

PAPUA NEW GUINEA

[IN THE NATIONAL COURT OF JUSTICE]

EP NO 19 OF 2017

IN THE MATTER OF A DISPUTED RETURNS FOR SAMARAI MURUA OPEN  
ELECTORATE

BETWEEN:

GORDON HENRY WESLEY

Petitioner

AND:

ISI HENRY LEONARD

First Respondent

AND

ELECTORAL COMMISSION

Second Respondent

Alotau : Salika, DCJ

2018 : 5, 6, 7, 8, 9 & 28 March

*Mr I Molloy with Ms C Copland* for the Petitioner

*Mr R Raka* for the First Respondent

*Mr M Kuma with Ms Kukari* for the Second Respondent

28<sup>th</sup> March, 2018

## Introduction

1. In a petition filed on 29 August 2012 the petitioner Gordon Henry Wesley alleged errors and omissions pursuant to s.218 of the Organic Law on National and Local Level Government Elections (Organic Law) against John Liba the Returning Officer. John Liba is an officer, servant and agent of the Electoral Commission, the second respondent.
2. The First Respondent was the successful candidate for the Samarai-Murua Open Electorate in the 2017 National Election and is now the sitting member of Parliament for that seat. Thus was not disputed.
3. The conduct of the election is the responsibility of the Electoral Commission, its officers and servants and agents pursuant to s.15, 16, 18, 19 and 20 of the Organic Law. This was not disputed.
4. The First Respondent was declared Member Elect for the seat by John Liba on 22 July 2017.

The Petition seeks an order for a recount of the ballot papers in the election of Mr Leonard Henry Isi for the Samarai Murua Seat. That is the substantive relief he seeks now.

The basis for the recount are stated in his petition which are:-

- “7. At the conclusion of the count of First Preference Votes, and following a Quality Check for Accuracy, the petitioner had scored 5,198 votes.*
- 8. The said figure of 5,198 in favour of the petitioner was accurately recorded in the Tally Sheet for use at the Counting Centre, showing First Preferences received by each candidate (the “Quality Check’ Form 66A”).*
- 9. At the completion of the count of the total number of first preference votes no candidate had received an absolute majority of votes.*

10. *In accordance with S168 of the Organic Law, the scrutiny proceeded to the second count to exclude the candidate with the fewest number of first preference votes, with each ballot-paper counted to him counted to the candidate next in order of the voter's preference (the "first exclusion count").*
  11. *At the commencement of the first exclusion count each candidate necessarily had the same respective number of votes as at the conclusion of the count of first preference votes. In the petitioner's case that was 5,198.*
  12. *The petitioner's number of first preference votes at the commencement of the first exclusion, however, was incorrectly recorded on the counting room tally sheet of progressive results of the Distribution Preferences ("the Form 66B") as 5,042, instead of the correct figure of 5,198.*
  13. *The said error or omission was not corrected but instead the figure of 5,042 remained on the said tally-sheet as being the number of first preference votes scored by the petitioner, and so remained to and including the final exclusion count.*
  14. *The inclusion of the figure of 5,042, instead of 5,198, as the number of first preference votes scored by the petitioner on the Form 66B, and the failure to correct the same so as to substitute the right figure of 5,198, were errors or omissions on the part the second respondent's said officer falling within S218 of the Organic Law.*
  15. *The difference of 15 votes between the true number of first preference votes in favour of the petitioner (5,198), and the number recorded at the commencement of the first exclusion and maintained on the Form 66B thereafter (5,042), having regard to the figures referred to above, including the winning margin, resulted in the said errors or omissions affecting the result of the election within the meaning of S218 of the Organic Law.*
5. The following facts were not disputed:-
- a) Mr Leonard Henry Isi and Mr Gordon Henry Wesley were both candidates for the Samarai-Murua Open Electorate in the 2017 National Election.

