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

Civil Appeal Case No. 17/739CoA/CIVA

BETWEEN: PETER FOGARTY
Appellant

AND: AIR VANUATU (OPERATIONS) LIMITED
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John William von Doussa*** ***Hon. Justice Ronald Young*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice Dudley Aru*** ***Hon Justice David Chetwynd*** ***Hon. Justice Paul Geoghegan***
Counsel:	*Mr. Robert Sugden for the Appellant* *No appearance for the Respondent*
Date of Hearing:	*13th July 2017*
Date of Judgment:	*21st July 2017*

JUDGMENT

1. This is an appeal against the dismissal of the appellant's claim in the Supreme Court. The appellant sought to recover VT9 million being remuneration which he alleged was due to him under a written employment contract entered into on 14th October 2011 under which he was to be appointed Chief Executive Officer of the respondent Air Vanuatu (Operations) Ltd (AVOL) for a period of 6 months.

2. When the appeal was called, counsel for the appellant announced his appearance but there was no appearance for counsel on the record by the respondent, or by anyone on its behalf. The failure of counsel to appear at the appointed time for a listed court hearing is not only very discourteous to the court, but places the court and other parties in difficult positions. The time and resources of the court are wasted; the expectations of other parties and witnesses are frustrated, often at considerable wasted cost; and the party whose representative is not at court to explain the situation will likely be penalized by a costs order.

3. In this case the court received a medical certificate shortly before the listed time saying that the respondent's counsel is "*sick and not fit to work for 2 days*". The respondent's counsel had courteously advised the court on the day preceding

the listing that he was suffering a bad cold affecting his breathing and if his situation did not improve he would ask for his case to be adjourned. Regrettably he failed to put in place a contingency plan for alternative representation of the respondent should his condition not improve nor was there any application for an adjournment of the appeal.

4. It must be recognized that where a matter is listed for hearing and neither a party or his counsel attend, the court may proceed in the absence of the party. Whether this happens will depend on the circumstances of each case and a consideration of issues that balance the situation of the other parties, of witnesses and of the court against the need to ensure that the matter is fairly dealt with.

5. In this instance the court proceeded to hear the appeal in the absence of the respondent and its counsel. The court did so as the respondent had filed a submission contesting the appeal which said simply: "*In response to the appellant's appeal and his submissions, the respondent disputes his appeal and submissions and relies on the judgment being appealed*". The court had the judgment, and had also read the appellant's submissions and appeal book. It seemed to the court that the appeal turned on the application of statutory provisions to facts which were not in dispute and the respondent would suffer no injustice if the appeal went ahead.

6. The claim by the appellant arose out of events which took place at a meeting of directors of AVOL on 14th October 2011. The events leading up to that meeting, and what occurred at and after it also gave rise to the litigation considered by the Court of Appeal in Isleno Leasing Company Ltd v. Air Vanuatu (Operations) Ltd [2016] VUCA 43. The trial judge adopted the outline of those events described in that judgment to set the background to the appellant's claim. We adopt the same course.

7. The issue before the Court of Appeal concerned a Deed of Release signed after the Board Meeting which was intended to settle a longstanding dispute between Isleno Leasing Company Ltd and AVOL over the lease of an aircraft. The Court of Appeal said:

> *"There had been ongoing discussions between the parties and the principal shareholders and directors of AVOL about a claim by Isleno for damages arising from the lease of the aircraft. The shareholders of AVOL are representatives of the Government who hold the shares in that capacity. Both sides were expressing a desire to settle the claim. On Friday 14th October 2011 there was a board meeting of AVOL. …*
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> *At that meeting two things happened that were central to the issues canvassed at trial. First, a resolution was passed concerning Isleno's claim. Secondly, the CEO, Mr. Laloyer, who was present at the meeting when it started and when the Isleno resolution was passed was suspended and Mr. Fogarty was appointed as the new CEO. A possible reason for this was discussed in evidence. It was suggested that it related to an Enquiry into an unrelated aircraft incident.*

Two versions of the minutes of the meeting were tendered in evidence. Whilst the text concerning the discussion and resolution on the Isleno's claim differ neither expressly authorized settlement of the claim on particular terms or the execution of a deed of release. One version of the minutes is unsigned, and another is signed by the chairman of the meeting, Mr. Mariasua. It seems he was removed from that office by the government shareholders of AVOL very soon after the meeting ...

And later, in relation to the execution of the Deed, the Court of Appeal observed:

"Then followed the execution of the Deed. It bears a type-written date 17th October 2011 (the following Monday). It has been signed by Mr. Fogarty on behalf of AVOL and his signature has been witnessed by Mr. Mariasua. ...

Because of the sudden removal of Mr. Laloyer and the appointment of Mr. Fogarty as CEO AVOL's case put in issue whether Mr. Fogarty was duly appointed to the office of CEO. ...

