

IN THE MATTER OF THE REPRESENTATION OF THE  
PEOPLE ACT 1983

AND:

IN THE MATTER OF A PARLIAMENTARY ELECTION  
FOR TANNA CONSTITUENCY HELD ON 2  
SEPTEMBER 2008

BETWEEN: WILLIE LOP of PPP Office, P.O.Box  
0154, Port Vila, Efate in the Republic of  
Vanuatu  
Petitioner

AND: JUDAH ISAAC of Port Vila, Efate in the  
Republic of Vanuatu  
First Respondent

AND: ELECTORAL OFFICE AND COMISSION,  
P.M.B. 9033, Port Vila, Efate in the  
Republic of Vanuatu  
Second Respondent

Coram: Chief Justice Vincent Lunabek

Counsel: Mr Daniel Iawha for the Petitioner  
Mr Jack Kilu for the First Respondent  
Mr Fredrick Gilu of the State Law Office for the Second Respondent

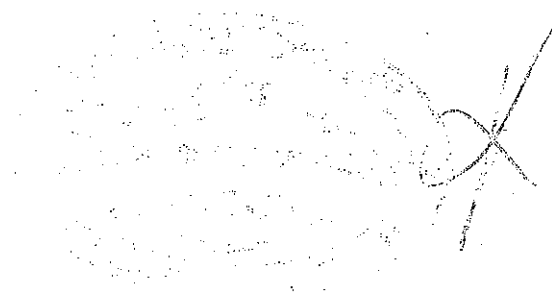
*Date of hearing:* 3, 4, 5 and 6 March 2009

*Date of oral Judgment:* 6 March 2009

*Date of publication of Reasons for Judgment:* 6 April 2009

REASONS FOR JUDGMENT

This is an Amended Election Petition filed by the Petitioner on 1 October 2008. The Petition seeks, among other relief, a declaration that the election of the First Respondent on 2 September 2008 is void.



## I - THE PARTIES

The Petitioner, Willie Lop, was a candidate in the National General Election referred to as ("the Election") held on 2 September 2008 for Tanna Constituency. He contested with 35 other candidates for the seven (7) seats allocated for the Constituency of Tanna in the Election under the logo and policy of the Peoples Progressive Party (PPP).

The First Respondent, Judah Isaac, was the sixth successful candidates in the Election of 2 September 2008 for the seven seats allocated for the Constituency of Tanna. He had obtained a total of 822 votes.

The Second Respondent is the Electoral Commission of the Republic of Vanuatu. The Second Respondent is responsible for the supervision of registration of voters and the Conduct of Elections to Parliament. On 12 September 2008, the Second Respondent in exercise of its powers under the Constitution and the Representation of the People's Act [CAP. 146], declared the following seven (7) candidates as duly elected for the Constituency of Tanna for the seven (7) allocated seats:

1.	Iauko Harry	1,662 votes
2.	Natuman Joe	992 votes
3.	Bob Loughman	955 votes
4.	Moses Kuo	908 votes
5.	Morking Stevens	855 votes
6.	Judah Isaac	822 votes
7.	Louis Etap	569 votes

The Petitioner is the runner-up of the seventh declared successful candidate with a total number of votes of 514.

## II - THE PETITION

The Petitioner's relief for prays are as follows:

(1) That the declaration of the First Respondent made by the Electoral Commission on September 2, 2008, as duly elected candidate for the national parliament of the Republic of Vanuatu be declared null and void.

(2) That the Electoral Commission or the Court declare the Petitioner as duly elected candidate for the national parliament for the Republic of Vanuatu in the event that declaration of the First Respondent is declared null and void as in relief (1) above.

(3) Alternatively to relief (2) above that the Electoral Commission within 2 months declare a by-election in the Constituency of Tanna for the seat duly declared in favour of the First Respondent in the event that the Court declares that the seat vacant.

(4) That the Second Respondent implement the orders of the Court by way of gazetting the name of the Petitioner and doing such other thing that is required to the satisfaction of the Second Respondent in so far as the declaration of the Petitioner is concerned.

(5) That the Supreme Court communicated the decision in respect to this petition to the Second Respondent as soon as possible.

(6) That the security for costs deposited to the Court by the Petitioner be paid back to the Petitioner without deductions.

(7) Such other relief as the Court thinks fit.

(8) Costs of this application to be in favour of the Petitioner and to be agreed or taxed.

