

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

Civil Appeal  
Case No. 21/516 CoA/CIVA

**BETWEEN:** CYNTHIA KAMMY ALA  
First Appellant

MURIELLE HERBERT  
Second Appellant

SHAMILLA BULE  
Third Appellant

JOSEPH ROBERT  
Fourth Appellant

MANEN MALA  
Fifth Appellant

ANNA STEPHENS  
Sixth Appellant

**AND:** VANUATU NATIONAL PROVIDENT FUND  
Respondent

**Coram:** *Hon. Chief Justice V. Lunabek  
Hon. Justice R. Asher  
Hon. Justice O. Saksak  
Hon. Justice G. Andrée Wiltens  
Hon. Justice VM Trief  
Hon. Justice R. White*

**Counsel:** *Mr S. Kalsakau for the Appellants  
Mr D. Yawha for the Respondent*

**Date of Hearing:** 6 May 2021

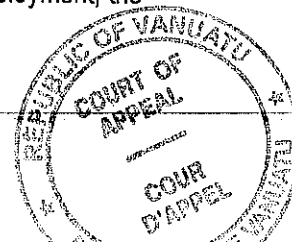
**Date of Decision:** 14 May 2021

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**JUDGMENT**

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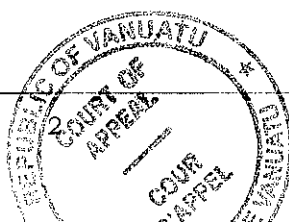
1. The employment of the six appellants by Vanuatu National Provident Fund (VNPF) came to an end in late 2019 or early January 2020. The appellants claim that, while it was their own actions in submitting notices of resignation which led to their respective cessations of employment, the circumstances in which they did so amounted to constructive dismissals by VNPF.



2. On 17 January 2020, the appellants commenced a single action in the Supreme Court in which they made their claims of constructive dismissal and sought monetary relief.
3. The names of the appellants and some of the details of their employment alleged in the Statement of Claim are as follows:

Name	Title	Start date of work	Suspension	Resignation	Years of work
Cynthia Kammy Ala	VNPF Board Secretary	13/03/06	11/10/19	10/10/19	13y 9m
Muriel Hurbert	Manager Internal Audit	16/06/07	11/10/19	10/10/19	12y 7 m
Shamila Bule	Senior Assistant Administrator	10/07/08	10/10/19	07/11/19	11y 7m
Joseph Robert	Manager ICT	09/02/05	20/09/19	07/11/19	15y
Manen Mala	Manager Legal	13/03/06	20/09/19	07/11/19	9y 11 m
Anna Stephens	Executive Assistant to GM	14/08/17	20/09/19	07/11/19	2y 2m

4. On 8 September 2020 (some five months after the pleadings had closed with the filing of VNPF's reply), VNPF applied for an order striking out the whole of the appellants' claims. It did so on two substantive grounds. First, it alleged that the proceedings were an abuse of the Supreme Court's process. This submission had two limbs: first, that the six claims of the individual employees were separate and distinct and it was inappropriate for them all to be brought in the one action; and, secondly, that it was an abuse of the Court's process for the appellants to pursue legal proceedings when they had failed to comply with VNPF's requirements with respect to disciplinary proceedings. The second substantive ground was that, quite apart from the first substantive ground, none of the appellants had a cause of action because they had brought their employment to an end by resignations without alleging constructive dismissal.
5. The primary Judge did not express a concluded view concerning the claim of abuse of process but, having identified a number of differences in the individual circumstances of the six appellants, said that those matters indicated "that the case will be more efficiently dealt with as separate cases". His Lordship upheld the second substantive ground and struck out the appellants' claim, holding that "as pleaded, [it] is so clearly untenable that it cannot possibly succeed".
6. The appellants now appeal against the striking out of their claim. For the reasons which follow, we consider that the appeal should be allowed.

