IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU

APPEAL CIVIL CASE No 2 of 1995

BETWEEN: Daniel MOUTON

Appellant

AND: SELB PACIFIC LIMITED

Respondent

Mr Juris Ozols for the Appellant
Mr Christian Roger de Robillard and
Mr Jon Baxter Wright for the Respondent
Date of hearing: 28, 29 and 30 October 1996
Date of Judgement: / November 1996

JUDGEMENT OF THE COURT

BACKGROUND

The Appellant was an employee of the Respondent from the 1st August 1987 until the 4th March 1994. His employment during that time was governed by three 2 year service contracts, the last expiring on the 31st July 1993. What contractual obligations, if any, governed the employer/employee relationships after the expiration of the third contract and up to the date of the termination of the Appellant's employment is one of the issues in dispute.

The Respondent is described as an old established and probably the biggest construction company in Vanuatu.

A Mr André François came to Vanuatu from France in 1971 and 3 years later joined the Respondent company. At the time of the trial he was its managing director and one of its principal shareholders.

In 1987 the Appellant while working as a *"Conducteur de Travaux"* for a very large construction firm in France was recruited by Mr François and was employed by the Respondent in Vanuatu in that capacity.

The initial two year contract was renewed for a further two years; likewise upon expiration of that second contract the parties entered into a further two year contract which expired on the 31st July 1993. Despite pressure applied by the Appellant in various forms no further contractual arrangements were entered into between the parties to this dispute.

THE PROCEEDINGS

A. The Appellant's claim

The proceedings instituted by the Appellant were founded on breach by the Respondent of

(i) The Joint Regulation 11 of 1969;

or in the alternative

(ii) The Employment Act 1988 (CAP 160)

and that as a result the Respondent was indebted to the Appellant in the sum of VT 21, 368, 000.

B. The Respondent's Counter claim:

The Respondent by way of Defence and Counter-claim particularised its own losses at VT 102, 704, 000 plus claims for rent of the house occupied by the Appellant; for use of the Respondent's vehicle by the Appellant; and for an injunction to prevent the Appellant from working in the building or construction industry anywhere in the Republic of Vanuatu for a period of 3 years.

The Respondent subsequently filed an amended Defence and Counter-claim increasing its losses to VT 107, 034, 638. The claims relating to the house and vehicle were quantified at an additional VT 1, 021, 395. The period of restraint was reduced in this to 2 years

JUDGEMENT

On the 13th April 1995 Judgement was delivered,

awarding the Appellant:

VT 2, 304, 167 by way of severance allowance but subject to the assessment and possible deduction from that award of earnings by the Appellant between March and May 1994.

and awarding the Respondent:

VT 5, 953, 834 and an injunction restraining the Appellant from exercising his trade in Vanuatu for 2 years.

Both monetary awards were to bear interest at 10%.

An award of costs in favour of the Respondent against the Appellant meant that a total judgment was entered against him for more than 9 million Vatu.

THE CONTRACTS

The three contracts which formed the basis of the employment arrangements between the parties were written in the French language; and apart from the provisions of salary increases were identical. They were entitled as:

> *"Employment contract*
> *In accordance with the provisions of Section 5*
> *of JR 11 of 24 July 1969 on employment in*
> *the Republic of Vanuatu"*

That legislation was repealed prior to the execution of the first contract. The parties agree however that the Employment Act 1988 (CAP 160) is the legislation which is applicable to this dispute.

There are two issues which arise as a result of the translation of the third contract which expired on the 31st July 1993. The first relates to the English meaning of the French word *"sera"*. In section 1 of the contract it is interpreted as *"may"* while in Sections 6 and 11 it is interpreted as *"shall"*. The second issue also concerns Section 1 and the meaning of the words *"tacite reconduction"* which has been translated as *"renewed by tacit agreement"*. There is no dispute with that translation. The sentence in full as translated, and set out in Section 1 of the Third contract and referred to as Exhibit 10 is as follows:

> *"This agreement may be renewed by tacit agreement upon the expiry of the said term unless one or the other of the parties hereto terminates the agreement by giving notice by registered letter three months prior to such date of expiry."*

The real dispute between the parties on this issue is whether the English words *"renewed by tacit agreement"* means an automatic renewal provision of the previous contract for another two years. This interpretation is the foundation of the Appellants claim. On the other hand the French words *"tacite reconduction"*, the Respondent submits, has the special meaning in French law converting the third contract upon expiry into a contract for an unspecified period of time.

The Appellant objects to the interpretation of this French term which has been included in all three contracts and which have all been written totally in the French language. Mr Ozols put it this way:

> *" To import some obscure provisions of French law and to seek to impose them over Vanuatu law is contrary to the Constitution and inconsistent with the development of the laws of Vanuatu".*

"One cannot import bits and pieces of French or English law into Vanuatu"

"Without specific legislative authority isolated provisions of French jurisprudence cannot be added to the Vanuatu legislation".

