

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

**Election Petition
Case No. 20/891 SC/CIVL**

BETWEEN: Ken Don Nmalamuwomu
Petitioner

AND: Gracia Shadrack
First Respondent

AND: Principal Electoral Officer
Second Respondent

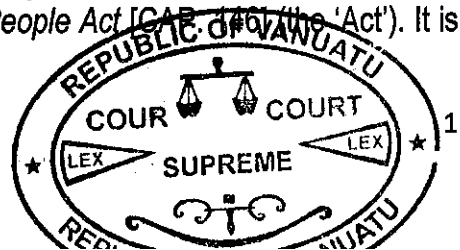
AND: Electoral Commission
Third Respondent

Dates of Hearing: 20 June-1 July 2020
Before: Justice V.M. Trief
In Attendance: Petitioner – Ms J. Kaukare & Mr B.K. Kalotrip
First Respondent – Mr J. Tari
Second and Third Respondents – excused (State Law Office)
Date of Decision: 3 July 2020

JUDGMENT

A. Introduction

1. This is an Election Petition disputing the election of the First Respondent Gracia Shadrack, Member of Parliament for the constituency of Malekula. The Petition alleges breaches of s. 61A of the *Representation of the People Act* [CAP 146] (the 'Act'). It is



opposed. The Second and Third Respondents were excused from the hearing and will abide the orders of the Court. This judgment determines the Petition.

B. Background

2. Polling day for this year's general election was 19 March 2020.
3. On 6 April 2020, the Electoral Commission, Third Respondent declared the results of the election.
4. The First Respondent was elected to one of the seven seats for the constituency of Malekula with 997 votes. The Petitioner Ken Don Nmalamuwomu was the second runner-up with 700 votes.

C. The Law

5. Section 60 of the Act provides for decisions of the Court in election disputes as follows:

60. (1) *On hearing a petition the Supreme Court may -*

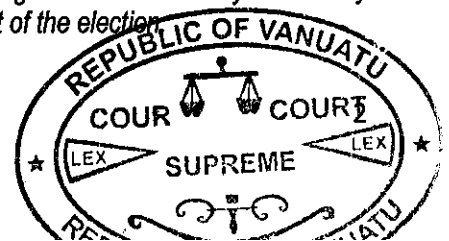
- (a) *declare the election to which the petition relates is void;*
- (b) *declare a candidate other than the person whose election is questioned was duly elected; or*
- (c) *dismiss the petition and declare that the person whose election is questioned was duly elected.*

(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.*

6. *The Representation of the People (Amendment) Act No. 10 of 2012 (the '2012 Amendment Act') amended para. 61(1)(a) of the Act and repealed subss 61(2) and (3), and substituted a new subs. 61(2). Accordingly, s. 61 of the Act provides:*

61. (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) *the candidate or any agent of the candidate has contravened section 61A, 61B or 61C;*
- (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) *Despite subsection (1), if on 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:*

(a) *it is satisfied that the election was conducted in accordance with the principles laid down in this Act; and*

(b) *such failure did not affect the result of the election,*

the election of the successful candidate is not to be declared void.

7. Sections 61A, 61B and 61C of the Act provide:

61A (1) *A candidate for election must not spend, allocate or otherwise disburse to the constituency in which he or she is a candidate, any money, whether in the form of:*

(a) *his or her representation allowance – if the candidate is a member of Parliament; or*

(b) *any money obtained from any other source of funding, whether in the form of:*

(i) *cash donations; or*

(ii) *donations in kind,*

from the period commencing at the end of the life of Parliament or at the date of the dissolution of Parliament under subarticle 28(2) or (3) of the Constitution, to and including, the polling day.

(2) *For the purposes of this section,*

donations in kind *includes, but is not limited to, food or food products, transport, transport fares, machinery, cooking utensils, building materials and furniture.*

61B *Despite section 61A and subject to paragraphs 46(a) and (b), a candidate may, without the intention of corruptly influencing any person, provide food, drink, transport and accommodation to any person on the polling day.*

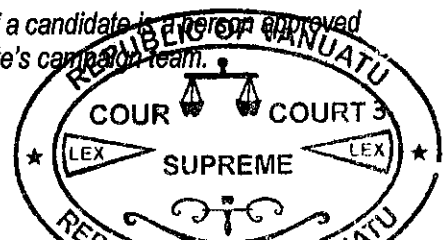
61C (1) *Despite section 61A and subject to paragraphs 46(a) and (b), a candidate may during the campaign period:*