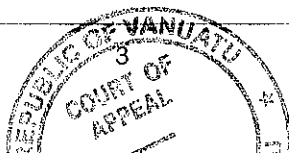


### **Factual circumstances**

7. In order to provide a setting for the Court's reasons, we record briefly some of the factual matters disclosed in the Statement of Claim and in the sworn statements of the claimants and of VNPF. In doing so, we make no findings about these matters.
8. The material indicates that, in about August 2019, the Office of the Ombudsman commenced, on its own initiative, an investigation into aspects of the conduct of the General Manager of VNPF and of its Board members. On 26 and 27 August 2019, the Office of the Ombudsman executed a search warrant at the premises of VNPF. Some of the claimants co-operated in the execution of the search warrant.
9. Several of the claimants make complaints about the conduct of the General Manager of VNPF. In particular, they make allegations about aspects of his conduct towards them after the execution of the search warrant by the Office of the Ombudsman.
10. It seemed to be common ground that the claimants' employment by VNPF had been suspended on the dates set out in the Table above under the heading "Suspension". VNPF's notices of suspension contained in each case allegations of misconduct or of "serious offences" by the appellants, gave them time in which to make a response in writing, and warned them that they may be required to participate in a Disciplinary Hearing. In some cases, dates for Disciplinary Hearings were fixed. However, with one exception, the Disciplinary Hearings have not proceeded because, in the meantime, the General Manager of VNPF had been charged with criminal offences and it was thought inappropriate that he should have to give evidence in the Disciplinary Hearings until those charges had been heard and determined.
11. Each of the appellants submitted notices of resignation on the dates set out in the Table under the heading "Resignation".
12. In the submissions on the appeal, counsel for the appellants submitted that the constructive dismissal of each appellant had also occurred on the date shown in the column headed "Resignation". However, that is the date upon which the employees gave notice of their resignations so it may be that their employment did not come to an end until the expiry of the period of notice given in each case. It is not necessary for the purposes of the resolution of this appeal to make any finding about that issue.
13. The material before the primary Judge suggested that VNPF still considered in March 2020 that it was inappropriate to proceed with the Disciplinary Hearings.

### **The jurisdiction to strike out**

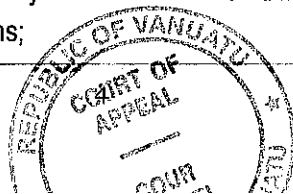
14. In seeking the striking out of the appellants' claim, VNPF sought to invoke the inherent jurisdiction of the Supreme Court found within the broad terms of s 28(1)(b) and s 65(1) of the *Judicial*



*Services and Courts Act No. 54 of 2000* and rules 1.2 and 1.7 of the *Civil Procedure Rules*. As this Court's decision in *Noel v Champagne Beach Working Committee* [2006] VUCA 18 indicates, this is a jurisdiction to be exercised sparingly and only in clear cases when the Court is satisfied that it has the requisite material. The Court will strike out a claim in the exercise of the inherent jurisdiction only when the claim is "so clearly untenable that it cannot possibly succeed". The Court's insistence that the inherent power be exercised only in such clear cases indicates that the jurisdiction should not be exercised if the resolution of disputed issues of fact is required: *Gouras v NACA Ltd* [2020] VUCA 53 at [22].

### **Abuse of process – multiple claims in a single action**

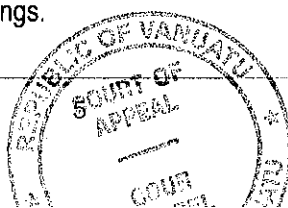
15. As the primary Judge did not strike out the claim on the basis of abuse of process, the appellants' Notice of Appeal did not contain a ground directed to that issue. However, some of the submissions on the hearing of the appeal were directed to the question of whether the strike out could have been justified on that basis.
16. The joinder of persons with separate claims in a single action against one respondent is not, of itself, an abuse of the process of the Supreme Court. To the contrary, Part 3 of the *Civil Procedure Rules 2002* specifically contemplates that such a course may be appropriate. By way of illustration, rule 3.1(2) provides that there can be more than one claimant and defendant in the one proceeding. Rule 3.3(1) provides that the Court may order that several claims against the one person be included in the one proceeding if:
  - (a) a common question of law or fact is involved in all the claims;
  - (b) the claims arise out of the same transaction or event; or
  - (c) for any other reason the Court considers the claims should be included in the proceeding.
17. The *Civil Procedure Rules* also vest the Supreme Court with flexible case management powers when an action is commenced by multiple claimants. The Court may order that a party to a proceeding cease as a party (rule 3.2(2)) or that the claims made by multiple claimants against one person be treated and heard as separate proceedings (rule 3.3(2)). Moreover, the Court's case management powers permit it to order that common questions of fact and law be heard in one hearing and that those issues which are specific to an individual claimant be heard in a separate hearing. Given these flexible powers, it will seldom be necessary for the Court to apply the principles concerning abuse of process when multiple claims are brought in the one action.
18. In the present case, there are differences in the factual circumstances of the six claimants of the kind to which the primary Judge referred. These included:
  - they had commenced employment with VNPF on different dates;
  - they held different positions;



