

(Civil Jurisdiction)

**BETWEEN: JOHN MORRISON WILLIE, SANDY KELVEN,
LIVO LANGI, HENRY NIN, TIRO VANUA,
KARL DAVID**

Claimants

AND: JOEL PATH

First Defendant

**AND: NORTHERN ISLAND STEVEDORING
COMPANY LIMITED**

Second Defendant

Coram: Justice Aru

Counsel: Mr. J. Kilu for the Claimants
Defendants no-appearance

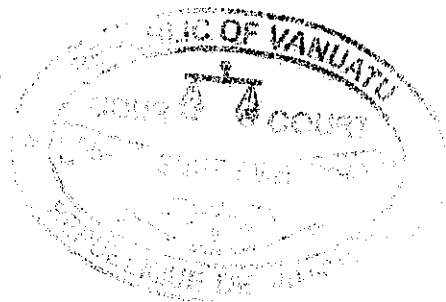
RESERVED JUDGMENT

Introduction

1. The claimants were appointed as members of the Board of Directors of the second defendant, Northern Islands Stevedoring Company Limited, (NISCOL) which is a local company incorporated under the provisions of the Companies Act [CAP 191].

NISCOL has 6 shareholders:-

- SANMA province - 30%
- PENAMA province - 20%
- MALAMPA province - 20%
- TORBA province - 10%



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- LUGANVILLE MUNICIPAL COUNCIL - 10%
 - VANUATU GOVERNMENT - 10%

2. The first defendant Joel Path represents SANMA province as a shareholder with 30 % shares. The background to these proceedings can be understood from the following chronology of events:-

Appointments of members of the Board of Directors by the shareholders

- 16 March 2012

John Morrison Willie was appointed a member of the Board of Directors;

On the same date Hendry Nin was also appointed a member of the Board of Directors;

On the same date Livo Langi was also appointed a member of the Board of Directors;

- 31 May 2012

Sandy Kelven was appointed a member of the Board of Directors;

- 27 June 2012

Tiro Vanua was appointed a member of the Board of Directors

- 30 August 2012

Karl David was appointed a member of the Board of Directors.

Appointments of Chief Executive Officer (CEO), Accountant and chairperson by the Board of Directors

- 19 July 2012



John Morrison Willie was purportedly appointed Chief Executive Officer (CEO) under a contract of employment for a term of one (1) year;

On the same date Hendry Nin was also purportedly appointed under a contract of employment as the Company Accountant for a term of one (1) year;

On the same date Sandy Kelven was also purportedly appointed on the same date as chairman of the Board under a contract of employment for a term of one (1) year.

- 2 April 2013

The Board of Directors purportedly resolved to extend the term of John Morrison Willie as CEO, Hendry Nin as Accountant and Sandy Kelven as chairman of the Board for a period up to 29 November 2015.

Terminations

- 10 April 2013

The appointment of John Morrison Willie as a Director and CEO was terminated;

On the same date the appointment of Hendry Nin as a member of the Board of directors and Company Accountant was terminated;

- 19 April 2013

The appointment of Sandy Kelven as a member of the Board of Directors and as chairman of the Board of Directors was terminated;

On the same date the appointment of Livo Langi as a member of the Board of Directors was terminated;



On the same date the appointment of Tiro Vanua as a member of the Board of Directors was terminated;

On the same date the appointment of Karl David as member of the Board of Directors was terminated.

The claim

3. The claimants initially filed their statement of claim on 16 May 2013. The claim was subsequently amended and on 22 April 2014 an amended claim was filed. Mr Livo Langi who was one of the claimants, discontinued his claim against the defendants by filing a notice of discontinuance on 29 September 2014. At the trial on 13 June 2016, Mr Kilu informed the Court that his clients have abandoned their original claims for:-

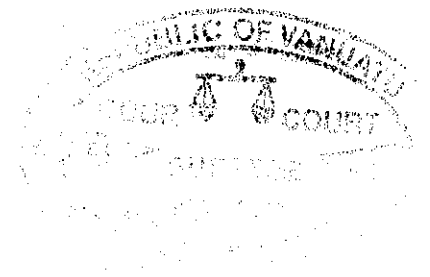
- 3 months' notice;
- outstanding leave;
- Basic severance and
- Breach of employment contract.

