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

Civil Appeal Case No. 27 of 2003.

BETWEEN: RICHARD LO trading as LCM
Appellant

AND: ALICK SAGAN
Respondent

Coram: **Hon. Chief Justice Vincent Lunabek**
Hon. Justice Bruce Robertson
Hon. Justice John W. von Doussa
Hon. Justice Daniel Fatiaki
Hon. Justice Patrick Treston

Counsels: Mr. Nigel Morrison for the appellant
Mr. Hilary Toa for the respondent

Hearing Date: 28th October 2003.
Judgment Date: 31st October 2003.

JUDGMENT

This appeal concerns the monetary entitlement of the respondent from the appellant, his former employer, consequent upon the termination of his employment by the appellant on 8th January 1998.

The respondent entered into a contract of employment with the appellant on or about 5th January 1990. At that time the respondent gave up permanent employment with another company to work for the appellant. By letter dated 5th January 1990 addressed to the appellant the respondent set out the conditions upon which he would enter into employment with the appellant. The appellant agreed to those conditions by signing the letter. The letter reads:

"5th January 1990.

(a) Premature termination of the contract of employment **VT29,184,000**

(b) Breach of the additional agreement-failure to pay for the respondent's house **VT14,800,000**

(c) Breach of additional agreement-failure to pay out a bank loan on the respondent's house **VT2,516,769**

(d) Breach of the contract of employment-improper deductions from salary and allowances during a period of sickness in 1993 ..... **VT107,000**

(e) Loss of future bonus that would have been earned if the contract of employment had run until 31st December 2010 ....**VT28,620,000**

TOTAL **VT75,227,769**

The appellant denied liability for all parts of the claim. The proceedings came on for hearing in Luganville. In a reserved judgment the learned trial judge dismissed the claims in paragraphs (a), (b), (c) and (e) above. On the claim in paragraph (d) the trial judge held that the claim was not statute barred, and held that the amount claimed had been underestimated. The learned trial judge made awards on additional items not mentioned in the pleadings. In the result the amounts set out below were awarded to the respondent:

1. Wrongful deductions during sickness VT120,000
2. Balance of severance payment VT245,000
3. Balance of notice period VT210,000
4. Unpaid salary 1990/1998 ..... VT2,270,000
5. Unpaid child allowance 1990/1998..... VT1,920,000
6. Damages for unexpired term of contract VT990,000

TOTAL VT5,755,000

The appellant now appeals against the whole of the award. There is no cross-appeal by the respondent on those aspects to the claim that were disallowed.

We deal first with the award made in item 6 above, and then deal with the following items in numerical sequence.

Damages for unexpired term of contract (Item 6)

It is convenient to deal with this item first as it appears to have been the main topic of argument at trial. The issue between the parties was whether the contract of employment was for a fixed term, or for an unspecified period. The Employment Act [CAP. 160] recognizes both kinds of contracts of employment and provides differently for each.

The learned trial judge noted that s. 15 of the Employment Act provides that the maximum duration of employment that may be stipulated or implied in any contract shall in no case exceed 3 years. This section is dealing with contracts of employment for a fixed term. His Lordship also noted that under s. 9 of the Act a contract may be made in any form whether written or oral provided that the contract of employment for a fix term exceeding six months shall be in writing and "*shall state the name of the parties, the nature of the employment, the amount and mode of payment of remuneration, and where appropriate any other terms or conditions of employment including, rations, transport and repatriation.*"

His Lordship held that the letter of 5th January 1990 constituted a written contract of employment. There is no dispute about the correctness of that finding.

His Lordship then considered whether the contract was for a fixed term. He noted that by acknowledging that the contract was for a period "*about ten fifteen or twenty years if necessary to*" the terms of the contract were inconsistent with the provisions of s. 15 of the Employment Act. However His Lordship noted that the appellant did not raise any objection to those words when he signed the letter of 5th January 1990. He said: "*within the bounds of the law, the Defendant (the appellant) was in fact and in law agreeing to a contract of at least more than six months and not more than three years. That was a fixed contract. But where it makes reference to about ten, fifteen or twenty years if necessary "to" the only possible construction i can place on that is that it became an implied term of the fixed contract that it should be a renewable contract.*"

His Lordship therefore held that there was initially a fixed term contract for three years which met the requirements of s. 15 of the Employment Act. Thereafter the contract was renewed for successive periods of three years. The contract was in its third renewal period when it was terminated. The termination occurred 11 months before the expiration of the third term. His Lordship held that as the appellant did not allow the third term to run its course, the appellant had broken the contract. His Lordship therefore awarded the respondent remuneration for the remaining 11 months of the term, namely the sum of VT990,000.

