

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

**Civil**  
**Case No. 22/1274 SC/CIVL**

**BETWEEN: Rudy Nelessamba, Anna Toa, Andrea  
Toa, Edmond Joe, Henry Toa, Job  
Ulas, Peter Sine, Jonas Tom, Samuel  
Joe & Tari Avock**

**Claimants**

**AND: Estate of James Yi (deceased)  
represented by Suling Shao as  
Executrix**

**Defendant**

*Date of Trial:* 17 April 2024  
*Before:* Justice V.M. Trief  
*In Attendance:* Claimants – Mrs M.G. Nari  
Defendant – Mr N. Morrison  
*Date of Decision:* 13 May 2024

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**JUDGMENT**

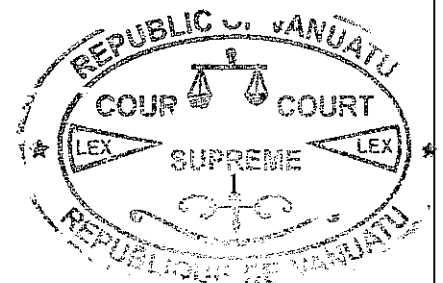
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A. Introduction

1. This was a contested claim for employment entitlements alleged to be owed on cessation of employment.

B. The Pleadings

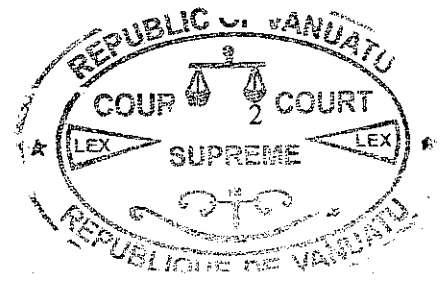
2. The Claimants Rudy Nelessamba, Anna Toa, Andrea Toa, Edmond Joe, Henry Toa, Job Ulas, Peter Sine, Jonas Tom, Samuel Joe and Tari Avock are residents of Luganville and former employees of Heng Tsing Trading, a manufacturing and trade business operated by James Yi.



3. On 1 December 2021, Mr Yi died. The Defendant is therefore his Estate represented by the sole executrix, his wife Suling Shao.
4. The Claimants were employed by Mr Yi for different periods from 2015-2020. They performed similar responsibilities for the kava processing business. They cut, cleaned and packed the kava for export.
5. At the end of 2021, Suling Shao asked the Claimants to stop work pending the grant of probate to her of her late husband's estate.
6. By the Claim, the Claimants are seeking payment in lieu of notice, annual leave and severance allowance. It is also alleged that the Claimant Rudy Nelessamba worked for a further 6 months in 2021. The claims were denied in the Defence. The Defendant stated that the claims would be paid if verified and lawful. It was denied that Mr Nelessamba worked a further 6 months.

C. Evidence

7. Each Claimant's claims was advanced on the basis that they were paid a salary of VT40,000 per month.
8. The Claimant **Rudy Nelessamba** relied on his Sworn statement filed on 14 April 2023 [**Exhibit C1**] and on his VNPF record which showed that he was employed from January 2018 to December 2021 [**Exhibit C1A**]. He is seeking payment of outstanding salary, notice, annual leave and severance allowance.
9. The Claimant **Andrea Toa** relied on her Sworn statement filed on 17 April 2023 [**Exhibit C2**] and on her VNPF record which showed that she was employed from January 2018 to December 2021 [**Exhibit C2A**]. She is seeking payment of notice, annual leave and severance allowance.
10. The Claimant **Job Ulas** relied on his Sworn statement filed on 17 April 2023 [**Exhibit C3**] and on his VNPF record which showed that he was employed from January 2018 to December 2021 [**Exhibit C3A**]. He is seeking payment of notice, annual leave and severance allowance.
11. The Claimant **Peter Sine** relied on his Sworn statement filed on 17 April 2023 [**Exhibit C4**] and on his VNPF record (in the name, "Peter Toka") which showed that he was employed for a year [**Exhibit C4A**]. He is seeking payment of notice VT28,000, annual leave VT30,000 and severance allowance VT40,000, totalling VT98,000.
12. The Claimant **Henry Toa** relied on his Sworn statement filed on 17 April 2023 [**Exhibit C5**]. He is 75 years old and has no VNPF record. He gave evidence that he

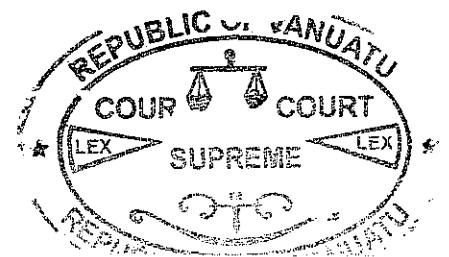


was employed for 5 years. He is seeking payment of notice, annual leave and severance allowance.

