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

Civil Case No.93 of 2005

BETWEEN: **JOCKLY and ELIZABETH KALO**
Claimants

AND: **SIMON KUO**
First Defendant

AND: **TUNA FISHING VANUATU CO. LTD.**
Second Defendant

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mr. Stephens for the Claimants*
Mr. Napuati for the Defendants

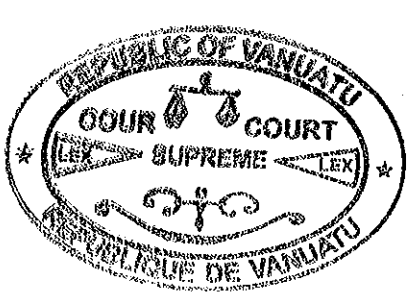
Date of Judgment: *31 January 2012*

JUDGMENT

1. The claim in this case was first instituted in March 2005 and concerns a claim for "*job entitlements*" under the Employment Act and "*loss of improvements*" carried out and left on the first defendants leasehold by the claimants who were living and working on the land when they were evicted from the land.

2. As part of the management orders in the case the second defendant company was removed from the proceeding pursuant to a consent order on 13 September 2005. The claimants were also ordered to apply for an order permitting the claim to be served outside Vanuatu on the first defendant. A fortnight later claimants' counsel inexplicably applied for the reinstatement of the second defendant company and the removal of the first defendant as a necessary party.

3. On **2 December 2005** in the absence of claimants' counsel who was refused audience in chambers by **Treston J.,** the first and only remaining defendant was ordered removed on the claimants' application, and, in the absence of any defendant "(the claim) *was struck out in its entirety*" and the claimants ordered to pay VT20,000 costs to the first defendant.



4. Three (3) years later on **30 June 2008** the claimants applied to set aside the orders striking out the claim and/or an order reinstating the claim. The application lay dormant for a further 17 months until it was called before me on **18 November 2009**. The claimants' application was granted and an amended claim which included the second defendant company was directed to be filed and an order for service of the claim outside the jurisdiction was also granted.

5. In essence, the claimants who are husband and wife, jointly claim that they were employed by the first defendant under three (3) separate oral contracts. **The first** was entered into in 1993 between **Jockly Kalo** and the first defendant, for Jockly to take care of the first defendant's seafood business involving the purchasing, processing and storage of sea-cucumbers and lobsters at the first defendant's leasehold property at **Erakor**. The claimants were required to leave their home at **Freshwota** and move to the first defendant's leasehold at Erakor. It is common ground that this first contract ended in 1996 because the business was not doing well and **Jockly Kalo** was paid his legitimate severance entitlements. There is no complaint about this contract.

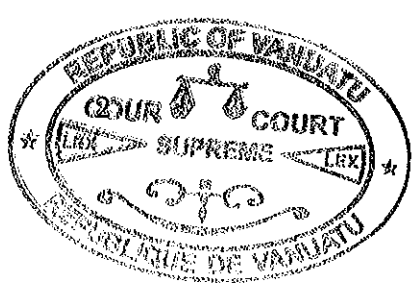
6. **The second** oral contract of employment commenced in 1996 again between **Jockly Kalo** and the first defendant under which Jockly Kalo was employed as a caretaker and security at the first defendant's leasehold at Erakor for a daily wage of **VT500**.

7. The following year, 1997, the second claimant **Elizabeth Kalo** was orally employed on a monthly wage of **VT15,000** by the first defendant to work as a gardener and carer of his sandalwood seedlings that had been planted by her husband and which were growing on an area of about 2 hectares on the first defendant's leasehold ('**the third** oral contract').

8. The claimants both say that their employment contracts were unlawfully terminated without any notice when the first defendant acting through an agent and director of the second defendant company, namely **Christophe Emelee**, obtained a Magistrate's Court order evicting them from the first defendant's leasehold in 2004.

9. In their joint defence the defendants deny the claim and assert that "*the claim itself is barred*". On 9 July 2010 the defendants applied to strike out the claim on the dual grounds that the claim disclosed "*no cause of action*" and/or "*is time barred pursuant to Section 20 of the Employment Act [CAP. 160]*". Written submissions were ordered and filed.

10. **Section 20** of the **Employment Act** [CAP.] reads:



"*No proceedings may be instituted by an employee for the recovery of remuneration after the expiry of 3 years from the end of the period to which the remuneration relates*".

