IN THE SUPREME COURT OF

THE REPUBLIC OF VANUATU

(Civil Jurisdiction)

Civil

Case No. 22/1698 SC/CVL

BETWEEN: DON KEN

Petitioner

AND: MP GRACIA SHADRACK

First Respondent

AND: ELECTORAL SERVICE COMMISSION

Second Respondent

Date of first hearing: 2nd December 2022

Before: Justice S M Harrop

Counsel: Mr R. Rongo for the Petitioner

Mr J. Tari for the First Respondent

Ms J Toa for the Second Respondent

Further Submissions: 5, 6 and 7 December 2022

Date of Judgment: 8th December 2022

Judgment as to whether there Is a Foundation for the Election Petition

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Introduction

1. In the general election held on 13 October 2022 Mr Gracia Shadrack was elected as one of the seven MPs for Malekula Island.

2. Mr Don Ken was the highest polling unsuccessful candidate in the Malekula election with 88 fewer votes than Mr Shadrack[1].

3. The result of the general election was published in the Gazette on 24 October 2022.

[1] Mr Shadrack received 760 votes but the lowest polling successful candidate was Hymak Anatole who received 726 votes; Mr Ken received 672 votes.

REPUBLIC OF VANUATU

4. Under section 57 of the Representation of the People Act CAP 146 (the Act) an election petition challenging the result of an election must, subject to s 57 (2), be presented within 21 days of the publication in the Gazette of the results of the election to which the petition relates.

5. Section 57(2) provides: "*If a petition alleges a specific payment of money or other reward after an election by or on the account of a person whose election is disputed, the petition may be presented within 21 days of the alleged payment*".

6. Section 57 (3) provides that the 21-day time limit "*shall not be extended*".

7. At 4:15 pm, on 14 November 2022, the last of the 21 days allowed, Mr Ken filed an election petition claiming that Mr Shadrack "was not validly elected for the seat of Malekula Island because he has breached section 43 of [the Act]".

8. Section 43 of the Act provides:

> "**43. Unauthorised voting**
>
> *Any person who knowingly votes –*
>
> *(a) at an election at which he is not entitled to vote;*
>
> *(b) more than once at an election;*
>
> *(c) at a polling station where he is not entitled to vote; or*
>
> *(c) as a proxy knowing the person for whom he votes has already voted or is no longer qualified to vote,*
>
> *commits an offence and shall be liable on conviction to a fine not exceeding VT 50,000 or to imprisonment for a term not exceeding 2 years or to both such fine and imprisonment.*

9. The stated grounds of Mr Ken's petition were: "*In fact, evidences will show that there are numbers of void proxy's around Malekula Constituency which shows that many of the proxy have the names of dead people who are already dead but the Electoral office still allow their names appear on the proxy. Also, there are names of peoples who lives in Santo, Vila and RSC workers who did not authorise anyone or the Electoral office staffs to have their names on the proxy and even did not authorise anyone to vote on their behalf when election rules do not permit him to do so. However, people who have made the proxy have vote for the first respondent on behalf of people who lives in Vila, Santo and RSC workers without authorisation of those people concern. The petitioner is the runner-up of the first Respondent and the difference in the number of votes is 88*" (sic).

10. The petition seeks a declaration that Mr Shadrack's election was void and a declaration that Mr Ken is the elected candidate for Malekula Constituency. In the alternative, Mr Ken seeks an order for a by-election.

11. At the time of filing his petition Mr Ken filed a brief sworn statement in support. This added nothing to the substance of the petition itself but in effect confirmed its contents on oath.

12. Paragraphs 1 and 2 of that statement confirm Mr Ken's candidature and that his petition asserts Mr Shadrack was not validly elected because he has breached section 43 of the Act.

13. Paragraph 3 of Mr Ken's sworn statement begins: "*In fact I will file my main sworn statement which will come in later which will adduce the, evidences which will show….*" [thereafter it is identical to the stated grounds of the petition quoted above].

14. This case having been allocated to me, on 15 November 2022 pursuant to Rule 2.5 of the Election Petitions Rules (EPR), I allocated the first hearing at Dumbea for 2 December 2022 at 10:30 am.

15. The notice of hearing was served on the second respondent on 21 November 2022 and on the first respondent on 30 November 2022.

16. On 28 November 2022 the petitioner filed sworn statements from Leah Mail and Hellena Buktan, then on 1 December 2022 his own further sworn statement which attached 33 witness statements apparently taken by police officers at Lakatoro between 10 and 17 November 2022[2].

