

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

Civil Case No. 18 of 2012

**BETWEEN: NORTHERN ISLANDS STEVEDORING
COMPANY LIMITED**
First Claimant

**AND: KUVU NOEL, JOHN NOEL, LIVO LANGI,
LONSDALE HINGE, JOHN MORRISON
WILLIE, HENRY NIN AND GRAHAM TAVUE,
Directors of Northern Islands Stevedoring Company
Limited.**
Second Claimants

**AND: KALFAU MOLLI, former Chief Executive Officer of
NISCOL**
First Defendant

**AND: SAILAS ROCROC, JOEL PAUL, CALISTO
CEVUARD former Directors of NISCOL**
Second Defendants

Coram: *Mr. Justice Oliver A. Saksak*

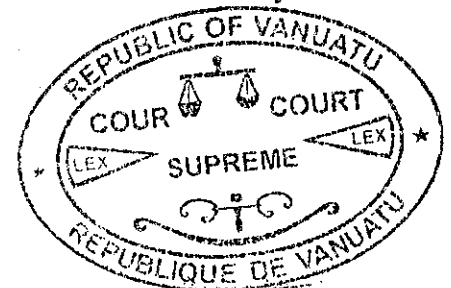
Counsel: *Dane Thornburgh for First Claimants
No appearance by Second Claimants
Ronald Warsal for First and Second Defendants*

Date of Hearing: *6th August 2012*
Date of Judgment: *3rd October 2014*

JUDGMENT

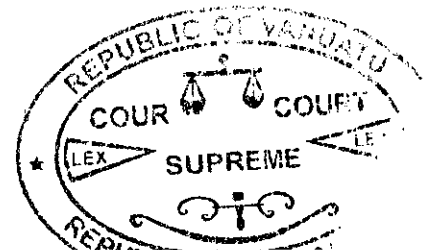
Introduction And Background Facts

1. This case has traversed a long and winding road which should by now be history and be laid to rest, except that the defendants contend there is still a live issue for the Court to determine. That is the issue of their counter-claims.
2. The Claimants filed their claims through Boarlaw on 21st March 2012 seeking basically an injunction and damages. On the same date the Claimants filed an urgent application for restraining Order on an interlocutory basis. The Court heard the application *exparte* and issued the restraining Orders sought on the same date. Liberty was given to the defendants to apply on 48 hours notice.



3. Next day being 22nd March 2012 Mr Warsal filed an urgent application seeking Orders that-
 - a) The ex parte Orders of 21st March 2012 be set aside pending the determination and resolution of the judicial review claims filed in-
 - i. CC 37/2012 between Sanma Provincial Council v. AG,
 - ii. CC 40/2012 between Malampa Provincial Council v. AG, and
 - iii. CC 7/2012 between Penama Provincial Council v. AG, and
 - b) In the alternative, that the Directors resolutions dated 19th March 2012 be stayed or set aside pending determination and resolution of Civil Cases 7,37 and 40 of 2012.
4. On 23rd March 2012, the Court heard the Defendant's application. Mr George Boar acted for the Claimants. Mr Warsal acted for the First Defendant and Mr Saling Stephens acted for the Second Defendants. One of the issues raised for the Court's determination then was whether the defendants had standing to bring their application.
5. On 26th March 2012 the Court delivered its Judgment concluding that-
 - a) "The Defendants do have standing to bring their application but they have no legal basis for seeking to set aside the Orders of 21st March 2012, the proceeding and the Resolutions on 16th and 19th March, or a stay of them.
 - b) The balance of convenience lies in favour of the Claimants.
 - c) The Defendant's remedies lies in damages for breaches of contracts under the Employment Act [CAP 160] which is an Act of general application.
 - d) The defendants have come to Court with unclean hands.
 - e) All the Orders sought by the Defendants are refused.
 - f) The Defendant's application is dismissed with costs of and incidental to the application in favour of the Claimants on the standard basis, as agreed or taxed."
6. On 4th April 2012 Mr Warsal filed an application for leave to appeal against the interlocutory Judgment dated 26th March 2012.
7. On 18th April 2012 the Court heard the application for leave. Leave was refused and the application was dismissed. The Court published its reasons on the same day. The reasons basically were that-
 - a) The Defendants had by then not filed any defences and/or counter claims to the claims filed on 21st March 2012, and had not filed any other proceeding challenging their terminations, and
 - b) The Resolution of 16th March 2012 was connected with the challenges made by the four Provincial Councils of Sanma, Penama, Malampa and Torba in Civil Cases 7, 37, and 40 of 2012 respectively.

The Court took judicial notice of the fact that those proceedings were dismissed with costs.



8. Subsequently on 8th May 2012 when the Court called the case for further conference, Mr Boar appeared with Joel Paul one of the Second Defendants in person. Mr Boar advised the Court that the defendants had filed a defence and counter-claim with the Registry in Port Vila. As such Counsel asked for 21 days to file responses. The Court issued directions and fixed a further conference for 25th June 2012. It appears the amended defence and counter-claims were filed in Port Vila on 9th May 2012 by Mr Stephens. The initial defence and counter-claims were filed on 7th May 2012.