11. The defence submissions relying on **Section 20**, is that:

> "*both claimants are claiming their* (Employment Act) *entitlements from 1996 to 2004 and the claim was filed on 3 June 2005. It is our submission that from 3 June 2005 to 3 June 2002 is three years and therefore within the prescribed period. However any claim from 1996 to 2 June 2005 is time barred and not claimable pursuant to Section 20*".

12. The claimants accept that their claim for remuneration "*is slightly affected*" but, they differ on the cut-off dates, in that they assert that their claim "*was filed ... on 17 March 2005*" and **not** 3 June 2005 as the defendants claim. The second limb of their claim concerns the improvements made to the first defendant's leasehold and is therefore **not** affected by the Section 20 limitation period.

13. Claimants' counsel relying on dicta of the Chief Justice in **Bong v. Wan Smol Bag Theatre** 2001 VUSC 13 also orally submits that the provisions of **Section 20** of the **Employment Act** are "*not mandatory*" and as for the improvement aspect of the claim it is based on the equitable principle of "*unjust enrichment*" which involves the conferment of a benefit to the defendant at the expense of the claimant which the court says it would be inequitable for the defendant to retain without some recompense to the claim.

14. The judgment in **Wan Smol Bag** (op. cit) is extremely brief and refers, in part, to a claim for "*damages for breach of contract*". In the circumstances I prefer the later judgment of the Court of Appeal in **NBV v. Cullwick** [2003] VUCA 39 which clearly over-ruled the view that the time limit in Section 20 was discretionary.

15. In its judgment the Court of Appeal noted that **Section 20** was limited to proceedings "*for recovery of remuneration*" and "*remuneration*" referred to periodic payments that become due to an employee during the currency of a contract of employment. In particular, "*the expression covers ordinary wages paid periodically whilst an employee is at work (and) extends to include annual leave and sick leave payments that become due whilst the contract of employment remains on foot*". The Court of Appeal was clear, however, that severance entitlements were **not** subject to the limitation period.

16. In this latter regard both claimants claim unpaid wages (since 1996/1997) and "*3 months* (termination) *notice*" and, in the second claimants' case, "*annual leave*" and "*VNPF*" contributions for a period of 7 years from 1997 – 2004. I am satisfied that, with the exception of **VNPF** contributions, the other items fall within the meaning of "*remuneration*" and therefore, in terms of **Section 20** of the **Employment Act**, are limited to the period **after** 17 March 2002. In other words, any claims prior to that date are statute-barred and cannot be proceeded with. To this limited extent the application succeeds and the claim for remuneration is restricted to the period between 17 March 2002 and 17 March 2005 or 2004 when the employment contacts were allegedly terminated.

17. Having said that the parties differ fundamentally on the existence of any employment contract or the terms of such a contract. The claimants are adamant that they were verbally hired to work on and care for the first defendant's property at **Imeltara**, on **Erakor**. The defendants on the other hand deny employing **Jockly Kalo** after he was terminated in 1996 and they assert that he was merely allowed to remain rent-free on the first defendant's leasehold because he had nowhere else to go and had asked to remain. Similarly, **Elizabeth Kalo** was hired on a temporary casual basis in order that she could earn some income for her family after Jockly had been terminated in 1996.

18. Needless to say, on the defendants' version, the claimants were **not** asked to do any planting on the first defendant's land and whatever crops or fruit trees they planted was for their own personal use and benefit for the 10 odd years that they lived on the land and the first defendant should not be held liable. On the claimants' version, in the absence of the first defendant who had migrated to New Zealand, they were hired and paid monthly wages to act as live-in caretakers of the first defendant's leasehold which had several buildings and a plantation of valuable sandalwood plantings that needed to be cared for and which the first defendant did not wish to leave unattended.

19. Plainly, this claim will stand or fall on which "*version*" the Court accepts after a trial as the matter cannot be determined on the papers alone.

20. Accordingly, and with a view to bringing this long-outstanding matter to a finality, I list this case for pre-trial conference on **10th February 2012 at 8.30 a.m.**

21. By way of further directions I order the claimants to initiate correspondence with defence counsel with a view to agreeing the following:

    (a) A chronology of relevant dates and events;

(b) Agreed facts; and

(c) Agreed Issues.

Such correspondence to be copied to the Court and delivered to defence counsel by **3 February 2012**.

22. Although the defendants have been partly successful in their application I reserve any order for costs until the final determination of this claim.

DATED at Port Vila, this 31st day of January, 2012.

BY THE COURT

D. V. FATIAKI
Judge.