

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

IN THE MATTER OF A DISPUTED RETURN FOR THE NAMATANAI OPEN ELECTORATE

EP NO. 07 OF 2017

BETWEEN:
J BYRON CHAN
-Petitioner-

AND:
WALTER SCHNAUBELT
-First Respondent-

AND:
ELECTORAL COMMISSION
-Second Respondent-

KAVIENG: FOULDS, J
16th May 2018

Case Cited:

DELBA BIRI v BILL NINKAMA (1982) PNGL R 342

GINSON SAONU v BOB DADAE (2004) SC763

JIMSON SAUK v DON POLYE (2004) SC769

MAUDE V LOWLEY (1874) L. R. 9 C. P. 165.

CLARK V. LOWLEY (18 B) 48 L. T. 7/6

CAMERON v FYSH (1904) HCA 49

BURBECK V BULLARD (1886) 2 T. L. R. 273

CRAFTER V WEBSTER (1979) 23 S. A. S. R. 61

STATE V AVA (2010) PGNC 180; N 4161 (16 November 2010) N4161

PUARIA V LERA (2013) PGNC 55; EP 89 of 2012 (8 April 2013) N 5148

ROGER TONGAI PALME V MICHAEL MEL, RUBEN TERATERE and THE ELECTORAL COMMISSION (1989) N808



MUNE V AGIRU, KAIULO and ELECTORAL COMMISSION (1998) PGSC 3; SC 590 (17 February 1998)

RAYMOND AGONIA V ALBERT KARO (1992) PNGLR 463

GABRIEL KAPRIS V JOHN SIMON (2013) N 5001

PETER ISOAIMO v PARU AIHI (2012) N4921

JIM NOMANE V WERA MORI and ELECTORAL COMMISSION (2013) PGSC 14

Counsel:

Mr G J Sheppard & Mr Moi for the Petitioner

Mr Iduhu for the First Respondent

Mr Iduhu & Ms Tera for the Second Respondent

REASONS FOR JUDGEMENT ON

PRELIMINARY POINT OF OBJECTING TO THE COMPETENCY OF PETITION.

FOULDS, J: This application arose from an electoral petition by J BYRON CHAN (the petitioner) against WALTER SCHNAUBELT (the first respondent) and the ELECTORAL COMMISSION (the second respondent) filed in the National Court of Justice at Waigani on 23 August 2017.

Pursuant to a notice of objection filed on 12 September 2017, the second respondent objected to the competency of the Petition pursuant to Section 208 (a) of the Organic Law on National and Local – Level Government Elections ("**Organic Law**").

The second respondent says that in essence, the petition failed to set out relevant and material facts relied upon to invalidate the election or return under **section 208 (a)**, and therefore, the Petition should not be heard pursuant to **section 210 of the Organic Law**.

Section 208; 209 and 210 of the Organic Law provides;

208. REQUISITES OF PETITION.

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 courthouse in any provincial headquarters within 40 days after the declaration of the result of the election in accordance with **section 175(1)(a)**.

209. DEPOSIT AS SECURITY FOR COSTS.

At the time of filing the petition the Petitioner shall deposit with the Registrar of the National Court K5, 000.00 as security for costs.

210. NO PROCEEDINGS UNLESS REQUISITES COMPLIED WITH.

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

For the sake of completeness I should also include, at this stage, **sections 204 and 205** which provide as follows:

204. LIABILITY FOR INDIRECT ACTS.

Every person is liable for an illegal practice or an offence against this Part committed directly or indirectly by himself, or by any other person on his behalf and with his knowledge or authority.

205. APPLICATION OF CRIMINAL CODE.

Nothing in this law shall derogate or be deemed to derogate the provisions of the Criminal Code, but a person is not liable to be prosecuted or punished both under this law and under the Criminal Code for the same offence.

Section 215. Provides:

215. VOIDING ELECTION FOR ILLEGAL PRACTICES.

- 215 (1) If the National Court finds that the candidate has committed or has attempted to commit bribery or undue influence, his election, if he is a successful candidate, shall be declared void.
- (2) A finding by the National Court under subsection (1) does not bar or prejudice a prosecution for an illegal practice.
- (3) The National Court shall not declare that a person returned as elected was not duly elected or declare an election void –
- (a) on the ground of an illegal practice committed by a person other than the candidate and without the candidate's knowledge or authority; or
 - (b) on the ground of an illegal practice other than bribery or undue influence or attempted bribery or undue influence, unless the Court is satisfied that the result of the election was likely to be affected, and that it is just that the candidate should be declared not to be duly elected or that the election should be declared void.

