

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

**CIVIL APPEAL CASE No.23 OF 2009**

**BETWEEN:** PUBLIC SERVICE COMMISSION  
First Appellant

**AND:** DIRECTOR GENERAL OF HEALTH  
Second Appellant

**AND:** THOMAS ISOM  
Respondent

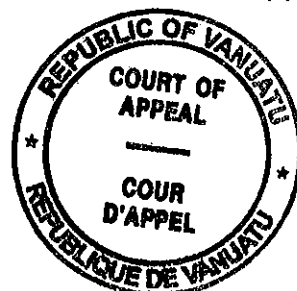
**Coram:** Chief Justice Vincent Lunabek  
Justice Bruce Robertson  
Justice John von Doussa  
Justice Oliver A. Saksak  
Justice Nevin Dawson  
Justice Daniel Fatiaki

**Counsel:** Mr Justin Ngwele for the Appellants  
Mr Saling Stephens for the Respondent

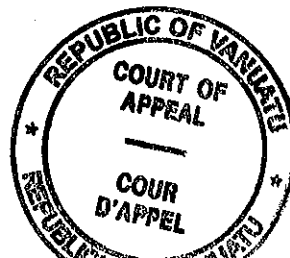
**Date of hearing:** 23<sup>d</sup> April 2010  
**Date of Judgment:** 30<sup>th</sup> April 2010

**JUDGMENT**

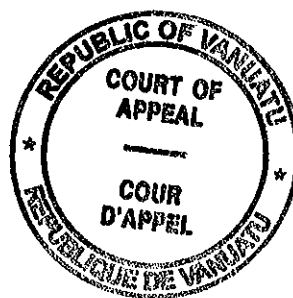
1. This is an appeal against the judgment of Clapham J dated 27<sup>th</sup> October 2009 in which the trial Judge quashed the decision of the Appellant removing and demoting the Respondent from his position as Director of the Southern Health Care Group, and awarded costs in favour of the Respondent on a solicitor and client basis.
2. The Appellants seek orders that-
  - (a) the whole judgment dated 27<sup>th</sup> October 2009 be set aside;
  - (b) Civil Case No.216 of 2005 be dismissed; and
  - (c) the Respondent pays the Appellants' costs of the appeal and also costs in the court below.



3. In Civil Case 216 of 2005 the Respondent as Claimant, filed claims for judicial review of two decisions made by the Public Service Commission (First Defendant and the Director General of Health Department (Second Defendant). The first decision was made on 18<sup>th</sup> May 2005 which resulted in the Respondent being removed from his post as Director and demoted to a new salary level of P.18.1. The decision was conveyed to the Respondent by letter dated 20<sup>th</sup> May 2005. The second decision was in respect of the appointment of a new Director by the First Defendant to replace the Respondent. He sought orders to quash the two decisions, and an order for payment of damages and/or compensation interests and costs.
4. At the hearing before the trial judge it became apparent that the Respondent was now in alternative employment. As such the trial judge considered that damages were a more appropriate remedy for the Respondent than a quashing order and urged the parties to discuss damages with a view to resolving the whole matter by negotiation. However, the parties did not come back to the trial judge with any intimation that they would take up negotiation. No evidence to support a damage claim was adduced. Accordingly, no order for damages was made. The trial judge simply quashed the First Defendant's decision to remove and demote the Respondent but declined to make other orders apart from a costs order.
5. The appeal was framed on four grounds which we summarise as follows:-
  - (a) That the trial judge misdirected himself generally by dealing with the merits of the Respondent's claims when he should have only reviewed the process of how the decision of the First Appellant was made.
  - (b) That the trial judge had made several legal errors in reaching his findings when there was nothing in the pleadings or evidence to support such findings.
  - (c) That the decision of the trial judge was affected by apparent bias by being influenced by political matters and other irrelevant considerations.
  - (d) That the trial judge had erred by awarding costs against the Appellant on a solicitor-client basis.



