

PUBLIC PROSECUTOR -v- IAN DAVID

Coram: *Lunabek CJ*

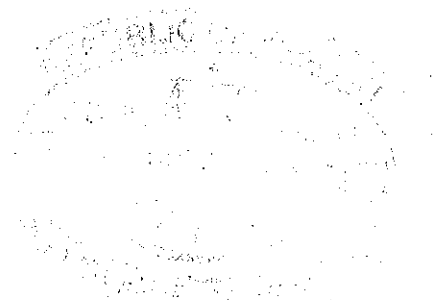
Counsel: *Mr Kammy Aromalo for the Public Prosecutor
Mr Ian David, Defendant in person*

SENTENCE

Mr Ian David, you appear today for your sentence. You are brought before the Court because as an employer, you failed to comply with relevant provisions of the Vanuatu National Provident Fund Act [CAP.189] ("the Act"). You are initially charged with seventy one (71) counts. On 11 May 2011, you entered guilty pleas on seventy (70) counts and you pleaded not guilty to one charge of failing to produce payroll record under ss.58(c) and 50(1)(i) of the Act. This latter charge is then withdrawn by the prosecution.

You pleaded guilty on the following counts:

1. 1 count for failure to pay contributions after having made deductions to the employees' wages, contrary to sections 26(1) & 50 (2) of the Act;
2. 1 count for failure to register employees, contrary to sections 23 & 50(1)(b) of the Act;
3. 34 counts for failure to pay contributions, contrary to sections 26(1) & 50(1)(c) of the Act;
4. 34 counts for failure to pay surcharges, contrary to sections 26(2) & 50(1)(e) of the Act;



The brief facts are provided by the prosecution and accepted by the Defendant. They are as follows:

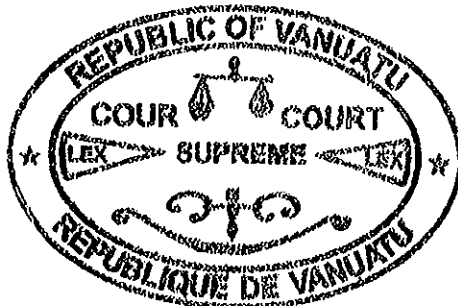
Mr Ian David, you have set up a construction company in the name of Davids Construction. You have registered Davids Construction on 16th May 2011 as an employer under the Vanuatu National Provident Fund (VNPF) Act [CAP.198]. In the completed registration form, Mr Ian David, you have stated you are the owner and Manager of the business.

Since registration, you have continued to pay monthly employees contributions until 2006 when you stopped making your employees contribution payments. You failed to pay for months in the period of June 2006 to March 2010.

In the defaulting period until charged, VNPF has been sending Notices to you to pay your employees contributions and to produce your employees wages record within 21 days but, you failed to comply with those notices. Investigation started as a consequence of your failure to comply with the notices.

VNPF inspectors conducted investigations in the beginning of 2010 and interviewed 13 of your employees. Your employees witness statements indicated that there were VNPF contribution deductions. The employees suggested that there was continuing employment way back to 1997. You, however, came up with your employees' wages' record. The record shows a total of one (1) to twelve (12) employees whose contributions you failed to pay to VNPF. There were a total of thirty four (34) late unpaid contribution months and thirty four (34) unpaid surcharges following from these failures.

In summary, you were a registered employer. Since registered, you were paying your employees contributions but, then stopped. You failed to register some of your employees. You have made deductions to your employees' wages but failed to pay them to VNPF. You have been given notices to pay and to produce wage record but failed. You failed to pay a total of 34 contribution months for your 2 to 12 of your employees.



The table below shows the summary of the unpaid employees' contributions months with their outstanding amounts and surcharges arising from those late contributions months as follows:

