

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

Civil Case No. 90 of 2013

**BETWEEN:** ODO TEVI  
Claimant

**AND:** THE RESERVE BANK OF VANUATU  
Defendant

**AND:** THE GOVERNMENT OF THE REPUBLIC OF  
VANUATU  
Third Party

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

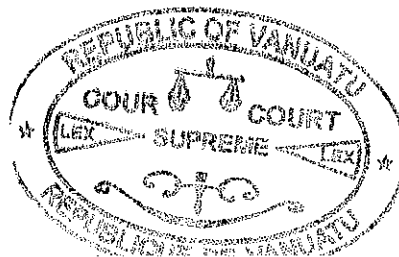
**Counsels:** Mr. E. Nalyal for the claimant  
Mr. N. Morrison for the defendant  
Ms. F. Williams for the Third Party

**Date of Decision:** 23 October 2013.

**REASONS FOR DECISIONS**

1. On 23 October 2013 I made the following orders after a lengthy hearing in Hearing Room No. 1:

- "1. The application for summary judgment is refused;
2. The application for separation is granted. The Third Party notice is accordingly struck out;
3. Defendant's application to amend defence is granted;
4. Liberty to the claimant to amend the claim and file and serve by 1 November 2013;
5. Thereafter defendant to file and serve an amended defence by 8 November 2013;
6. Claimant to reply (if desired) by 15 November 2013;
7. Defendant to file and serve sworn statements by 29 November 2013;
8. Matter adjourn to 6 December 2013 at 8.30 a.m.
9. Brief written reasons will be provided for the above orders.



10. *Costs reserved.*"

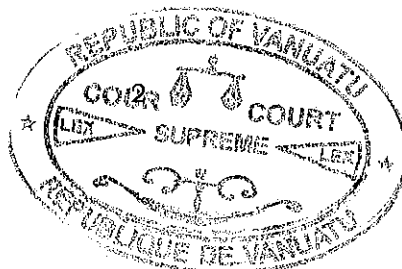
On that occasion I advised that I would give brief written reasons for my several orders. These are my reasons.

2. **Odo Tevi** was the Governor of the **Reserve Bank of Vanuatu (RBV)** until his employment contract was terminated and his appointment revoked by the Prime Minister in a letter dated 25 April 2013.
3. On 6 May 2013 the claimant issued proceedings against his employer (**RBV**) for unlawful termination and breach of contract and sought special and general damages and costs.
4. On 29 May 2013 the **RBV** filed its defence.
5. On 29 July 2013 the claimant applied for summary judgment on the basis inter alia of the claimant's sworn belief that there is "*no defence to the claim ...*" [see: Rule 9.6 (3) (b) (i) and (ii)] and the truth of the facts in the claim. The application is opposed in a defence submission dated 16 September 2013 which asserts that the defendant has "*real prospect of defending the claim*".
6. Upon such an application, the defendant may file a sworn statement setting out the "*reasons*" why he has an arguable defence. [see: Rule 9.6 (5)]. No sworn statement was filed in this case other than a written submission of defence counsel dated 16 October 2013 advancing the following "*reasons*" for opposing the application:

"1. *Section 8A (1) of the Reserve Bank of Vanuatu Act [CAP. 125] provides:*

*The Governor shall be a person of recognized experience in financial matters and shall be appointed by the Prime Minister on the recommendation of the Minister for a period of not more than five years and may with prior approval of the Prime Minister on the recommendation of the Minister **be eligible for reappointment** (emphasis added).*

2. *The section provides only for two periods of appointment. The first term and subsequently the term of reappointment. (Total 10 years). The intended appointment the subject of these proceeding would have extended the claimant's term to 15 years.*
3. ....
4. *In all the circumstances the subject appointment of the claimant was not a reappointment and accordingly section 8A (1) has no relevance.*



5. In all of the circumstances the claimant's appointment was void ab initio and the defendant further relies on paragraph 2.2 (a) to (p) of the Third Party's defence to the Third Party Notice and adopts that as it's further submission herein.
6. In the event that the claimant is successful on liability the defendant denies that quantum is proved such that judgment can be entered "in favor of the claimant in the sums as claimed in the claim".