6. Prior to hearing the substantive appeal the Court heard counsel in respect of the Appellants' application for enlargement of time filed pursuant tot Rule 9 of the Court of Appeal Rules.
7. Mr Stephens made submissions opposing the application on grounds of tactical delays which amount to a denial to the Respondent in enjoying the fruit of his judgment.
8. The Court noted the sworn statement of counsel for the Appellants filed in support of the application. Counsel contended that as there was only a short delay, no prejudice would arise against the Respondent. The Court noted that the decision on appeal is dated 27 October 2009. The Notice of Appeal and Grounds is dated 2<sup>nd</sup> December 2009. It appears that it was filed on the same date.
9. In civil cases the period of appeal is 30 days from the date of issuing the decision. In this case the 30 days' period expired on 25<sup>th</sup> November 2009. Until 2<sup>nd</sup> December, the appeal was late by seven days. We noted the explanation by counsel as to why the appeal was not filed in time. Whilst it was an unfortunate oversight on the part of counsel, the delay was not such as to cause prejudice to the Respondent, he already being in alternative employment. Leave was accordingly granted.
10. Turning now to the substantive appeal we note that Appellants extensive submissions in respect of the four grounds. Grounds 1 and 2 are considered and determined together as they are somewhat interrelated.  
It was submitted by counsel that on the basis of Willie v. Public Service Commission [1993] VUSC4: [1980-1984] VLR 634 the trial judge was wrong in examining the reasoning of the First Appellant and substituting his own opinion instead of simply reviewing the process. It was also submitted that the trial judge had made several errors in finding that-
  - (a) there was a denial of natural justice;
  - (b) procedures were not followed;



- (c) the person making the decision had no power to do so;
- (d) the decision was not authorised by the Public Service Act;
- (e) the decision involved an improper use of power which relies on irrelevant consideration;
- (f) the decision involves an error of law;
- (g) the decision was induced by fraud;
- (h) the decision was contrary to law.

It was further submitted that there was nothing in the pleadings or the evidence to enable the trial judge to make the findings that he did, and in respect to Ground 3 it was submitted that the trial judge's use of the words "The overall impression... of ...political matters in the background" indicated an apparent bias on the part of the trial judge.

11. The relevant parts of the decision of the trial judge begins in the second paragraph at page 3 where the trial judge said:

"... An important aspect of this case is the attitude of the Minister of Health as reflected in his letter of 23<sup>rd</sup> October 2004 which is as follows:

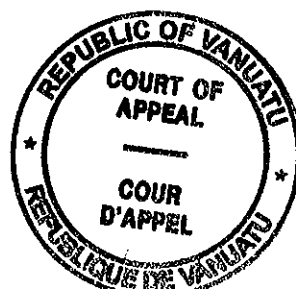
*"Mr Jean Alain Mahe  
Chairman  
Public Service Commission*

*URGENT – URGENT*

*Dear Mr Mahe,*

***Re: Disciplinary actions against the Director of Southern Health Care Group Mr Thomas Isom, the Manager of Assets Management of MoH Mr Morrison Bule and the Manager VCH, Mrs Leipakoa Matariki.***

*It has come to my knowledge that the abovementioned officers should be under disciplinary actions following serious allegation such as:*



- *Misconduct of Health Policy and false declarations concerning items donated by Australian Rotary Club.*
- *Misappropriation of Public Funds.*

*By way of such action, my advise and instructions would be that Mrs Maturine Carlot-Tary be appointed as Acting Director of Southern Health Care Group in order for the Minister to apply disciplinary measures towards Mr Morrison Bule and Mrs Leipakoa Matariki in accordance with the Public Service Act. Mr Jameson Morokoe will be appointed acting to Assets Management while Dr. Edward Tabisari at the Management of VCH.*

*Would you please take immediate action to this matter as I forward to acknowledge you disciplinary action as soon as possible.*

*Yours sincerely,*

*Hon. Keasipai Song  
Minister of Health"*

12. The trial judge then set out at third paragraph on page 6 of the decision section 19B of the Public Service Act (the Act) being the specific provisions for the removal of directors general and directors. The relevant parts are-

