IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

CIVIL CASE No. 29 OF 1997

Between: **Jean Paul VIRELALA** of P. O. Box 788 Port Vila, Efate in the Republic of Vanuatu.

Plaintiff

And: **AIR VANUATU** (Operations) Ltd. Of 2nd Floor, Lolam House, Port Vila, Vanuatu.

Defendant

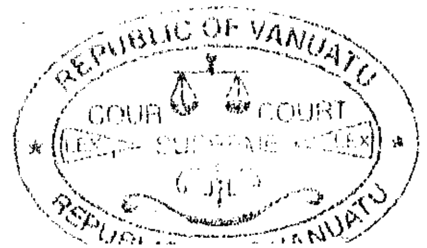
Coram: Acting Chief Justice Lunabek J.
Mr. Juris Ozols for the Plaintiff
Mr. Baxter Wright for the Respondents.

JUDGMENT

I. INTRODUCTION

By Summons dated 9th April 1997, the Plaintiff applies for the following orders and declarations:

1. That the contract of Employment ("the contract") executed the 28th day of January 1994 between the Plaintiff as Managing Director and the Defendant as employer whereby the Plaintiff was employed for a period of 5 years commencing 1 August 1993 as Managing Director of the Defendant is valid and binding pursuant to the provisions of Section 6 of the Employment Act [CAP. 160] nothwitstanding the provisions of Section 15 of the said Act.



2. That the Defendant and/or Board of Directors of the Defendant are in breach of the contract in purporting to suspend the Plaintiff from carrying out his duties.

3. That the Defendant is in breach of its obligations under the Employment Act [CAP. 160] and the terms of the contract in failing to provide any or proper reasons for the purported suspension from duties.

4. That the contract of Employment remains in full force and effect until 31st July, 1998.

5. And that the Plaintiff seeks an order from this Court restraining the Defendant and/or the Board of Directors of the Defendant from taking any further steps in reference to the purported suspension and/or termination of the contract pending Declarations from this Honourable Court in respect of the above matters.

The matter began before the Court by way of Exparte. Interim Injunctive Orders in the terms sought under point 5 of the Summons were granted on Exparte and are still continuing. The Plaintiff relied on his Affidavit dated 10th April, 1997 in support of the Summons. The Defendants file no Affidavit in support of their defence.

II. BRIEF FACTS

A. AGREED FACTS:

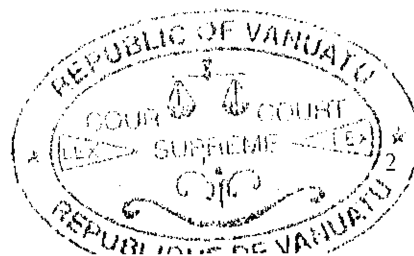
1. Jean Paul Virelala was offered a 5 years contract in 1993.

2. A 5 years contract was signed by Air Vanuatu (Operations) Ltd., the Defendants and the Plaintiff, Jean Paul Virelala.

3. Since that time similar 5 years contracts were given to other persons working with the Defendants: Rene Bibi, and four (4) others.

4. Recently Joseph Laloyer was given a 5 years contract duly executed.

5. More recently, Mr. John Path was offered a 5 year contract but differed executing such agreement pending the outcome of this case.



6. The Board issued a suspension notice to the Plaintiff, Jean Paul Virelala, in accordance with the shareholders regulations.

7. The Board have to remove the Plaintiff, Jean Paul Virelala, in accordance with the law.

8. The Plaintiff, Jean Paul Virelala, currently, holds the position of Director of Air Vanuatu and is the Managing Director.

9. The contract of Employment is silent on the question of powers of the board to suspend the Plaintiff.

10. The shareholders have revoked their suspended notice.

B. EVENTS ABOUT THE SUSPENSION OF THE PLAINTIFF.

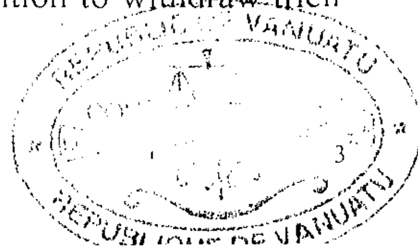
By a letter of 20th March 1997, the Hon. Serge Rialuth Vohor, the then Prime Minister of the Republic of Vanuatu, as a shareholder of the Defendants company issued a letter to the Plaintiff suspending him as the Managing Director of the Defendants company. The reason of the Plaintiff's purported suspension was that he seriously took part in the Municipal campaign.

