

PAPUA NEW GUINEA

[IN THE NATIONAL COURT OF JUSTICE]

EP NO 6 OF 2017

IN THE MATTER OF A DISPUTED RETURN FOR THE
MORESBY SOUTH OPEN ELECTORATE

SAMSON KIRILYO

Petitioner

V

JUSTIN TKATCHENKO

First Respondent

ELECTORAL COMMISSION

Second Respondent

WAIGANI : CANNINGS J

20, 21 NOVEMBER 2017

Elections – petitions – objection to competency of petition – need for strict compliance with Organic Law on National and Local-level Government Elections, Section 208 (requisites of petition) – Section 208(d): whether addresses of attesting witnesses adequately stated – Section 208(a): whether facts relied on to invalidate the election adequately set out.

Two respondents to an election petition objected to competency of the petition. The first respondent (the successful candidate) argued two grounds of objection: (1) that the petition was in breach of Section 208(d) (*requisites of petition*) of the *Organic Law on National and Local-level Government Elections* in that it was not attested by two witnesses whose addresses were stated; and (2) that the petition was in breach of Section 208(a) of the Organic Law in that it did not, in five respects, adequately set out the facts relied on to invalidate the election. The second respondent (the Electoral Commission) argued two grounds of objection: (1) that the petition was in breach of Section 208(a) in that it did not state sufficient particulars as to the winning margin and related matters; and (2) that the petition was in further breach of Section 208(a) of the Organic Law in that it did not, in 12 respects, adequately set out

the facts and grounds relied on to invalidate the election. The petitioner opposed both objections.

Held:

- (1) Strict compliance with each of the requirements of Section 208 of the Organic Law is required. Substantial compliance is not sufficient.
- (2) The *Election Petition Rules* 2017 prescribe the level of detail as to the address of an attesting witness that will satisfy the requirements of Section 208(d) of the Organic Law, which stipulates that a petition “be attested by two witnesses whose occupations and addresses are stated”.
- (3) The petition was non-compliant with Rule 4 and Form 1 of the *Election Petition Rules* 2017; and it failed to provide any additional detail that would satisfy Section 208(d) of the Organic Law. The first ground of the first respondent’s objection was upheld. It followed that the petition was dismissed for that reason alone.
- (4) As to the second ground of the first respondent’s objection, three of the five sub-grounds were upheld and two were dismissed.
- (5) As to the second respondent’s objection, both grounds of objection were dismissed.
- (6) The petition was accordingly dismissed. Costs followed the event, so that the petitioner was ordered to pay the first respondent’s costs (as his objection to competency was sustained) and the second respondent (as its objection to competency was refused) was ordered to pay the petitioner’s costs.

Cases cited

The following cases are cited in the judgment:

Delba Biri v Bill Ninkama [1982] PNGLR 342

Holloway v Ivarato [1988] PNGLR 99

Karo v Kidu [1997] PNGLR 28

Philip Kikala v Electoral Commission (2013) SC1295

OBJECTIONS

This is a ruling on objections to competency of an election petition.

Counsel

R Yansion for the petitioner
S Ranewa for the first respondent
I Molloy for the second respondent

CANNINGS J: This is a ruling on two objections to competency of an election petition. The petition, consisting of four grounds of challenge, was filed by unsuccessful candidate Samson Kirilyo, disputing the election of first respondent Justin Tkatchenko as member for Moresby South Open in the 2017 general election.

The first respondent (the successful candidate) argued two grounds of objection:

(1) that the petition was in breach of Section 208(d) (*requisites of petition*) of the *Organic Law on National and Local-level Government Elections* (the Organic Law) in that it was not attested by two witnesses whose addresses were stated; and

(2) that the petition was in breach of Section 208(a) of the Organic Law in that it did not, in five respects, adequately set out the facts relied on to invalidate the election.

 The second respondent (the Electoral Commission) argued two grounds of objection:

(1) that the petition was in breach of Section 208(a) of the Organic Law in that it did not state sufficient particulars as to the winning margin and related matters; and

(2) that the petition was in further breach of Section 208(a) of the Organic Law in that it did not, in 12 respects, adequately set out the facts and grounds relied on to invalidate the election.

