

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

Election Petition Case No. 12 of 2012

BETWEEN: BAKOA KALTONGA, JOSHUA KALSAKAU,
MAXIME CARLOT KORMAN, LUNA TASONG,
NICOLA WATT, JOHN GEORGE SOKOMANU,
BILLY KALSARAP, YOAN MARIASUA,
RICHARD KALTONGA, ELMO JOSEPH, LEVI
ISHMAEL and HARRY KALSONG
Petitioners

AND: THE PRINCIPAL ELECTORAL OFFICER
First Respondent

AND: STEVEN MAUTEREI KALSAKAU
Second Respondent

AND: ALFRED ROLLEN CARLOT
Third Respondent

AND: GILLION KALOTITI WILLIAM
Fourth Respondent

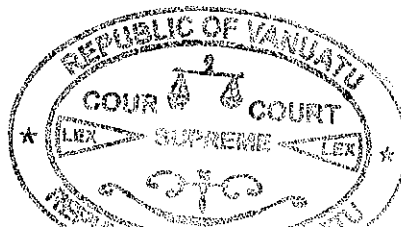
AND: NATO TAIWIA
Fifth Respondent

Coram: *Justice D. V. Fatiaki*

Counsel: *Mr. G. Blake for the Petitioners*
Ms. F. Williams and Ms. J. Warren for the First Respondent
Mr. B. Bani for the Fifth Respondent

JUDGMENT

1. Although this Election Petition generally challenges the entire result of the Efate constituency declared in the Parliamentary General Elections that took place on 30 October 2012, with the agreement of counsels this Court was requested and agreed to deal with the discrete allegations made in the petition, against **Nato Taiwia** who polled the fourth highest number of votes in the Efate Constituency, namely, **1022** votes.
2. The Petition is brought in the names of twelve (12) unsuccessful candidates in the Efate Constituency including **Joshua Kalsakau** who was the losing candidate who polled the highest number of votes namely, **1010** votes which is twelve (12) votes short of that gained by Nato Taiwia.



3. The specific allegations against Nato Taiwia are set out in **para. 17** of the Petition as follows:

“The Fifth Respondent (Nato Taiwia) treated voters by paying for food and kava for their benefit after the dissolution of parliament and during the period leading up to the election in breach of section 46 and 61A of the Act.”

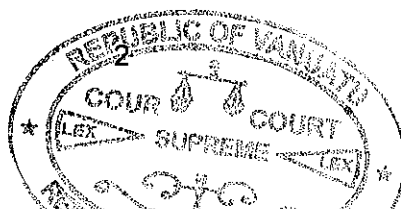
I say at once that reference to **Section 46** which defines the offence of “*treating*” is misguided because it no longer constitutes a ground for declaring an election void. (see in this regard: the observations of Spear J. in **Kalsakau v. Principal Electoral Officer** [2013] VUSC 99 at paras. 82 to 86 and 90).

4. It may be noted that the allegation of “*treating*” is a solitary allegation of: “... *paying for food and kava*” and does not include the provision of transportation or giving cash money. There is also no specific allegation of “*bribery*” contrary to section 45 or other corrupt practices made against Nato Taiwia. In this latter regard it is noteworthy that Nato Taiwia is not included in the allegations of bribery set out in **para. 15** of the Petition against Alfred Carlot. Additionally, no attempt was made to amend the allegations in the petition against Nato Taiwia.
5. Having said that I accept at once that no objection was taken before or during the trial, to the absence of any such allegations by respondent’s counsel. This was surprising especially as the sworn statements relied upon by the petitioners included clear evidence that part of the “*treating*” entailed the provision of free transportation to and from Ifira Island to Iriki landing and cash payments of **VT1,000** and **VT5,000** made to the petitioners’ witnesses by Nato Taiwia personally. Indeed, during the trial defence counsel even cross-examined **Bernard Kalotiti Kalorib** who testified to receiving VT5,000 from Nato Taiwia. Likewise Nato Taiwia was examined and cross-examined about the VT1,000 cash he gave to Kalo Morris at Malafau village.
6. Be that as it may defence counsel in his closing address drew the Court’s attention to **Rule 2.3 (1) (b)** of the **Election Petition Rules** which reads:

“(1) A petition must set out:

....
the grounds on which the election is disputed; and
the facts on which the petition is based;
....”

and counsel submits that, in the absence of any ground or facts alleging the provision of the transport giving of money by Nato Taiwia in the Petition, the Court should not rely on the evidence of Kalo Morris or Bernard Kalotiti insofar as their evidence referred to the giving or receipt of money. I agree.