The appellant at trial contended that the contract was for an unspecified period, and could be lawfully terminated pursuant to s. 49 of the Employment Act on three months notice or on a payment of three months remuneration in lieu of notice. A payment purporting to be three months remuneration in lieu of notice was paid to the respondent at the time of termination. The appellant contended that the contract of employment had therefore been lawfully brought to an end. The appellant has advanced the same argument before this Court.

We are unable to agree with the learned trial judge that the contract of employment was for a fixed term. A fixed term contract must not exceed three years. It is plain from the letter of 5th January 1990 that the parties contemplated that the contract could run for a significantly longer period. The words "*I am ready to work for you about ten, fifteen to twenty years if necessary to*" can be given no other meaning. Those words are contrary to an intention to enter into a contract for fixed period, let alone one fixed for a period as short as three years.

There is nothing in the letter which could be construed as contemplating a series of renewable contracts for three year terms.

His Lordship did not discuss in his judgment how, as a matter of law, successive three year terms would come about. There is no suggestion in the letter or in the evidence that the parties agreed to an option to renew. An option to renew would require agreement as to which party had the option and when and how it was to be exercised. The notion that the parties could agree to an option to renew a contract is well recognized in law. However this does not appear to be the line of reasoning relied on by His Lordship.

His Lordship appears to have held that the parties entered into a contract that imposed on each of them from the outset an obligation to recognize successive three year terms. If such an agreement was entered into, in our opinion it would offend s. 15 of the Employment Act, as in reality, there would be an agreement for a contract of employment exceeding three years.

In our opinion the only interpretation which can be given to the letter of 5th January 1990 is that it constituted the terms of a contract of unspecified duration. Accordingly, it was a contract that could be lawfully terminated on three months notice, or on a payment of remuneration in lieu of such notice. In the events which happened, the contract of employment was lawfully terminated in this way, and this is so even if there is now a dispute between the parties as to whether the three months remuneration in lieu of notice was calculated on the correct figures.

In our opinion the award of VT990,000 as remuneration for the unexpired third term of the contract must be set aside.

Wrongful deduction during sickness (Item 1)

The learned trial judge held that certain of the deductions which had been made from the respondent's remuneration and allowances in October or November 1993 were not unlawful. However, he considered that during those periods the remuneration received by the respondent had been incorrectly calculated, and that the respondent should have received an extra VT120,000 during the period of his illness. It is to be noted that this was not the claim pleaded or argued at trial by the respondent, and, further, that the calculation made doubled up on the award for the incorrect payment of salary and child allowances made in items 4 and 5 of the award. However, there is a more fundamental ground raised by the appellant, namely that claims in respect of the period in 1993 are statute barred.

There are two potentially relevant statutory time limits. The first is under s. 20 of the Employment Act which provides that no proceedings may be instituted by an employee for the recovery of remuneration after the expiry of three years from the end of the period to which the remuneration relates. In a pre-trial ruling the learned trial judge held that s. 20 did not bar the

respondent's action. That ruling was made at a time when it was thought that the time limit in s. 20 was discretionary. That view was over-ruled by this Court in *The National Bank of Vanuatu v. Cullwick, Civil Appeal Case No. 11 of 2002*. However, counsel for the appellant has not invited us to revisit the ruling in this case. The other time limit arises under s. 3 of the Limitation of Actions Act, No. 4 of 1991 which provides that a claim for damages in contract must be brought within six years of the cause of action arising. A claim for incorrect payment of salary and allowances would constitute a claim for damages for breach of contract, and would be covered by that section. The present proceedings were not commenced until approximately nine years after the alleged incorrect payments.

The learned trial judge said in relation to this aspect of the claim that as the action was founded on simple contract it was not time barred. With respect to the judge, that conclusion is plainly wrong. The claim was brought years out of time, and on that ground alone must fail. This ground of appeal also succeeds.

Balance of severance and notice payments (Items 2 and 3)

The learned trial judge considered that these payments had been wrongly calculated using a basic rate of VT55,000 per month whereas in accordance with the letter of 5th January 1990 a basic rate of VT70,000 should have been used. His Lordship therefore calculated that the payments of severance and notice should have been as follows:-

- Severance/half salary (VT35,000) X 7 years VT245,000
- Notice/VT70,000 X 3 months VT210,000

For the purpose of these grounds of appeal the appellant accepts the gross calculation, but points out that whilst his Lordship had described the amounts he calculated as being balances due, he gave no credit for the actual payments for severance and notice which totaled VT379,125. These two items in the award must therefore be reduced by this sum, and the award in respect of items 2 and 3 must be reduced from a total of VT455,000 to VT75,875.