- they had been suspended from their employment for different reasons;
  - two had submitted resignations on 10 October 2019 and four had submitted resignations on 7 November 2019;
  - the suspensions of their employment had not all occurred on the same date;
  - VNPF had given different reasons for those suspensions; and
  - Mr Robert had been suspended with pay while the other claimants had been suspended without pay.
19. However, the Statement of Claim also indicated that the claimants made a common claim, namely, that they had been subject to "continuous threats, intimidation and harassment by [VNPF's] General Manager for the disclosing VNPF information [in] Police Investigations and Ombudsman Investigations". The claimants' filed Response to the Strike Out Application also indicated that they alleged ill treatment by the General Manager VNPF by reason of their provision of information to the Ombudsman and to the Police in relation to a criminal investigation involving the General Manager of VNPF.
20. On its face, this appears to be a common issue of some substance. When the presence of this common issue is considered in conjunction with the flexible case management powers to which we have referred, it can be seen that the bringing by the claimants of their claims in a single action did not constitute an abuse of the process of the Supreme Court. That does not mean that the primary Judge may not determine to hear aspects of the claim which are particular to individual appellants in separate hearings. The parties can be expected to co-operate in proposing sensible and efficient means by which the trial may be conducted.

**Abuse of process – by-passing the disciplinary process**

21. Counsel for VNPF maintained on appeal the submission that the claimants' failure to comply with VNPF's requirements for a disciplinary hearing contributed to the proceedings being an abuse of process. His submission seemed to be that the conduct of the appellants in resigning, and not participating in VNPF's disciplinary process, meant that the allegations contained in the respective suspension letters were unchallenged with the consequence that the commencement of proceedings constituted an abuse of the Court's process.
22. The primary Judge did not express any view concerning this limb of VNPF's application and did not base his decision on it.
23. Counsel seemed to advance this submission on appeal only faintly. That was understandable. Contrary to counsel's submission, it seems that at least some of the appellants did provide responses to the allegations in the suspension letters by which they denied the matters alleged against them. In any event, if their employment had come to an end before the Disciplinary Hearings could be held, it is not easy to see how it could be material that they had not later participated in the Disciplinary Hearings.



### **Constructive dismissal and a cause of action**

24. We note again that the appellants' Statement of Claim indicated that their claim was for constructive dismissal and consequential entitlements.
25. The primary Judge referred to the discussion of the concept of constructive dismissal in *Auckland Shop Employees' Union v Woolworths (NZ) Ltd* (1985) 2 NZLR 372 and in *Ahelmahalahlah v Republic of Vanuatu* [2018] VUCA 16. In the latter case, the Court of Appeal noted at [32] that the concept of repudiation of contract is at the heart of the doctrine of constructive dismissal, that is, conduct which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
26. Having referred to these authorities, the primary Judge referred to the course of events culminating in the cessation of employment by each of the appellants and then concluded:
- "[28] *The delays in conducting the disciplinary hearings were not of the employer's doing but were beyond its control. In addition the claimants contributed to the delay in their disciplinary hearings as they were required to respond to the allegations against them within seven (7) days and did nothing. Therefore it could not be said that the VNPF engaged itself in conduct which shows that it no longer intended to be bound by the essential terms of its contract with each claimant.*"
27. On that basis, the primary judge regarded the claim as being "so clearly untenable that it cannot possibly succeed".
28. With respect to the primary Judge, this was a mistaken approach. It involved the Judge making an assessment of limited aspects of the evidence foreshadowed to be given by each party and evaluating whether it could indicate an intention by VNPF no longer to be bound by its contracts. These were matters for trial and inappropriate for consideration on a strike out application. Secondly, if the employments came to an end at the time the resignations were tendered (as counsel for the appellants seemed to contend) or at the end of the respective periods given in the notices of resignation, the focus at trial will be on the employer's conduct before the notices of resignation were given. That conduct is likely to extend well beyond the delay in the holding of the Disciplinary Hearings. That is a matter which can be assessed only at trial.
29. We note that the allegations in the Statement of Claim are made in both generalised and composite form. That is to say, the Statement of Claim does not distinguish between the claims of each appellant. This is a shortcoming which should be addressed. Counsel for the appellants



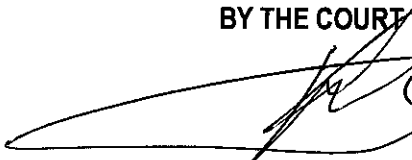
accepted that the Statement of Claim requires substantial amendment so that the claim of each appellant is properly pleaded and particularised. This should be attended to promptly.

**Conclusion**

30. For the reasons given above, the appeal is allowed and the orders made by the primary Judge are set aside.
31. With respect to costs, VPNF is to pay the appellants' costs of the appeal fixed at VT 25,000 and costs of the application to strike out before the primary Judge fixed at VT 25,000 within 21 days.

**Dated at Port Vila this 14<sup>th</sup> day of May 2021**

**BY THE COURT**

  
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**Chief Justice V. Lunabek**