17. Essentially the petitioner alleges various improprieties by Mr Shadrack and his younger brother Cliffson in arranging for a substantial number of invalid proxy votes, presumably in favour of Mr Shadrack.

The First Hearing on 2 December 2022

18. Mr Rongo appeared in support of the petition; will Mr Tari appeared for the first respondent and Ms Toa for the second respondent.

19. After some initial discussion with Mr Rongo about the underlying allegations Mr Ken makes, both Mr Tari and Ms Toa submitted that I could not be satisfied that there is a foundation for the petition[3] and that I must therefore strike it out [4] because the only documents filed within the 21 days permitted were the brief petition and brief sworn statement in support, which promised further evidence but did not itself contain any. In effect they submitted that there cannot be the requisite "foundation" for a petition unless it complies with the mandatory requirements of the EPR.

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[2] With the exception of one which appears to have been taken on 17 October 2022.
[3] As required under Rule 2.6 (2) (a)
[4] Pursuant to Rule 2.6 (3)

20. I allowed Mr Rongo until 5 December to file written submissions in opposition to the oral application to strike the petition out and counsel for the respondents to file reply submissions if they wished to do so. All counsel did so. I am grateful they each did so promptly and in accordance with the timetable I directed.

Submissions

21. In his submissions Mr Rongo confirmed the petitioner claims that Mr Shadrack was not validly elected because he has breached s43 of the Act and that "all his dealings up to his winning amount to corrupt practices which amount to criminal activities".

22. Mr Rongo said the additional sworn statements, containing the evidence said to support the petition, were filed outside the 21 days simply because the complaints to the police were only filed after that. He added that, even now, the petitioner cannot provide evidence about the allegedly void proxy votes without an order from the court permitting him to inspect the ballot boxes so as to compare the votes cast with the complaints made by the complainants at the Lakatoro police station.

23. Accordingly Mr Rongo seeks an order allowing the petitioner to inspect the ballot boxes within seven days and, I infer, a further reasonable but brief time to file further evidence in support of the petition.

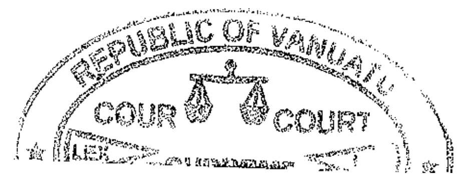
24. In response to a Supreme Court judgment, relied on by the respondents at the first hearing, *Joe v Andy*[5], Mr Rongo noted that in that case the court had allowed the petitioner an extension of time to amend his petition within seven days. By analogy, Mr Rongo said the petitioner ought to be given seven days to inspect the Malekula ballot boxes.

25. For the first respondent Mr Tari submitted that it is not enough under s61 of the Act, to give the power to the Supreme Court to declare an election void, for a petitioner to establish non-compliance with s43 (or any other provision of the Act). The petitioner must in addition satisfy the court (relevantly) under section 61 (1) (b) that "*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*" or, alternatively, under s61(1)(d) "*there was such irregularity in the counting of the votes as may reasonably be supposed to have affected the result of the election*".

26. Mr Tari submits there is no allegation as to how the alleged non-compliance with section 43 affected, or may reasonably be supposed to have affected, the result of the election. He points out there is no evidence whether any allegedly invalid proxies were cast, if they were cast who did so and whether any such proxies were cast in favour of the first respondent, as opposed to another candidate.

27. Mr Tari also submitted that the requirements of Rule 2.3 of the EPR had not been complied with and that the strict time limit in s57 meant that Mr Rongo's application for inspection of the

[5] [2020] VUSC 77; Election Petition 909 of 2020



ballot boxes must be refused. The petition should be struck out under Rule 2.6 (3) for these various reasons as having no foundation.

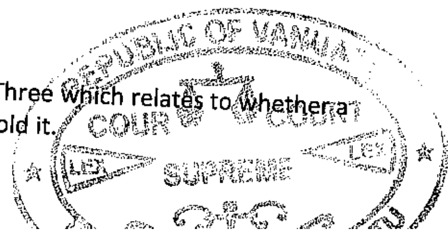
28. For the second respondent, Ms Toa emphasised the s57 time limit was not extendable and that the petitioner had waited until the last of the 21 days before filing the petition without all of the sworn statements in support. She submitted the sworn statement that he did file with his petition failed to disclose a foundation for it.