Unpaid salary and allowances (Items 4 and 5)

On these items the learned trial judge said:-

> *"The evidence of the defendant is that the plaintiff was paid a basic salary of VT50,000 per month. The plaintiff was not paid child allowances as agreed but he was paid housing allowances, travel allowances and output bonus or gratuities. The monthly payroll sheet for the year 1994 shows clearly those facts tendered into evidence as exhibit D5. There is no evidence as to how much the plaintiff was paid in 1990 when he commenced work with the defendant. Despite that, I am satisfied that the defendant did not perform in accordance with the contract by not paying the Plaintiff's salary of VT70,000 plus child allowances of VT20,000."*

His lordship then calculated the basic salary remuneration that would have been received over the full period of employment from January 1990 at VT70,000 per month, and purported to deduct the actual payment of basic salary to arrive at the total sum awarded of VT2,270,000 in item 4. His Lordship also allowed VT20,000 per month for child allowance for the full period of employment from January 1990 to arrive at the total of VT1,920,000 awarded in item 5. No consideration was given to the reality that the majority of the amounts allowed would have been statute barred.

The primary ground of complaint raised by the appellant on these grounds of appeal is that these claims were not pleaded nor were they even hinted at in evidence or addresses in the course of the trial. The respondent's claims raised in the pleadings and at trial were directed to future losses, not past losses. The respondent made no complaint about the payments of remuneration and allowances in the past. The reason why he did not do so appears to lie in his Lordship's observations in the passage from the judgment set out above that the respondent was not paid child allowances as agreed but was paid housing allowances, travel allowances and output bonuses or gratuities. The wage sheets in exhibit D5 disclose that in each of the pay periods concerned the respondent received various allowances and bonuses such that his total receipts significantly exceeded VT90,000 each month.

It is fundamentally important in the system of pleading and procedure that governs the conduct of litigation in this Republic that Courts determine only the issues raised between the parties in the pleadings and at trial. The

rules of procedure governing the pleadings and trials have been carefully developed through experience over a long period of time, and formulated to ensure that the basic principles of natural justice are observed. It is fundamental to a fair trial that each party is made aware of the case of the opposing party or parties, and given a fair opportunity to answer the opposing case. Those fundamental principles were broken in the present case. The respondent did not make the claim allowed by the trial judge. The appellant had no notice of the claim, and it is for that reason that the evidence did not disclose the amount of payments made to the respondent in 1990 or in other periods not covered by exhibit D5. The adequacy of those payments was simply not an issue, as the respondent made no complaint about them.

As a possible short fall in past payments was not raised as an issue at trial, the awards in items 5 and 6 must be set aside. Further, apart from this technicality, the awards under items 5 and 6 should in any event be set aside as the evidence at trial, such as it was, does not establish that the respondent was underpaid. On the contrary, whilst the salary, allowances and other items that made up his total monthly pay package were differently described from the letter of 5th January 1990, the total payments exceeded the aggregate amounts specified in the letter of 5th January 1990. Significantly, throughout the period of his employment the respondent received each month a "*housing allowance*" of VT25,000, and substantial "*output bonus*" over and above his "*basic salary*".

In summary therefore, save for VT75,875 being the balance of severance and the notice payments, the appeal succeeds against all of the other items allowed in the award.

There were two further issues canvassed in argument before this Court. The first concerned an award of interest made by the trial judge at the rate of 12% on the assessed damages from the date of judgment until the judgment was paid. Although in the past it has apparently been commonplace to claim interest at the rate of 12% in the pleadings, and for awards in this magnitude to be made on judgment sums, it must be recognized that interest rates have fallen greatly in recent times, and, generally speaking, an interest rate as high as 12% can no longer be justified.

The other issue concerned costs. It will be remembered that the respondent claimed in excess of VT75,000,000 but at trial received an award of VT5,755,000. Notwithstanding that the respondent substantially failed in his action, the trial judge awarded him the costs of the action. Even if the award in the Court below had been upheld, we consider that the order for costs was unduly favourable to the respondent. The respondent should have suffered a significant penalty in costs to recognize that the claims he made turned out to be exorbitant, and that the appellant was inevitably put to additional costs in defending those parts of the claim which failed.

The outcome of this appeal is that the judgment in favour of the respondent will be reduced to only VT75,875. In these circumstances we consider that there should be no order as to costs in the Court below. As the appellant has succeeded in this appeal the respondent should be ordered to pay the costs of the appeal.

The appeal is therefore allowed. The judgment in the Court below of VT5,755,000 is set aside and in lieu thereof judgment is entered in favour of the respondent for VT75,875. The order for costs in favour of the respondent in the Court below is set aside and in lieu thereof it is ordered that there be no order as to costs in the Supreme Court. The respondent must pay the appellant's costs of the appeal.

Dated at Luganville, this 31st day of October 2003.

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Hon. V. Lunabek CJ.

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Hon. J. B. Robertson J.

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Hon. J. von Doussa J.

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Hon. D. Fatiaki J.

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Hon. P. Treston J.

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL