

IN THE ELECTION DISPUTE COMMITTEE  
FOR THE REPUBLIC OF VANUATU

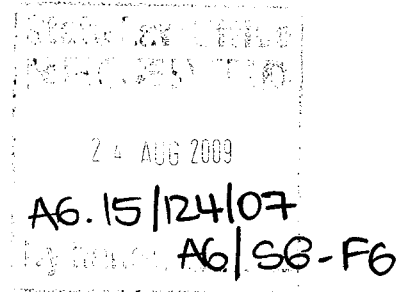
Election Dispute Case No. 2 of 2007

BETWEEN: **SELA ABRAHAM**  
- Petitioner

AND: **ELECTORL COMMISSION**  
- Respondent

Corum: Nesbeth Wilson (Chairperson)  
Cherol Ala (Member)  
Selwyn Garu (Member)

Mr George Boa appears for the Petitioner  
Mr Frederick Gilu appears for the Respondent



**DECISION**

The Petitioner in this case was a candidate contesting the Sanma Provincial Election in 2007. He obtained the same valid votes cast as one declared candidate Mr Edward Titipaia of 237 votes each. Mr Titipaia was then declared the last successful elected member of the Sanma Provincial Council on the basis that he was the eldest. The names of the elected persons to the Sanma Provincial Government were gazette on the 30<sup>th</sup> September 2007. The Petitioner filed his Petition in the Supreme Court at Luganville. The Petition was not dated and there is no filing date on the document received by the Committee.

The Petitioner now challenges the election of Mr Titipaia on the grounds that the Electoral Commission failed to consider the two candidate's birth certificates, and that the Petitioner is the oldest candidate. The Supreme Court in Luganville heard the matter by way of preliminary issue of whether it has jurisdiction to hear this election petition at first instance. The Court found that the matter should be heard and determined by the Election Dispute Committee and ruled accordingly.

The Petitioner seeks an order quashing the declaration of the election of Mr Titipaia Edward as councilor to Sanma Provincial Council and an order declaring the Respondent to declare Sela Abraham as duly elected councilor to the Sanma Provincial Council.

After the Supreme Court made the order on the 13 December 2007, the members of the Election Dispute Committee were appointed on the 19 June 2008. The Committee received the documents on the 9 October 2008 at 9.45am.

On or about 9 April 2009 the Committee directed the parties to provide records in relation to the release of the Petition from the Court Registry in Luganville and if there any records of any payment of deposit.

Another direction was made on or about 8 July 2009 directing counsels to make submissions in relation to the validity of the Petition, and the matter was adjourned to the 4<sup>th</sup> of August for the committee to make ruling on the issue.

The Petitioner's counsel filed his submission on the 17<sup>th</sup> July 2009 and the Respondent did not file their submission before 4 August as a result the committee further adjourned the matter to 24 August giving further time for the Respondent to file their submission. The Respondent's counsel filed their submissions on the 10<sup>th</sup> August 2009.

### **The Law**

The Local Government Election Petition Rules in accordance with the Decentralization Act [CAP 23] provides: -

#### **Rule 33 – Election Disputes Committee**

1. *There shall be an Election Disputes Committee which shall consist of three members, one of whom shall be the chairman, who shall be appointed by the Chief Justice by notice published in the Gazette...*

...4. *The names of the Election Disputes Committee together with the address of the Committee for service of Petitions shall be published in the Gazette*

#### **Rule 34 – Elections only to be challenged under these rules**

#### **Rule 35 – Persons who may present election petitions**

*An election petition may be presented by one or more of the following –*

- (a) *a person who is registered to vote at the election to which the petition relates;*
- (b) *a person claiming himself to have been a candidate at such election.*

#### **Rule 36 – Petitions only valid if deposit made**

1. *The presentation of an election petition shall not be valid unless within the time specified in rule 37, the person seeking to present the same lodges with the Election Disputes Committee a deposit of Vatu 100,000 as security for costs.*
2. ...
3. ...

