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

Civil Appeal Case No. 29 of 2014

BETWEEN: REPUBLIC OF VANUATU
Appellant

AND: MARK BEBE
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice Bruce Robertson*** ***Hon. Justice Oliver A. Saksak*** ***Hon. Justice Daniel Fatiaki*** ***Hon. Justice John Mansfield*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Stephen Harrop***
Counsel:	*Mr. I. Kalsakau and Mr. K. Tari for the Appellant* *Mrs. M. G. Nari for the Respondent*
Date of Hearing:	*7 November 2014*
Date of Judgment:	*14 November 2014*

JUDGMENT

1. The undisputed facts in the case are conveniently set out in the introduction of the Supreme Court judgment. We repeat them with necessary amendment to suit the appeal:

> *"1. On 24 November 2012, the respondent signed a contract of employment with the appellant to work as Director-General in the Ministry of Justice for 4 years.*
>
> *2. On 4 June 2013, the Prime Minister made a decision to transfer the respondent to the Ministry of Lands on the basis that "it has been decided that the heavy restructuring work at the Ministry of Lands needs a senior Director-General of high calibre."*
>
> *3. On 2 August 2013, the Prime Minister insisted that the respondent should move to the Ministry of Lands. However, the respondent refused to move and he contended that he has a specific contract with the Ministry of Justice for a specified period of 4 years.*
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> *4. On 7 August 2013, the new Minister of Justice, Parliamentary Secretary and other political people had a meeting with the respondent and forcefully told him to leave the office immediately*

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before further steps were taken to change the locks on the gate and office doors.

5. *On 8 August 2013, the respondent issued a claim for judicial review challenging his transfer by the Prime Minister and seeking a declaration, a mandatory order and a quashing order. In its defence, the appellant 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. On 30 August 2013, the Court delivered its Ruling in which it declined jurisdiction to hear the claimant's claim."*

2. This is the second occasion on which this matter has come before the Court of Appeal. On the previous occasion the respondent successfully appealed against an order of the Supreme Court declining jurisdiction in favour of an arbitration clause in the respondent's employment contract (*see*: Bebe v. Republic of Vanuatu [2013] VUCA 36).

3. In allowing the appeal and returning the matter to the Supreme Court, the Court of Appeal identified the legal issue raised by the proceedings when it said (at **paras. 17** and **18**):

> *"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 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.*
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> *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. ..."*

4. For completeness, we note that the respondent's employment contract identified the Prime Minister (not the "*Public Service Commission*" or the "*Government of the Republic of Vanuatu*") as the "*Employer*". It was not seriously disputed before us that the respondent's appointment followed the process outlined in **Sections 17A** and **17B** of the **Public Service (Amendment) Act No. 1 of 2011** (the "*Amendment Act*") which includes a "*recommendation of the Commission*", or that the Prime Minister had signed the respondent's employment contract in his capacity as Minister responsible for the Public Service.

5. On 20 July 2014 the Supreme Court delivered its judgment on the sole legal issue as follows (at **para. 27**):

"27. Accordingly, in answer to the question posed for determination, I find that for the purposes of Article 58 (2) of the Constitution a director-general is not a public servant."

We merely note that the particular expression in the relevant Article is: "*senior public servant*" and further, no consequential orders were made as sought in the judicial review application.

6. In her consideration of the issue the trial judge set out several clauses of the respondent's employment contract and referred to dicta in the judgment of the President of the Republic v. Speaker of Parliament [2012] VUSC 183 and in the recent judgment of the Court of Appeal in Silas v. Public Service Commission [2014] VUCA 9. In particular the trial judge said (at **paras. 23 to 26**):

> *"It is also equally clear to me that with the legislation of the **Public Service (Amendment) Act No.1 of 2011**, the position of directors-general has now been distinctively established under sections 17A, 17B and 17C with a different regime of appointment and termination from an ordinary public servant.*
>
> *Thus, in respect of the appointment of a director-general, section 17A provides that "the Minister on the recommendation of the Commission is to appoint a person to be a director-general under a contract of employment for a period of 4 years and the person may be reappointed only once." Whereas appointments to the Public Service are dealt with under section 23 of the **Public Service Act [Cap. 246]** which specifically states that "any appointment to or within the Public Service is to be made by the Commission." Moreover, under section 5 of the Act, "employee" means a person employed in the Public Service on a permanent basis.*
>
> *In this present case, Mr. Bebe's employment contract was signed by the then Prime Minister, Mr. Sato Kilman, and not by the Public Service Commission. Furthermore, Mr. Bebe's conditions of service are regulated by the said contract covering a specified period of "4 years in the Ministry of Justice." This undoubtedly puts the said employment contract in a different category outside the ambit and exclusive power of the Public Service as provided by Article 57 of the Constitution.*
>
> *I therefore accept the claimant's submissions that he is not a public servant and that the Constitutional provision under Article 58 (2) does not apply to him. In my considered view, the claimant is right. He is not a public servant. In reaching this conclusion, reliance is placed on the recent decision of the Court of Appeal in **Silas v Public Service Commission** (ibid at page 5) where the Court pronounced that "the appointee is not part of the Public Service given the appointing authority is the Prime Minister." I fully adopt this decision and, needless to say, I am bound by it."*

