

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

Civil Case No. 65 of 2015

**BETWEEN: JOSEPH ALICK**

*Claimant*

**AND: NI-VANUATU BUSINESS DEVELOPMENT**

*First Defendant*

**AND: REPUBLIC OF VANUATU**

*Second Defendant*

**Coram:** *Justice Oliver A. Saksak*

**Counsel:** *George Boar for the Claimant  
Sammy Aron for the Defendants*

**Date of Hearing:** *2 February 2016*

**Date of Judgment:** *21 April 2016*

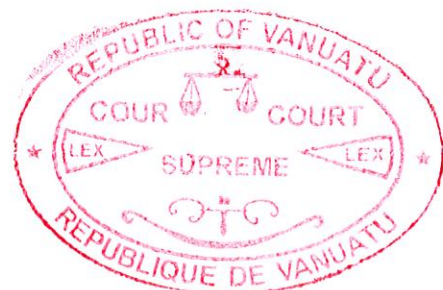
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**JUDGMENT**

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Introduction

1. This is a claim for damages in the sum of VT7,615,230. The claim is founded on a contract of service entered into by the parties in July 2013. It had a duration of 4 years. The Claimant had performed under the contract for some 5 months and was terminated by implication when another person was appointed into his position. The balance of his contract was 3 years and 7 months at VT153,846 per month. He claims VT7,615,230 for these and a further VT461,538 for 3 months salaries in lieu of notice. The total amount of damages is therefore the sum of VT8,076,768. He claims costs of the proceedings as well.

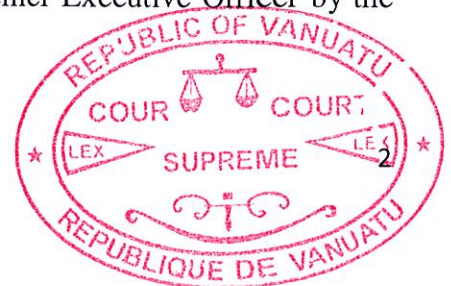


### Relevant Facts

2. A vacancy existed within the Ni-Vanuatu Business Development Fund (the Fund) when its previous Manager was terminated. The Fund advertised the vacant position in Issue No. 3888 of the Daily Post Newspaper. The closing date for applications was 4.30pm, 21<sup>st</sup> June 2013. The Claimant alleged he applied and was interviewed by an Interview Panel chaired by the Director of Trade and Tourism Department. On 1<sup>st</sup> July 2013 the Claimant was appointed as Chief Executive Officer of the Co-operative Development Fund. Subsequently on 1<sup>st</sup> July 2013 the Claimant executed an Agreement for Service with the Fund for 4 years commencing on 1<sup>st</sup> June 2013 to 1<sup>st</sup> June 2017. Under the Agreement the Claimant would be paid VT8,000,000 at VT76,923 per fortnight plus housing allowance of VT30,000 per month. From July 2013 the Claimant had been in employment with the Co-operative Development Fund and enjoying the benefits due under the Agreement. However the Claimant alleges that without notice and in breach of the Agreement, the Board of Directors of the Fund appointed another person as Chief Executive Officer and thereby terminating the Claimant's employment.

### Defence

3. The Defendant filed a lengthy defence on 14<sup>th</sup> August 2015. In brief and in summary the Defendant says that –
  - (a) The suspension of the constitutions of the fund and the appointment of an Interim Chairman of the Committee by the Minister of Tourism, Trade, Industry, Co-operative and Ni-Vanuatu Business Development (the Minister) was ultra vires and unlawful.
  - (b) The termination of John Tahi as Fund Manager by the Minister was unlawful.
  - (c) There was no proper interview done.
  - (d) The appointment of the Claimant by the Minister was ultra vires the Act and therefore unlawful.
  - (e) There was no approved structure for the position of Chief Executive Officer by the Committee.





- (f) The Service Agreement signed by the Claimant and the Interim Chairman was void abinitio and was invalid and of no effect.
  - (g) The Claimant did not perform any work and was never paid any wages under the signed Agreement.
  - (h) The approved salary for Fund Manager in Salary Scale H Os 4.3 for an annual salary of VT1,517,040 with a housing allowance of VT180,000 annually and VT48,000 child allowance annually.
  - (i) The Claimant's salary scale under the Agreement was never approved by the Public Service Commission.
  - (j) There was no breach of contract as the Claimant never served a six weeks probation period.
  - (k) On 21<sup>st</sup> July 2013 the Agreement was constructively terminated by the reinstatement of John Tahi as Fund Manager.
4. The Defendant says that the Claimant is not entitled to any reliefs he claims for, and says that his claims should be dismissed with costs.

