

**IN THE MATTER OF: ELECTION OF
MEMBERS OF PARLIAMENT OF THE
REPUBLIC OF VANUATU**

**AND IN THE MATTER OF: THE
REPRESENTATION OF THE PEOPLE'S
ACT [CAP.146]**

BETWEEN: ABERT MOSES MARIASI
Petitioner

AND : JOHN ROBERT ALICK
1st Respondent

AND : THE ELECTORAL COMMISSION OF
VANUATU
2nd Respondent

Coram : Mr Justice Oliver A. Saksak
 Mrs Glenda Gamma – Clerk

Counsel : Mr John Malcolm for the Petitioner
 Mr Edward Nalial for the First Respondent
 Mr Bill Bani Tangwata for the Second Respondent

JUDGMENT GIVING REASONS FOR ORAL DECISION

The hearing of this Petition commenced on Monday 1st march 1999 and lasted for two days. After hearing the evidence, arguments, submissions and responses on Tuesday 2nd March, 1999 I gave judgment in favor of the Petitioner and pronounced the following Declarations and Orders that:-

- (1) Pursuant to section 60(1)(a) of the Representation of the People Act [Act 146] the National General Election to Parliament of the Republic



of Vanuatu held on 6th March 1998 for the Constituency of Tongoa is hereby declared void.

- (2) Pursuant to section 61(1) of the Representation of the People Act [CAP 146], it is hereby declared that the National General Election of the Constituency of Tongoa on 6th March 1998 is void due to the breaches by the First Respondent of the provisions of section 50(1) of the Representation of the People Act [CAP 146].
- (3) Pursuant to section 61(1) of the Representation of the People Act [CAP 146], it is declared that the National General Election for the Constituency of Tongoa on 6th March 1998 is void due to the breaches by the Second Respondent, its servants and agents of section 34 and schedule 4, and section 52(g) of the Representation of the People Act [CAP 146] (the Act).
- (4) The Respondents pay for the costs of the Petition to be taxed failing agreement.
- (5) The Petitioner pays the Second Respondent's costs in respect of withdrawal and dismissal of the allegations contained in Grounds 1, 3, & 4 of the Petition.

The Court now provides the reasons for its findings, declarations and Orders in the passages that follow.

1. PARTIES AND LOCUS STANDI OF PETITIONER

The Petitioner, Abert Moses Mariasi was a candidate in the National General Elections (the Elections) held on 6th March 1998 for the Constituency of Tongoa. He is affiliated with Vanuaaku Pati (VP) for the purposes of the Elections to Parliament.

The First Respondent, John Robert Alick was the successful candidate in the Elections of 6th March 1998 for the Constituency of Tongoa and he is affiliated with National United Pati (NUP) for the purposes of the Elections to Parliament.

The Second Respondent is the Electoral commission of the Republic of Vanuatu.



As between the Petitioner and the First Respondent there was no issue as to locus standi. The Second Respondent did not challenge the status of the Petitioner but neither did they indicate acceptance.

Section 55 of the Act provides for persons who may present election petitions. Section 55 reads:

“An election petition may be presented by one or more of the following-

- (a)
- (b) a person claiming himself to have been a candidate at such election.”

On 27th February 1998 the Second Respondent caused to be published list of candidates for the Elections to be held on 6th March 1998. Under paragraph 12, 9 candidates contested for 1 seat whose names are:-

Pakoa Willie Calo Timatua-	Union of Moderate party (UMP)
John Robert Alick -	National United Party (NUP)
Abert Moses Mariasi -	Vanuaaku Pati (VP)
Pakoa Amos -	Melanesian Progressive Party (MPP)
George Willie Siri -	Vanuatu Republic Party (VRP)
Kenneth Daniel S.T. Pila -	Liberal Party (LP)
David Robert Amos -	Independent Candidate (IND)
Kalsaruru Amos -	IND
Richard David Fandanumata-	IND

On the 16th March 1998 after the Elections, the Second Respondent caused to be published results of the Elections. At paragraph 12 for the Constituency of Tongoa the following information are show:-

Registered voters:	1,811
Votes cast:	1,129
Turn out:	62%
Void votes:	5
Valid votes cast:	1,124

<u>Candidate</u>	<u>Affiliation</u>	<u>Votes</u>
Pakoa Willie Calo Tiamatua	UMP	214



John Robert Alick	NUP	348
Abert Moses Mariasi	VP	311
Pakoa Amos	MPP	24
George Willie Siri	VRP	52
Kenneth Daniel S.T. Pila	LP	20
David Robert Karie	IND	63
Kalsaruru Amos	IND	5
Richard David Fandanumata	IND	83

Copies of the Official Gazette in which the list of candidates and official results were published were annexed to the Petitioner's Petition as Annexures "A" and "B". I have seen those documents and I am satisfied that the Petitioner has standing in this matter for the purposes of section 55 of the Act.