FIRST RESPONDENT'S OBJECTION

Ground (1): breach of Section 208(d)

First respondent's submissions

The first respondent argues that the petition fails to meet the requirements of Section 208(d) of the Organic Law. Section 208 (*requisites of petition*) states:

A petition shall—

- (a) set out the facts relied on to invalidate the election or return; and
- (b) specify the relief to which the petitioner claims to be entitled; and
- (c) be signed by a candidate at the election in dispute or by a person who was qualified to vote at the election; and
- (d) be attested by two witnesses whose occupations and addresses are stated; and
- (e) be filed in the Registry of the National Court at Port Moresby or at the court house in any Provincial headquarters within 40 days after the declaration of the result of the election in accordance with Section 175(1)(a). [Underlining added.]

Mr Molloy for the first respondent (supported by Mr Ranewa for the second respondent) submitted that each of paragraphs (a) to (e) of Section 208 imposes a mandatory requirement, which must be strictly complied with, for a petition to be properly before the National Court. He submitted that the petition does not satisfy Section 208(d), which requires that the petition “be attested by two witnesses whose occupations and addresses are stated”. He submits that though two witnesses have attested the petition and stated their occupations, neither has stated his address in a way that meets the constitutional requirements.

Mr Molloy submitted that the address of an attesting witness must be stated with particularity, it must be a physical address, and a postal address will not be sufficient. He relies for these propositions on the prescribed form of an election petition, Form 1 of the *Election Petition Rules 2017*. This provides that after setting out the preamble to the petition, the facts relied on and the grounds upon which the petitioner relies, and after the space for the petitioner to sign the petition, the petition is to be attested by two witnesses, in the following way:

FIRST ATTESTING WITNESS:

I, (insert name of first attesting witness),
..... (insert occupation of first attesting witness), of
..... (insert address of first attesting witness: state
address precisely by section and lot number or where no section and lot
number by street name or in the case of a village or settlement, state name of
place precisely by referring to province, district and nearest town), WHOSE
SIGNATURE APPEARS BELOW, ATTEST THAT I HAVE WITNESSED
THE SIGNING OF THE PETITION BY THE PETITIONER.

.....
(signature of first attesting witness)

SECOND ATTESTING WITNESS:

I, (insert name of second attesting witness),
..... (insert occupation of second attesting witness), of
..... (insert address of second attesting witness: state
address precisely by section and lot number or where no section and lot
number by street name or in the case of a village or settlement, state name of
place precisely by referring to province, district and nearest town), WHOSE
SIGNATURE APPEARS BELOW, ATTEST THAT I HAVE WITNESSED
THE SIGNING OF THE PETITION BY THE PETITIONER.

.....
(signature of second attesting witness)

In the present petition, the witnesses have attested the petition as follows:

I, STEVEN TORU, (name) a MANAGER, (occupation) of HUMANITY
FOUNDATION, PO BOX 8362 BOROKO (address residential and postal)
have this day witnessed the signing of this Petition by the Petitioner and attest
to the matters contained in the Petition.

Dated the 18th August 2017.
Signature

I, MOSES REUBEN, (name) a CONSULTANT, (occupation) of SAKIN
INVESTMENT (address residential and postal) have this day witnessed the
signing of this Petition by the Petitioner and attest to the matters contained in
the Petition.

Dated the 18th August 2017.
Signature

Petitioner's submissions

Mr Yansion, for the petitioner, acknowledges a degree of non-compliance with the Rules. But he argues that the requirements of the Rules can be dispensed with under Rule 22, at the discretion of the Court. Moreover, the Rules are just a piece of subordinate legislation that give directory guidelines as to how a petition might be drafted. The Rules must be read and applied subject to the Organic Law, which is a Constitutional Law. The Organic Law requires only that the attesting witnesses' "addresses" be stated. It does not require that a physical or residential addresses be stated. Mr Yansion relied on the following passage in the judgment of Injia J, as he then was, in *Karo v Kidu* [1997] PNGLR 28:

In my view, s 208(d) simply requires an "address". Section 208(d) does not require a residential address. I agree with Sheehan J's statement [in *Agonia v Karo* [1992] PNGLR 463] of the purpose of s 208(d). ... In my view s 208(d) should be looked at as a whole. If the name, occupation, work place and postal addresses of the witnesses stated in the petition collectively render it possible to easily identify and locate the witness, then it is not necessary for the witness to give his residential address.

Mr Yansion argued that the statement of a witness's address is just one component of Section 208(d), which must be read as a whole. If details of the name, occupation and address of the witness, considered together, are sufficient to enable the person to be located, Section 208(d) will be complied with.