### III - THE GROUNDS OF THE PETITION

The grounds of the Petition are set out below:

1. That the First Respondent has committed the corrupt practice of bribery in the following way:
  - (a) Between July 2008 – August 2008, the First Respondent purchased Macocote type saucepans and put them into 100 flour bags.
  - (b) The First Respondent shipped the 100 flour bags full of Macocote type saucepans on board MV Malekula in July 2008 from Port Vila to Isangel, Tanna.
  - (c) The First Respondent distributed the Macocote type saucepans to various persons – villages and communities on Tanna.

The Petitioner made no allegations against the Second Respondent. The Second Respondent are not an active party in the Election dispute. They accept the jurisdiction of the Court and will be bound by any Order of the Court.

### IV - THE RESPONSE TO THE PETITION

The First Respondent says he is not a new comer to elections. He was contesting 2002, 2004 and 2008 elections. He was successful in all those elections. He said with his past experience he is familiar with the period to give out gifts and time prohibited to give gifts and time for campaign.

It is the case of the First Respondent that he will rely on the official statements issued by the Second Respondent to stop giving out the gifts. The First Respondent used his MP allocations to purchase saucepans about 600.

He ordered the 600 saucepans through Port Vila Au Bon Marché, and because he was aware about the prohibited dates, he said he exercised some pressure on Au

Bon Marché to speed up with his orders of the macocote saucepans. He was concerned that gifts must be distributed before the prohibited dates.

He made arrangements with MV Southern Star to ship the saucepans and some spades and axes to Tanna. He had paid freight of 65,000 Vatu for cost of shipment of saucepans. MV Southern Star delayed his trip to Tanna so the First Respondent transferred the saucepans and other items to MV Malekula on 22 July 2008. He paid freight costs of 83,000 Vatu to MV Malekula.

It is the case of the First Respondent that he must distribute the saucepans macocote within the time allowed by the Second Respondent. MV Malekula left Vila on 22 July 2008 and arrived on Tanna on 23 July 2008.

It is the case of the First Respondent that he started the distribution of macocote saucepans on 23 July 2008. He said the first village of distribution is Lamak. He says he has a programme for distribution of macocote saucepans from 23 July 2008 to 10 August 2008 at 8.00 a.m. o'clock and stopped. The First Respondent says it is true that he had distributed the macocote saucepans but the distributions were within the time allowed by the Electoral Commission.

The First Respondent says that the distribution of saucepan after 10 August 2008 is not true. He denies these because he says he did not break any law.

The First Respondent asks that the Court dismiss the Petition as it is baseless.

#### **V - LOCUS STANDI OF THE PETITIONER**

The Petitioner was a candidate for the Constituency of Tanna at the National Elections of 2 September 2008. He has the standing to file the Petition pursuant to Section 55 (b) of the Representation of the People's Act [CAP.146].

#### **VI - ELECTION OFFENCES**

Part XV of the Representation of the People's Act [CAP.146] deals with Election offences. Section 45(1) (a),(iii) is the relevant provisions for the purpose of this case.

Section 45 provides:

**45. (1) A person commits the offence of bribery-**

- (a) if he directly or indirectly by himself or by other person-
  - (i) gives any money or procures any office to or for any voter or to or for any other person on behalf of any voter or to or for any other person in order to induce any voter to vote or refrain from voting;
  - (ii) corruptly does any such act on account of any voter having voted or refrained from voting; or
  - (iii) makes any such gift or procurement to or for any person in order to induce that person to procure, or endeavour to procure, the election of any candidate or the vote of any voter;

*or if upon or in consequence of any such gift or procurement he procures or engages, promises or endeavours to procure the election of any candidate or the vote of any voter;*

- (b) if he advances or pays any money or causes any money to be paid to or to the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election, or knowingly pays any money or causes any money to be paid to any person in discharge or repayment of any money wholly or in part expended in bribery at any election;
- (c) if before or during an election he directly or indirectly, by himself or by any other person on his behalf, receives, agrees or contracts for any money, gift, loan or valuable consideration or any office, place or employment for himself or for any other person for voting or agreeing to vote or from retraining or agreeing to refrain from voting;
- (d) if after an election he directly or indirectly by himself or by any other person on his behalf receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting. [Emphasis added]

(2) For the purposes of subsection (1) of this section-

- (a) references to giving money include references to giving, lending, agreeing to give or lend, offering, promising and promising to procure or to endeavour to procure any money or valuable consideration; and
- (b) references to procuring office include references to giving, procuring, agreeing to give or procure, offering, promising and promising to procure or to endeavour to procure any office, place or employment.