7. The importance of specifying exactly what it is that is alleged against a respondent in an election petition is clear from a reading of **section 58 (1)** of the **Representation of the People Act** [CAP. 146] ("*the Act*") which provides:

"An election petition shall be in writing and shall specify the ground or grounds upon which an election is disputed".

(my underlining)

8. The mandatory nature of the requirement which is expressed in both the singular and plural, was also considered by the Court of Appeal in the context of a petition that had been amended outside the 21 days within which an election petition is required to be filed. [see: **section 57 (1) & (3)** of the Act and the judgment of the Court of Appeal in **Jimmy v. Rarua** (1998) VUCA 4] where both counsels before me in the present case, had successfully argued that the amended petition in that case involved the introduction of new grounds outside the 21 day period and were precluded by the Act.

9. The Court of Appeal in upholding counsel's argument said:

"The starting point in any statutory interpretation is clearly the words of the section itself. Upon a plain reading of the words (in sections 57 & 58) we are satisfied that the 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".

(my underlining)

10. The Court of Appeal also set out, adopted, and applied extracts from the judgments of the Supreme Court in **Naukat v. Naunun** [1999] VUSC 2 and **Jimmy v. UMP** [1982] VUSC 21 which included in Naukat's case a statement by the Acting Chief Justice:

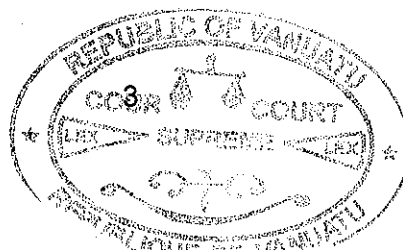
"That there is no jurisdiction to allow an amendment (to an election petition) introducing a fresh charge, whether the charge sought to be added is one only of a fresh nature or whether it is one of a fresh instance but not covered by the allegations in the petition as standing."

(my underlining)

11. The Court of Appeal did recognize however that:

"... a degree of particularizing or better defining specific allegations already made within the 21 day period is not objectionable ..."

(my underlining)



but again, the Court emphasized that the mandatory time frame had to be adhered to when it said:

"... a petitioner is prohibited from instituting an election petition in respect of new matters. In our view a petitioner is equally prohibited from amending an existing petition to introduce allegations and assertions which have not previously been made".

(my underlining)

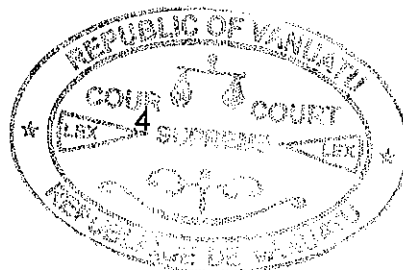
[re-affirmed in **Rarua v. Electoral Commission** (1999) VUCA 13 (majority judgment)].

12. In my view, given that restrictive approach to the grounds to be specified in an Election Petition and given that Section 61A disjunctively prohibits "cash donations" as well as "donations in kind" which latter expression includes a host of material benefits, in order to comply with Section 58 (ibid) it would be necessary to set out comprehensive particulars of the prohibited donation(s) it is alleged the respondent had provided in breach of the Section. At the very least, the broad nature of the "in-kind" donation would need to be identified consistent with the definition and beyond the mere mention of section 61A.
13. In light of the foregoing, in the absence of any necessary amendment(s) of the petition within the mandatory 21 days to include specific allegations or particulars of providing free transportation by boat and/or giving cash donations to named recipients, the petition must be considered "defective" and the evidence led in support of such unmentioned grounds must be considered irrelevant and inadmissible and cannot influence the court in determining the outcome of the petitioners' challenge to the election of Nato Taiwia.
14. As Spear J. noted during the course of the hearing of the election petition in **Kalsakau v. Principal Electoral Officer** [2013] VUSC99 (at para. 13):

"It is important that this restrictive approach to a consideration of election petitions is recognized as there was an attempt by Mr. Kalsakau at the hearing to go beyond the bounds of his petition with his complaints. That cannot be permitted."

