

BETWEEN: The Police Service Commission
First Appellant

AND: Republic of Vanuatu
Second Appellant

AND: Sam Dan Avock
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Gus Andrée Wiltens

Counsel: *Mr. K. Tari for the Appellants*
Mr. D. Yawha for the Respondent

Date of Hearing: *1st May 2019*

Date of Judgment: *10th May 2019*

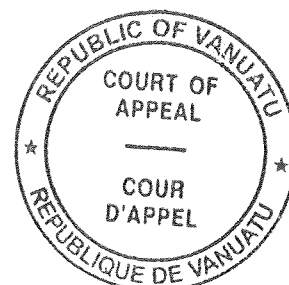
JUDGMENT

Introduction

1. This is an application to enlarge time to appeal a judgment of the Supreme Court upholding the respondent's claim for unjustified dismissal and ordering the Republic of Vanuatu to pay damages.

Background

2. On 16 March 2018 judgment was delivered by Geoghegan J awarding damages in favour of the respondent as follows:-
 - a) for breach of contract – VT3,240,970



- b) distress , humiliation and suffering – VT 100,000
 - c) interest at 5% p.a from 27 April 2016; and
 - d) costs
3. On 17 May 2018, the appellants applied for leave to appeal out of time.
 4. That application was heard by Saksak J on 18 February 2019. He dismissed it on the basis that the judgment was final and not an interlocutory decision. Accordingly any application to extend time to appeal could only be made to this Court.
 5. On 27 February 2019 the appellants filed their application to enlarge time to appeal.

Rules

6. Rules 9 and 20 of the Court of Appeal Rules set out the basis for such an application to be made to this Court. They provide as follows:-

"Enlargements of time.

9. The Court of Appeal, or a judge thereof, or a judge of the High Court, or, in the case of the Gilbert and Ellice Islands Colony, a judge of the High Court or the Senior Magistrate, may enlarge the time prescribed by the Rules for the doing of anything to which these Rules apply.

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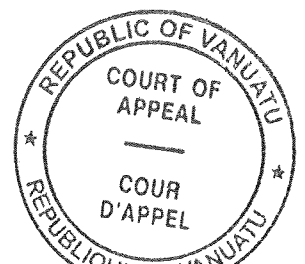
Time for appealing.

20. Except where by Ordinance otherwise provided and subject to rule 21, any notice of appeal, whether from an interlocutory or final decision of the High Court, shall be filed with the Registrar of the High Court within thirty days after the decision complained of, calculated from the date on which the judgment or order of the High Court was signed, entered or otherwise perfected."

7. These rules provide that any appeal must be made within 30 days of the decision being appealed, although the Court has the discretion to extend or enlarge time.

Grounds

8. It was submitted that there are reasons for the delay in appealing, and the appellants will be prejudiced if the appeal is not heard. The appellants also say that the respondent will not be prejudiced if the application to enlarge time is granted.
9. The main ground advanced to explain the delay in appealing is that the notice of appeal was not filed within the appeal period as all the staff members and lawyers



of the State Law Office were in mourning over the death of a colleague within the office soon after the judgment was issued.

Discussion

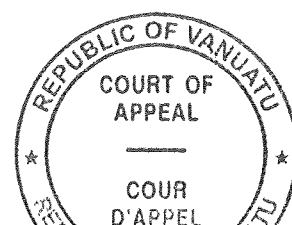
10. Mr Tari helpfully referred us to **Laho Ltd v QBE Insurance (Vanuatu) Ltd [2003] VUCA 26** where this Court identified a number of factors to be taken into account when deciding whether or not time should be enlarged: length of delay, reasons for the delay, chances of the appeal succeeding if time is extended and the degree of prejudice to the respondent if the application is granted. We apply the same criteria in considering the appellant's application.

Length and reasons for the delay

11. The appellants submit that failure to file a notice of appeal in time was justified as they were mourning the passing of a senior staff member and part of the delay was caused by the court registry in not getting their application for leave heard as soon as possible.
12. Judgment was issued on 16 March 2018. The appellants say that they only received a copy on 20th March 2018. It was accepted that the appeal period lapsed on 14 April 2018 and that they applied for leave to appeal on 17 May 2018. The application was therefore 33 days out of time.
13. The staff member passed away only a few days before the appeal period expired. Mr Tari conceded that it was 4 to 5 days. Accordingly, the majority of the appeal period was not satisfactorily explained away.

Chance of the appeal succeeding

14. The appellants' case was that Mr Avock had no contract of employment at all. He was appointed as chairperson under the Police Act. No contract, written or oral was agreed. Accordingly the appellants submitted Mr Avock had no right in "private" law to sue when he was dismissed. We disagree.
15. Mr Avock was offered the position of chairperson of the Police Service Commission. He accepted. His obligation was to undertake the tasks required of the chairperson. The Republic's obligation was to pay Mr Avock. This occurred. These circumstances created a contract for services which in turn gave rights to both Mr Avock and the Republic. For example, the Republic could terminate Mr Avock's employment if he breached his statutory obligations. And Mr Avock in turn could sue the Republic if his contract was terminated without cause.
16. Mr Avock was subsequently removed on the basis that he held a position of responsibility within a political party. This is a disqualifying circumstance for a member of the Commission (s9C (1) (d) of the Police Act [CAP 105]). The Judge



acknowledged in his judgment that the appellants raised this disqualifying circumstance in their defence however he pointed out that no evidence was filed in support of this, despite directions by the Court.

17. At paragraph 16 the Judge said:

"Accordingly no evidence has been produced by the defendants at any time which substantiated the reasons for the termination of Mr. Avock's employment. No sworn statement has even been filed by anyone on behalf of the defendants..."

18. And at paragraph 19:

"In such circumstances it is clear that the dismissal of Mr. Avock as chairman of the Police Service Commission was completely unjustified."

19. The Judge was satisfied that the termination was unjustified and gave judgment accordingly. We agree in the absence of any evidence to justify the dismissal, the chances of any appeal succeeding are nil.

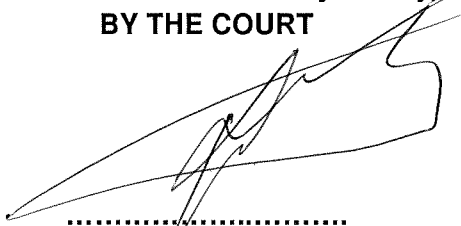
Prejudice

20. There is no prejudice to either party, as we are satisfied that the application to extend time cannot succeed.

Result

21. The application to enlarge time is refused and is hereby dismissed. The respondent is entitled to costs on a standard basis to be agreed or taxed.

**DATED at Port Vila this 10th day of May, 2019
BY THE COURT**


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Hon. Chief Justice Vincent Lunabek