Finally, section 113 of the Criminal Code provides:

- (1) Subject to subsection (2), a person who –
- (a) at after an election, knowingly and wilfully, and without the lawful command of a court or tribunal/unfastens the fold on a ballot – paper within which the number of an elector is written, which fold has been made in accordance with a law; or
 - (b) being a person required by law to discharge duties at an election in which the voting is by ballot – attempts to ascertain or discover, or aids in ascertaining or discovering, the candidate for whom the vote of any person is given at the election, except in the case of a person voting openly; or
 - (c) having in the exercise of his office at an election obtained knowledge, or the means of knowledge, of the candidate for whom any person has voted at the election – discloses or aids in disclosing that knowledge otherwise and in answer to a question put in the course of proceedings before a court or tribunal; or

(d) being a person required by law to discharge duties at an election – places on a ballot – paper any mark or writing not authorised by law, is guilty of a misdemeanour.

Penalty: imprisonment for a term not exceeding two years.

(2) Subsection (1) does not apply with respect to a member of the Police Force acting with lawful authority in the course of his duty.

Mr Harvey Nii, of Counsel for the second respondent, filed detailed and comprehensive written and oral submissions on the case law relating to the requisites of a petition set out in section 208 of the Organic Law, commencing with *DELBA BIRI v BILL NINKAMA (1982) PNGLR 342* and concluding with *GINSON SAONU v BOB DADAE (2004) SC763* and *JIMSON SAUK v DON POLYE (2004) SC769*. In the latter two cases, the Supreme Court held that the law on section 208 established by *BIRI v NINKAMA* was still good law. Indeed, in the latter case of *SAUK* the members of the Court said:

"In election petitions the subject of the National Court's determination and the resultant application for review before us now, what provision in the organic law creates or requests jurisdiction? We would, without hesitation hold that section 208 does by its enumeration of five (5) requisites of an election petition. The mandatory nature of these requisites is well established from a line of judicial authorities starting with the seminal decision of the Supreme Court in the case of DELBA BIRI v BILL GEMBOGLE NINKAMA (1982) PNGLR 342, where the court stated (at 345) that:

In our view it is clear that all the requirements in section 208 and section 209 must be complied with. Section 208 is in mandatory terms and being the organic law on national elections it is a constitutional law. Section 210 simply precludes any proceedings unless section 208 and section 209 are complied with."

It is noteworthy that my research failed to reveal any cases of a like nature wherein the petitioner was given leave to amend or add to the particulars of the petition upon the court finding that the petition was deficient in its compliance with section 208 of the Organic Law. That is hardly surprising since the Supreme Court in *BIRI V BILL NINKAMA et ors* (op. cit. paragraph 5, Page 5) said:

"There is a long line of authority for the proposition that there can be no amendment to a petition after the expiration of the time limit, commencing with *MAUDE V LOWLEY* (1874) L. R. 9 C. P. 165. Then see *CLARK V LOWLEY* (18 B) 48 L. T. 7/6 where the court indicated that an amendment would not be allowed where there was "a rigid limit" of time for the presentation of the petition." To allow otherwise would have the practical effect of "extending the time for filing the petition." *CAMERON v FYSH* (1904) HCA 49 per Griffith C. J. at 314.

In *IN RE NORWICH ELECTION PETITION; BURBECK V BULLARD* (1886) 2 T. L. R. 273 the Court indicated that if an election petition were an ordinary cause, probably an amendment introducing additional grounds might be allowed but the court was obliged to have regard to the limitation within which a petition must be presented. In *CRAFTER V WEBSTER* (1979)23 S. A. S. R. 61, the full Court of the Supreme Court of South Australia said at P. 63:

"a rigid limit of time similar to that falling for consideration in the cases to which we have referred is provided in **S. 170 (1) (e) of the Electoral Act (S. A.)**. In our view the mere fact that the court has the same powers, jurisdiction and authority as a Judge of the Supreme Court presiding at the trial of a civil cause does not entitle the Court of Disputed Returns to allow an amendment after the expiry of the time limited for filing the petition.

