

BETWEEN: IETONGA AIONG
PHILIP DOVO
ANTHONY TAL
KALO NIAL
JAMES ROY MATARIKI
First Appellant

AND: SAM KARIE
JOHN JOSIAH
ALBET MALTOCK
Second Appellant

AND: GOVERNOR OF THE RESERVE BANK
Respondent

Coram: *Hon Chief Justice V Lunabek
Hon Justice R Young
Hon Justice D Aru
Hon Justice R White
Hon Justice S Harrop*

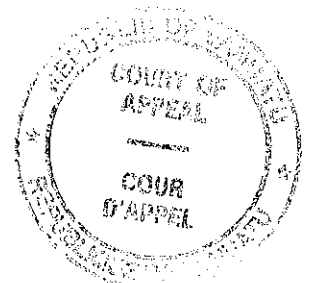
Counsel: *A Godden for the First and Second Appellants
M Hurley for the Respondent*

Date of hearing: *14 November 2022*

Date of Decision: *18 November 2022*

JUDGMENT OF THE COURT

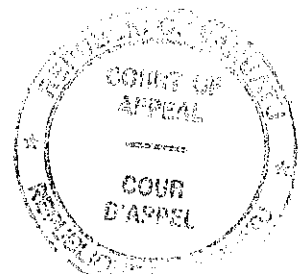
1. The appellants were removed from their positions as Board members and managers with the Vanuatu Rural Development Bank (the Bank) on 15 October 2021. In the case of the first five appellants (who are described collectively in the Notice of Appeal as the "First Appellants"), the removal was from their positions as Directors of the Bank. In the case of the sixth, seventh and eighth appellants (described in the Notice of Appeal collectively as the "Second Appellants") the removal was from their employment in senior positions in the Bank.



2. In the Judicial Review proceedings at first instance, the Directors sought a declaration that a Directive of the Governor of the Reserve Bank (the Directive) resulting in their respective removals from office was unlawful. At the heart of the appellants' case was their contention that the Governor had no statutory authority to issue a directive removing them from office or terminating their employment.
3. In addition, the appellants sought immediate reinstatement, an order to "clear" their names, an order they have access to their bank accounts at different commercial banks in Vanuatu and an award of damages. None of these remedies were pursued before us. As we pointed out to counsel for the appellants this was a judicial review application seeking a declaration that their removal from office was unlawful. It was not the courts function to "clear" the name of the appellants of some unspecified conduct nor to award damages, nor to make orders relating to accessing bank accounts relating to banks that were not parties to these proceedings.
4. The appellants' claims were dismissed by the primary judge. They now appeal to this Court. In order to address and resolve the issues raised by the appeal, it is first necessary to set out some background.

The Bank

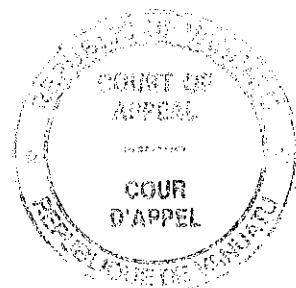
5. The Bank was established by the *Vanuatu Agriculture Development Bank Act No 20 of 2006* (the VADB Act 2006) as a body corporate to facilitate and promote the economic development of the national resources of Vanuatu, including, but not limited to, its natural resources. It has an authorised share capital of VT 500,000,000 comprised of 50,000 shares with a value of VT 10,000 each (s 8). The Government of Vanuatu by the Minister of Finance and the Minister of Agriculture hold not less than 60% of the issued share capital (s 26C).
6. The VADB Act 2006 established the Board of the Bank (s 12). It vested in the Board responsibility for the day to day operations of the Bank and the function of ensuring that its policies are implemented in an efficient and effective manner (s 13).
7. Section 14 of the Act, as in force to 21 July 2021, provided that the Board of the Bank consisted of seven persons, with each to be nominated by specified persons or bodies in Vanuatu. Section 14(5) provided for directors to be appointed for terms not exceeding three years but specified that each could be appointed for only two terms. The effect was that the maximum term which an individual director could serve is six years.



