

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No. 199 of 2007

BETWEEN: GUY BENARD
Claimant

**AND: THE GOVERNMENT OF THE REPUBLIC OF
VANUATU**
First Defendant

AND: THE ATTORNEY GENERAL
Second Defendant

Coram: Justice N. R. DAWSON

Date of Hearing: 11th June, 2009

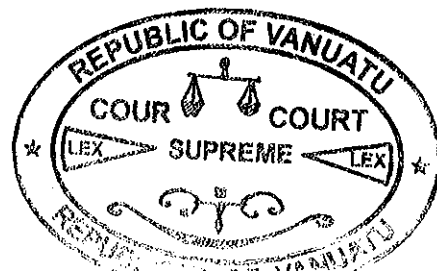
Date of Decision: 2nd October, 2009

Counsel: Claimant: In person

Defendants: Mrs. V. Trief and Mr. A. Jenshel

DECISION

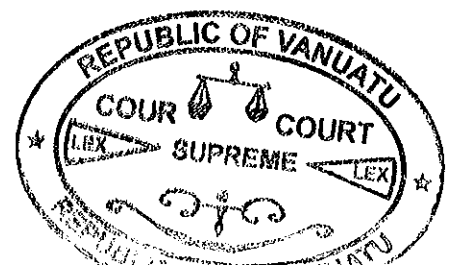
1. The Claimant has brought an action against the First and Second Defendants with respect to arrears of salary he claims is owed to him by the Vanuatu Maritime Authority (VMA). A preliminary hearing has been held to deal solely with the issue of whether the Defendants can be held liable for any debt of the VMA. A hearing was held on 11th June, 2009. The parties were then invited to file and serve their final submissions no later than 14th August, 2009 and any response to the other parties' submissions by 4th September, 2009.
2. The VMA was created by a statute of Parliament in 1998, thereafter consolidated in the Vanuatu Maritime Authority Act 2006 (the Act). The Act was repealed by a further Act of Parliament on 31st December, 2007, by the Vanuatu Maritime Authority (Repeal Act) No. 22 of 2007, (Repeal Act), to take effect from 1st January, 2008. A Liquidator for the VMA was subsequently appointed on 2nd July, 2008.



3. The Claimant submits that the VMA was created and terminated by Parliament, and the VMA was an agency dealing with public money and property. The Claimant also submits that Parliament appropriated a further VT 40 million in each year of 2008 and 2009 and that these funds should be used to pay the debts of the VMA including outstanding salaries.
4. The Claimant submits that upon the winding up of the VMA that the assets were insufficient to pay outstanding claims is irrelevant as the VMA they say was an “arm” of the Government and therefore the Government is responsible for any lawful debts left owing by the VMA. The Claimant refers to the Public Finance and Economic Management Act 2006 (Cap. 244) section 2 which defined “Government Agency” as including:
- “(a) an office entity and instrument of the Executive Government other than a ministry or a Minister;
 - (b) a local government council;
 - (c) a municipal council;
 - (d) A corporation (whether established by statute or otherwise) and any subsidiary of that corporation that:
 - i) is substantially owned or controlled by Government;
 - ii) Has a significant financial interdependence with the State by virtue of any allocation in an Appropriation Act;
 - iii) has significant use or control of public money.”
- The Claimant submits that this supports his contention that the VMA was an “arm” of the Government and therefore the Government should be liable for any debts owed by the VMA at the time the VMA was wound up. He submits that the Government decided to repeal the Act and is therefore responsible for the consequences of the repeal.
5. The Defendants submit that the Act shows a clear legislative intention to separate the Government from the VMA as a statutory body, that the VMA was set up to perform as a stand alone entity, and as such the Government is not an agent of the VMA. Therefore they submit, that the Government is not responsible or liable for any debts owed by the VMA at the time it was wound up.
6. The VMA Act section 3 says:

“3. (1) The Vanuatu Maritime Authority is established.