9.1 Mr Boar filed a Reply and Defence to Counter-claims on 30th May 2012. It is necessary first to restate the pleadings of the defendants in paragraph 2 of their defence as follows-

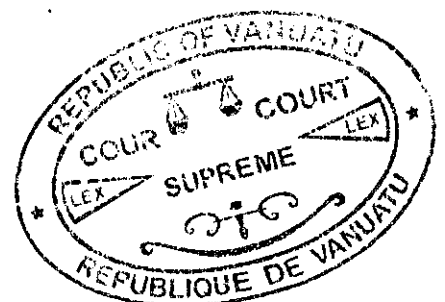
"2. The Second Defendants deny that the Second Claimant are lawful Directors of the First Claimant and further say that the appointments of the Second Claimants as Directors of the First Claimant was not made in accord with section 196 of the Companies Act [CAP 191] and the Articles of Association of the First Claimant and thus their appointment are invalid, void and of no legal effect.

Particulars:

- a) Section 196 of the Companies Act [CAP 191] requiring special notice on the Second Defendant for their terminations which such special notice was not made to the Second Defendants to terminate them as Directors on 16th March 2012.
- b) Article 93 of the Memorandum and Articles of Association of the First Claimant requires special notice to be made to the Second Defendants for their removal which such notice was not made on 16th March, 2012.
- c) Section 134 (3) (ab) of the Companies Act [CAP 191] requires that in case of any other meeting of the First Claimant a quorum of 95% in normal value of shares is required whereas the meeting on 16th March 2012 was only sixty (60) percent as shareholders Calisto Cevuard for Sanma Province did not attend and thus the requisite majority was not attained at that meeting of the First Claimant to terminate the Second Defendants on that date.
- d) Articles 51(b) of the First Claimant's Memorandum and Articles of Association requires that in any case of any other meeting a majority on number of the members having a right to attend and vote not less than 95% percent where as the meeting on 16th March 2012 did not attain 95% percent quorum and thus the terminations of the Second Defendants as Directors is invalid and void and of no legal effect".

9.2 And by way of their Counter-Claims they defendants plead-

- 1. "At all material times the Frist Defendant is the lawful Chief Executive Officer of the First Claimant having been appointed on or about September 2009.



2. At all material times, the Second Defendants along with 12 others being:

- | | | |
|--------------------|----------------------|--|
| (a) Arsen Maliu | (e) Frederick Maso | (j) Peter James |
| (b) Abraham Jack | (f) Edward Titipia | (k) Muboi Bani |
| (c) Malong William | (h) Langi Tavua | (l) Young Sale |
| (d) Siemon Seler | (i) Gregory Taranban | (m) John Bule, were appointed Directors of The First Claimant on or about the period of July and November 2010. |

3. The Second Defendants say that to date, they are lawful Directors of the First Claimant.

4. On or about 16th March 2012 some members of the First Claimant allegedly purportedly conducted a Shareholders meeting of the First Claimant and terminated the Second Defendants excluding Calisto Cevuard and Silas Rocroc.

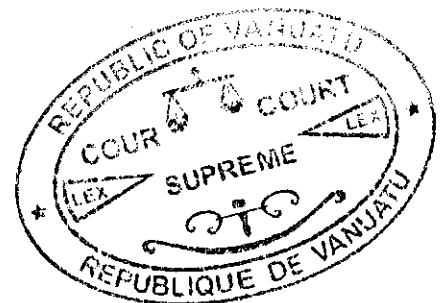
5. The Second Defendants and the others named in paragraph 2 of the Counter-claim contend that the Shareholders Meeting and its Resolution of 18th March 2012 are invalid and thus void and of no legal effect, being conducted in breach of the provisions of the Companies Act [CAP 191] and the first Claimant's Memorandum and Articles of Association.

6. As a consequence therefore, the appointment of the Second Claimants as Directors is invalid, void and of no legal effect.

7. It follows therefore that the purported termination of the first Defendant as Chief Executive Officer is invalid, void and of no legal effect as he had been terminated by the Second Claimant who are persons with no authority to terminate him."

9.3 The reliefs sought by the Defendants are-

- a) A declaration that the Resolution dated 16th March 2012 be declared null and void and of no legal effect.
- b) An Order directing the Registrar of Companies to rectify the register to the extent that Arson Maliu, Frederick Maso, Peter James, Abraham Jack, Edward Tutipia, Muboi Bani, Molo- William, Langi Tavua, Young Sale, Siemeon Seler, Gregory Taranban and Johnson Bule are the Directors of the First Claimant,
- c) A declaration that the appointment of John Morrison Willie as General Manager is void and of no legal effect.
- d) A declaration that the First Defendant Kalfau Moli is the Chief Executive Officer of the First Claimant until the Board of Directors otherwise decides.
- e) Costs.