Summary

Outstanding contributions &, Surcharges calculated as at April 2011

Line	Cont Mth	Due Mth	Amt	Sur 5%	Mths Late	Surh Amt
01	06/2006	07/2006	14,308	715	57	40,755
02	07/2006	08/2006	15,588	779	56	43,624
03	08/2006	09/2006	15,588	779	55	42,845
04	09/2006	10/2006	15,588	779	54	42,066
05	10/2006	11/2006	15,588	779	53	41,287
06	11/2007	12/2007	1,600	80	40	3,200
07	12/2007	01/2008	1,600	80	39	3,120
08	01/2008	02/2008	9,510	475	38	18,050
09	02/2008	03/2008	9,510	475	37	17,575
10	03J2008	04/2008	9,510	475	36	17,100
11	04/2008	05/2008	9,510	475	35	16,625
12	05/2008	06/2008	9,510	475	34	16,150
13	06/2008	07/2008	11,904	595	33	19,635
14	07/2008	08/2008	21,944	1,097	32	35,104
15	08/2008	09/2008	21,944	1,097	31	34,007
16	09/2008	10/2008	24,024	1,201	30	36,030
17	10/2008	11/2008	24,024	1,201	29	34,829
18	11/2008	12/2008	24,024	1,201	28	33,628
19	12/2008	01/2009	21,944	1,097	27	29,619
20	01/2009	02/2009	40,792	2,039	26	53,014
21	02/2009	03/2009	40,792	2,039	25	50,975
22	03/2009	04/2009	40,792	2,039	24	48,936
23	04/2009	05/2009	40,792	2,039	23	46,897
24	05/2009	06/2009	40,792	2,039	22	44,858
25	06/2009	07/2009	40,792	2,039	21	42,819
26	07/2009	08/2009	38,546	1,927	20	38,540
27	08/2009	09/2009	36,466	1,823	19	34,637
28	09/2009	10/2009	36,466	1,823	18	32,814
29	10/2009	11/2009	31,282	1,564	17	26,588
30	11/2009	12/2009	14,972	748	16	11,968
31	12/2009	01/2010	14,972	748	15	11,220
32	01/2010	02/2010	25,574	1,279	14	17,906
33	02/2010	03/2010	25,574	1,279	13	16,627
34	03/2010	04/2010	25,574	1,279	12	15,348



Total- Contributions	VT 771,396			VT 1,018,396	
Total Contributions & Surcharges-		VT 1,789,792			

In summary:

Total unpaid (outstanding) Contributions	VT 771,396
Total unpaid (outstanding) Surcharges	VT 1,018,396
Total unpaid (outstanding) contributions and surcharges owing to VNPF are.....	VT 1,789,792

Below are the Relevant Provisions of the Act:

Section 23 of the Act states:

"Every employer shall cause every employee of his to apply to the Board in the prescribed manner for registration as a member of the Fund and every such employee shall be registered as a member with effect from the date that contributions under this Act first become payable in respect of him".

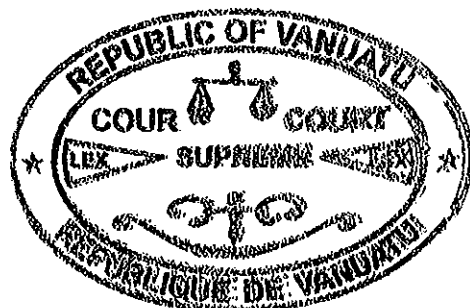
Section 26(1) of the Act states:

"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".

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 50(1)(e) of the Act states:

"Any person who-

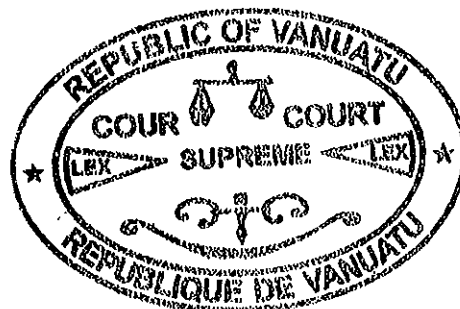
Fails to pay to the Board within such period as may be prescribed any surcharge which he is liable to pay under section 26(2) is guilty of an offence and shall be liable on conviction to a fine not exceeding VT100,000 or to a term of imprisonment not exceeding 6 months or to both such fine and imprisonment."

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."

By perusing the relevant provisions of the Act, they constitute statutory offences or strict liability offences in that they have been created by the Legislature in order to provide mandatory duty to each and all employers in Vanuatu to be responsible for their employees registrations/ deductions from employees wages and make required monthly contributions payments to the VNPF.

In this case, the facts show that you failed to comply with the provisions of the VNPF Act for a total period of 34 months (2 years and 10 months) from June 2006 to March 2010 in respect to 12 of your employees.



I take these facts into account when I consider your sentencing. In your sentencing, I consider also what you say in your written submissions.

You seem to say that you are not aware that failure to pay your employees contributions was an offence until when the VNPF inspectors came around to your work site at the Meteo at the beginning of 2010, where you constructed a new Meteo building for the Government of Vanuatu. Your wife was taking care of your employees' wages and the employees' contributions. But since June 2006, you paid your employees salaries but you held on their VNPF contributions because the Government did not pay you for one year period of work.

