IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

(Civil Jurisdiction)

CIVIL CASE No.77 of 2000

| BETWEEN: | JOE JEFFRED BONG Plaintiff |
|----------|--------------------------------|
| AND: | WAN SMOLBAG THEATRE Defendant |

Coram:

Chief Justice Vincent Lunabek

Counsels:

Mr. Saling Stephens for the Plaintiff

Mr. Edward Nalial for the Respondent

Judgment date:

11 October 2001

Written reasons date:

08 October 2002

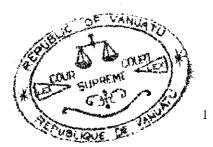
REASONS FOR JUDGMENT

On 4 July 2000, the Plaintiff filed a Summons against the Defendant for:

- Damages in the sum of One Million Eight Hundred and Fifty Seven
 Thousand Eight Hundred and Eighty Two Vatu.
- 2. General Damages;
- 3. Interests and costs.

The trial in this matter began on 20 August 2001.

Both parties agreed for the Court to determine the following issues:



- Did the Plaintiff, Mr. Bong, resign from his employment with the Defendant, Wan Smolbag Theatre, in 1994 when he chose to go on scholarship to Australia for more than one year?
- 2. Did the Plaintiff resign from his employment with the Defendant when knowing that his employment contract was for a specified period to end on August 1 1996, however, he chose to go on scholarship to Australia in 1995?
- 3. Did the Defendant terminate the Plaintiff's employment contract in 1994?
- 4. Did the action of the Defendant in advertising the replacement of the Plaintiff amount to termination?

The trial proceeded on the basis of affidavit evidence read and the crossexamination of the deponent by the other side on the disputed facts of the affidavit material.

The Plaintiff has filed an affidavit dated 6 July 2001 in support of his case. The Defendant has filed the following affidavits in support of her defence.

| (a) | Charleon Falau | dated 19 June 2001 |
|-----|----------------------|----------------------|
| (b) | Paul Tabi | dated 19 June 2001 |
| (c) | Bob David | dated 19 June 2001 |
| (d) | Lucy Rarua | dated 19 June 2001 |
| (e) | Jo Dorras | dated 19 June 2001 |
| (f) | Peter Donovan Walker | dated 19 June 2001 |
| (g) | Peter Donovan Walker | dated 16 August 2001 |

(h) Massing Theophile of the Training and Scholarships Coordination Unit (TSCU) dated 17 August 2001.

On 11 October 2001, the Court had made the following Orders:

- 1. That the Plaintiff's claim for damages in the sum of one million eight hundred and fifty seven thousand eight hundred and eighty two Vatu (1,857,882 Vatu), is refused.
- 2. That the claim for general damages is refused.
- 3. That there is no need to make an order for interest.
- 4. That the costs are awarded to the Defendant and to be paid by the Plaintiff and costs agreed if not then taxed at 10,000 Vatu per hour.
- That the Defendant's claim under paragraph 124 of the Defendant's Summons is dismissed. [See judgment dated 7 May 2001, Civil Case No.77 of 2000].
- 6. That the reasons of the decision be forwarded in due course.

The reasons of the decision of 11 October 2001 are set out below.

BRIEF BACKGROUND

The Plaintiff, Joe Jeffred Bong, is a ni-Vanuatu citizen. He first joined the Wan Smolbag Theatre (W.S.T.), the defendant in or about November 1989. He was one of the founding members of the defendant. Sometimes in 29 August 1994, the plaintiff signed a contract with the defendant which was to end on 1 August 1996.



In 1994, the plaintiff and his wife applied for an Ausaid Scholarship to study in Australia. The plaintiff accepted the scholarship award granted to him and his wife on 8 June 1995.

In or about November or December 1994, the defendant advertised, auditioned and employed a new actor to replace the plaintiff. The plaintiff was present during the auditioning of the new actor and was asked to give his opinion about the new actor to which he did by saying that the new actor was the right person. The plaintiff says, his contract of employment was terminated by the defendant in December 1994. The plaintiff says this was done without properly consulting and informing the plaintiff. On 16 January 1995 the plaintiff signed another employment contract with the defendant and CUSO. The 1995 contract was for the "secondment of the plaintiff in the temporary, full time position of settlement Programme Collaborator". This for 5 and a half months. In or about the second week of August 1995, the plaintiff left Vanuatu for Australia. In August 1996, the plaintiff while he was still in Australia, sent a facsimile to the defendant for the defendant to pay his severance pay and also that he wanted to enter into a new employment contract with the defendant. The plaintiff did not receive a reply from the defendant. The plaintiff, then, issued the Writ claiming damages for breach of contract.

The defence is in substance that the defendant admits that an agreement was entered into with the plaintiff on 29 August 1994 which was to end on 1 August 1996. The defendant says that the plaintiff resigned from his employment with the defendant when the plaintiff on his own accord decided to go for training in Australia in 1994 and did not return for the duration of his contract. The defendant admits that in November 1994, the defendant advertised, auditioned and employed a new actor to replace the plaintiff. The defendant says, the plaintiff resigned from his employment with the defendant in about November 1994. The defendant admit that an agreement was entered into between the plaintiff, the defendant and CUSO but the defendant says, this agreement was

totally separate (with new terms) from any previous agreements with the defendant. The defendant says further that on two occasions (1995, 1997) the Department of Labour discussed the plaintiff's claim on grounds the claim had no basis. Finally, the defendant says tat the plaintiff resigned from his employment in November 1994 and further that the plaintiff failed to honour the verbal agreement with the defendant by which the defendant agreed to re-employ the plaintiff if the plaintiff returned from Australia within 1 year from November 1994. The plaintiff remained in Australia for an excess of 3 years.