4. The only claim being pursued for the purposes of this trial is a claim for unjustified dismissal. The calculations submitted for each claimant for their purported unjustified dismissal is as follows:-

- **John Morrison Willie**

a) Board Member

Salary VT 100,000 per month [employed for 12 months and 24 days – 16 March 2012 to 10 April 2013] s. 56 (2) (a) i) and (b)[1 month salary by number of months of employment – VT 100,000 x 12 x 24 [basic severance] VT 1,224,000 x 6 = VT 7,344,000



b) CEO

Employed from 19 July 2012 to 10 April 2013 salary VT 400,000 per month [8 months and 20 days] $VT\ 400,000 \times 8 \times 20 = VT\ 3,280,000 \times 6 = VT\ 19,680,000$ Total claimed for a) and b) (termination as a Director and as a CEO = VT 27,024,000

- **Hendry Nin**

a) Board member

Salary VT 100,000 per month

employed from 16 March 2012 to 10 April 2013 – 12 months 24 days x 100,000]

[basic severance] $VT\ 1,224,000 \times 6 = VT\ 7,344,000$

b) Accountant

Salary VT300,000 per month employed from 19 July 2012 to 10 April 2013 [8 months and 20 days] $VT\ 300,000 \times 8 \times 20 = VT\ 2,460,000$ [basic severance] $VT\ 2,460,000 \times 6 = VT\ 17,220,000$

Total claimed for a) and b) (termination as a Director and as the Accountant) = VT 17,220,000

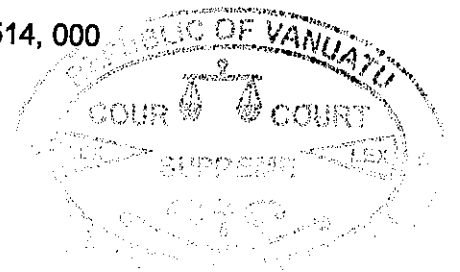
- **Sandy Kelven**

a) Board member

Salary VT 100,000 employed from 31 May 2012 to 19 April 2013 [12 months and 19 days] $VT\ 100,000 \times 12 \times 19\ \text{days} = VT\ 1,219,000$ [basic severance] $VT\ 1,219,000 \times 6 = VT\ 7,314,000$

b) Chairman of the Board of Directors

Salary VT300,000 per month employed from 19 July 2012 to 19 April 2013 [9 months] $VT\ 300,000 \times 9 = VT\ 2,700,000$ [basic severance] $VT\ 2,700,000 \times 6 = VT\ 16,200,000$ Total claimed for a) and b) (termination as a Director and as Chairman of the Board) = VT 23, 514, 000



- Tiro Vanua

Director

Salary VT 100,000 per month Employed from 27 June 2012 to 19 April 2013 [9 months and 21 days] $VT100,000 \times 9 \times 21 = VT921,000$ [basic severance] $VT 921,000 \times 6 = VT 5,526,000$

Total claimed for termination as a Director = **VT 5,526,000**

- Karl David

Director

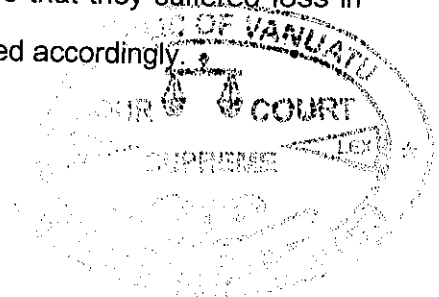
Salary VT 100,000 per month

Employed from 30 August 2012 to 19 April 2013 [11 months and 20 days] $VT100,000 \times 11 \times 20 = VT 1,120,000$ [basic severance] $VT 1,120,000 \times 6 = VT 6,720,000$ Total claimed for termination as a Director = **VT 6,720,000**