Unlike the **ELECTORAL ACT 1929 – 1976 (S. A.)**, The organic law contains no such provision that the National Court hearing disputed returns under **S. 206** has the same power, jurisdiction and authority as it would have on the trial of a civil suit, so that the position in our jurisdiction is even stronger, that there can be no amendment by calling in aid such a provision as for example Order 32, Rule 13 of the National Court Rules of Court which gives to a Judge in an ordinary cause a discretionary power of amendment of any defect or error in any proceedings. In our view, the National Court Rules can have no application to election petitions."

On the morning of the first day of the hearing Mr Shepherd of counsel for the Petitioner abandoned ground 2 (errors and omissions by the second respondent by accepting the ballot papers folded in the shape of an aeroplane as to reveal the contents of the vote to the public at large in contravention of **sections 138 (b) and 152 of the Organic Law**) (errors and omissions by the second respondent by proceeding with the count in the absence of the

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scrutiny of the petitioner at the Namatanai Counting Centre in breach of **sections 150 and 151 of the organic law**); and ground 3 in their entirety and paragraph **4.8** (undue influence by the first respondent).

In the order of presentation of submissions of respondent counsel, counsel for the second respondent took the lead. Counsel for the first respondent adopted the submissions of the second respondent and made further submissions to the Court.

Counsel for the second respondent summarised the second respondent's objections to the petition beginning at paragraph 2, on page 3 of the SECOND RESPONDENT'S SUBMISSION ON OBJECTION TO COMPETENCY (2RS) entitled SUMMARY OF OBJECTIONS. At paragraphs 5.28 to 5.30 on page 22 of 2RS. At paragraph 5.28 counsel for the second respondent submits that ground 1 of the petition deals with "illegal practices" a characterisation with which I agree. The petition generally alleges that the first respondent either personally or through his authorised agents with his knowledge and authority intentionally or knowingly orchestrated, planned, coached and instructed voters (intending on marking ballot papers for him) to fold ballot papers in the shape of an aeroplane so as to reveal their votes. As a result of this scheme, voters (supporters) were seen folding and casting their ballot papers in the shape of an aeroplane during polling, which practice was widespread all throughout the electorate. In so doing, the first respondent attempted to ascertain or discover the candidate for whom the voters (supporters) had marked their ballot papers for, contrary to section 138(b) of the Organic Law. I also find that the aforementioned statement is in every material way an accurate and fair assessment of the allegations of "illegal practices".

In paragraph 5.29 of 2RS counsel for the second respondent submitted that ground 1 of the petition was incompetent for failing to plead essential 'facts in figures' as required by section 208 (a) of the Organic Law (facts in figures). In paragraphs 5.27 to 5.35 inclusive of 2RS counsel for the second defendant sets out in some detail what is meant by essential "facts in figures" and the law relating to it. I agree with and adopt those paragraphs. I note that I initially accepted the argument put by counsel for the petitioner that it was sufficient to satisfy the requirements of section 208 (a) in this case for the respondents to be able to EP 07 of 2017



calculate various figures like winning margins et cetera from other facts and figures provided by the petitioner in the petition. I was wrong and now, with all materials presently before me, I abandon that view entirely. It is mandatory for the pleader to state precisely the figures upon which he relies and upon which he intends to call evidence (see paragraphs 5.29 to 5.35 inclusive of 2RS) and not leave it to the reader (in this case the respondents) to calculate them. To do so, in my view, is to invite uncertainty which is contrary to the scheme of the provision.

Prior to considering those submissions in any detail I raised with counsel for the second respondent the question of whether the folding of the ballot paper in the manner alleged was actually illegal and if so, how. Later, I also sought and obtained responding submissions from counsel for the petitioner. I raised the question because the only references to folding the ballot paper I could find in the Organic Law or Regulations were in sections 126 and 138 of the Organic Law. Viz:

126. BALLOT – PAPERS TO BE INITIALLED.

(1) no ballot – paper shall be delivered to a voter without being first initialled or at least at fixed with an official mark as prescribed by the presiding officer, and an exact account shall be kept of all initialled ballot-papers.

(2) the initials of the presiding officer shall be placed on the back of the ballot – paper in such a position as to be easily seen when the ballot – paper is folded so as to conceal the names of the candidates.

138. VOTES TO BE MARKED IN PRIVATE.

Except as otherwise prescribed, a voter upon receipt of the ballot paper shall without delay:

(a) retire alone to some unoccupied compartment of the booth, and in there, in private, mark votes for three candidates in order of preference or, where there are less than three candidates for each candidate in order of preference on the ballot – paper in the prescribed manner; and

- (b) fold the ballot – papers so as to conceal his votes and show clearly the initials of the presiding officer or the at fixed mark and exhibit it so folded to the presiding officer, and then openly, and without unfolding it, deposit it in the ballot – box; and
- (c) quit the booth.