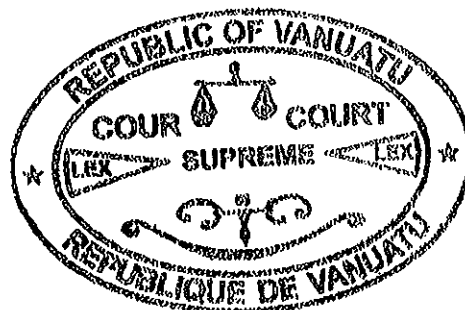
You cooperated with the VNPF inspectors and the prosecution authorities. You are graduated in the Diploma in building construction. You are an elder of Pentecostal Church. You have issued a claim in the Courts against the Government for failure to pay you as per your agreement with the Government.

You offer to pay VNPF employees contributions of VT771,396 by 31 August 2011 and by September 2011, you say you will pay VT50,000 per month for any fine until the total amount of fine imposed against you is fully paid.

I apply the decisions of the following cases in your present case:

- **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).
- **PP v. Tamata** [2010] VUSC 15; Criminal No.01 of 2010 (26 March 2010).

Offences in violations of the provisions of the VNPF Act [CAP.189] are serious offences. Offences under ss.26 to 50 of the Act are not only serious but also dishonest offences.



In the present case, the total amount of Vatu owing and requested by the prosecution for the relevant offences and for the period referred to in the charges in accordance with ss.26(1); 50 (1)(c), (e); 50(2); 58 of the Act are as follows:

(i) Total unpaid outstanding Contributions	VT 771,396
(ii) Total outstanding Surcharges	VT 1,018,396
(ii) Total (i) + (ii).....	<u>VT 1,789,792</u>

Order will be made for you to pay that amount of VT1,789,792. For matter of convenience, offences are grouped under categories (1), (2), (3) and (4) for purpose of corresponding appropriate sentence imposed on you.

In category (1), 1 count for failure to pay contributions after having made deductions to the employee wages, contrary to sections 26(1) & 50 (2) of the Act. You are sentenced to pay a fine of VT100,000 and 3 months imprisonment suspended for 2 years, to be concurrent.

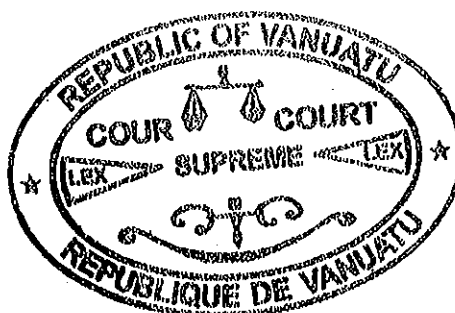
In category (2), 1 count for failure to register employees, contrary to sections 23 & 50(1)(b) of the Act, you are sentenced to pay a fined of VT20,000 and 3 months imprisonment suspended for 2 years, to be concurrent.

In category (3), 34 counts for failure to pay contributions, contrary to sections 26(1) & 50(1)(c)of the Act, you are sentenced to pay a fine of VT20,000 per count (x 34) and 3 months imprisonment suspended for 2 years.

In Category (4), 34 counts for failure to pay surcharges, contrary to sections 26(2) & 50(1)(e)of the Act, you are sentenced to pay a fine of VT10,000 per count (x 34) and 3 months imprisonment suspended for 2 years, to be concurrent.

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

In summary, you are ordered to pay-



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1.	VT 771,396	for unpaid contributions
2.	VT 1,018,396	for unpaid surcharges
3.	VT 680,000	for fines
4.	<u>VT 200,000</u>	for prosecution costs
	VT 2,669,792	Total

What follows is the method of payment and sequential orders:

You are to pay the above sums of Vatu in the following manner:

1. VNPF contributions-
You shall pay VT771,396 for VNPF unpaid contributions by 31 August 2011.
2. Surcharges, fines and costs-
 - (i) You shall pay VT50,000 per month starting from September 2011 for the payment of VT1,018,396 surcharges.
 - (ii) Upon settlement of the above payment, you shall pay VT50,000 per month until the total amount of VT680,000 is paid or 6 months imprisonment in default.
 - (iii) Upon settlement of payment of total fines, you shall pay VT50,000 per month for costs until total VT200,000 is paid or 6 months imprisonment in default.
3. Liberty to apply subject to notice to the other side.
4. You have 14 days to appeal your sentence if you are unsatisfied with it.

DATED at Port-Vila this 8th day of July 2011

BY THE COURT

Vincent LUNABEK
Chief Justice