#### VIII - MEANS REA

Under Section 45(1)(a)(i) & (iii) of the Act, the word "corruptly" has not been used for any of the specified acts done thereunder to constitute bribery, whereas any such act done under s.45(1)(a)(ii) is required to have been done "corruptly" to constitute bribery. The reason being that, in the situation raised under s.45(1)(a)(i) and (iii), the very proof of the act itself allows the Court to draw a prima facie inference that it was done with a corrupt intention. [Naukaut v. Naunun (1999) VUSC Election Petition Case No.31 of 1998 (Judgment of 27 January 1999)]; Peter Salemalu v. Paul Ren Tari, Election Petition Case No.30 of 1998.

Applied to the present case, if it were to be proved that the First Respondent, Judah Isaac, distributed 600 saucepans, spades and axes as he admitted in his evidence to the people and communities who voted for him in 2004 general elections and also to others, in order to induce his former voters of 2004 and others to vote for him in the National General Election of 2 September 2008; Or upon or in consequence of distributing the macocote saucepans, spades and axes, the First Respondent, Judah Isaac procures, or engages, promises to procure his election as a candidate or the vote of a voter or voters of the communities, the Court would be entitled to draw a prima facie inference that the First Respondent, Judah Isaac, did so with a corrupt intention, even though the word "corruptly" has not been used in Section 45(1)(a)(iii) for the purpose of this case.

The First Respondent, Mr Judah Isaac, must rebut that inference. If he failed to rebut it, then the Petitioner would be entitled to succeed.

The word "corruptly" imports intention.

"corruptly" does not mean wickedly, or immorally, or dishonestly.

"corruptly" means doing something knowing that it is wrong and doing it with the object and intention of doing that thing which the law intended to prohibit. [see Halsbury laws of England, Fourth Edition, paragraph 768].

The important question though to consider is the state of mind of the First Respondent, Judah Isaac.

Did Judah Isaac distributed the 600 saucepans, some spades, axes from 23 July 2008 to 10 August 2008 to various people, villages and communities as he admitted in his response to the Petition filed 12 December 2008 and confirmed by his oral evidence in Court on 4 March 2009 for the purpose of corruptly influencing people to vote for him; or was his intention merely to satisfy the request of the communities and mothers of their communities?

If the first intention is proved then the First Respondent will be guilty of bribery and his election will be void. If it is not proved then, the First Respondent will be declared to have been duly elected and the Petition be therefore dismissed.

#### **IX - BURDEN AND STANDARD OF PROOF**

The Petitioner has the burden of proof. The burden of proof necessary to establish whether an act of bribery or corrupt practice had been committed by the First Respondent is a civil standard of proof. That is on balance of probabilities and I agree with Oliver Saksak J in *Taranban v. Boedoro* (2004) VUSC 15. CC case No.149 of 2004 (3 December 2004) that the standard of proof is a higher standard than in the normal civil cases.

#### **X - THE SUMMARY OF EVIDENCE AND DISCUSSION ON EVIDENCE**

This is the summary of the evidence in this case. The record of the whole and detailed evidence are contained in the Court file of this case with sworn statements



and oral testimonies of each and all witnesses of the Petitioner and the First and Second Respondents.

The allegations and intended evidence that the First Respondent made promises to pay any individual of VT15, 000 and VT30, 000 to a man and his wife during the period before 10 August 2008 and after 10 August 2008 are rejected and/or struck out.

The reason is that such allegations are not pleaded in the Petition. There were no grounds advanced on the basis of these allegations when the Petition was filed on 1 October 2008. If the Court accepts these allegations and evidence in support, it is, then, a de facto substantive amendments of the Petition by adding new grounds after 21 days period and so, is contrary to Sections 57 and 58 of the Representation of the People's Act [CAP.146].

The following facts are not disputed by the parties because the First Respondent admitted those facts in his response to the Petition filed 12 December 2008 and in his oral testimony during the trial on 4 March 2009 at Isangel, Tanna:

- The First Respondent purchased from Au Bon Marché, Port-Vila, 600 saucepans "Macocote" with different sizes:
  - 200 pieces for size 32
  - 200 pieces for size 30
  - 200 pieces for size 28
  - [See paragraph 2 of the First Respondent sworn statement filed 11 December 2008]. He ordered the saucepans on 11 May 2007.
- He intended to distribute the saucepans on the month of May 2008 before the declaration of official candidature. He said to his understanding, he is not allowed to make donation or gifts or giving out MP allocations during and after the period of official candidature. (See letter dated 13 December 2007 attached to "JI1".
- He said he was fully aware of the starting date of the campaign.