8. Significant amendments to the VADB Act 2006 were made by the *Vanuatu Agriculture Development Bank (Amendment) Act No 16 of 2021* (the 2021 Amendment) which came into operation on 22 July 2021. These amendments included:
- (a) the change of the name of the Bank to "*Vanuatu Rural Development Bank*";
 - (b) the Board to consist of five members, with specified characteristics, each nominated by an identified body;
 - (c) the inclusion in Part C of detailed provisions for the supervision and accountability of the Bank, including prudential supervision by the Reserve Bank. A number of the provisions in Part C are in issue in this appeal and we will return to them; and
 - (d) the inclusion in a transitional provision (s 28) that persons occupying positions as Director, General Manager or Deputy General Manager immediately before the commencement of the amending Act were to continue in those positions for a period of three months from the date the amending Act came into force (22 July 2021) and would be deemed to be terminated on the expiry of that period. This transitional provision has a significance to which we will return.

The status of the director appellants

9. The status of the director appellants is as follows:
- Ietonga Aiong – appointed a Director on 19 August 2011. She was the Chairperson of the Board;
 - Philip Dovo – appointed a Director on 25 August 2017;
 - Anthony Tal – appointed a Director on 23 August 2009;
 - Kalo Nial – appointed a Director on 16 September 2009 ;and
 - James Roy Matariki – details not shown.
10. Each of these persons had served continuously as a Director since their first appointment. In consequence, the continued appointment of Ms Aiong, Mr Tal and Mr Nial as Directors, was not compliant with s 14(5) of the Act as in force to 21 July 2021.
11. By the operation of the transitional provision in s 28 of the Amending Act, the employments of all directors and Mr Karie were, in any event, to cease on 21 October 2021.



The Status of the employee appellants

12. The status of the employee appellants are as follows:

- Sam Karie – commenced as General Manager of the Bank of 12 December 2018 for a term of three years. However, Ms Aiong as Chair of the Board and Mr Karie countersigned a letter on 5 May 2021 which purported to extend the period of his employment to 12 December 2024;
- John Josiah – appointed to the position of Managing Lender on 14 December 2020; and
- Albet Maltock – employed as Finance Manager. The date of his commencement of employment in that position was not shown in the evidence.

The directive of the Governor to the Bank

13. On 15 October 2021, the Governor issued a directive to the Bank. It stated:

“Directive No 2 of 2021

Directives to the Vanuatu Rural Development Bank

The Reserve Bank of Vanuatu as the Supervisor and Regulator of [the RDB] has considered the External Auditor’s report submitted on 22 September 2021 and is of the opinion that the RDB has engaged in unsound practices which are likely to adversely affect its operations.

Therefore, under the powers stipulated under section 37C of the [Amendment Act], the Reserve Bank of Vanuatu hereby directs [the Bank] to:

- 1. Remove the Board of Directors and Management immediately;*
- 2. Cooperate with the Pacific Advisory Vanuatu [PAV] throughout the term of the engagement;*

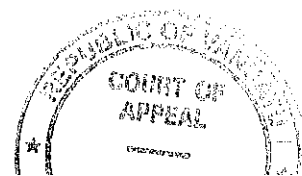
[3 – 7. Refrain from five specified activities.];

- 8. Cease further payouts to the Board and Management;*
- 9. Ensure all Bank assets are secured and surrendered to PAV as directed.*

These directives are deemed effective on this 15th day of October 2021

*(signed)
Governor”*

14. As is apparent, this directive required the Bank to “remove the Board of Directors and Management immediately”. It was common ground that this Directive was not served on



the Board members and management on October 15 and only came to their notice when these proceedings were issued. This Directive was served on Mr Glen Craig of Pacific Advisory who was, on 15 October, appointed by the Reserve Bank as the Administrator of the Bank. There is no evidence he removed the directors and management.

The directives to the appellants

15. At the same time on 15 October 2021, the Governor issued directives to all of the appellants (the Individual Directives). In the case of Ms Aiong, the Directive stated:

"Dear Mrs Aiong

Directive for your immediate removal as Chairlady and Board Member

*The Reserve Bank of Vanuatu (RBV) as the Supervisor & Regulator of [the Bank] has considered the External Auditor's report submitted on 22 September 2021 and is of the opinion that the VADB/VRDB has engaged in unsound practices which are likely to adversely affect the operations of the Bank. Therefore, pursuant section 37C the [Amendment Act], the Reserve Bank of Vanuatu **hereby removes you as Chairlady and Board Member** of the Bank and directs you to:*

- 1. Surrender all Bank assets in your possession forthwith;*
- 2. Surrender to [PAV] all Bank files, computer passwords and documents immediately;*
- [3 – 7 Refrain from specified activities]; and*
- 8. Vacate the Bank premises immediately and [you are] prohibited from re-entering during the term of PAV's engagement.*

*This Directive is deemed effective on this **15th day of October 2021.***

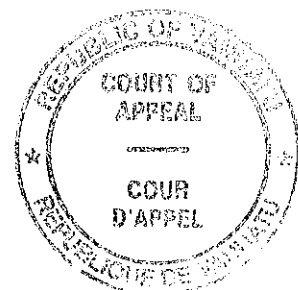
*(Signed)
Governor"*

16. The Individual Directives from the Governor to the other appellant employees were in materially identical terms, save for variations according to the position held by each.
17. As is apparent, the Governor stipulated in each of the Bank and Individual Directives that he was acting pursuant to s 37C of the 2021 Amendment.

