

**IN THE COURT OF APPEAL OF  
THE REPUBLIC OF VANUATU**  
(Civil Appellate Jurisdiction)

**CIVIL APPEAL CASE No. 05 of 2012**

**BETWEEN:** GUY MARCEL ALAIN BENARD  
Appellant

**AND:** THE REPUBLIC OF VANUATU  
Respondent

**Coram:** Hon. Justice John von Doussa  
Hon. Justice Ronald Young  
Hon. Justice Daniel Fatiaki  
Hon. Justice Oliver Saksak  
Hon. Justice Robert Spear  
Hon. Justice Dudley Aru

**Counsel:** Mr Guy M.A. Benard in person  
Mr Godden Avock for the Respondent

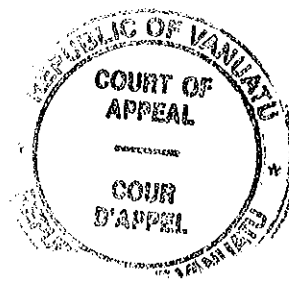
**Date of Hearing:** 26 April 2012

**Date of Decision:** 4 May 2012

## **JUDGMENT**

### **INTRODUCTION**

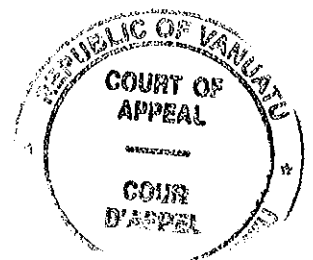
1. Mr Benard worked for the Vanuatu Maritime Authority (VMA) from 2003 until December 2007 when the VMA's existence was ended by Parliament.
2. Mr Benard's case in the Supreme Court was that he was an employee of the VMA and not a contractor and as a result he was entitled from the Republic to unpaid annual leave, a severance allowance, payment for the remaining period of his employment contract (until 30 June 2010) and other damages after the VMA was abolished.
3. The Judge in the Supreme Court concluded that part of Mr Benard's employment was a contract of services and part a contract for services. Thus the Judge said for the provision of some services to the VMA Mr Benard was an employee. But for the provision of other services to the VMA he was employed as a contractor.



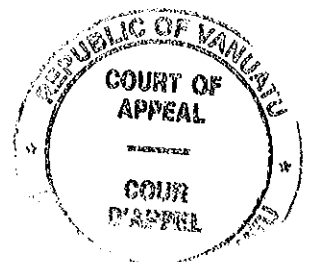
4. The Judge concluded that the contract for services between Mr Benard and the VMA was void and in breach of the Government Contracts and Tenders Act [CAP.245]. Thus Mr Benard had no entitlement to any benefits arising from that portion of his employment contract where he was a contractor. However where Mr Benard was an employee then he was entitled to benefits in terms of his contract and the Employment Act [CAP.160]. The Judge concluded that the only lawfully payable unpaid benefit due to Mr Benard was a severance payment. This payment was based on a total employment period of 4 years and 2 months. The Judge concluded that that part of Mr Benard's monthly salary that was lawfully payable to him as an employee was 294,000VT of a total monthly salary of 814,000VT. The severance payment was calculated on the basis of one month's severance payment for each year of employment and totaled 1,225,000VT which the Judge awarded. The Judge rejected claims for unpaid annual leave and the remaining period of Mr Benard's contract until 2010.
5. Mr Benard made an application to this Court to admit further evidence at the appeal hearing. The proposed evidence was from Mr Napuati and Mr Emelee. This evidence related to the question of whether Mr Benard was an employee or a contractor. Given our conclusion on this point we do not need to consider their evidence. We refuse the application.
6. This appeal is based on Mr Benard's claim that he was an employee, he was entitled to be paid until June 2010 when his contract ended and that he was entitled to a severance allowance and unpaid leave based on this contract.