- He shipped the 600 saucepans on board MV Malekula on 22 July 2008 as he was having difficulties with MV Southern Star. He paid 83,000VT for costs of shipment of the 600 saucepans from Vila to Isangel, Tanna on board MV Malekula despite the costs he had already paid for MV Southern Star.
- He said he made a programme of distribution of saucepan macocote with some spades, axes from 23 July 2008 to 10 August 2008.
- He said he distributed the 600 saucepans to his 2004 voters in the villages and communities from 23 July 2008 to 10 August 2008 at 8.00AM o'clock and then stopped.
- He admitted while under cross-examination that while he distributed the saucepans to his 2004 voters and also to for others because they requested saucepans through his voters or supporters.

There are two short points of facts to be determined by the Court. The First is whether the First Respondent provided two saucepans, a dish, a single mattress and a spade on 20 August or 26 August 2008 at Imarapu football field at Whitesands area, Tanna. George Napiko, Thomas Iaru, Nauka Kraison and Loughman Steven testified that on 20 August 2008, while they were campaigning for Thomas Iaru as an Independent Candidate, they saw Judah Isaac with his campaign team arriving in a truck with 2 saucepans, a dish, a mattress and a spade.

None of them could say who received the saucepans, the dish, the spade and the single mattress. The mattress was an open mattress it has no plastic cover protection on it. There were lots of people, a crowd like the crowd of people in the open Court room. Some of the Petitioner's witnesses say their team went away first and others say Judah moved away first. The witnesses for the Petitioner gave contradictory evidence as to whether the two saucepans were old or new.

The First Respondent's version of facts is that, they went for campaigning; they brought the two saucepans to cook for the campaign team. At Imarapu the Chief of that village provided food for them. They did not use the two saucepans to cook the meals for the campaign team. The mattress was a used mattress. He said because of the rough conditions of the road, and the conditions of his truck, they put the

mattress behind the truck for the two (2) women who accompanied them to sit on it. The two women accompanied them to do the cooking for the campaign team. The spade is put on the truck to assist when the truck would be having difficulties on the rough and muddy road.

The First Respondent and his witnesses may have mistaken on the exact date of the campaign at Iamru village. The fact which is accepted by all witnesses of the Petitioner and the First Respondent, is that the Petitioner's witnesses held a campaign at Imaru village on same day as the First Respondent. They arrived first and the First Respondent and his campaign team arrived after them. Two old women accompanied the First Respondent's team. I accept the evidence on behalf of the First Respondent that the mattress is an used mattress and a new one. It is used for the two women to seat on it because the rough conditions of the road during the campaign and also the old conditions of his truck. Despite differences as to the exact dates whether the campaign was on 20, 26 or 28 July 2008, the version of facts of the First Respondent is to be preferred. The evidence is that there were lots of people at the football field during the campaign. Witnesses compare the crowd then with the crowd of people in the court room during the hearing of this election petition. It is very unlikely that the two (2) saucepans and one spade will be given to more than 100 people gathered together. There is more likely that the two saucepans were intended to be used by the two women to cook meals for the First Respondent and his campaign team. However, on the said day, the two saucepans were not used to cook because the chief of Imaru village provide food to the First Respondent and his campaign team which is also confirmed by the said chief. In any event, there is no evidence as to who received the 2 saucepans, the dish, the spade and the mattress.

On the second factual dispute, the evidence is that the First Respondent supplied macocote saucepans on 15 August 2008. The First Respondent rebuts that evidence in that on 15 August 2008, he was campaigning at Kingcross market, Whitesands, Tanna. This was confirmed by one of his witnesses. The Petitioner's witness was not sure about the date when he saw the First Respondent giving macocote saucepan. This witness said he will rely on the evidence of someone who is not a witness. The

evidence of the First Respondent is also accepted on that point. The Court rejects the version of facts given by the Petitioner's witness on this specific point.

The Principal Electoral Officer, Mr. Martin Tete, filed a sworn statement on the election processes with relevant dates to assist the Court. The content of his sworn statement is not challenged by the parties in the Petition. Paragraphs 21 to 28 are the relevant paragraphs. I set them out below for ease of reference:

***"2008 General Election logistics***

21. *In relation to the 2 September 2008 General Election for members of Parliament, the Electoral Commission had various consultations with the Hon. Minister for Internal Affairs and the then Hon. Prime Minister. Pursuant to these said consultations, on or about the 10<sup>th</sup> of April 2008 the Electoral Commission met and endorsed the following general election logistical arrangements as:*
- a) The starting date for lodging candidature application forms in Tuesday 1 July 2008;*
  - b) The closing date for lodging candidature application forms must be by 4.30pm Monday 14 July 2008;*
  - c) The declaration and announcement of qualified candidates will be made on Monday 11 August 2008;*
  - d) The political campaigns will commence on Monday 11 of August 2008 and will close at 12 midnight on Saturday 30<sup>th</sup> August 2008;*
  - e) That the closing date to lodge Proxy Application is on Friday 29 August 2008; and*
  - f) That the Polling Day for voters to cast their votes will be on Tuesday 2 September 2008.*
22. *After having endorsed the above logistics the then Prime Minister then advised the President of the date of polling day to be 2 September 2008. On 14 April 2008 the President signed an order declaring 2 September 2008 to be the polling day for the General Election.*
23. *On or about the 14<sup>th</sup> of May 2008 the Electoral Office issued a general election news on the citizens of Vanuatu announcing that the President of the Republic of Vanuatu has declared the 2<sup>nd</sup> day of September 2008 as Polling Day for the Republic.*