There is no allegation or particulars that both subsections 126(1) and (2) were breached in any way, let alone by whom they were breached. Nor was there any allegation or particulars as to what constitutes folding a ballot – paper in the shape of an aeroplane. It follows that no evidence could be led by the Petitioner as to the determination of whether the folding of a ballot – paper in a particular manner was an "*illegal practice*." Each case would need to be considered on its own facts.

To my mind it is quite clear that the scheme of the legislative provisions relating to secret ballots contained in the Organic Law are directed solely to protecting an elector's right to cast his vote in secret. They are not directed to any other purpose, in particular to preventing any elector from disclosing the manner in which he voted to any other person. As was put to me by counsel for the second respondent at paragraphs: 5.57, 5.59 and 5.60 on page 27 of 2RS:

"there is nothing under part XIII (The Polling) or anywhere else in the Organic Law or its regulations (Electoral Law (national elections) regulation 2007) that expressly prohibits a voter from folding his ballot paper in the shape of an aeroplane (or I apprehend, any other shape for that matter). And at paragraph 5.59: This provision only demands that the voter must not disclose his preferences at the time he marks his votes to anyone, including the election officials. It does not prevent the voter from showing how he or she folded the ballot paper. This is so because after the voter marks his or her preferences and folds the ballot paper, he or she is permitted by section 138 (b) of the Organic Law to exhibit his or her ballot paper openly to the presiding officer before he or she deposits it into the ballot box. And at paragraph 5.60; As such no errors (including illegal practices) were committed by the polling officials at polling. Even if the polling officials knew of the aeroplane votes, the pleadings do not demonstrate how this knowledge amounted to errors or omissions that materially affected the result of the election under section 218 of the Organic Law."

That means, in my view that any elector is entitled to divulge to anybody else the way in which he voted or indeed, the way in which he intended to vote. In other words, in the absence of anything to the contrary, he is entitled to waive the protection afforded him under the Organic Law. For those reasons, I find the electors who cast a balus vote could not thereby have indulged in illegal practices in terms of the Organic Law. In my view it follows consequentially that neither the first nor the second respondent's actions amounted to "illegal practices". I would therefore strike out ground 1.

Even if I am wrong in the conclusions I have just reached, with respect I agree with and adopt the submissions by counsel for the second respondent in paragraphs 5.27 to 5.35 and 5.57, 5.59 and 5.60 inclusive of 2RS and would strike out ground 1 as being incompetent for the reasons given.

Counsel for the Petitioner responded to the observations I made about "*illegal practices*" and the possible consequences (at that point not yet made) by referring to 2 cases, *State V Ava (2010) PGNC 180; N 4161 (16 November 2010) N4161* and *PUARIA VLERA (2013) PGNC 55; EP 89 of 2012 (8 April 2013) N 5148* and exhorting me to carefully consider them in detail, particularly, the first – mentioned. His response was based on a statement made by Kariko, J. at paragraphs 36 in his reasons for judgement in the National Court in PUARIA. Viz:

It would then seem logical to conclude that the reference to "illegal practice" under section 204 should also be accorded the same meaning. Kariko, J was there referring to reasons for judgement by Woods, J in *ROGER TONGAI PALME V MICHAEL MEL, RUBEN TERATERE and THE ELECTORAL COMMISSION (1989) N808*, where he held that section 204 does not apply to the offences of bribery and undue influence and suggested that where liability is alleged in relation to bribery and undue influence committed by another person (not the winning candidate) a petitioner could plead "a nexus by procuring or counselling". Kariko, J then goes on at paragraph 35 to say: However with respect, I am not sure whether His Honour Woods, J's interpretation in relation to section 204 is correct. The reference in section 215 (3) (b) of the Organic Law to "an illegal practice other than bribery or undue influence" has been held to mean, by necessary implication, that bribery and undue influence are "illegal practices", and "illegal practices" mean electoral criminal offences (under part XVII of the Organic Law in addition to the election – related offences created by the Criminal Code.

The two unarticulated major premises not raised by counsel for the petitioner are, first, the second line in paragraph 36 of *PURIA* (supra) in which Kariko, J goes on to say:

"But I need not make a determination of that issue now as the matter was not fully argued and in any case, my decision does not rest on what may be the correct interpretation."

