

**OFFICE OF THE OMBUDSMAN**

**PUBLIC REPORT**

**ON THE  
FAILURE OF THE POLICE TO  
PROVIDE ACCURATE CRIMINAL  
RECORDS FOR APPLICANTS FOR  
THE 5<sup>TH</sup> PRESIDENTIAL ELECTION  
AND THE DEFECT IN THE ELECTION  
OF THE PRESIDENT ACT [CAP 104]**

12 January 2007



**REPUBLIC OF VANUATU**

4045/2007/01

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**PUBLIC REPORT ON THE FAILURE OF THE POLICE TO PROVIDE ACCURATE  
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AND THE DEFECT IN THE ELECTION OF THE PRESIDENT ACT [CAP 104]**

**SUMMARY**

The Ombudsman is issuing this Public Report to illustrate the importance of screening candidates for Presidential elections especially for their criminal records.

In the 5<sup>th</sup> Presidential elections that took place in April 2004, Mr Alfred Masseng Nalo (now deceased) was elected as the 5<sup>th</sup> President of the Republic of Vanuatu. After his election, it was found that he had a suspended sentence that would expire on or after 3 April 2005. As such, the late Mr Masseng Nalo was not eligible to contest in the Presidential elections as per section 24 (1) (b) of the Representation of the People Act [CAP 146].

In investigating this issue, the Ombudsman has found that section 80 of the Police Act [CAP 105] provides that the Police keep record of all previous convictions. However, the Criminal Records Office (CRO) of the Vanuatu Police Force does not keep record of convictions that have been made throughout Vanuatu. Thus, when providing the Certificate of Previous Conviction for the late Mr Masseng Nalo, it did not include the conviction of the late Mr Masseng Nalo in Santo that was subsequently suspended for two (2) years.

Furthermore, it has been found by the Ombudsman that there may be a defect in the Election of the President Act [CAP 104]. Section 3 of the same Act states that a nomination paper for a candidate for election as President shall be in Form B in Schedule 1 and shall be subscribed by the signatures of ten persons who shall themselves be qualified to be elected as President of the Republic. This said section of CAP 104 allows for the nomination of a candidate that may not be eligible to contest in a Presidential election.

Following the above findings, the Ombudsman now makes the following recommendations:

**Recommendation 1:**

**That the Police Commissioner ensures that the Criminal Records Office (CRO) keeps and maintains proper records of all criminal convictions throughout the Republic of Vanuatu.**

**Recommendation 2**

**That Section 3 of the Election of the President Act [CAP 104] be amended so that the people who nominate a candidate for the Presidential election have had an opportunity to properly scrutinize their nominee's background.**

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## **1. JURISDICTION**

- 1.1 The Constitution, the Ombudsman Act and the Leadership Code Act allow the Ombudsman to look into the conduct of government, related bodies, and Leaders. This includes the Electoral Commission, the Electoral Office and the Vanuatu Police Force. The Ombudsman can also look into defects in laws or administrative practices, including the Election of the President Act [CAP 104] and the function of the Police under section 80 of the Police Act [CAP 105] which is to keep record of previous convictions.

## **2. PURPOSE, SCOPE OF INVESTIGATION AND METHODS USED**

- 2.1 The purpose of this public report is to set out the facts leading up to the election of late Masseng Nalo as the 5<sup>th</sup> President of the Republic of Vanuatu.
- 2.2 The scope of this investigation is to establish the facts about the alleged failure of the Police to provide accurate criminal records for applicants for the 5<sup>th</sup> Presidential elections and to determine whether there are any defects in the Election of the President Act [CAP 104] or the administrative practice of keeping record of previous convictions by the Police is defective.
- 2.3 This Office collects information and documents by informal request, summons, letters, interviews and research.

## **3. RELEVANT LAWS**

- 3.1 Relevant parts of the following laws are reproduced in **Appendix 'A'**.  
Election of the President Act [CAP 104]  
Representation of the People Act [CAP 146]  
Police Act [CAP 105]

## **4. OUTLINE OF EVENTS**

### **Facts of the election of Mr Alfred Masseng Nalo as the 5<sup>th</sup> President of the Republic of Vanuatu.**

- 4.1 On 24 March 2004, the term of office for Vanuatu's 4<sup>th</sup> President, His Excellency John Bennet Bani; expired and a vacancy in the President's Office arose.
- 4.2 On 26 March 2004, the Chief Justice, His Lordship Vincent Lunabek J, issued a Writ for the election of the President of the Republic of Vanuatu pursuant to section 1 of the Election of the President Act [CAP 104] (Please refer to **Appendix 'A'**). The date appointed in the writ for the election of the President was Thursday 8<sup>th</sup> April 2004.
- 4.3 Following the Writ, the Electoral Commission, with the powers vested in it by section 2 of the Election of the President Act [CAP 104] (please refer to

**Appendix 'A')**, also issued a Notice on 26 March 2004. This Notice was to declare that following the Writ made by the Chief Justice; nominations for the President's post could now be made using the prescribed Form B that is contained in Schedule 1 of CAP 104 (please refer to **Appendix 'A'**). The closing date for all applications was 2<sup>nd</sup> April 2004.

- 4.4 On 30 March 2004, a completed nomination form was lodged at the Electoral Commission in which the late Mr Masseng Nalo was nominated as a candidate for the 5<sup>th</sup> Presidential election.
- 4.5 On 31 March 2004, the Principal Electoral Officer, Mr Martin Tete, issued a letter to the Officer-in-charge of the Criminal Investigation Department of the Vanuatu Police Force, Mr George Twomey, requesting him to provide the police criminal records, if any, of the late Mr Masseng Nalo who had submitted his application for the post of President.
- 4.6 A Certificate of Previous Convictions was thus issued by the Police Force Criminal Records office for the late Mr Masseng Nalo. The only record that was on this certificate was that on 25 June 1987, the late Mr Masseng Nalo was fined a total of VT 6,000 for permitting 2 cars to be used without road tax and permitting other persons to drive the vehicles without insurance.
- 4.7 On 5 April 2004, the Electoral Commission made assessments and comments on each of the applicants. The Commission at that time made a decision to approve the late Mr Masseng Nalo's application.
- 4.8 On 8 April 2004, the Electoral College met at the Parliament House to elect a President. However, this could not be done as a consensus could not be reached by the College to elect a potential candidate as President. The Chief Justice, who was also the returning officer, then ordered the College to meet again on 10<sup>th</sup> April 2004. The College still could not elect a President on that date. The College was then ordered to meet again on 12 April 2004.
- 4.9 On 12 April 2004, the late Mr Masseng Nalo was duly elected as the 5<sup>th</sup> President of the Republic of Vanuatu.
- 4.10 The total amount of funds that was allocated in the Electoral Commission's budget to cater for this Presidential election was VT 4 million.
- 4.11 On 13 April 2004, the State Law Office informed the Electoral Commission that the newly elected President had a suspended sentence for a period of 2 years which will expire after 3 April 2005. As such, the late Mr Masseng Nalo was not eligible to contest the Presidential elections as per section 24 (1) (b) of the Representation of the People Act [CAP 146] (please refer to **Appendix 'A'**).

The Commission was then requested to reconsider the newly elected President's position and take the necessary steps to ensure that there is full compliance with the law. This could be achieved by requesting the President to voluntarily step down or by seeking a declaration by the Court.

4.12 This suspended sentence followed the conviction of the late Mr Masseng Nalo in Criminal Case No. 11 of 2002 (please refer to **Appendix 'B'**) that was tried in Luganville, Santo by the Supreme Court. The late Mr Masseng Nalo was convicted for:

- aiding and abetting misappropriation – 2 months imprisonment;
- receiving property dishonestly – 1 month imprisonment to run concurrently with the above conviction making a total of 2 months and
- aiding and abetting misappropriation - 2 months imprisonment to be made consecutive to the sentences for the above 2 convictions making a total of 4 months imprisonment.