24. *On or about the 15<sup>th</sup> of May 2008, a press statement was issued by the Chairman of the Electoral Commission that the term of the present Parliament would expire on the 6<sup>th</sup> of July 2008, and that parliamentary elections must be held within 60 days after the expiry date.*
25. *The press statements also stressed that any indigenous citizens who are interested and are qualified can collect that candidature application forms from Provincial Headquarters, LMC and the Electoral Office and apply to contest the general election. The Chairman reminded interested applicants that their applications must be the requirements as set-out under section 23, 24 and 25 of the Act.*
26. *On or about 1 July 2008, the Electoral Commission met and decided that despite the initialed service message released by Mr. Tom Alick Kalo, Compiler – Electoral Office, the due date for the closure of donations, handouts, presents, gifts and or MP allocations etc; should stop by 12 midnight on the 10<sup>th</sup> of August 2008, following complaints raised by the Speaker of Parliament, Hon. Government Ministers and MPs through the State Law Office.*
27. *The announcement made by the Electoral Commission for the closure of gifts by 12 midnight of 10 August 2008 was because after the screening of potential candidates from 15 July to 10 August 2008, the Electoral Commission will announce the names of candidates qualified to contest the 2 September 2008 general election on or about the 11<sup>th</sup> of August 2008 as endorsed by the Commission.*
28. *I wish to state that the official announcement of qualified candidates by the Electoral Commission was made on the 15<sup>th</sup> of August 2008. The total number of candidates qualified to contest the general election per constituency are as follows (relevantly):*
  - 1...
  - ...
  16. *Constituency of Tanna – 7 seats (35 candidates)."*

## APPLICATION OF LAW

When I apply the law to the facts and circumstances of this case, I bear in mind that I must consider all the circumstances of the case together. It would not be realistic to view the distributions of 600 macocote saucepans, spades and axes in isolation, divorced from the context in which they were made. The purpose of setting up the distributions programs from 23 July to 10 August 2008 was more than simple requests from the mothers of the communities as the First Respondent explained in his evidence. The purpose of distributions was also in relation to the First Respondent's candidacy to the general elections of 2 September 2008. The persons to whom the distribution of gifts of macocote saucepans, spades and axes was given were potential electors. There is no dispute that the general elections were imminent.

Further, the 600 macocote saucepans were ordered by the First Respondent in 2007. The First Respondent intended to distribute them in May 2008.

The President of the Republic signed an order declaring 2 September 2008 to be the polling day for the general elections. The 600 saucepans were shipped to Tanna Island on 22 July 2008. They were distributed by the First Respondent and his committees to his 2004 voters and others. During the election campaigns, the First Respondent made his political campaigns to different places, areas including villages and places he had distributed the saucepans, spades and axes from 23 July to 10 August 2008.

In the circumstances of what took place, satisfying the requests of the mothers of the various communities with the distributions of macocote saucepans, was not the only motive, or the dominant motive, behind the distributions. It would be sufficient for the purpose of establishing the intent required for bribery under section 45 (1) (a) (iii) of the Representation of the People's Act, if one of the motives which accompanied the distributions of macocote saucepans was to induce electors to vote for the First Respondent. The Court must be governed by what the First Respondent said and what he did, and by the inferences the Court ought to draw therefrom but the Court cannot go into any intention of the First Respondent.

It is submitted on behalf of the First Respondent that the distribution of the macocote saucepans was part of the First Respondent's parliamentary allocations and it took

place outside the election period. The First Respondent says he relied on an announcement issued by the Second Respondent, Electoral Commission, on about 1 July 2008, to the following effect:

*"... distribution blong MP allocation, donations, presents mo ol gifts by politician mo eligible candidates bambae hemi continue from 1<sup>st</sup> July 2008 mo bae hemi must stop nomo long 12 midnight long Sunday 10<sup>th</sup> August 2008 folem decision blo Electoral Commission we hemi mekem finis long saed blong declaration/publication/announcement blo ol eligible qualified candidates long Monday 11<sup>th</sup> August 2008."*

The above announcement purported to set the time period whereby outgoing members of Parliament or intending candidates for the 2 September 2008 general elections can made gifts or donations prior to the election poll.