(a) *present a gift of a custom mat or an amount not exceeding VT1,000, or both, to a chief or any person of similar authority in an area or village for the purposes of holding a campaign in that chiefs or persons village or area; or*

(b) *provide food, drink, entertainment, transport or accommodation only to his or her agents; or*

(c) *provide entertainment to the public for the purposes of entertaining the public during his or her campaign rally.*

(2) *For the purposes of this section, an agent of a candidate is a person approved by a candidate as a member of that candidate's campaign team.*



(3) *To avoid doubt, this section applies only during the campaign period declared by the Electoral Commission for purposes of this Act.*

8. The Petitioner bears the burden of proving his case to the civil standard of proof – on the balance of probabilities. That is, that it is more likely than not that the events alleged occurred.

D. Grounds of Petition and Response

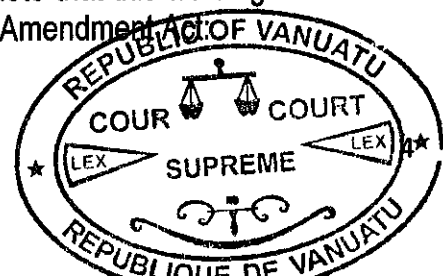
9. The Petition was filed on 24 April 2020. It alleges that the First Respondent and his agents contravened s. 61A of the Act by spending or disbursing money in the form of cash donations or donations in kind after the cut-off date prescribed in s. 61A of the Act:

- (i) On 10 February 2020, the First Respondent and his younger brother Clipson Shadrack donated VT25,000 and 5 spades to the Wala community, North East Malekula;
- (ii) The First Respondent donated a timber boat to the Dixon community, South East Malekula after the cut-off date;
- (iii) The First Respondent handed over iron roofing to the New Covenant Church at Lawa Village, South Malekula after the cut-off date;
- (iv) On 16 March 2020, the First Respondent gave VT6,000 and VT1,000 to an old woman Penaina at Okai area before and during the campaign period;
- (v) On 16 March 2020, the First Respondent and agents handed over VT150,000 to Danmaru Penuvet, North West Malekula;
- (vi) On 18 March 2020, the First Respondent and agents Winnie Sam and Ruben Daniel presented 25kg bags of rice to the South Malekula communities of Lembinwen, Labu, Lawa, Windua, Vinmavis, Disvale and Dixon; and
- (vii) On 19 March 2020, the First Respondent, Clipson Shadrack and agents gave Sergio Kombe VT1,000 in front of the Northroudam polling station.

10. It is common ground that 22 January 2020 was the cut-off date pursuant to s. 61A of the Act. At the hearing, Joe Johnson Iati, the Principal Electoral Officer (Second Respondent) confirmed his two sworn statements ("**Exhibits P1 and P2**") and that this was the date for "the end of the life of Parliament".

11. The Petition alleges breaches by the First Respondent and his agents after the cut-off date up to and including on 19 March 2020, the polling day.

12. Further, it is alleged that the conduct of the First Respondent and his agents was so extensive that it affected the result of the election. I note that this wording reflects the wording of para. 61(1)(a) of the Act prior to the 2012 Amendment.



61. (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;*

13. However, the 2012 Amendment Act changed the wording of para. 61(1)(a) of the Act to:

61. (1) ...
(a) *the candidate or any agent of the candidate has contravened section 61A, 61B or 61C;*

14. This Petition is two-fold. It firstly pleads breaches of s. 61A of the Act which accords with para. 61(1)(a) of the Act as amended. However, it is difficult to understand why counsel for the Petitioner then pleaded the second aspect of the Petition using the wording of para. 61(1)(a) prior to the 2012 Amendment Act.

15. Petitioner's counsel's misconstruing of the Act extended to Ms Kaukare completely misquoting para. 61(1)(a) of the Act in the Petitioner's Closing Submissions and referring me to bribery (s. 45 of the Act) instead of s. 61A. Counsel's conduct was a disservice to the Petitioner.

16. The First Respondent's Response filed on 18 May 2020 denied the allegations in the Petition.

17. Both parties brought evidence about an incident alleged to have occurred on 9 March 2020 in which the First Respondent gave VT600 to 3 boys at Akamb, South Malekula for their vote and about the First Respondent allegedly handing over a timber boat to the Rano community. These events were not pleaded in the Petition - counsels agreed that no question therefore arose for my consideration.

