

IN THE MAGISTRATES' COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 8 of 2008

BETWEEN: THE GOVERNMENT OF VANUATU
Claimant

AND: LITOUNG ROGER
Defendant

AND: THE LYCEE ANTOINNE DE
BOUGAINVILLE SCHOOL COUNCIL,
Lycee Antoine de Bougainville
Third Party

Coram: S. R. Bani

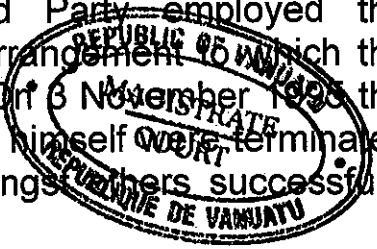
Counsels: Frederick J. Gilu & Justin Ngwele for the Claimant & Third Party
Stephen T Joel for the Defendant.

JUDGMENT

The Claimant filed a Magistrates Court Claim seeking eviction orders. The Defendant in his defence concedes that he is not entitled to continue to occupy the dwelling house the subject of the claim. However the he filed a counterclaim against the Claimant and the Third Party for non-payment of his employment entitlements.

An order for eviction was issued on 8th April 2009 as a separate issue from the counterclaim filed in this matter. On the Counterclaim both counsels submitted that they did not intent to cross-examine witnesses on each side. Counsels were directed to file written closing submissions. These final submissions were filed, although not in the time specified in the direction order.

To put this matter into perspective, the pleadings of the counterclaim are such that the Third Party employed the Defendant from 22 February 1976, an arrangement of which the Defendant refers to as the first contract. On 6 November 1996 the Defendant amongst other employees like himself were terminated by the Third Party. The Defendant amongst others successfully

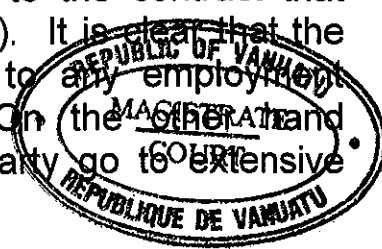


sued the third Party for non payment of employment entitlements in the Supreme Court. That matter was styled Supreme Court Civil Case No. 93 of 1997. Presumably after the institution of Civil Case 93 of 1997 (VUSC), the Third Party agreed to settle the employment entitlements of the applicants including the Defendant in the present case. These entitlements included 3 months notice, leave owing and severance payments.

The Defendant's entitlements were still not paid when he successfully applied for the job he was terminated from with the Third Party. The Defendant refers to this employment as the second contract. The Defendant entered into a Trusteeship agreement with the Third Party that his entitlements under the settlement agreement in the Supreme Court Civil Case No. 93 of 1997 be withheld until the Defendant resigned or ceased to be employed by the Third Party. The Counterclaim arises from that settlement agreement. The Defendant was dismissed from work under the second contract on 30 January 2006. It is pleaded that the counterclaim refers only to the first contract, the contract that ended in November 1995.

In defence to the counterclaim, the Third Party appears to be referring only to the contract referred to by the Defendant as the second contract. This employment contract commenced on 2nd October 1997 and ended on 30th January 2006. It is pleaded in defence that the Defendant is not entitled to any employment entitlements as he was terminated for serious misconduct on 30th January 2006. The Third Party pleads in defence that there was no breach of agreement.

The issue for determination is whether the Defendant is entitled to his employment benefits under the first contract which was terminated in 1995 and subject to an application filed in the Supreme Court. It is difficult to understand why counsels for the Claimant and the Third Party continue to dwell on the second contract. By reading the documents filed for the counterclaim, the Defendant makes no reference whatsoever to the contract that was terminated in 2006 (the second contract). It is clear that the Defendant accepts that he is not entitled to any employment entitlements under the second contract. On the other hand Counsels for the Claimant and the Third Party go to extensive effort to dwell on that contract.