I have peruse the relevant provisions of the Constitution [Articles 18, 19 and 20] and the Representation of the People's Act [CAP.146], I could not find a provision or a law which legitimizes the presentation of gifts or donations by incumbent members of Parliament, or intended candidates to people villages or communities in any of the constituency, before or during or after an election. One of the general functions and responsibilities of the Electoral Commission and the Principal Electoral Officer is to supervise the registration of voters and the conduct of election to parliament. This includes making declarations or publications or announcements on eligible qualified candidates for an election to parliament.

It is to be noted that the making of announcement to the effect that:

*"... distribution blong MP allocation, donations, presents mo ol gifts by politicians mo eligible candidates bambae hemi continue from 1<sup>st</sup> July 2008 mo bae hemi must stop nomo long 12 midnight long Saturday 10 August 2008..."*

is outside the functions and responsibilities of the Second Respondent, Electoral Commission. That part of the said announcement has no effect in law.

The First Respondent said he had relied on it when he distributed macocote saucepans, spades and axes from 23 July 2008 to 10 August 2008 to his 2004 voters

and others. The evidence before the Court is that he did more than just relying on the said announcement. In effect, not only he distributed the saucepans, spades and axes to his purported 2004 voters and others who were potential electors but he also went campaigning to these people, villages and communities during the campaign period for 2 September 2008 Elections.

His reliance on the announcement was at his own risk and peril because in law, there is no particular time when bribery is allowed. Bribery for election purposes is prohibited at all times. It will therefore be a mistake to think that bribery is allowed outside the 'period of election'.

Section 45(1) (c) and (d) of the Act [CAP.146] provides that an offence of bribery can be committed before or during or after an election in this way:

*"45. (1) A person commits the offence of bribery:*

*(a)...*

*(b)...*

*(c) if before or during an election he directly or indirectly, by himself or by any other person on his behalf, receives, agrees or contracts for any money, gifts, loan or valuable consideration or any office, place or employment for himself or for any other person for voting or agreeing to vote or from refraining or agreeing to refrain from voting;*

*(d) if after an election he directly or indirectly, by himself or by any other person on his behalf, receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any person to vote or refrain from voting.*

*(2)..."*

The Supreme Court of Samoa made a statement in the case of *Ah Hian v. Amosa* (2001) WSSC 16 and I agree and accept it as a persuasive authority on this point:

*"...there is no particular time when bribery or treating is allowed. Bribery and treating for election purposes are prohibited at all times. It will therefore be a mistake to think that bribery and treating are allowed outside the 'period of election'..."*



In the present case, I accept the submissions made by counsel for the Petitioner that the distributions of macocote saucepans from 23 July to 10 August 2008 can be reasonably inferred by the Court to amount to bribery. On the evidence, the distributions of macocote saucepans few weeks before the election is suspicious and it is rational to infer that the giving of the macocote saucepans by the First Respondent and his campaign team was to induce or endeavour to procure the First Respondent's voters of 2004 and others.

The First Respondent himself illustrates this in his oral testimony when he provided the details of his distributions to various persons, villages and communities between 23 July to 10 August 2008. Among other distributions, he said 300 saucepans were given on 30 July 2008 by his committee; he distributed more than 100 saucepans on 31 July 2008 at Imaru village; 9 saucepans at Whitegrass on 2 August 2008. Further he testified that in 2002 general elections, he was successfully elected with more than 600 votes; in 2004, he was elected with a total of 784 votes and on 2 September 2008 general elections, he was elected with a total of 822 votes.

The distribution of 600 saucepans, spades and axes to voters of 2004 and others in various villages, places and communities from 23 July to 10 August 2008 in the manner described were widespread or extensively prevailed that it may be reasonably supposed to have affected the result of the election. The admission evidence of the First Respondent of the distribution, the manner, the large quantity and the timing while the general elections are imminent, constitute reasonable basis for making the supposition that they have affected the result of the election of 2 September 2008 on the constituency of Tanna. The inference is confirmed by the increasing total numbers of votes he obtained in 2008 elections on comparison with the total numbers of votes he got in 2002 and 2004 elections.

Based on the above considerations, the election of the First Respondent on 2 September 2008 must be void for bribery under s.45 (1) (a) (iii) of the Act (CAP.46] as sought in relief 1 of the Petition.