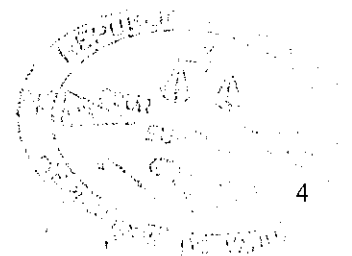
2. PETITIONER'S PRAYERS

The Petitioner sought declarations and orders that-

- (a) Pursuant to section 60(1)(a) of the Act the Elections held on 6th March 1998 for the Constituency of Tongoa be declared void.
- (b) Pursuant to section 61(1) of the Act the Election of the First Respondent as Member of Parliament on 6th March 1998 be declared void due to breaches by him of the provisions of section 50(1) of the Act.
- (c) Pursuant to section 61(1) of the Act the Elections held on 6th March 1998 for the Constituency of Tongoa be declared void due to breaches by the Second Respondent, its servants and agents of section 34, schedule 4, Part VII and section 52(g) of the Act.
- (d) Such further order or relief as the Court deems just.
- (e) The Respondents pay the costs of the Petition.

3. THE GROUNDS

First Ground – Discrepancy of Electoral Records.



The Petitioner alleged that in 1995 the number of registered voters for Tongoa/Shepherds Constituency was 2,391. In 1998 the Second Respondent's records indicate registered voters for Tongoa Constituency was 1,811 and for Shepherds Constituency was 1,082 a total of 2,893. This the Petitioner alleged was an increase of 502 voters representing a 20.9% increase. Such an increase was not possible due to the static nature of population growth in the area Tongoa/Shepherds constituency. He alleged further that during 6th March 1998 elections the total registered voters for 6 polling stations on Tongoa amounted to only 1,767 and not 1,811 as shown by the second Respondent's records showing a difference of 44 additional voters. It is contented by the Petitioner that on the basis of this discrepancy the integrity of the electoral role registration system and the result of the Elections for the constituency of Tongoa were open to grave doubt.

Second Ground -Breach of Section 34 and Schedule 4 of the Act

The Petitioner alleged that during the Elections there were many examples of persons voting by proxy votes by voters whose circumstance were that they were registered at more than one Polling Station.

Third Ground - Breach of Part VII of the Act

The Petitioner alleged that the greatest majority of voters registered in the Constituency for Tongoa have no citizenship numbers entered in their electoral cards which has led to duplicate registrations and voting under different names in the Constituency of Tongoa.

Fourth Ground – Breach of Section 16 of the Act

The Petitioner alleged that the electoral list for the Constituency of Tongoa was not made available for inspection by the public during the immediately preceding calendar year during a period ended on 15 June 1997. The result being that persons whose names were removed after the 1995 election were not able to inspect the electoral list and make an application before the end of the inspection period for inclusion of their names in the list.

Fifth Ground - Breach of section 50(1) of the Act



It is alleged by the Petitioner that during the Elections at Itakoma Polling Station the First Respondent was for lengthy periods throughout the entirety of polling-

- (a) standing within 100 meters of the polling station;
- (b) failing to wear any badge or identification as provided for in Rule 8(2) of Schedule 5 of the Act.
- (c) Holding deliberations and/or discussions with voters.

Sixth Ground - Breach of section 52(g) of the Act

It is alleged that a voter who produced his electoral card identity in the name of Kalo Pakoa attended at the Silimaui Polling Station to vote during the Elections, but due to a typographical error on the electoral list the NUP Observer Mr Pakoa Charlie protested against Mr Kalo Pakoa casting his vote and was eventually refused to cast his vote by the Presiding Officer Ms Annie Margaret.

4. THE BURDEN AND STANDARD OF PROOF

The Onus is on the Petitioner to prove his case according to the civil standard of proof, that is to say on the balance of probabilities. I was referred by Mr Malcolm to Election Petition No.29 of 1998 - Peter Salemalu -v- Paul Ren Tari and Electoral commission, and election Petition No.31 of 1998 - Shem Naukaut -v- Harris Naunun & Ors. These cases provide firm authority for holding that the standard of proof is a civil standard.