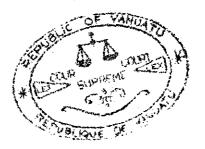
THE EVIDENCE

The evidence were adduced by affidavit materials filed and oral evidence by the cross-examination of the deponent witnesses.

THE PLAINTIFF'S EVIDENCE

- Mr. Bong's evidence in chief is by way of affidavit which was tendered to the Court as Exhibit P1, his affidavit was sworn 6 July 2001 and filed on the same date.
- 2. Under cross-examination, the following were his answers summarised.
- 3. Mr. Bong confirmed that at the time of applying for the scholarship in 1994, he was under an Employment Contract with Wan Smolbag Theatre for a fixed period until 1 August 1996. He stated he was aware of the Contract, however he applied to go on scholarship.
- 4. He stated Wan Smolbag Theatre did not ask him to go nor did Wan Smolbag Theatre force him to go.
- 5. He admitted that he was in Australia from 1995 and returned to Vanuatu in January 1999.
- 6. He further admitted that prior to leaving for Australia for studies, he entered into a "proposal" with Wan Smolbag whereby he would return within 1 year and Wan Smolbag would re-employ him.

- 7. He agreed that he was still being paid a salary by Wan Smolbag in December 1994.
- 8. Further he agreed that Wan Smol Bag continued to pay his salary until June 1995 when the Agreement between himself, Wan Smolbag and CUSO ended.
- He further stated that he first approach CUSO for employment and then told Mr. Peter Walker by telephone not to worry because he had secured employment with CUSO.
- 10. He admitted that Mr. Walker informed him that it was not possible for Mr. Bong to receive a salary while on study in Australia. He further agreed that he knew he risked losing his salary by choosing to go on the scholarship to study.
- 11. Mr. Bong stated further that he remembered sitting an English test at the Ausaid Office but cannot remember whether the test was recorded.
- 12. When it was put to him that he called Mr. Peter Walker in the UK to tell him that his scholarship had been delayed, Mr. Bong replied that maybe he called Mr. Walker but he could not remember. That call was to advise Mr. Walker that his (the plaintiff's) scholarship had been delayed.
- 13. Mr. Bong further admitted that he was present at the audition when a Mr. Palen of Malekula was recruited by Wan Smolbag. He stated he said that he thought Mr. Palen was the right actor to replace him. He further stated in cross-examination that he did not complain to Wan Smolbag or Mr. Walker about the recruitment of Mr. Palen.
- 14. He denied being involved in a video called "Another week, Another workshop". However, when the video was shown to him, he admitted being in the video doing rehearsals rather than training or leading the group he was with in the video.
- 15. It was put to Mr. Bong that he made the threatening calls contained in the Annexure "A" of Ms Jo Dorras' affidavit (Exhibit D3). He denied threatening Ms Jo Dorras by saying words to this effect, "I am coming back in a few months, get out of the country or I'll fucking kill you".

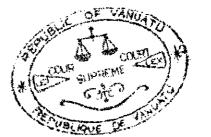


16. He stated that he did not think that the letters annexed as "G" to Mr. Walker's affidavit (Exh. D1) were threatening or offensive, and Mr. Bong further stated that one is entitled to swear.

THE EVIDENCE OF THE DEFENDANT

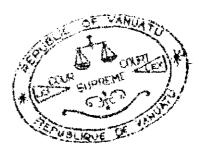
Mr. Peter Donovan Walker

- 1. Mr. Walker's affidavit evidence in chief are contained in his 2 affidavits (tendered as Exhibit D1 and D2).
- 2. Under cross-examination, he confirmed on the whole what he deposed in his evidence in chief.
- 3. He stated he is the Manager of the defendant and he knew Mr. Bong since about February or March 1989. He said at the start they were good friends they went out for kava and Mr. Walker helped Mr. Bong to guarantee the loan for Mr. Bong and further he helped Mr. Bong take his baby to a doctor and also Mr. Bong help Mr. Walker look after his house. He stated they were good friends at the start.
- 4. He stated that he first heard about Mr. Bong applying for a scholarship when he asked him into the back room at Wan Smolbag late August/September 1994. Mr. Walker stated in August/September 1994 Mr. Bong told him on that occasion "Mi sori blong talem long yu long taem ia wan actress is just out long Wan Smolbag Theatre be mi nidim you blong writtem reference blong mi". He stated he wrote Mr. Bong's reference in this scholarship application at the back room of Wan Smolbag House.
- 5. Mr. Walker confirmed his evidence in chief under paragraph 10 of his affidavit Exhibit D1 that Wan Smolbag Theatre group agreed verbally that if the plaintiff returned from Australia within one year the defendant would re-employ him. He further confirmed that the one year verbal agreement was made sometime in August/September 1994 before the group toured

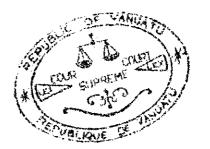


Erromango. He further stated that he was not mistaken by the one year verbal agreement. He confirmed the defendant agreed including these members of the defendant, Charleon Falau, Bob David, Paul Tabi, Lucy Rarua.

