

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

Civil Appeal  
Case No. 20/3449 COA/CIVL

**BETWEEN:** ALPET CHRISTELLE SALTUKRO, ANGELA MAHURI,  
ANNIES NAMEL ELLIE, ANTHONY VIRA, ATINGATING  
CHRISTINA, CARLA LISHI, CHARLEY MANAI LABAN,  
CHARLIE DAVID MANDAVAH, DANIEL KARUPI  
TAMATHUI, EMMA JENDRICK, FIFINE TARI TAMATA,  
INES LEIMALU TAPASEI, IRENEE LUAN, JEAN YVES  
KAPALU, JELLY MATEBASIA, JENNIFER DANIEL,  
JIMMY WILLIE, KALOTAP MARAE, LAURENTY REBOU,  
LEEN MALILI, LESSY LOUIS, LITEN NOELLINE,  
MANIOUNE SAEL, MANUEL WILLIE KALO, MATAL  
BUSAI SERGIO, NAIME SAWAN, NATASHA ORREN-  
KOMBE, NATI KALMANU KAIBERT, PAOLO VINABIT,  
REECE KALSAKAU, RICHARD ARU, ROBERT  
ROUVOUNE, ROY THOMSON, SAM MALAI, STELINE  
JEK, SILVIE WATT ALA, TEITOKA SHIROKANU (all 37  
VIT Teachers)  
Appellants

**AND:** THE TEACHING SERVICE COMMISSION  
First Respondent

**AND:** THE GOVERNMENT OF THE REPUBLIC OF VANUATU  
Second Respondent

**Coram:** *Hon. Chief Justice Vincent Lunabek*  
*Hon. Justice John Mansfield*  
*Hon. Justice Oliver Saksak*  
*Hon. Justice John Hansen*  
*Hon. Justice Dudley Aru*  
*Hon. Justice Viran M Trief*

**Counsel:** *Mr James Tari for the appellants*  
*Mr Hardison Tabi and Ms Jelinda Toa for the Respondents*

**Date of Hearing:** 16<sup>th</sup> February 2021

**Date of Judgment:** 19<sup>th</sup> February 2021

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## JUDGMENT

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### Introduction

1. The applicants are teachers at the Institute of Technology (the VIT) in Port Vila. There are 37 of them altogether.



2. By formal application the applicants seek leave of the Court to extend time for them to file an appeal out of time.

### **Background Facts**

3. The applicants instituted legal proceeding in the Supreme Court in Civil Case 16/480 on 26<sup>th</sup> February 2016.
4. They claimed the sum of VT 87,776,640 being the balance of their past salaries to January 2006 and for future salaries to the conclusion of their proceeding.
5. In addition they claimed general and special damages, interest of 5% per annum and costs.
6. The sum of VT 87,776,640 claimed was the difference of the applicant's salaries they claimed arose out of the 2005 Government Remuneration Tribunal's ( GRT) decision to elevate Senior Secondary School Teachers to a new salary scale EO4.3 equivalent to VT 1,517,040 per annum.
7. Up until 2005, the applicants were paid salaries on salary scale EO 3.5 equivalent to VT 1,234,800 per annum.
8. The primary Judge in the Supreme Court fixed the matter for trial for five days from 1<sup>st</sup> June 2020, some 4 years after the filing of the claim.
9. On 1<sup>st</sup> June 2020 the applicant's previous counsel Eric Molbaleh made a concession to the Court that the applicants had been appropriately paid from 2005 to 2017. Mr Molbaleh made the concession after having considered the extensive sworn statement of Derek Alexander and after taking instructions from the applicants.
10. Subsequent to the concession the primary Judge dismissed the claims and awarded costs in the sum of VT 250,000 against the applicants jointly and severally.
11. The applicants now seek leave to extend the time to file an appeal against that dismissal.

### **Submissions**

12. The applicants acknowledged in their submissions they were out of time by about 4 months from 1<sup>st</sup> June to 9<sup>th</sup> October 2020. They submitted by comparison with **Lal v Ati and others Civil Case No. 17/1769** where the delay was 14 months with no satisfactory explanation, this Court granted leave. The Court should likewise grant leave in this case.
13. In regard to the reasons for the delay the applicants submitted their (a) previous lawyer Mr Molbaleh had not given them back their file despite they had tried to retrieve it from him, and (b) Mr Molbaleh failed to get copies of documents from the Court file, having been advised the Court file was closed.



14. Furthermore the applicants claim Mr Molbaleh had misinterpreted or acted without their instructions when making the concession he did on 1<sup>st</sup> June 2020, resulting in their claims being dismissed.
15. The applicants relied on the sworn statement of Anthony Vira in support of their submissions.
16. Counsel for the respondents, Mr Tabi did not respond specifically to Mr Tari's submissions but simply relied on the written submissions dated 12<sup>th</sup> February 2020 (sic) and filed on 15<sup>th</sup> February 2021. These go to the substance of the appeal.
17. In their submissions the respondents raised objections to the document marked "AV3" attached to the statement of Anthony Vira. They submitted the applicants were trying to introduce new evidence without an appropriate application, and that with such new evidence the respondents have not been given the opportunity to respond, and that the attachment should be disallowed.
18. The respondents relied on the sworn statement of Derek Alexander dated 26<sup>th</sup> August 2016 in support of their submissions.