That line represents a full and frank concession by the judge that his observations in relation to "illegal practices" in these circumstances is no more than obiter.

Secondly, in the third last paragraph of page 7 of *MUNE V AGIRU, KAIULO and ELECTORAL COMMISSION* (1998) PGSC 3; SC 590 (17 February 1998) Injia, J said:

"In the present case, the trial judge accepted that the term "illegal practice" had been given a liberal and extended meaning to include those acts set out in OLNE section 178, as well as sections 105 and 106 of the Code. The trial judge however stated that the "illegal practices" were confined to those defined in these provisions and the Court must not go out of those provisions to create new acts to come within those meanings. The trial Judge found that the acts complained of did not come within the meaning of those provisions. I accept this statement of principle and findings on the pleading as being correct."

It follows that, I find that *AVA* and *PUARIA* provide counsel for the Petitioner with no assistance. Indeed, I find that section 204 of the Organic Law is of no assistance to the Petitioner to make out a case against either of the respondents pursuant to section 113 (1) (b) of the Criminal Code.

Finally, on the question of illegal practices I entirely agree with and adopt counsel for the second respondent's submission and the reasons thereof contained in paragraph 5.129 of 2RS.

Ground 4 of the petition alleges "bribery" and "undue influence" against the first respondent personally or through its agents pursuant to section 215 (1) and 3 (a) of the

Organic Law. As I have said previously, save paragraph 4.8 in the petition, which he has abandoned, the petitioner is pursuing ground 4 on page 10 of the petition (see 2RS, supra, at paragraph 5.87).

"Undue influence" is defined in the Criminal Code at sections 102 and although not defined therein, section 103 sets out a series of different circumstances which constitute bribery. That moved Cannings, J in *PETER ISOAIMO v PARU AIHI* (2012) N4921 at paragraph 9 to say that;

Because of the high number of alternative elements it provides and the many different combinations of elements this gives rise to, a petitioner must specify what particular bribery offences were alleged to have been committed.

See also the reasons for Judgement of Kandakasi J, Cannings and Collier, JJ, in the Supreme Court on *JIM NOMANE V WERA MORI and ELECTORAL COMMISSION* (2013) PGSC 14 at paragraph 52.

In *RAYMOND AGONIA V ALBERT KARO* (1992) PNGLR 463 in summary at pp 467 – 470 Sheehan, J opined that because of the serious charges and consequences that electoral petitions engender and the seriousness to the electoral process and the rights of the people to elect their representative of a challenge based on an allegation of bribery, the charge or charges must be pleaded with clarity and definition. As well as the specifics of the particular allegation, such as names, numbers, dates, place, there must be allegations that this money, that property or the gift was offered by the successful candidate and that the reason that it was given or offered was to get a named person to vote or not to vote, or to interfere unlawfully, as the case may be in the free voting of an election.

As to the elements of bribery, see *GABRIEL KAPRIS V JOHN SIMON* (2013) N 5001, per David J at paragraph 32.

Perusal of ground 4 of the petition does not characterise, let alone plead, which of the bribery offences are alleged to have been committed. That is to say under sections 103 (a) (iii) or (d) of the Code. Moreover, insofar as alleged bribery and undue influence were committed by the authorised agents of the first respondent there is no allegation that they

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were committed with the "knowledge and authority" of the first respondent as required by section 215 (3) (a) of the Organic Law. The omission by the petitioner of those details is fatal and sufficient for me to find that ground 4 is incompetent in its entirety and I so find it and as a result, strike it out in its entirety.

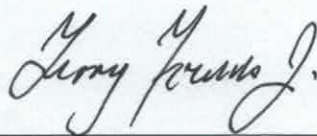
For the above reasons I find:

1. That Grounds 1, and 4 of the petition be struck out.
2. That the petition be dismissed as being incompetent.

It is for those reasons that on 13 March 2018 at Kavieng in Papua New Guinea I ordered:

FORMAL ORDERS:

1. That the petition is dismissed on the grounds of incompetency.
2. That the petitioner pay the respondents' costs of and incidental to the petition.
3. That the security deposit be paid out of Court to the Fairfax Legal Trust Account.
4. That Time is abridged.



Lawyers for the Petitioner : Young & Williams Lawyers

Lawyers for the First Respondent : Fairfax Legal Pln

Lawyers for the Second Respondent :