

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Civil Jurisdiction)

Civil Case No. 156 of 2010

BETWEEN: VANUATU NATIONAL PROVIDENT FUND
Claimant

AND: RICHARD ANTHONY KONTOS
Defendant

Coram: Justice D. V. Fatiaki

Counsels: Mr. K. Aromalo for the claimant
Defendant in person

Date of Decision: 14 February 2013

JUDGMENT

1. This case has its origins in Criminal Case No. 57 of 2010 namely **Public Prosecutor v. Richard Kontos** where the defendant was charged with 68 counts for offences under the **Vanuatu National Provident Fund Act [CAP. 189]** ("*VNPF Act*") including, 33 counts each of Failing to Pay Contributions and Failing to Pay Surcharges for late payments of contributions contrary to **Section 26 (2)** of the VNPF Act.
2. At the very outset the defendant pleaded "*not guilty*" and challenged both the quantum and the legal basis upon which the surcharges were calculated by the VNPF. Directions with given to assist in resolving the defendant's concerns. Suffice it to say the differences were not resolved.
3. On the next conference date, counsel for VNPF indicated that the defendant had paid-up all outstanding contributions to VNPF and all that remained was the surcharges imposed by VNPF which counsel indicated would be better pursued by way of a civil claim.
4. The criminal prosecution was accordingly "*nolle prosequied*" and the present civil claim was filed against the defendant seeking the sum of **VT983,025** for surcharges imposed under **Section 26 (2)** of the **VNPF Act** which had accumulated over a period of 3 years from February 2007 to December 2009 and involving between 7 to 33 employees of the defendant's hotel.
5. The defendant's concerns about the VNPF's interpretation of **Section 26 (2)** of the **VNPF Act** continued as a principal area of dispute between the



parties. Written submissions were ordered and these were filed. I am grateful for the assistance provided whilst recognising that the defendant represented himself throughout the proceedings.

6. **Section 26 of the VNPF Act** provides:

"(1) 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.

(2) 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 per cent in respect of each month or part of the month after the due date for which the contributions remain unpaid;

Provided that –

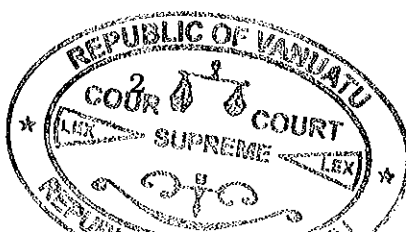
(a) If the amount of surcharge so calculated is less than VT50 the surcharge payable shall be VT100; and

(b) The Board may in any case in which it thinks fit remit in whole or in part the payment of any surcharge due under the provisions of this subsection."

7. It is clear from the above that VNPF contributions are calculated and payable, in arrears, on a monthly basis by the employer in accordance with subsection (1). Subsection (2) then sets out what is to happen to an employer who fails to pay contributions on time.

8. The defendant in his submission writes:

"1. It is my interpretation as the Act is written above, the 5% does not indicate that it is 5% per month or 5% per annum but indicates overall whether the contribution is half a month late, a full month late, 1 year late or 5 years late. The way the Act is written is referring to 5% on a once off a late payment. For example: all the late contributions are to be added up once off and calculated at 5% on the total amount. The Act in no way indicates that it is 5% per month. The words are 'in respect of each month or part of the month after the due date for which the contributions remain unpaid'. The time factor is referring to the monthly contribution whether the contribution is half a month, 1 month, 1 year or 5 years late. The way the VNPF suggests, this would mean a late fee percent of 60% per annum (5% per month x 12 months = 60% per annum) which is USURY (Collins English Dictionary noun: practice of lending money at an extremely high rate of interest) USURY (Janfay New English Dictionary noun: the business of lending money with interest, the charging of exorbitant interest on money lent).



- (a) For example: VT50,000 x 1 months late x 5% = VT2,500 or
- (b) As I say: VT50,000 x 12 months late x 5% = VT2,500 not
- (c) VNPF say: VT50,000 x 12 months late x 5% = VT35,000 not

- 2. For the Act to read as the VNPF office suggests that the 5% is due per month on all late contributions, the Act would have to read ... at the rate of 5% per month calculated monthly in respect of each month or part of the month after the due date for which the contributions remain unpaid. The Act does not say this.
- 3. As it is written, the 5% is a one off global charge and not a formula to be calculated monthly or yearly but as a once off calculation."