4.13 On 14 April 2004, the Electoral Commission issued a letter to the Attorney General in response to the letter of 13 April 2004 mentioned in section 4.11 above.

The Commission had decided that the eligibility of the late Mr Masseng Nalo as a candidate of the Presidential election amounts to an election dispute which should be appropriately addressed to the Supreme Court of Vanuatu as the Court of competence to hear it as an election dispute. Further involvement of the Electoral Commission on the Presidential election will only be subject to the direction of the Court of Competence – the Supreme Court of the Republic of Vanuatu.

4.14 On 27 April 2004, the Solicitor General filed a Claim for Judicial Review with the Supreme Court of Vanuatu for the following orders to be made :

- A declaration that the first defendant was not eligible to stand for election to the position of President of the Republic of Vanuatu.
- An order quashing the first defendant's appointment as President of the Republic of Vanuatu.
- A declaration that the office of the President is vacant.

This case was registered as Civil Case No. 90 of the Supreme Court.

4.15 On 7 May 2004, the Supreme Court delivered a judgment on Civil Case No. 90 of the Supreme Court (please refer to **Appendix 'C'**). There were 4 orders that were made in this judgment which were:

- Mr Masseng Nalo was not eligible to stand for election to the position of the President of the Republic of Vanuatu.
- Mr Masseng Nalo's appointment as the President of the Republic of Vanuatu is quashed.
- The Office of the President is now declared vacant.
- There is no order as to costs.

## **Enquiry by the Ombudsman.**

4.16 On 21 and 22 April 2004, the following persons were served with Notices to appear before the Ombudsman on 27 April 2004 and explain the procedures to select and approve the applications submitted by candidates for the position of the President of the Republic of Vanuatu:

- (i) Mr Martin Tete, Principal Electoral Officer;
- (ii) Pastor Sethy Regenvanu, Chairman of the Electoral Commission;
- (iii) Ms Cherol Ala, Member of the Electoral Commission;
- (iv) Mr Tom Alick Kalo, Deputy Principal Electoral Officer and
- (v) Pastor Youen Atnelo, Member of the Electoral Commission.

4.17 On 27 April 2004 at 9:00am in the morning, Mr Martin Tete was interviewed by officers of the Ombudsman.

Mr Tete confirmed the information stated in points 4.5, 4.6, 4.7 and 4.11 above.

Mr Tete advised that during the process of screening the applicants, they were not informed by the CID or the Luganville Court House that the late Mr Masseng Nalo had a 2 year suspended sentence that was still valid.

Furthermore, Mr Tete stated that since 1980, the process of screening applicants has been the same and that is, for the CID to advise them of any criminal records that candidates may have. This is the same process that was followed for the Presidential elections but the Police did not inform them of the suspended sentence.

4.18 Pastor Sethy Regenvanu, the Chairman of the Electoral Commission, was interviewed by officers of the Ombudsman on 27 April 2004 at 10:00am.

Pastor Regenvanu advised that upon receiving the applications from each individual candidate, they had screened them all to ensure that they were eligible to contest the Presidential elections. The candidates that were deemed to be eligible were then forwarded to the Electoral College for the Presidential election.

In his view, the Electoral Commission followed the procedures to screen the applicants before submitting the names of the eligible candidates to the Electoral College. It was the Police that failed to inform the Commission of the late Mr Masseng Nalo's suspended sentence.

- 4.19 Pastor Youen Atnelo, member of the Electoral Commission was interviewed by officers of the Ombudsman on 27 April 2004 at 11:00am.

Pastor Atnelo stated in the interview that the Commission had followed the procedure to screen applicants by asking the Police to provide the criminal records (if any) of each of the applicants. The Police had however, failed to inform the Commission that the late Mr Masseng Nalo had a suspended sentence. If the Police knew that they do not have the records of those convicted on Santo or elsewhere, they should inform the Commission so that the Commission can contact these other places.

In this case, the Commission was not informed until after the late Mr Masseng Nalo was elected as President. This was why the matter had to go to court as the late Mr Masseng Nalo refused to resign as the President.

- 4.20 Ms Cherol Ala, member of the Electoral Commission was interviewed by officers of the Ombudsman on 27 April 2004 at 2:00pm.

Ms Ala stated in the interview that the Commission did not receive any information from the Police about the late Mr Masseng Nalo's suspended sentence. In her opinion, if the sentence was imposed by the court, then the Police should have this information. As this was not so, it was only after the late Mr Masseng Nalo was elected as President that they were informed of the suspended sentence by the State Law Office.

Furthermore, there should be a clear guideline on how to screen applicants in CAP 146 and CAP 104. At the moment, the same process is used to screen applicants for the Presidential elections as well as candidates for National Elections which is to go through the Police. Once the Police provide a Police Clearance, then the applicant is deemed to be eligible to contest in the elections. This is what happened in the late Mr Masseng Nalo's case – the Police provided a Police clearance therefore he was considered to be an eligible candidate for the Presidential elections.

- 4.21 Due to Mr Tcm Alick Kalo's work commitment, it was not possible for him to be interviewed by officers of the Ombudsman.
- 4.22 On or about 28 April 2004, the following persons were served with Notices of Witness to appear before the Ombudsman to explain their involvement as witnesses to the late Mr Masseng Nalo's application in the prescribed Form B – Nomination of Candidate for Election as President of the Republic, contained in the Election of the President Act [CAP 104] (please refer to Appendix 'B'):

- (1) Mr Adrien Malere;
- (2) Mr Tom Bakeo;
- (3) Mr Noel Molvis;
- (4) Mr Alick George Noel;
- (5) Mr Melteres Ambrosio;
- (6) Mr Makali Kalo and
- (7) Mr Theophile Massing.

4.23 Mr Adrien Malere was interviewed by officers of the Ombudsman on 3 May 2004.

Mr Malere stated in the interview that he had known the late Mr Masseng Nalo for a very long time. Towards the Presidential elections, he had called the late Mr Masseng Nalo by phone to Ambrym to inform him that he was the UMP party's nominee to the post of President. This was due to his past position as a Member of Parliament and also as the Speaker of Parliament. He did not know that the late Mr Masseng Nalo had a suspended sentence of two (2) years nor did the late Mr Masseng Nalo inform him of it. Thus, when the late Mr Masseng Nalo asked him to sign the appropriate form as a witness, he signed it. Furthermore, the Electoral Commission also accepted the late Mr Masseng Nalo's application therefore he considered everything to be alright.

4.24 Mr Tom Bakeo was interviewed by officers of the Ombudsman on 3 May 2004.

Mr Bakeo stated in the interview that he had known the late Mr Masseng Nalo from when they were living on Santo and they are now neighbours at D'York Street, Independence Park. On the last day before the closing date for applications to the Presidential post, the late Mr Masseng Nalo went to his house and asked him to sign the Nomination of Candidate for Election of President of the Republic in which he was the nominee. Mr Bakeo stated that he signed the Form in good faith and as the law requires that there must be witnesses to an application.

Mr Bakeo further stated that it is not required by law that witnesses must properly scrutinize an applicant before signing as a witness. It is the duty of the Electoral Office and Commission to scrutinize the applicants to see if they are eligible to contest in any election. Mr Bakeo also stated that he had heard that there was a case against the late Mr Masseng Nalo in Santo but did not know whether his suspended sentence had expired or if the President had pardoned him. But again, as witnesses are not empowered by law to properly scrutinize an applicant, he did not think he had to scrutinize the application before signing it. He only signed it in good faith and it is the Electoral Office and Commission who have the last say.