#### Evidence

5. The Claimant gave evidence to prove his claims on the balance of probabilities. He confirmed his evidence by sworn statements dated 17<sup>th</sup> April 2015 (Exhibit C1) and of 1<sup>st</sup> February 2016 (Exhibit C2). Jossie Masmas gave evidence in support of the Claimant's claims confirming his evidence by sworn statement dated 26<sup>th</sup> October 2015 (Exhibit C3) and of 1<sup>st</sup> February 2016 (Exhibit C4).
6. The Defendants produced evidence from Ridley Joseph and George Borugu. The former is the acting Director of Co-operatives and Ni-Vanuatu Business Development and the latter is the current Director of Department of Tourism. Mr Joseph confirmed his evidence by



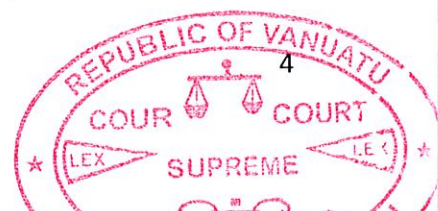
sworn statement dated 1<sup>st</sup> December 2015 (Exhibit D1) and was cross-examined by Mr Boar. Mr Borugu confirmed his evidence by sworn statement dated 3<sup>rd</sup> December 2015 (Exhibit D2) and was cross-examined by Mr Boar.

### Issues

7. Three issues have been identified by both the Claimant and the Defendant for determination by the Court as follows:-
  - (a) Whether or not the Minister has the power to suspend the Constitutions of the Co-operative Development Fund and (the CDF) and the Small Business Development Fund (the SBDF)?
  - (b) Whether or not the Claimant's Agreement of Service dated 1<sup>st</sup> July 2013 is legally valid and enforceable?; and
  - (c) Whether or not the Committee Members were legally appointed?

### Discussions

8. On the first issue the Claimant places reliance on Section 59 of the Co-operative Societies Act, Section 18 L of the Declaration Act and the case authority of Sanma Local Government Council v. Wells (2012) VUCA 12 CAC 17 of 2012 in support, sections 5, 24 and 30 of the Constitution of CDF, Section 21 of the Interpretation Act and clause 10 of the Loan Policies of CDF and SBDF.
9. Mr Boar for the Claimant argued and submitted that Section 59 of the Cooperative Societies Act when read in conjunction with Section 21 of the Interpretation Act gives the Minister power to appoint and remove a special member of a committee. Further Mr Boar argued that because the Government had appropriated moneys (as grant pursuant to Section 30 of the CDF and SBDF constitutions, it follows that the Minister having a supervisory power, had power to dissolve the constitutions of CDF and SBDF.
10. Having read those provisions carefully the Court disagrees with Mr Boar's submissions. Section 59 of the Cooperative Societies Act provides discretionary power of the Minister

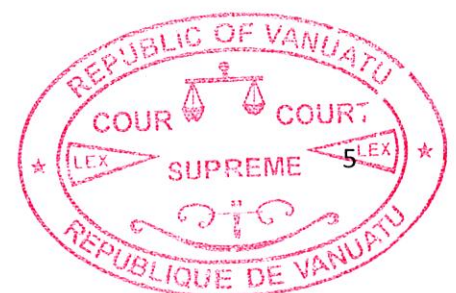




to appoint special committee members. This section does not give any power to the Minister to dissolve the Constitutions of CDF and SBDF.