Discussion and Decision

29. Rule 2.3 of the EPR sets out the criteria for what a petition under Part Two[6] of the Act must contain. It provides:

> ***2.3 What a petition must contain***
>
> *(1) A petition must set out:*
>
> *(a) whether the person was registered to vote, or claims to have been a candidate, at the election; and*
>
> *(b) the grounds on which the election is disputed; and*
>
> *(c) the facts on which the petition is based; and*
>
> *(d) an application for an order about service of the petition.*
>
> *(2) The petition must have with it:*
>
> *(a) a sworn statement by the petitioner in support of the petition, setting out details of the evidence the petitioner relies on; and*
>
> *(b) any other sworn statements that support the petition.*
>
> *(3) A sworn statement must be in Form 2.*
>
> *[NOTES: 1. A petition may only be brought by a person who was registered to vote, or claims to have been a candidate, at the election. See s.55 of the Representation Act.*
>
> *2. The petition must set out the grounds on which the election is disputed. See s.58 of the Representation Act.]*

[6] Part Two relates to challenges to the validity of an election to Parliament, as opposed to Part Three which relates to whether a person validly elected to Parliament has vacated his or her seat or has become disqualified to hold it.



30. Rule 2.3(2), by its use of the introductory words "must have with it", means that the sworn statements referred to thereafter in (a) and (b) must be filed at the same time as the petition. "With" implies contemporaneity.

31. Even if that interpretation were wrong, in combination with the immutable[7] deadline in section 57, the effect of Rule 2.3 is that the petitioner must file all of his or her sworn evidence supporting the petition before the expiry of the 21 days. The fact that, in s57(2), Parliament has permitted only one very limited exception to that deadline, namely where the petition alleges a specific payment of money or other reward, and even then only one which is made *after* an election, serves to reinforce both the strictness of the time limit and the need to file all sworn evidence before it expires.

32. What this means in practical terms is that, other than in the circumstances coming within s57(2), a candidate who has concerns about the legitimacy of an election, no matter what the basis of that concern may be, has to act urgently. In this case the period of time between the election day itself, 13 October 2022 and the expiry of the 21-day deadline on 14 November 2022, just over a month, was the maximum time Mr Ken or anyone else had to gather evidence.

33. Even where, as alleged here, it is either difficult or impossible for a petitioner to obtain the relevant evidence in time to meet the 21-day deadline, Parliament has not permitted the extension of that period, no matter how good the reason justifying extension might be. I infer this reflects the need for promptly-established certainty of election results and for consequential urgency on the part of those wishing to challenge the formally declared results.

34. I accept the submission for the respondents that the petitioner has failed to comply with both Rule 2(a) and 2(b), the requirements of which are cumulative. Mr Ken's initial sworn statement in support of the petition does not "set out details of the evidence" he relies on. It merely refers in a very general and vague way to various forms of proxy impropriety, repeating the wording of the petition itself. On its face indeed it expressly disavows that it is providing details of the evidence relied on because it says: *"In fact I will file my main sworn statement which will come in later which will adduce the evidences…"*

35. As to rule 2(2)(b), there were no other sworn statements filed with the petition, or at any time before the expiry of the 21-day period. Accordingly, the respondents submit that I must put to one side the three statements filed after the 21 days expired on 14 November and assess whether there is a foundation for the petition based solely on Mr Ken's initial sworn statement. Further, if I find there is a sufficient foundation, the petitioner should not be permitted to file or rely on any further evidence prior to the hearing because it is all required to be filed with the petition.

36. Counsel for the respondents relied on the judgment of Justice Saksak in *Joe v Andy*[8]. In that case the petitioner filed his petition on 27 April 2020 together with a sworn statement in support. At the first hearing on 29 April 2020 counsel for the petitioner sought leave to file an amended petition within seven days, which was granted over the opposition of the respondent.

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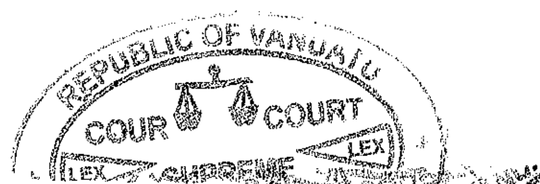
[7] Subject to s57(2) which does not apply here.
[8] [2020] VUSC 77; Election Petition 909 of 2020



With reference to Mr Rongo's submission that by analogy his client should be permitted seven days to inspect the proxy votes, I note that it is not clear from the judgment when the 21-day period expired in that case. It may well be, given the first hearing was only two days after the petition was filed, that the seven days was included in the 21 days.

37. When the petition was called again on 12 May 2020 for the Rule 2.9 conference, counsel for the petitioner had not filed an amended petition and instead sought to rely on the original petition. He had filed 14 sworn statements on 11 May 2020.