#### **Rule 37 – Time for presentation of petitions**

- (1) *Subject to sub rule (2) an election petition shall be presented within 21 days of the publication in the Gazette of the results of the election to which the petition relates.*
- (2) *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.*
- (3) *The time limit provided for in this rule shall not be extended.*

#### **Rule 39 – Election petitions to be in writing and copies to be served on affected persons**

- (1) *An election petition shall be in writing and shall specify the ground or grounds upon which an election is disputed.*
- (2) *The proceedings of the Committee shall be conducted in English, French or Bislama ...*
- (3) *...*

#### **Rule 40 – Decisions of Election disputes Committee**

- (1) *On hearing a petition the Election Disputes Committee 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 the person whose election is questioned was duly elected.*
- (2) *The Election Dispute Committee may make such orders as to the payment of costs by any person appearing before it as it may deem fit.*

#### **Submissions**

The Petitioner submits that by virtue of the Supreme Court Ruling of 13 December 2007, this Committee has the jurisdiction to determine this election. There is no suggestion that the Supreme Court Ruling offends Rule 37(1) as regards filing the Petition within 21 days. Indeed such contention will now be untenable. For the appropriate forum to raise such contention was when the Supreme Court was seized of the Petition complies with Rule 37 (1) of the Act.

The Petitioner further submit that the Supreme Court Ruling has disqualified the relevance of the question posed by the committee. For to suggest that the Petition is now defective for want of compliance with Rule 37 (1) of the Act is akin to collateral attack on the Supreme Court Rulings. Indeed it is submitted, the Committee is now vested with the jurisdiction to determine the Petition. It need not ask itself whether the Petition is legal or not.

The Petitioner also submits, that the committee would exceed its jurisdiction if it continues to decide the legality or otherwise of this Petition on that basis alone. It is noted further that the Electoral Commission had not appeal the Supreme Court Ruling of 13 December 2007. The Appeal period has lapsed.

The Petitioner further submit that the pertinent questions which this committee must address are, did the Petitioner pay his deposit fee of Vatu 100,000 as required by Rule 36(1) of the Act and that if delay in submission of the election petition to the election dispute committee disqualify the legality of the election petition.

The Respondent submit that the ruling of the Supreme Court directing the Petition to be transferred to the Committee to determine the matter arises from the preliminary question posed by the Respondent at that time relating only to the question of Jurisdiction to hear the matter at first instance. The Respondent submits also that the ruling of the Supreme Court to transfer the matter to the Committee only meant for the committee to deliberate on the Petition in totality without the Supreme Court making any findings on the substance of the Petition. Accordingly the Respondent submits that for the Petitioner o

propose that any ruling now by the Committee would be a collateral attack on the ruling of the Supreme Court would be misconceived.

The Respondent further submits that there is no evidence before the committee to confirm such deposit being made. The only suggestion which the court could draw inferences from is the receipt provided with the Petitioner's submission and the Petitioner's submission made at the Supreme Court dated 27 November 2007. That on the 27 November 2007, it was alleged that at the time when the Petition was lodged at the Supreme Court a deposit of Vatu 20,000 was made. Should the Petitioner allege that the petition was properly lodged within the time required at the Supreme Court, the Respondent submits that the Petition was lodged without the required deposit fee of Vatu 100,000.

It is submitted that the Respondent in reading rule 36 it implies the requirement that when filing a petition the Petitioner must within that period pay a deposit Vatu 100,000. The Petitioner had submitted that the deposit of Vatu 100,000 on 15 March 2009 fulfill the requirement of making the deposit. It is submitted that such deposit was made well outside the required period

It is the submission of the Respondents that in order that any decision of the Committee to have effect on Mr Titipaia Edward the said person must be party to this proceedings. The Respondent submits that the Petition before the Committee is defective as it does not include necessary parties to it and which rule 37 (3) now prevents such amendment pursuant to *Naukaut* case.

The Respondent says that this Petition does not meet the prerequisites provided to the rules to progress the matter further.

### **Findings**

Having said the above the Committee finds the following: -

1. That Sanma Provincial Election was conducted on the 26 September 2007, by which the results were gazetted on the 30 September 2007.
2. That the result showed that the Petitioner and one Mr Edward Titipaia had the same valid votes casted and that Mr Edward Titipaia was declared the last successful elected member of the Sanma Provincial Council on the basis that he was the eldest of the two.
3. That after publishing the results in the official Gazette the Petitioner filed his Petition in the Supreme Court at Luganville Santo challenging the election of Mr. Titipaia on the ground that the Electoral Commission failed to consider the two candidates' birth certificates and that the Petitioner is the oldest candidate.
4. That the Court heard the matter by way of preliminary issue of whether the Supreme Court had jurisdiction to hear the election petition at the first instance on or about 12 December 2007. And that the supreme Court found that the matter was brought to a wrong forum and that should therefore be transferred to the Election Dispute Committee.
5. That the Petitioner had sort two orders, i.e. (i) an order quashing the declaration of the election of Mr Edward Titipaia as councilor to Sanma Provincial Council, and

(ii) an order declaring the Respondent to declare Mr Sela Abraham as duly elected councilor to the Sanma Provincial Council.