(2) The Authority:



- (a) is a body corporate with perpetual succession; and*
- (b) is to have an official seal; and*
- (c) may sue and be sued in its corporate name.”*

7. Section 4 of the Act sets out the composition of the VMA as a body of six members to be appointed by the Minister. Section 5 then goes on to set out the principal objectives of the VMA:-

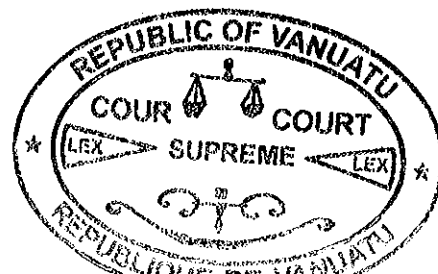
“5. The principal objectives of the Authority are to:

- (a) regulate, administer and promote the Vanuatu maritime transport industry; and*
- (b) promote the provision of an effective marine pollution prevention programme; and*
- (c) promote the provision of an effective marine pollution response system”.*

The functions of the VMA are set out in Section 6 as follows:-

6. *In furtherance of its principal objectives, the Authority has the following functions:*

- (a) to be responsible for:*
 - (i) the general administration of the Acts specified in Schedule 1 and any regulations and rules made under those Acts; and*
 - (ii) the collection of fees, charges and other revenue payable under those Acts, regulations or rules;*
- in accordance with the provisions of those Acts, regulations and rules;*
- (b) to ensure compliance with the law in respect of the registration, licensing, operation and crewing of vessels;*
- (c) to ensure that the teaching and training of seafarers by the Vanuatu Maritime College meet the STCW requirements;*
- (d) to promote compliance with safety standards in the maritime transport industry;*
- (e) to promote regular reviews of, and improvements and developments in, the maritime transport industry;*
- (f) to promote compliance with marine pollution prevention standards in the maritime transport industry;*
- (g) to promote Vanuatu's preparedness for, and ability to respond to, occurrences resulting in the pollution of the marine environment;*
- (h) to ensure the provision of appropriate distress and safety radio communication systems and navigational aids for shipping;*
- (i) to ensure compliance with occupational health and safety standards for seafarers;*
- (j) to promote safety in the maritime transport industry by providing information and advice on maritime safety;*
- (k) to ensure the investigation of accidents, mishaps and incidents, and the reporting of those investigations as obliged under any convention, memorandum of understanding or other agreement to which Vanuatu is a party;*
- (l) to maintain and preserve records and documents relating to the Authority's functions;*



- (m) to produce, publish and distribute, whether for payment or otherwise, in paper, electronic or magnetic form such reports, papers or other information as may be conducive to the carrying out of the Authority's functions;*
- (n) to provide training schemes, whether by itself or with the co-operation of such other persons or bodies as the Authority thinks fit, for its employees or for other persons concerned with maritime affairs;*
- (o) to advise the Minister on maritime transport policy;*
- (p) to undertake such research as is necessary to enable the Authority to perform any of its functions;*
- (q) to act internationally as the national authority, or representative, of Vanuatu in respect of matters relating to the supervision and regulation of the maritime transport industry;*
- (r) to provide advice and assistance to the government in relation to matters affecting the maritime transport industry, including:*
 - (i) to prepare and submit reports to the government and other persons or bodies engaged in the marine transport industry in or from within Vanuatu; and*
 - (ii) to make recommendations on the regulation of the maritime transport industry and on legislation relating to the industry;*
- (s) to assist and advise the government on matters relating to any Act or regulation directly or indirectly relevant to the maritime transport industry;*
- (t) such other functions as are conferred on it by this Act or any other Act;*
- (u) such other functions as the Minister may prescribe by notice in the Gazette;*
- (v) to do anything else that is incidental or conducive to the performance of any of the preceding functions."*