5. EVIDENCE

Counsel for the Petitioner led oral evidence from the Petitioner himself and four other witnesses namely William John, Roy Isaiah, Kalo Pakoa and Morten Rarua. These four witnesses had filed written statements on 9th June 1998 over which they were cross-examined.

Counsel for the First Respondent led evidence from the First Respondent and also oral evidence from two other witnesses namely Toara Masoe and Toara Alick. The First Respondent filed an affidavit on 17th February 1999 over which he was cross-examined.



Counsel for the Second Respondent led oral evidence from Tom Alick Kalo, Deputy Principal Officer and Annie Margaret, Presiding Officer at Silimaauri Polling Station. Affidavit of Jeanette Bolenga, paragraph 7 was read in as evidence. Further the affidavit of Kepoue Manwo, Secretary of the Citizenship Commission of 6th July 1998 was admitted without objection as evidence.

6. AGREED FACTS

As between the Petitioner and the First Respondent the following facts were agreed:-

- (a) The Petitioner and First Respondent were candidates in the National Elections for the Constituency of Tongoa on 6th March, 1998.
- (b) The Petitioner received 311 votes.
- (c) The First Respondent received 348 votes.
- (d) On 6th March 1998 the First Respondent admitted attending within 100 meters of the Itakoma Polling Station.
- (e) The First Respondent admitted having discussions with 4 persons present but denied the discussions were political.

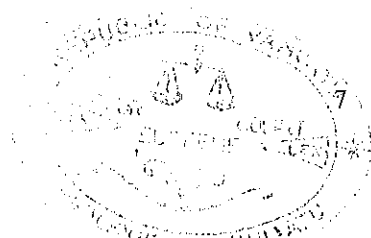
No facts were agreed as between the Petitioner and the Second Respondent.

7. GROUND WITHDRAWN

During opening of the Petitioner's case Counsel for the Petitioner informed the Court that the Third and Fourth Grounds of the Petitioner's Petition were withdrawn. The withdrawals were confirmed upon satisfactory explanatory given by the Second Respondent or servants or agents in their evidence.

8. THE REMAINING GROUNDS 1, 2, 5 and 6

I deal firstly with the First Ground. This concerns only the First Respondent, John Robert Alick who was declared elected by the Second Respondent. He admitted being within 40 meters of the polling station of Itakoma. He admitted talking only to four people and he denied that he had political discussions with them. He deposed to an affidavit to that effect and produced two witnesses who confirmed the First Respondent's facts who were cross-examined on their evidence. I was not impressed by the First Respondent



and his witnesses as truthful witnesses. I refer to parts of their evidence to show inconsistencies firstly regarding their conversation.

Defence witness Toara Masoe (T.M.)

Edward Nalial (E.N.) - “Wanem yutufala itokabaot ?”
TM - “About 5 minit ipas Toara Alick ikam wetem. waef blong hem. Solwota I gud. Mifala istap talem se sapos mifala ifinis, mifala igo long solwota. John ino toktok.”

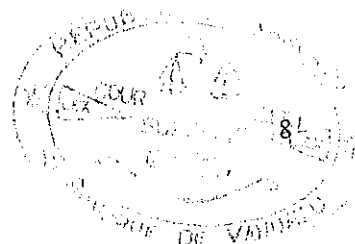
Defence witness Toara Alick (T.A.)

EN - “Long 6 Maj wanem I happen?”
TA - “Mi mo waef blong mi igo blong hem iko insaed finis. Mr Alick istaon istap. Mifala istap storian ino wetem MP Alick be wetem tawian blong mi. Mifala istap storian abaot gud weta blong go long solwota mo ol pig we I kakae garen blong mifala.”

Defence witness – First Respondent – John Robert Alick (JRA)

JRA- “Oli tokabaot fishing mo ol pig we istap kakae garen blong olgeta mo sam samting moa be hemia nao tufala mein subjek blong olgeta.”

From these I found that the conversation about going fishing and the pigs destroying gardens were made up. If all these were true, the First Respondent should have said so in his affidavit dated 16th February 1999. I found their evidence contradictory and therefore this cast doubt on their truthfulness. None of the two witnesses say that the First Respondent was sitting with his back to the voters. The First Respondent said that but he failed to state it in his affidavit. When Toara Alick says that when he and his wife arrived Toara Masoe and his wife had already gone in to vote. That is inconsistent with what Toara Masoe says. And when Toara Alick says that he was having a conversation about fishing with his ‘tawian’ it indicates a lot more people were around at the time. When the First Respondent said that only the witnesses and their wives were talking about fishing and pigs, it was a lie because at paragraph 9 of his affidavit he admitted that he had general conversation with them.



