IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

CIVIL APPEAL CASE No. 2 OF 1997

In the Matter of the Constitution of the Republic of Vanuatu
And
In the Matter of the Vanuatu National Provident Fund Act [CAP.189]
And
In the Matter of an Application by DINH VAN THAN for declaratory and injunctive relief regarding the purported removal by the Minister of Finance

Between : DINH VAN THAN of P.O.Box 205, Port-Vila, Efate in the Republic of Vanuatu

Petitioner and Applicant

And : THE MINISTER OF FINANCE, Port-Vila, Efate in the Republic of Vanuatu

First Respondent

And : VANUATU NATIONAL PROVIDENT FUND BOARD

Second Respondent

And: GOVERNMENT OF THE REPUBLIC OF VANUATU represented by its Attorney General

Third Respondent

And : PETER SALI

Fourth Respondent

Coram : Hon. Justice Bruce Robertson
Hon. Justice John von Doussa
Hon. Justice K. Mataskelekele

Counsel : Mark Hurley for the Petitioner
Ishmael Kalsakau for the Respondents

JUDGMENT

In the Court of Appeal list for the annual session there were two matters Civil Case 2 of 1997 and Civil Case 4 of 1997, neither of which it was necessary or appropriate for the Court to hear for reasons which we have separately outlined.

In respect of 4 of 1997 a Judge of the Supreme Court sitting alone referred to the Court of Appeal four agreed questions of law which would assist in the hearing of the substantive matter in that case which is Constitutional Petition 119 of 1997.

We note in respect of that case that leave has been granted to amend the 1st Respondent so that the proceeding is now against "the Minister of Finance, Port-Vila, Efate in the Republic of Vanuatu" and that no reference is included to the name of a particular holder of that Office at some point of time. Except in the most exceptional circumstances, whenever proceedings are instituted against Ministers or other Government Officials, it is the Office which should be named as the party and not a particular incumbent of the Office.

The questions upon which the assistance of the Court Appeal was requested to help with the eventual hearing of this case were as follows :

First question :

Was it within the powers of the Minister to remove the Petitioner as a member of the Board appointed under s. 3(1) on any ground other than 3(3) and particularly whether the provision of s. 21 of the Interpretation Act could be called in aid.

The Vanuatu National Provident Fund Act [CAP 189] contains specific provisions about the composition of the Board:

"COMPOSITION OF THE BOARD

3.(1) *The Board shall consist of -*

(a) six members appointed by the Minister and who shall be-

(i) two persons employed by the Government one of whom shall be a representative of the Ministry responsible for finance ;

(ii) two representatives employers not being persons employed by the Government or by the Board ;

(iii) two representatives of employees not being persons employed by the Board ; and

(b) the General Manager, ex-officio member.

(2) Subject to subsections (3) and (4) members of the Board other than the General Manager may be appointed for a term of 3 years or for such shorter period as the Minister may in his discretion in any case determine.

(3) If the Minister is satisfied that a member appointed under subsection (1)(a)-

(a) has been absent from 2 consecutive meetings of the Board without the written consent of the Chairman ;

(b) has become insolvent ;

(c) is incapacitated by physical or mental illness ;

(d) has been convicted of a crime involving moral turpitude ; or

(e) is otherwise unable or unfit to discharge the function of a member ;

the Minister may by notice published in the Gazette declare the office of the member vacant.

(4) A member appointed by the Minister in accordance with subsection (1)(a) may resign by giving not less than 30 days notice in writing to the Minister."

S. 21 of the Interpretation Act [CAP 132] provides :

"POWER TO APPOINT INCLUDES POWER TO REMOVE

21. *Where an Act of Parliament confers power on any authority to make any appointment that authority shall also have power (subject to any limitations or qualifications which affect the power of appointment) to remove, suspend, reappoint or reinstate any person appointed in the exercise of the power."*

If s.21 is read without any restriction or control it would makes the whole of s.3(3) unnecessary and meaningless. If a Minister has a complete discretion then there is no sense in the Parliament listing the particular circumstances in which a Minister may act.

