

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

(Civil Jurisdiction)

Judicial Review Case No. 1479 of 2016

BETWEEN: AUGUST LETLET

Applicant

AND: THE REPUBLIC OF VANUATU

Respondent

Hearing: *Monday June 13th 2016 at 9 am*

Before: *Justice JP Geoghegan*

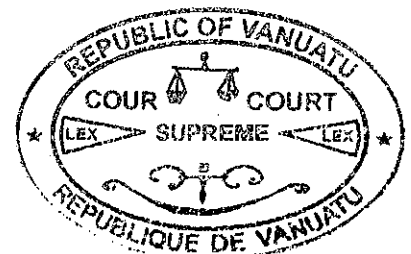
In attendance: *Ms S Mahuk for the Claimant*

Mr S Kalsakau (SLO) for the Defendant

Judgment: *Friday, June 17th 2016 at 5 pm*

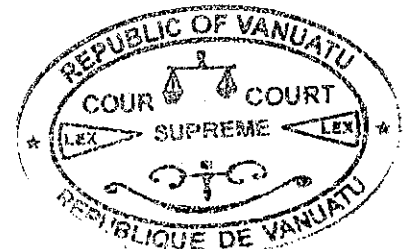
JUDGMENT

1. The issue to be determined in this judgment is whether or not the Court should grant injunctive relief to the claimant Mr Letlet. Mr Letlets claim is as a result of the revocation of his employment as Director General of the Ministry of Finance and Economic Management on April 12th 2016. Mr Letlet claims that the decision to revoke his employment is wrong in law and that he should be reinstated to his position or alternatively should be paid the salary and benefits pending the final determination of matters by the Court.



Background

2. This is a case where the background facts are largely agreed between the parties.
3. In April 2015, the then Director General of the Ministry of Finance and Economic Management resigned from his position. At that time Mr Letlet was employed as the Principal Economist in the Department of Finance and Treasury. He was interested in the vacant Director General's position and, in response to a public advertisement, lodged an application for the position. Mr Letlet understood that the applicants for the position would be reviewed by an independent panel who would then interview and short list applicants in order that recommendations could be made to the Prime Minister who would then appoint the successful applicant to the role.
4. In July 2015, Mr Letlet was appointed as Acting Director General, a role which he undertook along with his existing role as the Principal Economist in Finance and Treasury.
5. Mr Letlet says that in early November 2015, he was notified by one of the members of the interview panel, Ms Nancy Wells, that his application could not be considered for the next stage of the selection process. Mr Letlet says that given his qualifications and the fact that he was already undertaking the role of Acting Director General, he was both surprised and disappointed by that advice. Mr Letlet was informed that the panel had recommended another person, Mr Benjamin Shing to the Public Service Commission. Mr Letlet says that that position appeared to be confirmed when in January 2016, he received correspondence from the Public Service Commission advising that the recruitment process had been completed and a recommendation had been forwarded to the Prime Minister. Mr Letlet says however that he was informed that the Prime Minister then rejected the recommendation of Mr Shing and directed the re-advertising of the position. There is no dispute between the parties that this is exactly what happened.
6. The position of Director General was re-advertised in January 2016. Mr Letlet submitted another application. Mr Letlet says that his understanding of the position was that while an independent panel was convened there were no interviews carried out in the second round of



recruitment and the panel made a recommendation to the Prime Minister based on the interviews which they had undertaken in the first round of recruitment. Given that Mr Letlet was not interviewed in the first round it would be apparent therefore that, on the face of it, Mr Letlet was not the recommended candidate.

7. Despite that, on February 10th 2016, Mr Letlet received an email from Ms. Judith Melsul the Acting Secretary of the Public Service Commission advising as follows:-

“Dear Mr August,

After the deliberation of the recruitment for DG-MFEM, the Commission made recommendations to the Hon. Prime Minister. Hon. Prime Minister agreed to enter into a contract with you as the Director General of MFEM.

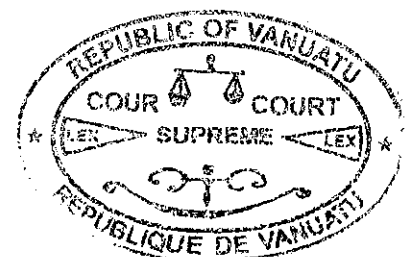
As such we are inviting you to attend the signing of your contract as Director General of MFEM with your employer – Hon. Prime Minister- the signing is scheduled to take place this morning at 11.00 at PMO.

