

PUBLIC PROSECUTOR -v- JOSEPH TAMATA

Coram: *Chief Justice Vincent Lunabek*

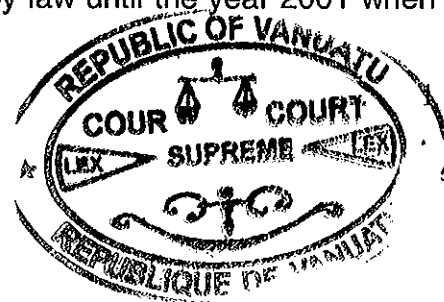
Counsel: *Mr Kammy Aromalo for the Public Prosecutor
Mr Edward Nalyal for the Defendant*

SENTENCE

This is the sentence of the Defendant, Joseph Tamata, on the breaches of the provisions of the Vanuatu National Provident Fund Act [CAP.189] ("the Act"). On 16 February 2010, the Defendant pleaded guilty to 25 counts of breaches of the provision of the Act which are set out below:

- (a) 1 count of failure to pay contributions after having made deductions to the employee wages, contrary to sections 26(1) & 50 (2) of the Act;
- (b) 8 counts of failure to pay contributions (detailed in counts 2, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29 and 31), contrary to sections 26(1) & 50 (1)(c) of the Act; and
- (c) 16 counts of failure to pay surcharges (detailed in counts 3, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 16, 18, 30 and 32), contrary to sections 26(2) & 50(1)(c) of the Act.

The Defendant on 10th March 1997 registered his business as an employer with the VNPF and indicated his position in the business as Owner and General Manager of Computer Network Services (CNS). At the time of registration he was employing six (6) employees with a monthly payroll of Vatu 295,000 per month. An employee would earn an average of VT49,166 per month. The Defendant continued paying his employee contribution on monthly basis as required by law until the year 2001 when



he started paying late. Late payments of contributions incurred surcharges at the rate of 5% of the amount paid late by the number of months it remain unpaid until paid. The surcharges continued to accumulate as a result of the late payment of employee contributions to VNPF. Late payments continued until March 2007 and, then the Defendant stopped making contribution payments.

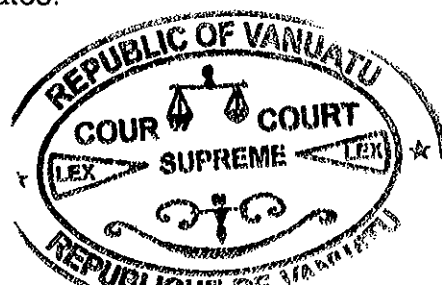
The Defendant failed to make further payments of contributions for and on behalf of twenty (20) of his employees to VNPF from April 2007 to December 2008. VNPF has sent numerous demand notices to the Defendant's official address P.O.Box 1287 for the Defendant to submit payroll record and/or pay the outstanding contributions for the defaulting period but the Defendant failed to submit such record and also failed to pay contributions until and only when he was charged in October 2009 that he began to make payments to VNPF.

The Defendant paid contributions for the period April 2007 to April 2008.

Table "A" is an extract from the VNPF Maximize System Record showing paid contributions that incurred surcharges:

TABLE "A"							
Line	Cont Month	Due Month	Amount	Paid date	Months late	Surch Amount	Surch No.
01	04/07	05/07	78,320	20/11/09	30	117,480	55744
02	11/07	12/07	78,960	20/10/09	22	86,856	55301
03	12/07	01/08	79,360	20/11/09	22	87,296	55750
04	01/08	02/08	74,720	20/11/09	21	78,456	55743
05	02/08	03/08	75,200	20/11/09	20	75,200	55745
06	03/08	04/08	81,520	01/02/10	21	85,596	56811
07	04/08	05/08	81,520	01/02/10	20	81,520	56812
Total Surcharges -						612,404	

From May 2008 to December 2008 contribution cheques are post-dated and are with VNPF. The cheques will be deposited on their due dates.