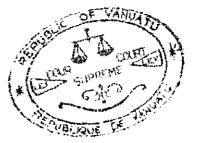
- 6. Mr. Walker further confirmed that at the time of auditioning to recruit a new actor the plaintiff stood outside and watched all applicants being auditioned and agreed that a Mr. Palen from Malekula was the right actor to replace him. He agreed with other members of the defendant. The plaintiff at the time never objected or complained about the recruitment of Mr. Palen. Mr. Walker's evidence was that the plaintiff knew the purpose of recruiting Mr. Palen and the plaintiff never asked the defendant to stop the audition. The purpose was that Mr. Palen would replace the plaintiff of Wan Smolbag while the plaintiff was on scholarship. He further confirmed everyone knew and agreed that there needed to be a replacement actor for the plaintiff.
- 7. Mr. Walker further agreed he executed the employment agreement with the plaintiff and that he hand wrote 1989 at the bottom for severance pay purposes.
- 8. He stated he did not sign the agreement between CUSO, Wan Smolbag and Mr. Bong because he was on leave in the United States but he authorised the signature of the agreement (annexure F to Mr. Walker's affidavit, Exh.D1). He said that the purpose for CUSO agreement was to guarantee the plaintiff's employment no matter that his study or scholarship was delayed.
- 9. He stated that the plaintiff approached Mr. Simon Swale about working with CUSO, and the work was beneficial to the defendant, and further CUSO was a close working partner of the defendant and the plaintiff knew Mr. Swale too.
- 10. He stated that, yes, may be it would have been important to set out the one year agreement with the plaintiff in writing however the fact is that there was a verbal agreement. He further stated that just because there



- was no written agreement there was no excuse for the plaintiff to break or breach the verbal agreement.
- 11. He stated that the plaintiff faxed Mr. Walker in July 1996 asking for a new employment contract, and Mr. Walker informed him that the plaintiff had to be in Vila performing in plays. He asked why hadn't the plaintiff jumped on a plane and come back then.
- 12. Mr. Walker stated that he did not keep a copy of the fax which the plaintiff sent to him in 1996 because he didn't think that this matter would come this far.
- 13. In terms of the plaintiff's salary, Mr. Walker stated that it was his understanding that all founding of the defendant received VT60,000 per month and the salary was to increase to VT65,000 per month in 1995. Mr. Walker did not agree that the plaintiff was paid 70,000VT per month.
- 14. When it was put to him that the plaintiff was paid VT70,000 per month, Mr. Walker replied he did not know but the only evidence which sets out any salary the plaintiff was receiving is annexure B to Mr. Walker's affidavit Exhibit D1 which wets out that the defendant had budgeted VT65,000 for the defendant's salary.
- 15. In terms of managing the finance of the defendant, Mr. Walker stated that each group managed their own account and submitted their group accounts quarterly then the funds were transferred to each group's account at the bank. He stated he was involved in transferring the funds. Mr. Walker further stated that he did not thing that the salary was an issue because the plaintiff resigned from his employment. He stated that if needed, he could go to the Bank and ask for the account statements. He further stated that it would be easier for him to provide account statements for the past three years but going back to 1994 is a long time.
- 16. It was put to Mr. Walker that the defendant held the audition of the time that the group was in Erromango, and he disagreed. He stated that other actors on the tour were present at audition.



- 17. Mr. Walker stated that there was no official document he had a scholarship however he referred to paragraph 11 of his affidavit (Exh. D1) which had his evidence that he contacted Mr. Aaron Hanghangkon an officer at Ausaid to check on the plaintiff's scholarship and Mr. Hanghangkon informed Mr. Walker there was no doubt that the plaintiff and his wife would be on scholarship to Australia.
- 18. Mr. Walker stated the plaintiff had requested his salary while he would be away on study before the plaintiff on Erromango.
- 19. He agreed there was no resignation from the plaintiff before he went to Erromango however the plaintiff told Mr. Walker he was going on Scholarship to Australia.
- 20. Mr. Walker agreed that the employment agreement between the plaintiff and the defendant to end in July 1995 or 1996 but not July 1995 as suggested by the counsel for the plaintiff.
- 21. Mr. Walker stated the plaintiff did not give three months notice as required under the employment agreement he signed with the defendant.
- 22. He further said under cross-examination that he knew the plaintiff would be going on scholarship because Ausaid had informed the defendant, the plaintiff himself had requested salary while away on study, all these showed he was going to Australia.
- 23. He confirmed that an Ausaid officer informed Mr. Walker the plaintiff was going. Mr. Walker stated he had a duty as manager of the defendant to check with Ausaid as to the plaintiff's scholarship.
- 24. His further evidence was that the defendant as an organisation had a duty to find a replacement actor.
- 25. He further stated that the plaintiff went to Canada and CUSO was responsible for his travel there.
- 26. The agreement with CUSO, the defendant and the plaintiff involved the defendant because the work the plaintiff would be doing related to the defendant. That work was to build up the defendant, CUSO and the plaintiff's name.