15. So much then for the election petition, I turn next to a consideration of the provisions of the **Representation of the Peoples Act** [CAP. 146] which the petitioners allege was breached by Nato Taiwia and/or his agents namely, **section 61** which provides (in its amended form):

"61. Grounds for declaring election void



(1) The election of a candidate may be declared void on an election petition if it is proved to the satisfaction of the Supreme Court, that –

- (a) the candidate or any agent of the candidate has contravened section 61A, 61B or 61C;
- (b) there has been such non-compliance with the provisions of this Act, in the conduct of polling or in any other matter that such non-compliance affected the result of the election;
- (c) the candidate was at the time of his election a person not qualified or disqualified for election; or
- (d) there was such irregularity in the counting of the votes as may reasonably be supposed to have affected the result of the election.

"(2) Despite subsection (1), if on an election petition, the Supreme Court finds that there has been failure to comply with any provision of this Act, but the Court further finds that:

- (a) it is satisfied that the election was conducted in accordance with the principles laid down in this Act; and
- (b) such failure did not affect the result of the election, the election of the successful candidate is not to be declared void."

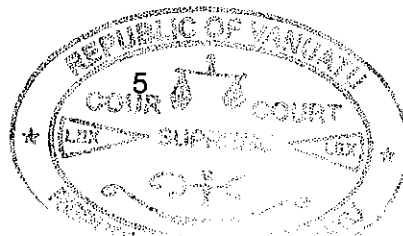
16. This section in its current form is materially different from its predecessor and came into effect on 30th April 2012 with the passing of the **Representation of the Peoples (Amendment) Act No. 10 of 2012** ("The Amendment Act").

17. It was first considered by this Court hearing the election petitions brought after the October 2012 General Election and, in particular, in the judgment of Spear J. in the **Kalsakau** case (op. cit) where he observed (at **para. 90**):

"I have already mentioned the difficulties identifying the "principles laid down in the Act". However, it is the second requirement under s.61(2)(b) that is likely to present any petitioner with more significant hurdle to overcome in a petition of this type – that is, that any payments made did not affect the result of the election."

and finally at **paras. 125 and 126**:

"125. This case illustrates just how difficult it is now to have an election overturned by way of an election petition. A petitioner is required to establish that the non-compliance with the Act, the prohibited gifts or such like must have had an effect on the outcome of the election. That will in most cases be very difficult indeed to prove particularly



given the short period of time that a petitioner has to define the scope of his or her petition.

126. *One of the more far-reaching consequences of the 2012 amendments was the repeal of s.61(2). That provided that the election of a candidate subsequently convicted of an offence of corrupt practice (personification, bribery, treating and undue influence) shall be declared void. This leaves the consequences of committing such an offence to be the penalties specified in s. 48 of a fine not exceeding Vt 100,000 or to imprisonment for a term not exceeding five years or both. There is now no means by the Act to overturn the election of a candidate unless it is proven that this must have had an effect on the outcome of the election under s.61 as amended."*
18. Earlier in his judgment (at **paras. 27 to 30**) Spear J. had noted two difficulties in the interpretation of **section 61(2)**. The first, being the absence of any "express statement of principles laid down in the Act" and, the second difficulty, "... is that an initial or primary finding under s. 61 (1) (b) that the non-compliance affected the outcome of the election is then effectively required to be reviewed under s. 61 (2) (b)."
19. Without necessarily differing from those observations I would merely note that section 61(3)(b) in the Amendment Act appears to be a re-formatting of what was section 61(3)(b) of the earlier provision rather than a completely new provision.
20. Furthermore, in my view section 61(2) is less confusing if it is viewed as giving rise to an evidential burden on the respondents' part where the petitioner has established one or more of the grounds enumerated in section 61(1) to the satisfaction of the Court on a balance of probabilities.
21. In other words, although section 61(1)(b) specifically mentions that the petitioner must prove the non-compliance complained about "... affected the result of the election" that ingredient or element may be proved by inference from the nature and extent of the proved non-compliance and section 61(2) allows a respondent (not the petitioner) where such an inference may be drawn, to seek to uphold the challenged election result by establishing the existence of both exculpatory factors set out in subsection (2) to the satisfaction of the Court on a balance of probabilities. Needless to say, the drawing of such an inference is likely to be easier or more readily made where the respondent's winning margin is very narrow.
22. The other possible view of section 61(2), based on the opening words is that the subsection recognizes a different ground or basis for voiding an election, namely, "... that there has been failure to comply with any provision of this Act ..." distinct from and unaffected by the matters enumerated in section 61(1)(a)