The Court, then, considered the nature, appropriateness and extent of the other remedies that the Petitioner sought in the Petition. This is more so with the

declaration sought in the relief 2 of the Prays in the Petition. The declaration sought in the relief 3 is an alternative to the relief sought in the relief 2. The Court informed Counsel that the declaration sought in relief 2 is not appropriate but instead a declaration of vacancy of seat must be made consistently with the declaration made in relief 1. After a short discussion with Counsel on this point, they agree that that is the appropriate course to take as a necessary consequence of the declaration made in relief 1.

Bellow are the reasons why the Court refuses to grant the declaration the Petitioner is seeking in the relief 2 in the Prays of the Petition. The declaration sought in relief (2) is reproduced below for ease of reference:

*"That the Electoral Commission or the Court declare the Petitioner as duly elected candidate for the national parliament for the Republic of Vanuatu in the event that declaration of the First Respondent is declared null and void as in relief (1) above".*

This declaration seems to have asked the Electoral Commission or the Court to declare the Petitioner as duly elected candidate in the event that the election of the First Respondent is declared void. Principally, it reflected a misapprehension by the Petitioner and his Counsel of the election petition regime; the functions and responsibilities of the Electoral Commission to conduct elections to Parliament; the functions and powers of the Supreme Court in relation to parliamentary election petitions and the circumstance of the exercise of their respective functions, responsibilities and powers under the Act [CAP.146].

This election Petition was brought before the Supreme Court pursuant to Part XVI – ELECTIONS PETITIONS - (ss.54 to 61) of the Act (Cap146). Once the Supreme Court is petitioned, I cannot see how the Electoral Commission can make the declaration to the effect and extent sought therein. The nature of the declaration sought in relief 2 referred to above, is sourced in Section 60(1)(b) of the Act which is one type of the "DECISIONS OF COURT IN ELECTIONS DISPUTES". The Electoral Commission is not an election dispute court and it has no power to make such a declaration as sought in relief 2 in the circumstance of this case.

The circumstances I can think of within the Act (Cap146), whereby the Electoral Commission has the power to make a declaration of election, are under:

- Section 29 (1) for the candidates elected without a poll; and
- Section 29 (2) for the number of candidates elected and the number of seats vacant.
- Rule 21 of the Election of Candidates Rules - Schedule 5 (Section 37) for candidates elected after an election which includes a by-election.

Needless to say that the circumstances referred to in Section 29 (1);(2) and Rule 21 of Schedule 5 (s.37 ) of the Act, are different from those of an election petition. The only possible way that the Electoral Commission can make the declaration sought in the relief 2 of the Petition is after a by-election and if the Petitioner is successful.

Second, the declaration sought in the relief 2 cannot be granted by the Supreme Court in the circumstance of this case, although, such a power is given to the Supreme Court under Section 60 (1) (b) of the Act. S.60 of the Act is a general provision. It sets out the decisions the Supreme Court may make on hearing an election petition, which are to:

- “(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.”*

The circumstances of the application of a decision under s.60 (1) (a) or (b) or (c) are described in Section 61(1) (a), (b), (c); (2); (3) (a), (b) and Section 62 of the Act (Cap 146). Sections 61 and 62 of the Act are set out below:

*“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 hereinbefore enumerated or not, have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;*
  - (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) *The election of a candidate shall be declared void if he is convicted by a Court of committing a corrupt practice or of attempting or conspiring to commit a corrupt practice.*
- (3) *Notwithstanding the provisions of subsection (1)-*
- (a) *where upon the hearing of an election petition the Supreme Court finds that any agent of a candidate has been guilty of a corrupt practice and the Supreme Court that-*
    - (i) *no corrupt practice was committed by the candidate himself or with his knowledge or consent or approval;*
    - (ii) *the candidate took all reasonable means for preventing the commission or corrupt practices at such election;*
    - (iii) *in all other respects the election was free from any corrupt practice on the part of the candidate; and*
    - (iv) *such corrupt practices did not affect the result of the elections,*
- then, if the Supreme Court so decides, the election of such candidate shall not by reason of any such practice be void;*

- (b) *where upon the trial of 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 it is satisfied that the election was conducted in accordance with the principles laid down in this Act and that such failure did not affect the result of the election, the election of the successful candidate shall not by reason of such failure, be void.*

#### **EXAMINATION OF VOTES CAST**

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

In the present case, the Petitioner has sought a declaration under s.60 (1) (b) in relief 2 referred to earlier, on the basis that he is the runner-up of the seventh declared successful candidate and he had obtained a total number of 514 lawful votes.