- 4.25 Mr Noel Molvis was interviewed by officers of the Ombudsman on 3 May 2004.

Mr Molvis stated in the interview that he had known the late Mr Masseng Nalo for a long time. He also knew that the late Mr Masseng Nalo had a case against him in Court. When the late Mr Masseng Nalo approached him to sign his Nomination of Candidate for Election of President of the Republic Form, he had asked him about the case. What the late Mr Masseng Nalo told him was that his lawyer had advised that it was okay for him to contest in the Presidential elections. It was based on this information that he signed as a witness. Unfortunately, it is not known who the late Mr Masseng Nalo's lawyer was.

Mr Molvis also stated that it is the Electoral Office and Commission who should have screened all applicants properly.

- 4.26 Mr Alick George Noel was interviewed by officers of the Ombudsman on 3 May 2004.

Mr Noel stated in the interview that he is a politician like the late Mr Masseng Nalo and they had worked together in the same political party for many years. It was during these times that the late Mr Masseng Nalo was elected as a Member of Parliament and had served as a Minister as well as the Speaker of Parliament. When he was approached by the late Mr Masseng Nalo to sign the Nomination of Candidate for Election of President of the Republic Form as a witness, he did not hesitate to do so.

Mr Noel further stated that he had known that there was a court case against the late Mr Masseng Nalo in Santo but he did not know what the outcome of the case was. He did not even think of asking the late Mr Masseng Nalo of this when the late Mr Masseng Nalo approached him with the Form.

Mr Noel went on to say that in his opinion, everybody involved in the election of the late Mr Masseng Nalo as President contributed to his improper or illegal election. First, the late Mr Masseng Nalo himself was not honest enough to say that there was a suspended sentence against him. Second, as a witness, Mr Noel stated that he did not even read the Form or the names of the others who had signed; he just went on and signed. Lastly, the Electoral Office and Commission did not screen the applicants properly nor the Police.

- 4.27 Mr Ambrosio Melteres was interviewed by officers of the Ombudsman on 4 May 2004.

Mr Melteres stated in the interview that he knew the late Mr Masseng Nalo very well. He was approached by the late Mr Masseng Nalo outside the ANZ bank to sign the Nomination of Candidate for Election of President of the Republic Form as a witness. Being good friends with the late Mr Masseng Nalo, he did not hesitate to sign the Form without reading through the Form and asking any further questions. He also did not know that the late Mr Masseng Nalo had a suspended sentence.

Mr Melteres further stated that in his opinion, it was the Electoral Office, Electoral Commission and the Police who did not screen the application properly and to find out about this suspended sentence.

- 4.28 Mr Makali Kalo was interviewed by officers of the Ombudsman on 4 May 2004.

Mr Kalo stated in the interview that he knew the late Mr Masseng Nalo very well – especially as the former Speaker of Parliament. When he was approached by the late Mr Masseng Nalo to sign the Nomination of Candidate for Election of President of the Republic Form, he went on to sign it as a witness without asking any further questions. Furthermore, Mr Kalo was of the opinion that it is the Electoral Commission which is at fault as it did not screen the application properly.

- 4.29 Mr Theophile Massing was interviewed by officers of the Ombudsman on 6 May 2004.

Mr Massing stated in the interview that he knew the late Mr Masseng Nalo very well. When he was approached by the late Mr Masseng Nalo to sign the Nomination of Candidate for Election of President of the Republic Form, he was aware that the late Mr Masseng Nalo had a court case against him in Santo but he did not know what the outcome of that case was.

Mr Massing further stated that it is his opinion that the Electoral Commission and Police are at fault because they failed to inform the Members of Parliament of the late Mr Masseng Nalo's suspended sentence.

4.30 The Ombudsman did not interview the 3 other witnesses who had signed the Nomination of Candidate for Election of President of the Republic Form in which the late Mr Masseng Nalo was the nominee as they are either now residing at their respective home islands or could not be located. These 3 witnesses are:

- (1) Chief Isaac Wan;
- (2) Mr Galgal Meleun Fenbi and
- (3) Ms Emma Jemmis.

4.31 Major Arthur Caulton Edmanley, Acting Commissioner of Police advised the Ombudsman in a letter dated 10 February 2006 that the Criminal Records Office at Port Vila Police Station do not have all records of all criminal convictions throughout Vanuatu.

4.32 Mr Martin Tete informed the Ombudsman on 13 March 2006 that the first Presidential election of 2004 in which the late Mr Masseng Nalo was elected had an originally approved budget of VT 4 million. When the late Mr Masseng Nalo's election was disqualified by the Supreme Court, additional funding had to be sought to run the second Presidential election in which His Excellency Kalkot Matas Kelekele was elected.

The additional funding that was approved by the DCO & COM policy papers and appropriated by virements made through the office of the Director General of the Ministry of Internal Affairs and the Department of Finance and Economic Management, was for an amount of VT 4.3 million. This budgetary allocation also includes the allowances for the members of the Electoral College.

## **5. RESPONSES BY THOSE WITH COMPLAINTS AGAINST THEM**

5.1 Responses to the Working Paper were received from the former Chairman of the Electoral Commission, Pastor Sethy Regenvanu, the Solicitor General Mr Dudley Aru, the Principal Electoral Officer, Mr Martin Tete, and two of the late Masseng Nalo's nominators, Mr Ambrosio Melters and Ms Emma James,.

5.2 In his reply Pastor Sethy Regenvanu said he agreed on what has been mentioned in the working paper and has nothing more to add. He concluded that it is his prayer that the incident will remain an important lesson for all who love Vanuatu and its people.

5.3 Mr Dudley Aru stated that he has no additional comments to make on the contents of the working paper.

- 5.4 Mr Martin Tete stated that the current screening procedure arrangements is that future checks are to be channelled through the Supreme Court Registrar, for suspended sentences, the Public Prosecutor and the CID Unit of the Police Department.
- 5.5 Mr Ambrosio Melteres confirmed what has been stated in section 4.27 of the Working Paper. He reiterated that he was approached on the street of Port Vila to sign the Nomination Form and he did because he was a good friend of the late Masseng Nalo. Apart from this, he has no further comments to make.
- 5.6 Ms Emma Jemmis stated in her reply that at the time she nominated late Masseng Nalo she was working in the Office of the Leader of Opposition. Mr Adrien Malere who was in charge of the nomination of the late Masseng Nalo approached her saying that they needed ten signatures on the nomination form. That they had already written her name and all they needed was her signature. She queried this but was assured that it was okay for her to sign since she is working in the Office of the Leader of the Opposition.
- 5.7 Chief Isaac Wan replied that he lives on his home island, Tanna. He does not live in Port Vila but comes to Port Vila occasionally. In 2004 he travelled to Vila for some personal business. While in Port Vila he was met by members of the UMP Party who where Mr Andre Malere and Mr Alfred Maliu. These two people told him that as he was a chief they require him to sign the nomination paper for late Mr Masseng Nalo to contest the presidential election. He then signed the papers however, he did not know at the time that late Masseng Nalo had a criminal record. He continued stating that had he known this he would not have signed the paper that they asked him to sign.

## 6. FINDINGS

### 6.1 Finding 1: **FAILURE BY THE POLICE TO PROVIDE ACCURATE CRIMINAL RECORDS FOR APPLICANTS FOR THE 5<sup>TH</sup> PRESIDENTIAL ELECTIONS**

Section 80 of the Police Act [CAP 105] (please refer to **Appendix 'A'**) provides that the Police must have proof of previous convictions and that such records will be provided in the Certificate of Previous Convictions contained in Schedule 2 of the same Act.