Determination

I uphold Mr Molloy's submission that strict compliance with each of the requirements of Section 208 is mandatory. This has been the state of the law since the seminal decision of the Supreme Court (Kidu CJ, Kapi DCJ, Andrew J) in *Delba Biri v Bill Ninkama* [1982] PNGLR 342, in which the Court emphasised:

Furthermore, it seems to us that the statute has clearly expressed its intention that a petition must strictly comply with s 208. It is not difficult to see why. An election petition is not an ordinary cause (*In Re The Norwich Election Petition; Birbeck v. Bullard* (1886) 2 TLR 273), and it is a very serious thing. It is basic and fundamental that elections are decided by the voters who have a free and fair opportunity of electing the candidate that the majority prefer. This is a sacred right and the legislature has accordingly laid down very strict provisions before there can be any challenge to the expression of the will of the majority.

In our opinion it is beyond argument that if a petition does not comply with all of the requirements of s 208 of the Organic Law ... then there can be no proceedings on the petition because of s 210.

Section 210 (*no proceedings unless requisites complied with*) states:

Proceedings shall not be heard on a petition unless the requirements of Sections 208 and 209 are complied with.

Clearly the manner and extent to which the attesting witnesses have provided their addresses mean that the petition is non-compliant with the *Election Petition Rules 2017*, in that:

- no physical address is provided for Steven Toru, only a post office box, with no further details, is provided;
- no address at all is provided for Moses Reuben as the words “Sakin Investment” do not amount to statement of an address.

True it is that the Court has some power to dispense with the requirements of the Rules, but the power to do so is heavily qualified and this is apparent from the clear words of Rule 22 (*relief from the Rules*), which states:

The Court may dispense with compliance with any of the requirements of these Rules, either before or after the occasion for compliance arises, unless the rule is a requirement of the Organic Law. [Underlining added.]

In this case there was no application to dispense with the requirements of the Rules (and if there had been an application it is very unlikely to have succeeded in view of the qualifying words at the end of Rule 22).

I see some merit, nevertheless, in Mr Yansion’s submission that non-compliance with the Rules does not necessarily make the petition incompetent. The requirement to state the witness’s addresses emerges from the Organic Law. It is conceivable, therefore, at least in theory, that a petition could be non-compliant with the Rules but nevertheless comply with the Organic Law. The present case, however, is far removed from that scenario.

The *Election Petition Rules 2017* prescribe the level of detail as to the address of an attesting witness that will clearly satisfy the requirements of Section 208(d) of the Organic Law. If a petition fails to give the details prescribed by the Rules, it is necessary that it give some other details of the address of the witness or his or her name or occupation that would enable that witness to be easily located.

In this case the only details given of the address of the first witness, Steven Toru, are “Humanity Foundation PO Box 8362 Boroko”. When those details are combined with the witness’s name and occupation (“Manager”), it cannot reasonably be said that this witness could easily be located. Section 208(d) has not been complied with.

Non-compliance with Section 208(d) of the Organic Law is starker in the case of the second witness, Moses Reuben, who has not stated his address in any meaningful way. “Sakin Investment” is not an address.

Conclusion re ground 1 of first respondent’s objection

The address of each witness has been stated so vaguely that, not only is the petition non-compliant with the Rules, it is non-compliant with Section 208(d) of the Organic Law. The consequences are as follows:

- the petition fails to meet one of the mandatory requirements of a competent petition;
- as this Court has no discretion to relieve the petitioner of the need to comply with such mandatory requirements, the petition is not competent;
- the first ground of objection is upheld;
- the petition must be dismissed for this reason alone.

Ground (2): breach of Section 208(a)

The first respondent argues that the petition is in breach of Section 208(a) of the Organic Law in that it did not adequately set out the facts relied on to invalidate the election. To determine this ground of objection (and its sub-grounds) it is observed that the petition was drafted in such a way that it generally set out the facts relied on to invalidate the election in part B (paragraphs 1 to 9) and then set out four grounds of challenge:

- errors and omissions in transporting ballot boxes (part C1, paras 10 to 21);
- errors and omissions in the scrutiny of the counting (part C2, paras 22 to 32);
- errors and omissions during quality check (part C3, paras 33 and 34);
- illegality and unlawful actions (part D, paras 35 to 39).

I now summarise and determine the five sub-grounds of objection.

Objection re part B, para 7

The objection concerns the failure to state the winning margin correctly. I dismiss this objection as arguments about the correctness of the statement of the winning margin could be raised at the trial of the petition. It is not a matter going to the competency of the (*Philip Kikala v Electoral Commission* (2013) SC1295).

Objection re part C1, paras 10 to 21

This objection concerns the allegations about the method of transporting the ballot boxes to the counting centre. I uphold this objection as it is not clearly pleaded what breach of law or duty is being alleged. Nor is it pleaded how the result of the election was affected.