11. That is sufficient to answer the first issue in the negative. The case authority of Sanma Local Government v. Wells is distinguished and is of no assistance to the Claimant's argument and submissions on this issue.
12. Following the dissolution of the CDF and SBDF constitutions by the Minister, the Minister then appointed an interim committee on 8 March 2013 pursuant to Section 5(F) and Section 8 of the constitutions of CDF and SBDF. The members were Marakon Alilee (Director-General) as Vice-Chairman, Jossie Masmass as Chairman, and Sowany Joseph Matou as treasurer.
13. Mr Aaron for the Defendants raised this as an issue and arguing on the basis of Section 59 of the Cooperative Societies Act, that in doing so the Minister had acted ultra vires the Act.
14. The Court agrees with the submissions of the State. The Court reiterates that Section 59 of the Act does not give power to the Minister to appoint such a committee. Clause 5 of the CDF and SBDF constitutions give power to appoint Committee Members. The full membership of such a committee is at least 6 members. The seventh member may be alternates pursuant to clause 5(f) but that is only a discretionary appointment.
15. The Minister purportedly made appointments under clause 5(f) of the CDF and SBDF constitutions. With respect, that amounted to an unreasonable and unlawful exercise of discretion. This avenue is available where there is a need of "advisors" in the committee. The appointment letter of 8<sup>th</sup> March 2013 did not appoint Mr Alilee, Mr Masmass and Mr Joseph as "advisors" but as Members of a Microfinance Committee. That purported appointment was ultra vires the Act and the CDF and SBDF constitutions because it had fallen short of three members and alternate members as advisors. (Cl.5(f)).
16. The Minister relied also on Clause 8 of the CDF and SBDF constitutions to make the appointments.

Clause 8 states:

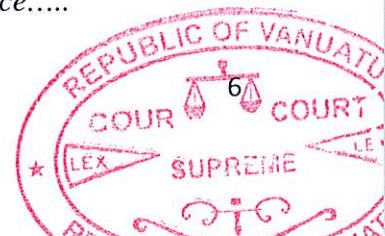


*“The Committee at its first meeting shall elect a Chairman, a Vice-Chairman and a Secretary and Treasurer, who shall hold office for a period of three years from the date of election and may be re-elected or replaced after such period by the Committee.”*

17. On 8<sup>th</sup> March 2013 the Minister purported to appoint Mr Masmias as the Chairman, Mr Marakon as the Vice-Chairman and Mr Joseph as the treasurer. Clearly the Minister had assumed the role and function of the Committee itself under Clause 8 when he nominated the Members into their specific positions. Clearly the Minister had acted beyond his powers in doing so and I so rule.
18. For those reasons the third issue of whether or not the Committee Members appointed on 8<sup>th</sup> March 2013 were legally appointed is answered in the negative.
19. The consequential effect of the above declaration and ruling is that every decision and act of this Committee made or done after their purported appointment on 8<sup>th</sup> March 2013 were illegal, void and of no legal effect. This includes the appointment of the Claimant and the execution of the Agreement of Service dated 1<sup>st</sup> July 2013. (The Agreement).
20. The Claimant argued and submitted that he was validity appointment under this Agreement. That argument is untenable and is rejected by the Court for the following reasons –
  - (a) The purported Committee was not legally established and legally constituted as required by Clause 5 of the CDF and SBDF constitutions.
  - (b) The Agreement contained terms and conditions which were and are inconsistent with the Constitutions of CDF and SBDF. For instance Clause 21 states that:

*“The Manager of the Small Business Development Fund will act as the Secretary/Treasurer of the Association with the following terms & conditions of service.*

    - a. shall serve for a period of three years;*
    - b. shall receive no remuneration during his/her period of service.....”*





Further Clause 23 states:

*“The duties of the Secretary/Treasurer shall be: and subject to this Constitution and to the general directions of the Committee, shall be responsible for the day to day Management of the business of the Fund.....”*

(underlining for emphasis).

21. Looking at the Agreement Clause D1.2 the term of the Agreement is 4 years, an obvious contradiction to Clause 21 a. of the CDF constitution. Further Clause D2.1 states that the salary of the Manager will be VT8,000,000 for the contract, again a clear contradiction to Clause 21 b. of the CDF constitution. And Clause 23 clearly states that the engagement of the Manager is subject to the constitution.

22. For those findings the Court rules that the Agreement of Service dated 1<sup>st</sup> July 2013 is illegal, invalid and is of no legal effect. That being so, the Claimant could not have been lawfully appointed.

#### The Result

23. The Claimant's claims therefore fail in their entirety and they are dismissed.

24. There will be no order as to costs. Each party must pay its own costs.

**DATED at Port Vila this 21<sup>st</sup> day of April, 2016.**

**BY THE COURT**

  
**OLIVER A. SAKSAK**

**Judge**