- 27. Mr. Walker's further evidence was that the CUSO agreement was related to Mr. Bong's scholarship because the whole process was started when Mr. Bong decided to apply for a scholarship whilst on contract. The scholarship was delayed, the defendant and Mr. Walker himself helped him to work. These events are all related.
- 28. Mr. Walker did not agree that the CUSO agreement came in when the plaintiff complained about the replacement actor. His evidence was that the agreement with CUSO was entered into so that the plaintiff would not suffer while waiting to go on scholarship to Australia.
- 29. Mr. Walker stated that the agreement was signed on 16 January 1995 when he was not in Vanuatu however he was fully aware of the Agreement.
- 30. He further stated that the plaintiff called him in the United Kingdom on 1 January 1995 and told him that his scholarship was delayed. He confirmed the diary entry (annexure D) records correctly what he (Walker) wrote that day.
- 31. He stated that it was not a lie but the defendant was helping the plaintiff when the defendant agreed to pay two thirds of the plaintiff's salary under the CUSO agreement.
- 32. Mr. Walker stated that it was the plaintiff who decided to go on scholarship to Australia and the defendant and the plaintiff agreed that if the plaintiff return within one year he would have a job.
- 33. He further stated that Mr. Bong informed Mr. Walker that "I've got bad news I'm going on scholarship with my wife to Australia".
- 34. The plaintiff's action showed he was going.
- 35. He stated there was no reason to discipline the plaintiff. The one year agreement was to employ the plaintiff if he returned within the one year from Australia.
- 36. Mr. Walker stated the defendant helped the plaintiff because of the delay in his scholarship. The defendant did not discipline the plaintiff.



37. The one year agreement was between the defendant and the plaintiff and it was not relevant that CUSO be included. Further the CUSO agreement showed the plaintiff would be finished on 30 June 1995 and then going on scholarship to Australia. He said he was not mistaken the one year verbal agreement between the plaintiff and the defendant existed.

Ms Jo Dorras

- 38. Ms Jo Dorras' evidence in chief is contained in her affidavit filed and tendered as Exhibit D3.
- 39. Under cross-examination she confirmed on the whole the evidence she had set out in chief. Following are a summary of her answers under cross-examination.
- 40. She stated that in respect to paragraph 10 of Mr. Walker's affidavit (Exh.D1), she did not know whether she was present because she works at home and it has been a long time 7 years have passed.
- 41. She further stated the time she was aware of the one year verbal agreement between the plaintiff and the defendant because the plaintiff told her. She further stated the agreement was clear, provided the plaintiff came back from Australia within one year. She stated she has knowledge of the one year agreement. As to the specific dates, she stated that she did not want to lie but she knew that there was 1 year verbal agreement.
- 42. She stated she is the script writer at the defendant and some times had management responsibilities, decision making times, many times she is present or she hears about those decisions later.
- 43. She stated that at the time of the audition and recruitment of Mr. Palen, everyone sat and agreed to recruit a replacement actor. She does not know the date of the recruitment. No one took minutes of the recruitment because all members of the defendant had trust and everyone thought it was a normal thing.



- 44. Her evidence was she does not know who makes payments, Mr. Michael Taurakoto is responsible for the payments.
- 45. The meeting to recruit a replacement actor, everyone agreed, and the defendant had to because they (the members of the defendant) were going on tour in March or April the following year being 1995.
- 46. The audition took place sometime at the end of August or September 1994.
- 47. Ms Dorras stated that she heard about the plaintiff's scholarship application being delayed when the plaintiff rang her husband, Mr. Walker in January while they were in the United Kingdom.
- 48. She stated that the plaintiff asked the defendant to send videos to Ballarat which was where the plaintiff would be going to study. November or December 1994 Ballarat told the defendant that Bong was going there to study.
- 49. A further evidence was that Mr. Bong got confirmation from Ausaid in July because he had to do a bridging course. Ballarat asked that requirement from Mr. Bong.
- 50. She further stated that on the one part, Mr. Aaron Hanghangkon of Ausaid confirmed Mr. Bong would be going on scholarship 1994 and the written confirmation came in 1995.
- 51. Ms Jo Dorras further stated that at the time of the audition to recruit Mr. Palen, the plaintiff sat next to her and said: "Palen hemi stret man blong recruitem hem blong replacem mi". Her further evidence was that the plaintiff said this two times then and Palen on stage and the plaintiff and her sat next to each other. Everyone was there at the audition.
- 52. There was a meeting after the audition, all the applicants and the group met and decided.
- 53. Her evidence was that the plaintiff agreed with the replacement actor because he was going to scholarship.
- 54. When counsel for the plaintiff referred to annexure "A" of Ms Dorras' affidavit, (Exh.D3), she confirmed that she went to the British High



Commission then officer, Arthur Colton because she did not want her children to answer the phone when the plaintiff called and swore or made verbal abuses on the telephone. She stated that she was not there when the police took the plaintiff to the police station and that there was no answer from the police.

- 55. She did not agree that the police closed the file because there was no case but it was due to poor police work.
 - 56. She confirmed that the plaintiff returned from Australia in about 1999, and she never swore at the plaintiff because it's not her "fashion". She may have smiled but never swore.