The Criminal Records Office (CRO) of the Vanuatu Police Force is in charge of keeping in record, previous convictions of any citizen or person convicted in any of the courts in Vanuatu. Thus, in ensuring that applicants to the post of President were eligible as candidates as required by section 24 of the Representation of the People Act [CAP 146] (please refer to **Appendix 'A'**), the Electoral Commission had requested the CRO to provide a Certificate of Previous Convictions, where appropriate for each of the applicants.

It was found during this enquiry that the record of convictions kept by the CRO does not contain the records of all criminal convictions throughout Vanuatu. This was why Mr Masseng Nalo's conviction by the Santo Supreme Court was not contained in the Certificate of Previous Conviction that the CRO had issued to the Electoral Commission.

Furthermore, while the officer(s) in charge of the CRO were aware that the records do not contain information on criminal convictions throughout Vanuatu, they did not inform the Electoral Office or Commission of this.

The Vanuatu Police Force has therefore failed to properly carry out its function as per section 80 of the Police Act [CAP 105] to keep proper records of previous convictions.

**6.2 Finding 2: DEFECT IN SECTION 3 OF THE ELECTION OF THE PRESIDENT ACT [CAP 104]**

Section 3 (1) of the Election of the President Act [CAP 104] (please refer to **Appendix 'A'**) states that a nomination paper for a candidate for election as President shall be in Form B in Schedule 1 and shall be subscribed by the signatures of ten persons who shall themselves be qualified to be elected as President of the Republic.

The Ombudsman has found during this enquiry that 7 of the 10 witnesses to Mr Masseng Nalo's nomination signed the prescribed Form without sighting any other documents as proof that Mr Masseng Nalo was eligible as a candidate for the Presidential election.

**7. RECOMMENDATIONS**

**7.1 Recommendation 1**

**That the Police Commissioner ensures that the Criminal Records Office (CRO) keeps and maintains proper records of all criminal convictions throughout the Republic of Vanuatu.**

It is current practice that the CRO only keeps records of criminal convictions for criminal cases tried in the courts in Port Vila only. The CRO must ensure that it keeps record of all criminal convictions that are made by the courts throughout the Republic of Vanuatu as it is vital information that is required by important organisations such as the Electoral Commission. This is also to ensure that what happened in 2004 does not happen again in the future.

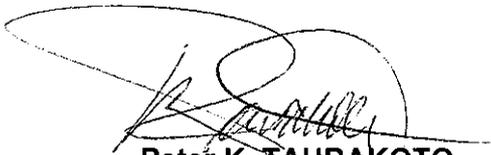
## 7.2 Recommendation 2

**That Section 3 of the Election of the President Act [CAP 104] be amended so that the people who nominate a candidate for the Presidential election have had an opportunity to properly scrutinize their nominee's background.**

It appears that section 3 of this same Act and the prescribed Form contained in the Schedule also allows for the nomination of a candidate that is not eligible to contest in a Presidential election. This section should therefore be amended so that persons signing in support of a nomination have the opportunity to properly scrutinize their nominee by sighting relevant documents such as the Certificate of Previous Convictions provided by the Police.

The Nomination of Candidate for Election as President of the Republic Form itself should be revised so that persons signing in support of a nominee provide their full contact details.

**Dated the 12<sup>th</sup> day of January 2007**

A handwritten signature in black ink, appearing to read 'Peter K. Taurakoto', is written over a horizontal line. The signature is stylized and somewhat cursive.

**Peter K. TAURAKOTO**  
**OMBUDSMAN OF THE REPUBLIC OF VANUATU**

**8. INDEX OF APPENDICES**

**A** Relevant laws

**B** Supreme Court judgment on Public Prosecutor vs Noel Faenolave, Alfred Massing and Alfred Maliu, Criminal Case No. 11 of 2002

**C** Supreme Court judgment on Government of the Republic of Vanuatu vs Masseng Nalo, Civil Case No. 90 of 2004

**ELECTION OF THE PRESIDENT ACT [CAP 104]**

**ELECTION OF THE PRESIDENT ELECTION OF THE PRESIDENT**

To make provision for the election of the President of the Republic.

**WRIT FOR ELECTION OF PRESIDENT**

- 1. (1) Within 2 days of a vacancy occurring in the office of President of the Republic the Chief Justice shall issue a writ for election of the President.
- (2) A writ for the election of the President shall be in accordance with Form A in Schedule 1 and shall state the day on which the electoral college provided for in Article 34 of the Constitution shall meet to elect the President.
- (3) The day referred to in subsection (2) shall be a day not earlier than 2 weeks nor later than 3 weeks after the day of the vacancy occurring in the office of the President.

**NOTIFICATION OF ISSUE OF WRIT AND OF ELECTION**

2. As soon as practicable after the issue of the writ the Electoral Commission shall cause a notice to be published in the Gazette and exhibited throughout Vanuatu in such public places as it shall consider appropriate stating -

- (a) that the writ has been issued;
- (b) the day on which the election shall take place;
- (c) the place or places where nomination papers must be lodged;
- (d) the last day on which nomination papers may be lodged; and
- (e) the place where the voting will take place.

**NOMINATION PAPERS**

3. (1) A nomination paper for a candidate for election as President shall be in Form B in Schedule 1 and shall be subscribed by the signatures of ten persons who shall themselves be qualified to be elected as President of the Republic.

(2) The nomination paper shall be endorsed with the consent to nomination of the person named therein as a candidate for election as President.

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**SCHEDULE 1**

**FORM B**

(section 3)

**NOMINATION OF CANDIDATE FOR ELECTION AS  
PRESIDENT OF THE REPUBLIC**

We the undersigned being persons qualified to be elected President of the Republic of Vanuatu  
HEREBY NOMINATE

.....of  
.....

to be a candidate for election as President of the Republic and certify that to the best of our

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knowledge and belief he is qualified for election.

Signatures and names (the latter in block capital letters)

- 1. .... 6. ....
- 2. .... 7. ....
- 3. .... 8. ....
- 4. .... 9. ....
- 5. .... 10. ....

Dated the ..... day of ..... 19 .

I ..... of ..... consent to nomination as a candidate for election as President of the Republic and declare I am qualified to be so elected.

Dated ..... Signature .....

**REPRESENTATION OF THE PEOPLE ACT [CAP 146]**

**ELIGIBILITY OF CANDIDATES**

24. Subject to section 23 a person shall be eligible to stand as a candidate for election to Parliament if he-

- (a) is not disqualified from voting;
- (b) has not received a sentence including a suspended sentence of a term or terms of imprisonment which has not ended;
- (c) is not an undischarged bankrupt;
- (d) has attained 25 years of age; and
- (e) is a citizen.

**POLICE ACT [CAP 105]**

**PART VII  
MISCELLANEOUS**

**PROOF OF PREVIOUS CONVICTIONS**

80. (1) In this section, any reference to fingerprints shall be construed as including a reference to palm prints.

(2) In any inquiry , trial or other proceedings under any law for the time being in force, a previous conviction of an offence may be proved, in addition to any other mode provided by any law for the time being in force-

(a) by an extract certified under the hand of the officer having the custody of the records of the court in which such conviction was imposed, to be a true copy of the sentence or order; or

(b) by certificate signed by the officer in charge of the prison in which the punishment or any' part thereof was inflicted; or

(c) by production of the warrant of commitment under which the punishment was suffered:

Provided that, in each of the cases set out in the preceding paragraphs, evidence is also produced to identify the accused person with the person so convicted.

## Appendix A - Page 3 of 3

(d) by certificate in the form prescribed in Schedule 2 hereto, given under the hand of a member appointed by the Minister in that behalf who shall have compared the fingerprints of a person previously convicted and such certificate shall be prime facie evidence of all the facts therein set forth provided that is produced by the person who took the fingerprint of the accused.