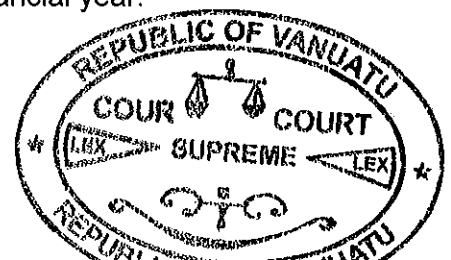
Section 7 of the Act sets out the powers of the VMA, as follows:

- "7. (1) *In addition to any other powers conferred on it by this Act, the Authority has power to do all things necessary or convenient to be done for or in connection with the performance of its functions.*
- (2) *Without limiting subsection (1), the powers include the following:*
 - (a) to enter into contracts;*
 - (b) to acquire, hold and dispose of real and personal property;*
 - (c) to engage persons to perform services for the Authority;*
 - (d) to do anything incidental to any of the powers specified in this subsection or otherwise conferred on the Authority."*

Section 8 of the Act requires the VMA to have regard to Government policy in the exercise of its powers.

Section 9 goes on to say that the VMA must where appropriate consult with Government performing its functions and exercising its powers.

Section 10 requires the VMA to give the Minister and the Minister responsible for finance a draft performance agreement for each financial year.

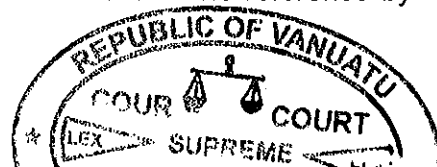


Section 12 of the Act requires the VMA to appoint a Commissioner of Maritime Affairs, subject to the written consent of the Minister but, his consent must not be unreasonably withheld.

Section 38 of the Act allows the Commissioner to appoint such employees, including employees on secondment from other organisations, as he or she thinks fit or necessary for the performance of the VMA's functions. The Commissioner is also able to terminate or suspend the employment of any employees.

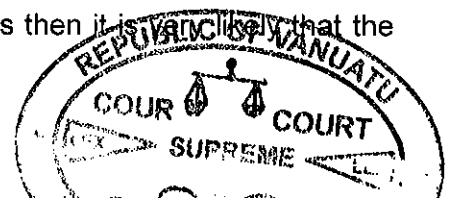
Section 41 allows the VMA to execute deeds, instruments, contracts or other documents on behalf of the VMA. Section 42 of the Act establishes the Maritime Appeal Tribunal whose members are to be appointed by the Chief Justice of the Supreme Court, with one member of the Tribunal being a Judicial Officer who is also to act as a Chairperson of the Tribunal. This Tribunal is to hear any appeals on decisions made by the VMA concerning shipping matters (Section 45).

8. In some submissions to this Court and in some previous cases referred to by counsel, a body such as the VMA has on occasions been referred to as an "arm" of the Government. That is a word that has been used as a matter of convenience but has no legal definition. It is quite clear from the Act that the VMA was not a Government Department and the employment of persons by the VMA was not covered by the Public Service Act and the Public Service Commission. Section 2 of the Public Finance and Economic Management Act states that a body such as the VMA is a Government Agency.
9. The Act sets out how the VMA was constituted and what powers it would have to perform its functions. The Government retained various powers of direction to the VMA particularly in areas of finance and the VMA had responsibilities to report back on various matters to the Government. The nearest parallel that can be drawn is that of a company incorporated under the Companies Act. The Government is in the nature of a shareholder vis a vis the VMA which has the right to set the direction of the company, and to receive reports back from the company, but otherwise to leave it alone to get on with its business within the guidelines of the shareholder's directions. Shareholders also have the right to wind up their company should they so choose.
10. The Claimant has referred this Court to three previous cases concerning the VMA he says supports his case. The first is Vanuatu Maritime Authority v. Athy [2006] VUSC 110; Civil Case 17 of 2006 (14 July, 2006) which concerned a claim for judicial review against the Director General of Finance. This claim was struck out by Treston J as *"the claim for judicial review was misconceived in that the Claimant was seeking review of a Government officer's action when itself was an arm of Government."* The reference by



the Judge in that case effectively recognizes that the VMA is a Government Agency pursuant to Section 2 of the Public Finance and Economic Management Act. This case does not suggest that the government is liable for the debts of the VMA, and therefore does not advance the Claimant's case.