38. Counsel for the respondent submitted that Rule 2.3(b) had not been complied with when the petition was filed on 27 April 2020.

39. Justice Saksak dismissed the petition because the petitioner's sworn statement filed on 27 April 2020, while it set out the details of his allegations, provided no evidence in support of them. The 14 other sworn statements, which by inference did contain evidence in support of the allegations, had been filed well outside the 21-day period allowed by section 57 (1) of the Act. His Lordship ruled that they should have been filed with the petition on 27 April 2020[9]: "*When the petition was filed on 27th April it was filed with the petitioner's sworn statement setting out the details of his allegations. But there were (sic) no evidence in support of those allegations" ....Rule 2.3(2)(b) was not complied with. And the statements filed on 11 May 2020 have been filed well outside of the 21s days period allowed in s 57(1) of the Act.*"

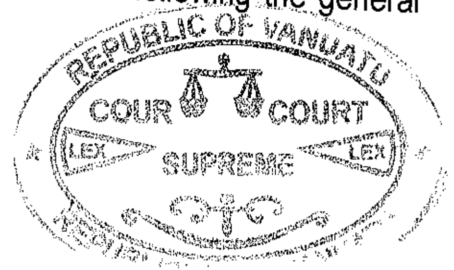
40. Justice Saksak followed the judgment of the Chief Justice in *Job Andy v Electoral Commission*[10] where the petitioner had, within time, filed his petition and a sworn statement in support setting out details of the evidence he relied on, but no other sworn statements. The petitioner told the court on 19 February 2016 that the supporting statements *would* be filed within the 21 days but they were not filed until March and April 2016, outside the s57 time limit.

41. The Chief Justice held: "*In my judgment, the petition filed by the petitioner, although it may have a foundation, it is incomplete and is not validly presented by the petitioner within the mandatory prerequisites under section 57 (1) of the Act and the requirements of Rules 2.3(2)(b) and 2.5(1) of the [EPR]. The petition as envisaged under section 57 (1) of the Act is the petition presented (filed) inclusive of the sworn statements that support the petition as provided in the [EPR].*

The [EPR] are made consistently with the provisions of [the Act] and in particular ss. 57, 58 and 59. The [EPR] must be read and applied consistently with the provisions of the Act as those Rules provide and require. Election petitions are serious matters. They challenge the wishes of the majority of electors in an election petition. Those who instigate any challenge must comply with the mandatory prerequisites under ss. 57(1)(2) of the Act and [the EPR]"

42. In *Joe v Andy* Justice Saksak also referred to and applied the Court of Appeal judgment in *Jimmy v Rarua*[11]. An election petition was filed on 24 March 1998 following the general

[9] At paragraphs 12 and 15
[10] [2016] VUSC 69; Election Petition 16/238
[11] [1998] VUCA 4; Civil Appeal Case 02 of 1999



election which had taken place on 6 March 1998. On 3 December 1998 an application to strike out the petition for delay was heard. In response the petitioner sought to amend his petition by filing amended grounds. The Supreme Court judge granted leave that day although there was only limited argument about the meaning and effect of s57 of the Act. On 22 January 1999 an application to strike out some of the amended grounds was heard and refused. The respondents appealed. The

43. The issue before the Court of Appeal was whether the 21-day period in s57 precluded any substantial amendment to the ground outside that period. It was held that it did. The court said: "*Parliament in this jurisdiction has determined that when there is an election petition there is to be enumerated within the 21 day period (from which there can be no extension) a clear statement of the matters complained of.*"

44. The court approved the observations of the Acting Chief Justice *in Naukaut and Naunum & Others*[12]: '*under [the Act] the Supreme Court has no jurisdiction to allow an amendment of the petition after the time prescribed by statute by the introduction of a fresh substantive charge; nor to convert an offence charged under one statutory related provision, although the facts might support the latter offence… There is no jurisdiction to allow an amendment introducing a fresh charge, whether the charge sought to be added is one only of a fresh nature, or whether it is one of fresh instance but not covered by the allegations in the Petition as standing.*"