We believe those objections are misconceived. To simply enquire into the French meaning of *"tacite reconduction"* a term which was accepted by both the Appellant and the Respondent, is not importing the Code Civil of France into the laws of Vanuatu as suggested by the Appellant. We are satisfied that the evidence presented at the trial fully justified the Chief Justice in finding that the third contract upon expiry was then converted into a contract for an unspecified period of time.

As to what Vanuatu law is to be applied to such a contract both parties are in agreement ; it is the Employment Act 1988 (CAP 160).

The Employment Act 1988 (CAP 160).

As the name implies, this Act provides for the statutory duties and obligations to be observed by both employers and employees and the consequences which flow from any breaches that may occur. It is in this context that the Act provides that no contract of employment shall be terminated without notice, (Section 49). This is one of the issues in dispute.

The Appellant on 28 December 1993 went to France for his annual holidays. Prior to his departure he was paid a bonus of VT 700, 000 additional to his normal monthly salary of the same amount. He returned to Vanuatu on the 3 March 1994 and upon reporting to the Respondent the following day was told by Mr François that his employment was terminated. The Appellant says without notice. He certainly received no notice written or otherwise between December 1993 and the 4 March 1994 while he was on holiday in France during which time Mr François had his contact address and telephone number.

The Appellant says this action was in contravention of Section 49 of the Employment Act 1988.

In reply the Respondent relies upon the provisions of Section 50 of the Act, which states as follows:

"In the case of 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"

Relying on Section 50 the Respondent says that the Appellant's employment was rightfully terminated upon the following grounds:

"(i) Moral misconduct in that the Plaintiff failed to use his best endeavours to promote the Defendant's business interests.

(ii) Serious Negligence in the way the Plaintiff administered on behalf of the Defendant various projects for which the Plaintiff was responsible. The Defendant refers to the Particulars of paragraph 17 and 18 hereof.

(iii) Failure by the Plaintiff to properly account to the Defendant for projects under the Plaintiff's control.

(iv) The Plaintiff was habitually neglectful of his duties for which he was engaged. The Defendant refers to the Particulars of paragraphs 17 and 18 hereof.

(v) Wilful disobedience by the Plaintiff of instructions given by the Defendant.

(vi) Lack of skill and care in the Plaintiff's performance of his employment."

As a consequence of those allegations the Appellants misconduct was so serious that the Respondent considered it was entitled and justified in dismissing the Appellant without notice and without any liability on the Respondents part to pay any compensation in lieu of notice.

But the Respondents also relied on Section 55 (2) of the Act which states as follows:

> *"An employee shall not be entitled to severance allowance if he is dismissed for serious misconduct as provided in Section 50"*

The Respondents defence therefore to the proceedings initiated by the Appellant alleged that his "*serious misconduct*" was so serious that he was not entitled to any compensation in lieu of notice; nor to any severance allowance.

It is therefore fundamental to a proper consideration of the opposing issues that both parties have presented to us for resolution, that what constitutes *"serious misconduct"* be identified, in order to interpret those provisions of the Employment Act 1988 relied on by both the Appellant and the Respondent.

Serious Misconduct

The Respondent in its Counter-claim alleges that the Appellant failed to exercise due care and skill in the performance of his duties and also acted in reckless disregard to the business interests of the Respondent. In support of those allegations the Respondent provided

the following particulars which the Chief Justice in his Judgement recognised the Respondent had established:

> *"(a) Failure properly and appropriately to address the complaints of Caillard Kaddour regarding the access road to Lot No. 5 "Clos d'Elluk" which complaints were first brought to the Plaintiff's attention on 3rd March 1993 at the latest, and remained unattended to for a period in excess of ten (10) months.*
>
> *(b) Failure to ensure that the Mitride's house was sited in accordance with the architect's drawings.*
>
> *(c) Failure to comply with the provisions of the General Conditions for Works Contracts in respect of the Santo Roads contracts and failure to carry out and supervise the works with the required skill, care and consideration.*
>
> *(d) Failure to order and/or adequately supervise the ordering of materials to comply with the specifications of the Santo Boat Shed contract, by failing to order two bays of sufficient length to accommodate the cantilevered structure of the two gable ends of the building."*

As a result of those breaches the respondent claimed that it had suffered losses and damages which it quantified as follows:

"(a) Costs of making good the defects on the access road to Lot No. 5 at " Le Clos d'Elluk" carried out under Mr Mouton's supervision	*1, 478, 900 VT*
(b) Loss estimated on Mitride House	*350, 000 VT*
(c) Additional unrecoverable costs incurred on the Santo Boat Shed	*341, 855 VT*
(d) Additional unrecoverable costs incurred on the Santo Road	*4, 370,549 VT"*

In the concluding stages of this appeal, which has already occupied 3 days, Mr Ozols has informed us from the Bar that the losses referred to and claimed by the Respondent in (a) to (d) above have not been the subject of verification by him despite requests and applications in this regard both to Counsel for the Respondent and to the Court. That such an elementary entitlement, for whatever reasons should be denied to one of the parties in a civil litigation suit defies any rational explanation.