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### SCHEDULE/ANNEX 2

(Section 80)

#### VANUATU POLICE / POLICE DES VANUATU

#### CERTIFICATE OF PREVIOUS CONVICTIONS / EXTRAIT DU CASIER JUDICIAIRE

I hereby certify that I have compared the finger impressions of..... contained on fingerprint from number .....and taken at on ..... by..... with records held at the Criminal Registry of the Vanuatu Police Force, and have found them to be identical with the finger impression of ..... The following convictions are recorded against this person, which are a true copy of the records held at this office.

Je, soussigne, certifie avoir compare les empreintes digitales de ..... prelevees a le par r et figurant sur le formulaire numero ..... avec celles de fiches de l'identite Judiciaire de la Police des Vanuatu, et constate qu'elles sont identiques a celles de ..... Les condamnations suivantes, dont l'interessee fait l'objet, sont une copie confirme des Fiches detenues au Fichier de notre Bureau.

Signed/Signe:

Fingerprint form no.: Formulaire d'empreintes no.	Date of conviction: date des condamnations:	Court: Tribunal	Offence of which convicted: Delit:	Sentence: Condamne:	Name in which convicted: Nom sous lequel l'interessee a ete condamne

"B"

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IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU

Criminal Case No.11 of 2002

(Criminal Jurisdiction)

PUBLIC PROSECUTOR

V.

NOEL FAENOLAVE  
ALFRED MASENG  
ALFRED MALIU

Coram: Mr Justice Oliver A. Saksak  
Ms Cynthia Thomas – Clerk

Counsel: Ms Linnes Moli for the Public Prosecutor  
Mr Daniel Yawha for the Defendants

JUDGMENT

The Defendants were convicted and sentenced accordingly on 3<sup>rd</sup> April, 2003.

Noel Faenolave was charged with 5 counts of –

- (a) False Pretence under section 125(c);
- (b) Theft under section 125(a) x 2 counts; and
- (c) Misappropriation under section 125(b) x 2 counts.

Alfred Maseng was charged with 3 counts of –

- (a) Aiding and abetting misappropriation under sections 30 and 125(b) x 2 counts; and
- (b) Receiving property dishonestly under section 131.

Alfred Maliu was charged with 1 count of aiding and abetting misappropriation under sections 30 and 125(b). All charges were laid under the provisions of the Penal Code Act [CAP.135] (the PC Act).

The prosecutions had the burden of proof beyond reasonable doubt by producing evidence to show that all the elements of the



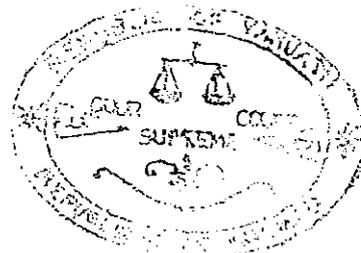
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offences committed by the defendants existed. The prosecutions called 11 witnesses to give evidence to prove their case.

The defendants themselves gave evidence on oath and produced evidence from two other witnesses namely, Christian Ben and Evelyn Vira.

I do not propose to summarise the evidence of each witness in this judgment but references will be made to relevant parts later.

The facts of the case were that Noel Takau, complainant purchased 65½ bags of cocoa beans from vendors at West Coast Santo and had them shipped to Luganville on the MV Kawale on 31<sup>st</sup> December, 2001. The cocoa bags were then kept at a Dock at Sarakata waiting for export. In the meantime Noel Takau had applied to the Vanuatu Commodities Marketing Board (the VCMB) for an Export Permit. It was in and during the process of the export permit application that Noel Faenolave, as the previous Chairman of the VCMB began to get involved in the transaction. Conflicting advices were given by the VCMB to Noel Takau concerning his application. At one time he was advised by letter that his application was refused for reasons provided. But orally over the telephone Noel Faenolave had made representations to Noel Takau that his permit was ready for collection. At this, Noel Takau made his way to Luganville to have physical custody of his permit so that he could export his cocoa beans. He spent four days in Santo and returned to Vila without the Permit he was promised. Whilst in Santo he met Noel Faenolave and together with Alfred Maliu they went to visit the cocoa bags at the Dock at Sarakata. Thereafter Noel Faenolave made representations to the person in charge of the Dock that he was acting for and on behalf of Noel Takau. On 14<sup>th</sup> January 2002 Noel Faenolave removed 12 bags of cocoa beans from the Dock. After having the beans graded by the Cocoa Inspector, Noel Faenolave sold the 12 bags of cocoa beans. He got Alfred Maseng to attend to the cashier's office to sign out and collect the money for the 12 bags. Alfred Maseng did so and met Noel Faenolave shortly thereafter to hand over the money. In doing so, Noel Faenolave gave Alfred Maseng the sum of VT5.000. The balance of the money was never received by Noel Takau.



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On 15<sup>th</sup> January, 2002 Noel Faenolave again in a VCMB truck went to the Dock at Sarakata and removed 7 bags which he took to the

Cocoa Inspector for grading. After grading, the cocoa was placed in the name of Alfred Maseng who again went to the cashier's office and signed for and collected the money as payment for 7 bags of cocoa beans. Alfred Maseng again handed the money over to Noel Faenolave a short time later. Together, Noel Faenolave, Alfred Maseng and Alfred Maliu went around to various places in Luganville consuming the money either on kava, drinks or food. None of the money was received by Noel Takau. Altogether the sum involved was VT81,367.

The defence case was that Noel Takau and Noel Faenolave had an agreement that if Noel Faenolave assisted Noel Takau to grant him an export permit, Noel Takau would give him 19 bags of cocoa beans. Noel Takau did not accept that contention to be correct. His evidence was that he had made an application for an export permit to export cocoa beans. In the hope and belief that such permit would be granted he entrusted the responsibility of grading the beans only to Noel Faenolave as the Chairman of the VCMB at the time. His evidence shows that Noel Faenolave went beyond what he was entrusted to do. His evidence shows that he purchased the cocoa beans and as such he was the owner. There was nothing in his evidence to show that he had given up 19 bags of cocoa beans to Noel Faenolave. There was also nothing in his evidence to show that he had given expressed authority to Noel Faenolave to sell his cocoa beans. I observed Noel Takau give his evidence and had no reservation that he was a credible witness.

Alfred Maseng had a hand in all these. Prosecution witness Senly Buleval, the VCMB Cashier in her evidence told the Court that it was this man who signed for payment and collected the money for 12 bags of cocoa on 14<sup>th</sup> January and again for 7 bags on 15<sup>th</sup> January 2002. The money was paid to Alfred Maseng because his name appeared on the two invoices for payment.

Dumont Boe, the Cocoa Inspector told of how he graded the cocoa beans at Noel Faenolave's request. He told the Court in his evidence that he was told by Noel Faenolave that the cocoa beans were shipped from Lingarak on Malekula and that they belonged to



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Alfred Maseng. This officer saw all three of the defendants in his office at one time prior to the grading of the cocoa beans.

Prosecution witness Sammy Henry, cargo supervisor on the MV Kawale confirmed that the 65½ bags were shipped from West Coast Santo on 31<sup>st</sup> December 2001 and that they were shipped in Noel Takau's name.

Prosecution witness Bernard Natnaut, cargo supervisor on the MV Combito told the Court that during 2001 they never took on board any cocoa from Lingarak in the name of Alfred Maseng.

Prosecution witness Allan Varu who is a shop-keeper at the Coop shop at Sarakata who confirmed that the cocoa bags at the Dock were Noel Takau's. He confirmed that Noel Faenolave and some VCMB workers approached him on 14<sup>th</sup> January and that he was told the 12 bags were to be graded. He asked Noel Faenolave as to what would happen to the cocoa after grading and was told by him that the cocoa bags would be kept at the VCMB dock.