Secondly I consider and summarize the witnesses evidence about time. John William for the Petitioner told the Court that he arrived at the polling station at 7 o'clock in the morning that day. The polling station opened at 7.30am. On arrival he said he saw the First Respondent already at the polling station where he stayed the whole of the morning until 12 o'clock noon. He told the Court that during that time, the First Respondent was moving around.

Roy Isaiah told the Court that he arrived at about 8 o'clock am. He said he saw the First Respondent on arrival and shook hands with him before he went into the polling station to take his place as an observer. He said he saw the First Respondent standing around until they closed for lunch.

For the First Respondent witness Toara Masoe said he arrived at the polling station at about 9.30 o'clock am. He said at that time the First Respondent was already at the station.

Toara Alick saw the First Respondent there but he could not tell what time he saw him.

The First Respondent said he was at home at 7.30am listening to radio messages. He said he went to the station at 8.30 am. He said he had no watch and did not know time. The following is part of his evidence in cross-examination by Mr J. Malcolm. (JM)

J.M. - What time did you go to the station?

J.R.A.- 8.30 am

J.M - How many people were there?

J.R.A.- Don't know

J.M. - Was there much line?

JRA - Yes

JM - You sat there all on your own until 9.30am?

JRA - Can't say

JM - Why didn't you just go vote and leave?

JRA - I respected the line.

JM - You sat from 8.30am until polling closed?

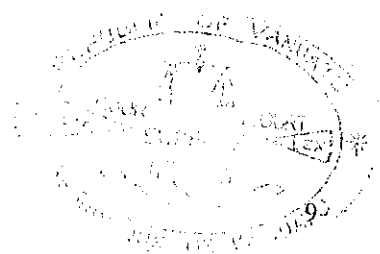
JRA - "Mi no save"

JM - When did it close?

JRA - "Mi no save."

JM - You sat for 3 hours?

JRA - "Mi no save."



JM - What time did you vote?
JRA - "Mi no save".
JM - How long was voting?
JRA - "Mi no save."
JM - How long is it from your village to the station?
JRA - "Mi no save time, no watch."

The Court put some specific questions to the First Respondent.

CT - When were you born?
JRA - 1957
CT - Where did you attend school?
JRA - "Attended Onesua High School from 1972-1974. 1975, went to Honiara Techniques took up plumbing course until 1978. Worked at British works until 1980 when it was transferred to Vanuatu Government. In 1993 I was terminated and I went home."

For someone well educated as the First Respondent to say that he did not know time is beyond belief. In both his affidavit evidence and oral evidence he is very firm about the time he arrived at the station being 8.30am. How he knew that when he said he did not have a watch and could not tell the other times and simply replied "Mi no save" is clear indication of a lie. I am prepared to accept the evidence that the First Respondent was at the polling station at 7.00am until it closed for lunch at 12.30pm as the truth. He was at the polling station for some 5 ½ hours.

The Law – section 50(1) of the Act reads:-

"During the hours of polling no person shall within 100 meters of any polling station-

- (a) seek to influence any person to vote for any candidate;
- (b), or
- (c) hold any deliberations or discussions."

Finding

I found that the First Respondent was within 40 meters of Itakoma Polling Station for 5½ hours during polling on 6th March. As a candidate the First Respondent could not and should not have to wait that long to exercise his democratic right to vote. He should have been given the priority to vote as all candidates in all elections should, or be given the right to vote by proxy



through his/their wives. Such would avoid the risk of all candidates breaching section 50 of the Act.

I was satisfied that when the First Respondent was in or at the polling station for 5½ hours he had defeated the lawful purpose of his presence there which was to vote, and his doing so amounted to a deliberate attempt to influence voters. As regards deliberations or discussions I was satisfied that some discussions took place. Discussions here need not be political but if such discussion is held between a group of 2 to 4 people who are voters for say three to five minutes from time to time, which discussion is accompanied by physical presence of the candidate as here, for 5½ hours, that action becomes a corrupt practice. For definitions I endorse the definitions given by His Lordship Vincent Lunabek, Acting Chief Justice in Civil Case No.29 of 1998 Nikenike Vurobaravu -v- Josias Moli & Or at pp. 23-24.