## **FACTS**

7. The essential facts are not in dispute. However a necessary context to the facts requires an understanding of the two relevant statutory provisions in the Vanuatu Maritime Authority Act [CAP.253] relating to employment.
8. Section 38 of the VMA Act entitles the Commissioner to appoint employees of the VMA "as he or she thinks necessary for the efficient performance of the Authority's functions". (s.38(1))



9. Section 39 authorizes the Authority to appoint consultants to “advise on the exercise or function or powers of the Authority” (section 39(1)). These appointments will typically be as contractors not employees. Section 39 details the contractor’s remuneration and other benefits.
10. On 24 September 2003 Mr Benard was appointed as a Consultant to the VMA specifically pursuant to s.39(1) of the Act. No claim arises with respect to this period.
11. On 6 November 2003 there was a new employment contract, detailed in a letter from Mr John Napuati who was then Acting Commissioner of Maritime Affairs. The letter of employment appointed Mr Benard specifically pursuant to s.38 of the VMA Act. It said that Mr Benard was to be an Advisor to the Commissioner and a Surveyor. The employment was for four months. Mr Benard was also appointed a licensing officer under the Shipping Act.
12. Shortly afterwards, on 10 November 2003, a further contract was signed between the Vanuatu Maritime Commissioner and Mr Benard. Mr Benard’s job was extended to “train the Commissioner and VMA Staff in Maritime technical matters and to advise the Commissioner and the staff and to survey resources”.
13. On 26 January 2004, his period of employment was extended for a further period to 6 July 2004. On 1 April 2004, the Commissioner and Mr Benard signed what was described as a Service Agreement for three years until 1 June 2007. This Agreement is also said to be pursuant to section 38(1) of the VMA Act. Mr Benard’s duties included those of a technical advisor and a surveyor. Mr Benard is described as an employee in the Agreement.
14. In March 2005, Mr Benard was appointed as Deputy Commissioner under the VMA Act. And on 18 April of that year the Commissioner’s powers were delegated to Mr Benard for a period.
15. On 22 July 2005, Mr Benard’s employment contract was further amended. The amendments included a provision that Mr Bernard’s entitlement to a



severance allowance was to be calculated from 1 November 2003 to the end of his contract then in June 2007.

16. Mr Benard's final contract was signed on the 11 of April 2007 for a further period of 3 years to commence 1 July 2007. That contract was also said to be pursuant to s.38 of the VMA Act. Mr Benard was employed as the Deputy Commissioner, a technical advisor and surveyor by the VMA.
17. Shortly after Mr Benard's 2007 contract had been signed, Parliament passed the Vanuatu Maritime (Repeal) Act. That Act provided that as at the 31 December 2007 the VMA was abolished. It made no reference to rights of the Maritime Authority's employees subsequent to 31 December 2007.

### **THE JUDGE'S DECISION**

18. The respondent's case and the Judge's conclusion about Mr Benard's employment contracts can be summarized in this way. Although Mr Benard's employment contracts were expressed to be pursuant to s.38 of the VMA Act, they were partly s.38 and partly s.39 contracts. The Judge concluded that given Mr Benard was primarily employed as a specialist advisor then s.39 of the VMA Act was the statutory authority for the employment for such person.
19. The Judge concluded that the Commissioner could not appoint an employee under s.38 to act as his advisor to advise on the functions or powers of the Authority. Where Mr Benard's employment covered those functions then he was, the Judge concluded, a section 39 contractor. The Judge concluded that those parts of Mr Benard's employment that involved his function as a Licensing Officer and as the Deputy Commissioner were appointments as an employee and not a contractor and therefore properly done pursuant to s.38.

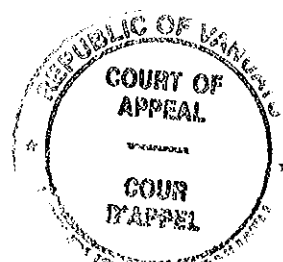
### **DISCUSSION – SECTIONS 38 and 39**

20. Section 38(1) provides-

#### ***"APPOINTMENT OF STAFF***

*38.(1) The Commissioner may appoint such employees, including employees on secondment from other organisations, as he or she thinks necessary for the efficient performance of the Authority's functions."*

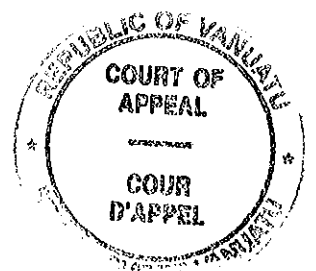
- Section 39(1) provides-



***“CONSULTANTS, SPECIALISTS, ETC***

*39.(1) The Authority or the Commissioner may appoint consultants, specialists or advisory committees to advise on the exercise of functions or powers of the Authority.”*