8. The present proceedings directly concern the appointment of Mr. Fogarty, the appellant, as Chief Executive Officer.

9. The appellant's evidence before the Supreme Court was that he was summoned into AVOL's office late on Friday 14th October 2011 and then signed an employment contract at about 7:30pm. Mr. Mariasua as chairman of the AVOL Board signed the contract on behalf of AVOL. The provisions of the contract commenced as follows:

"WHEREAS the employer has agreed to employ the employee under the conditions as set out in the Annexure "A" and in the position of Chief Executive Officer/Managing Director Acting.

AND WHEREAS the employee has agreed to his being employed by the employer pursuant to Annexure "A"

NOW THIS EMPLOYMENT CONTRACT SAYS:

1. *Employee shall take up employment with the employer in the position of Chief Executive Officer/Managing Director Acting;*
2. *The employee shall take up his new appointment with the employer on 14th October 2011 for period of 6 months. Any extension of such employment shall be at the sole discretion of the employer,*
3. *The remuneration of the employee shall be VT1,500,000 per month".*

10. Annexure A of the contract specified the commencement date as 14th October 2011.

11. Whilst the contract describes the positions to which the appellant was appointed as "*Chief Executive Officer/Managing Director Acting*" the minutes of the Board meeting make no reference to the appointment of the appellant as Managing Director. The minutes of the meeting record:

"The meeting resolved to appoint Mr. Peter Fogarty as Acting Chief Executive Officer of Air Vanuatu (Operations) Ltd until further notice".

12. As the contract provided, the appellant took up his employment immediately after the contract was signed on 14th October 2011 and sought to fulfill his role during the following days. However he says his endeavours were frustrated by the former CEO, Mr. Laloyer who continued to occupy the office of the CEO and said that he had instructions that he should remain in that position.

13. There was evidence at trial that at about 7:30pm on Friday 14th October 2011 the Prime Minister and the Minister of Finance (two of the shareholders) in a "*travelling minute*" terminated and removed from office four of the seven directors of AVOL who had participated in the Board meeting earlier that day. Mr. Mariasua was one of those removed.

14. The change in composition of the Board, and its consequences for the continued management of AVOL led to circumstances which prevented the appellant's attempts to exercise the role of CEO, and also that of Managing Director. The appellant says he realized that politics were involved. He did not want to get entangled in it. He realized he had been prevented from performing the duties required by the employment contract by the shareholders and he considered his contract to be repudiated.

15. At trial the purported appointment of the appellant to the roles of both Acting CEO and Acting Managing Director led to consideration of the powers of the meeting of directors on 14th October 2011 to suspend Mr. Laloyer from his role as Managing Director, and to appoint a replacement. In our opinion attention to this topic was not relevant to the claim by Mr. Fogarty for remuneration as Chief Executive Officer and unfortunately served to confuse the issues necessary to be decided about his role as CEO. The role of CEO was a separate one capable of being performed even if the purported appointment as Acting Managing Director was not in accordance with the Companies Act [CAP. 191] and the Articles of Association of AVOL. In so far as the trial judge found that there were irregularities in the removal of Mr. Laloyer as Managing Director and the appointment of the appellant as a director, we do not consider those irregularities provided a defence to the appellant's claim for remuneration as Acting CEO.

16. The defences to the appellant's claim at trial that did not confuse the position of Managing Director with that of CEO were; that Mr. Mariasua in his capacity as chairman of the Board had no authority to execute the employment contract as he had been removed from office by the resolution of the shareholders contained in the travelling minute; that the employment contract was unlawful and invalid because the appellant did not have a work permit; and because the employment contract was procured by fraud based on an alleged conspiracy to defraud AVOL by signing the Deed of Release with Isleno Leasing Company Ltd.

17. The allegation of fraud does not seem to have been developed at trial and was not considered by the trial judge in his judgment. It has not been raised in argument in this Court.

18. The trial judge held that the travelling minute was effective to remove the four directors named in it, including Mr. Mariasua, immediately upon its execution. This conclusion is challenged by the appellant, but in any event the evidence fails to establish whether the travelling minute was executed before Mr. Mariasua signed the contract of employment. On the respondent's case both events are said to have happened at about 7:30pm. More importantly, it seems that the terms of the appellant's employment as set out in the employment contract had been agreed beforehand, and, as the preamble says, the employment contract was to record those terms. As the term of employment was not for more than 6 months the contract was not required to be in writing under s.9 of the Employment Act [CAP. 160].

19. The remaining ground of defence based on the appellant not holding a work permit as required by the Labour (Work Permits) Act [CAP. 187] was upheld by the trial judge, and is the issue on which this appeal turns. The appellant is a non-citizen of Vanuatu. The Act relevantly provides in section 2:

"(1) It shall be an offence for any non-citizen worker to whom this Act applies to take up or to continue in any employment in Vanuatu, without first having obtained a work permit or, where such permit has been issued, otherwise than in accordance with the conditions thereof.