- b) The First Respondent was declared MP for Samarai-Murua on 22 July 2017.
  - c) The Electoral Commission was responsible for the conduct of the election pursuant to s.15, 16, 18, 19 and 20 of the Organic Law on National and Local Level Government (Organic Law).
  - d) The total number of allowable ballot papers remaining in the count for the electorate after the final exclusion was 12,591 (Form 66B Exhibit C produced by the Electoral Commission).
  - e) The absolute majority required to win was 6,296 (50% plus 1 of the total allowable ballot papers).
  - f) The First Respondent was declared with 6,342 votes, while the petitioner who was the runner up with 6,249 votes.
  - g) The winning margin, The First Respondent scored exceeding the absolute majority was 46.
  - h) The number of votes the First Respondent scored in excess of the votes in favour of the petitioner was 93.
6. The petitioner's grievance is that at the conclusion of the count of first preference votes before quality checks, he scored 5,198 votes and that the figure was correctly recorded on the tally sheet for use at the Tally Centre by the Electoral Officials led by John Liba, the returning officer. The petitioner contended that (and this was not disputed) at this point, no candidate scored absolute majority of the votes thus, the scrutiny proceeded to the eliminations or exclusion process until the day of declaration.
7. The petitioner contended that at the start of the elimination process his tally should have started with 5198 votes but that figure was reduced and recorded as 5042 votes. He therefore alleged that an error had occurred committed by the Electoral Official led by the Returning Officer John Liba. He therefore submitted that the election results would be affected if 5,198 was recorded at the start of the elimination or exclusion counts which could affect the First Respondent's election as the duly elected Member for Samarai-Murua at the National Parliament.

#### Issues

8. The issues for this court to determine are:-
- (a) Whether the figure 5,198 was the correct figure at the end of counting of first preference votes and correctly recorded on the Form 66B.

- (b) What was the correct figure to be recorded
- (c) Whether the election results would be affected if the figures were erroneously recorded.
- (d) Were errors committed by Electoral Officials as alleged.

Answering the Issues

9. Issue (c)

The simple answer to Issue (c) is that if the figure 5,198 was correct and correctly entered, the election result would be affected.

Issue (a)

What was the correct figure to record after counting of the first preference votes.

- 10. The primary evidence for the petitioner on this critical issue comes from Form 66B an official electoral document where the figures are entered after counting of the first preference votes. The figure 5,198 is indeed recorded as the total number of first preference votes by the petitioner. The logical argument is that before proceeding onto the exclusions, the starting figure for the petitioner going into the exclusion would be 5,198. Instead the petitioner is recorded to have polled 5048 first preference votes going into the exclusions.
- 11. The petitioner alleged this was an error committed by the electoral officials. The electoral officials explanation is that 5,198 was the first figure recorded before quality check and that after the quality checks the figure was reduced to 5042 because some of his first preference votes were ruled to be informal. While this in itself may be a good enough explanation per se that explanation is not recorded in either Form 66A. Form 66A Quality check form and form 66B. In other words the explanation is not supported by the Electoral Commission's own Documents.
- 12. Each of the parties called evidence either supporting or disputing the figures, however in the end the figures recorded in Form 66A Quality Check speaks for itself as recorded in the forms produced by the Electoral Commission.
- 13. The petitioner called Philemon Dumali a scrutineer at the counting centre for the petitioner. His evidence was that he was present at the first preference count and at the beginning of the first elimination. He recorded the petitioner's first preference votes as 5156 and that when 5042 was posted at the commencement of the elimination

counts he was confused. He said he complained to the Returning Officer but was told to take the matter up with the Court of Disputed Returns.

14. The Second Respondent called John Paul Weiteli and John Liba the Returning Officer Weiteli was responsible for recording of the tally at the Counting Centre. He recorded all figures on the Tally Board. He however has no independent recollection of the figures he recorded or entered on the tally board. He said he did not hear any exchange between Dumali and Liba and that if it happened he was not aware of it.

15. Weiteli also told the court that the figures recorded normally were provided to the "data and calculations team" for entering into the computer. The data given to that team were never produced as evidence before the Court. No one from that team gave evidence. The court does not know what manual data was given to the data and calculation team. To me it is important what primary information was entered into the computer and the source of the information. To me if that critical information is lacking the figures subsequently entered into the computer cannot be reliable.