By another joined letter of 20th March 1997 to the Plaintiff, the then Hon. Prime Minister, Rialuth Serge Vohor and the then Minister of Civil Aviation, Hon. Demis Lango, as shareholders wrote to the Plaintiff terminating the Plaintiff as a member of the Board of Air Vanuatu.

By a letter of 21st March 1997, the then Chairman of the Board of Air Vanuatu, Mr. Alfred Maliu, wrote to the Plaintiff advising him that following the 20th March 1997 letter of suspension by the Prime Minister, the Board has taken the following decisions (inter alia):

"*(i) Per the letter from the shareholders of 20th March suspending you as Managing Director, the Board has endorsed the suspension for a period of 2 weeks pending further clarification from the shareholders on the reasons for your suspension ...*"

By another joined letter of 4th April 1997 the then Hon. Prime Minister, Rialuth Serge Vohor and the then Hon. Minister of Civil Aviation, Demis Lango, wrote to the Plaintiff confirming their intention to withdraw their



first joined letter of 20th March 1997 and confirmed also that the Plaintiff remains as a member of the Board of Air Vanuatu.

On 7th April 1997 Counsel for the Plaintiff wrote to the Chairman of Air Vanuatu (Operations) Ltd. Advising them of the decision of the Prime Minister and the Minister of Civil Aviation.

Despite the aforementioned correspondence, the Board of Directors have refused to lift the suspension or allow the Plaintiff to return to his place of work and instead they have responded through their solicitors advising that the suspension continues for a further period of one week.

On 11th April 1997 the Plaintiff sought and obtained Exparte injunctive orders restraining the Defendants and the Board of Director of the Defendant from giving effect to the purported suspension from duties of the Plaintiff pending the Plaintiff summons (pursuant to Order 58) and further that the Defendant/Board of Directors be restrained from taking any action to terminate the contract of employment pending the further determination of this Court (as contained in point 5 of the Summons).

III. ISSUES

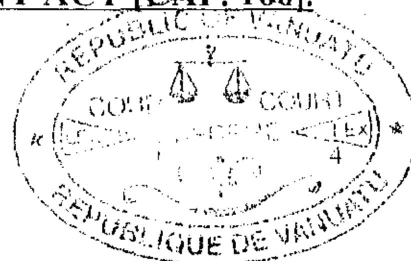
The questions to be determined by this Court are two fold:

1. Is the Plaintiff's 5 years contract valid and enforceable in accordance with Section 6 of the Employment Act [CAP. 160]? Put another way, is 5 years contract more advantageous for the Plaintiff/employee than the conditions of the Employment Act [CAP. 160] under Section 15?

2. The question of the Plaintiff's suspension by the Defendant:
   (a) Are the Defendants, in suspending the Plaintiff, in breach of the terms of the contract and the Employment Act [CAP. 160]?
   (b) Is this a good case for the Court to grant and/or maintain declarations and consequential injunctive relief?

I will now proceed by answering the first question at issue.

ISSUE I: IS THE PLAINTIFF'S 5 YEARS CONTRACT VALID AND ENFORCEABLE IN ACCORDANCE WITH SECTION 6 OF THE EMPLOYMENT ACT [CAP. 160].



Both parties agreed that the Plaintiff's contract with the Defendant is governed by the provisions of the Employment Act [CAP. 160]. Section 6 and Section 15 of the Act, are relevant to the question of the validity, and duration of the Plaintiff's contract.

Section 6 of the Act provides:

> "*Nothing in this Act shall affect the operation of any law, custom award or agreement which ensures more favorable conditions in any respect to the employees concerned than those provided for in this Act.*"

Section 15 of the Act states:

> "*The maximum duration of employment that may be stipulated or implied in any contract shall in no case exceed three years.*"

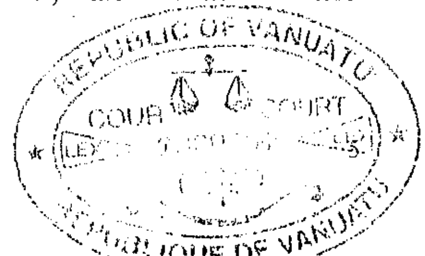
The Plaintiff submits that his contract is subject to Section 6 but not to Section 15 of the Act which limits the duration of any fixed term contract to three years. The Plaintiff argued that Section 15 is subject to Section 6, and a 5 years fixed term contract is saved, because it constitutes "*more favorable conditions in any respect to the employee concerned than those provided for in this Act*".