Prosecution witnesses Henry Atel and Daniel Jonas were VCMB workers who told the Court they were with Noel Faenolave on the VCMB truck that removed the 12 bags of cocoa and the 7 bags from the Sarakata Dock and taking them for grading. They each told the Court they knew the cocoa was Noel Takau's but found out upon grading that the owner's names were Alfred Maseng.

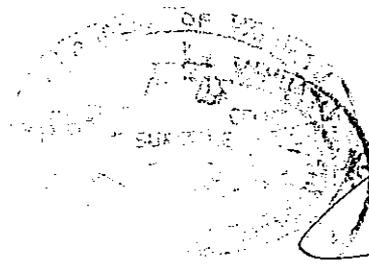
Alfred Maliu was with Noel Takau and Noel Faenolave on 4<sup>th</sup> January 2002 when they went to see the cocoa at the Sarakata Dock.

The evidence from each of the defendants were inconsistent with what the prosecution witnesses told the Court, and they each lacked credibility. Their witnesses evidence also lacked credibility. The Court did not place any weight on the evidence of the defendants and their witnesses.

The relevant sections of the Penal Code Act are –



- A. Section 30 which provides for complicity –  
*“Any person who aids counsels or procures the commission of a criminal offence shall be guilty as an accomplice and may be charged and convicted as a principal offender.”*
- B. Section 122 defines theft as follows -
1. *“A person commits theft who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof;*
  2. *A person shall also be guilty of theft of any such thing notwithstanding that he has lawful control thereof, if, being a bailee or part owner thereof he fraudulently converts the same to his own use or the use of any person other than the owner.*
  3. *For the purpose of subsection (1) -*
    - (a) *the word “takes” includes obtaining physical control –*
      - (i) *by any trick or by intimidation;*
      - (ii) *(not relevant);*
      - (iii) *(not relevant);*
    - (b) *The words “carried away” include the removal of any thing from the place which it occupies but in the case of a thing attached, only if it has been completely detached;*
    - (c) *The word “owner” includes any part-owner or person having physical control of, or a special property or interests in, anything capable of being stolen”.*
- C. Section 123 defines Misappropriation as follows –  
*“A person commits Misappropriation of property who destroys, wastes or converts any property capable of being taken which has been entrusted to him for custody, return, accounting or any particular manner of dealing (not being a loan of money or of monies for consumption)”.*



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- D. Section 124 defines what obtaining property by false pretences means as follows –

*"Every person obtains property by false pretences who, by a false pretence, that is to say, any representation made by words, writing or conduct, of a*

*matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false, or does not believe to be true with intent to defraud, either directly or indirectly, obtains possession of or title to anything capable of being stolen or procures anything capable of being stolen to be delivered to any person other than himself".*

- E. Section 125 prohibits theft, misappropriation and false pretences as follows –

*"No person shall cause loss to another –*

- (a) by theft;  
(b) by misappropriation; or  
(c) by false pretences.*

*Penalty: Imprisonment for 12 years.*

- F. Section 131 provides for receiving property dishonestly obtained as follows –

*"No person shall receive anything obtained by any offence, or by any act wherever committed which, if committed within the Republic would constitute an offence, knowing that thing to have been dishonestly obtained".*

Applying these provisions to the facts as proved by admissible evidence, I was satisfied beyond reasonable doubt that Noel Faenolave had committed the offences of false pretences, theft and misappropriation of cocoa beans and misappropriating the monies obtained from the unauthorised sale of those cocoa beans. Noel Faenolave knew perfectly well that the cocoa beans were neither his nor Alfred Maseng's. He misrepresented that fact to the Cocoa Inspector knowing the same to be false. I am satisfied that the prosecution had discharged the onus of proof that was on them by proving all the elements of these offences against Noel Faenolave to the required standard. Accordingly I convicted him as



charged and sentenced him after considering the mitigation factors put forward on his behalf by his counsel.

As regards Alfred Maseng, I am satisfied beyond reasonable doubt that he committed the offences of aiding and abetting misappropriation and of receiving property dishonestly. He had his

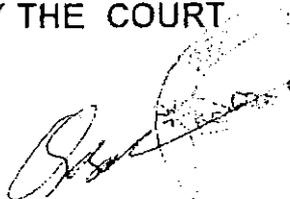
name on two invoices which required him to attend to the Cashier on 14<sup>th</sup> and 15<sup>th</sup> January 2002 consecutively to sign for payment and to collect the money for the cocoa beans. He knew very well the cocoa beans were not his. And he knew also that they were not Noel Faenolave's. He facilitated the commission of these offences. He received VT5,000 in cash as a reward, which money he well knew was neither Noel Faenolave's, nor his own. The prosecution had discharged the onus of proof that was on them to the required standard. Accordingly I convicted him as charged and sentenced him after considering the mitigating factors put forward on his behalf by his counsel.

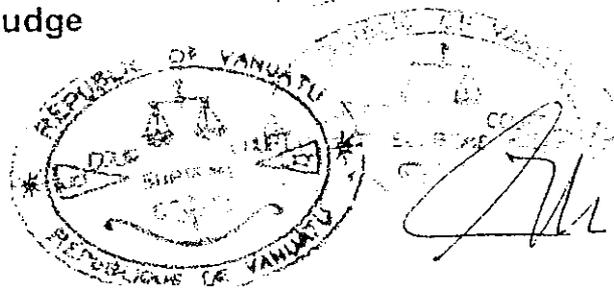
Finally for Alfred Maliu, I had no doubt that the prosecution had proved the elements of the charge of aiding and abetting misappropriation against him. He was seen visiting the cocoa bean on 4<sup>th</sup> January. He was seen at the grading shade by the Cocoa Inspector. His close Company with Noel Faenolave at this time left me in no doubt that Alfred Maliu was an accomplice to the offences committed by Noel Faenolave. Accordingly I convicted him as charged and imposed a fine on him.

In sentencing them, the defendants were informed of their rights of appeal.

Published at Luganville this 19<sup>th</sup> day of May, 2003.

BY THE COURT

  
OLIVER A. SAKSAK  
Judge



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IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU

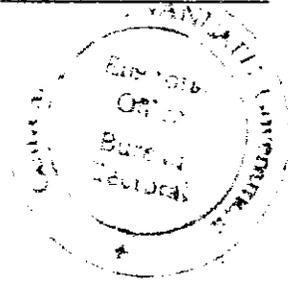
Criminal Case No.11 of 2002

(Criminal Jurisdiction)

**PUBLIC PROSECUTOR**

**V.**

**NOEL FAENOLAVE  
ALFRED MASENG  
ALFRED MALIU**



Coram: Mr Justice Oliver A. Saksak

Counsel: Ms Linnes Moli for the Public Prosecutor  
Mr Daniel Yawha for the Defendants

Date: Thursday 3<sup>rd</sup> April, 2003.

## **SENTENCE**

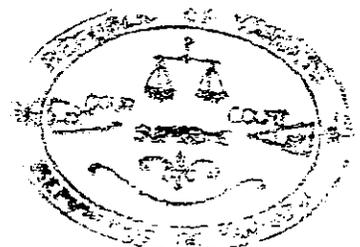
Based on the evidence presented to the Court, the prosecution has proved beyond reasonable doubt that the three defendants are guilty of the following offences:-

1. **Noel Faenolave**

- Count 1 - Charged for false pretence under section 125(c) of the Penal Code Act [CAP.135] (the Act)
- Count 2 - Theft under section 125(a) of the Act.
- Count 4 - Misappropriation under section 125(b) of the Act.
- Count 8 - Theft, section 125(a).
- Count 9 - Misappropriation, section 125(b).