Section 37C of the 2021 Amendment

18. Section 37C provides:

"37C Unsound or unsafe practices



- (1) *If the Reserve Bank is of the opinion that Bank:*
- (a) *is following unsound or unsafe practices in the conduct of its Banking business that are:*
 - (i) *likely to jeopardise its obligations to its depositors or other creditors; or*
 - (ii) *likely to adversely affect the operation or stability of the financial system in Vanuatu; or*
 - (b) *have contravened or failed to comply with the terms and conditions of its licence or any of the provisions of this Act,*

the Reserve Bank may issue a directive to the Bank.

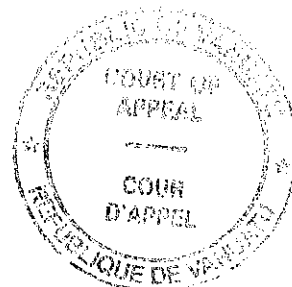
- (2) *The directives may require the Bank:*
- (a) *to cease the practice, contravention or non-compliance; and*
 - (b) *to take such action (including action to replace or strengthen management) as maybe specified in the directives to correct the conditions resulting from the practice, contravention or non-compliance."*

19. In the proceedings at first instance, the appellants contended that s 37C authorised only a directive from the Reserve Bank to the Bank to cease a practice or to replace the management. They contended that in their case, the Reserve Bank had not issued a directive to the Bank or to its management but instead had itself purported to remove the Directors and the Employees.

20. The appellants also contended that the Governor's directives were not authorised by s 34M of the 2021 Amendment. That section provides (relevantly):

"34M The Reserve Bank remove a director, manager, secretary or other officer

- (1) *The Reserve Bank may direct, in writing, the Bank to remove a person who is a director, manager, secretary or other officer of the Bank if the Reserve Bank is satisfied that the person:*
- (a) *is a disqualified person under s 34L;*
 - (b) *does not meet any other fit and proper criteria in this Act or guidelines.*
- (2) *Before directing the Bank to remove a person, the Reserve Bank must give a written notice to:*
- (a) *the person;*
 - (b) *the Bank,*

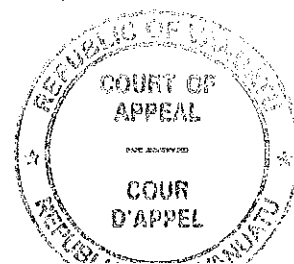


giving each of them a reasonable opportunity to make submissions on the matter.

- (3) *A direction takes effect on the day specified in it, which must be at least seven days after it is made.*
- (4) *If the Reserve Bank directs the Bank to remove a person, the Reserve Bank must give a copy of the direction to the person and the Bank.*
- (5) *If the Bank fails to comply with the direction under subsection (1), [it] commits an offence and is liable on a conviction to a fine not exceeding VT 10,000,000."*

The decision of the primary Judge

21. The appellants contended before the primary Judge that each of ss 34M and 37C authorised the Reserve Bank, in the circumstances to which they referred, only to issue a direction to the Bank, and not itself to remove them from their respective positions. Accordingly, their removal from those positions by the Governor of the Reserve Bank was unlawful.
22. The primary Judge rejected these contentions for a number of cumulative or alternative reasons.
23. First, the Judge considered that s 37C vested power in the Governor of the Reserve Bank to issue the directives of 15 October 2021, at [11]. As we understand it, the Judge regarded this as a power expressly granted.
24. Secondly, the Judge considered that s 37C(2)(b) impliedly vested a power in the Governor to remove the appellants from their respective positions. The Judge based that implication on the parenthetical clause in s 37(2)(b) "including acting to replace or to strengthen management", at [13].
25. Thirdly, even if there was no implied power, s 34M vested the Reserve Bank with a discretionary power. The Judge regarded the absence of the seven days' notice required by ss 34M(2) and (3) as immaterial, because the appellants had "terminated themselves" in about June 2021 by conduct (to which we will return). The Judge considered that conduct amounted to "unsound or unsafe practices" for the purposes of s 37C. Although considering that the appellants had "terminated themselves" in June 2021, their continuation in employment to 15 October 2021 had been pursuant to the "grace period" for which s 28 of the 2021 Amendment provided.