5. In addition to their claim it was submitted that they seek an interest of 10% on their overall total claim.

Defence

6. The defendants filed an amended defence to the amended claim with a counterclaim on 26 August 2014. The gist of the defendant's defence is that the claimants were terminated for gross misconduct, fraud and breaches of their fiduciary duties as directors of NISCOL. They allege that the claimants failed to act in good faith in the interest of NISCOL and did not exercise their powers as Directors for proper purposes and actually exercised the same in a fraudulent manner. They allege that the claimants breached their duty of care in performing their duties as Directors by making unauthorised payments out of funds belonging to NISCOL.
7. As a result, by way of counterclaim the defendants allege that they suffered loss in the sum of VT 43,294,122 and seek judgment to be entered accordingly.



Evidence

8. The claimants rely on the following sworn statements which were tendered at trial:-

- Sworn statements of John Morrison Willie tendered as **Exhibit 'C1'**
- Sworn statement of Hendry Nin tendered as **Exhibit 'C2'**
- Sworn statement of Hendry Nin in response to Peter Sakita tendered as **Exhibit 'C3'**
- Sworn statement of Hendry Nin in response to Qwen Andrews tendered as **Exhibit 'C4'**
- Sworn statement of Hendry Nin in response to Livo Langi tendered as **Exhibit 'C5'**
- Sworn statement of Sandy Kelven tendered as **Exhibit 'C6'**

9. Karl David and Tiro Vanua did not attend the trial hearing but did file their sworn statements on 17 and 14 June 2013 respectively.

10. For the defendants, although they were not represented at the trial , they did file the following sworn statements in support of their defence and counterclaim:-

- Sworn statement of Peter Sakita filed on 30 September 2014
- Sworn statement of Livo Langi filed on 29 September 2014
- Sworn statement of Qwen Andrew filed on 30 September 2014
- Sworn statement of Joel Path filed on 7 August 2013 and amended and filed on 15 October 2015

Law

11. The claimants rely basically on the following provisions of the Employment Act [CAP 160]:-

- Section 50 (4)
"50. *Misconduct of employee*



(1) *In the case of a serious misconduct by an employee it shall be lawful for the employer to dismiss the employee without notice and without compensation in lieu of notice.*

.....

4) *No employer shall dismiss an employee on the ground of serious misconduct unless he has given the employee an adequate opportunity to answer any charges made against him and any dismissal in contravention of this subsection shall be deemed to be an unjustified dismissal."*

- Section 56 (4) and (6)

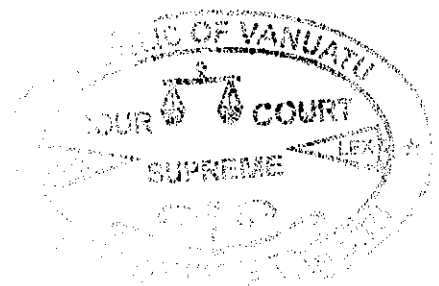
"(4) *The court shall, where it finds that the termination of the employment of an employee was unjustified, order that he be paid a sum up to 6 times the amount of severance allowance specified in subsection (2).*

.....

(6) *The court may, where it thinks fit and whether or not a claim to that effect has been made, order an employer to pay interest, at a rate not exceeding 12 per cent per annum from the date of the termination of the employment to the date of payment."*

12. Mr. Kilu submitted that an employer cannot dismiss an employee on the grounds of serious misconduct without first giving the employee an opportunity to be heard. (s 50 (4). Where no opportunity is given, the dismissal is deemed to be an unjustified dismissal. It was further submitted that if the Court finds that the termination is unjustified then it must order that the employee be paid up to 6 times the amount of his severance. (s56(4))

13. Mr Kilu invited the Court to find that no opportunity was given to his clients before their termination as the defendants do not deny that in their evidence and the claimants' evidence is not contested. He submits that taking into account the circumstances of the case [see: **VBTC v Malere & Ors** [2008] VUCA 2] the termination of his clients' employment was unjustified and therefore they are entitled to 6 times the amount of their severance.