to (d). This view treats section 61(2) as a separate and distinct provision for voiding an election result and is based on the overall impression created in the Court's mind where the petitioner has failed to prove the separate grounds enumerated in the petition under section 61(1). This view lays emphasis on the discretionary nature of the Court's power ie. "may" even where the petitioner has not met the requirements of section 61(1).

23. With those introductory remarks I turn to consider the provisions of section 61A of the Amendment Act which is the particular contravention alleged in the ground directed against Nato Taiwia in the election petition.

24. Section 61A provides:

"61A Cut-off date for using representation allowance, any money or donations in kind

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

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

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

(i) cash donations; or

(ii) donations in kind,

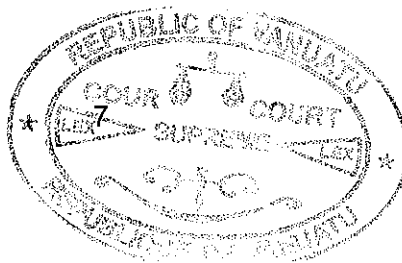
from the period commencing at the end of the life of Parliament or at the date of the dissolution of Parliament under subarticle 28(2) or (3) of the Constitution, to and including, the polling day.

(2) For the purposes of this section, **donations in kind** includes, but is not limited to, food or food products, transport, transport fares, machinery, cooking utensils, building materials and furniture."

25. To establish a contravention of the section, the petitioner must establish the following conjunctive elements on a balance of probabilities:

(1) That Nato Taiwia was a candidate for election;

(2) That he spent, allocated, or otherwise disbursed to the constituency where he was a candidate cash or "donations in kind" [as defined in subsection (2)]; and



- (3) That such spending, allocation or disbursement occurred between the end or dissolution of Parliament up to and including the polling day of the election in which he (Nato Taiwia) was a successful candidate (*"the statutory prohibited period"*).

26. For completeness, I set out the provisions of **section 61B** and **Section 61C** which creates exceptions to **Section 61A** and which are heavily relied upon by Nato Taiwia. The exceptions are:

61B Exception on polling day

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

61C Exception during the campaign period

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

(a) (not relevant)

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

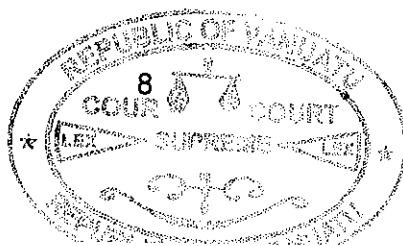
(c) Provide entertainment to the public for the purposes of entertaining the public during his or her campaign rally;

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

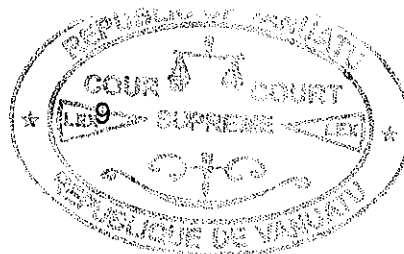
(3) *To avoid doubt, this section applies only during the campaign period declared by the Electoral Commission for the purposes of this Act.*
(my underlining)

27. These exceptions which came into force on 30 April 2012 well before the 2012 General Election have not been the subject of judicial consideration before this petition. It is necessary therefore to say a little about their scope and purpose.

