January 2016 in the Constituency of Efate Rural was thoroughly undertaken by the Examination Committee.
26. The Report shows that the voting envelope which contained the ballot papers for the polling station of Rantapao was not contained in the ballot boxes containing the voting envelopes for Efate Rural Constituency. The Examination Committee agreed to examine the votes cast at the polling station of Rantapao as recorded in the tally sheets of the official election records. The Petitioner and the Second Respondent obtained each 3 votes at Rantapao Polling Station. There was no void vote there.
27. At the polling station of Malatia, North Efate, where the Petitioner complained that he had obtained 14 votes there but they were not counted, the report shows that the Petitioner has obtained 14 votes and the Second Respondent has obtained 2 votes.
28. The Report shows the following findings of the Examination Committee:



Recount findings:

Petitioner : 843 valid votes (the official results was 831 and upon recounting, there was 14 added vote at the polling station of Malatia and less 1 Void vote and 1 missing vote at the polling station of Natapao [831+14-1-1=843]

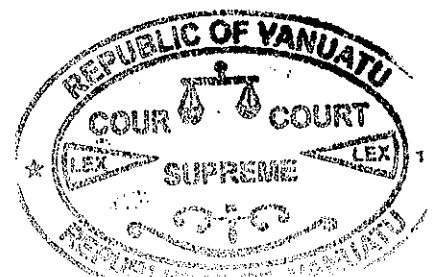
Second Respondent:

840 valid votes (the official result was 840) and upon recounting, the votes cast remained as 840.

Submissions

29. It is submitted for the Petitioner that the findings of the Committee for the Malatia polling station indicated 14 votes to the Petitioner, thus confirming the Petitioner's ground for his petition, that the Electoral Commission erred in the declared Election Results which indicated zero (0) vote to the Petitioner for the Malatia polling station.
30. In respect to the lost Rentapao polling station ballot papers, it is submitted that the Examination Committee sought the Principal Electoral Officer's opinion and the Committee members including the Second Respondent collectively agreed to rely on the opinion of the P.E.O, and the tally sheet records of the Electoral Commission for Rentapao polling station of the elections of 22 January 2016.
31. It is further submitted that the Committee was further satisfied with the Principal Electoral Officer's opinion and did not dispute the results on the tally sheets records for Rentapao Polling station.
32. The Petitioner relies on the case of *Carlot -v- Sambo [2004] VUSC 23* where at page 11, the Court stated:

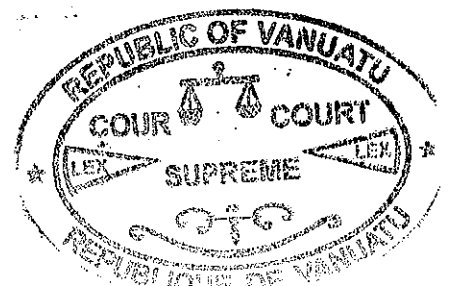
“Although the counted and void votes of the Petitioner and First Respondent cannot be counted because they are missing, the only



evidence before the Court is the Tallys sheet records as part of the Official Report provided by the Presidings Electoral Officer of the Polling station of Blacksands...

The Electoral Commission is entitled to rely on them in a Petition seeking for Examination of counted and void votes and in particular in the circumstances where the votes were missing as in the present case..."

33. It is said for the Petitioner that in *Carlot –v- Sambo [2004] VUSC 23*, the Court accepted for the reliance of the tally sheet records, in the Examination of counted and void votes, where the votes are missing.
34. It is then submitted for the Petitioner that the case of *Carlot –v- Sambo* applies to the Petitioner’s case in this proceedings whereby the Rentapao Polling station ballot papers are missing and the Committee made the right decision to accept and apply the tally sheet records results to the total overall votes received by the Petitioner and the second Respondent for Rentapao polling station, being 3 valid votes to the Petitioner and 3 valid votes to the Second Respondent.
35. The Petitioner ultimately submitted that as the findings of the Examination Committee show that he has obtained 843 valid votes and the Second Respondent has obtained 840 valid votes, and the Committee’s findings confirmed the ground for his petition that the Electoral Commission made an error in the results for the Malatia polling station in mistakenly omitting to include 14 valid votes for him for Malatia polling station, he submitted for this Court to:
 - (a) Accept the findings of the Examination Committee contained in the Report of the Examination Committee;
 - (b) Declare that the Petitioner did obtain a majority of the lawful votes than the Second Respondent.