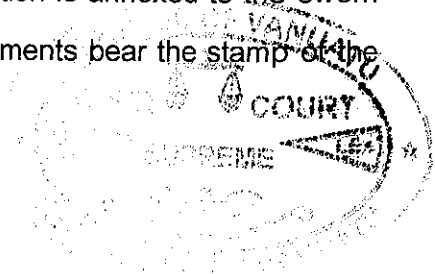
14. The claimants allege that their termination was high handed [see: **Mann v Air Vanuatu Limited** [2010] VUSC 168] as they were terminated by the first defendant Joel Path but not the shareholders. It was submitted that there was no meeting of the shareholders to terminate them. The claimants allege that there should have been 4 shareholders to meet to terminate them. They say that no opportunity was given to them to respond the allegations against them and no warnings were given. It was further submitted that there was no audit report to confirm that their termination was justified therefore a multiplier of 6 must be adopted.

15. Finally the claimants claim interest pursuant to s.56 (6) to be calculated at a rate of 10% per annum on any amounts awarded in their favour [see: **Willie v Mirvac Hotels Pty Ltd** [2013] VUSC 169].

Discussions

16. The trial of this matter had been adjourned on several occasions for various reasons. On the date of this hearing Mr. Eric Siba who was then Counsel on record for the defendants had filed a notice of ceasing to act and did not appear for the trial. In light of the previous adjournments, Mr Kilu insisted that the trial proceed. Despite the defendants not appearing or represented at the trial, they did file and serve their evidence in response to the claimants' sworn statements. It is therefore evidence for the purpose of this proceeding (rule 11.7 – Civil Procedure Rules) and will be considered as well.

17. The claimants allege that their termination as directors and as CEO, Accountant and Chairman of the Board in the case of John Morrison Willie, Hendry Nin and Sandy Kelven was unjustified. They bear the onus to prove their case on the balance of probabilities. As directors of a company that is duly incorporated under the Companies Act, their claim cannot be considered in isolation of the provisions of the Companies Act and the company's Memorandum and Articles of Association. A copy of the company's Memorandum and Articles of Association is annexed to the sworn statement of Peter Sakita as Annexure 'A'. These documents bear the stamp of the



VFSC which is the company registry. The Memorandum of Association sets out the shareholding structure as set out at paragraph 1 above. Relevantly the following articles of the Articles of Association provide as follows:-

Part 6 – Directors

- *Article (art) 51 – Appointment and removal of directors*

“...

(4) A director may be appointed or removed by ordinary resolution passed at a meeting called for the purpose, or by a written resolution .

(5) A director vacates office if he or she:

a) is removed from office in accordance with sub article 4);

.....”

(emphasis added)

- *art 54 – powers and duties of directors*

“(5) The directors have the duties set out in the Act and in particular :

a) each director must act in good faith and in a manner that the director believes to be in the interests of the company ; and

b) a director must not act or agree to the company acting in a manner that contravenes the Act or these rules .”

(emphasis added)

- *art 55 – specific powers of directors*

“(1) without limiting article 54, the directors have the following powers :

a) to carry out the instructions of shareholders ;

b) oversee the general administration of the company ; and

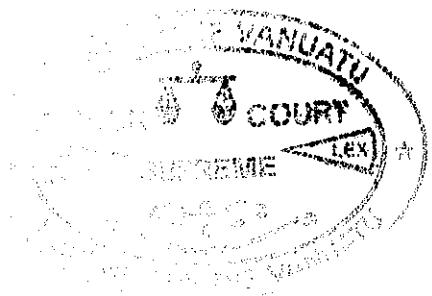
c) execute the company policies ;

d) appoint and terminate the company's senior staff ; and

e) required to properly report to shareholders the audit and financial status of the company on monthly basis ; and

..”