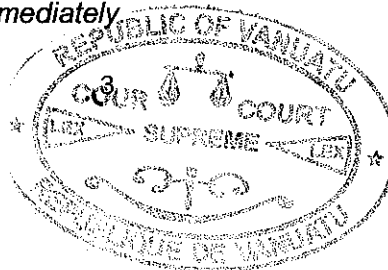
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7. I confess that the submission appears to advance "reasons" that are not pleaded or particularized in the defence to the claim as they should have been, nor are they substantiated by any sworn statement filed by the RBV. I accept that the former Minister of Finance who recommended the appointment of the claimant has expressed a view as to the meaning and effect of section 8A (1) of the RBV Act which is inconsistent with the "reasons" advanced in paragraphs 2 and 5 (above) and for that reason alone, there should be a trial of the claim.
8. Indeed, the so-called "reasons" advanced in **paragraphs 1 and 2** (above) appears to be inconsistent with the defendant's assertion in **paragraph 7** of its Third Party Notice "... that the claimant was appointed under a contract of employment lawfully and validly under Section 8A (1) of the RBV Act". This inconsistency is reinforced by the defendant's unconditional admission of **paragraphs 1 to 6** of the claim which traces the appointment of the claimant as Governor of the RBV under an employment contract for a fixed term of 5 years and which, **paragraph 5** asserts: "... was binding on the parties and enforceable".
9. Be that as it may the claim is comprised within 20 numbered paragraphs of which it is only necessary to set out **paragraphs 17 to 20** as follows:

- "17. *It is a further term and condition of the Employment Contract that where the Prime Minister unlawfully terminates the claimant's employment contract, the defendant will compensate the claimant in the sum equivalent to one month's salaries and allowances at time of termination multiply by the remaining months of the contract term;*
18. *On 25 April 2013, the claimant's employment contact was unlawfully terminated.*

### Particulars

*Letter dated 25 April 2013 from Moana Carcasses Kakotai Kalosil MP, Prime Minister of Vanuatu, to Odo Tevi terminating his employment as governor of the Reserve Bank of Vanuatu effective after 16.30pm on 26 April 2013 and revoking Mr Tevi's appointment made on 19 March 2013 effective immediately*



19. The termination of the claimant's employment contract was unlawful as that termination is in breach of the terms of the Employment Contract dated 19 March 2013.

20. The claimant has suffered damages as a consequence of the termination of his Employment Contract dated 19 March 2013 as follows:

- (a) Salary – VT800,000/month x years = VT48 million
- (b) Rent Allowance – VT200,000/month x 5 years = VT12 million
- (c) Fuel Allowance – VT30,000/month x 5 years = VT1,8 million
- (d) Severance – VT800,000/month x 5 years = VT4 million
- (e) Gratuity – 20% of VT48 million = VT9,6 million
- (f) Annual Leave – 21 days/year x 5 years x salary per day (VT26,000) = VT2,730,000
- (g) Other entitlements as provided in the Employment Contract, to be assessed.”

10. The defence for its part unreservedly admits **paragraphs 1 to 17** of the claim and denies **paragraphs 18 to 20** (above) in the following terms:

“17. It admits paragraph 17.

18. It denies the contract was unlawfully terminated as pleaded at paragraph 18.

19. It denies paragraph 19.

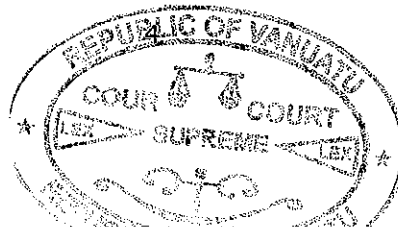
20. It denies the claimant has suffered damages compensable by the defendant as pleaded or at all.”