13. The Claimant **Anna Toa** relied on her Sworn statement filed on 17 April 2023 [Exhibit C6]. She is 70 years old and has no VNPF record. She gave evidence in cross-examination that she worked from sometime in January 2021 to sometime in December 2021.
14. The Claimant **Edmond Joe** relied on his Sworn statement filed on 8 April 2024 [Exhibit C7] and on his VNPF record (in the name, "Simeon Joe") which showed that he was employed for a year [Exhibit C7A]. He confirmed in cross-examination that he worked for Mr Yi from January-December 2021. He is seeking payment of notice, annual leave and severance allowance.
15. The Claimant **Samuel Joe** relied on his Sworn statement filed on 8 April 2024 [Exhibit C8] and on his VNPF record (in the name, "Samuel Simeon") which showed that he was employed from January-December 2021 [Exhibit C8A]. He confirmed in cross-examination that he and his brother Edmond Joe worked for Mr Yi for the same period of time. He is seeking payment of notice, annual leave and severance allowance.
16. I gave the Claimant **Tari Avock's** Sworn statement filed on 25 April 2024 an exhibit number [Exhibit C9] and his VNPF record (in the name, "Densly Tari Liu Tom") an exhibit number [Exhibit C9A] however he was not present for cross-examination. The VNPF record showed that he was employed from January-December 2021. He is seeking payment of notice, annual leave and severance allowance.
17. I also gave an exhibit number to the VNPF record for the Claimant **Jonas Tom** [Exhibit C10]. He is deceased and had not sworn a statement.
18. Each of the Claimants present were cross-examined.
19. The following documents were tendered into evidence for the Defendant:
  - a) Mr Yi's will [Exhibit D1];
  - b) Exemplification of Probate granted to Suling Shao by the High Court of New Zealand dated 27 April 2022 [Exhibit D2]; and
  - c) Order of the Supreme Court of Vanuatu resealing the grant of probate to Suling Shao [Exhibit D3].

D. Consideration

20. Section 20 of the *Employment Act* [CAP. 160] (the 'Act') provides as follows:



20. *No proceedings may be instituted by an employee for the recovery of remuneration after the expiry of 3 years from the end of the period to which the remuneration relates.*

21. Section 31 of the Act provides as follows:

31. *The employer shall pay to the employee during the annual leave remuneration at least equal to the employee's average remuneration for the 12 months preceding the commencement of the leave:*

*Provided that such remuneration unless the parties otherwise agree need not include any bonuses, overtime pay, expatriation allowances or reimbursement of expenses.*

22. Section 20 of the Act operates in a mandatory fashion as a bar to instituting proceedings for the recovery of remuneration after 3 years from the end of the period to which the remuneration relates, although it does not extinguish the underlying legal right to receive the remuneration: *National Bank of Vanuatu v Cullwick [2002] VUCA 39 at p. 8.*

23. Does "remuneration" include annual leave?

24. In *National Bank of Vanuatu v Cullwick [2002] VUCA 39 at p. 6*, the Court of Appeal held as follows:

*The word "remuneration" is not expressly defined in the Act:..*

...

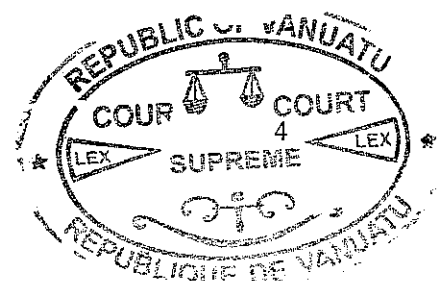
*In our opinion s. 20 is limited in its operation to periodic payments that become due to employees during the currency of a contract of employment. The expression covers ordinary wages paid periodically whilst an employee is at work, but extends to include annual leave and sick leave payments that become due whilst the contract of employment remains on foot: see s. 31.*

*(my underlining)*

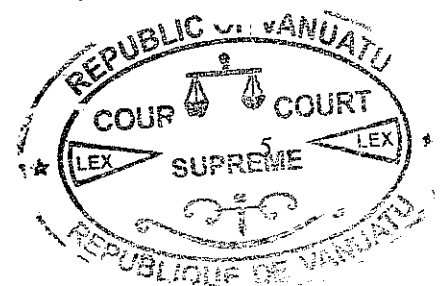
25. Accordingly, the expression "remuneration" covers ordinary wages paid periodically but extends to include annual leave payments which became due whilst the contract of employment remained on foot: *National Bank of Vanuatu v Cullwick [2002] VUCA 39 at p. 6.*

26. An employee is entitled to annual leave only after 1 year of employment: subs. 29(1) of the Act. If an employee seeks payment of annual leave which became due whilst the contract of employment remained on foot, only the annual leave payment for the 3 years prior to the institution of the present proceedings may be recovered: s. 20 of the Act.

27. Accordingly, any claim by the Claimants for the payment of annual leave which arose earlier than 3 years before the present proceedings were instituted is barred by s. 20 of the Act.