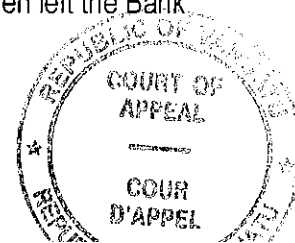
26. Next, the Judge noted that the five Director Appellants had been appointed as Directors by the Minister in the exercise of a power to make appointments. Section 21 of the *Interpretation Act* meant that the Minister also had the power to remove the directors. It was immaterial that the removals had been effected by the Reserve Bank Governor because, in doing so, he had been acting under the instruction of the Minister for Finance and as his alter ego. The Judge referred in this respect to the endorsement in *Ranch De La Falaise v Republic of Vanuatu* [2013] VUSC 162 of the proposition in *De Smith* "Judicial Review of Administrative Action" (4th ed at 307):

"Special considerations arise where a statutory power vested in a Minister of a Department of State is exercised by a departmental official, the official is the alter ego of the Minister or the Department, and since he is subject to the fullest control by his superior he is usually spoken of as a delegate ... The courts have recognised that "the duties imposed on Ministers and the powers given to Ministers are normally exercised under the authority of the Ministers by responsible officials of the Department. Public business could not be carried out if that were not the case". In general, therefore, a Minister is not obliged to bring his own mind to bear upon a matter entrusted to him by statute but may act through a duly authorised officer of his Department. The officer's authority need not be conferred upon by him by the Minister personally; it may be conveyed generally and informally by the officer's hierarchical superiors in accordance with departmental practice."

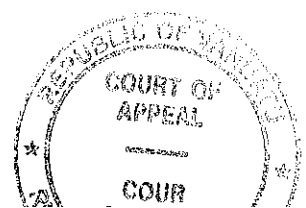
27. Lastly, the Judge considered that the fact that the appointments of all the director appellants and the employment of Mr Karie were to terminate in any event (pursuant to s 28) on 21 October 2021 operated in some way to preclude their removals on 15 October 2021 as being characterised as invalid.

Discussions

28. In oral submissions before this court the appellants raised one ground of appeal only. The directive from the Governor to the directors and senior management purporting to remove them from their respective positions did not follow the requirements of s 37C. In particular the Governor purported to remove the Directors and Management of the Bank when section 37C gave the Governor no such power. Its power was to direct the Bank to remove the relevant directors and management staff. Its failure to follow the statutory process meant the directive had no effect and did not remove the appellants from office.
29. As we have noted there were two directives from the Governor, dated the 15th of October 2021. The unnumbered directive was addressed to the respective first and second Appellants and purported to remove them from office. It was common ground that that letter was served on the appellants on 15th of October. The appellants then left the Bank premises as a result of or arising from that direction.

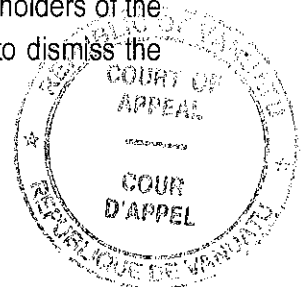


30. On the same day directive number two was issued by the Governor. As we have noted it was provided to the Administrator of the Bank but there was no evidence to show he acted on the directive.
31. We accept that the Reserve Bank Governor was not authorised to directly remove the Board members or the employees. Section 37C is clear. The Reserve Bank can require the Bank to take such action (including to replace or strengthen management) as may be specified in the directive. Here the Governor in its directive purported to dismiss the appellants. It could not do so.
32. We disagree with the primary judge that somehow such a power could be inferred from the words of s37C. Once the Governor is of the opinion that those factors in s37C (1) are established its power is to issue a directive to the Bank. That directive (subs 2) can require the Bank to remove management as specified in the directive, but no power is given to the Governor to do so.
33. The Judge also considered s34M of the Reserve Bank which sets out a process for the Governor if it wishes to remove a director or manager of a bank. The Judge accepted this process had not been followed by the Governor when it dismissed the appellants but said that in the circumstances any failure could be excused and that this section could be invoked to support the dismissal.
34. In their written submissions the appellants complained that the Judge was wrong to excuse the failures to comply with s34M. They said if the Governor wanted to dismiss the Board and management the process provided for in S34M had to be followed.
35. We do not consider that s34M had any relevance to this case and in this we differ from the primary Judge. The Governor did not purport to dismiss the appellants pursuant to this section, and did not in any event comply with its terms. The failure to do so means it cannot be used as an alternative source of power.
36. In summary therefore we are satisfied the Governor's directive of 15 October purporting to dismiss the appellants was without lawful power.
37. The appellant sought orders in the Supreme Court that the removal of the appellant was unlawful and seeking reinstatement.
38. Remedy in judicial review cases is discretionary. A Court may refuse a remedy where there is little value in any such remedy. (*See Odhames Press Ltd v London and Provincial*