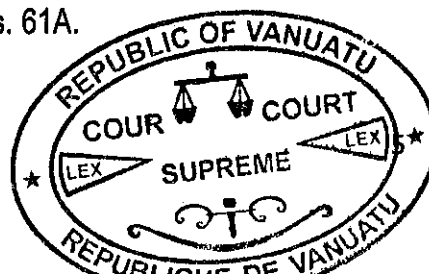
E. Issues

18. The first issue for the Court's determination is, "Have the First Respondent and his agents contravened s. 61A of the Act?" **[Issue 1]**

19. Given the wording of subs. 61(2) of the Act, where the Court finds that there has been a failure to comply with s. 61A of the Act, the issue then for the Court's determination is, "Has the failure to comply with s. 61A of the Act affected the result of the election?" **[Issue 2]**

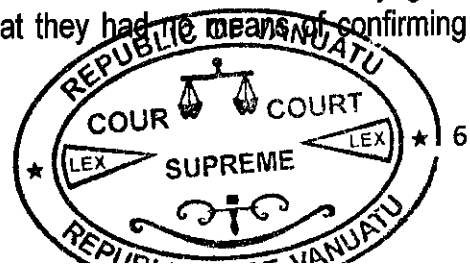
F. Issue 1: Have the First Respondent and his agents contravened s. 61A of the Act?

20. I will deal in turn with each of the alleged breaches of s. 61A.



Allegation (i) – First Respondent and his younger brother Clipson Shadrack donated VT25,000 and 5 spades to the Wala community, North East Malekula on 10 February 2020

21. The Petitioner purported to give evidence that all the events alleged in the Petition occurred (“**Exhibit P3**”). However, he agreed in cross-examination that he was not present at each of the dates and places alleged, and made his sworn statement based on reports he had received from his agents. That the Petitioner’s sworn statement was poorly drafted by counsel is an understatement.
22. In examination-in-chief, Andre Mathew Terong, witness for the Petitioner, stated that the contents of his sworn statement are false (‘I kiaman toktok’). He was not cross-examined. I accept what Mr Terong told me from the witness box.
23. Annisei Malisas gave similar evidence in her sworn statement as Mr Terong (“**Exhibit P10**”) however she did not present for cross-examination.
24. Tony Tsugengen states in this sworn statement for the First Respondent (“**Exhibit R9**”) that Ms Malisas and Mr Terong’s sworn statements are baseless and false. He denied having received any donation from the First Respondent as alleged. Mr Tsugengen was emphatic in cross-examination that Ms Malisas and Mr Terong’s statements were not true. Having heard Mr Terong and Mr Tsugengen, I reject Ms Malisas and Mr Terong’s sworn statements.
25. Jean-Yves Malere confirmed in cross-examination that he made his sworn statement (“**Exhibit P12**”) to support that of Mr Terong and Ms Malisas. When put to him that the First Respondent’s evidence is that on 10 February 2020, he was in Port Vila and only came to Malekula on 4 March 2020, Mr Malere said that no, the First Respondent was here. I asked Mr Malere how he could be sure of the date being 10 February 2020. His response was, “From mi stap lo taem ia” (“Because I was here”). He confirmed there wasn’t anything else to make him sure of the date.
26. I do not accept that Mr Malere is a witness of truth. I was not convinced he had any actual knowledge of the date involved. Rather, what he was concerned about was to put to the Court that there had been a donation after the cut-off date.
27. Similarly, it was put to Christiong Teijingkon in cross-examination that on 10 February 2020, the First Respondent was in Port Vila. He responded that his statement (“**Exhibit P17**”) was true. When challenged that he was lying, he said, “No, I was there, I saw” (“Mi stap, mi luk”). I asked Mr Teijingkon how he could be sure that the date of 10 February 2020 was correct? His answer was because it was past the cut-off date. I also was not convinced that Mr Teijingkon had any actual knowledge of the date involved. He was more concerned about asserting that a donation had occurred after the cut-off date rather than whether or not one had actually occurred as alleged.
28. I was left with the distinctly unfavourable impression that Mr Malere and Mr Teijingkon were purporting to give evidence of an event that they had ~~means of~~ confirming

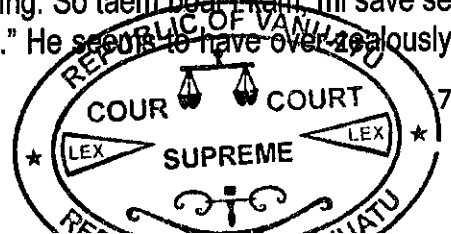


occurred on 10 February 2020 as alleged. I do not accept they were witnesses of truth.