Mr Kalsakau's answer to that is that the Vanuatu National Provident Fund Act does not include any powers of termination. He submits that s.3 is only about a Minister declaring the office of a member of the Board vacant, therefore he contents this does not preclude the Minister using the general power under s.21 of the Interpretation Act to terminate.

With respect we are of the view that this argument is a distinction without a difference. The power of appointment to this Board is for a term of 3 years. It is clear that Parliament intends that person will continue to serve for the whole of that term. On a Board of this nature where stability and continuity are so important there are good policy reasons lying behind the statutory provisions.

Because under s.3(1) the make-up of the Board has been organised so as to reflect the diversity of interests which needs to be covered, if a person having been appointed under one of the categories in s.3(1)(a) no longer fulfils the qualification which was necessary for the appointment (and they are foolish enough not to immediately resign) it would be open to a Minister to exercise the power under s.21 of the Interpretation Act.

That apart we are of the view that the only power of the Minister is to follow the steps which are outlined in sub-section 3. If the Minister is satisfied that any of the criteria (a) to (e) exist then the Minister has a discretion by Notice published in the Gazette to declare the Office of the member vacant. That is to effectively terminate that person's membership of the board. That is the only basis upon which that can occur.

Second question :

Was it within the power of the Minister to remove the Petitioner as the Chairman of the Board under section 4(1) so long as he remains a member of the Board ?

Section 4 provides :

"POWERS OF THE BOARD

4.(1) The Minister shall appoint from among the members other than the General Manager a Chairman and a Deputy Chairman of the Board.

(2) The Chairman and Deputy Chairman shall each serve as such until their term as member expires and may be reappointed.

(3) Where the Chairman is absent or otherwise unable or unfit to discharge his functions the Deputy Chairman shall have and exercise all the powers of the Chairman under this Act."

The words of the section are clear and ambiguous.

Section 4(2) provides that once a person has been appointed as Chairman or Deputy Chairman they shall serve as such until their term as a member of the Board expires.

We are again of the view that this clear and unambiguous statement in the Act means the provisions of the Section 21 of the Interpretation Act cannot be contemplated. If a person is the Chairman, then so long as they remain a member of the Board they will continue to be Chairman.

There is no power for a Minister to decide that a person shall cease to be a Chairman but continue to be a member of the Board. If the Vanuatu National Provident Fund Act contained only s.4(1) the Minister would have an ability to appoint or dismiss a person as Chairman or Deputy Chairman so long as they continue to be a member of the Board. Section 4(2) however must be given meaning. It is clear that the discretion would otherwise which one have anticipated and expected has specifically been removed. Any person holding Office as Chairman continues to be the Chairman so long as their term in the Board continues.

The third question was :

Was the Minister required to give prior notice of his intention to declare the Office of the Petitioner as a member vacant under s.3 (3) specifying the facts said to constitute the ground, to give the Petitioner an opportunity to respond before making a decision, and give reasons for a decision.

Learned counsel before us were of the view that the basic principles of public and administrative law had application. The principles of natural justice are such that any Minister contemplating action under s.3(3) of the Vanuatu National Provident Act must necessarily advise a person of factual circumstances which he was of the view could satisfy any of the enumerated criteria. It was acknowledged that this need not be attended by any particular formality. A letter or other form of written notification which encapsulated those factual issues which could be said to fulfil any of the criteria would be sufficient. It was also acknowledged (and we confirm) that an opportunity for a response must be provided to ensure that a Minister was not acting upon a misapprehension or incorrect information or failing to fully appreciate a circumstance of relevance.

Having advise of the matters which will be considered and having provided an opportunity for a response, (and this may well have to happen within a matter of a very short time period) it is the Minister who then must be satisfied. It is his assessment of a situation which is relevant.

