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

Civil Appeal Case No. 1334 of 2016

BETWEEN: REPUBLIC OF VANUATU
Appellant

AND: COLIN NATONGA
First Respondent

VANUATU NATIONAL SPORTS COUNCIL
Second Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice Bruce Robertson
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan

Counsel: *Mr Lennon Huri (SLO) for the Appellant*
Mr Less Napuati for the First Respondent
No appearance by or on behalf of the Second Respondent

Date of Hearing: *Friday 15th July 2016 at 1:30 pm*
Date of Judgment: *Friday 22nd July 2016 at 4 pm*

JUDGMENT

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1. This is an appeal from a determination by the Judge in the Supreme Court that he did not have jurisdiction to determine an application to set aside consent orders in the proceedings before him. On the basis of that determination the application before him was withdrawn.

2. The proceedings in the Supreme Court consisted of a claim by Mr Natonga that his employment as the Chief Executive Officer of the Vanuatu National Sports Council (*"VNSC"*) was unlawfully terminated on August 6th 2013. Mr Natonga's claim was for a total sum of Vt 13, 361, 096 comprised of the balance of his salary payable for the remaining balance of his 3 year employment contract and various other allowances and entitlements.

3. A statement of defence was filed by the State in respect of the claim. The nature of that defence is not relevant to this appeal. Various sworn statements were filed by the parties and settlement negotiations were undertaken by the parties in respect of the matter.

4. The Solicitor General, acting for the State, made an offer of settlement of Vt 5,656,705 and on June 12th 2015, Mr Natonga's counsel Mr Napuati wrote to the Solicitor General's office accepting that offer. The letter stated:

> *"Thank you for your letter dated today.*
>
> *We accept your client's offer of Vt 5, 656,705 and the payment of the same by instalment. Kindly process the first payment of Vt 1 million by next week.*
>
> *Yours faithfully.*
>
> *Less John Napuati.*
>
> *Cc – Collin Natonga."*

5. On June 17th 2015, the Solicitor General wrote to both Mr Napuati and Mr Boar (counsel for VNCS) attaching a consent order for signature by both counsel on behalf of their clients. The consent order provided for payment by the State to the claimant in the sum of Vt 5, 656, 705 *"inclusive of costs as full and final settlement of this matter"*. It made provision for an initial payment of Vt 1 million to be paid by the end of June 2015 with monthly installments at the

end of each month from July 2015 in the sum of Vt 500,000 until the total amount was fully paid. Mr Boar, for VNSC did not sign the consent order and negotiated for inclusion of a provision for payment of his legal costs for advice given to VNSC.

6. By letter dated 21st September 2015, Mr Boar advised the Solicitor General that he would accept Vt 500,000 as payment for his costs and he enclosed an amended consent order bearing his signature. That consent order was identical to the order sent to him earlier by the Solicitor General with the exception of the addition of the following clause:-

> *"4. The first and second defendant shall pay Vt 500,000 to Boar Law, on a Solicitor Client basis and as full and final legal costs in this matter."*

7. In a sworn statement dated March 30th 2016 and filed in the Supreme Court, Mr Lennon Huri deposed that he was counsel in the State Law Office personally involved in dealing with this matter. He stated that on February 24th 2016, he prepared consent orders and had the Director General of the Ministry of Youth and Sports sign them at his office in the Ministry. In his oral submissions before this Court Mr Huri confirmed that the Director General signed the consent order in his presence. A copy of that consent order, unsigned, was provided to the Court. It omitted the clause relating to payment of Mr Boar's costs which had been included by Mr Boar earlier. The consent order was then sent to Mr Boar under cover of a letter from the Acting Solicitor General on February 25th 2016. While one might have expected that letter to have made reference to the deletion of the clause relating to Mr Boar's costs, it did not do so.

8. According to Mr Huri's statement the State Law Office received a letter from Mr Napuati dated March 7th 2016, which referred to a sum of Vt 13 million payable by the State. Mr Huri

then contacted the Supreme Court to obtain a copy of the consent order and upon receipt of that order noted that it provided that the State was to pay to the claimant the sum of Vt 13 million rather than the sum of Vt 5,656,705 set out in the order previously sent to Mr Boar, In his sworn statement Mr Huri stated that the Ministry did not consent to the payment of Vt 13 million to the claimant and that the consent order had been altered. At that point the State then filed an urgent application to set aside the consent order on the grounds that Mr Natonga or the VNSC had misled the Court by altering the content of the consent orders as agreed by the parties.

9. It is contended by the State, and there appears to be no dispute in respect of this matter, that at the hearing of the urgent application the Supreme Court Judge stated that he could not hear the urgent application as the matter had been concluded when the parties executed the consent orders. On that basis the urgent application was withdrawn.

