

(Civil Jurisdiction)

**BETWEEN: NORTHERN ISLAND STEVEDORING
COMPANY LIMITED (NISCOL)**

First Claimant

**AND: SANDY KALVEN, HENRY NIN, JOHN
MORRISON WILLIE, LIVO LANGI, TIRO VANUA,
KARL DAVID of on behalf of NISCOL Board of
Directors**

Second Claimants

**AND: JOHN MORRISON WILLIE CEO of and for
NISCOL**

Third Claimant

AND: LEON KATTY WARSAL

First Defendant

AND: MARTIN MAHE AND MATAI SEREMIAH

Second Defendants

Mr Justice Oliver A. Saksak

Mr James Tari and Mr Eric Sciba for the Claimants
Mr Ronald Warsal and Mr George Boar for the Defendants

Date of Hearing and Decision: 8th February 2013
Date of Publication of Reasons: 18th February 2013

JUDGMENT

1. This judgment provides further reasons for the decision handed down by the Court on 8th February 2013.
2. The Claimants alleged among other things that the purported appointment by the Minister of Civil Aviation of the First Defendant on 26th November 2012 as Chairman of Niscol and as Government Shareholder Representative were unlawful. (Paragraphs 4 and 10 of amended claims).



3. The letter of appointment is annexed as part of "JMW1" to the sworn statement of John Morrison Willie dated 23 January 2013. The first letter is addressed to Mr Warsal Leo Kati (the first defendant) in the following terms –

"Dear Mr WARSAL,

Subject: Your appointment as the Minister of Ports Representative to NISCOL Board.

I am glad to inform you that you are hereby appointed as the Hon. Minister of Civil Aviation, Ports & Harbour, and Telecommunication Representative to the Board of Directors of the Northern Islands Stevedoring Company Limited (NISCOL).

You shall be responsible for the reporting and the monthly briefing to my Cabinet or to my 1st Political Advisor.

The Board is recommended to act accordingly.

By copy of this, the GM of NISCOL is informed and his cooperation with this instruction shall be welcomed.

Yours Sincerely,

*Signed: Hon. SAMSEN SAMSON (MP)
Minister of Civil Aviation, Ports & Harbour,
Telecommunications.*

*CC: Hon. Prime Minister, PM Office, Port Vila.
: Hon. Minister of Public Utility, Port Vila.
: DG of Public Utility, Port Vila."*

(My underlining for emphasis).

4. The second letter is addressed to the General Manager of NISCOL as follows:-



"Dear GM,

Subject: Appointment of Mr WARSAL Leo Kati as the Hon. Minister of Ports & Harbour Representative to the Board of Directors of NISCOL.

Please do find attached herewith the Appointment letter of Mr WARSAL Leo Kati as my Representative to the Board of Directors of NISCOL and the Board is hereby recommended to formalise this Nomination to the Chairmanship of the Board as sworn as possible.

In addition, please note that I will pay a visit to Santo International Wharf sometime next week to have a joint meeting with the Board and the management of NISCOL and the Harbour Master as your Supervising Authority.

By copy of this, the Ports Department at Luganville is hereby informed.

Sincerely Yours,

Signed: Hon. SAMSEN SAM (MP)
Minister of Civil Aviation, Port & Harbour, Postal Services.

CC: DG of Public Utility, Port Vila.

CC: Harbour Master, Santo International Wharf, Luganville.

(My underlining for emphasis).

5. On 22nd January 2013, another Minister wrote the following letter to the first defendant as Chairman of the Board of Directors of NISCOL –

"Dear Sir,

Re: NORTHERN ISLANDS STEVEDORING COMPANY LTD
("NISCOL")

I wish to refer you to the above.



I am well informed on the current state of affairs of NISCOL. In particular, your recent appointment as Chairman of the NISCOL Board of Directors. As the Minister responsible for Ports and Harbour, I wish to remind you that the allotted 10% share of the government in NISCOL is entrusted to me.

Therefore as a shareholder of NISCOL, I expect you to ensure that all proceedings in relation to the management of NISCOL are conducted in accordance with the articles of association of NISCOL. I also understand that you have appointed Martin Mahe to the position of Deputy Chief Executive Officer of NISCOL. I am instructed that Mr Mahe is well qualified to assume the position.

Therefore as Minister responsible, I support his appointment to the said position.

Further, it is important that the integrity of the current government is maintained at all times. Therefore we accept that your leadership and management of NISCOL will reflect positively on the current government of Hon. Meltek Sato Kilman Livtunvanu.

Finally, as a shareholder of NISCOL I represent the interest of the Republic of Vanuatu.

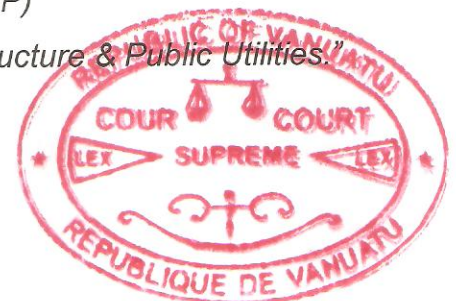
Therefore I am obliged to appraise the Prime Minister, Hon. Meltek Sato Kilman Livtunvanu concerning all affairs of NISCOL. Accordingly, I expect you will appraise me on all matters relating to NISCOL.