6. That the Election Dispute Committee was appointed on the 19 June 2008, and the Petition which was lodged in the Supreme Court was received by the Chairperson on the 9 October 2009 at 9.45am.
7. That on or about 4<sup>th</sup> March 2009, the Committee held conference with both counsels directing them verbally to collect and provide records of the transactions done after the orders made in the Supreme Court.
8. That by 9 April 2009 the parties have not provided any records to the Committee and as a result the Committee made written Direction Orders for the Respondent to provide to the Committee the records of – when the documents left the office of the Santo Supreme Court Registry; when the documents arrived at the office of the Electoral Office; and whether any deposits were made in accordance with part 7 of the Decentralization (Statutory Orders).
9. That notice was send to counsels to appear before the Committee on the 8 July 2009, where the Committee directed the Counsels to make submissions to the committee within 7 days to help the Committee to decide whether the requirements required by law were met so that the matter be progressed.
10. That submission from the Petitioner was received by the Committee on the 17 July 2009 and submissions were received from the Respondent on 10 August 2009.

### **Consideration of the application of the Law**

The Committee agrees with the Respondent that the Petitioner's Petition failed to meet the prerequisites of the Petition pursuant to the Rules.

The Petition filed in the Supreme Court was not dated and there is no filing date on the document received by the Committee, therefore it is not clear whether the petition was filed within 21 days as prescribed by the Rules.

**Rule 33(4)** requires that all Election Petitions must be served at the Election Dispute Committee. The fact that the petition being filed at the Supreme Court does not make the Petition filed within the time required. This is a clear abuse of process. Furthermore there was nothing suggested by the ruling of the Supreme Court as to the validity of whether the Petition was filed within the required period of time.

The Committee cannot agree with the Petitioner to say that any ruling of the Committee now would be a collateral attack on the ruling of the Supreme Court. The filing of the Petition at the Supreme Court was clearly stated by the ruling of the Supreme Court that it had been to a wrong venue or forum and further the Court decided not to dismiss the petition but ordered a transfer to the Committee and we say that this did not mean that the requirements were all met.

The law clearly provides for the prerequisite of the payment of deposit; **Rule 36** provides that **Petitions only valid if deposit made:** *(1) The presentation of an election petition shall not be valid unless within the time specified in rule 37, the person seeking to present the same lodges with the Election Disputes Committee a deposit of Vatu 100,000 as*

*security for costs.* Since the Committee received the transferred documents it had no records or idea as to the payment of the Vatu 100,000, until the Submission received by the Petitioner on or about 17 July 2009 when a Government receipt of Vatu 100,000 which showed that the moneys were paid on the 17 March 2009. This again is another abuse of process. The moneys should have been paid to the Committee as required by rule 36 which the Petitioner failed to do so. **Rule 37** sub-rule 1 provides that the Election Petition shall be presented within 21 days. **Rule 37 (3)** states that *"The time limit provide for this rule shall not be extended"*.

The Petitioner had failed to file the Petition against the Electoral Commission including Mr. Edward Titipaia who is the person affected in this matter. The case provided by the Respondent; **Noukaut v Naunam [1999] VUSC 2 EP 31 of 1988** where the court made a ruling on the provision of section 57 of the Representation of the People Act [CAP 146]. The ruling of this case prevents a Petitioner from amending a petition unless the amendment is made within 21 day period.

HAVING SAID all the above the Committee concludes that the Petition before the Election Dispute Committee is defective as it has not meet the prerequisites as required by the Rules.

**The Committed** therefore makes the following Orders: -

1. That the Petition against the Electoral Commission is defective, therefore is void;
2. That the Committee declares Mr Edward Titipaia as duly elected member of the Sanma Provincial Council;
3. That this decision is subject to appeal to the Supreme Court.

**DATED at Port Vila this 24<sup>th</sup> day of August 2009.**



  
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**CHEROL ALA**  
Member

  
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**SELWY GARU**  
Member