(c) Order the Petitioner is duly elected in place of the Second Respondent.

36. The First Respondent submitted to the similar effect to these advanced by the Petitioner. The First Respondent also refers and relies on the case of *Carlot –v- Sambo [2004]* referred to earlier.

It is submitted on behalf of the Second Respondent that since the Petitioner had come to this Court specifically for examination of votes cast pursuant to s.62 of the Act, this exercise cannot be carried out completely due to the fact that the ballot papers of the polling station of Rentapao were missing.

37. Therefore, it is submitted that the tally sheet will not reflect the correct numbers of votes for Rentapao polling station.

38. The Second Respondent submitted that the case of *Carlot –v- Sambo [2004]* *VUSC 23* cannot be of assistance to the Petitioner's case as the factual circumstance of that case is distinguished from the current case.

39. It is argued for the Second Respondent that it is a crucial mistake by the Electoral Commission which prohibits the examination of votes cast and the true reflection of the Efate Constituency results. The Second Respondent submitted that since he has been declared as the winning candidate and given the very crucial mistakes done by the Electoral Commission the Petitioner's Petition should be struck out.

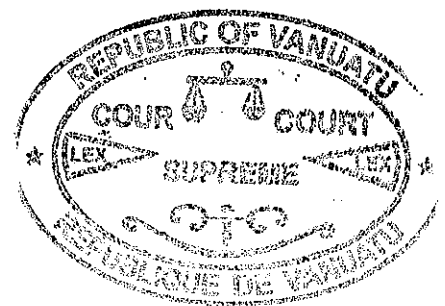
40. The Second Respondent further submitted that the relief sought by the Petitioner is general and not specific. The relief must be specifically pleaded



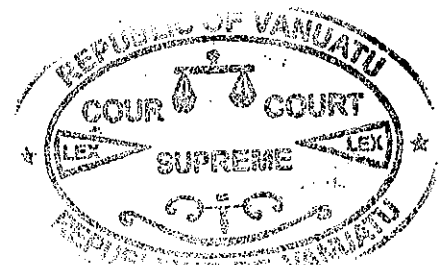
and so the Court cannot make orders sought by the Petitioner under s.60(1) of the Act.

Discussions

41. The Court considers first the Rentapao incident as reflected in the Report of the Examination Committee dated 18 April 2016. The ballot papers of the elections conducted on 22 January 2016 at Rentapao polling station were lost. The Committee agreed to rely on the Tally sheets records kept by the Principal Electoral Officer. The Tally sheet records of Rentapao shows the Petitioner and the Second Respondent obtained each 3 votes. The case of *Carlot -v- Sambo [2004] VUSC 23* is the authority and good law on this point. The Petitioner and the First Respondent are correct and justified to rely on that case.
42. The factual circumstances of this case are not so different from the facts in *Carlot -v- Sambo [2004] VUSC 23*. The facts in Carlot case and the incident of Rentapao in the present case are about the missing of ballot papers in a polling station. The Examination Committee in both cases relied on the tally sheet records under the custody of the Principal Electoral Officer to carry out the Examination of votes cast in one polling station.
43. The missing of the ballot papers of Rentapao polling station does not constitute a ground of the Petition of the Petitioner.
44. The ground of the Petition was the miscounted votes of the Petitioner and specifically, the miscounted 14 votes at Malatia polling station which is the ground of the Petition seeking orders pursuant to s.62 of the Act and other orders the Court considers just in the circumstance of this case.