29. Having heard the Petitioner's witnesses, I conclude that many of them gave their evidence under an apprehension that as long as a cash or other donation was made after the cut-off date, that was unlawful. However, this proceeding illustrates that in addition, it must also be shown that the failure to comply with s. 61A of the Act – if there was one – affected the result of the election.
30. The First Respondent's evidence ("**Exhibit R1**") is that from 22 January 2020 to 22 February 2020 he was in Port Vila and travelled to Malekula on 4 March 2020. Elizabeth Leipakoa Shadrack, the First Respondent's wife also evidences that her husband was in Port Vila and travelled to Malekula on 4 March 2020 ("**Exhibit R3**"). There is no evidence to the contrary as to the First Respondent's whereabouts on 10 February 2020.
31. Clipson Shadrack, the First Respondent's younger brother, denied this allegation altogether ("**Exhibit R8**").
32. Having heard the evidence and closely observed Mr Malere, Mr Teijingkon, the First Respondent and Mr Shadrack, I prefer and accept the First Respondent and Mr Shadrack's evidence.
33. In the circumstances, I consider that the Petitioner has failed to prove the allegation that on 10 February 2020, the First Respondent and his younger brother Clipson Shadrack donated VT25,000 and 5 spades to the Wala community.

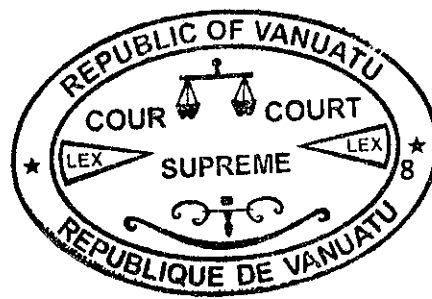
Allegation (ii) – First Respondent donated a timber boat to the Dixon community, South East Malekula after the cut-off date

34. Suwasang Kaipapa made two sworn statements for the Petitioner ("**Exhibits P5 and P6**"). He confirmed in cross-examination that despite what he said in his earlier sworn statement, that the First Respondent did not come to Dixon with the boat.
35. Mr Kaipapa evidences that he was present on 6 March 2020 when the First Respondent donated the boat to Dixon community. This is rebutted by the First Respondent who in his sworn statement evidences that on 6 March 2020, he and his campaign team were at Matanvat, Botovro and Vao (small island) at North East Malekula. Berry Melteckoin and Alick Natnaur confirm this in their sworn statements ("**Exhibits R5 and R17**").
36. Mr Kaipapa evidences that after polling day, he and Olav Urinmal searched for the boat all over Dixon and eventually found it anchored in Lokobanga River covered with burao leaves and shrubs. He said that they were surprised to find the boat there as it is not normal for boats to be anchored up the river but normally anchored down the sea shore. Mr Kaipapa stated in re-examination that, "From boat I kam lo Dixon [afta 22 January 2020 we] man I nomo save givim samting. So taem boat I kam mi save se hemi bribery. So statement ia I folem ol tingting ia." He seems to have over-zealously



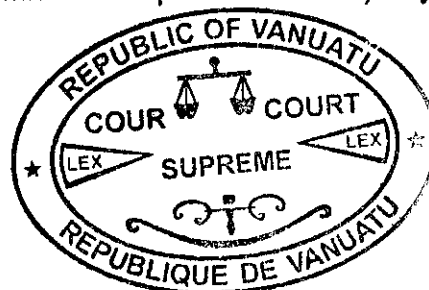
jumped to the conclusion that since the boat came to Dixon after the cut-off date, that it was there for an unlawful purpose.