Mr. Charleon Falau

- 57. Mr. Falau's evidence in chief is contained in his affidavit tendered as Exhibit D5.
- 58. He further gave evidence in chief verbally. His evidence was that he joined the defendant in November 1989. The other founding members including the plaintiff.
- 59. As to the salary, his evidence was that there was an increase in August 1994 in his salary to VT60,000. This was the same figure he received a salary in December 1994.
- 60. The defendant tendered the video as Exhibit D4 through Mr. Falau and Mr. Falau's evidence was that Mr. Bong is involved in the plays shown on this video.
- 61. Under cross-examination, he said he swore his affidavit on 19 June 2001, and does not remember the exact date of making the affidavit but some time in June. He stated that counsel for the defendant drafted his affidavit, however, it's his statement and he believes is true and does not wish to make any corrections.
- 62. He stated he read Mr. Walker's affidavit and paragraph 10 of his affidavit (Exh.D1) is true. There was a verbal agreement between the plaintiff and

the defendant as set in Mr. Walker's affidavit (Exh.D1) paragraph 10. He does not know the exact date but it was sometime in 1994. At the time of the agreement members of the defendant were present including Bob David, Paul Tabi, Lucy Rarua.

- 63. When asked whether Ausaid gave the official acceptance in 1995 to Mr. Bong of his scholarship, Mr. Falau replied, No, he had heard the plaintiff was going on scholarship in 1994 through Mr. Bong's wife because they are close family. When challenged, Mr. Falau insisted he knew in 1993 that the plaintiff would be going on scholarship.
- 64. Mr. Falau stated that the defendant agreed the one year verbal agreement after the plaintiff said he want to go for one year, the defendant followed the plaintiff's wish, Mr. Falau's exact words were to the effect, "mifala i follem tingting blong hem".
- 65. When questioned as to why the one year verbal agreement was not written down, he responded that the plaintiff wanted to go, he told us verbally so we agreed verbally. This answer he confirmed is not made up.
- 66. As to the audition he stated that after the group came back from the Erromango tour, the audition took place. The audition took place at Wan Smolbag and there were many applicants. His further evidence was that he heard Mr. Bong say that he thought Mr. Palen was the right actor to replace him at the defendant. Mr. Falau said that at that time he was on stage with Mr. Palen and the plaintiff gave his opinion about Mr. Palen in front of them.
- 67. When questioned as to the exact words which the plaintiff said at that time, Mr. Falau replied he said words to the effect, "mi luk se man ia hemi stret man blong tekem ples blong mi".
- 68. He stated that the plaintiff said the above words at the audition to recruit Mr. Palen. Further Mr. Falau stated the defendant needed to take a replacement actor because the group needed to go ahead somehow.
- 69. As to his salary, Mr. Falau stated that in 1994 he was receiving VT60,000 per month so was the plaintiff. There was an increase each year at the

- end of the year his salary increased to VT65,000. His evidence was that it was not true that the plaintiff received VT70,000 per month.
- 70. He further stated that his group were in charge of the account and the plaintiff received the same salary and when the plaintiff left for CUSO under the CUSO agreement, Mr. Falau himself paid the plaintiff because he had then become in charge of the account.
- 71. He stated that paragraph 4 of his affidavit is true.

Ms Lucy Rarua

- 72. Ms Rarua's evidence in chief is contained in her affidavit tendered as Exhibit D6.
- 73. She confirmed her evidence on the whole under cross-examination.
- 74. As to paragraph 4 of her affidavit, she stated she was present at the time of the 1 year verbal agreement.
- 75. She explained in her evidence that the plaintiff gave his agreement he will go on a scholarship and there be a replacement for him. Her evidence was that as to paragraph 4 of her affidavit, they were all there, and the plaintiff told them inside Wan Smolbag House.
- 76. She said the plaintiff agreed with Mr. Palen's recruitment. She remembers the plaintiff saying that once.
- 77. She stated she remembers the 1 year verbal agreement.
- 78. She agreed her affidavit is similar to Mr. Falau's. It was put to her that someone wrote her affidavit and she had to sign it, she answered that they all talked about it, everyone involved as witnesses in this matter discussed the contents of the affidavit. Those people are Charleon Falau, Bob David, Paul Tabi, Jo Dorras, Peter Walker, and Lucy Rarua. They had many small meetings she cannot remember when but some time in June.
- 79. The 1 year verbal agreement with the plaintiff, everyone agreed including the following people. Kamy Robert, Wyline Toka, Peter Walker, Bob



David, Paul Tabi including some other members who have left and she does not remember their names.

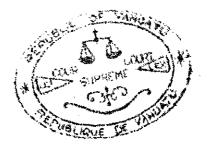
Mr. Bob David

- 80. Mr. David's affidavit exhibit D7 contains his evidence in chief.
- 81. His evidence under cross-examination is summarised as follows:
- 82. He joined the defendant in 1993, but was there before. He was shown Ms Rarua's affidavit and agreed that paragraph 2 of both affidavits are the same because they were all there at the same time when the things he set out in his affidavit happened.
- 83. He agreed that the group met to give their statements, however, confirmed in re-examination that all that he has deposed in his evidence in chief are true and that he was there when those things occurred.