PLS dress up for this very special occasion, and we wish to extend the invite also to your Hon. Minister.

I wish to congratulate you on your new appointment. It is of high calling, and the Commission confides and trusts in you to lead this organization with high integrity and discipline.

Judith Melsul
Acting Secretary
PSC.”

8. Mr Letlet duly attended the office of the Prime Minister on February 10th 2016 and signed a contract of employment. The contract is expressed to be between the Prime Minister of the Government of the Republic of Vanuatu as employer and Mr Letlet as employee. The contract was signed by the Prime Minister and by Mr Letlet.



9. As a consequence of being appointed to the new position Mr Letlet resigned from his position as Principal Economist in the Department of Finance and Treasury. His resignation was accepted and severance entitlements were paid.
10. On February 11th 2016, the newly elected Government appointed the Hon. Charlot Salwai as Prime Minister and the Hon. Gaetan Bikioune as Minister of Finance and Economic Management.
11. There is no dispute that on April 12th 2016, Mr Letlet received a letter from the Prime Minister advising of the revocation of his employment contract. Because of the significance of that letter in these proceedings I set the text of the letter out in full as follows:-

"12th April 2016

Letlet August

Director General

Ministry of Finance and Economic Management

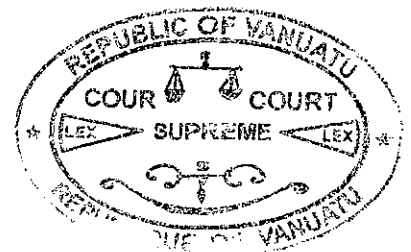
Port Vila

Dear Mr August,

*RE: REVOCATION OF YOUR APPOINTMENT AS THE DIRECTOR GENERAL OF
THE MINISTRY OF FINANCE AND ECONOMIC MANAGEMENT*

I refer to the above matter and to the process which the Public Service Commission undertook for the appointment of the Director General of the Ministry of Finance and Economic Management.

Your appointment as the Director General of the Ministry of Finance and Economic Management was made ultra vires the provisions of the Public Service Act [CAP 246]. I am aware that the Commission wrote to the former Prime Minister in a letter dated 9 February 2016, informing him of the recommendation of the interview panel



of the most competent and suitable applicant, which was Mr. Benjamin Shing. The Prime Minister then appointed you as the Director General instead. You were not the recommended candidate from the Commission.

Because your appointment was not based on the recommendation made by the Commission to the Prime Minister then and made ultra vires the provisions of subsection 17A(1) of the Act, your appointment as the Director General of the Ministry of Finance and Economic Management is null and void.

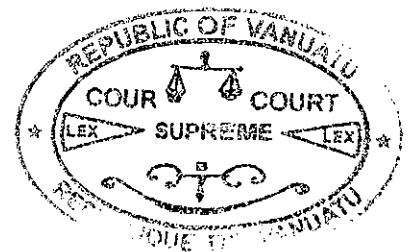
I wish to inform you by this letter that your appointment is revoked as the Director General of the Ministry of Finance and Economic Management, as of the date of this letter.

Yours sincerely,

*Hon. Charlot Salwai Tabimasmās, MP
Prime Minister”*

12. The Prime Minister’s decision was at odds with the views of his Minister of Finance and Economic Management who wrote to the Prime Minister on April 13th setting out at some length the background to Mr Letlets appointment and to his reservations regarding the appointment of Mr Shing. In the final 2 paragraphs of his letter the Minister of Finance and Economic Management wrote as follows:-

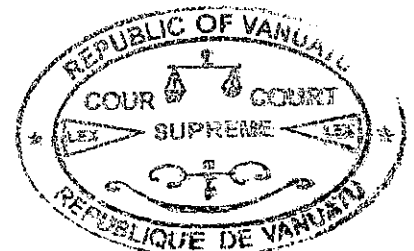
“Accordingly as Minister responsible for Finance and Economic Management, I write to inform you that I have learn (sic) about some allegations about Mr Benjamin Shing during his time in Government which, I as custodian of public fund will not accept him to be Director General of Finance and Economic Management. In this regard, I strongly recommend that you revoke your current letter and reinstate Mr Letlet August as Director General of Finance and Economic Management. Hon. Prime Minister, since appointed into the position of the Minister of Finance and Economic Management, I have enjoyed working with Mr Letlet August and hence, I strongly recommend that he



remain the Director General of Finance and Economic Management according to his employment contract.