37. Due to the inconsistencies in his evidence and his assumption of unlawful behaviour rather than on what he personally was witness to, I do not accept Mr Kaipapa's evidence. It is rejected.
38. Roger Whiteley Kilman made a sworn statement for the Petitioner to which he annexed a copy of the video clip he made of his interview with Mr Kaipapa ("**Exhibit P26**"). Mr Kilman's statement is hearsay and inadmissible. Counsel for the Petitioner should know better than to put forward such evidence on their client's behalf. They drafted two further similar statements for Mr Kilman and for Olav Urinmal and Abong Marcellin Gulgul.
39. Olav Urinmal states in his sworn statement ("**Exhibit P20**") that he and Mr Kaipapa searched for the boat at Dixon and found it anchored in the river. He annexed the video clip of Mr Kaipapa speaking about the boat. The video clip is hearsay and inadmissible.
40. Watson Vanua Lai stated in his sworn statement ("**Exhibit P14**") that Mr Kaipapa told him that the boat was donated by the First Respondent and his committee to the Dixon community. Mr Lai's statement too is hearsay and inadmissible.
41. The Petitioner's evidence in cross-examination is that he knows that the blue timber boat belongs to the Fisheries Department. The Petitioner's witnesses Jean Mark Yorle and Reuben Werbny also confirmed in cross-examination that the boat belongs to the Fisheries Department.
42. Mr Tari relied on the Fisheries Department documents tendered into evidence ("**Exhibits P22, P23 and P24**") that the boat belongs to the Fisheries Department and has been placed under the care and management of the Rano Island Fisherman Association on its behalf. The First Respondent's evidence is that he initiated this fishing boat project on behalf of the Rano Fishermen Association.
43. Mr Tari submitted that it is not possible to donate something which the donor is not the owner of. In his submission, the boat not belonging to the First Respondent, it was not possible for him to donate it to another person. I am not convinced that the wording of s. 61A requires such a strict interpretation.
44. However, there is also no evidence before me that the First Respondent donated a timber boat to the Dixon community.
45. The Petitioner has failed to prove this allegation.



Allegation (iii) – First Respondent handed over iron roofing to the New Covenant Church at Lawa Village, South Malekula after the cut-off date

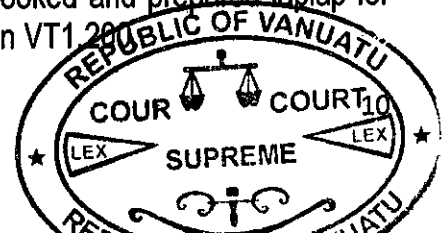
46. In examination-in-chief, John Bruce stated that his sworn statement for the Petitioner ("Exhibit P9") does not contain his statements and it is not true. He said that on 6 March 2020, he was not at Lawa but at his village up in the bush. He did not see the activity alleged in his statement. Mr Bruce stated that the statement he signed had different wording but was then edited. He was emphatic that the statement he signed did not contain any dates, but that the one tendered to the Court contained dates. He was sure that it was Ms Kaukare that he had spoken with on the phone and that she should know how come his statement now contained dates. I was left in no doubt that Mr Bruce believes that Petitioner's counsel changed his statement by inserting dates into it after he had signed it.
47. I accept that Mr Bruce is a witness of truth as to his statement not being true and that it was not his statement. He was undeterred on this in examination-in-chief and cross-examination. Mr Bruce said he was not in Lawa on 6 March 2020 so did not see the event as alleged. He did not waver that the statement that he had signed did not have dates, but that the one before the Court did. I therefore reject Mr Bruce's evidence contained in "Exhibit P9".
48. Peter Isno states in his sworn statement ("Exhibit P16") that he saw iron roofing dropped off at Samuel Wimbong's house at Lawa on 27 February 2020, and then on 6 March 2020 it being moved to Winnie Sam's house. He evidences that both Samuel Wimbong and Winnie Sam are members of the First Respondent's campaign team.
49. Mr Kilman made another sworn statement for the Petitioner to which he annexed the video clip he made of his interview with Mr Isno ("Exhibit P28"). This statement from Mr Kilman is also hearsay and inadmissible.
50. Melton Sinmor, witness for the Petitioner, states that he saw iron roofing at Winnie Sam's house, that she is a member of the First Respondent's campaign team and that after the election, it will be given to the church ("Exhibit P21").
51. On the other hand, the First Respondent evidences that the iron roofing is the property of the Leaders Party Vanuatu (the political party that he is affiliated with) and at all times was with Samuel Wimbong to build the First Respondent's shelter for his camp at Lawa Village. It was never donated to the Covenant Church as alleged. The First Respondent confirmed in re-examination that the iron roofing was used for shelter for his camp, the Leaders Party flag flies from it and it is still there today. I accept his evidence.
52. I note that the First Respondent's use of iron roofing for his camp is permitted by subs. 61C(1) of the Act. This provides that despite s. 61A, a candidate may during the campaign period provide accommodation (which encompasses a shelter) only to his or her agents.