The following submissions were made on behalf of the Defendants.

Firstly, a fixed term contract of in excess of three (3) years, that cannot be determined before its expiration by the employee, is not clearly a contract "*more favorable to the employee*" than the provisions of the Act. It is then argued for the Defendants by citing hypothetical examples in support that there are many circumstances when a contract that purported to tie an employee to his employer without the opportunity for determination before the end of contract date, would be less favorable, not more favorable.

In such circumstances, it is submitted for the Defendant that whether particular contractual circumstances are more or less favorable than the provisions of the Act cannot left to the employee to decide. It is an issue that must be decided applying objective criteria by the Court.

Therefore, it is submitted for the Defendant that, since, a fixed term contract of more than three years is clearly capable of being less favorable than the provisions of the Act, Section 6 of the Act cannot be read to displace the provisions of Section 15, and that in the



circumstances, the Plaintiff's contract with the Defendant must be read subject to the provisions of Section 15 of the Act.

Secondly, by virtue of the provisions of Section 15 of the Act, the Plaintiff's contract becomes at best one of unspecified duration capable of termination in accordance with the provisions of Section 49 of the Act. The Defendant relies on the case of Mouton –v- Selb Pacific Ltd., Case No. 42 of 1994. The Supreme Court had to consider the effect of a fixed term contract that was capable of being renewed. In His Judgment, d'Imecourt CJ held that:

> "... *The implied duration of (Mouton's) contract (the Plaintiff) would be over the three years permissible by the law (Section 15 of the Act) and would be ultra vires and therefore void.*" (at p. 8) (my emphasis).

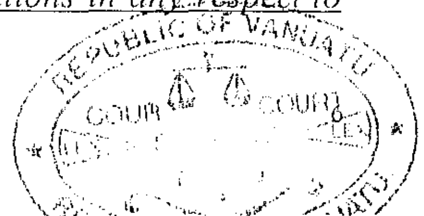
> "... *if the contract were renewed by tacite reconduction for a further period of two years it would mean that this would be a contract for an implied term of more than three years and as such the term would be void and the contract would expire on 31st July 1993. On the other hand, if it converts to a contract for an unspecified period, the contract can be terminated by notice of usually three months. In this way Section 15 is not affected in any way.*" (at p. 10).

The Court of Appeal did rule in favour of Chief Justice d'Imecourt's findings with regard to the nature of Mouton's contract.

It is therefore put for the Defendant that having regards to Section 15 of the Act, and the decision of both the Supreme Court, and Court of Appeal in Mouton –v- Selb Pacific Limited, the Court should find the Plaintiff's contract of employment with the Defendant for a period of five years is not valid or enforceable, and, more than three years of the contract having expired already has been converted into a contract of unspecified duration capable of termination by either party in accordance with the provisions of Section 49 of the Act.

This is a case where the Plaintiff/Managing Director got a contract of employment with the Defendant company for a period of 5 years. The contract is governed by the Provisions of the Employment Act [CAP. 160].

By Section 6 of the Act, "*<u>Nothing in this Act shall affect the operation of ... agreement which ensures more favorable conditions in any respect to</u>*



the employees concerned than those provided for in this Act." (my emphasis).

By Section 15 "*The maximum duration of employment ... stipulated or implied in any contract shall in no case exceed three years.*" (my emphasis).

By perusing the language of Section 6 and Section 15 of the Act [CAP. 160], it transpires clearly that there are inconsistencies between the two Sections. Put another way, Section 6 and Section 15 dealing with the same subject-matter (the duration of the contract of employment) are in conflict.

Whereas, Section 15 of the Act mandatory provides that the maximum duration of the employment contract is 3 years, Section 6 mandatory prohibits anything in the Act to affect the operation of ... (an) agreement which ensures more favorable conditions in any respect to the employee concerned. By operation of Section 6 of the Act, the 5 years Employment Contract, if it ensures more favorable conditions to the Plaintiff/employee, is in conflict with the 3 years contract under Section 15 of the same Act.