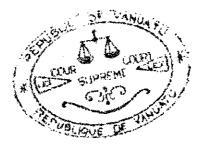
Mr. Paul Tabi

- 84. Mr. Tabi's evidence in chief is contained in his affidavit as exhibit D8.
- 85. Under cross-examination, Mr. Tabi seemed confused as shown by the way he answered and his demeanour. On the whole he answered yes to the questions put to him under cross-examination.
- 86. He agreed he joined the defendants with Mr. Bob David, and was not a founding member of the defendant. He further agreed that paragraph 2 of Mr. David's affidavit is the same as paragraph 2 of his affidavit.
- 87. Despite his answers under cross-examination, he confirmed under reexamination that all that he had set out in his affidavit as evidence in chief are all true.

Mr. Massing Theophile



- 88. Mr. Theophile's affidavit tendered as Exhibit D9 contains his evidence in chief.
- 89. When cross-examined, the following were his answers:
- 90. He confirmed that he has authority from the training and scholarship coordination unit to make this affidavit and that authority was given to him by the Principal Scholarship's Officer, Mr. Antoine Tina. The authority was verbal and that Mr. Theophile himself is the Deputy Principal Scholarships Officer. Further he stated that the documents are under the Principal Scholarships Officer's authority.
- 91. As to who has the final say on whether or not an applicant is successful and goes on scholarship, Mr. Theophile replied that the Scholarship's Board has the final say. The process is the applicants submit their applications to the Scholarship's Board then the Board refers them to the funding agency or governments and then those agencies come back to the Board and the Board informs the applicant.
- 92. He confirmed his position as the Finance Officer and Acting Senior Scholarship Officer which makes him second in command at the Training Scholarships Coordination Unit.
- 93. He agreed that some scholarship applications are rejected.
- 94. He further agreed that when one applies it does not mean that he goes.
- 95. He further stated that it was the responsibility of the employee to notify the employer about going on a scholarship. It was not the responsibility of the Training Scholarship Coordination Unit to notify the employer. He stated that the final answer for a scholarship's award comes from the Training and Scholarship's Coordination Unit and so the applicant must come back to that office.
- 96. He further stated that an applicant can refuse or accept an award so it is up to the applicant.
- 97. He stated that Mr. Bong's letter of acceptance for the scholarship, he thought, was about 5 June 1995, referred to annexure "F" of his affidavit



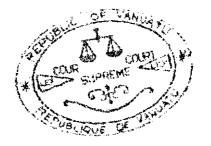
which is a letter from Ausaid dated 5 June to the then Principal Scholarship's Officer.

Mr. Takau Falau

- 98. Mr. Falau gave his evidence in chief verbally.
- 99. He told the Court that he is from Ambrym and in April 1998, he went to Australia to see the plaintiff.
- 100. He further stated that one Saturday they had watched a program on television called, "Hey hey Its Saturday" and about 8.30PM he and the plaintiff got into the plaintiff's car and drove to another town.
- 101. When they got to a town called "Aripol" the plaintiff made a call to Vanuatu to Ms Jo Dorras. When the plaintiff made the call, Mr. Falau stated that he was about 2 metres away from the telephone booth and he heard everything that the plaintiff said.
- 102. Mr. Falau stated that he heard the plaintiff say words to the effect, "White bastard, get out of the country or I will fucking kill you when I come back".
- 103. After he made the telephone call, the plaintiff told Mr. Falau that he had talked to Ms Jo Dorras. He stated that they then drove to another town to play at a casino.
- 104. Under Cross-examination, Mr. Falau stated he knows the plaintiff well.
- 105. He stated that he was in Court the day before and left at 3.00PM when the plaintiff had not finished his evidence.
- 106. He confirmed that he has a dispute with the plaintiff over a telephone bill.
- 107. He stated further that he did not know he was going to be a witness until this morning, he was sent out this morning from the hearing.

FACTUAL FINDINGS AND CREDIBILITY

1. On the assessment of the evidence given in the plaintiff's and the defendant's cases respectively, the following facts are established:



- (a) There existed a binding employment contract between the plaintiff and the defendant for the duration of 29 August 1994 until 1st August 1996.
- (b) The plaintiff chose to go on scholarship in Australia.
- (c) The plaintiff remained in Australia from August 1995 until January 1999.
- (d) It was the plaintiff who approached Simon Swale of CUSO in January 1995 for employment and an employment agreement was entered into between the plaintiff, CUSO, and the defendant. Under that agreement, the plaintiff was paid VT60,000.
- (e) The plaintiff agreed or accepted Mr. Palen as a replacement actor for him with the defendant. The plaintiff did not complain about Palen's recruitment.
- (f) Prior to departing for Australia, the plaintiff was aware that he would not receive a salary from the defendant while he studied.
- (g) The plaintiff did not inform the defendant of this first scholarship application to the Training and Scholarship's Coordination Unit.
- (h) The plaintiff had to sit a test as a bridging course in January 1995 to bring his English up to the standard required by Ballarat University. He admitted sitting the test at Ausaid.
- (i) The plaintiff threatened Mr. Walker and Ms Dorras.
- (j) The plaintiff made the threatening and abusive call to Ms Dorras as set out in annexure "A" to Ms Dorras' affidavit tendered as Exhibit D3.
- 2. The plaintiff was involved in training a group of the defendant which late became known as Health Force. The plaintiff was involved in the video title "Another Week Another workshop". The evidence is overwhelming in that video that the plaintiff was involved in plays.