53. Samuel Wimbong states in his sworn statement for the First Respondent ("**Exhibit R4**") that the iron roofing belongs to the Leaders Party and they used it for the shelter for the First Respondent's camp at Lawa Village. He confirmed that the First Respondent did not hand over any iron roofing to the New Covenant Church. Further, that the only time that the First Respondent campaigned at Lawa village was on 14 March 2020, not 6 March 2020 as alleged. He confirmed in cross-examination that both he and Winnie Sam are committee members (supporters) of the First Respondent. I accept Mr Wimbong as a witness of truth and accept his evidence.
54. The Petitioner's case was not assisted by quite unhelpful cross-examination by Ms Kaukare. I had to remind her during her cross-examination of Mr Wimbong of the rule in *Browne v Dunn* – that her duty is to put her client's case in cross-examination, not to prove the First Respondent's case!
55. Winnie Sam states in her sworn statement ("**Exhibit R13**") that he did not hand over any iron roofing to the New Covenant Church as alleged. Further, that he campaigned only once at Lawa village, on 14 March 2020.
56. Leisale Alick states in her sworn statement ("**Exhibit R10**") that she is an Elder in the Covenant Church at Lawa village and that the First Respondent did not hand over any iron roofing to that church on 6 March 2020. I accept Ms Sam and Ms Alick's evidence.
57. In the circumstances, the First Respondent has proved that there was no donation by the First Respondent of iron roofing to the New Covenant Church at Lawa Village after the cut-off date.
58. This allegation fails.

Allegation (iv) – First Respondent gave VT6,000 and VT1,000 to an old woman Penaina at Okai area before and during the campaign period

59. Makai Obed, witness for the Petitioner, gave evidence that the First Respondent gave his mother Penaina Obed VT6,000 during an awareness session and then VT1,000 during the campaign period at Okai island for her vote ("**Exhibit P8**"). He confirmed in cross-examination that his mother is a supporter of the First Respondent. His concern is that the First Respondent gave his mother money after the cut-off date.
60. Ambong Marcelin Gulgul made two sworn statements for the Petitioner to which he annexed copies of the video clips he made of his interviews with Mrs Obed and Mr Obed ("**Exhibits P29 and P30**"). These statements are rejected for being hearsay and inadmissible.
61. The First Respondent evidences that Mrs Obed has been a supporter of his and family friend since the 2016 snap election. She cast the only vote for him at her polling station in 2016. He has used his MP Allocation fund to assist her and in 2019, her son to go to RSE. He states that Mrs Obed unrequested cooked and prepared laplap for his 15-member awareness team for which she was given VT1,000.



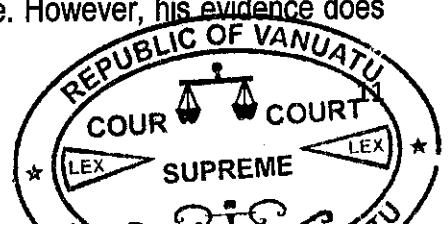
62. Mrs Obed gave evidence for the First Respondent ("Exhibit R2"). She confirms in her sworn statement that she was the only voter for the First Respondent at the Okai polling station in 2016. She gave laplap to the First Respondent in February 2020 as she is a strong supporter of his, and rice, island food and fish to him and his team on 16 March 2020. She was clear in cross-examination that she had received a total of VT7,000 from the First Respondent. It was not put to her whether or not this was for food cooked.
63. Having heard the evidence, I accept that the First Respondent gave Mrs Obed VT7,000 on two occasions, both times when she gave him and his team food that she had made. I do not consider that a breach of s. 61A of the Act but even if it was, I am satisfied that such failure could not and did not affect the result of the election as it involved Mrs Obed alone – just one voter.
64. This allegation fails.