9. Counsel for VNPF, equally forcefully, submits that the object of the VNPF Act is clear and that is to provide for mandatory contributions to be made by employers to the VNPF on behalf of employees and for the payment of benefits out of the Fund to such employees upon their attaining retirement age. Counsel also emphasises the monthly nature of the contributions and payments that an employer is required to make on his employee's behalf.

10. More particularly, concerning the meaning of **Subsection (2) of Section 26** and the rate at which the surcharge is to be calculated counsel writes:

Point 3 – Talks about surcharge liability arising from non payment of contribution in time (monthly) (arising from point 2);

Point 4 – Talks about the rate of surcharges which is at 5% in respect of each month or part of the month (the word "each" refers to numbers, in this case means two or more months. The word "each" is not mistakenly written as it means 5% for each and every month for which the contribution remain unpaid. The subordinate clause "after due date for which the contribution remain unpaid" supplements that explanation or interpretation. Calculation or formula is as follows: 5/100 x 18,240 is VT912 as the amount of surcharges in respect of each month or part of the month after the due date for which the contribution remain unpaid (ie: from April 2007 to April 2010 (37 months). In other words, surcharge amount of VT912 for April 2007, VT912 for May 2007, VT912 for June 2007 ... and so on as the contribution remain unpaid. The short form formula is in the original submission."

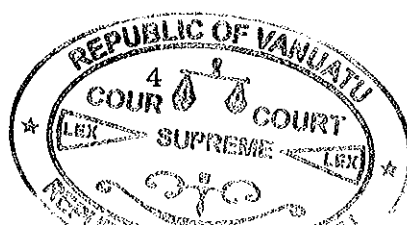
And finally counsel concludes:

"... the claimant says they have interpreted section 26 literally and have read and understand that in the context of which it is written.

In effect, this means that:




- (a) *The calculation is made in accordance with section 26 of the VNPF Act;*
- (b) *The interpretation and calculation promotes or encourage monthly contributions;*
- (c) *The interpretation is in accordance with section 8 of the Interpretation Act [CAP. 132];*
- (d) *The interpretation is fair and liberal as it is to ensure the attainment of the object of the Act according to its true intent meaning and spirit."*
11. After careful consideration of the competing submissions I uphold the claimant's submissions as correctly interpreting the true meaning and effect of the provisions of **section 26 (2)** of the **VNPF**.
12. If the defendant's submission is correct the subsection would have ended with the words: "... 5 per cent".
13. Furthermore, the surcharge is imposed not only on an amount (**i.e.** the amount of the unpaid contributions) but also at a "rate" which, by definition, necessarily incorporates a duration or frequency (**i.e.** "*in respect of each month after the due date for which the contributions remain unpaid*").
14. I accept that such an interpretation can result in the surcharge being higher than the original unpaid contribution in respect of which the surcharge is imposed, but, that is the nature and purpose of the surcharge which is, to ensure that an employee's contributions are not only paid on time (**i.e.** monthly in arrears), but also, to compensate an employee for any tardiness on his employer's part in paying contributions. Reading the section in this way gives meaning and effect to the phrase "... *in respect of each month after the due date which the contributions remains unpaid*" which would be rendered redundant on the defendant's interpretation.
15. Furthermore, if the defendant were upheld in his submission that the surcharge is a "*once off and calculated at 5% on the total amount*" that would mean that an employer could dictate when the surcharge would be imposed (however long after the due date) and the employer would not suffer any adverse consequences. That cannot have been the intenton of Parliament and I reject the defendant's submissions in that regard.



16. In my view the clear intention and meaning of **section 26 (2)** is to impose a surcharge calculated as a once -only fixed amount (**i.e.** 5% of the unpaid contribution calculated at the date imposed) with a variable duration (**i.e.** in respect of each month the contribution remains unpaid). In this way, the surcharge is neither compounded nor usury and the total amount to be paid is determined, solely, by the duration that the contribution remains unpaid which is a matter exclusively and entirely within the employer's control.
17. For the foregoing reasons the claim is upheld and judgment is entered as prayed with costs to be taxed if not agreed.

DATED at Port Vila, this 14th day of February 2013.

BY THE COURT


D. V. FATIAKI
Judge.

