

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

Criminal
Case No. 20/1909 SC/CRML

**BETWEEN: The Public Prosecutor
Prosecutor**

**AND: Isom Philip and Peter Patty
Defendants**

Date of PLEA: 10th day of August, 2020 at 9:00 AM
Before: Justice Oliver Saksak
In Attendance: Mr Kevin Nathan for Public Prosecutor
Mr Lent Tevi for the Accuseds

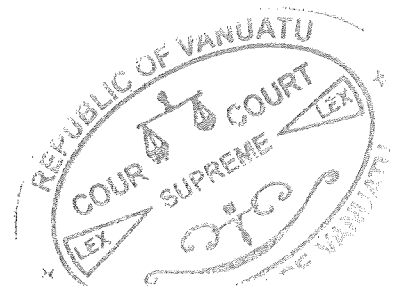
DECISION

Introduction

1. This case was committed for trial today by committal order dated 9th July 2020. The Senior Magistrate reached the view there was a prima facie case established for charges to be laid.
2. A total of 78 charges (Counts 1-78) were preferred. An amended charge was filed on 6th July 2020. The charges are laid under section 26 (1) and section 50 (1) (c) of the Vanuatu National Provident Fund Act [CAP. 189] (the VNPF Act).
3. Today Mr Nathan seeks leave to amend the charges to include section 53 of the VNPF Act.

Preliminary Issue

4. A preliminary issue was raised which the Senior Magistrate did not consider but left it for consideration by the Supreme Court. The issue is whether Mr Peter Patty as Lord



Mayor and Mr Philip Isom can be prosecuted for offences committed allegedly under section 26 (1) and section 51 (1) (c) and (e) of the VNPF Act?

The Law

5. Section 26 of the VNPF Act provides for payments of contribution as follows:-

“26. Payment of contributions

(1) The employer shall pay to the Board the contributions payable in any month for and by all of his employees by the end of the following month in such manner and such form as may be prescribed.

(2) Where the employer fails to pay some or all of the contributions due within the time specified in subsection (1) he shall be liable to a surcharge on the amount of the contributions not so paid at the rate of 5 per cent in respect of each month or part of the month after the due date for which the contributions remain unpaid:

Provided that –

(a) if the amount of surcharge so calculated is less than VT 50 the surcharge payable shall be VT 100; and

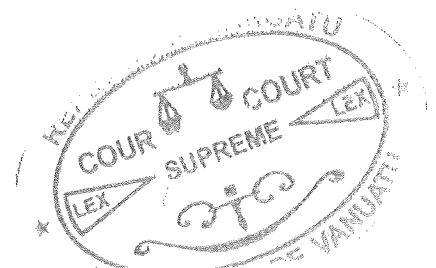
(b) the Board may in any case in which it thinks fit remit in whole or in part the payment of any surcharge due under the provisions of this subsection.”

6. Section 50 of the VNPF Act provides for offences and penalties as follows:-

“(1) Any person who –

(c) fails to pay to the Board in any month any amount which, under section 26(1), he is liable to pay in that month in respect of any employee;

(e) fails to pay to the Board within such period as may be prescribed any surcharge which he is liable to pay under section 26(2);



Shall be guilty of a offence and shall be liable on conviction to a fine not exceeding VT 100.000 or to a term of imprisonment not exceeding 6 months or to both such fine and imprisonment....”

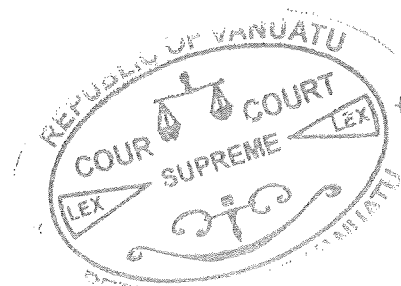
7. Section 53 of the VNPF Act provides for liability of officers of corporations as follows:-

“53. Liability of officers of corporations

Where an offence against this Act or any order or regulation made thereunder has been committed by a body corporate, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer or a partner of the body corporate, firm, society or other body of persons or was purporting to act in such capacity shall, as well as such body corporate, firm, society or other body of persons, be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.” (my emphasis)

Submissions

8. Mr Nathan submitted by virtue of section 2 of the Interpretation Act “ *person*” includes any statutory body, company or association or body of persons corporate or unincorporated. Counsel relied on the cases of Solomon Islands National Provident Fund Board v Russel Islands Plantations Estates Limited [2005] SBHC 167, Unelco Vanuatu Limited v Republic [2016] VUSC 128 and Taurakoto v Batic [1993] VLR 4, [1980-1994].
9. Mr Tevi submitted that pursuant to section 53 of the VNPF Act the accuseds were not at the time of the alleged offendings officers of the Luganville Municipality and therefore could not be liable for failures of payments of contributions for the years alleged being 2001 to October 2018.



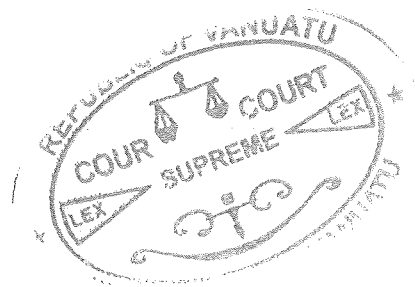
Discussion

10. With respect to Mr Nathan the issue was not whether the Luganville Municipality was liable for non-payments of VNPF contributions for the years alleged. And therefore his submissions on section 2 of the Interpretation Act is not sustainable. It is rejected. The case authorities he cited are not applicable.
11. The issue is whether Mr Patty and Mr Isom were officers of the Luganville Municipality in 2001 through October 30, 2018, to be liable under section 53 of the VNPF Act?
12. The relevant words in section 53 are-

“ Where an offence committed against this Act.... has been committed by any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer...” (my emphasis)
13. It is common knowledge that Mr Patty only occupied the office of the Mayor since 2019 and Mr Isom has occupied the office of Acting Clerk since July 2020.
14. The offendings alleged are for the periods form November 2001 through 30th October 2018. These periods fall outside the periods of occupancy of the offices of the Mayor and the Clerk held by the 2 named accuseds. In my considered opinion Mr Patty and Mr Isom cannot be liable for prosecution under the ambit of section 53 of the VNPF Act.

The Result

15. Accordingly I find there is no prima facie case established against them and I acquit both of them of the 78 charges laid against them.
16. Leave to amend the amended charges is declined.



DATED at Luganville this 10th day of August, 2020.

BY THE COURT

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Oliver Saksak

Judge