Allegation (v) – First Respondent and his agents handed over VT150,000 to Danmaru Penuvet, North West Malekula on 16 March 2020

65. The only witness for the Petitioner as to this allegation was Pierre Rofrof. He stated in examination-in-chief that he signed his sworn statement ("Exhibit P7") on behalf of his small brother who was a counsellor affiliated with the Petitioner. He took no part in preparing the statement and only signed when unnamed persons came to him to sign the statement. He stated in cross-examination that his small brother had told him to sign the statement so he did.
66. Mr Rofrof's evidence cannot be relied on. I reject it.
67. The Petitioner has failed to prove this allegation.
68. The circumstances that Mr Rofrof described in which he signed his sworn statement left me with a distinctly unfavourable impression that persons on behalf of the Petitioner were engaged in fabricating evidence to support this Petition. This impression was reinforced by what I heard from other witnesses for the Petitioner namely Andre Mathew Terong, John Burce, Andre Iano Vanuvel and Wenislas Combe.

Allegation (vi) – First Respondent and his agents Winnie Sam and Ruben Daniel presented 25kg bags of rice to the South Malekula communities of Lembinwen, Labu, Lawa, Windua, Vinmavis, Disvale and Dixon on 18 March 2020

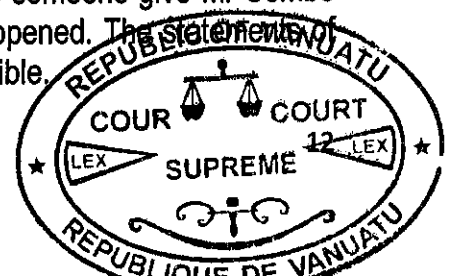
69. Anoil Serau's evidence ("Exhibit P15") is that on 15 March 2020 he and others rescued 18kg yellow bags of rice from an anchored boat as the sea was very rough and they were concerned the rice would get wet. They moved the rice to his house. Later that afternoon, the First Respondent and his campaign group came by and asked for their rice. They left 10 bags of rice in Lawa and left on a boat for Akamb. I accept Mr Serau as a witness of truth and his evidence. However, his evidence does not prove any donation of rice to the Lawa community.



70. Mr Kilman annexed the video clip of his interview with Mr Serau ("Exhibit P27") to his final sworn statement. This is hearsay and inadmissible.
71. Mr Kaipapa evidences that on 18 March 2020, he saw Winnie Sam and Ruben Daniel bring rice to Dixon on a boat. He knows that both are supporters of the First Respondent. He saw that two 18kg yellow bags of rice were dropped off for Simeon Kaiabab to pick up. He states that after that, the boat headed towards Lambunpu area.
72. On the basis of this evidence, Petitioner's counsel seem to have assumed that the First Respondent's agents presented bags of rice to other communities in South Malekula. Ms Kaukare conceded however that there was no evidence of rice donations other than at Lawa and Dixon. This allegation is not made out in respect of the other communities as alleged.
73. I have already stated that I do not accept Mr Kaipapa as a witness of truth. Accordingly, I reject his evidence.
74. Andre Iano Vanupel stated in cross-examination that he was forced to sign his sworn statement ("Exhibit P13"). He said that he did not see any of the events in the statement – he was at the bush. Further, when Ms Kaukare called to speak about the statement, Mr Kaipapa speaking to him in language told him what answers to give on the telephone. I accept Mr Vanupel's evidence that he was forced to sign his sworn statement. I reject that statement.
75. In the circumstances, there is no evidence that the First Respondent or his agents presented rice to any of the communities as alleged. The Petitioner has also failed to prove this allegation.

Allegation (vii) – First Respondent, Clipson Shadrack and agents gave Sergio Kombe VT1,000 in front of the Northroudam polling station on 19 March 2020

76. Wenislas Combe had to be summonsed to attend the hearing. His evidence-in-chief was that he was forced to sign his sworn statement. In cross-examination, he stated that he does not speak English and does not know what his statement says – he was told to sign it. Further, that he signed the statement on the wall of Sato Kilman's house. He had already signed it before they came to the Court House for the Clerk to witness his signature.
77. I accept Mr Combe's evidence that he was forced to sign his sworn statement for the Petitioner. Accordingly, I reject his evidence in that sworn statement.
78. Lingorie Malwosi and Ephraim Malnaim state in their sworn statements ("Exhibits P18 and P19") that Sergio Kombe confessed to them at night on 20 March 2020 that he was given VT1,000 by the First Respondent and Clipson Shadrack. Mr Malwosi confirmed in cross-examination that he did not actually see someone give Mr Combe VT1,000 – only that Mr Combe told them that that had happened. The statements of both Mr Malwosi and Mr Malnaim are hearsay and inadmissible.