Discussion

10. It is abundantly clear from the summary of events referred to above that this is a matter which raises very serious issues regarding possible abuse of Court processes, the integrity of the judicial process and possible fraudulent activities. There are no reasons given by the Judge in the Supreme Court as to why the Court would not have jurisdiction to set aside a consent order in these circumstances, however that is not surprising given that the application was withdrawn.

11. We have raised with counsel for the State why no sworn statement was filed by the Director General given that it appears to be contended by Mr Natonga and/or VNSC that there was some type of arrangement agreed to by the Director General that explains the Vt 13 million

payment. It would have assisted the Court greatly to have had a sworn statement from the Director General clarifying this. Ultimately however that is not necessary in order to determine this appeal as the real issue is whether the Supreme Court has jurisdiction to revisit or set aside a consent order in circumstances such as those which presented themselves here.

12. We are of the clear view that the Court does have such jurisdiction. The Court has clear power to regulate its own processes and to act in a manner which avoids abuse of process. This case also raises the possibility that there may have been conduct on the part of one or more counsel for the parties which is inconsistent with their duties as officers of the Court. We stress that this is only a possibility as we appreciate that there is further evidence which would need to be heard. In his written submissions Mr Napuati submitted that a consent order, once signed between the parties and endorsed by the Supreme Court, renders the Supreme Court judge functus officio. He referred to the Supreme Court decision in Peter v. Daniel [2014] VUSC 218 as authority for that proposition. Mr Napuati resiled from that position during the course of the hearing and conceded that the Court would have jurisdiction to revisit the matter where for example, there was a clear error or misunderstanding between the parties. While Mr Napuati referred to the fact that there was a lack of agreement in this case as to whether or not there was a mistake, that is not something in itself which could deprive the Court of a jurisdiction which it otherwise held.

13. In Peter v. Daniel, Harrop J dealt with the situation where consent orders had been filed in the Supreme Court but where one party subsequently complained that the terms of the orders were not those which he had discussed with his counsel prior to the hearing and that he had not been personally involved in negotiating the settlement. The application before Harrop J sought orders temporarily suspending the consent order and amending it.

14. In considering the issue Harrop J stated:

> *"10. I do not consider that I have jurisdiction to consider Mr Peter's application for suspension of the consent order or to amend it.*
>
> *11. Once the consent order was made, then in my view the Supreme Court became functus officio so far as questions of determination of the merits of the case were concerned. The only jurisdiction the Supreme Court has thereafter is as to enforcement of the judgment entered by consent. There is no material difference in my view between the making of the consent orders and the making of orders at the end of a reserved judgment following a defended trial.*
>
> *12. If any party is dissatisfied with an order of the Supreme Court then the remedy is to appeal to the Court of Appeal. There is no jurisdiction for a party to ask the Supreme Court for a review or reconsideration of that judgment.*
>
> *13. Quite apart from that, it is fundamental to the civil justice process that the Supreme Court Judge is able to rely – without enquiry – on the word of counsel and on documents signed by counsel as being clopped with the authority of appropriate instructions from his or her clients".*

15. We consider that while finality is certainly important there are circumstances which justify the Supreme Court, as part and parcel of protecting the integrity of its own processes, in revisiting or correcting a consent order where there appears to have been clear error or mistake, or, as is suggested in this case, fraud. We are accordingly of the view there are exceptions to the general principle referred to by Harrop J.

16. We would also add that this is not a case where the Court is being asked to revisit the merits of the case. This is a case involving a matter of process and the integrity of the courts process in circumstances where there is, on the face of it, clear irregularity or worse.

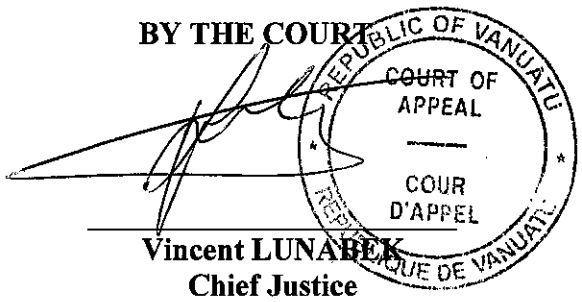
17. For these reasons we uphold the appeal, set aside the consent order and remit the application to set aside the consent orders back to the Supreme Court for determination.

18. We would add finally that we were concerned by the fact that Mr Boar, as counsel for the Second Respondent did not appear at the hearing despite having appeared for the Second Respondent at the call over of all appeals at the beginning of the week. Given the particular circumstances of this case, we had expected Mr Boar to appear and regard it as a serious discourtesy to the Court that he did not do so.

19. Costs are awarded against the first respondent in favour of the appellant with costs to be agreed within 14 days failing which they are to be taxed.

DATED at Port Vila this Friday 22nd day of July, 2016

BY THE COURT



Vincent LUNABEK
Chief Justice