It is to be noted that s.3(3) is not even then absolute. The Minister still has a discretion as to whether he will in all the circumstance declare the Office vacant.

The substantial variation in the submissions of counsel was on the obligation of a Minister, having decided to declare the Office vacant, to give reasons for his decision.

This is a special function which is vested in the Minister and we are not persuaded that the law can or should impose some rigid or extensive obligation in that regard. However, the Minister's action will always be reviewable by the Court and therefore it is essential that the basis upon which the Minister operated is recorded and transparent. The issue which the Court will be concerned about include whether :

- the Minister considered all relevant matter and did not considered irrelevant matter ;
- that he used the power for a proper and not an improper purpose ;
- that the decision taken was a decision which in law was reasonable - one which a rational Minister in the circumstances could have reached ;

the Court will never be concerned to substitute its own judgment for that of the Minister but merely to be in a position where it can assess and determine that the statutory power has been lawfully exercised. To the extent that information is necessary so such a judgment can be made then some brief note of reason will be required.

The fourth question was :

Is the decision made by the Minister on the 11th August 1997 reviewable by the Supreme Court acting in pursuance of Art.61 and 53(1) of the Constitution?

We have found ourselves unable to answer this question in any detailed way. The possibility of seeking a constitutional petition is a unique mechanism within the Republic of Vanuatu. The words of the Constitution are very wide. It is clear that it may be applied for and used even though they are alternative remedies available under the law.

It has become apparent in this Session that because of the provisions of Order 61 (which require an application for leave to be made before a person applies for a prerogative writ) counsel are filing constitutional petitions (which do not require leave) so as to avoid that hurdle.

We do not encourage this approach. It is clear that the framers of the constitutional provision of this country wanted to provide a mechanism whereby any person denied those fundamental and important right preserved under the Constitution could always have a means to approach the Court. There are signs that this important ultimate safeguard is being inappropriatly used. We have learned that Constitutional Petitions have been issued naming Judges as well as parties. It would only be in the most extraordinary circumstances that this course of action would be appropriate.

It is the judgment of the Judges which should be challenged not the individual office holders as Judges. If they have acted in some way which is wrong or inappropriate then their judgment should not stand. The citing of a Judge in a Constitutional Petition (as well as being in conflict with the Constitutional recognition of judicial independence under the Constitution) will mean that the Judges will have to request the Attorney General on their behalf to apply to have them struck from the proceedings. If not they will simply abide the decision of the Court. It is of the very nature of the separation of power and the fundamental precepts of the doctrine of judicial independence the Judges do not become part of the litigation process or become personally involved in cases before the Court.

On a similar basis we are troubled to find that a reasonable and legitimate challenge to the exercise of a statutory power by a Minister is reviewed by the issuing of a Constitutional Petition. A traditional application under the law where the legal questions and issues can be determined would be much more sensible.

In the present case we lack a factual basis to know whether it can be said that this action is necessary or appropriate. As we indicated to counsel, if one reads the words of the provisions of the Constitution literally and absolutely, they are without limit. Virtually any activity in the life of Vanuatu which was the cause of grievance by somebody could be framed in a way to make a constitutional petition. That is demeaning of this important mechanism intended for matters of substantial import which cannot otherwise conveniently be dealt with. There is a danger of seriously debasing the currency of constitutional petitions if they are resorted to when there is no need because the normal processes of the law are more that sufficient to deal with the issue.

We can do no more than say that this matter may be capable of being brought within the technicality of the constitutional petition but whether it is prudent wise or a good use of that important mechanism is a question we cannot comment upon at this stage.

DATED AT PORT-VILA, this 7th DAY of OCTOBER 1997

BY THE COURT

J.B. ROBERTSON J. J.W. von DOUSSA J. K. MATASKELEKELE J.

REPUBLIC OF VANUATU COUR D'APPEL — COURT OF APPEAL