28. They provide in clear terms, exceptions to the prohibitions contained in Section 61A ie: giving of "cash donations" and "donations in kind" during the statutory prohibited period if the prohibited conduct occurs on "polling day" (**section 61B**) or during the officially declared "campaign period" (**section 61C**) where the donees are the "agents" of the donor candidate.



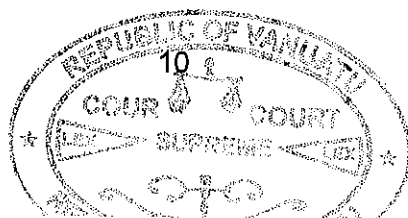
29. However, neither exception is available prior to the officially declared campaign period or if it is established that the prohibited donation was given "*corruptly*" with a view to influencing a person either to vote or not to vote at an election or on account of the person having voted or refrained from voting.
30. In other words, in spite of the exceptions, "*treating*" as defined in **Section 46** of the Act remains a criminal offence. Parliament however has decided that a candidate may treat his approved "*agents*" and entertain the public at a campaign rally during the "*campaign period*" and provide food, drink, transport and accommodation to anyone on the "*polling day*", without falling foul of section 61A.
31. As to who are "*agents*" of a candidate, besides subsection (2) of section 61C little assistance or explanation is provided, other than to say an "*agent*" is a person who acts with the approval of the candidate.
32. There is no limitation on the number of "*agents*" a candidate may have; no requirement for the candidate to submit a list of the names of his "*agents*" to the Electoral Office or to register his or her "*agents*" by a specified date. Nor is there a requirement that an "*agent*" wear or carry some form of identification of the candidate he or she represents during the campaign period. There is also no prohibition on an "*agent*" acting for more than one candidate in an election or in the same constituency. In simple terms, just because a candidate has not submitted a list of agents or a person's name is not on a candidate's list, does not necessarily mean that the omitted person is not an "*agent*" approved by the candidate. In my view the absence of such basic checks and necessary limitations means that the exception under **Section 61C (1) (b)** is open to manipulation and abuse by unscrupulous candidates and needs to be considerably tightened up.
33. It is common ground that the "*statutory prohibited period*" during the 2012 General Election extended from the end of the life of Parliament on 3 September 2012 up until and including the officially declared polling day on 30 October 2012. Likewise the official "*campaign period*" extended for 2 weeks prior to polling day and was for a shorter period.
34. To establish the alleged contravention of **Section 61A** the petitioners rely on the sworn statements of:
- Joshua Kalsakau;
 - Claude Kalsakau;
 - Kalo Morris;
 - Bernard Kalotiti Kalorib;
 - Kalsong Kalpokai;



- Simo Sablan; and
- Lawikoto Kalfabun;

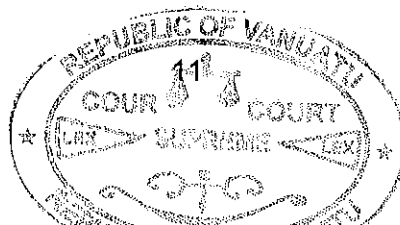
Except for Claude Kalsakau and Kalo Morris all of the petitioners witnesses personally produced their sworn statements and were cross-examined. Claude and Kalo had died after their sworn statements were filed. Their statements were admitted after defence counsel indicated he had no objection to their inclusion as part of the petitioner's evidence.