21. We differ from the Supreme Court Judge’s analysis. Firstly, we do not consider that s.38 and s.39 of the VMA Act read together prohibited the Commissioner from employing an individual under section 38 who was to advise the Commissioner or the Authority on their functions. Section 39 is an empowering section. It uses the word “may” throughout. That section therefore empowers the Authority to appoint particular persons to advise the Authority on its powers and functions. However, section 39 does not prevent the Commissioner from hiring specialists pursuant to s.38 to provide him with particular advice on the exercise of his powers and functions. There is nothing in the content of the sections which would justify such a restriction.
22. Secondly, the Commissioner in fact hired Mr Benard pursuant to section 38 of the Act. Mr Benard’s employment contract which both parties signed, said section 38 defined their relationship. Mr Benard and the Commissioner were entitled to define the employment contract in this way. That is because the thrust of each of Mr Benard’s employment contracts from 2003 to 2007 were for Mr Benard to provide services to assist the Commissioner to carry out his functions under the Act.
23. For example the 2007 contract required Mr Benard to advise the Commissioner on matters relating to the functions of the VMA. This obligation arose in turn from the Commissioner’s obligations under the VMA Act. Mr Benard also had training obligations. This is also the Commissioner’s obligation. Thus to use the words of s.38 Mr Benard was hired by the Commissioner to provide assistance toward the efficient performance of the Commissioner’s and thereby the Authority’s function.
24. In summary therefore s.39 did not prevent the Commissioner from hiring specialist persons to advise him as to his functions. Section 39 simply empowers the Authority to appoint consultants to assist in the exercise of its functions. Section 38 gives the responsibility for hiring staff for the VMA to the



Commissioner as part of his responsibility to manage the Authority. Such staff could be employed to advise the Commissioner on technical matters: They were s.38 employees.

25. The third point in favour of the appellant's interpretation of the contract arises from the content of the employment contracts. The content of the contracts point strongly toward Mr Benard's status as an employee. Mr Benard's contract of employment contained these terms amongst others:
- (a) salary was paid monthly and subject to review;
  - (b) an entitlement to annual leave on pay;
  - (c) an entitlement to sick leave;
  - (d) particular work hours were identified requiring Mr Benard's sole devotion to his position;
  - (d) an entitlement to compensation for overtime;
  - (f) an entitlement to housing and vehicle allowance;
  - (g) there was agreed liability by the VMA as his employer for workmen's compensation with respect to any liable accident or injury.

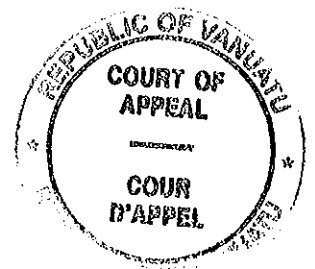
Typically a contractor would be paid for the work done. A contractor would not therefore be expected to receive paid annual leave or sick leave. Nor would a contract for services be expected to cover an employer's liability for workmen's compensation.

These factors all strongly point toward Mr Benard as an employee rather than a contractor.

26. We are therefore satisfied that the contract between the VMA and Mr Benard was a section 38 contract.

**WHAT THEN ARE Mr BENARD'S LEGITIMATE LOSSES?**

27. Mr Benard claimed he was entitled to the payment of his salary from the date Parliament abolished the Authority until the end of his contract. (30 June 2010)
28. In the Supreme Court the Judge assessed whether, with respect to that portion of Mr Bernard's salary that related to section 38 functions, he was



entitled to be paid until the expiry of his contract in 2010. The Judge said that given section 2 of the VMA Repeal Act ended the VMA, Mr Benard's employment was "frustrated by a total failure of consideration...". The Judge concluded therefore that any obligation the VMA had to Mr Benard ended at 31<sup>st</sup> December 2007 when the VMA itself was abolished.