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Table "B": showing post-dated cheques payments and manually calculated surcharges:

TABLE "B"						
Line	Cont Month	Due Month	Amount	To be paid date	Months late	Surch Amount
01	05/08	06/08	78,320 (paid)	26/02/10	20	78,320
02	06/08	07/08	78,896 (paid)	26/02/10	19	74,951
03	07/08	08/08	78,896	31/03/10	19	74,951
04	08/08	09/08	83,176	31/03/10	18	74,858
05	09/08	10/08	78,376	30/04/10	18	70,538
06	10/08	11/08	78,376	30/04/10	17	66,619
07	11/08	12/08	82,856	30/05/10	17	70,427
08	12/08	01/09	83,016	30/05/10	16	66,412
			VT484,696			VT577,076

The post dated cheques totaling VT484,696 and surcharges in table "A" is VT612,404 and surcharges in table "B" is VT577,076.

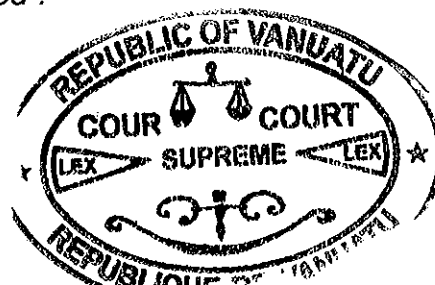
In summary:

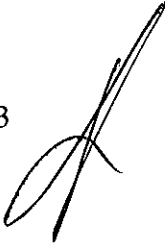
- Total outstanding contributions..... VT 484,696
- Total outstanding surcharges in Tables "A" & "B" are... VT 1,189,480
- Total outstanding contributions & surcharges owed
To VNPF as at 24/03/2010 by the Defendant is.....VT 1,674,176

The relevant provisions of the VNPF Act which set out the respective penalties for the breaches alleged against the Defendant are set out as follows:

Section 26(1) of the Act states:

"The employer shall pay to the Board the contributions payable in any month for and by all of his employees by the end of the following month in such manner and such form as may be prescribed".



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Section 26(2) of the Act states:

"Where the employer fails to pay some or all of the contributions due within the time specified in subsection (1) he shall be liable to a surcharge on the amount of the contributions not so paid at the rate of 5 percent in respect of each month or part of the month after the due date for which the contributions remain unpaid."

Section 50(1)(c) of the Act states:

*"Any person who-
Fails to pay to the Board in any amount which, under section 26(1), he is liable to pay in that month in respect of any employee is guilty of an offence and shall be liable on conviction to a fine not exceeding VT100,000 or to a term of imprisonment not exceeding 6 months or to both such fine and imprisonment."*

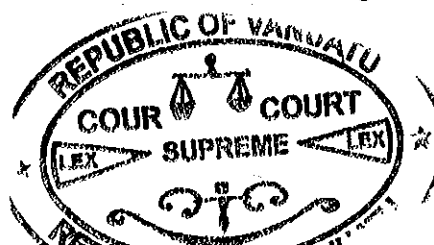
Section (1)(e) of the Act states:

*"Any person who-
Fails to pay to the Board within such period as may be prescribed any surcharge which he is liable to pay under section 26(2) is guilty of an offence and shall be liable on conviction to a fine not exceeding VT100,000 or to a term of imprisonment not exceeding 6 months or to both such fine and imprisonment."*

Section 50(2) of the VNPF Act states:

"Any person who deducts from the remuneration wages of an employee any sum greater than that permitted to be recovered under this Act or, having made any deduction, fails to pay to the Fund in the time required by section 26(1) the contribution in respect of the time required by section 26(1) the contribution in respect of which such deduction has been made, shall be guilty of an offence and liable on conviction to a fine not exceeding VT200,000 or to a term of imprisonment not exceeding 1 year or to both such fine and imprisonment."

The question to be determined by the Court is about the appropriate sentence to be imposed on the Defendant. The prosecution refers the Court to the following cases:



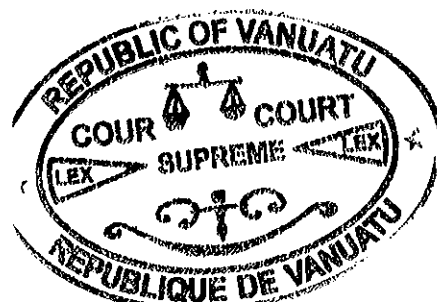
- **PP v. Mark Lowen** [2003] VUSC 47; Criminal Case No.39 of 2002 (5 August 2003).
- **PP v. Dick Eade** [2009] VUSC 113; Criminal Case No.01 of 2009 (6 October 2009).