Sporting News Agency [1936] 1 All ER 217 The Dairy Farmers Co-operative Milk Co Ltd v Commonwealth (1946) 73 CLR 381.) and Answorth v Criminal Justice Commission [1992] HCA 10, (1992) 175 CLR at 581-582).

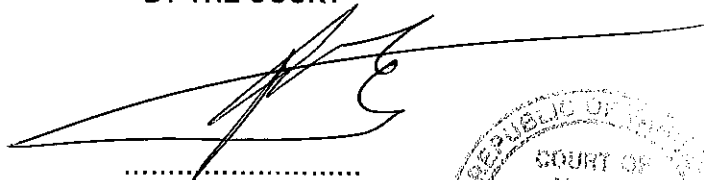
39. In the circumstances of this case, we are not prepared to make the orders sought by the appellants.
40. We are satisfied that the Governor had evidence that meant it could reasonably hold the opinion that in terms of s37C (1) (a)(b) that the Bank was following unsound practices which were likely to jeopardise its obligations to its creditors and the Bank had failed to comply with the terms and conditions of its license. And in those circumstances, it had the statutory power to direct the Bank to remove the appellants (s37C (2)(b)).
41. Directive number 2 addressed to the Administrator of the Bank (for this purpose the "Bank") required him to remove the appellants in accordance with s37C. However by the time that directive was received it appears that the appellants had left the Bank apparently accepting their fate.
42. The auditors undertaking an audit of the Bank sent a letter dated 21 September 2021 to the Bank and to the Reserve Bank Governor identifying payments to Board members, management and employees of some VT135 million which it considered had little justification. Those payments constituted, in the view of the auditor's serious irregularities giving rise to an obligation to advise both the Bank and the Reserve Bank. The Auditor's report was subsequently reviewed by Mr Craig of Pacific Advisory. He concluded that the vast majority of the payments identified by the auditors of concern were indeed questionable payments. The total payments approved by the Board for Board members and staff totalled 131,225,597VT. Although the actual amount paid out was just over 124,000,000VT of which, Mr Craig considered only, VT3 million could be argued to be within the CEOs contract and therefore an entitlement. The payments made to the Board members included such items as goodwill payments, and ex gratia payments apparently made in anticipation of the end of their term. The management payments made to all the employee defendants included "payment in lieu of notice" although confusingly they had at least three months' notice of the end of their contract, sick leave although no cash payment for sick leave was apparently authorised and ex gratia payments.
43. The Auditor's report was provided to the Reserve Bank Governor and to the Minister of Finance. On 13 October 2021 the Minister of Finance as one of the shareholders of the Bank gave a direction to the Governor of the Reserve Bank of Vanuatu to dismiss the relevant Board members and relevant management employees.



44. So as at 15th of October one of the shareholders in the Bank, the Minister of Finance had given instructions to the Reserve Bank to dismiss the Board and senior management, the Reserve Bank had given an instruction to the Administrator of the Bank, Mr Craig, to remove the Board and management of the Bank immediately; Mr Craig was obliged to comply with the directive; the terms of the Board and Mr Karie were to expire in any event on 21 October expire; and three of the Board members were serving as Board members as at 15 October 2021 in breach of the limitation that Board members could only be appointed for two terms of three years. Finally, all the appellants had apparently anticipated the end of their terms given the extensive payments made to themselves.
45. In those circumstances removal as Board members and management employees was inevitable. The appellants appeared to accept the inevitability of their removal by leaving the Bank's premises on 15th of October.
46. For the reasons given therefore we refuse to make declarations as sought by the appellants.
47. The appeal is dismissed.
48. The respondents will have costs of 100,000vt in total for which the appellants will be jointly and severally liable.

DATED at Port Vila this 18th day of November, 2022

BY THE COURT



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Hon. Chief Justice Vincent Lunabek