7. The appellant appeals the whole of the Supreme Court judgment on two (2) grounds as follows:

> *"(1) The judge at first instance erred in law in deciding that because the respondent's employment contract was signed by the Prime Minister and not by the Public Service Commission, it undoubtedly puts the said employment contract in a different category outside the ambit*

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and exclusive power of the Public Service as provided by ***Article 57*** *of the Constitution - (the "contractual parties" argument).*

(2) The judge at first instance erred in law in deciding that a Director General for the purposes of ***Article 58 (2)*** *of the Constitution is not a public servant - (the "interpretation" argument).*

8. We are grateful for the helpful written and oral submissions presented by counsel for the parties at the hearing of the appeal.

9. In brief, this appeal turns on a narrow question of the interpretation of the phrase: "*Senior public servants*" as it appears in **Article 58** of the Constitution which provides:

"58 (1) The rule of security of tenure provided for in Article 57(5) shall not apply to the personal political advisers of the Prime Minister and Ministers.

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

(our underlining)

10. We also set out the provisions of **Article 57** of the Constitution which is referred to in Article 58. It provides:

"57. Public servants

(1) Public servants owe their allegiance to the Constitution and to the people of Vanuatu.

(2) Only citizens of Vanuatu shall be appointed to public office. The Public Service Commission shall determine other qualifications for appointment to the public service.

(3) No appointment shall be made to a post that has not been created in accordance with a law.

(4) The Prime Minister or the chairman of a Local Government Council may, exceptionally, make provision for the recruitment of staff for a specified period to meet unforeseen needs.

In urgent cases, the Public Service Commission may, after consulting the Ministers responsible for finance and public administration, make such a decision instead of the Prime Minister.

(5) For as long as their posts exist, public servants shall not be removed from their posts except in accordance with the Constitution.

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(6) *Public servants shall be given increments in their salary in accordance with the law.*

(7) *Public servants shall leave the public service upon reaching retirement age or upon being dismissed by the Public Service Commission. They shall not be demoted without consultation with the Public Service Commission.*

(8) *The security of tenure of public servants provided for in sub-article (5) shall not prevent such compulsory early retirement as may be decided by law in order to ensure the renewal of holders of public offices."*

11. In Public Service Commission v. Willie [1993] VUCA the Court of Appeal observed of Article 57 of the Constitution:

> *"The general purposes of article 57 are clear, although the provisions of sub-article 8 occasion some difficulty. The article has the dual purpose of requiring public servants to remain politically neutral, and at the same time of protecting them from political interference. It is highly desirable, in any society, that the members of the Public Service do not allow political affiliations to influence their duty to the Government of the day in the service of the Nation and that they should not be removed or suffer any other disadvantage for purely political reasons. The Constitution seeks to give effect to that ideal.*
>
> *Article 57(5) is intended to ensure that public servants have security of tenure for as long as their posts exist. That is made clear, not only by the words of that provision, but also by article 58, which makes exception in the case of personal political advisers of the Prime Minister and Ministers and allows senior public servants in Ministries to be transferred to other posts of equivalent rank. A similar policy is revealed by article 60(4) which protects the Public Service Commission from outside interference. ...."*

12. Before discussing in more detail the grounds of appeal, we deal shortly with the reliance placed by the trial judge on the judgment of this Court in the **Silas** case (ibid). The adopted sentence: "*... the appointee is not part of the Public Service given the appointing authority is the Prime Minister*" which occurs in paragraph 29 of the **Silas** judgment, is preceded by the following paragraphs in the Court's judgment which reads:

> *"24. The use of the word "exceptionally" in Article 57(4) illustrates that such a recruitment is to be an exception to the rules of recruitment provided for in Part 1. This logically follows. The appointment under Article 57(4) is a temporary one for unforeseen needs. Part 1 is concerned with long term employment with the public service with security of tenure (Article 57(5), (8)), by citizens of Vanuatu (Article 57(2) who owe their allegiance to the Constitution (s. 57(11). The use of the word exceptionally illustrates that the appointment under Article*

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57(4) will not be subject to the other constraints of Part 1. It will stand aside from ordinary public service appointments provided for in Chapter 9 Part 1."

and

"28. We are satisfied ... that a Prime Ministerial appointment pursuant to Article 57(4) is an appointment outside the Public Service and that Article 57(4) gives the Prime Minister the power to hire and terminate."