The Petitioner seems to say that because he had obtained more votes than the other 27 unsuccessful candidates on 2 September 2008 elections, a declaration be made to the effect that he be declared duly elected to occupy the seat vacated by the First Respondent. This is not right and cannot be so in the circumstance of this case. I make this observation. The Supreme Court can declare a candidate other than the person whose election is questioned was duly elected under s.62 proceeding (Examination of Votes Casts). This occurs when on an election Petition the election is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes and after examination of the counted and void votes and of the counting of votes, the Supreme Court confirms his claim, then, the Court can make the declaration to the effect as sought in relief 2 in question. If that is the sort of declaration the Petitioner intended to be applied to him when he sought the relief under consideration, then, the Court cannot grant it to him because it is a wrong exercise of the judicial discretion under the Representation of the People's Act [CAP.146]. It is bad in law.

The present petition is advanced on the ground that the election of the First Respondent on 2 September 2008, was secured on basis of bribery and have so extensively prevailed that they may be reasonably supposed to have affected the result of the election. Indeed, the Supreme Court so found on the basis of evidence produced during the trial hearing. The uncontested sworn statement of the Principal Electoral Officer, Mr. Martin Tete, shows that on 2 September 2008 Elections, 7 Parliamentary seats were allocated to Tanna Constituency. 35 candidates contested the elections for the 7 seats on 2 September 2008. On 12 September 2008, 7 out of the 35 candidates were declared elected by the Second Respondent (including the First Respondent). 28 Candidates were not successful (including the Petitioner).

The Petitioner brought this petition successfully against the election of the First Respondent, which is declared void because of bribery. The elections of the other 6 declared successful candidates were not challenged by the petition, and, as such, their elections are secured and not affected. The bribery, in this case, is so widespread that they were supposed to have affected the result of the election and this is more so in relation to the 28 unsuccessful candidates (including the Petitioner). The Petitioner obtained 514 lawful votes. The 27 other unsuccessful candidates obtained a total of 6775 lawful votes. Once the election of the First Respondent is declared void for bribery and his Parliamentary seat declared vacant consequently, the total number of votes obtained by any of the unsuccessful candidate (including the Petitioner) became meaningless. Common sense and justice (based on law) require that a by-election is to be directed so that any of the unsuccessful candidate whose election had been affected by the bribery of the First Respondent in the 2 September 2008 Elections (such as the Petitioner) and any other qualified and interested candidate could contest the election for that one seat on the Constituency of Tanna.

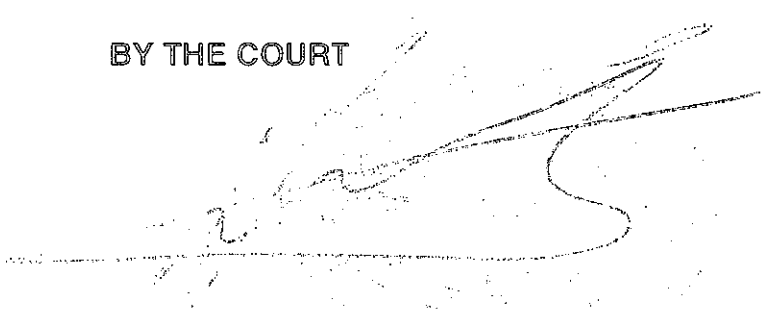
These are the reasons of the following orders the Court made on 6<sup>th</sup> March 2009 at Isangel, Tanna:

## ORDERS

1. Pursuant to Section 61(1)(a) of the Representation of the People's Act [CAP.146], a Declaration is hereby made that the election of the First Respondent, Judah Isaac, of 2 September 2008 at the Constituency of Tanna, is void due to the breaches of Section 45(1)(a) of the Representation of the People's Act [CAP.146] by the First Respondent himself and his campaign team.
2. Consequent upon Declaration in 1 above, the Parliament seat occupied by the First Respondent, Judah Isaac, the sixth successful candidate in the Constituency of Tanna on 2 September 2008, is hereby vacated.
3. Order is made directing the Second Respondent, the Electoral Commission to conduct by-Elections pursuant to Section 22 of the Representation of the People's Act [CAP.146] for the one seat of Parliament of Tanna Constituency as a result of the declaration made in 1 above.
4. Order for costs are awarded in favour of the Petitioner. Such costs shall be taxed or agreed.
5. A Certificate shall be issued to inform the Speaker of Parliament.
6. A report shall be provided to the Public Prosecutor pursuant to Section 64 of the Representation of the People's Act [CAP.146].
7. The written reasons of the oral Judgment will be provided as soon as possible.

**DATED at Isangel, Tanna this 6<sup>th</sup> day of March 2009**

**BY THE COURT**

  
**Vincent LUNABEK**  
**Chief Justice**