(2) Every employer who wishes to employ any non-citizen worker shall make application for a work permit to the Commissioner of Labour in the form and manner prescribed in Schedule 1.
..."

20. The following relevant definitions appear in Section 1:

"employer" means a person for whom a person performs a contract for service, whether the contract is written or not and whether or not the first person pays the second person;

"employment" means the performance by an employee of a contract of service, whether written or not, and whether paid or unpaid and the words "employ", "employed", and "employee" shall be construed accordingly;

21. The Act further provides:

"6. Offences

(1) It shall be an offence for any employer to employ any non-citizen worker in respect of whom a work permit has not been issued or whose work permit has been issued in respect of employment by another employer. ...

10. Vocational training

(1) It shall be a condition of the issue of every work permit or its renewal or change of employment status, or transfer to another employer, that the employer shall train a citizen worker"

22. It is not disputed that the appellant did not have a work permit authorizing his employment by AVOL on 14th October 2011. He says that one of the first things he did after his appointment was to arrange for AVOL to lodge an application for the necessary work permit. He does not know if the application went ahead, and if so with what outcome. There is no evidence that a work permit was later granted for him to work with AVOL.

23. The trial judge held that the employment of a non-citizen without a pre-existing valid work permit is a criminal offence under s. 2 and any employment contract entered into without first having obtained the valid work permit is illegal. On this basis the appellant's claim had to fail.

24. The appellant submits that this conclusion is wrong. He argues that the trial judge arrived at his conclusion by holding that the words "*taking up employment*" in s. 2(1) meant entry into a contract of employment. However in the definition of "*employment*" there is no reference to "*entry into*" a contract of employment. Rather, the definition refers to the performance by an employee of a contract for service. It follows, so the appellant argues, that entry into the contract was not contrary to the Act, and the contract itself was not void for illegality, although his subsequent performance without a permit would contravene s.2(1). The appellant points out that the work permit requirement is not one-sided. The employer has the obligation under the Act to apply for the permit, and if a non-citizen employee works without a permit the employer is also guilty of an offence. As the employment contract itself was not void for illegality it could be performed by the appellant thereafter obtaining a work permit. The submission however fails to show how this gives rise to any entitlement to the appellant to receive remuneration as there is no evidence that a work permit was ever granted.

25. Where either the formation of the contract or the performance of it is prohibited by statute the legal consequences of that illegality are a matter of statutory construction: Gnych v. Polish Club Ltd [2015] HCA 23 at [35] – [39]. The principles there discussed by the High Court of Australia concerned a contract the formation of which was prohibited by a statute but in our opinion those principles apply equally to ascertain the legal consequences of a statutory prohibition against the performance of a contract not illegal in its formation. Those principles were said by the High Court of Australia in Australian Competition and Consumer Commission v. Baxter Health Care Pty Ltd [2017] HCA 38 at [46] to require a consideration of "*the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party, and*

any other relevant considerations. Ultimately, the question is one of statutory construction".

26. The purpose of the Act is clearly to regulate the employment of non-citizens so as to protect and enhance the employment prospects for the citizens of Vanuatu. This purpose is exemplified not only by the requirement being imposed on non-citizens, but by the imposition on the employer of such persons of a work permit tax in s.3 and the vocational training requirement imposed under s.10. The mischief which the Act seeks to address, as is clear from the definitions of employer and employment, is not the formation of a contract of employment in itself, but the performance of such a contract once made. Similarly, the scope of both s.2 and s.6 is limited by the definitions to the performance of the contract of service, and do not extend also to the entry into, that is the formation of, a contract of employment. The Act does not prevent the formation of a contract of employment in itself, and a contract expressly or impliedly conditional on a work permit being first obtained before performance commenced would not offend ss.2 and 6. However, the language of s.2(1) is clear, and both the language and purpose of the Act require that any work performed under a contract for service by a non-citizen is totally prohibited unless authorized by a work permit. The fact that an offence and penalty is imposed both on the employer and the employee under the Act defeats any possible argument that the illegality attaches only to the employer.

27. In the present case, the commencement by the appellant of his duties on 14th October 2011 was illegal as was his subsequent performance during the following days. He was never in a position to perform the duties required under the employment contract. As the contract could not lawfully be performed, the appellant obtained no legal right to remuneration. For this reason the appellant's claim was correctly dismissed. Accordingly, this appeal must also be dismissed. The appellant must pay the respondent's costs of the appeal on the standard basis.

DATED at Port Vila this 21st day of July, 2017

BY THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

Hon. Vincent Lunabek
Chief Justice