I trust the above justification is sufficient to revoke your letter dated April 12th, 2016."

13. In his evidence Mr Letlet referred to the significant consequences of the decision revoking his appointment. He and his wife have 3 children aged 12, 10 and 3 months. They are currently living in New Zealand as Mrs Letlet is on a study scholarship from the New Zealand Government, studying at Auckland University for a Master's program in management. It appears that all things being equal she will be in New Zealand until November 30th 2018. Mr Letlet's evidence is that in order to secure his wife and children's entry into New Zealand, he was required to provide confirmation of his financial support and he has provided that confirmation. It includes confirmation that his financial support will cover education, healthcare, accommodation and all other related costs to sustain his families' welfare in New Zealand. Those costs would be significant. Mr Letlet says that his mother in law has also travelled to New Zealand to look after the couple's new born baby while his wife is undertaking study. He is required to provide financial support for her as well. Confirmation of that support has been provided to the relevant New Zealand authorities.
14. Mr Letlet has provided evidence that the cost of a rental property for his family in Auckland is NZ\$540 per week and in securing that property he had advised the landlord of his contract with the Vanuatu Government and his appointment as Director General of the Ministry of Finance and Economic Management. He says that the likely impact of not obtaining an injunction is that his family risks being evicted from their home in Auckland and relocating to Port Vila. In the interim Mr Letlet is financially committed to his own loan repayments in Vanuatu including substantial fortnightly payments to the bank in respect of a loan. The detriment not only to Mr Letlet but also his family as a result of the revocation of his employment is clear and substantial.
15. Where there does appear to be some divergence in the evidence for the claimant and the defendant is around what occurred during the "second round" of consideration of candidates for the position of Director General. In this regard Ms Melsul swore two statements in support



of the State. She confirmed that on November 12th 2015, the Commission made a recommendation to the Prime Minister that Mr Shing be appointed to the position of Director General but that because of the then Prime Minister's reservations concerning various allegations about Mr Shing the Commission were directed to re-advertise for the position. Ms Melsul said that while a panel was convened to consider the applications, given that the same applicants applied, the panel decided to stick to its previous shortlist. Accordingly Mr Letlet was never interviewed by the panel or considered as a candidate recommended for the position. Ms Melsul said that at all material times Mr Letlet was never recommended for the position. Mr Letlet's appointment was on the Prime Minister's own volition and independent and irrespective of the Commission's recommendation after due process had been carried out.

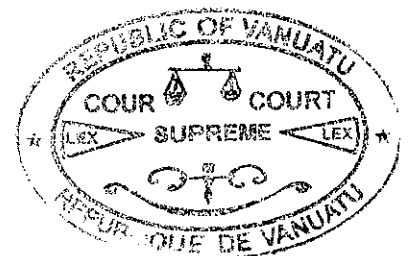
16. As against that, a sworn statement in support of Mr Letlet's claim was made by Mr John Morsen Willie who was Chairman of the Public Service Commission at that time of these events. Mr Willie confirmed the former Prime Minister's rejection of the Commission's recommendation and his direction to re-advertise the position. Mr Willie confirmed that by letter dated February 9th 2016 the Commission wrote to the former Prime Minister as follows:-

"The Public Service Commission at its meeting number 03 of 2016 dated 9th February 2016, decision number 04, consider the panel selectin (sic) recommendation for the above position and decided to refer the matter to your office for further determination to be made pursuant to section 17A of the Public Service (Amendment) Act No. 1 of 2011.

The Commission has noted that the same applicants applied in the second round of advertisement and the panel could not assess further for reasons that assessments have already been made on the applicants.

The Commission deliberate (sic) on the decision of the panel and notes that an audit report on the recommended candidate has been forwarded to yourself, Hon. Prime Minister.

The Commission therefore decides that the panel recommendations per the first round of assessments be referred to your Office, to make appointment to the position of Director General, Ministry of Finance and Economic Management, from the applicants of the



advertised position, pursuant to section 17A of the Public Service (Amendment) Act No. 1 of 2011.

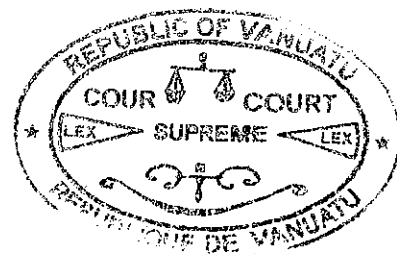
Hon. Prime Minister we will be happy to provide you with further assistance should you request on this matter."