It also included the following **paragraph 21** which reads:

“The defendant otherwise and in the alternative relies on the Third Party Notice filed against the government of the Republic of Vanuatu herein.” (whatever that means).

11. It is immediately apparent from the above pleadings that the primary defence of the RBV is a bare denial of the claimant's averment that his employment contract was “... unlawfully terminated”. No details or particulars are provided in the denial nor are any alternative facts pleaded or particularized and none was sought by claimant's counsel.

12. If I may say so the claim, as framed, is unfortunate in that there is no separate and distinct averment that the claimant's employment contract was terminated on a certain date, other than, a reference to a termination letter in the “Particulars” to **paragraph 17**. Nor is there an averment that the termination letter was itself “unlawful” or beyond the powers of its author.



Indeed, it remains unclear why? the author of the claimant's termination letter was not included as a defendant in the original claim. In the result there is no admission in the pleadings that the claimant's employment contract has been terminated.

13. Another shortcoming in the claim, as pleaded, is in its failure to identify with precision *how?* it is said the claimant's termination was "*unlawful*". No specific clauses of the claimant's employment contract were identified as having been breached by the termination letter although the same is pleaded in **paragraph 19**.
14. In this regard, claimant's counsel was constrained to rely on the claimant's sworn statements as establishing the fact of his termination in so far as it is undisputed that the claimant no longer works at or for, the RBV since 26 April 2013.
15. Claimant's counsel also refers in his written submissions to statements made in the defendant's Third Party Notice wherein it states at **paragraphs 4 to 7**:

"4. *The letter of termination was directly contrary to the expressed views and wishes of the employer/defendant named herein.*

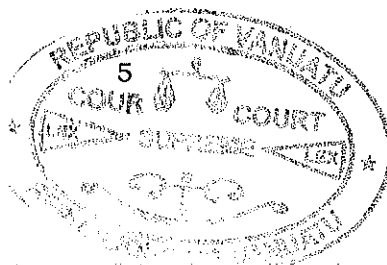
5. *The employer/defendant asserted that pursuant to section 8A (1) of the Reserve Bank of Vanuatu Act, the Prime Minister has power of appointment of the governor of the Reserve Bank.*

6. *The employer/defendant asserted that consequently the Prime Minister has powers of revocation of appointment pursuant to Section 21 of the Interpretation Act [CAP. 132].*

7. *The employer/defendant asserted that wherein the claimant was appointed under a contract of employment lawfully and validly under section 8A (1) of the Reserve Bank of Vanuatu Act [CAP. 125] the fact of that being a 3<sup>rd</sup> consecutive 5 year term did not render the contract invalid."*

16. In summary, the Third Party Notice whilst accepting the power of the Prime Minister to appoint (and remove) the claimant pursuant to **Section 8A (1)** of the **Reserve Bank of Vanuatu Act** read with **Section 21** of the **Interpretation Act**, nevertheless, asserts that the claimant's:

*"... termination was directly contrary to the expressed views and wishes of the (RBV)..." and "... the claimant was appointed under a contract of employment lawfully and validly under Section 8A (1) ... (and) ... the fact of that being a third consecutive 5 years term did not render the contract invalid."*



17. In light of those statements in **paragraphs 4 and 7**, defence counsel's reluctance to concede liability remains unclear and confusing.

18. Be that as it may of crucial importance to the application for summary judgment is counsel's submission that:

*"(a) The admissions of paragraphs 3, 4, 5, 6 and 17 of the claim ... (in effect) ... remove or nullify the defence of the RBV as a matter of contract law, and nullify the RBV's denials of paragraphs 18 and 19 of the claim;*

*(b) The admissions of all terms of the contract of employment as to entitlements due to the claimant – this admission nullifies the RBV's denial of paragraph 20 of the claim."*

19. After carefully considering the submission and the defence of the RBV as pleaded, as well as the identified shortcomings in the claim, I cannot agree. In my view there is no inevitable conflict or inconsistency in the defendant's admissions and denials. Indeed, the admissions go no further than to acknowledge the appointment of the claimant to the position of governor of the RBV on admitted contractual terms and conditions including salary, allowances and entitlements.