(emphasis added)



- *art 58 – remuneration of directors*

"(1) Directors may receive remuneration and other benefits from the company with the approval of the shareholders by ordinary resolution .

(2) A director must not vote on a resolution concerning remuneration or benefits to be received by him or her .

..."

(emphasis added)

- *art 62 – Vacation of directors office*

"The office of the director is vacated if he or she:

...

g) is voted out of his office by resolution of the majority of the shareholders."

(emphasis added)

- *art 67 – Election of chairperson*

"(1) The directors may elect a chairperson for the purposes of their meetings and determine the period for which he or she is to hold office.

..."

Part 7 – Chief Executive Officer

- *art 69 – Chief Executive Officer*

"(1) The directors are to appoint the Chief Executive Officer (CEO) of the company based on merit.

2) The person appointed CEO of the company must be made in accordance with the prescribed criteria and after consultation with the shareholders .

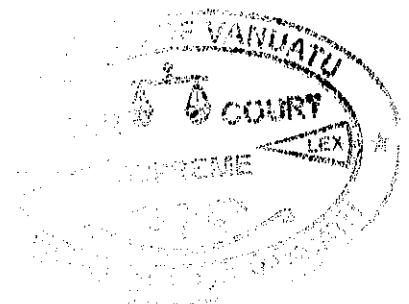
3) Subject to the terms of any agreement entered into , the CEO may be terminated on the following grounds:

a) for failing to perform his or her duties as prescribed under this Articles , and

b) for failing to comply with the directors directives.

4) The CEO's remuneration and allowances are prescribed in schedule 1."

(emphasis added)



Part 8 – Powers and duties of the shareholders

- *art 74 – Power and ownership of the company*

"1) The power and ownership of the company is vested in the shareholders .

2) The power to appoint the directors and the accountant is vested with the shareholders."

(emphasis added)

Part 14 – Miscellaneous

- *art 96 – Remuneration and allowances*

"1) the remuneration of the directors are as set out in schedule 1 .

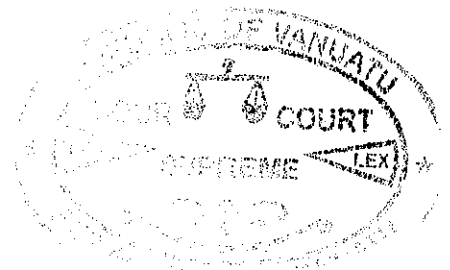
2) The sitting allowances of the Board members are as set out in schedule 1."

(emphasis added)

Schedule 1 - Article 96 Miscellaneous

Remunerations

POSITIONS	ACTIVITY	AMOUNT IN VATU	NARRATIVES
Chief Executive Officer	position	1. VT200,000 2. VT 10,000	Monthly salary Entertainment allowance
Chairman – Board of Directors	position	VT 100,000	Monthly salary
Members of the Board	position	VT60,000	Monthly salary
.....
.....
.....
.....
.....



18. The Articles of Association of NISCOL provide that the company is owned by the shareholders (art 74) and it is the shareholders who have the powers to appoint and also to remove members of the board of directors. (art 51 and 74) . Any remuneration or benefit of the directors must be approved by the shareholders (art 58) and finally a director is specifically prohibited from voting on any resolution concerning remuneration or benefits to be received by him. (art 58)

Directors

19. It is not disputed that the claimants were appointed members of the board of directors of NISCOL pursuant to a resolution of the shareholders. That is admitted by the defendants. The shareholders when appointing directors also have the powers to remove them by ordinary resolution passed at a meeting called for that purpose. (art 51 (4). Mr Sakita in his evidence says that there was an extraordinary shareholders meeting held on 10 April 2013 [Annexure 'B'- Minutes] which considered and approved the removal of the claimants as directors of the company. Their decision was:-

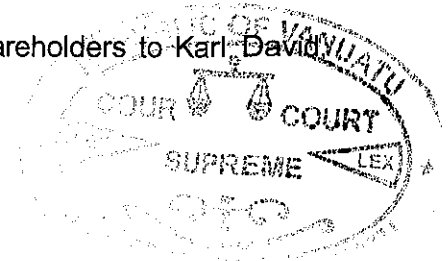
"IT WAS RESOLVED: moved by the Government rep, seconded by PENAMA province and unanimously accepted by the meeting to terminate all the current Board members".

