

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

Election Petition
Case No. 20/891 SC/CIVL

BETWEEN: Ken Don Nmalamuwomu
Petitioner

AND: Gracia Shadrack
First Respondent

AND: Principal Electoral Officer
Second Respondent

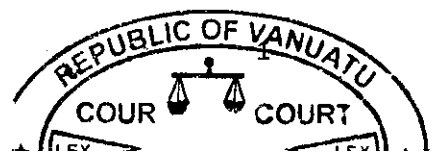
AND: Electoral Commission
Third Respondent

Date of Pre-Trial Conference: 22 June 2020
Before: Justice V.M. Trief
In Attendance: Petitioner – Ms J. Kaukare
First Respondent – Mr J. Tari
Second and Third Respondents – excused (State Law Office)
Date of Decision: 24 June 2020

JUDGMENT AS TO STRIKE-OUT APPLICATION

A. Introduction

1. This is an Application to strike out the Election Petition on the basis that it was filed outside the time limit prescribed in subs. 57(2) of the *Representation of the People Act* [CAP. 146] (the 'Act').
2. Having heard counsels, I delivered my decision and reasons. I set them out in this judgment.



B. Background

3. The polling day for this year's general election was 19 March 2020.
4. On 6 April 2020, the Electoral Commission declared the results of the election.
5. On 8 April 2020, the results of the election were published in the *Official Gazette* No. 26.
6. On 24 April 2020, the Petitioner filed this Petition disputing the election of the First Respondent, Member of Parliament for the constituency of Malekula. The Petition alleges that the First Respondent spent money in the form of cash donations and donations in kind in the period 22 January 2020 to 19 March 2020 being dates within the period commencing at the end of the life of Parliament to and including, the polling day, contrary to s. 61A of the Act. Such non-compliance is alleged to have affected the result of the election.

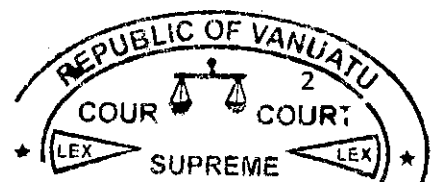
C. The Law

7. Section 57 of the Act prescribes the time for presentation of petitions as follows:

57. (1) *Subject to subsection (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 section shall not be extended.*

8. Sections 61 and 61A of the Act provide:

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) *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.

61A (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.*

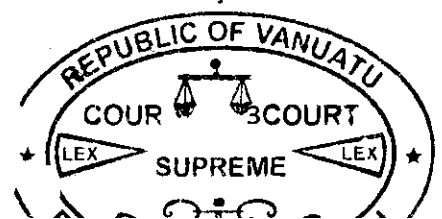
D. Submissions

9. Mr Tari submitted that subs. 57(2) of the Act required that the Petition be filed within 21 days of the alleged payments of money or other reward set out in the Petition. The last alleged payment was made on 19 March 2020 therefore the Petition had to be filed by 8 April 2020. He relied on the decision in *Restuetune v Ati*, Election Petition Case No. 20/911 (18 May 2020).

10. Ms Kaukare submitted that this proceeding had already been listed for hearing of the Petition therefore a strike-out application was precluded. Further, that subs. 57(2) allowed a petition to be presented within 21 days of alleged payments that were made "after an election". In the present case, the specific payments alleged were made before or on polling day therefore the Petition was properly filed within 21 days in accordance with subs. 57(1) of the Act. She also submitted that in any event the Petition could not have been filed within 21 days of each alleged payment as the results of the election had not yet been declared (this applied to all but the last 2 alleged payments).

E. Discussion

11. That this proceeding had been listed for hearing of the Petition could not preclude the hearing of this Strike-Out Application. That would be to put form over substance. I reject this submission by Ms Kaukare.



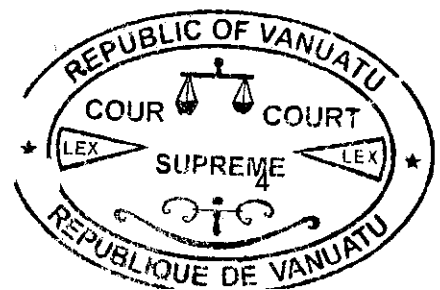
12. Subsection 57(1) of the Act provides that an election petition shall be presented within 21 days of the gazettal of the results of the election to which the petition relates. The results of the election were gazetted on 8 April 2020, therefore election petitions had to be presented within 21 days of that date.
13. Looking at the scheme of the Act as a whole, s. 61A of the Act provides that a candidate must not spend, allocate or otherwise disburse to his or her constituency any money in the form of cash donations or donations in kind from the period commencing at the end of the life of Parliament to and including, the polling day. The Act does not prohibit any expenditure by candidates in their constituency **before** the end of the life of Parliament. The only prohibition is on a candidate spending money in his or her constituency during the period set out in s. 61A.
14. However, it may well be the case that a candidate does not actually spend money in his or her constituency in accordance with s. 61A but instead promises voters that in return for their vote, he or she will make a payment or other reward **after** the election.
15. The wording of subs. 57(2) of the Act suggests that it is directed at such payments of money or other reward made **after** an election:

57. ...

(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.*

(my emphasis)

16. Given that the prohibition in s. 61A of the Act applies only to payments made from the end of the life of Parliament to and including, the polling day, it is logical that s. 57(2) is intended to apply to any payments made **after** polling day. I therefore agree with Ms Kaukare's submission that subs. 57(2) allows a petition to be presented within 21 days of payments allegedly made "after an election".
17. The end result is that subs. 57(1) requires that petitions must be presented within 21 days of the gazettal of the results of the election. However, for any payments of money or other reward made **after** an election by or on account of a person whose election is disputed, the petition alleging those specific payments or reward **may** be presented within 21 days of the alleged payment. This could be well after the time limit provided for in subs. 57(1). Whichever subsection applies, that time limit cannot be extended – subs. 57(3).
18. I therefore differ from the interpretation of subs. 57(2) taken in *Restuetune v Ati*, Election Petition Case No. 20/911.
19. The payments alleged in this Petition were all made in the period up to and including the polling day. In the circumstances, subs. 57(2) does not apply and the Strike-Out Application is not made out. It is declined and dismissed.



F. Result and Decision

20. The First Respondent's Strike-Out Application is declined and dismissed.
21. As previously ordered, this matter is listed for Hearing of the Petition **at 9am on 29 June-3 July 2020** at Lakatoro Courthouse (5 days).

**DATED at Port Vila this 24th day of June
BY THE COURT**

VM Trief
.....
Viran Molisa Trief
Judge