Objection re part C2, paras 22 to 32

This objection concerns the failure to state how the inadequate scrutiny or, as alleged, the absence of a scrutiny for 64 of 96 ballot boxes, affected the result of the election. I dismiss this objection as there are serious allegations of fact and alleged breaches of the Organic Law that are adequately pleaded.

Objection re part C3, paras 33 to 34

This objection concerns the allegations about errors or omissions during the quality check. I uphold this objection as it is not clearly pleaded what breach of law or duty is being alleged. Nor is it pleaded how the result of the election was affected.

Objection re part D, paras 35 to 39

This objection concerns the allegation that the returning officer was not a qualified person, due to his being an active member of the Defence Force. I uphold this objection as it is not clearly pleaded what breach of law or duty of the Organic Law is being alleged. Nor is it pleaded how the result of the election was affected.

Conclusion re ground 2 of first respondent's objection

Three of the objections are upheld, two are dismissed. If this petition were going to trial, the only ground of the petition to be determined would be 'errors and omissions in the scrutiny of the counting (part C2, paras 22 to 32)'.

SECOND RESPONDENT'S OBJECTION

Ground (1): breach of Section 208(a) re winning margin etc

The objection concerns the failure to state the winning margin correctly. I dismiss this objection for the same reason I dismissed a similar argument by the first respondent. Argument about the correctness of the statement of the winning margin could be raised at the trial. It is not a matter going to the competency of the petition (*Philip Kikala v Electoral Commission* (2013) SC1295).

Ground (2): further breaches of Section 208(a)

The objection concerns the alleged failure of the petition to state facts with particularity, so as to enable the second respondent to prepare its case. For example, it is argued that failure to adequately describe or identify vehicles and persons in the petition prejudices the second respondent and fails to meet the requirements of Section 208(a) of the Organic Law. I am unimpressed by these arguments.

According to the Supreme Court's decisions in *Delba Biri v Bill Ninkama* [1982] PNGLR 342 and *Holloway v Ivarato* [1988] PNGLR 99, though there must be strict compliance with the requirement to set out the facts relied on, the level of factual detail required will be sufficient if it meets these requirements:

- the facts that must be set out are the material or relevant facts which would constitute a ground on which the election might be invalidated;
- evidence by which those facts are proposed to be proved should not be set out;
- the facts must be set out or pleaded in a clear, concise and coherent way in order to satisfy the purpose of pleading the facts, which is to indicate clearly the issues upon which the opposing parties can prepare their cases and to enable the court to see with clarity the issues involved.

The petition generally meets those requirements and I dismiss the whole of ground 2 of the second respondent's objection.

Conclusion re second respondent's objection

Both grounds of objection are dismissed.

CONCLUSION

As to the first respondent's objection, ground 1 is upheld and parts of ground 2 are upheld. Ground 1 is critical. Upholding this ground means that the petition will be entirely dismissed as incompetent.

Both grounds of the second respondent's objection are dismissed.

The question of costs of the petition is a matter of discretion. Rule 19(1) of the *Election Petition Rules 2017* states that the Court "may make such orders as to costs as it deems fit". Subject to any specific orders for costs that apply to any interlocutory hearings I deem it fit that costs follow the event. The petitioner will be ordered to pay the first respondent's costs (as his objection to competency was sustained). The second respondent (as its objection to competency was refused, and also because its notice of objection was, albeit with the leave of the Court, filed late) will be ordered to pay the petitioner's costs.

The petitioner will be refunded any security for costs that he has under Section 209 of the Organic Law and Rule 7 of the *Election Petition Rules 2017* deposited with the Registrar.

ORDER

- (1) The first respondent's objection to competency of the petition is upheld.
- (2) The second respondent's objection to competency of the petition is refused.
- (3) The entire petition is dismissed.
- (4) Subject to any specific orders for costs that apply to any interlocutory hearings: (a) as between the petitioner and the first respondent, the petitioner shall pay the first respondent's costs of the petition; and (b) as between the petitioner and the second respondent, the second respondent shall pay the petitioner's costs of the petition.

- (5) The Registrar of the National Court shall forthwith refund to the petitioner any security for costs that the petitioner has under Section 209 of the Organic Law and Rule 7 of the *Election Petition Rules 2017* deposited with the Registrar.

Ruling accordingly.

Lawyers for the petitioner	:	Yansion Lawyers
Lawyers for the 1 st respondent	:	Simpson Lawyers
Lawyers for the 2 nd respondent	:	Kawat Lawyers