28. I turn now to each of the Claimants' claims.
29. I find on the evidence that **Rudy Nelessamba** was employed by Mr Yi from January 2018 to December 2021, a period of 4 years. I find that his claim of employment for an additional 6 months in 2022 is not proved as no VNPF contributions are recorded after December 2021 and the Claimants' accounts were consistent that Suling Shao told all workers to stop in December 2021. In addition, the employer Mr Yi died in December 2021 so there was no longer an employer nor possible employment after December 2021. I find that Mr Nelessambe is entitled to notice VT120,000 (3 months x VT40,000), annual leave VT90,000 (3 years annual leave x VT30,000) and severance allowance VT160,000 (4 years x VT40,000), totalling VT370,000.
30. I find on the evidence that **Andrea Toa** was employed by Mr Yi from January 2018 to December 2021, a period of 4 years. I find that she is entitled to notice VT120,000 (3 months x VT40,000), annual leave VT90,000 (3 years annual leave x VT30,000) and severance allowance VT160,000 (4 years x VT40,000), totalling VT370,000.
31. I find on the evidence that **Job Ulas** was employed by Mr Yi from January 2018 to December 2021, a period of 4 years. I find that he is entitled to notice VT120,000 (3 months x VT40,000), annual leave VT90,000 (3 years annual leave x VT30,000) and severance allowance VT160,000 (4 years x VT40,000), totalling VT370,000.
32. I find on the evidence that **Peter Sine** was employed for 1 year. His claim for notice VT28,000, annual leave VT30,000 and severance allowance VT40,000, totalling VT98,000, is accepted by the Defendant.
33. I find on the evidence that **Henry Toa** was employed by Mr Yi from January 2017 to December 2021, a period of 5 years. I find that he is entitled to notice VT120,000 (3 months x VT40,000), annual leave VT90,000 (3 years annual leave x VT30,000) and severance allowance VT200,000 (5 years x VT40,000), totalling VT410,000.
34. I find on the evidence that **Anna Toa** was employed by Mr Yi for less than a year within 2021. Accordingly, she is not entitled to annual leave payment or to severance allowance. I find that she is entitled to notice VT28,000.
35. I find on the evidence that **Edmond Joe** was employed by Mr Yi from January-December 2021, a period of 1 year. Accordingly, he is entitled to notice VT28,000, annual leave VT30,000 and severance allowance VT40,000, totalling VT98,000.
36. I find on the evidence that **Samuel Joe** was employed by Mr Yi from January-December 2021, a period of 1 year. Accordingly, he is entitled to notice VT28,000, annual leave VT30,000 and severance allowance VT40,000, totalling VT98,000.



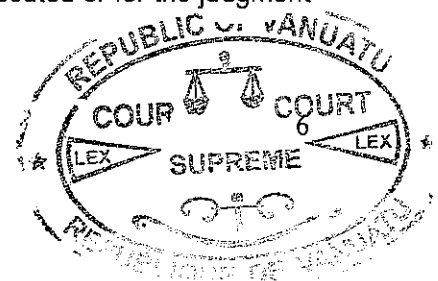
37. **Tari Avock** was not available for cross-examination however his filed sworn statement is evidence in the matter: rule 11.7(1) of the *Civil Procedure Rules*. His VNPF record was also tendered into evidence [**Exhibit C9A**]. The VNPF record shows that Mr Avock was employed by Mr Yi from January-December 2021, a period of 1 year. Although Mr Avock was not available for cross-examination, I consider that I can give weight to his evidence as his account is corroborated by his VNPF record, and even if he deposed otherwise, I consider that I can find his period of employment of 1 year proved by his VNPF record. Accordingly, I find that Mr Avock was employed by Mr Yi for a period of 1 year and that therefore he is entitled to notice VT28,000, annual leave VT30,000 and severance allowance VT40,000, totalling VT98,000.
38. The Claimant **Jonas Tom** is deceased and not represented in this proceeding by an administrator of his estate. He has no lawful entitlement.

E. Result and Decision

39. Judgment is **entered** for the Claimants (but not Jonas Tom) and accordingly, it is ordered that the Defendant is to pay to the following Claimants:
- a) Rudy Nelessamba – VT370,000;
  - b) Andrea Toa – VT370,000;
  - c) Job Ulas – VT370,000;
  - d) Peter Sine – VT98,000;
  - e) Henry Toa – VT410,000;
  - f) Anna Toa – VT28,000;
  - g) Edmond Joe – VT98,000
  - h) Samuel Joe – VT98,000; and
  - i) Tari Avock – VT98,000 (total of VT1,940,000, being the 'judgment sum').
40. The Defendant is to pay interest of 5% per annum on the judgment sum until fully paid.
41. Costs must follow the event. The Defendant is to pay the Claimants' costs of the proceeding as agreed or taxed by the Master. Once set, the costs are to be paid within 28 days.

F. Enforcement

42. Pursuant to rule 14.3(1) of the *Civil Procedure Rules*, I now schedule a conference **at 1pm on 17 June 2024** to ensure the judgment has been executed or for the judgment



debtor to explain how it is intended to pay the judgment debt. For that purpose, this judgment must be personally served on the Defendant.

**DATED at Port Vila this 13<sup>th</sup> day of May 2024  
BY THE COURT**

*VM Trief*  
.....  
Justice Viran Molisa Trief