17. Mr Willie stated that, upon receiving that letter, the former Prime Minister enquired both of him as Chairman and of Ms Melsul as Acting Secretary, why the Commission had not listed a recommended candidate for the position of the Director General. He says that he and Ms Melsul then verbally advised the Prime Minister that the Commission had left the Director General recommendation open for him to decide. Mr Willie stated that accordingly the Commission presented to the Prime Minister a shortlist of recommended candidates, which included the claimant, and advised the Prime Minister to decide on the most suitable one.
18. The Court also received a statement in support of the application from the former Prime Minister the Hon. Sato Kilman Livtuvanu which essentially confirmed the evidence of Mr Willie as to Mr Letlets appointment. He stated that the Commission presented him with a shortlist of recommended candidates, which included Mr Letlet and that:-

"17. Based on the Commission's advice and on consideration of the list of recommended candidates from the Commission, I formed the view that the Claimant was the most qualified, experienced and suitable candidate. I therefore advised the PSC of my selection and arranged for a contract of employment to be prepared."

Discussion

19. Mr Letlet seeks the following orders subject to determination of substantive issues by the Court:-
- 1) An order directing the Respondent to revoke the appointment of the Acting Director General of the Ministry of Finance and Economic Management and reinstating the applicant to his position as Director General of the Ministry of



Finance and Economic Management until such time as the validity of the revocation of appointment is determined under the judicial review claim filed.

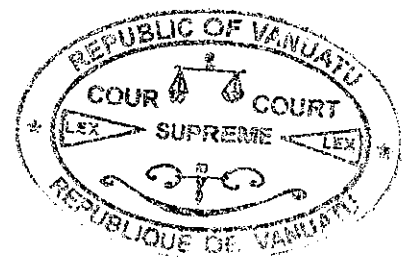
- 2) An order directing the respondent to satisfy payment of the applicant's salary and enjoyment of benefits pursuant to his employment contract dated February 10th 2016 pending determination of the judicial review.
- 3) An order directing the respondent to reimburse the salary and benefits of the applicant which were unpaid since the revocation decision of April 12th 2016 and pursuant to his employment contract.
- 4) Such further other orders as the Court sees fit.

20. The application is brought pursuant to rule 7.5 and 7.7 (a) (i) of the Civil Procedure Rules 2002. Although technically in this case the application for urgent interlocutory relief was filed at the same time as the substantive judicial review claim, there is no dispute that the Court should adopt the procedure set out in rule 7.5 that Mr Letlet should satisfy the Court that there is a serious question to be tried and that he would be seriously disadvantaged if the orders which he was seeking were not granted. In that regard, as set out in Ms Mahuk's helpful submissions the test is that outlined in American Cynamid v. Ethicon [1975] AC396, Valele Family v. Toro [2002] VUCA 3, Iririki Island Holdings v. Ascension Ltd [2007] VUCA 13 and Livo v. Boetara Trust [2002] VUCA 10.

21. Consideration of these issues also involves a consideration of the balance of convenience as referred to in Valele Family v. Toro where the Court stated:-

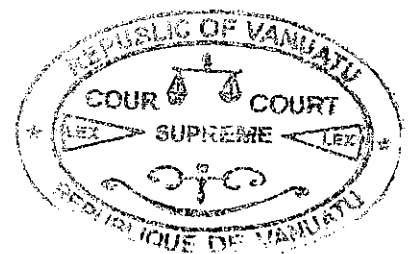
"Even where there is an interim injunction made in the first instance the issue before the court when an inter parties hearing for an interlocutory injunction occurs is whether there is a serious question to be tried. If so, the Court must then consider the balance of convenience between the parties having regards to the seriousness of the issues in question, and whether the position of the defendant can be appropriately protected, by an undertaking from the plaintiff as to damages or otherwise, in the event of that the plaintiff ultimately fails a trial."

22. I consider that there is ample evidence supporting urgency in this case. What seems to be abundantly clear from the evidence filed for both parties is that Mr Letlet has at all times acted



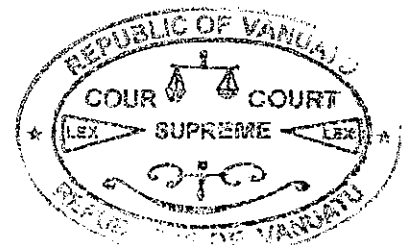
in good faith and upon representations made through the Public Service Commission and the State. The position which he has now been placed in is untenable on any continuing basis as it is clear that he has significant commitments and that the position he now finds himself in renders it more likely than not that he would be unable to service those commitments with very significant detrimental impact on himself and his family.