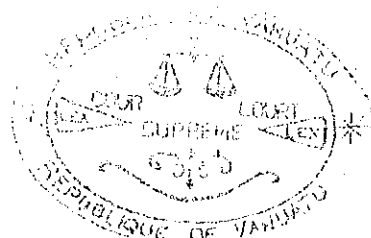
For the foregoing reasons the Court declared that the election of the First Respondent on 6th March was and is null and void.

First Ground

I found that the Petitioner did not call or produce any evidence to discharge the burden of proof that was on him in respect of this ground. I am persuaded by the explanations given by the Deputy Principal Electoral Officer and accept that there is no discrepancy of electoral records. For those reasons, the Court dismissed this ground.

Second Ground

This contained allegations of breaches of section 34 and Schedule 4 of the Act. These provisions regulate voting by proxy. It was alleged that there were many examples of persons voting by proxy voters whose circumstances were that they were registered at more than one polling station. And the Petitioner produced documents as Annexures "C" and "D" as an example of double registration showing names of seven voters who were registered to vote at Ecole Colardeau in Port-Vila and at the same time those same voters registered to vote at Itakoma Polling Station on Tongoa. The Court was not satisfied with the explanation given by Mr Tom Alick on behalf of the Second Respondent as to why that was so and what could be the remedy. With that evidence the results of the elections for the Tongoa Constituency is open to grave doubt which necessitates a bi-election. For



those reasons I found the allegations proved by the Petitioner and declared accordingly.

Sixth Ground – Breach of Section 52(g) of the Act

Section 52 reads:-

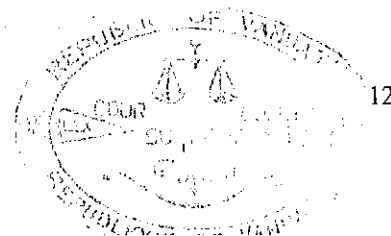
“Any election officer having any duty under this Act, who-
(g) without reasonable cause acts or omits to act in breach of his official duty, commits an offence and shall be liable on conviction to a fine not exceeding VT60,000 or to imprisonment for a term not exceeding 3 years or to both such fine and imprisonment.”

It was alleged that Annie Margaret had refused to allow Kalo Pakoa to vote for himself and in proxy for his two sons at Silimauro Polling Station. Kalo Pakoa gave evidence and produced his and his sons cards. One his son's card was stamped indicating that he had voted by mistake. He told the Court that he was refused to vote simply because there was a wrong individual number given on his card. He told the Court that a NUP observer had protested against his voting.

Annie Margaret, Presiding Officer at Silimauro Polling Station gave evidence. She confirmed that Kalo Pakoa was not allowed to vote because he had a wrong individual number on his card. She told the Court that the number 13/10 was allocated to a different person. She told the Court that Kalo Pakoa's number was eventually found as 1/3 but confirmed that she decided that he could not vote. She told the Court that some political observers had protested against Kalo Pakoa voting but that she had to take the final decision.

The 1997 Electoral Roll for Tongoa used for polling at Silimauro Polling Station on 6th March 1998 was produced into evidence. At page 13 line 10 there is no name, in other words there is a blank space. It is therefore untrue that 13/10 had been allocated a name. At page 1 line 3 the name of Kalo Pakoa appears. The particulars therein contained identify with the particulars on his card.

I find no reason at all why Kalo Pakoa should have been refused to vote and I find the decision by the Presiding Officer to refuse him to vote for himself and for his two sons by proxy was a breach of section 52(g) of the Act and I so ruled.



It was argued by Mr Tangwata on behalf of the Second Respondent that as a matter of law even if there was such a breach, it was not one that affected the results of the election for the constituency of Tongoa as required by section 61(1)(b) of the Act and therefore the elections should not be declared void. The basis of that argument is that only 3 people did not vote on 6th March and even if they had been allowed to vote, the result of the election would not have changed.

I would have no difficulty in accepting that argument if the only allegation in the petition was for breach of section 52(g). Here there have been multiple allegations. Even though a number of them have been withdrawn and/or dismissed the balance have been proven which makes it necessary for the whole elections for Tongoa Constituency to be declared void.

9. COSTS

For the Petitioner's success in bringing the Petition, it is proper that the Respondents pay his costs.

On the other hand where he has failed to prove his allegations and has withdrawn those allegations or have them dismissed by the Court, the Petitioner ought to pay the Second Respondents costs in defending those allegations. This I think should be defrayed or deducted from the deposit of the Petitioner paid under Section 56 of the Act and I so order.

PUBLISHED AT PORT-VILA, this 9th DAY OF MARCH, 1999

BY THE COURT HOUSE


.....
OLIVER A. SAKSAK

Judge