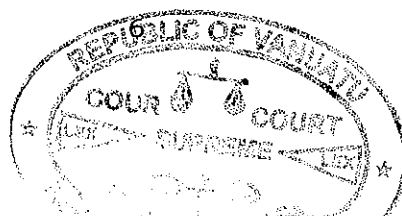
20. Even the defendant's admission of **paragraph 17** is nothing more than an acknowledgment of the existence of the following clause in the claimant's employment contract which reads:

*"In the event that the Prime Minister unlawfully terminates your contract, the Bank will compensate you in the sum equivalent to one months salary and allowances at the time of termination multiplied by the remaining months of the terms of your appointment."*

21. If I may say so the wording of the clause is unusual in that the claimant's immediate employer RBV is agreeing to compensate the claimant in the event of a non-contractual third party's actions in unlawfully terminating the claimant's employment contract.

22. The clause also appears to be either a *"penalty"* or a genuine pre-estimate of liquidated damages in the event of an unlawful and premature termination by the Prime Minister, of the claimant's appointment as governor of the RBV. Notwithstanding the debatable nature of the clause or its enforceability, the triggering event (if any) for its implementation is a judicial determination of *"unlawful"* termination which is not admitted or properly raised in the pleadings.

23. In opposing the *"reasons"* advanced against the various amounts enumerated in the claim, claimant's counsel identifies their source as being



"... from the (claimant's) contract of employment dated 19 March 2013 entered into between the claimant and the defendant" and counsel forcefully submits:

*"The claimant must be paid all his entitlements as claimed because he would have received those entitlements but for the breach of his contract by way of its termination on 25 April 2013".*

Given the absence of an unequivocal admission of unlawful termination of the claimant's employment contract by the RBV, the submission appears overly optimistic.

24. I note in counsel's submission that the authorities cited for the submission does not include reliance on the "unusually-worded" clause referred to above, but, in any event, the cited authorities do not support the submission.
25. In my view the entitlement of an employee who has been unlawfully terminated or dismissed to damages is measured by reference to the period of notice for termination in the employment contract or in the applicable legislation such as the **Employment Act** where termination occurs prior to the agreed end of the employment contract. Strictly there is no entitlement to such relief called "*balance of contract*" especially where the employment contract is a written one and subject to mitigation.
26. Even if I am wrong in this view damages for breach of contract are necessarily "*at large*" and must be assessed. Even an unjustly terminated employee's statutory entitlement to severance payment under the Employment Act must be assessed (see: **Municipality of Luganville v. Garu** [1999] VUCA 8).
27. For the foregoing reasons the claimant's application for summary judgment was refused.
28. Contained within claimant counsel's additional written submissions in response is an application that the case between the defendant and the third party be separated from the claimant's case on the basis that a Third Party Notice creates a separate action and does not afford a defence to the claimant's claim and, further, "... *the case between the defendant and the third party is interfering with the claimant's claim*" in so far as the defendant is abusing the Third Party procedure by attempting to have the third party defend the claimant's claim.
29. The relevant Third Party Notice is addressed to the Government of the Republic of Vanuatu and "... *claims an indemnity*". Nowhere in the Notice is there mention of a binding agreement to indemnify the defendant or of any liability already established against the defendant and when questioned by the Court, defence counsel frankly accepted that the Notice was issued "*in anticipation*" of a liability being found or established in the claimant's claim.