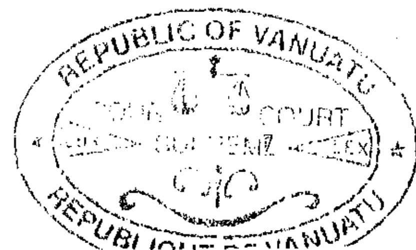
Section 6 of the Act is a specific provision which translates the intention of the legislature to provide for all the circumstance of a special case bearing in mind of the overall purpose of the Employment Act [CAP. 160]: The protection of the employee against the Employer. And, Section 15 of the same Act, on the contrary, is a more general provision enacted for general situation of the employment contract.

How then to resolve the conflict between Section 6 and Section 15 of the Act [CAP. 160]?

The question, here, turns upon the application of the principle involved in the maxim generalia specialibus non derogant ("general provision does not impliedly repeal specific provision").

The principle is stated succinctly by O'Connor J in Goodwin –v- Philips (1908) 7 CLR 1 at 14:

> "*Where there is a general provision which, if applied in its entirety, would neutralize a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply.*"



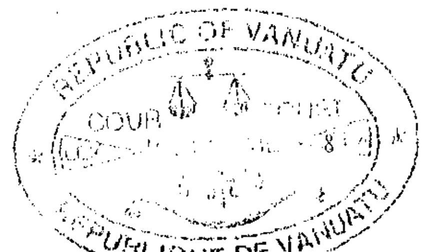
A particular application of the principle in underlying the generalia specialibus approach is to be considered in the present case where two provisions (sections) contained in the one enactment dealing with the same subject-matter (the duration of the Employment contract) are in conflict.

Applied to this case, I am of the view that Parliament after having considered specially matters contained in Section 6, has afterwards dealt with Section 15, a provision in general terms, wide enough to repeal, or supersede, or qualify the specific provision (Section 6). The reason in all these cases including this case is clear. In providing Section 6, the legislature had their intention directed to specific situations which the Employment Act [CAP. 160] meant to meet, and considered and provided for all the circumstance of the special case. And, having so done, Parliament is not to be considered by a general provision (Section 15) subsequent to the Specific one (Section 6), and making no mention of any such intention, to have intended to derogate from that which, by her own special provision (Section 6), Parliament had, thus, carefully supervised and provided. [see also Bayberry –v- Plowman (1913) 16 CLR 468 at 473-474].

The circumstance of the present case, shows that the Plaintiff had left his previous job where he could get security of employment and went to work for the Government controlled company (the Defendant) as its Managing Director. There is something the Plaintiff was giving up in return of getting the 5 years contract of employment with the Defendant company. It would be grossly unfair for the Defendant company (which drafted and signed the contract of employment of 5 years with the Plaintiff) to rely on a technicality and caused the Plaintiff to rely on her detriment. The Defendant company must be stopped from denying the effect of 5 years contract of employment with the Plaintiff.

If a contract of employment of more than 3 years such as 5 years in this case, can be less favorable to the employees concerned, than the provision of this Act, it has to be appreciated by material evidence in support but not hypothetical examples as the Defence counsel attempted to do in this particular case.

The Defence's submission that by virtue of Section 15 of the Act, the Plaintiff's contract becomes at best one of unspecified duration capable of termination in accordance with the provisions of Section 49 of the Act



[CAP. 160] on the reliance of the case of Mouton –v- Selb Pacific Limited (Civil Case No. 42 of 1994) is also rejected.

The case of Mouton –v- Selb Pacific Limited has to be distinguished from the present case. In the Mouton's case, the Plaintiff had a two years contract with the Defendant company. By "*tacite reconduction*" the contract could be renewed. One of the issues the Court has dealt with in the Mouton's case was the meaning to be given to "*tacite reconduction*" (a French term of contract). The French persuasive authorities on the point is that: The contract was renewable by means of "*tacite reconduction*" unless the contract was determined by letter sent by registered mail, one year prior to the date of expiry of the contract. The Court [in Machtelinck (495) Cass. Civ. 23 October 1974.] held that "*since the contract did not contain a clause limiting the number of times that the contract could be renewed by means of "tacite reconduction", it was therefore in its very nature a contract for an unspecified period.*"