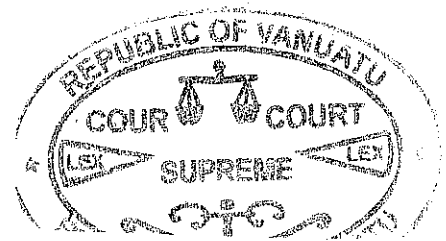
45. The court also approved what Chief Justice Cooke had said in a 1982 case:[13] *I considered the argument of both counsel and ruled that under the act only 21 days from the publication in the Gazette of the results of the election is allowed to a petitioner to lodge his petition. The petition means whatever the grounds for objecting to the result of an election must be filed within the 21 days. If additional grounds were lodged within the 21 day period, they would be accepted by the court. Section 53(3) categorically states that the limit shall not be extended…. If this subsection had not been included in the section of the act the court may well feel inclined to grant some latitude to the petitioner but in view of its inclusion, I hold that Parliament considered 21 days adequate to file all the grounds of the petition. I ruled therefore that the additional grounds of the petition being out of time cannot be argued by the petitioner.*"

46. Applying these statements of principle and the approach of both the Supreme Court and the Court of Appeal in these earlier cases, it is obvious that this petition must be struck out because I cannot be satisfied there is a foundation for it, on consideration (only) of the documents filed before the 21-day period expired.

47. The election petition and Mr Ken's initial brief sworn statement merely contain broad unparticularised allegations without any, let alone sufficient, supporting evidence. Rule 2.3((2)(a) was not complied with because, while the petition had a sworn statement by the petitioner filed with it, that statement did not set out details of the evidence relied on; it merely referred in a very general way to allegations of impropriety relating to proxies. It was not, as it was required to be, a detailed setting out of evidence on which the petitioner relied.

[12] Election Petition No. 31 of 1998.

[13] *Willie Jimmy* – Civil case 126-92 Vol. 1 VLR 1980-88 at 42-43



48. The requirement of Rule 2.3 (2) (b), which is cumulative on that in Rule 2.3(2)(a), was also not complied with because none of the other sworn statements supporting the petition were filed with the petition (or later, but still within the 21-day period).

49. These shortcomings alone are sufficient for the petition to be struck out.

50. I uphold the submissions of the respondents seeking striking out, including that of Mr Tari as to the absence of any evidence that any non-compliance affected the result of the election or may reasonably be supposed to have affected it.

51. Had it been necessary, I would also have found the petition was insufficiently particularised in enumerated paragraphs[14] and that the bald allegation that Mr Shadrack himself had breached s43 was a questionable basis for a petition since that section is directed at criminal conduct by a particular voter. The conduct of one voter could not be expected to affect the outcome of an election. My understanding is that Mr Ken alleges something different: coordinated action by Mr Shadrack and his younger brother to arrange for invalid proxies. That may very well be a proper basis for a petition under one or more other sections of the Act but not section 43.

52. I reject Mr Rongo's request for an order for inspection of the ballot boxes and time to file an amended petition in light of what may be found; as the Court of Appeal made clear in *Jimmy v Rarua,* there is a prohibition on adding fresh grounds to a petition outside the 21-day period.

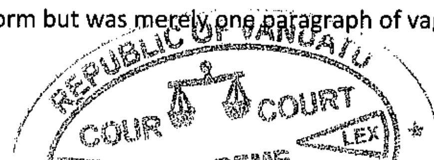
53. The combined provisions of the Act and the EPR, the meaning and application of which have been made clear by both the Supreme Court and the Court of Appeal, place a heavy onus on anyone challenging officially-declared election results published in the Gazette to formulate in a petition a detailed, enumerated list of grounds and to place before the court all of the petitioner's evidence before the expiry of the 21-day period. It might be said that Parliament has made a policy decision that even if there are some underlying concerns about the validity of an election result then, unless those are clearly articulated and supported by detailed sworn evidence within 21 days, the result, representing the wishes of the majority of the electors, will stand. After allowing a clear but time-limited opportunity for challenge, Parliament has effectively said that certainty is more important than perfection.

<u>Result</u>

54. The election petition is struck out under rule 2.6 (3) of the EPR because I am not satisfied that there is a foundation for it.

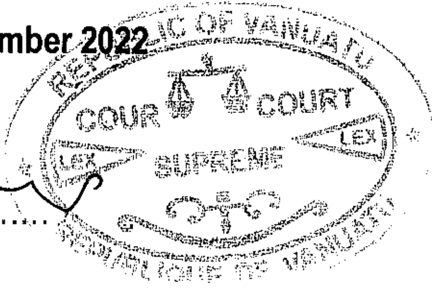
55. I award costs to the first and second respondents against the petitioner in the sum of VT50,000 each, a total of VT100,000. The VT20,000 deposit lodged by the petitioner is to be used for part payment of these costs.

[14] See Form 1 in the Schedule to the EPR; here the petition did not follow that form but was merely one paragraph of vague and general allegations relating to proxies.



Dated at Port Vila this 8th day of December 2022

BY THE COURT



Justice S M Harrop