35. In summary, the petitioners' evidence is uniformly consistent in that during the statutory prohibited period Nato Taiwia had established a camp near the beach at a place called Paunny on the island of Ifira where free food and kava was provided not only to his "agents" and campaign helpers but to all persons who entered the camp on a daily basis. No-one was turned away. In cross-examination some of the witnesses accepted that the persons they saw at the camp included Nato Taiwia's agents and campaign team.
36. **Joshua Kalsakau** made particular mention of a conversation he had with Nato Taiwia during the statutory prohibited period at the Iriki jetty, where he: "*asked him whether he was aware that what he was doing, feeding the people, was tabu and illegal and that this can be reported to the authorities. He replied and said he was aware.*" He did not however report the illegal activity to the authorities at the time.
37. In cross-examination he agreed that the conversation with Nato Taiwia occurred a few days before polling in the 2012 elections and he generally confirmed that besides Nato Taiwia's agents the persons who daily attended and ate at the camp included the agents' wives and children. He also mentioned seeing **Song Napakaurana** and the **Korikalo** brothers Amos and Brown at the respondent's camp. He baldly denied that a written list of Nato Taiwia's agents had been sent to the Electoral Office prior to the start of his election campaign.
38. No evidence was led however as to whether or not the 3 above-named persons or the wives and children of Nato Taiwia's "agents" were registered voters in the constituency or did not receive the approval of Nato Taiwia to be present at his camp or had performed any prohibited act as his "agent".
39. In the present case **Nato Taiwia** provided a typed list of 63 named "agents" in a letter dated 1 October 2012 addressed to the Principal Electoral Officer. The list was confined to his "agents" on **Ifira island**. The letter also indicated that he had "agents" in other villages and polling station which would be provided later. However, no other list was produced at the trial but, as earlier pointed out, that omission does not mean that such "other agents" did not exist or were not approved by him. Indeed, his evidence was to the contrary in that the other



persons including **Claude Kalsakau** and **Bernard Kalotiti** acted as his "agents" during his campaign but were not included in the list because they were not residents of **Ifira island**.

40. Nato Taiwia denied any recollection of having the particular conversation with Joshua Kalsakau. He knows Bernard Kalotiti Kalorib his close relative who had campaigned for him in the Port Vila/Malapoa areas. Likewise Claude Kalsakau in his sworn statement deposed to being the respondent's "*main campaign and resource person during the election*".
41. He admitted feeding a large number of people at his Pauuni camp site starting during the events leading up to the case of **Ifira Trustees Ltd. and Kalsakau and Others v. Barak Sope and Others** [2013] VUSC 131 the "*Ifira Trustees*" case) in September/October 2012 and continued until the commencement of his election campaign in October 2012 when he made a list of his approved "agents". During the campaign period he fed his "agents" and their families at the camp as well as defendants involved in the "*Ifira Trustees*" case which was filed on 2 November 2012.
42. Under rigorous cross-examination he admitted transporting and feeding several hundred supporters on the closing night of his campaign on 27 October 2012. He was adamant that he never supplied or paid for any kava during his campaign or at his camp. He was also adamant that a list of his "agents" was sent to the Electoral Office.
43. **Lebu Kalterikia** was on Nato Taiwia's campaign team during the 2012 General Elections. He lived on Ifira Island and he prepared Nato Taiwia's list of "agents" and personally delivered it to the Electoral Office on 1 October 2012 with Alick Kalmelu. He produced a list which had an official Electoral Office stamp on it [**Exhibit D2(A)**]. He said the purpose of the list was to identify the people who would be at Nato Taiwia's camp during the election campaign. He denied making the list after the court case had started - "*only God is my witness*". He confirmed that the list he prepared was restricted to "agents" who lived on Ifira Island and did not include other "agents" on the mainland.
44. He agreed that many people ate at Nato Taiwia's camp during the campaign period and that no one was refused entry or food because it was "... *not our custom*" to bar people or deny food to people who were in the camp "... *but we didn't encourage it*". Normally however there were fewer people than the 63 people named in the list of "agents".
45. In this particular regard defence counsel advanced an unusual and novel argument that the prohibited conduct contemplated by Section 61A was: "*donations*", and the mere feeding of uninvited people who came to the

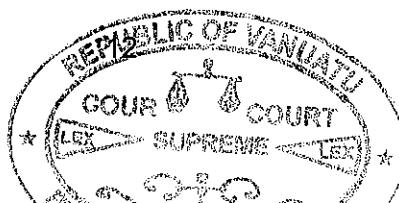


respondent's camp of their own volition did not constitute a "donation" which required a more intentional proactive giving on the respondent or his agents part rather than the mass feeding "by omission to prevent it" that was established by the petitioners' witnesses. In similar vein counsel argued that such persons in not being barred from eating or from entering the camp could be said to have the tacit approval of the respondent sufficient to make them his "agents" for the purposes of the exception in **Section 61C (1)(b)**. There being nothing in the section to prohibit "agents" being progressively approved during the course of the "campaign period".

