

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

CIVIL APPEAL CASE NO. 27 of 2013

BETWEEN: MARK BEBE

Appellant

AND: REPUBLIC OF VANUATU

Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice Olivier Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Robert Spear
Hon. Justice Dudley Aru

Counsel: Mrs. Mary Nari Grace for the Appellant
Mr. Ishmael Kalsakau for the Respondent

Hearing: 13 November 2013

Judgment: 22 November 2013

JUDGMENT

1. On 24 November 2012 the appellant entered into an employment contract to serve as Director General in the Ministry of Justice for 4 years. By clause 34.1 the contract document was declared to be "*the entire agreement between the parties.*" There was no express provision in the contract allowing for the transfer of the appellant. The contract however, was governed by and to be interpreted "*in accordance with the law of Vanuatu*" which includes article 58 (2) of the Constitution which provides:-

"Senior public servants in Ministries may be transferred by the Prime Minister to other posts of equivalent rank."



2. Clause 31 of the contract provided that in the event of a dispute:-

"31.1 The parties must attempt to settle any disputes arising between them in an amicable manner.

31.2 If the parties fail to settle their disputes in an amicable manner, the dispute must be referred to arbitration under the Trade Disputes Act [CAP 162]."

3. The Trade Disputes Act defines an "arbitration proceeding" as a proceeding taken before a board under that Act with a view to bringing about a settlement of a trade dispute by arbitration between the parties, and, PART 2 sets out the available dual processes of conciliation and arbitration for the resolution of disputes between employers and workers.

4. In particular, sections 11 and 12 provide:-

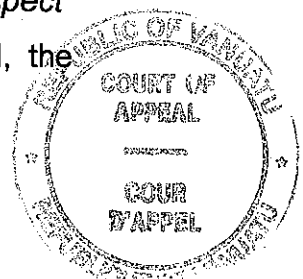
11. If the Commissioner considers that there is a reasonable prospect of bringing about a settlement of a dispute, in whole or in part, by arbitration, he may, subject to a written consent of all the parties to the dispute, recommend to the Minister that the dispute, or any outstanding part thereof, be referred to a board of arbitration.

12. Upon the receipt of the Commissioner's recommendation under section 11 the Minister may refer the dispute, or any outstanding part thereof, to a board of arbitration which shall consist of:-

(a) a sole arbitrator appointed by the Minister; or

(b) a chairman and an equal number of members experienced in industrial relations as representatives of employers and representatives of workers, respectively, all appointed by the Minister.

5. The above provisions envisage a *two-step* process requiring first, the Commissioner of Labour to be satisfied that there is "*a reasonable prospect*" of achieving a settlement of the dispute by arbitration. If so satisfied, the

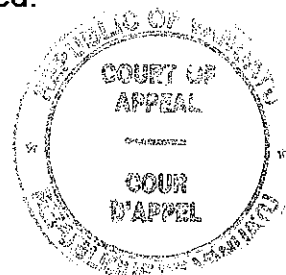


Commissioner, with *"the written consent of the parties"*, may then recommend arbitration to the Minister who, in turn, is to refer the dispute either to a sole arbitrator or to an arbitration panel.

6. In the absence of the Commissioner being satisfied that the dispute is amenable to arbitration or if the written consent of the parties is not forthcoming, there can be no arbitration *"under the Trade Disputes Act."*
7. During the course of our discussions with appellant's counsel it became clear that even if clause 31 was invoked, the appellant would not agree to the dispute being subject to arbitration. Counsel for the State appeared to suggest that the existence of clause 31 (above) obviated the need to obtain the appellants' *"written consent"* to arbitration. We do not agree. Clause 31 establishes a dispute resolution process which includes a referral to arbitration under the Trade Disputes Act in the event that the parties are unable to settle their dispute amicably. For completeness we note that section 19 expressly provides:-

"No award resulting from any arbitration shall be made which is inconsistent with any written law."

8. By letter dated 4 June 2013 under the hand of the Prime Minister, the appellant was informed that as from 10 July 2013 he was transferred to the Ministry of Lands in the position of Director General.
9. What followed next was an exchange of correspondence between the appellant, the Prime Minister's office, and the Attorney General culminating in a letter dated 2 August 2013 from the Acting Prime Minister instructing the appellant to move to the Ministry of Lands without further delay and warning him that failure to comply could lead to his suspension and being disciplined.