For ourselves we are placed in an impossible situation more particularly when the parties were entitled to rely on the Court for a resolution to this dispute between Mr François and Mr Mouton who have worked together so successfully for the financial advantage of the Respondent. How can we ever commence to assess whether the losses upon which the respondent relies were the result of serious or minor misconduct. There is no doubt that a loss of 6, 000, 000 VT is of a serious consequence.

However a loss of 60, 000 VT may in the overall context of the facts of the case be of no consequence. If the Applicant has been denied access to the accounts of the Respondent for whatever reason then the Appellant has been subjected to a most elementary denial of justice; and we as a consequence prevented from doing justice to both the Appellant and the Respondent. We have not investigated how this extra-ordinary state of affairs has come about. That it has, means the Judgement on the Counter -claim in favour of the Respondent has been achieved without the Appellant being allowed to inspect the balance sheets and all other relevant documentation that should have been made available upon discovery. Regrettably it means that not only are we prevented from making any assessment of the losses and damages which the Respondent says it has suffered but we, as a result, cannot commence to evaluate whether the alleged misconduct is serious.

Injunction

The Judgement dated 13 April 1995 also granted an injunction in the following terms:

> *" .... an injunction restraining Mr Mouton from exercising any activity in connection with his trade as a "Conducteur de Travaux" in Vanuatu for the next two years from this order and further from divulging to any third party the "secret formula" of SELB".*

This Court on the 4 October 1995 stayed the enforcement of that injunction pending the hearing of this appeal. While we are prevented from reaching any final conclusions in this dispute for the reasons already expressed, there are no such difficulties in making a determination on the injunction that was granted. Clause 3 (3) of the Contract of Employment states as follows:

> *" In the event that the agreement is determined by Mr Daniel Mouton or by reason of gross misconduct on his part, he shall strictly refrain from pursuing any activity related to his profession in the Republic of Vanuatu for a period of two years from the termination of this contract".*

This provision on its face, is subject to the same impediment that we have previously discussed viz whether the misconduct alleged is "gross". However we -believe this issue does not of itself necessarily rely upon an assessment of misconduct. The fact that this Court is

prevented from making a final determination because the Respondent has failed or refused to make available information on discovery to which the Appellant is entitled must be a relevant consideration on whether an injunction should be granted. It has been suggested that Mr François has a *"secret formula"* and as such is entitled to the protection of an injunction which would deprive the Appellant from doing the only work he knows in the country where he has resided for the last 9 years. Tendering for road construction work and for building houses can never be related to some special secret formula or the accolade of a trade secret. When Mr François speaks of his secret formula, that is puffery in the extreme. For those reasons the appeal by the Appellant is allowed in part and the injunction is cancelled.

Interim Conclusion

Because we are unable to proceed to a final judgement for the reasons already expressed, we consider that some interim orders are necessary in order to reflect that the Appellant has a judgement the final determination of which he is now prevented from enforcing.

At the commencement of this now very prolonged dispute the Respondent made an offer of settlement, the terms of which are detailed in Exhibit 57. Two of those terms are as follows:

1. 3 months salary at VT 700, 000 per month in lieu of notice;

2. Holiday pay at VT 834, 615.

There are other entitlements also. That offer was subject to restraint of trade provisions in Vanuatu for 3 years. Those negotiations were never consummated There has never been any dispute that holiday pay was due and owing to the Appellant. There has been inconsistency as to the actual amount. The figure of VT 834, 615 in the offer of settlement would appear to be the correct amount.

The three months salary referred to in Exhibit 57 and totalling VT 2, 100, 000 is a figure less than the Judgement awarded to the Appellant by the Chief Justice as severance pay. As long as the Respondent has recourse to the assets of the Appellant both in Vanuatu and France we propose to make an interim order both as to the holiday pay and the 3 months salary in lieu of notice.

Finally Mr de Robillard has provided us with a chronology of events subsequent to the Judgement issued on the 13 April 1995. We have identified that document as C.A.1. We refrain from making any comment on the events disclosed other than to stay all proceedings detailed in the chronology and to order an immediate release of the car belonging to Komeco Limited.

There will therefore be orders as follows:

(a) The sums of VT 834, 615 holiday pay together with VT 2, 100, 000 salary in lieu of notices to be paid by the Respondent to the Appellant on or before the 1 December 1996 pending final judgement, when these amounts will be either credited or debited to the Appellant;

(b) The immediate release of the Peugeot 505 to Komeco Limited the owner of that vehicle;

(c) The cancellation of the injunction against the Appellant issued on the 13 April 1995;

(d) An order for discovery by the Respondent of all documentation relevant to the proper quantification of the following contracts viz The Clos d'Elluk; the Mitride House; the Santo Boat Shed; the Santo Road. Full discovery is to be made by the Respondent prior to the 1 December 1996;

(e) An order that no applications shall be herein after instituted that are in anyway related to these proceedings without the leave of this Court;

(f) These proceedings are adjourned to the next sitting of the Court of Appeal;

(g) Costs are reserved.

Justice ROBERTSON
Judge of Appeal

Justice MUHAMMAD
Judge of Appeal

Justice DILLON
Judge of Appeal

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