13. Plainly, in that case the Court was construing the Prime Minister's exceptional power under **Article 57 (4)** to make temporary appointments for a specified period to meet an unforeseen need and not with an ordinary public service appointment provided for in **Chapter 9 Part 1** of the Constitution. **Article 57 (4)** of the Constitution makes clear that the appointing authority is "*the Prime Minister*". The judgment is readily distinguished on that basis and is the context within which the quoted sentence finds itself. We find no assistance in the **Silas** judgment which is confined and limited in its application to a consideration of **Article 57(4)** of the Constitution.

14. With those observations we turn to consider the first ground of appeal the "*contractual parties*" argument.

15. Even accepting that **sections 17A**, **B** and **C** of the Amendment Act do set up a different regime for appointing and terminating Directors-General (DGs), the fact remains that the regime is established by an amendment of the **Public Service Act [CAP. 246]** (the "*principal Act*") and not outside it as might be expected, if DG's were no longer to be considered part of the Public Service.

16. Notably the Amendment Act does not alter or delete the definition in the principal Act of a "*director general*" which means "*the head of a ministry*", nor does it affect or alter the definition of the "*Public Service*" which inter alia comprises those persons employed in the ministries of the Government of Vanuatu as are designated by the Prime Minister pursuant to the **Government Act [CAP. 243]**. It is common ground that the Ministry of Justice is the "*ministry*" that the respondent was assigned to work in under the terms of his employment contract.

17. Furthermore although the "*Prime Minister*" is referred to as the "*Employer*" in the respondent's employment contract it cannot be seriously argued that he personally hired the respondent as if the appointment was made under Article 57(4) of the Constitution.

18. In rejecting a not dissimilar argument in Attorney General v. Kalpokas [1999] VUCA 4, where the appellants argued that the parties to each of the contracts being considered in that appeal were the Prime Minister and the appointee and not the Government, this Court said:

"The letters of appointment do not expressly say that the offer of appointment is by the Government, or that the other party to the contract of appointment will be the Government. The appellants argued

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that the parties to each of the contracts are the Prime Minister and the appointee. We reject that argument. It could not have been intended that the Prime Minister would be personally responsible for the salary and other benefits envisaged by the contracts. We considered the import of the letters is that the Prime Minister was acting on behalf of the Government to appoint the respondents to positions within the Government. ...."

19. Similarly in the present case, we are satisfied that the respondent's employment contract was executed by the Prime Minister in his capacity as the Minister responsible for the Public Service and not as the Prime Minister.

20. In short, we are satisfied that the Amendment Act did not alter or break the continuity or relationship that existed between the Directors-General and the Public Service albeit that the Public Service Commission was no longer their appointing authority.

21. We uphold the appellant's submissions on the first ground of appeal. This determination effectively disposes of the appeal but in deference to counsel's submissions we briefly set out our views on the second ground of appeal which we have designated "*the interpretation argument*".

22. It can be seen that the Public Service Commission is established by **Chapter 9** of the Constitution with responsibility for the appointment and promotion of public servants who comprise the Public Service (**Article 60**). By **Article 57(3)** no appointment shall be made to a post in the Public Service that has not been created in accordance with a law. The **Public Service Act [CAP. 246]** and the Amendment Act is the law relevant to this action and together they deal with how posts are created in the "*Public Service*" including Director-General posts and more generally how the Commission is to carry out its constitutional functions.

23. In the absence of a definition of the term "*public servant*" in the Constitution it is necessary for this Court to arrive at a meaning having regard to the context in which the expression occurs in the Constitution namely, in **Articles 57**, **58** and **60**. All these Articles are contained within **Chapter 9** of the Constitution headed: "ADMINISTRATION" and, more particularly, **Part 1** under the sub-heading: "**The Public Service**".