11. The other two cases cited by the Claimant are interlocutory decisions made by the Court in Civil Case 148/2005 Vanuatu Maritime Authority v. Minister of Public Utilities & Attorney General and Civil Case 181/2005 Vanuatu Maritime Authority v. Director of Fisheries and Commissioner of Police. Both are distinguishable on the same basis as Vanuatu Maritime Authority v. Athy referred to in paragraph 10 herein. English (Tamlin v. Hannaford [1949] 2 ALL ER 327), Australian (Townsville Hospitals Board v. Townsville City Council [1982] 42 ALR 319, and New Zealand (Waitakere City Council v. Housing Corporation [1992] 3 NZLR 591) decisions all support the finding that an authority constituted by a sovereign government that creates a corporate body like the VMA intends that body to operate and function as a stand alone separate entity even if it is still subject to some government control and oversight.
12. The intent of the legislation is clear. The Act created the VMA so that it could operate and fulfill certain functions without the Government having to be involved in its day to day operational decisions. The Act proscribes the areas of responsibility within which the VMA and the Commissioner may act and allows the VMA to get on with its daily business. Sections 3, 7, 38 and 41 of the Act allowed the VMA to operate, enter into contracts and hire staff without recourse to any governmental body for any form of consent or oversight. Therefore it cannot be said that the government is responsible for decisions of the VMA in areas where the VMA has sole and independent authority to act.
13. The Employment Contract relied upon by the Claimant specifically states that it is a contract between the Commissioner of the VMA as the employer and the Claimant as employee. It goes on to say "*For the purpose of this Employment Contract/Agreement, the Employer is acting on behalf of the Vanuatu Maritime Authority (VMA).*" There can be no question that the VMA was not the Claimant's employer. Section 3 (c) of the Act specifically states that the VMA "*may sue and be sued in its corporate name*", and therefore the Claimant should be filing his claim for outstanding salary with the Liquidator of the VMA.
14. The submission from the Claimant that the government should be responsible for the consequences of the repeal of the Act raises two points. The first is, that if the assets of the VMA were insufficient to cover its outstanding liabilities then it is inevitable that the

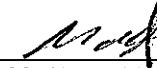


government would have been acting irresponsibly if it had not taken steps to wind up the VMA. Experience indicates that an insolvent organization, if allowed to continue to operate, is at risk of increasing its overall debt to the detriment of its creditors.

15. The second point is, that the Repeal Act is silent as to how the VMA is to be wound up. This came later. The submissions that immediately after the repeal of the Act, the government took possession of all VMA assets and that later the government allocated further funds towards the winding up of the VMA which have not been used raise concerns. It would be expected in the usual course of events that all assets of the VMA would first be used to cover outstanding liabilities with only any excess then going back to the government. That however is not the issue in this case, but if the Claimant does have evidence of such assets of the VMA taken by the government and further allocations of funds by government to the VMA, it might well be in his best interests to pass on such information to the Liquidator.
16. As a matter of statutory interpretation, the Defendants in this matter cannot be held liable for the debts of the VMA. As a consequence, the claim must fail in its entirety.
17. As a general rule costs of litigation are awarded against the losing party, in this case the Claimant. However the Court has a discretion pursuant to Rule 15.1(1) in deciding whether and how to award costs. Pursuant to Rule 15.1 (4) the Court may order each party to pay his own costs, and that is the order made in this case. This litigation raised an important issue for the first time in this jurisdiction and raised legal principles not easily followed by a self-represented lay litigant.

Dated at Port Vila, this 2nd day of October, 2009

BY THE COURT


N. R. DAWSON
Judge