20. At that same meeting the following resolutions were also made:-

"IT WAS RESOLVED: Moved by the LMC rep and seconded by the Government rep and was accepted by the meeting to terminate the current CEO;

IT WAS RESOLVED: Moved by the Government rep and seconded by the PENAMA rep and accepted by the meeting that the positions of CEO, Accountant and chief engineer be will be advertised internally and externally based on eligible criteria to be determined by the interim Board for selected candidates."

21. Following these resolutions notices of intention to remove the claimants as directors were issued on the same date by the chairman of the shareholders to Karl David



~~Sandy Kalven, Livo Langi and Tiro Vanua [Annexure 'C']~~. Similarly on the same date, notice of termination were issued to Hendry Nin as the Accountant and John Morrison Willie as a member of the board of directors of NISCOL and as the CEO. [Annexure 'D' and 'E']

22. On the 23 May 2013, notices of termination were issued to Sandy Kalven, Livo Langi and Karl David as members of the board of directors of NISCOL.
23. The claimants submissions appear to suggest that as directors they are also employees of the company and the provisions of the Employment Act regarding termination of employment applies to them. That submission in my view is misconceived and is rejected. Despite the fact that a monthly salary is prescribed for members of the board of directors, the claimants are not employees of the company. The salary prescribed in schedule 1 is VT 60,000 per month. There is no evidence that their salary of VT 100,000 approved by themselves sitting as the board of Directors on 2 April 2013 [Exhibit C'6'-Annex 'SK4'] was sanctioned by the shareholders. (art 58 (1))
24. Contrary to article 58 (2) of the Article of Association the Claimants sitting as the board of directors approved for themselves the following benefits on 16 April 2016 [Exhibits C'6'- Annex 'SK7'] without the sanction of the shareholders:-

"The Board of Directors therefore resolved that the following be the compensation for the:-

Board Chairman, Sandy Kalven: VT7, 000, 000 plus the Toyota Hilux

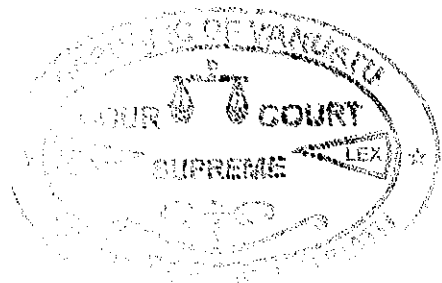
Vice Chairman, Livo Langi: VT 3, 000, 000

Chief Executive Officer, John Morrison Willie: VT7, 000, 000 plus the Toyota Land Cruiser

Accountant, Henry Nin: VT7, 000,000 plus the Toyota Hilux

Board member, Tiro Vanua: VT2, 000, 000

Board members, Karl David: VT2, 000, 000"



25. By their own evidence, the claimants' instruments of appointment annexed to each of their sworn statements states that they are appointed "as a member of the board of directors of the Northern Islands Stevedoring Company Ltd". There is no evidence that they were appointed as employees of NISCOL. Their subsequent removal as directors is in accord with the resolutions of the shareholders pursuant to article 51 of the Articles of Association. There is nothing high handed about their removal. The first defendant by his various letters to the claimants as chairman of the shareholders was simply carrying out the resolutions made by the shareholders. This is confirmed by the second defendant in his amended sworn statement filed on 15 October 2015.