2. **Alfred Maseng**

- Count 5 - Aiding and abetting Misappropriation under sections 30 and 125(b) of the Act.



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Count 7 - Receiving property dishonestly under section 131 of the Act.

Count 10 - Aiding and abetting Misappropriation under sections 30 and 125(b) of the Act.

3. Alfred Maliu

Count 3 - Charged with aiding and abetting Misappropriation under sections 30 and 125(b) of the Act.

The Court therefore convicts all three defendants in respect of the charges against each of them.

In sentencing the defendants I disregard their past record of previous convictions. Noel Faenolave's last conviction was for forgery in August 1995 for which he was fined VT10.000 and paid VT5.000 in costs. Alfred Maseng's last conviction was in 1989 for intentional assault for which he was fined VT2.000. Alfred Maliu has a long history of convictions back to 1980. His last conviction was in March 1994 in relation to a traffic offence.

I take into account the fact that all three defendants are the sole bread-winners in and for their respective families. That they each support their children at schools and other relatives' children to attend schools in Vanuatu. I take into account the contributions each of the defendants has made towards the political, social and economic developments of Vanuatu. They each hold reputable positions in the community. I take into account the ages of Alfred Maseng and Alfred Maliu and the physical health of Alfred Maliu.

It is with regret and misfortune that these leaders should allow their reputations to be marred by the commission of these criminal offences.

The aggravating factors that the Court takes into account to impose jail terms and a heavy fine is the fact that Noel Faenolave and Alfred Maliu as Chairman and Ex-Officio member of the VCMB, had abused their positions of trust. To deter others from so acting, the Court is of the view that terms of imprisonment should be imposed on Noel Faenolave and Alfred Maseng. However those jail terms should be



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suspended. For Alfred Maliu, the Court is of the view that a rather heavy fine should suffice. Accordingly the Court imposes the following sentences.

1. On Alfred Maliu –

Count 3 - For aiding and abetting misappropriation, he is sentenced to pay a fine of VT30.000 to be paid within 14 days from today or in default, imprisonment for 2 months.

2. On Alfred Maseng –

Count 5 - For aiding and abetting misappropriation – 2 months imprisonment.

Count 7 - For receiving property dishonestly – 1 month imprisonment to run concurrently with count 5 making a total of 2 months.

Count 10 - For aiding and abetting misappropriation – 2 months imprisonment to be made consecutive to the sentences for Counts 5 & 7, making a total of 4 months imprisonment.

This term of imprisonment is suspended for a period of 2 years from today. This suspension is made under the provisions of the Suspension of Sentences Act [CAP.67].

There will be a restitution order against Alfred Maseng in respect of VT5.000 he admitted to receiving from Noel Faeolave. He is ordered to replay VT5.000 to Noel Takau, via the Court Registry on or before 15<sup>th</sup> April, 2003.

3. Noel Faenolave –

On Count 1 – For false pretence - 4 months imprisonment.  
On Count 2 – For theft – 4 months imprisonment concurrent to Count 1.



*AKG*

On Count 4 – For Misappropriation – 4 months concurrent.

-----  
Total = 4 months  
=====

On Count 8 – For theft - 5 months

On Count 9 – Misappropriation – 5 months concurrent.

-----  
Total = 5 months  
=====

But I order that these 5 months be served consecutively with the 4 months for Counts 1, 2 & 4. These thefts related to two incidents committed in just one day apart. The Overall total sentence for Noel Faenolave is 9 months imprisonment. Like Alfred Maseng, this term of imprisonment is suspended for 2 years.

There will be a restitution order against Noel. He is ordered to repay the sum of VT81,367 to Noel Takau via the Court Registry. Payments will be made in 2 instalments as follows:-

- (a) End of April, 2003 - VT40,683.
- (b) End of May, 2003 - VT40,684.

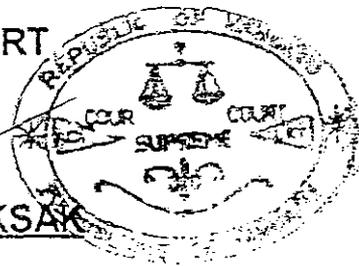
Should any of the defendants wish to appeal, you may do so within 14 days.

⊗ DATED at Luganville this 3<sup>rd</sup> day of April, 2003.

BY THE COURT

*Oliver A. Saksak*

OLIVER A. SAKSAK  
Judge





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## Supreme Court of Vanuatu

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### **Government of the Republic of Vanuatu v Maseng Nalo [2004] VUSC 4; Civil Case No 90 of 2004 (7th May, 2004)**

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

CIVIL CASE No. 90 of 2004

BETWEEN:

**THE GOVERNMENT OF VANUATU**  
Claimant

AND:

**ALFRED MASENG NALO**  
First Respondent

AND:

**THE ELECTORAL COMMISSION**  
Second Respondent

Coram: Chief Justice Lunabek

Counsel: Messrs Dudley Aru & Fredrick Loughman for the claimant  
Mr. Bill Bani for the first respondent  
Mr. Michael Edwards for the second respondent

### **JUDGMENT**

#### **1. Introduction**

Before me is a claim for Judicial Review. The claimant is the Government of Vanuatu. The first respondent is the elected President of the Republic of Vanuatu, His Excellency Alfred Maseng Nalo.

Government of the Republic of Vanuatu v Maseng Nalo [2004] VUSC 4; CIVIL Case NO 9... Page 2 of 7

The second respondent is the Electoral Commission who is submitted itself to the jurisdiction of the Court and bound by any Order of the Court and as such is excused from attendance.

## **2. Relief sought**

The claimant claims for the following Orders:

1. A declaration that the first defendant was not eligible to stand for election to the position of President of the Republic of Vanuatu;
2. An Order quashing the first defendant's appointment as President of the Republic of Vanuatu;
3. A declaration that the Office of the President is vacant.

## **3. The grounds of the claim**

The grounds of the claims are set out with the claim. A sworn statement was filed by the Public Prosecutor, Nicholas Mirou, on 27<sup>th</sup> April 2004 in support of the claim.

The claimant's case is that the first respondent was ineligible to stand for election of the position of President of the Republic because he did not meet the requirements of Article 35 of the Constitution and Section 24(1)(b) of the Representation of the People Act [CAP. 146].

## **4. The response**

The first respondent does not admit that he did not meet the requirements of Article 35 of the Constitution as well as Section 24(1)(b) of the Representation of the People Act [CAP. 146].

He, therefore, invites the Court to make a ruling that:

1. For purposes of Section 24(1)(b) of [CAP. 146], Mr. Alfred Maseng Nalo was eligible to stand for election to the position of President of the Republic of Vanuatu.
2. For purposes of Section 24(1)(b) [CAP. 146] a person can be elected to the position of President of the Republic of Vanuatu despite having a suspended sentence but that suspended sentence must be of a term or terms of imprisonment which had already ended.
3. That the claimant's claim be dismissed in its entirety with costs against the claimant.

The first respondent files a sworn statement on 3 May 2004 in support of his defence.

## **5. The issue**

The critical issue for the determination by the Court is whether or not the first respondent was eligible

for election as President of the Republic of Vanuatu held in April 2004.

## 6. The facts

The factual circumstances leading up to this challenge are not in dispute. They are briefly summarized as follows:

On 3 April 2003 the first respondent was convicted of two Counts of aiding and abetting misappropriation under Sections 30 and 125(b) of the Penal Code [CAP. 135] and one count of receiving property dishonestly under Section 131 of the Penal Code Act [CAP. 135]. He was sentenced to a total of 4 months imprisonment. However, the sentence of imprisonment was suspended for a period of 2 years from 3 April 2003 pursuant to the suspension of sentences Act [CAP. 67].