46. In my view the submissions are misconceived in so far as they look at the irrelevant actions and behavior of the recipient of the donation and not at the donor/candidate which is the target and focus of Section 61A. it is the candidate's spending, allocation or disbursement of money (whether in the form of "cash" or "kind") that matters. The term "donation" is plainly used to clarify and differentiate such prohibited gratuitous spending from ordinary payments made in consideration of valuable services rendered in the course of a normal business transaction.
47. He agreed there was a "large crowd" on the respondent's campaign closing night on 27 October 2012. The "campaign period" was for two weeks preceding the polling day. When Parliament ended he went "house to house" campaigning for Nato Taiwia to ensure that all eligible voters over 18 years of age were registered to vote.
48. Finally in cross-examination he accepted that it could be said "in custom" if someone receives food, he or she is expected to reciprocate for the gesture – "you could say that people we feed, we could count on their vote".
49. The above evidence is reminiscent of the observations of Dawson J. when he said in **Barak Sope and others v. PEO** [2009] VUSC 62 (at para. 29):

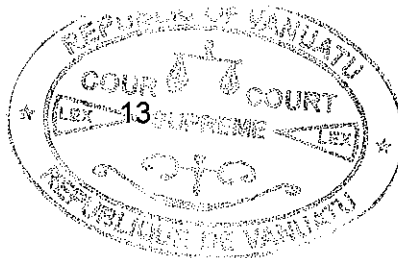
"... no effort was made to restrict consumption of all this food to only those persons (ie. election team and sub-committees). One witness made it clear that when food was made available, anybody present could participate in its consumption. Making available a feast of food to anybody provided by campaign members supporting (a candidate) can only have been for the purpose of fostering a positive view of him as a candidate and thereby making it more likely those persons would vote for him. These types of activities are bribery in breach of section 45 (1) (ii) and also treating in breach of section 46 (a) of the Act."

50. In cross-examination by State Counsel he agreed that he had no independent written record of having delivered the list of agents to the Election Office but he

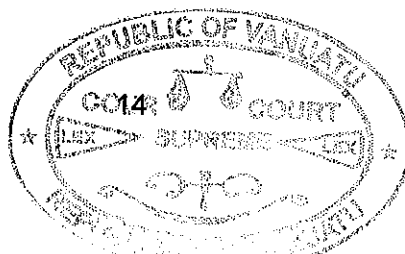


was accompanied by Alick Kalmelu at the time. The list was submitted because the Election Office required it.

51. In re-examination he clarified that mostly the "agents" wives and children did the cooking in the camp and the feeding of "agents" only occurred during the campaign period.
52. The Principal Electoral Officer **Charles Vatu** gave evidence that the Elections Office had no record of having received a list of "agents" from Nato Taiwia nor was a copy found after searching for it. In cross-examination he agreed that the provision of a list of "agents" was a standard practice in the 2012 General Elections and that he himself was a candidate in the election and the party he represented had provided a list of approved agents.
53. He accepted however that the only requirement for an "agent" is that he/she be "approved" by the candidate. There was no requirement to produce a list; no limitation on the number of "agents" a candidate could have and failure to submit a list was not an election offence nor did it disqualify a candidate from standing in the election.
54. He accepted that realistically he had no idea what it was like in the Elections Office at the time of the 2012 General Elections and he reluctantly accepted the "possibility" that Nato Taiwia's list of agents was unrecorded or went missing after it was delivered to the Electoral Office. The requirement to submit a list of agents was an "administrative requirement" of the Elections Office intended to protect the candidates against "public suspicion".
55. To the Court the witness agreed that he was appointed Principal Electoral Officer on 30 September 2013, ie: 11 months after the 2012 General Elections.
56. The second State witness was **Pierrette Henry** a long-time employee of the Elections Office who was secretary/typist and front desk officer during the 2012 General Elections receiving all inwards and outwards mails. She described the Elections Office procedure for stamping, receiving and dispatching mail. She attached copies of the two (2) stamps used by the Electoral Office. She was requested and searched the office records and confirmed that there is no record of Nato Taiwia's list of agents in the office files.
57. In cross-examination she confirmed that the Election Office was busy in the lead up to and during the 2012 General Elections necessitating the employment of three (3) extra temporary staff to handle the many queries received. She recalls seeing Nato Taiwia and other candidates coming to the Elections Office but she was unfamiliar with his campaign secretary.