Accountant

26. Article 74 (2) of the Articles of Association specifically provides:-

"2) The power to appoint the directors and the accountant is vested with the shareholders."

(emphasis added)

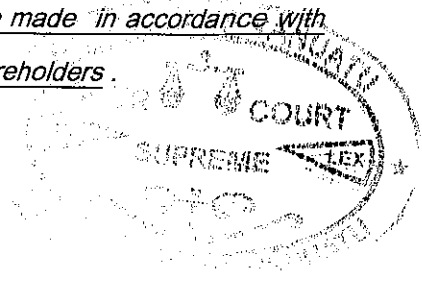
27. There is no evidence provided by the claimants of any resolution of the shareholders appointing Hendry Nin to the position of the Accountant in addition to his appointment as a director. Accordingly, there is also no resolution of the shareholders agreeing that Mr Nin be paid a monthly salary of VT 300,000. The contract was therefore entered into in breach of the provisions of the Articles of Association as it was not sanctioned by the shareholders.

CEO

28. The CEO of NISCOL is appointed by the board of directors .Article 69 1)and 2) provides:-

"1) The directors are to appoint the Chief Executive Officer (CEO) of the company based on merit.

2) The person appointed CEO of the company must be made in accordance with the prescribed criteria and after consultation with the shareholders.



(emphasis added)

29. It is mandatory that the appointment of the CEO must be made in consultation with the shareholders. The prescribed salary of the CEO is VT 200,000 per month as provided in schedule 1 of the Articles of Association. The claimants have not provided any evidence to show that the appointment of John Morrison Willie as CEO was made in consultation with the shareholders or that schedule 1 was amended to prescribe his salary as CEO in the sum of VT400, 000 per month.

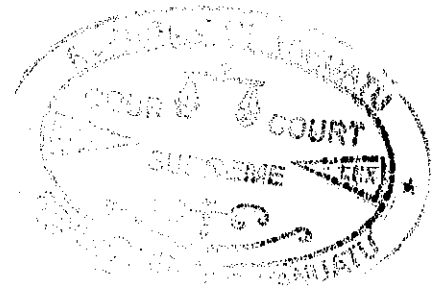
Chairperson

30. The chairperson is elected by the directors (art 67) and his monthly salary as specified by schedule 1 is VT 100,000 a month. The contract of Sandy Kalven as chairperson specifies that as chairperson he is entitled to a salary of VT 300, 000. There is no evidence that schedule 1 was amended to provide the chairpersons salary in the sum of VT 300, 000 per month.

31. Whilst remaining as directors Hendry Nin, John Morrison Willie and Sandy Kalven gave themselves contracts as the Accountant, CEO and chairperson with salaries which are clearly in breach of the provisions of the Articles of Association. Article 54 5) b) provides that:-

"a director must not act , or agree to the company acting in a manner that contravenes the Act or these rules ."

32. The evidence of the first defendant filed on 15 October 2015 is that the three contracts and the salaries specified in each contract were never sanctioned by the shareholders nor the Articles of Association. This evidence is unchallenged by the Claimants. Considering also the evidence of Peter Sakita, I am satisfied that the contracts for the CEO, the Accountant and the chairman of the board are unlawful and unenforceable as they were made in breach of the provisions of the Memorandum and Articles of Association of NISCOL.



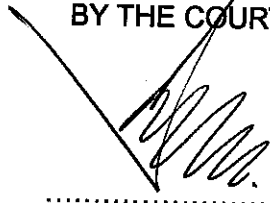
Conclusion

33. The claimants are therefore not entitled to claim for unjustified dismissal for the reasons given. When taking up their directorships of NISCOL, they are bound by its Memorandum and Articles of Association. Their claim for unjustified dismissal fails and is hereby dismissed.

34. The defendants did not argue their counterclaim therefore the counterclaim is also dismissed. I make no order as to costs.

DATED at Port Vila this 26 day of October, 2017

BY THE COURT



D. Aru
Judge