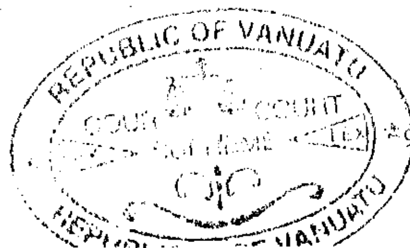
In his Judgment, d'Imecourt CJ, considering the effect of Section 15 of the Employment Act [CAP. 160] on the basis of the above French persuasive authority, states:

> "*If the contract were renewed by tacite reconduction for a further period of two years it would mean that this would be a contract for an implied term of more than three years and as such the term would be void ... on the other hand, if it converts to a contract for an unspecified period, the contract can be terminated by notice of usually three months. In this way Section 15 is not affected in any way.*"

On appeal, the Court of Appeal stated they were satisfied that the evidence presented at the trial fully justified the Chief Justice in finding that the third contract upon expiry was then converted into a contract for an unspecified period of time [Daniel Mouton (Appellant) –v- Selb Pacific Limited (Respondent) Appeal Civil Case No. 2 of 1995].

In the present case, by contrast, the issue is not about the meaning and interpretation of the words "*tacite reconduction*". The present case stands on a very different footing.

In this case, there was a fixed term contract of employment of 5 years between the Plaintiff and the Defendant. The issue is about the conflict between Section 6 and Section 15 of the Employment Act as to whether a fixed term contract of 5 years is saved on the basis of Section 6 of the Act, since it "*ensures more favorable conditions in any respect to the*



employees concerned than those provided in this Act", and in particular Section 15 of the Act.

I am therefore of the view that Section 6 of the Act [CAP. 160] contemplates something in benefit of the Plaintiff/employee and as such is enforceable. In essence, the 5 years contract is saved because it is more advantageous for the Plaintiff. It provides a security for employment. The Plaintiff as the Managing Director of Air Vanuatu (Operation) Ltd. (the Defendant) is in a very senior position. Judicial notice can be taken of the fact that in a small town like Port Vila, once the Plaintiff is out of his position, he cannot take another similar position because no other position is readily available.

I therefore accept the submission that the Plaintiff's contract is subject to Section 6 of the Employment Act [CAP. 160] and not Section 15 of the same Act which limits the duration of any fixed term contract to three years.

The second question for the determination by the Court is about the suspension of the Plaintiff by the Defendants.

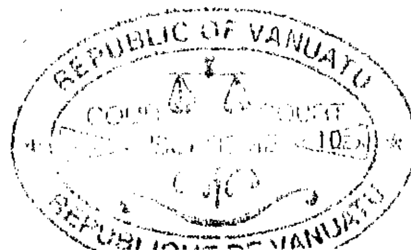
<u>ISSUE II: SUSPENSION OF THE PLAINTIFF BY THE DEFENDANTS.</u>

Two (2) sub-questions arose here. (A) Are the Defendants, by suspending the Plaintiff, in breach of the terms of the contract and the Employment Act [CAP. 160]? (B) Is this a case warranting the Plaintiff to apply for a declaration/injunction restraining any attempt to exclude him from office?

I will deal with both questions in turn.

<u>A. Are the Defendants in breach of the terms of the contract and the Employment Act [CAP. 160]?</u>

The Plaintiff says the contract does not provide for the Defendants to suspend the Plaintiff. The only power the Defendants have under the contract of employment is the power to terminate the agreement in the event of serious misconduct as defined in Clause 12 of the Agreement. It is therefore submitted for the Plaintiff that the Defendants do not have the power to suspend the Plaintiff and as such they are in breach of the employment contract.



It was submitted for the Defendants that the Courts will not enforce a contractual relationship between two persons or parties, against the will of one of the parties. The persuasive authority for that proposition is the judgment of Lord Reid in the United Kingdom (U.K.) House of Lords case of Ridge –v- Baldwin AC (1964) page 40. At page 65 of that case, Lord Reid stated:-

> "*The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason, or for none. But if he does so, in a manner not warranted by the contract he must pay damages for breach of contract*".

I have had the opportunity to peruse the terms and conditions of the said contract which was annexed to the Plaintiff's sworn Affidavit filed in support of this action on 10th April 1997.