29. Mr Benard submits that the Judge was wrong in his conclusion as to frustration. He said the Republic could not rely upon its own actions, being the repeal of the VMA, to excuse them from liability on his contract and so the doctrine of frustration could not apply to this case.

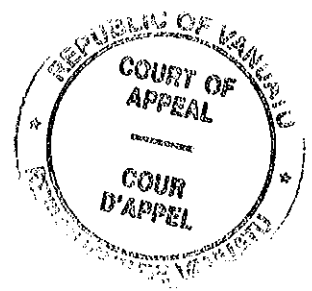
30. We consider that the significant point is that the contract was frustrated not by the Executive arm of the Government, who had the responsibility for the decisions of the VMA, but by Parliament. Parliament was not a party to the employment contract. The VMA did not frustrate the contract. Parliament did. We therefore reject that submission.

31. Mr Benard's next submission was that s.12 of the Employment Act obliges his employer to provide work and to pay him during his contract whether work was provided or not. Section 12 of the Employment Act provides as follows:

**"12. Duty of employer to provide work**

*Except in the case of, and during an emergency which prevents him from doing so, every employer shall provide the employee with work in accordance with the contract during the period for which the contract remains in force and on such number of working days as is expressly or impliedly provided in that contract. If the employer fails to provide work as aforesaid he shall pay to the employee, in respect of every day on which he shall so fail, remuneration at the same rate as if the employee had done the day's work."*

32. Section 12 of the Employment Act is concerned with existing employment. Mr Benard's employment ended on 31<sup>st</sup> December 2007 when his employer went out of existence. In those circumstances section 12 of the Employment Act can have no application to the situation and does not entitle Mr Benard to payment beyond 31 December 2007.



33. The third submission made by Mr Benard is that section 11 of the Interpretation Act [CAP.132] applies to preserve his rights arising from his employment contract. He says therefore that section 11 entitles him to his salary until June 2010.

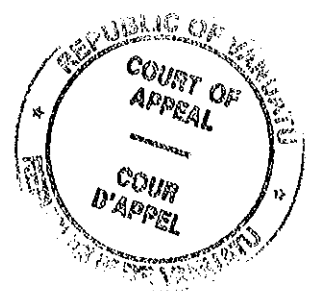
34. Section 11 of the Interpretation Act provides as follows:

**"11. EFFECT OF REPEAL**

- (1) *Where any Act of Parliament repeals any Act, the repeal shall not-*
  - (a) *revive anything not in force or existing at the time at which the repeal takes effect; or*
  - (b) *affect the previous operation of the enactment so repealed or anything duly done or suffered under it; or*
  - (c) *affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or*
  - (d) *affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed;*
  - (e) *affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment, and any such investigation, legal proceeding or remedy may be continued or enforced, and any such penalty forfeiture or punishment may be imposed, as if the repealing Act had not been passed.*
- (2) *Upon the expiry of an Act of Parliament this section shall apply as if the Act had been repealed.*
- (3) *Where an Act of Parliament that has been amended by another Act is repealed the repeal shall include all the provisions in the other Act that amended the repealed Act."*

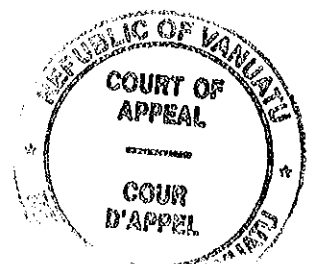
35. Mr Benard's submissions focused on subsections (c) and (e). He said that the proper interpretation of subsection (c) was that the VMA Repeal Act affected his employment contract because such a repeal affected his rights and privileges arising from his employment contract entered into pursuant to s.38 of the VMA Act. These rights and privileges were protected by s.11 he said. He submitted in turn that subsection (e) preserved his right to take legal proceedings relying upon a breach of subsection (c).

36. We reject this interpretation of section 11. This section is designed to protect despite the repeal of a statute, the rights, privileges, obligations and liabilities that are acquired, accrue or are incurred under the repealed statute. Mr Benard's rights and privileges arise from his contract of employment and did not accrue nor were they acquired pursuant to the VMA Act.