***"19B. Procedure for removal of directors-general and directors***

1. *The Commission must not remove a director-general or director from office unless the Commission has received a complaint in writing from the Prime Minister, a Minister, the Ombudsman or the Auditor-General:*
  - (a) *alleging that there is a ground or are grounds for his or her removal under subsection 19A(1); and*
  - (b) *setting out the evidence in support of the allegations..."*

13. Then at the second paragraph on page 7, the trial judge said:

*"The procedure to be followed where there is consideration for the removal of directors-general and directors is covered by the above section 19B. It*



*requires that the Commission must not remove a person in that category unless the Commission has received a complaint in writing from the Prime Minister, a Minister, the Ombudsman or the Attorney (sic) General. There must be an allegation that there is a ground or are grounds for his or her removal under subsection 19A(1)".*

14. His honour continued at paragraph 3-

*"In summary 19A(1) provides the Commission with a discretion to remove a director-general or director-*

*(a) because his or her performance is unsatisfactory; or*

*(b) because of misconduct on his or her part; or*

*(c) because of physical or mental incapacity, or (d) if he or she becomes bankrupt."*

15. The trial judge continued at 4<sup>th</sup> paragraph from page 7 onto page 8-

*"The applicable provision that the First and Second Defendants rely upon would seem to be 19A(1)(b) "because of misconduct on his or her part". So the complaint to comply with section 19B must set out the allegation. In this instance an allegation relating to misconduct and set out the evidence in support of the allegation."*

16. Further at the last sentence of paragraph 3 at page 8 the trial judge said:

*"This letter clearly makes allegations but proceeds on the basis that they are established and does not set out the evidence in support of the allegations. So clearly the procedure is faulty."*

17. Counsel for the Appellants was asked whether there was evidence in support of the allegations raised submitted along with the letter itself. No sufficient answer or at all was given by counsel. Further counsel for both the Appellants and the Respondent were asked whether they made any submissions written or oral to the primary judge raising section 19 of the Act.

Mr Stephens told the Court he had written submissions but did not hand them up to the trial judge. Mr Ngwele said he made only oral submissions. It was



however discovered on the original file that both counsel had made written submissions and that it was in fact Mr Ngwele who had raised sections 19A and 19B in his written submissions.

18. Once section 19 of the Act was raised, the trial judge was obliged and entitled to analyse the facts and evidence in light of the legal requirements as set out in section 19B(1)(a) and (b). The trial judge did that and found that the procedure was faulty resulting in the quashing of the decision. Was he in error? The Court concludes that he was not. The appeal therefore fails on grounds 1 and 2.
19. There remains grounds 3 and 4 which are somewhat again interrelated. It was alleged by the Appellants that there was apparent bias in the remarks of the trial judge at paragraph 2 of page 11 of the decision that-  
*"...the overall impression that one gets from the evidence is that there were political matters in the background."*
20. It was further submitted these comments indicated apparent bias on the part of the trial judge to the extent that it affected his independent mind and led to the award of a solicitor and client costs against the Appellants.
21. The remarks by the trial judge may have been a little robust but they were not such as to amount to bias perceived or apparent that affected his decisions. He decided this case because the clear statutory framework required by section 19B had not been followed. Comments on peripheral matters would not lead a fair-minded observer who knew all the facts to conclude that anything had gone wrong in the critical process. The appeal must also fail on ground 3.
22. As to the issue of costs awarded on a solicitor and client basis, Mr Stephens accepted that he did not seek costs on that basis. Although it is correct as submitted by Mr Stephens that costs remain in the discretion of a judge, we find that in this case there was nothing which entitled the trial judge to justify an exercise of discretion to award solicitor client costs against the Appellants.



There was nothing exceptional about the case. The appeal against the cost order succeeds and the appeal will be allowed only on ground 4.