79. The First Respondent's evidence is that he was escorted by the Police to and from the polling station. He did not speak to or even see Sergio Kombe. He spoke with Camille Juliard Kileteir who accompanied him back to his house. Mr Kileteir confirms this in his sworn statement ("Exhibit R16"). Clipson Shadrack denies that he ever bribed Sergio Kombe as alleged ("Exhibit R8"). Sergio Kombe in his sworn statement for the First Respondent ("Exhibit R7") names several persons who forced him into a truck and then drove him to Disere Urinmal's house. There, he was threatened and forced to sign a statement. He did so out of fear of Disere Urinmal. He states that he did not receive any payment from the First Respondent or his representatives on polling day. Mr Kombe was unshaken on this in cross-examination. There is no evidence to the contrary.

80. The Petitioner has failed to prove this allegation.

81. The Petitioner having failed to prove all the allegations made in the Petition, I therefore answer the question, "Have the First Respondent and his agents contravened s. 61A of the Act?" "No".

G. Issue 2: Has the failure to comply with s. 61A of the Act affected the result of the election?

82. Given my finding that the First Respondent or his agents have not contravened s. 61A of the Act, I need not determine this issue.

83. Mr Kalotrip also conceded that the Petitioner had not brought any evidence that the First Respondent's conduct affected the result of the election. The effect is that even if I had answered Issue 1 the other way, the Petition would likely still have failed as there was no evidence brought that the failure to comply with s. 61A affected the result of the election.

H. Costs to be paid personally by lawyers

84. Rule 15.26(1) of the *Civil Procedure Rules* provides:

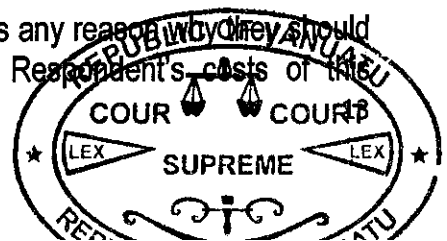
15.26 (1) *The court may order that the costs of the whole or part of a proceeding be paid by a party's lawyer personally if the party brings a proceeding that:*

(a) *has no prospect of success, is vexatious or mischievous or is otherwise lacking in legal merit; and*

(b) *a reasonably competent lawyer would have advised the party not to bring the proceeding.*

85. Given the way Petitioner's counsel conducted this proceeding, it had little prospect of success and lacked legal merit. Consequently Ms Kaukare and Mr Kalotrip should have advised their client not to bring the proceeding.

86. I therefore asked Ms Kaukare and Mr Kalotrip if there was any reason why they should not personally pay the whole or a part of the First Respondent's costs of this



proceeding. Mr Kalotrip attempted to lay this at the feet of Mr Yawha, the principal of their firm. I stated that it was not befitting that he make such a submission when he and Ms Kaukare appeared for the Petitioner throughout the hearing of this Petition. He stated that it was for the Court to decide. Ms Kaukare stated that like Mr Kalotrip, it was for the Court to decide.

87. Having given Ms Kaukare and Mr Kalotrip the opportunity to be heard, I order that the Petitioner pay a third of the First Respondent's costs and that the other two thirds be personally paid by Ms Kaukare and Mr Kalotrip.

I. Result and Decision

88. In conclusion, I answer each of the issues as follows:

- Have the First Respondent and his agents contravened s. 61A of the Act? "No."
- Has the failure to comply with s. 61A of the Act affected the result of the election? "I need not determine this issue."

89. The allegations against the First Respondent have not been established to the Court's satisfaction on a balance of probabilities and the Petition is accordingly dismissed.

90. Further, I declare that the First Respondent was duly elected.

91. Having given Ms Kaukare and Mr Kalotrip an opportunity to be heard, I order that the Petitioner pay a third of the First Respondent's costs and that the other two thirds be personally paid by Ms Kaukare and Mr Kalotrip. These costs are on the standard basis as agreed or taxed by the Master. Once settled, the costs are to be paid within 21 days.

DATED at Port Vila this 3rd day of July 2020
BY THE COURT


.....
Viran Molisa Trief
Judge