37. Section 38 of the VMA Act authorizes the Commissioner to hire and fire staff. That section relates to the Commissioner's powers and obligations. Mr Benard's rights arise solely from his contract of employment. They do not arise from the VMA Act. We are therefore satisfied that section 11 of the Interpretation Act has no application to this case.
38. Finally, on this aspect of the case Mr Benard argued that given this Court had concluded that the Government was responsible for the debts of the VMA (see **Benard v. Government of the Republic of Vanuatu** [2009] VUCA 42) then the VMA's responsibility to Mr Benard as his employer passed to the Government. This in turn Mr Benard said allowed him to sue the Republic (of which the Government was a part) for the unexpired portion of his 2007 contract.
39. This Court's previous observations regarding the VMA and the Government were made in relation to the Public Finance and Economic Management Act regarding the debts of the VMA. They had no relevance to the facts of this case. As we have identified there is no statutory provision preserving Mr Benard's contractual rights with respect to the VMA. Mr Benard's contractual rights ended when the VMA was abolished.
40. After this appeal ended Mr Benard filed in Court what he called his "Last Address" to the Court. This contained one further submission relating to the question of frustration.
41. Mr Benard pointed out that the Government Proceeding Act 2007 defined the Republic as including Parliament and the Government. Thus he said that the Republic should be responsible for the actions of Parliament and that it therefore unilaterally frustrated the contract.
42. As we have observed Mr Benard's rights arise only from his employment contract. When Parliament abolished his employer, his employment contract ended. Unless Parliament preserved his rights under the contract, the contract of employment was frustrated. Parliament did not preserve Mr Benard's contractual rights and so the contract was frustrated, given that neither party was then able to perform the contract.



43. We are therefore satisfied the Judge in the Supreme Court was correct when he concluded that Mr Benard had no cause of action against the Republic for his contract beyond the 31<sup>st</sup> December 2007.

## **ANNUAL LEAVE**

44. It follows from our previous conclusion that any annual leave payment otherwise lawfully payable could only extend to 31<sup>st</sup> December 2007. Mr Benard in any event only claimed 11.5 days as annual leave untaken and unpaid from the 1<sup>st</sup> July 2007 to 31<sup>st</sup> December 2007. The Republic accepts that 11.5 days was Mr Benard's unpaid and untaken leave.

45. However the Judge in the Supreme Court considered that section 33 of the Employment Act prevented Mr Benard's claim for payment of annual leave. Section 33 of the Employment Act provides as follows:

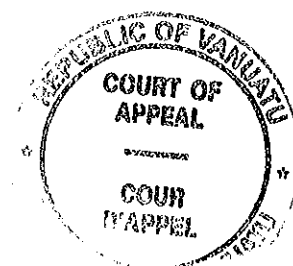
**"33. Duration of entitlement**

*After leaving the service of his employer any employee may avail himself of his annual leave and travel, if any, within 6 months from the date on which he ceased to work for that employer:*

*Provided that travel shall only be paid for by the employer if the employee actually makes the journey."*

46. The Judge in the Supreme Court said there was no evidence Mr Benard had made a claim for his annual leave entitlement for this period until he filed these proceedings and so the claim was time-barred pursuant to s.33. Further the Judge noted that Mr Benard had settled his entitlement to unpaid annual leave in Civil Case 199 of 2007.

47. It is not immediately clear how s.33 is to be applied. The provision seems to provide that after an employment contract is at an end a previous employee may take annual leave but must do so within the six months after the contract has ended. It is not apparent how an ex-employee is to take annual leave from employment when his employment has ended. This is especially so in this case given Mr Benard's employer went out of existence.



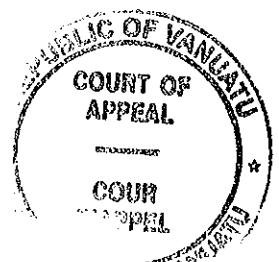
48. However before us Mr Benard said shortly after the VMA had been abolished he claimed unpaid annual leave but this had been refused. Counsel for the Republic did not dispute this. Given that concession Mr Benard must be entitled to be paid for his leave entitlement for the last six months of his contract which was untaken and unpaid. He asserted a claim for untaken annual leave well within the six month period which seems to underlie section 33. He was therefore not out of time to make such a claim.
49. The Judge in his decision seemed to conclude in any event Mr Benard had received his unpaid leave entitlement in other proceedings before the Courts. The Republic accepted that Mr Benard had not settled his claim for unpaid and untaken annual leave from July to December 2007 in Civil Case 199 of 2007. The Republic did not challenge the amount of Mr Benard's claim of VT341,800. We therefore award Mr Benard VT341, 800 in payment of his untaken leave entitlement.