24. It is evident that the Administration is separated and different from the other "*arms*" and institutions established in the Constitution including the office of the Head of State (or the President) in **Chapter 6**; the National Council of Chiefs in **Chapter 5**; Parliament (or the Legislature) which is dealt with in **Chapter 4**; The Executive which comprises the cabinet, the Prime Minister and Ministers in **Chapter 7**; and Justice (or the Judiciary) which his dealt with in **Chapter 8**.

25. The separation of the Public Service Commission is further reinforced by **Article 60(4)** which insulates it against the direction and control of any other person or body in the exercise of its constitutional functions which includes "*the appointment of public servants*" within the Public Service [*see:* **Article 57(2)**].

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26. The Court of Appeal also had occasion in **Kalpokas** (ibid) to consider and discuss a "*public servant*" when the Court said:

> *"The notion of a public servant emanates from that of 'civil servants' in the Westminster system of government, and this historical connection explains the exception of member of the armed forces in the definitions in the Public Service Act of 'Public Service'. Members of the armed forces were not considered to be in the "civil" service. The following passage from Hood Phillips "The Constitutional Law of Great Britain and the Commonwealth", 1952 Edit, at pp. 245-246 is helpful:*
>
> > *"All civil servants are Crown servants, but not all Crown servants are civil servants, for the term is not applied to Ministers, their Parliamentary Secretaries and Parliamentary Private Secretaries, or other holders of political offices, nor to member of the armed forces. The expression "established civil servant" is significant for certain particular purposes such as superannuation (Superannuation Acts, 1834-1919(I); but otherwise "civil servant" is merely a non-legal expression covering Crown servants employed in the central government Departments. Local Government officers and the employees of Public Corporations, such as the British Broadcasting Corporation, the British Transport Commission and its Executives, the British Electricity Authority and its Area Boards, and the British Overseas Airways Corporation, are thus not civil servants, though the nature of their work and their conditions of employment bear many similarities. The following definition of the civil service has been suggested for general purposes: "the body of officials in the service of the Crown, who discharge duties belonging to the exercise of the King's executive powers, but not being the holders of political offices".*
>
> *It remains the positions that not every person who serves the Republic of Vanuatu in whatever position thereby comes within the definition of "Public Service". Ministers, Parliamentary Secretaries, the Attorney General, the Auditor General and the Ombudsman provide examples. Critical to the notion of a public servant in the Constitution, and in the definition of "Public Service", is that the public servant works under a contract of service, with the Government as the employer. The office holders just mentioned do not work under contracts of service. They hold constitutional or statutory office, and their entitlements and obligations are created by statute, not by contract."*

27. In our view "*public servants*" are necessarily an intrinsic part or element of the "*Public Service*". This is implicit in **Article 57(7)** which speaks of "*public servants*" leaving "*the public service*". The Public Service is also defined in the **Public Service Act [CAP. 246]** as comprising persons employed in a "*ministry*" of the government of which a "*director general*" is, by definition, its "*head*".

28. In our view to construe the phrase "*senior public servants*" in **Article 58(2)** so as to exclude the "*head*" of the Ministry of Justice from its ambit would be contrary to the entire legislative framework. A contractual arrangement cannot

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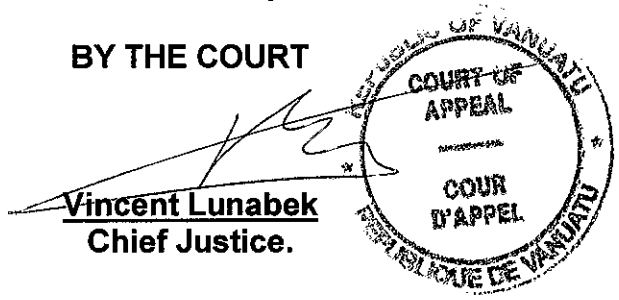
alter the inescapable fact that a Director-General is in every sense a "*senior public servant*" and the constitutional provision is not thwarted by the contract.

29. Finally, we observe that the fact that a Director-General is a public servant and may be appointed under contract for a fixed term is consistent with **Article 57(5)** and **(8)** of the Constitution, as they must be read with **Article 58(2)**. The security of tenure which is protected by **Article 57(5)** is the tenure given by the contract of employment presently under consideration. That conclusion accords with the observations in **Kalpokas** (ibid) referred to in [26] above.

30. We therefore sustain and uphold the second ground of appeal and for that reason also this appeal must be allowed with normal costs. The consequence is that the orders made in the Supreme Court are set aside and that application is dismissed. The respondent (as claimant in that proceeding) should pay the costs of the Supreme Court proceedings.

DATED at Port Vila, this 14th day of November, 2014.

BY THE COURT



Vincent Lunabek
Chief Justice.