### **Discussion**

19. The relevant and appropriate factors to be taken into account in deciding whether or not to grant an extension of time to the applicants to file their appeal are clearly set out in **Laho Ltd v QBE Insurance (Vanuatu) Ltd [2003] VUCA 26**. These are :-
  - (a) The length of the delay,
  - (b) The reasons for the delay,
  - (c) The chances of the appeal succeeding if time for appeal is extended, and
  - (d) The degree of prejudice to the potential respondent if the application is granted.
20. The appeal period under Rule 20 of the Court of Appeal Rules is 30 days. In this case the applicants have acknowledged there was a delay of roughly 4 months from 1<sup>st</sup> June 2020.
21. We note that this is the second attempt by the same applicants and intended appellants to appeal. Their first appeal was filed as Civil Appeal Case No.2564 of 2020. It was dismissed by consent order that was executed by Counsel Mr Molbaleh and Mr Tari on 10<sup>th</sup> November 2020 and endorsed by the primary Judge.
22. With the consent order in existence it is difficult to understand why Mr Tari himself should see fit to make the application for an extension of time when he himself become involved in the case from 10<sup>th</sup> November 2020. Despite that, Mr Tari filed the application on 9<sup>th</sup> December 2020, a month later.
23. The delays have been unfortunate. The applicants have attributed the blame solely to Mr Molbaleh. In our view Mr Tari squarely contributed to the delays too and more so the fact the Mr Tari signed the consent order making it difficult for the applicants to unwind the position at this point.



24. We emphasise at this point that both counsel handled the applicants' case badly. The applicants have been disadvantaged by the failures and omissions of both counsel, resulting in them being put in this undesirable situation. Their remedy is perhaps against the lawyers themselves.
25. The consent order of 10<sup>th</sup> November 2020 is what distinguishes this application from the two applications made in the Lal case which had different facts and circumstances.
26. In our view the delay of up to 4 months was not reasonable delay in light of what occurred on 1<sup>st</sup> June 2020 and 5 months later on 10<sup>th</sup> November 2020.
27. Next, the reasons for the delay. Mr Vira deposed to the applicant's endeavours to collect the file from Mr Molbaleh but was unsuccessful. The statement falls far short of stating dates and who of the applicants actually attended on Mr Molbaleh to make the requests or demand. That reason is not adequate.
28. The other reason given by Mr Vira was that Mr Molbaleh was unable to get access to the Court documents from the Court. For access to be obtained an application is necessary. There is no evidence the applicants made such application. In any event a simple notice of appeal does not require documents from the party's file or the court file. This reason is also inadequate.
29. Next the chances of the appeal succeeding. This factor depends also on whether the applicants have an arguable case. Mr Vira stated in his statement that the applicants did not give instructions to Mr Molbaleh to admit to the Court on 1<sup>st</sup> June 2020 that the applicants had been appropriately paid.
30. For that evidence to have any force or weight it needed confirmatory statements of either all the 37 applicants or half of them or even those who were present in Court with Mr Molbaleh on 1<sup>st</sup> June 2020. The statement by itself is insufficient and too general. Mr Vira needed to depose to which of the applicants were available in Court so that those persons also could make sworn statements confirming his statement. That has not happened.
31. The respondents' submissions in paragraphs 25 and 26 indicate there was a 15 minutes adjournment which Mr Molbaleh was given so he could get his client's instructions. It was after that adjournment that Mr Molbaleh obtained instructions and then informed the Court accordingly. As an officer of the Court it is highly unlikely Mr Molbaleh would see fit to give contradictory information to the Court.
32. By the sworn statement of Anthony Vira the applicants have waived privilege. Since doing so, they have had ample time also to obtain a sworn statement from Mr Molbaleh about what they say were the instructions. They have not done so.
33. In support of their submissions in relation to an arguable case, the applicants placed reliance on the attachment marked "AV3" to the sworn statement of Anthony Vira. We noted the objections by the respondent's counsel and accepted that the document should not be allowed. The applicants had failed to make proper application.



34. Mr Vira omitted or failed to depose to where the one- page document was obtained from. If it is a document obtained from the Teaching Service Commission Mr Alexander would have annexed it to his sworn statement dated 26<sup>th</sup> August 2016. If it was a document from the GRT 2005, it would have been proper for someone from that tribunal to have deposed to a statement annexing it.
35. The origin of the document is not explained and the only proper cause is to reject it.
36. Those factors show the applicants do not have an arguable case and that reduces the chances of them succeeding if leave was granted.
37. Finally from the documents annexed to the sworn statement of Derek Alexander to which the applicants have not addressed adequately or at all, it is plain that the applicants have no arguable case.
38. The final factor is the prejudice to the respondents. The applicants submitted the prejudice is minimal.
39. The respondents submitted the application should be dismissed and claimed costs in the sum of VT 75,000. This amount indicates the respondents have allocated much time and costs on the case since its inception in 2016 to the hearing in June 2020 and the appeal in November 2020. The respondents have filed a lot more papers and documents than the applicants have. This indicates the level of prejudice in terms of costs to the respondents.
40. For these reasons leave to extend time to the applicants to file an appeal is refused. Their application is dismissed.
41. The respondents are entitled to their costs of the appeal which is fixed at VT 70,000.

**DATED at Port Vila this 19<sup>th</sup> day of February 2021**

**BY THE COURT**



**Hon. Vincent Lunabek**  
**Chief Justice**