#### **SEVERANCE ALLOWANCE**

50. Section 56 of the Employment Act provides for severance allowances. The section provides as flows:

**"56. Amount of severance allowance**

- (1) *Subject to the provisions of this Part, the amount of severance allowance payable to an employee shall be calculated in accordance with subsection (2).*
- (2) *Subject to subsection (4) of the amount of severance allowance payable to an employee shall be-*
- (a) *for every period of 12 months-*
- (i) *half a month's remuneration, where the employee is remunerated at intervals of not less than 1 month;*
- (ii) *15 days' remuneration, where the employee is remunerated at intervals of less than 1 month;*
- (b) *for every period less than 12 months, a sum equal to one-twelfth of the appropriate sum calculated under paragraph (a) multiplied by the number of months during which the employee was in continuous employment.*
- (3) *Where remuneration is fixed at a rate calculated on work done or includes any sum paid by way of commission in return for services, the remuneration shall, for the purposes of this section, be computed in the manner best calculated to give the rate at which the employee was being remunerated over a period not exceeding 12 months prior to the termination of his employment.*



- (4) *The court shall, where it finds that the termination of the employment of an employee was unjustified, order that he be paid a sum to 6 times the amount of severance allowance specified in subsection (2).*
- (5) *Any severance allowance payable under this Act shall be paid on the termination of the employment.*
- (6) *The court may, where it thinks fit and whether or not a claim to that effect has been made, order an employer to pay interest, at a rate not exceeding 12 per cent per annum from the date of the termination of the employment to the date of payment.*
- (7) *For the purposes of this section the remuneration which shall be taken into account in calculating the severance allowance shall be the remuneration to the employee at the time of the termination of his employment."*

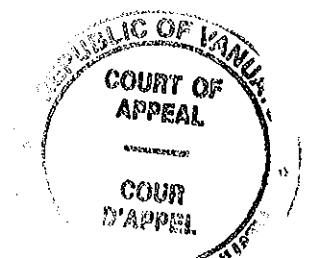
51. The Judge in the Supreme Court calculated the appellant's severance allowance based on-

- (a) an assessment that that part of Mr Benard's employment that related to a legitimate section 38 contract was 294,000VT per month out of Mr Benard's monthly contractual payment of 814,000VT as at 1<sup>st</sup> of July 2007.
- (b) that the relevant period when Mr Benard was a section 38 employee was 4 years and 2 months.

52. We have concluded however that Mr Benard was, with respect to all of his employment, a section 38 employee. The employees of the VMA had apparently negotiated a more generous arrangement than that originally provided for in the Employment Act as to severance payments. Section 56(2)(a)(i) (as it then applied) provided for severance payments at the rate of ½ month pay for each 12 month period as an employee. The more generous arrangement negotiated by Mr Benard and other employees of the VMA is expressly permitted by s. 56 of the Employment Act.

The amount payable was to be based on his remuneration at the date his contract ended. This payment is therefore properly calculated as follows:-

- (a) Mr Benard's monthly salary as at 31 December 2007 – VT814,000
  - (b) Mr Benard's service 4 years and 2 months
  - (c) Amount payable - 4 x VT814,000= VT3,246,000
- Plus 2 months employment @ monthly rate of VT814,000 = VT136,000
- Total amount payable: VT3,382,000



53. The Supreme Court order for a severance payment of VT1,225,000 is set aside. Instead Mr Benard is entitled to a severance payment of VT3,382,000.

## **DAMAGES**

54. Mr Benard seeks damages for what he describes as the unlawful end of his employment. He stresses that there was no complaint about his performance of his duties. Mr Benard's Claim was formulated pursuant to s.56(4) (see 50 of this Judgment).