Thank you for your understanding.

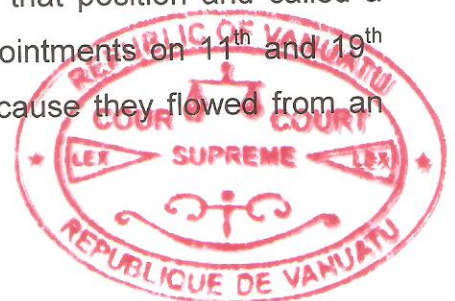
Yours Sincerely,

Signed: Hon. Tony Nari (MP)
Minister of Infrastructure & Public Utilities.

(My underlining for emphasis).



6. The Claimants did not raise any complaints about the letter by Minister Tony Nari. Nevertheless it is in the sworn statement of the First Defendant filed on 25th January 2013 as annexure "LKW9". The letter among others, endorses the purported appointment as Chairman made by Minister Samsen Sam on 26th November 2012. Unfortunately that is a misconception of what those letters say. Clearly Mr Warsal's appointment was as "Representative" not as Chairman.
7. The Court makes the following observations and findings in light of those evidence:-
- (a) From the three letters it appears there is a clear conflict as to which Minister is in charge to make an appointment.
 - (b) The position of conflict between the two Ministries indicate an uncertainty in the position of the Government and the State.
 - (c) In matters of this nature the question arises whether or not this was a matter that needed a collective decision of the Government made at its Council of Ministers. Counsel for both the Claimants and the Defendants did not address the Court sufficiently or at all on these aspects.
 - (d) In any event the letter addressed to the First Defendant was not an appointment letter to the position of the Chairman. It was merely an appointment as Government Representative and nothing more. And it was not addressed to NISCOL as indicated in the final paragraph.
 - (e) The second letter was addressed to the GM of NISCOL. In the current structure of NISCOL, there is no GM or General Manager position.
8. From those observations and findings it was enough for the Court to conclude that the purported appointment of Mr Warsal as Chairman of NISCOL was never done. When therefore Mr Warsal assumed that position and called a meeting to make resolutions and some other appointments on 11th and 19th January 2013, all those actions were unlawful because they flowed from an unlawful or illegal appointment right from the start.



9. The sworn statements of Martin Mahe filed on 23rd and 24th January 2013 disclose some purchases of vehicles which the Defendants alleged are for personal use of the Claimants Sandy Kalven, John Morrison Willie and Henry Nin. Further, there are shown statement or Invoices (Annexure "MM4") which reveal a total of VT216,103,941 outstanding debt to the Government as wharfage fees. There are other allegations of abuse and/or misuses of NISCOL's funds by the Claimants. Those allegations support the First Defendant's actions in terminating the Claimants.
10. Indeed those may be valid and legitimate allegations but unless and until NISCOL as a company had by ordinary resolution resolved to terminate the Board chaired by Sandy Kalven, it was not enough to comply with the law for only one shareholder holding 10% to appoint a representative who would then go out of his way to remove and appoint a new Board. That was an outright illegal and unlawful action.
11. The further sworn statement of the First Defendant filed on 5th February 2013 annexes a copy of a Memorandum of and Articles of Association of NISCOL ("LK1") which the Defendants rely on as the valid document. Clause 93 of these Articles provides for removal of directors by the company by ordinary resolutions.
- What however transpired on 11th and 19th January 2013 were urgent extraordinary shareholders meeting called by the First Defendant representing only a 10% shareholder, when he had no standing at all as Chairman to issue such notices.
12. Finally, the Claimants gave evidence of a new company called NISCOL whose Memorandum and Articles of Association were recognised, accepted and registered by the Vanuatu Financial Services Commission on 18th October 2012. George Andrews the FSC Commissioner, deposed to the registration of the new Company in his sworn statement dated 6th January 2013. Luke Shem deposed to a sworn statement as to the new shareholders of NISCOL and the events that led up to the formation of the new Company.



13. The Defendants have not at anytime challenged that registration. As such, the Memorandum and Articles of the new NISCOL is the only legal document that recognises the Board chaired by Sandy Kalven as the lawful Board that currently exists. That document supersedes that relied on by the Defendants dated 4th November 1991. The Board of Directors chaired by Sandy Kalven are registered pursuant to Section 194(1)(a) of the Companies Act Cap. 191. As such, they can only be removed under clause 51, 52 and 53 of the new Memorandum and Articles of Association of NISCOL dated 18th October 2012 and not otherwise as the First Defendant had done.

PUBLISHED at Luganville this 18th day of February 2013.

BY THE COURT


OLIVER A. SAKSAK

Judge