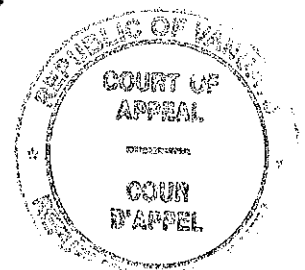


10. On 6 August 2013, lawyers acting for the appellant responded in a strongly worded letter to the Acting Prime Minister expressing the view that the purported transfer of the appellant appeared to be in breach of the appellant's employment contract which specifically assigned him to work in the Ministry of Justice for 4 years. The letter also denied the availability of Article 58 to transfer the appellant and labeled the decision to transfer him as "unlawful."
11. On 8 August 2013, the appellant issued a claim for judicial review challenging his transfer by the Prime Minister and seeking a declaration, a mandatory order and a quashing order. The Government while admitting the relevant sequence of events in its defence, nevertheless raised the provisions of clause 31 by way of a preliminary bar to the claim. Written submissions were filed and the matter was heard on 28 August 2013.
12. On 30 August 2013 a RULING was delivered on the following question posed by the judge, namely:

"Is there in fact any dispute between the claimant and the Prime Minister with respect to the subject matter of the action before this Court?"

13. The question is problematic as the subject matter of the claim was not about any particular term of the appellant's employment contract but rather the "decision" of the Prime Minister transferring the appellant in the exercise of his power under Article 58(2) of the Constitution.
14. Be that as it may the Judge answered the question in the affirmative and concluded:

....that this Court has no alternative but to decline jurisdiction to hear the claimant's claim for Judicial Review of the Prime Ministers' decision of 4



June 2013 transferring him to the position of Director General of the Ministry of Land."

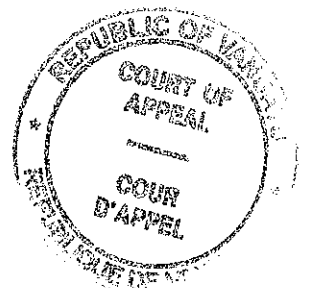
15. The Judge's conclusion is tantamount to a dismissal of the appellant's claim for judicial review. The Judge in the Supreme Court concluded that as the arbitration route had not been explored, the substantive proceeding should be dismissed. We do not agree. At most it could be stayed but even that is of doubtful value in light of counsel's indication during the hearing of the appeal.

16. The real remaining issue now is encapsulated in the first ground of appeal.

"The Court erred in law in declining to answer the legal question raised in the Appellant's claim for judicial review: "whether the decision to transfer the Appellant to the position of Director General on the Ministry of Lands under Article 58(2) of the Constitutional was lawful or not? Only the Supreme Court has power to answer that question."

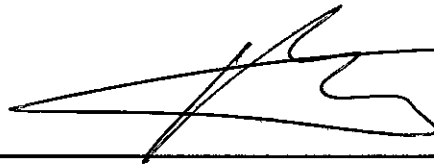
17. The decision being challenged in the appellant's judicial review application is the decision taken by the Prime Minister to transfer the appellant. "...in accordance with the section 58 subsection 2 (sic) of the Constitution." The lawfulness of that decision necessarily entails a careful consideration of the meaning, effect, availability, and limitations to the exercise of the power granted to the Prime Minister under the constitutional provision.

18. In simple terms the issue is - whether for the purposes of Article 58 (2) of the Constitution a Director General is a "senior public servant". If he is, the Prime Minister can exercise his power under Article 58 (2). If he is not, the powers of the Prime Minister will be limited. We are not of the view that this question is amenable to arbitration law. It is a legal issue which needs to be progressed with alacrity in a Court.



19. The appeal is allowed. The arbitration steps should be undertaken and completed within 21 days and if not settled by that process, the legal question identified in paragraph 18 should be returned to the trial judge to be tried and determined in the exercise of the original jurisdiction of the Supreme Court.

FOR THE COURT



Hon. Chief Justice Vincent Lunabek