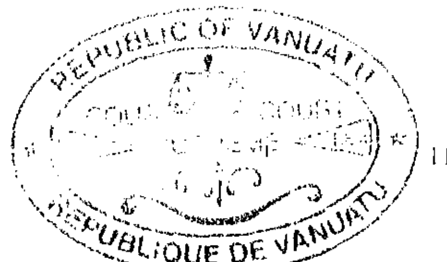
The contract in question is the Employment Contract between Air Vanuatu (Operations) Limited ("the Employer") (the Defendants) and Jean Paul Virelala, ("the Employee") (the Plaintiff) signed on 28th January 1994. Clause 2 of the said agreement says that the Employee shall commence the employment with the Employer on the 1st August 1993 for a period of 5 years.

By perusing the clauses of the employment contract, there is no contractual provision for the Defendants to suspend the Plaintiff. The only power for the Defendants is to terminate the Plaintiff as provided under Clause 12 of the said Employment contract. The power under Clause 12 of the agreement is to be exercised in the event of serious misconduct as defined in sub-clauses (1) (2) and (3) of Clause 12.

It is clear, the Plaintiff's contract of employment is not terminated but it is suspended by the shareholders.

This is an attempt by the members of the Board to remove the Managing Director of the Defendant company from office. The Plaintiff's removal from office by the Defendants has to be done in accordance with the law.

The contract does not have a suspension clause giving the shareholders/Defendants the power to suspend the Plaintiff/Managing Director of the Defendants.



It transpires from the relevant affidavit material of the Plaintiff filed on 10th April 1997, in support of this action, that the Defendants shareholders were under the directions of the Prime Minister to suspend the Plaintiff. This is against the rules of the independence of Board of Directors. There is no power anywhere in the contract and the employment Act [CAP. 160] to so act as they did.

In my view, the Defendants are in breach of the employment contract in purporting to suspend the Plaintiff. Further, in suspending the Plaintiff/Managing Director, they are in breach of their obligations under the Employment Act [CAP. 160] and the terms of the contract in failing to provide any or proper reasons for the purported suspension from duties. This may also amount to a breach of their fiduciary duties to act in the best interest of the Defendant company.

I will now proceed with the Second sub-question raised.

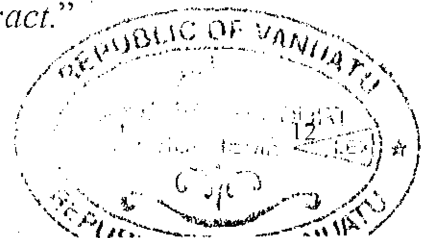
B. Is this a good case for this Court to grant declarations and injunction to prevent the Defendant/Employer any attempt to exclude the Plaintiff/Employee from office?

The Plaintiff says this is a good case for the Court to intervene and to maintain the declaration and consequential Exparte injunction orders granted by this Court on 11th April 1997.

The Defendants submit in substance that the Employment Contract between the Plaintiff and the Defendants is a contract of service. The Courts cannot order specific performance of a contract of service. Further the Court should not grant any injunctive relief limiting the employer's absolute right to terminate a contract of service at any time. The remedies that flow to the employee, if there has been a breach of the contract, is damages, not specific performance.

The following authorities were referred to this Court by the Defendants:

- Ridge –v- Baldwin AC (1964) 40.
  At page 65 of that case, Lord Reid stated:
  "*the law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason, or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract.*"



- Addis –v- Gramaphone Company Limited adopted and confirmed by the High Court of Australia in Baltic Shipping company –v- Dillon 176 CLR 344 are authorities for the proposition that an employee wrongfully dismissed from his employment cannot include damages for compensation for the manner of the dismissal, for his injured feelings.

- Atlas Steels (AST.) PTA Ltd. –v- Atlas Steels Limited (1948) 49 SR (NSW) 157 is the authority for the proposition that where a director is removed prior to the expiry of her or his term, the question arises whether a director can restrain the company from no acting or obtain damages for wrongful dismissal. A director cannot prevent the company from equitable remedies of injunction and specific performance are not granted to enforce personal relations on unwilling parties.

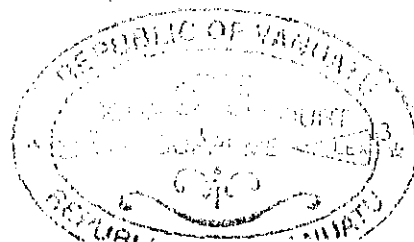
It was on that basis that the Defendants apply to the Court to discharge the Exparte injunctions granted to the Defendant on 11th April 1997.