45. In the present case, as reflected in the Report, the Petitioner and the Second Respondent obtained each 3 votes as reflected on the Tally sheets records kept by the Principal Electoral Officer at Rentapao polling station. The Petitioner nor the Second Respondent is affected in the votes obtained from Rentapao polling station.
46. The Submissions on behalf of the Second Respondent on the missing ballot papers of Rentapao were advanced as if it was a ground of the Petition. It was not. There was no cross petition.
47. The Court rejects the submissions made on behalf of the Second Respondent on this point as baseless.
48. The Court also rejects the submissions made on behalf of the Second Respondent that since he has been declared as the winning candidate and given the very crucial mistakes done by the Electoral Commission, the Petitioner's petition must be struck out. The above submissions are baseless.
49. The Court accepts the following findings of the Examination Committee contained in the Report dated 18 April 2016:
- The Petition has obtained 843 Valid Votes; and
 - The Second Respondent has obtained 840 Valid Votes.
50. The Court rejects the Second Respondents submissions that the reliefs sought in the petition are not specifically pleaded and they are general and so the Court cannot make any of the orders under section 60 of the Act.



51. The Petitioner seeks the following remedies in this Petition:

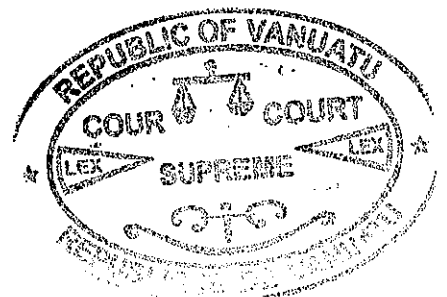
1. An order that there be an examination of the counting of votes at Malatia Polling Station.

2. Any other orders, the Court considers just.

51. Whilst the remedies sought seem to be general, to my judgment, they are clear enough. I am satisfied that the relief sought is in accordance with the effect of a finding of the Petitioner having obtained a lawful majority after an examination of Votes Cast pursuant to section 62 of the Act. Section 60 of the Act gives the Court power to make a numbers of different types of declarations and orders which include a declaration that a candidate other than the person whose election is questioned was duly elected (s.60 (1) (b)).

52. I find that a declaration following a finding of a lawful majority of votes under s.62 Examination of votes cast means a candidate other than the person whose election is questioned was duly elected as in the present case.

53. In the Constituency of Efate Rural, there are more than two candidates for more than one seat and, here, a petition is presented against the Second Respondent, claiming as against him a recount and the seat, it is not necessary for the Petitioner to claim a general re-count, that is as regards the other candidates as well, on the recount against the Second Respondent resulting in the Petitioner's favour, the Petitioner becomes entitled to the Second Respondent's seat. That is the situation in the present case and the Court is satisfied to that effect. Section 60 (1) (b) of the Act gives power to the Supreme Court to make declarations to this effect. I consider section 60



(2) of the Act and I think I order costs in favour of the Petitioner against the First Respondent on the standard basis and I do so.

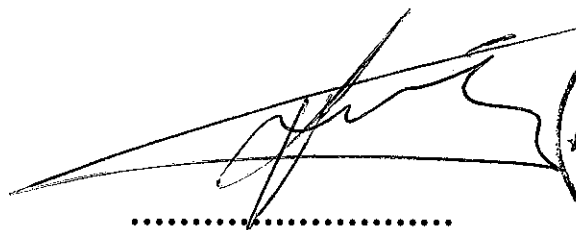
54. The Court makes the following orders and declarations:

ORDERS AND DECLARATIONS

1. It is declared that the Petitioner, Gillion Kalotiti William other than the Second Respondent, Nato Taiwia, whose election is questioned was elected in the elections of 22 January 2016 held at Efate Rural Constituency.
2. It is ordered that the Electoral Commission shall issue a declaration in the Gazette forthwith from the date of the Judgment to effectuate the alterations of the total number of votes obtained by the Petitioner, Gillion Kalotiti William and the Second Respondent, Nato Taiwia, as reflected in the Report of the Examination Committee and the Judgment of the Court.
3. The Petitioner is entitled to costs against the First Respondent, such costs to be agreed or determined on the standard basis.

DATED at Port Vila this 23rd day of April, 2016

BY THE COURT



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Vincent Lunabek

Chief Justice