30. **Rule 3.7 of the Civil Procedure Rules** is the relevant rule. It permits a defendant to serve a Third Party Notice on a person who is not a party to the proceeding if the defendant "... *claims a contribution, indemnity or other remedy*" against the third party. Service of a Third Party Notice makes the person served "... *a party to the proceeding ... as if the defendant had started a proceeding against the person*". It does not thereby, in my view, make the third party a defendant to the original claim. The tense and wording of the **Rule** also suggests to my mind that the third party's liability to indemnify or contribute to the defendant either has been established or agreed.

31. In **Meyer v. White Sands Resort & Country Club** [2008] VUSC 60 Tuohy J. in dealing with an opposed application to join a third party in the action before him relevantly observed:

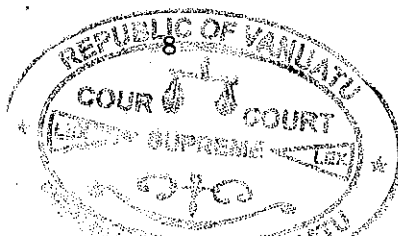
*"In my view Rule 3.7 must be read as meaning if the defendant claims a contribution or an indemnity or other remedy in respect of the defendant's liability to the claimant for the remedies which the claimant is seeking against the defendant".*

32. I respectfully agree and would add in my view an "*indemnity*" be it contractual or otherwise, cannot be invoked or claimed by the person indemnified unless and until liability has been admitted or established against that person or he has paid out the claim or liability but, in any event, no defence is afforded to the claimant's claim which seeks to establish the very liability for which the RBV claims an indemnity from Government.

33. In **Westpac v. Leye** [2005] VUSC 125 Treston J. in striking out a third party notice in that case where an "*indemnity*" was sought against the third party, said (in words that would apply equally to this case):

*"In this case when the defendants issued their notice against ... (the third party) ... they effectively endeavoured to commence a completely different fresh action against (the third party) within the confines of the present claim by the bank against the defendants. In my view that is inappropriate when (the third party) has not admitted liability for the defendant's claim. If the notice were allowed to stand the Court would be forced to determine the liability of (the third party) to the defendant ... (in its separate cause of action) ... before it could determine whether or not (the third party) had any liability to the defendant. In my view that is not the purpose of a third party notice ...*

*The correct procedure is for the Defendants to sue whoever they choose in relation to the motor vehicle collision in a separate action in the usual way and obtain a judgment, if appropriate, against the Defendants in that case. Only then can it issue a notice for contribution or indemnity or other remedy. This is simply a claim by the bank against the Defendants under an asset purchase agreement and the Defendants cannot undertake a trial within a trial to establish*






*the contribution or indemnity or other remedy against the Director in this fashion.*

(my underlining)

34. *A fortiori* where the third party has filed an extensive and detailed "*defence*" in which it denied any liability to indemnify the RBV. In the present case if the third party notice were allowed to stand the Court would be forced to determine the lawfulness of the third party's actions and therefore it's liability to the defendant before it could determine the defendant's liability to the claimant.
35. For the foregoing reasons and to avoid any further confusion creeping into these proceedings the Third Party Notice was struck out leaving the defendant to pursue its own separate action against the Government as it sees fit.
36. The defendant's application to amend its defence to remove an "*apparent inconsistency*" in its pleading to paragraphs 5 and 18 to 19 was also allowed and the claimant was granted liberty to amend his claim in the hope that the issues between the parties would become clearer.
37. Finally with a view to progressing matters, the defendant was ordered to file and serve sworn statements.
38. Given the orders both for and against the parties the court declined to make any order as to costs.

**DATED at Port Vila, this 23<sup>rd</sup> day of October, 2013.**

**BY THE COURT**

  
**D. V. FATIAKI**  
Judge



The seal is circular with the text "REPUBLIC OF VANUATU" at the top and "SUPREME COURT" in the center. It features a central emblem with a scale of justice and a book. The seal is partially obscured by the signature and the judge's name.