- 3. As to the plaintiff's contention that the defendant terminates his employment, the plaintiff admitted under cross-examination that he chose to go on scholarship in Australia despite knowing that the was under a binding agreement with the defendant which would expire on 1 August 1996. He further admitted he went to Australia in August 1995 whilst there was one more year left on the agreement with the defendant. He admitted that in January 1995 he approached Mr. Simon Swale of CUSO to ask for employment. He admitted sitting a test to bring up his standard of English in January 1995. The plaintiff called Mr. Walker in England on 1 January 1995 informing Mr. Walker that his scholarship had been delayed. The fact that he entered into an agreement with CUSO and the defendant until 30 June 1995 was because the plaintiff knew he would leave for Australia at about July or August 1995 which is in fact the date the plaintiff and his wife left for Australia. For the plaintiff to say at the stage that in January 1995 when he was signing the agreement between CUSO and the Defendant that he did not know he was going, is incorrect because if he was really looking for employment he would have signed an agreement for a duration longer than 30 June 1995. The combination of the facts as described amount to a breach of the contract of employment with the defendant.
- 4. The plaintiff did not refuse that Mr. Palen replace him as an actor at the defendant while he was away. The evidence of the six witnesses who are members of the defendant was that the plaintiff did not complaint or ask that the audition and the recruitment of Mr. Palen to stop. This amounted to his acceptance.
- 5. The plaintiff contended that he did not enter into a verbal agreement with the defendant that if he returned from study from Australia within one year the defendant would re-employ him. The evidence of the six witnesses who are members of the defendant is overwhelming. The plaintiff admitted agreeing at Wan Smolbag Haus to this effect. Mr. Charleon Falau's evidence is that the group were following his wish. He wanted to go to



- Australia on scholarship and he asked verbally so the group entered into a verbal agreement with him.
- 6. The plaintiff contended that he received VT70,000 per month as salary while employed by the defendant in December 1994. There is no evidence clearly establishing that the plaintiff received VT 70,000 per month in December 1994. The only evidence which Mr. Walker told the Court is contained in annexure B to his affidavit (Exh.D1). His evidence as written there is suggestive saying if they budgeted VT65,000 which suggests was not the salary the plaintiff was being paid. Mr. Charleon Falau's evidence is in December 1994 he as a founding member of the defendant including the plaintiff. His evidence to support his contention here is annexure "G" to his affidavit. It is a VNPF document. The evidence is inadmissible on the basis that the plaintiff is not the author of the document. The document does not establish that it relates to the plaintiff's contributions. His name does not appear on the document. The plaintiff's documents "G" is disallowed.

It follows from the factual findings that the evidence of the defendant must be preferred. The evidence of the plaintiff are rejected for the following reasons:

- The plaintiff lacked credibility as a witness. Through out his evidence he was untruthful and below are parts of his evidence which clearly show he was not telling the Court the truth.
- It was put to him under cross-examination that the made the threatening call to Ms Jo Dorras contained in Ms Dorras' affidavit (Annexure H), the plaintiff vehemently denied making the abusive and threatening call. His evidence was that it could have been anyone who made that call and he certainly did not make that call. However, Mr. Takau Falau's evidence established that it was the plaintiff who made that call on a Saturday in Australia. The plaintiff did not tell the truth to the Court.

- Further under cross-examination Mr. Bong denied he was involved in a video called "Another Week Another Workshop". He denied known the video. He denied training a group which later became known as Health Force. He denied being involved with the group from Kiribati. The evidence contained in that video titled "Another Week Another Workshop" provides clear evidence that Mr. Bong was involved in the training of the group from Kiribati, and the group which later became known as Health Force. Mr. Bong was involved in the video itself. Therefore again he did not tell the truth to the Court under cross-examination.
- It was put to him under cross-examination that when he submitted his first scholarship application he did not inform the defendant, and he replied that he did. Counsel for the defendant showed a page from annexure A to Mr. Massing Theophile's affidavit. That page records that in answer to a question in the application Mr. Bong wrote the following "This application is done without the consent of the Director of Wan Smolbag Theatre because he may be a blocker of my further studies". The plaintiff was untruthful in his first answer that he informed the defendant of his first scholarship application. He then admitted it. He was untruthful in his first answer.

The plaintiff contended that he joined the audition while it was already in progress. The evidence pointed to the contrary. The plaintiff admitted he was there. Members of the defendant who are witnesses in this Court gave evidence that they also toured Erromango and were involved in the audition. The fact is that the audition could not have commenced while they were on Erromango. The plaintiff's contention to the contrary is rejected.

The plaintiff contended that he did not sign any agreement in respect to returning from Australia there was a "proposal" to this effect. That was a 1 year verbal agreement.



The plaintiff contended that the evidence of the defendant are fabricated because they are put into identical affidavits formats and contents. This contention must be rejected. All witnesses of the defendant who are its members, witnessed the same events, they told the Court the same recollection of events. They were telling the truth and their demeanor in the witness box reflect that.

THE LAW AND ITS APPLICATION

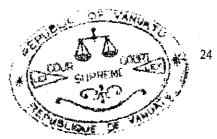
Section 48 of the Employment Act [CAP.160] provides:

"S.48 Subject to the provisions of this part a Contract of Employment shall terminate on the last day of the period agreed in the contract or on completion of the piece of work specified therein."