55. We are satisfied that this section has no application to Mr Benard's circumstances. His employment was not unjustly terminated. His employment ended because Parliament, as is its right, ended the existence of his employer. This decision was Parliament's to make and no unjust dismissal resulted.

## **CERTIFICATE OF EMPLOYMENT**

56. Section 52 of the Employment Act provides as follows:

**"52. CERTIFICATE OF EMPLOYMENT**

- (1) *An employee whose employment has been terminated shall be entitled to receive from the employer, on request at the time of the termination, a certificate specifying the dates of his engagement and termination and the type of work on which he was employed.*
- (2) *Nothing unfavourable to the employee shall be inserted in such a certificate."*

57. Mr Benard was not provided with any such certificate by the Republic. We record counsel for the Republic accepted in Court that the Republic should provide and would provide such a certificate to Mr Benard. The certificate does no more than record that Mr Benard was employed in a certain position for a certain period with the VMA. It is not what could be described as a reference. While we do not have any power to make an order that this be done we expect counsel for the Republic to arrange for such a certificate to be provided to Mr Benard.

## **COSTS**

58. Mr Benard complains that although he sought reimbursement of his expenses in the Supreme Court no order was made. Mr Benard also seeks before us what he describes as costs in this Court being a reimbursement for the time



he has spent on this case. He says that justification for such order is found in Rule 15.4(a) of the Civil Procedure Rules. This provides as follows:

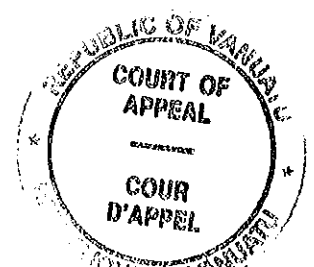
*"15.4 A party who is not represented by a lawyer:*

*(a) may recover disbursements;..."*

59. This Rule could entitle Mr Benard to an order for payment of "disbursements" only. We take the use of the word disbursement to mean actually incurred expenses relating directly to this litigation. This does not however entitle Mr Benard to payment for the time he has spent with respect to this case.
60. The payment of such disbursements to a self represented litigant would ordinarily follow the general principles on which costs are awarded. In the Supreme Court the appellant was partly successful and partly unsuccessful. The same can be said of this appeal. In other words both sides of this litigation have in part succeeded and in part lost. In those circumstances we consider there is no basis for any order for costs or disbursements in favour of either party in this litigation.

## **INTEREST**

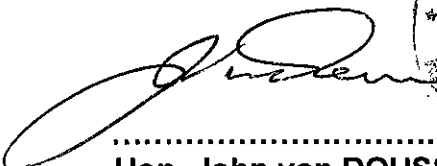
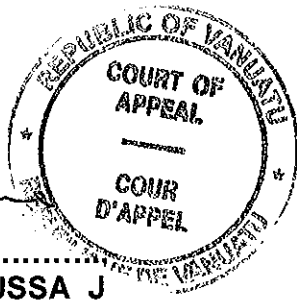
61. The Judge ordered interest to be paid on the amount of judgment from the date of the filing of the claim until payment at 5% per annum. We see no reason to differ from this view and confirm that 5% interest should be payable from the date of filing of Mr Benard's claim until the payment of the sum at 5% per annum.
62. In summary therefore-
- (a) We allow the appeal to the extent that we declare Mr Benard was for his employment from November 2003 until 31 December 2007 a section 38 VMA Act employee.
  - (b) Mr Benard is not entitled to any payment pursuant to his 2007 contract after the 31<sup>st</sup> December 2007;
  - (c) Mr Benard is entitled to a severance allowance based on his 4 year 2 month term of employment calculated at a rate of 1 month per year based on his last monthly salary of 814,000VT being an amount of VT3,382,000;



- (d) Mr Benard is also entitled to a payment of 11.5 untaken annual leave days being a total of VT341,800;
- (e) No order as to costs in either Court is made in favour of either party.
- (f) Mr Benard is entitled to interest of 5% per annum from the date of filing of the Supreme Court proceedings until payment of the judgment.

**DATED at Port-Vila this 4<sup>th</sup> day of May 2012**

**ON BEHALF OF THE COURT**

  
  
.....  
**Hon. John von DOUSSA J**