In this case, the then Chairman of Air Vanuatu, informed the Plaintiff by a letter of 21st March 1997, that the Board has endorsed the suspension of the Plaintiff by the Prime Minister's letter of 20th March, as a shareholder.

I was urged upon by the Defence Counsel to discharge the Exparte injunction granted on 11th April 1997 on the constraint of the law: such as the authority of the case of Ridge –v- Baldwin and the case of Atlas Steels Limited referred to above.

With due respect to the Defence's submissions, I am of the view that this is too narrow a view of the principles of law in its application to Vanuatu circumstances. This is a case where a man has a right, the law should give a remedy by stepping over the trip-wires of previous cases and to bring the law into accord with the needs of Vanuatu society today. The Court had a discretionary power to intervene by way of declaration and injunction in the decision of the Board of Air Vanuatu endorsing the Prime Minister's letter of 20th March 1997 as a shareholder.

The present case constitute an exception to the general rule, referred to in the case of Ridge –v- Baldwin and other (1963) 2All ER66; Atlas Steels (Aust.) Pty Ltd. –v- Atlas Steels Limited (1948) 49 SR (NSW) 157.



The correct law on this point can be found in Ford's "Principles of Corporations Law" Sixth Edition, at paragraph 1424:

The removal of a director by members of the Board, whether under the law or under the articles, may in a particular case be a breach of contract on the part of the company for which the director may be entitled to sue for damages. Where removal is attempted in the absence of a power to remove, or in a manner not authorized by the act or the articles, a director may apply for a declaration that the attempt is invalid and for consequential injunctions restraining any attempt to exclude him or her from office. However, declaration and injunction are equitable remedies, which will not be granted to enforce a personal relationship against the will of the parties. If therefore, it is shown that a majority of members do not want the Plaintiff as a director, any available remedy in damages must suffice.

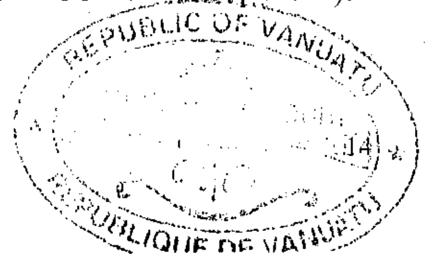
Applied in this case, the suspension of the Plaintiff by the Defendants is an attempt to remove him from office. The shareholders have no power under the Employment Contract nor under the Employment Act [CAP. 160] to suspend the Plaintiff. The suspension constituted a manner of removal not authorized by the Act nor the Contract.

Further there is no evidence that a majority of the members of the Board of Directors of Air Vanuatu do not want the Plaintiff as Managing Director of the Defendants. The letter of the Chairman of the Board of Air Vanuatu dated 21st March 1997 endorsing the Plaintiff's suspension by the Prime Minister on 20th March 1997, was issued pending further clarifications of the Plaintiff's suspension. This does not amount to "a majority of the members of the Board do not want the Plaintiff as a Director" so that damages will suffice.

It is therefore appropriate for the Plaintiff to apply as he did for a declaration that the attempt to remove him from office by way of suspension without any or proper reasons is invalid and for consequential injunctions restraining any attempt to exclude him from office. The purported suspension is, therefore, invalid and I so rule.

The following authorities are in support of this view.

- Josias Moli –v- Petre Malsungai, Chairman of Vanuatu National Provident Fund (First Defendant) and V. N. P. F. (2nd Defendant). Civil Case No. 98 of 1996 (Decision of Supreme Court – unreported).

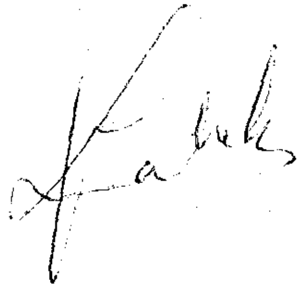


- Hill –v- C. A. Parsons Ltd. (CA) (1972) 1 Ch. 316.

- Barnard and others –v- Nation Dock Labour Board and others (CA) 1953 2 Q. B. 18.
- Vine –v- National Dock Labour Board (1956) 1 Q. B. 656.

The Declarations and injunctive orders sought in the Summons dated 9th April 1997 by the Plaintiff, are, all granted as requested. The costs are awarded in favour of the Plaintiff, and costs be taxed failing agreement.

Dated at Port Vila, this 1st day of April 1999.



Vincent LUNABEK
Acting Chief Justice.