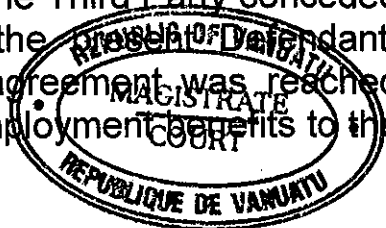


Evidence in support of the counterclaim is a Sworn Statement deposed by the Defendant. This evidence is not challenged by the Claimant counsels so that it is accepted as the evidence of the Defendant on the counterclaim. Evidence in support of the defence to the counterclaim is that deposed by Mrs. Goretti Lunabek.

It is submitted for the Defendant that the Defendant concedes that he is not entitled to any employment entitlements for the second contract from October 1997 to January 2006. However, it is submitted that the Third Party is duty bound under the settlement terms of the Supreme Court Civil Case No. 93 Of 1997 to discharge its obligation thereat. It is further submitted by counsel for the Defendant that section 20 of the *Employment Act* is inapplicable having regard to section 4 of the *Limitation Act* No 4 of 1991. This submission is accepted and needs no further comment.

It is contended by counsel for the Claimant and Third Party that the Defendant is not entitled any employment entitlement as he was terminated for serious misconduct. The matter of *Timothy Quai v Government of Vanuatu*, Civil Case No.182 of 2006 VUSU, is cited as a binding authority for their contention. This may be the case if this Court's final determination is limited to the second contract that was commenced in 1997 and terminated in 2006. The Defendant was dismissed for serious misconduct on the second contract. The first contract is the issue for determination by this court and not the second contract.

It is further contended by counsel for the Claimant and Third Party that the Defendant failed to show by way of evidence that there exists a trusteeship agreement executed between the Third Party and the Defendant. The Defendant asserts in the pleading that there was an agreement to that effect. Indeed the Defendant did not make that deposition in his sworn statement. But did he need to prove by evidence that a trusteeship agreement exists? The answer must be in the negative. The Defendant need not prove that there was an agreement in existence. All that the Defendant needed to prove was that there was a settlement agreement with respect to the contract which was a subject of an application before the Supreme Court. In that matter the Third Party conceded that it owed the Applicants, including the Defendant, employment entitlements. A settlement agreement was reached between the parties for the payment of employment benefits to the applicants.

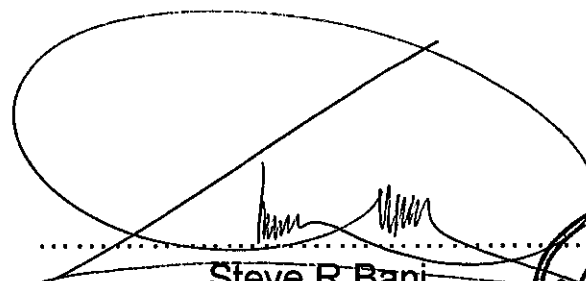


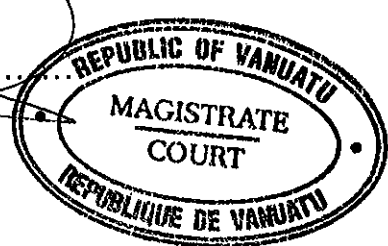
The Third Party by ignorance and/or neglect failed to honour that settlement deed. The Defendant was a beneficiary of that settlement agreement so that he must be able to reap the fruits of that settlement. On the balance of probabilities the counterclaim must succeed. It is thus ordered:-

1. Judgment in the sum of VT 897,348 is entered for the Defendant, Mr. Roger Litoung against the Third Party, Lycee Louis Atoinne de Bouganville School Council.
2. No order is made for the payment of interest on the judgment sum.
3. The Third Party shall bear the costs of this proceeding to be determined by the court failing agreement.

Dated at Port Vila this 15th Day of May 2009

BY THE COURT


Steve R Bani
Senior Magistrate


REPUBLIC OF VANUATU
MAGISTRATE
COURT
REPUBLIQUE DE VANUATU