23. I consider that there is ample evidence that there is a serious question to be tried. While the evidence raises issues as to whether or not appropriate processes have been followed in the appointment of Mr Letlet to the position of Director General, what is clear is that he has acted on various representations by agencies or agents of the State to his considerable current detriment. Even if his appointment were found to be void, one might think that Mr Letlet may have a valid claim for damages on other grounds. In any event, Mr Kalsakau quite responsibly conceded for the State that there is a serious question to be tried.
24. As to the issue of the balance of convenience, I conclude that the balance of convenience lies firmly in favour of Mr Letlet in terms of interim relief for the reasons already referred to. I consider that the real issue in this regard is whether or not the Court should stop short of directing Mr Letlet's reinstatement.
25. In looking at this issue I do not accept the submissions of the Acting Solicitor General on behalf of the State that in terms of rule 7.5 (3) there is no risk that Mr Letlet would be seriously disadvantaged if the order were not made as the disadvantage which Mr Letlet is seeking to prevent "has already occurred". I do not accept the submission of the Acting Solicitor General that it would be futile for the Court to grant the order sought. The very reason why parties apply for urgent injunctive relief is because of the disadvantage that they have suffered and the need to rectify matters on an urgent basis. I do not accept the Acting Solicitor's General's submissions that Mr Letlet cannot be reinstated to his former position and/or his salaries reinstated and backdated as the letter of revocation has taken effect. It is not uncommon in applications of this kind for the court to be asked to preserve or reinstate a status quo pending further order of the Court. In that regard, I also reject the submissions of the State that the effect of such an order would be to bring finality to the matter and is therefore contrary to the rules relating to interlocutory orders. An order granting interim relief of the kind sought by Mr



Letlet would not bring finality to the matter. It would merely reinstate a status quo subject to final determination by the Court. The Court cannot make an unlawful appointment lawful, but what it can do is to preserve the situation until the Court has had the opportunity to determine whether the appointment was lawful or not. That is the very purpose of interim relief of this kind.

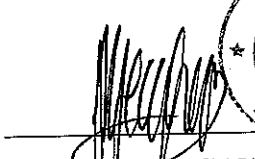
26. In this regard I also note that the appointment of the Acting Director General may be revoked at any time and that the Acting Director General would simply return to his former employment. I am accordingly satisfied that there is no particular prejudice to any Acting Director General were Mr Letlet to be reinstated to his former position. In that regard I also note the support that appears to be present for Mr Letlet from the Minister of Finance to whom he would presumably be directly responsible.
27. It was also submitted on behalf of the State that damages may be an adequate remedy for Mr Letlet in the absence of interim relief. I reject that submission. The potential impact on Mr Letlet and his family in the absence of immediate relief is, as I have said, real and substantial. Damages awarded at some future point would be of cold comfort and would not prevent the immediate financial crisis which Mr Letlet currently faces.
28. Given that the applicant has also filed a claim for judicial review I record that I am satisfied of all of the matters referred to in rule 17.8 (3) (a) – (d) of the Code of Civil Procedure and that accordingly that claim may proceed.
29. For these reasons I am satisfied that the applicant should be granted interim relief and I make the following orders:-
- 1) An order directing the respondent to revoke the appointment of the current Acting Director General of the Ministry of Finance and Economic Management.
 - 2) An order reinstating the applicant to his position as Director General of the Ministry of Finance and Economic Management pending determination of the validity of his revocation of appointment.



- 3) An order directing the respondent to pay the applicant's salary and benefits pursuant to his employment contract dated 10 February 2016 until further order of the court.
- 4) An order directing the respondent to reimburse the applicant forthwith the salary and benefits of the applicant unpaid to the respondent since April 12th 2016 pursuant to his employment contract.
- 5) Costs are granted in respect of this application in favour of the applicant. If costs are not agreed between the parties within 14 days, they are to be taxed.
- 6) Given that this matter should proceed to a substantive hearing as soon as possible I direct a pre-trial conference to be held on Friday, August 5th at 9 am. I would urge the parties to endeavor to resolve the matter themselves in the interim.

Dated at Port Vila, this 17th day of June, 2016

BY THE COURT


JP GEOGHEGAN
Judge