58. She accepted that there were times when she would leave the front office to be manned by one of the other girls but she denied the possibility that Nato Taiwia's list of agents could have been delivered during one of those absences because she claimed to be the only person authorized to receive a candidate's agent list. She didn't call and remind candidates who hadn't presented their agent list because she was "... *very busy at the time and couldn't keep track or check on who had or hadn't presented a list of agents*". Significantly she didn't deny the genuineness of the stamp on the respondent's list of agents produced by Lebu Kalterikia in Court.
59. In so far as it is necessary to do so where there is a conflict between the evidence of the Elections Office officials and Lebu Kalterikia and Nato Taiwia, having heard their evidence and observed them closely, I prefer and accept the respondent's evidence.
60. The Election Office officials left me with the distinctly unfavourable impression that they were trying too hard to protect the office's processes and procedures even to the extent of rejecting the possibility of human error on the part of temporary-help during a time when the office was "*very busy*".
61. Needless to say I also reject the suggestion that the respondent's non mandatory "*list of agents*" was a fraudulent concoction created after the challenge to Nato Taiwia's election was filed and in an attempt to bolster his defence.
62. Additionally it was common ground that the feeding of people at the respondent's camp commenced well before the "*campaign period*" during the time when the "*Ifira Trustee case*" was going on in September/October 2012 and continued until the closing day of the respondent's election campaign on the night of 27 October 2012.
63. I accept counsel's submission that gratuitous feeding of persons outside the "*campaign period*" and within the "*prohibited statutory period*" in connection with the conduct of the election is in breach of Section 61A even if the persons being fed were "*agents*" of the respondent. But in order to establish such a breach however, it would be necessary to produce fairly exact evidence of the feeding that occurred in the respondent's camp between 3 September 2012 and 15 October 2012. The petitioner would also have to establish that on the relevant feeding day or days the respondent was a "*candidate*" duly registered for the 2012 General Elections.
64. In this latter regard no documentary evidence was produced to establish the dates of the "*campaign period*" or when the respondent's candidature was




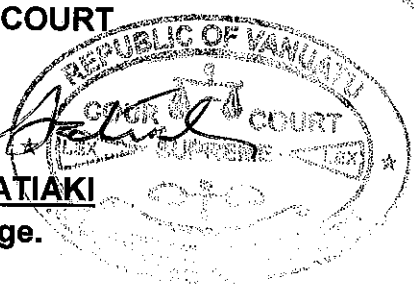
confirmed and declared by the Electoral Commission yet both would have been readily available with little effort.

65. Needless to say unless and until the respondent's candidature was officially declared, he was not a "candidate" for the purposes of **Section 61A** and that event would have occurred sometime after the end of Parliament and before the declared "campaign period" commenced.
66. In the circumstances although food may have been freely available in the respondent's camp at Pauuni, given the **Section 61C** "exception" and the respondent's "list of agents" and the fact that the "Ifira Trustess" case was ongoing during September/October 2012, in order to establish a breach of **Section 61A** it would be necessary for the petitioners' evidence to be much more specific as to the date(s) and the identity of the persons who attended and ate at the camp during the statutory prohibited period. Vague generalities that might have been acceptable in 2009 will no longer suffice to establish a prima facie case in 2012.
67. The allegations against Nato Taiwia have not been established to the Court's satisfaction on a balance of probabilities and is accordingly dismissed. The question of costs are reserved to when the balance of the petition is determined.

DATED at Port Vila, this 16th day of May, 2014.

BY THE COURT


D. V. FATIAKI
Judge.

The seal of the Republic of Vanuatu Court of Appeal is circular. It features a central emblem with a scale of justice and a book. The text "REPUBLIC OF VANUATU" is written around the top inner edge, and "COURT OF APPEAL" is written around the bottom inner edge. There are two stars on either side of the central emblem.