I will apply the law to the facts as found by answering the questions listed as submitted by the parties at the commencement of the trial:

(1) Did Mr. Bong resign from his employment with Wan Smolbag Theatre in 1994 when he chose to go on scholarship to Australia for more than one year?

The evidence is that the plaintiff chose to go on scholarship. That was his own choice. The defendant did not ask him nor force him to go on scholarship. The plaintiff went to Australia in 1995 and remained until 1999. This period is clearly in excess of one year. The employment contract entered into between the plaintiff and the defendant which is annexed to the affidavit of the plaintiff (Annexure A), expressly states that the defendant will employ the plaintiff and the plaintiff was legally obliged to work for the defendant until August 1996. The contract of employment entered into between the plaintiff and the defendant (referred to as "1994 contract"), is a contract for a specified period or fixed period is incapable of lapsing or being terminated at any other date except on the date



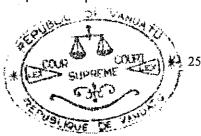
specified. It was not open for the plaintiff in 1994 or 1995 to go on scholarship. Section 48 of the Employment Act [CAP.160] confirms this position in that: "...a contract of employment shall terminate on the last day of the period specified...". In this case, the conduct of the plaintiff as described amount to a de facto resignation. The law is against him. In effect, the plaintiff chose to go on a scholarship in 1995 amounted to termination of the employment contract.

The defendant submitted that clause 5 of the agreement is in line with the common law position in terms of specified contracts in that where a party terminates or repudiates a contract before the date of lapsing, then, that party is obliged to pay damages to the aggrieved party. Clause 5 of the Employment Contract provided that should the employee break this contract he loses the right to any benefit such as holiday pay, severance pay. In addition, the employee understands that he will be liable to pay back the last month's salary unless he can prove serious mistreatment by the employer. The defendant further said in choosing to go on scholarship, the plaintiff lost any right to claim benefits such as severance pay which he now claims. The defendant then submitted the plaintiff breached the agreement and as such, he is obliged to pay back the defendant the last month's salary.

The law as referred to by the defendant in respect of this submission is the good law. However, the claim against the plaintiff to pay back the last month's salary must be refused as it is not pleaded or no counterclaim was ever made by the defendant against the plaintiff apart from the submission made to this effect.

The answer to question 1 is in the affirmative. It suffices to dispose of the entire claim of the plaintiff. However, other outstanding questions will be answered for completeness.

(2) Did Mr. Bong resign from his employment with Wan Smolbag Theatre when knowing that his employment contract for specified period to end on



1 August 1996, however, he did choose to go on scholarship in Australia in 1995?

The answer to the question 2 must also be in the affirmative.

The plaintiff resigned from his employment with the defendant. The plaintiff knew that his employment contract would end on 1 August 1996. However, he chose to go on scholarship to Australia in 1995 and returned to Vanuatu in 1999. He asked prior to go on scholarship whether he could be paid his salary and he was informed he could not. It was verbally agreed between the plaintiff and the defendant that if he returned within 1 year, he would be re-employed. He telephoned Mr. Walker on 1 January 1995 in the United Kingdom and informed Mr. Walker that his scholarship had been delayed and he had found employment with Mr. Simon Swale of CUSO. He admitted approaching Mr. Swale for employment. He worked with CUSO for a period until 30 June 1995. He then left for Australia in August 1995. The events as describe showed that the plaintiff was going to Australia. The plaintiff's contention that he did agree for the defendant to recruit Mr. Palen as an actor to replace him at Wan Smolbag Theatre, has no basis. He was there during the auditioning of the new actor. He commented Mr. Palen is a good actor. The only plausible conclusion to draw is that by his conduct, the plaintiff no longer wishes to be bound by the contract he had entered into in 1994 with the defendant. There was repudiation of the employment agreement between the plaintiff and the defendant by the plaintiff. The defendant followed the wishes of the plaintiff in allowing him to go on scholarship. That was an act of acceptance of the repudiation by the defendant in the circumstances of this case. The law then is that repudiation by one party alone does not terminate the contract, it requires acceptance by the other. The authority for that position is the case of Daniel Mouton v. SELB Pacific Limited Supreme Court, Civil Case No.42 of 1994 (p.15) and upheld in the Court of Appeal SELB Pacific Limited v. Daniel Mouton, Appeal Case No.2 of 1995.



3) Did Wan Smolbag Theatre terminate Mr. Bong's employment contract in 1994?

It follows from the answers given to questions 1 and 2 above, that the answer to question 3 must be in the negative. The evidence as found and accepted by the Court are against a positive answer to this question.

4) Did the action of the defendant (Wan Smolbag Theatre) in advertising the replacement of the plaintiff (Mr. Bong) amount to termination?

The answer to the last question must be in the negative. The audition of a recruitment of Mr. Palen to replace the plaintiff was an ancillary action taken by the defendant in the face of the fact that the plaintiff had prior to that, apply for a scholarship to go to Australia. The defendant needed a replacement actor to be recruited for the defendant's work and plays to continue. The plaintiff was present during the auditioning of the new actor. He agreed the actor was the right man to replace him.

These are the reasons of the Orders made on 11 October 2001.

DATED at PORT-VILA, this 8th DAY of OCTOBER 2002