16. I echo similar sentiments expressed by Yagi, J in *Manase v Polye* (2016) 2 May 2016 when he said:-

*"the evidence is that the Electronic Tally Sheet was compiled by an electoral official for the purposes of sending the results of the counts electronically to the Central Tally Room. The officer responsible for entering the figures was not called to explain these discrepancies including procedures used and the times the entries were made.... In my view, the Electronic Tally Sheet cannot be regarded as the official record and therefore cannot be relied upon. The entries made in the Electronic Tally Sheet are therefore unreliable for the reasons given."*

17. John Liba relied on the electronic data which he annexed to his affidavit. He did not dispute the manual evidence in the form of Form 66A, Form 66A Quality Check Form and form 66B. He did not say if the data information entered into the computer was from the Forms or from the figures posted on the tally board. He said he did not sign Form 66A Quality Check form but he did not dispute its production as part of the evidence. He said he left his manual tallies in Misima. The question then is are the manual tallies in Misima the source of information provided to the data and the calculation team to then enter into the computer? Are the manual tally sheets also in the forms 66A and 66B and whether they are the signed ones. If the manual tally sheets

in Misima are the primary source documents entered into the computer then they should have been produced.

18. I consider the evidence of John Liba to be unreliable as he should have produced the manual tally sheets which he says he left in Misima. It was incumbent upon him to produce them to the court. He did not. This court only has Exhibits A, B and C to rely on.
19. Similarly I consider the evidence of Joel Harry, Joshua Jacob and Terrence Ako to be unreliable. These witnesses are scrutineers and they compiled electorate records of what happened. Their collective evidence does not explain the discrepancies in Exhibits A, B, and C.
20. In answering the issue of which was the correct number, this Court cannot answer that question positively. The Court does not know as no proper explanation is given with and other evidence.
21. Issue (b) follows the first issue. The Court does not know.
22. It is apparent on the face of the Form 66A, Form 66A Quality Check and Form 66B that errors appear to have been made without a proper explanation. The error would have affected the election result.
23. The Respondents raised the legal doctrine of estoppel. They argued that s.152 of the Organic Law provides a procedure to be followed where objection is taken to ballot papers and s.153A provides a procedure for excluded ballot boxes. The respondents argued that the petitioner's evidence from Dumali is that he complained about the figures to the Returning Officer and he was told to take it up with the Court of Disputed Returns. The issue of estoppel did not arise. The returning officer had a role or duty to perform and that duty was not performed and that was to ensure correct and accurate figures were recorded and that proper records should have been kept to explain the change of figures after the first preference count.
24. Having heard the oral evidence, this court is confronted with exhibits A, B and C, documentary evidence which speak for themselves. I can only say that the figures were recorded. Figures 5198 was recorded at the end of the counting of first preference. Figures 5042 is also recorded in the Exhibits. I just cannot ignore them without any proper explanation. I consider the computer generated data annexed to John Liba's

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affidavit to be unreliable as the source documents for the computer data are not before the courts.

25. I am of the view that Exhibits A, B and C reveal an error. The error obviously would affect the result of the election. I am of the view that the fair thing to do would be to order a recount of all ballot papers for the Samarai-Murua seat, while Mr Isi will continue to hold office.

26. The orders are:-

- a) The Electoral Commission shall recount all ballot papers relating to the Samarai-Murua seat.
- b) The declaration of the election of Mr Leonard Henry Isi as the Member for Samarai-Murua declared on 22 July 2017 remains until after the recount.
- c) A new declaration is to be made if after the recount is completed, the election result is affected.
- d) The recount shall begin on 30 April 2018.
- e) Costs are awarded to the petitioner against the 2<sup>nd</sup> Respondent.
- f) The petitioner's security for costs is to be refunded to him.

27. Ordered accordingly.

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Lawyers for Petitioner	:	<i>Simpson Lawyers</i>
Lawyer for First Respondent	:	<i>Posman Kua Lawyers</i>
Lawyer for Second and Third Respondent	:	<i>Kimbu Lawyers</i>