On 24 March 2004, the term of Office of His Excellency President Bani was completed and a vacancy in the Office of the President arose.

On 26 March 2004, a Writ for Election of the President was then issued.

On 30 March 2004, the first respondent was nominated to stand for election.

On 31 March 2004, a nomination paper in his favour was presented to the second respondent, the Electoral Commission. The second respondent accepted the first respondent's nomination and presented him to the Electoral College as a valid candidate.

On 12 April 2004, the first respondent attained the necessary number of votes from the Electoral College to win the election and on that date was sworn in as the President of the Republic.

## 7. The relevant legal requirements

Article 35 of the Constitution states:

*"Any indigenous Vanuatu citizens qualified to be elected to Parliament shall be eligible for election as President of the Republic."*

For a person to be eligible to stand for election as a Member of Parliament, Section 24(1) of the Representation of the People Act [CAP. 146] provides as follows:

*"24. (1) Subject to Section 23 a person shall be eligible to stand as a candidate for election to Parliament if he-*

- (a) is not disqualified from voting;*
- (b) has not received a sentence including a suspended sentence of a term or terms of imprisonment which has not ended; (Emphasis added)*
- (c) is not an undischarged bankrupt;*
- (d) has attained 25 years of age; and*
- (e) is a citizen."*

Section 24(1)(b) is the relevant paragraph for consideration in the present case.

The suspension of sentences are provided under the Suspension of Sentences Act [CAP. 67]. Section 1 is the relevant section and it provides as follows:

*"1. The execution of any sentence imposed for an offence against any Act, regulation, rule or order may, by decision of the court having jurisdiction in the matter, be suspended subject to the following conditions-*

*(a) when the court which has convicted a person of an offence considers that, in view of the circumstances and in particular the nature of the crime and the character of the offender, it is not appropriate to make him suffer a penalty it may in its discretion order the suspension of the execution of any sentence it has imposed upon him., on the condition that the person sentenced commits no further offence against any Act, regulation, rule or order within a period which shall be fixed by the court, not exceeding 3 years;*

*(b) if, at the end of such period, the person the execution of whose sentence has been suspended in accordance with this section shall not have been convicted of any further offence against any Act, regulation, rule or order, the sentence shall be deemed to be annulled;*

*(c) if before the end of such period, the person the execution of whose sentence has been suspended in accordance with this section is further convicted of any offence against any Act, regulation, rule or order, the original sentence shall be immediately executed, in no case concurrently with any subsequent sentence;*

*(d) the court shall, when ordering the suspension of the execution of the sentence, explain clearly to the person sentenced the nature of the order and shall ascertain that the has understood its meaning."*

## **8. The arguments and submissions**

It is submitted on behalf of the claimant that by being subject to a suspended sentence at the time of the election, the first respondent did not meet the requirements of Section 24(1)(b) of the Representation of People Act [CA.146] and was not qualified to stand for election to Parliament and hence the Presidency.

It is, therefore, submitted for the claimant that because the first respondent's sentences were suspended for two years, he is disqualified under Section 24(1)(b) of the Representation of the People Act [CAP. 146] as he has received suspended sentences of imprisonment totalling four months that have not ended. The sentences will only end for the purposes of Section 24(1)(b) when either:

1. The two years have expired for which the sentence has been suspended, i.e.

on 3 April 2005, under Section 1(b) of the Suspension of Sentences Act, or

2. After he has served the term of imprisonment if required to do so under Section 1(c) of the Suspension of Sentences Act.

In response, it is submitted on behalf of the first respondent that the effect of a suspension is that the execution of a term or terms of imprisonment remains the same but only its execution is stayed. It is also said for the first respondent that the Suspension of Sentences Act does not use the words "sentence of a term or terms of imprisonment which has not ended". Instead, it uses "suspension of the execution of the sentence".

It is, therefore, submitted that Section 24(1)(b) of the Representation of the People Act [CAP. 146] only applies to a candidate "whose term or terms of imprisonment has not ended" irrespective of whether it was a sentence or suspended sentence.

It is further said for the first respondent that his 4 months' terms of imprisonment ended on 3 August 2003 as a result of which the first respondent was eligible to be nominated for election to the post of President.

It is finally submitted for the first respondent that for the purposes of Section 24(1)(b), when the first respondent applied for the position of President on 31 March 2004, he was not under a suspended sentence of terms of imprisonment which has not ended because his 4 months' terms of imprisonment had already ended on 3 August, 2003.

## **9. The application of the law**

Applying the law to the fact of this case, the submissions made on behalf of the first respondent cannot stand and must be rejected as they represent a misapprehension of the purpose and effect of the suspension of sentences scheme under the Suspension of Sentences Act [CAP. 67]. Further the provisions of Article 35 of the Constitution and Section 24(1)(b) of the Representation of the People Act are clear.

Section 1 of the Suspension of the Sentences Act [CAP. 67] is also clear. There is no ambiguity nor uncertainty warranting for construction or interpretation.

Section 1 of the Suspension of Sentences Act empowers the Court to suspend the execution of any sentence imposed for an offence against any Act, regulation and set out the conditions in paragraphs (a), (b), (c) & (d) and a period of suspension of the sentence to be fixed by the Court.

Section 1 (a) of the Act is the relevant paragraph to comprehend the rationale of the suspension of the sentences mechanism for the purpose of this case.

Section 1 states:

*"1. The execution of any sentence imposed for an offence against any Act, regulation, rule or order may, by decision of the court having jurisdiction in the matter, be suspended subject to the following conditions-*

*(a) when the court which has convicted a person of an offence considers that, in view of the circumstances and in particular the*

*nature of the crime and the character of the offender, it is not appropriate to make him suffer a penalty it may in its discretion order the suspension of the execution of any sentence it has imposed upon him., on the condition that the person sentenced commits no further offence against any Act, regulation, rule or order within a period which shall be fixed by the court, not exceeding 3 years;"*

Under Section 1 of the Suspension of the Sentences Act [CAP. 67], the first respondent was sentenced to 4 months imprisonment. That sentence was then suspended for 2 years from 3 April 2003, is still alive and will come to an end on 3 April 2005. It is the execution of the sentence of 4 months imprisonment that has been suspended for the period of 2 years commencing from 3 April 2003. The sentence of 4 months imprisonment is yet to be executed if required to do so under Section 1(c) of the Act [CAP. 67]. I accordingly accept the submissions made on behalf of the claimant.

By perusing and considering the language of Article 35 of the Constitution, and Section 24(1)(b) of the Representation of the People Act [CAP. 146], the first respondent is not eligible to stand for the election to the position of President of the Republic of Vanuatu on 31 March 2004 as he has received a sentence of 4 months imprisonment which was suspended for a period of 2 years from 3 April 2003. That suspended sentence "has not yet ended".

The first respondent was not eligible for election of President of Vanuatu pursuant to Section 24(1)(b) of the Representation of People Act [CAP. 146].

On the basis of the above considerations, the judgment must be issued in favour of the claimant. Orders and Directions sought by the claimant must be granted accordingly. Orders and Declaration sought by the first respondent are refused. They have no basis in law.

## **10. ORDERS**

The Court makes the following **ORDERS AND DECLARATIONS**:

1. The first respondent was not eligible to stand for election to the position of President of the Republic of Vanuatu.
2. The first respondent's appointment as President of the Republic of Vanuatu is quashed.
3. The Office of the President is now declared vacant.
4. There is no Order as to costs.

**Dated at Port-Vila this 7<sup>th</sup> day of May 2004**

**BY THE COURT**

**Vincent LUNABEK  
Chief Justice**

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