In the present case, the following characteristics are present:

1. The Defendant was and is the owner and Manager of Computer and Network Services (CNS) pursuant to section 53 of the VNPF Act [CAP.189];
2. The Defendant is employing 20 staff and is paying salaries ranging from as low as VT18,000 to the highest as VT300,000 per month;
3. The staff are in fact earning more than VT3,000 per month;
4. That the Defendant failed to pay the contributions in time required by law. See table "A" for the contribution months that were paid late and, see table "B" for the contribution months that the cheques are yet to be deposited on or in the due dates; and
5. That the Defendant knew that he failed to pay as required by law as per his confirmation on his suspect statement and that he failed to exercise such due diligence to prevent the commission of the offence.

The prosecution says the following aggravating factors are present in this case:

- (a) Employees were falsely informed by the employer's act when he deducted contribution from their salary that contributions were to be paid into the VNPF but then did not pay the contribution into their accounts in VNPF;
- (b) When failing to pay into VNPF, the employees lose other benefits the VNPF offers to its members such as Members Financial Services Limited [MFSL] a company where members can obtain loan for home improvements and school fees and so on;
- (c) Members' entitlements – respective members of VNPF or employees of the Defendant are missing out from annual interests that should have been credited to their respective membership accounts had the Defendant pay their contributions when due.



In mitigation, the Defendant had pleaded guilty to the charges and also had paid contributions from April 2007 to April 2008. As from May 2008 to December 2008, the cheques are post-dated and are with VNPF and the cheques are to be deposited on the due dates, the Defendant can get the benefit of those.

It must be emphasized that offences in violation of the provisions of the VNPF Act [CAP.189] are serious offences. Offences under section 26 and 50 of the Act are not only serious but dishonest offences.

When I sentence you I take into consideration of the facts that you cooperated fully with the VNPF authorities since the start of this case; the fact that you have taken steps to pay some of the contributions and the fact you made arrangements with the VNPF authorities to pay the remaining contributions and surcharges.

On 1 count of failure to pay contributions after having made deductions to the employees wages, contrary to sections 26(1 and 26(2) of the Act, you are sentenced to pay a fine of VT100,000 and 3 months imprisonment suspended for 2 years concurrently.

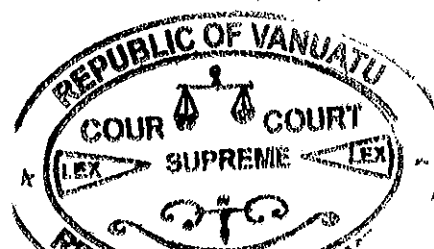
On the 8 counts of failure to pay contributions, contrary to sections 26(1) and 50(1)(e) of the Act, you are sentenced to pay at the rate of Vatu 30,000 fine per count which is totaling VT249,000 and 2 months imprisonment suspended for 2 years concurrent.

On the 16 counts of failure to pay surcharges, contrary to sections 26(2) and 50(1)(e) of the Act, you are sentence to pay a fine at the rate of VT20,000 per count which is totaling VT360,000 and 2 months imprisonment suspended for 2 years concurrent.

The prosecution is entitled to the costs of VT200,000.

In summary, the Defendant is ordered to pay:

1. Total outstanding contributions of VT 484,696
2. Total outstanding surcharges of VT 1,674,176



3.	Total fines of	VT 700,000
4.	Prosecution costs	VT 200,000
	TOTAL VT.....	VT 2,858,872

The Defendant is to pay the above sum in the following manner:

1. VNPF contributions of VT486,696 by 3 installments-
 - 1st installment: VT149,809 by 31 March 2010;
 - 2nd installment : VT156,752 by 30 April 2010;
 - 3rd installment: VT165,872 by 30 May 2010.
2. Surcharges of VT1,189,480.
 Arrangements are made between VNPF and Defendant for Defendant to pay surcharges by end of June 2010 of VT30,000 per month until VT1,189,480 is fully paid in September 2013.
3. Fines and costs: (VT700,000 + VT200,000)
 The Defendant is to pay 50,000 Vatu per month after the final settlement of the VNPF contributions and surcharges until final settlement of total fines and costs (VT900,000) or 3 months imprisonment in default.
4. Liberty to apply subject to sufficient notice to the other side.
5. The Defendant has 14 days to appeal if he is dissatisfied with this sentence.

DATED at Port-Vila this 26th day of March 2010

BY THE COURT

**Vincent LUNABEK
Chief Justice**