23. The Appellants raised the issue of lack of pleadings to enable the trial judge to deal with issues which were extraneous or which had irrelevant considerations.
24. We have examined the grounds of the judicial review claim and have found that-
- (a) the allegations raised in paragraphs 5, 8 and 9 involve issues of denial of natural justice.
  - (b) Paragraph 6 raises non-compliance with section 29 of the Public Service Act by the Appellants.
  - (c) Paragraph 7 raises the issue of lack of jurisdiction by the Appellants to deal with the Respondent's matter which in itself is very wide in nature.
  - (d) Paragraph 10 raises the issues of removal, demotion and new appointment being made in breach of the Public Service Act based "on political grounds."
  - (e) Paragraph 11 raises allegations of breaches the Public Service Act, natural justice principles and of Article 5 of the Constitution.
25. While those allegations were raised, some of which had extensive and wide implications and considerations, it is difficult to see how the trial judge had made legal errors when he made findings on the issues raised by counsel for the Appellants which are specified from (a) to (h) under paragraph 10 of this judgment.
26. The Appellants pleaded to these in their defence and filed some evidence in support of their defences. The trial judge considered that evidence and made findings that the Appellants now challenge. We are not persuaded that in doing so, the trial judge had made legal errors.
- The case turned on statutory interpretation. The Judge recognised there could be down-stream consequences with perhaps even further litigation. He was encouraging the parties to try and short circuit matters but he made no orders,





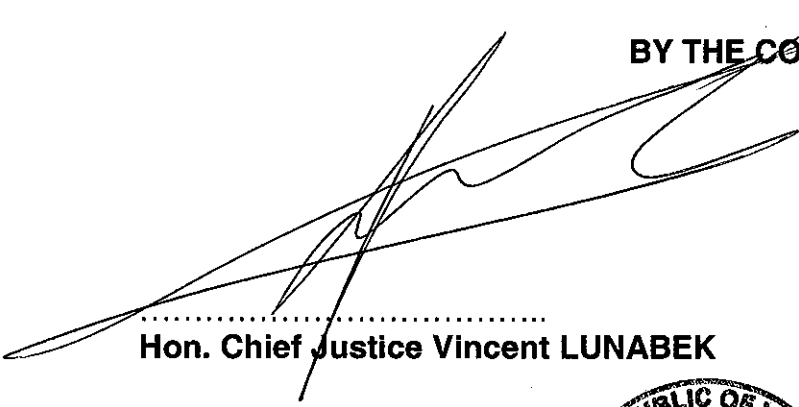
nor did he compromise or affect their ability to do what they will to resolve matters in the way they wish.

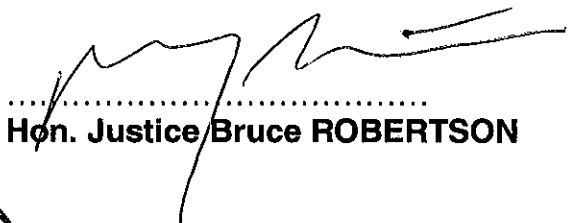
27. In the final conclusion, the substantive appeal is dismissed but the appeal is allowed only on ground 4 in respect to costs. The order for cost is set aside and substituted by the following:

“The Appellants will pay the respondent’s costs of the appeal, and costs in the Supreme Court on the standard basis.”

**DATED at Port-Vila this 30<sup>th</sup> day of April 2010**

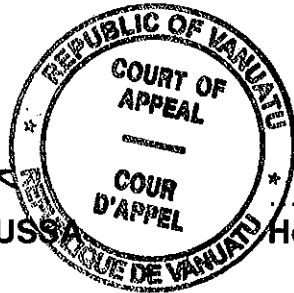
**BY THE COURT**

  
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**Hon. Chief Justice Vincent LUNABEK**

  
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**Hon. Justice Bruce ROBERTSON**

  
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**Hon. Justice John von DOUSS**

  
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**Hon. Justice Oliver A. SAKSAK**



  
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**Hon. Justice Nevin DAWSON**

  
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**Hon. Justice Daniel FATIAKI**