10.1 In reply Mr Boar as Counsel for the First and Second Claimants at the time stated as follows-

“1. They do not admit paragraph 2 (of the Defence) and further say-

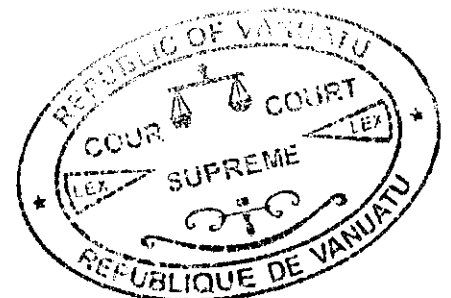
- a) The First and Second Defendants are the employees of the Northern Island Stevedoring Company Limited (the Company) and have been terminated and their grievances lie in contract law.
- b) The First and Second Defendants have no locus standi to challenge the validity or otherwise of the shareholder’s determination of 16th March 2012.
- c) The First and Second Defendants are estopped from pleading the lawfulness and/or otherwise of the Second Claimants appointments on the basis that the issues of appointment are res judicata vis-à-vis the Court Judgment on this matter on 26th March 2012.
- d) The validity of the lawfulness or otherwise of the Second Claimant’s appointment on 16th March 2012 as directors of the Company has by implication been upheld in the Court of Appeal decisions in Civil Appeal Case No 18 of 2012 and Civil Appeal Case No. 15, 16 and 17 of 2012 respectively.

10.2 The First and Second Claimants do not admit the defences in paragraphs 3 and 4, and do not take issue with the defences in paragraphs 6,7,8, and 9.

10.3 They do not admit paragraph 5 and further say-

- a) “The appointment by the Minister, of Commissioners of the Shareholders of the Company constitutes new shareholders representatives, with powers to terminate and appoint new Directors of the Company. This was done on 16th and 19th March 2012.
- b) The Court of Appeal Cases No. 15,16, and 17 of 2012 by implication upheld the validity of the Minister’s actions to suspend the Provincial Councils and appointed shareholders representatives (Commissioners) to the Company as valid and in accordance with law.
- c) The Court of Appeal Cases No. 18 of 2012 dismissed the First and Second Defendant’s appeal which meant that-
 1. The Judgment of this Court dated 26th March 2012 remain valid and
 2. The termination of the First and Second Defendants and including all the then Directors and Shareholders of the Company on 16th March 2012 remain valid and in accordance with law”.

10.4 They say the First and Second Defendants are not entitled to any orders sought in their counter-claims.



10.5 To the Counter-claims the Claimants further alleged that-

- a) The First Defendant still owes the Company the sum of VT 30.086.361.
- b) Under their control, direction and management of the First and Second Defendants, including the 12 named directors of the Company had an outstanding debt of VT 441.917.142 made up as follows:-

| | | |
|--------|----------------------|----------------|
| (i) | VAT | VT 92.725.667 |
| (ii) | Municipal Tax | VT 4.799.534 |
| (iii) | VNPF | VT 12.020.652 |
| (iv) | Ports & Harbour Dues | VT 209.047.020 |
| (v) | Water Charges | VT 452.736 |
| (vi) | Staff | VT 93.480.000 |
| (vii) | Land Rents | VT 593.864 |
| (viii) | Others | VT 31.441.297 |

As a result of these debts due to the Defendant's actions, the First Claimant continues to suffer.

10.6 The First and Second Claimants seek the following reliefs-

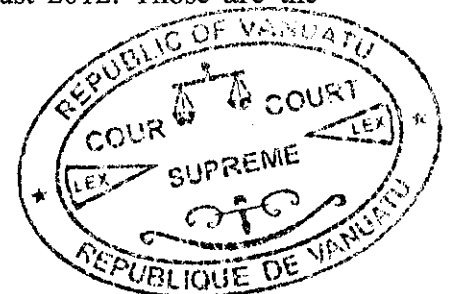
- a) An Order that the counter-claims be dismissed
- b) An Order that the First Defendant repays the sum of VT 30.086.361.
- c) An Order that the First and Second Defendants including the ten named directors, be jointly and severally liable its repay the Company's debts in the sum of VT 441.917.142.
- d) Costs, and
- e) Such further Orders the Court deems fit.

11.1 On 6th August 2012 the First Defendant appeared in person. The Claimants and the Second Defendants did not appear. The Claimants and the Second Defendants did not appear. The Court noted letters by Mr Thornburgh and Mr Warsal seeking adjournments. The Court also noted Mr Warsal's email of even date recording that Mr Boar and Mr Warsal had agreed that there was no dispute as to facts and that the only legal issues to be determined were-

- a) Whether the Shareholder's Resolutions of 16th March 2012 are valid or invalid?
- b) Whether the Director's Resolutions of 19th March 2012 are valid or invalid?

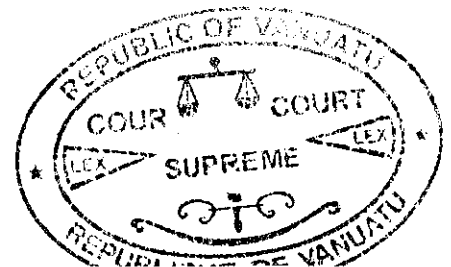
11.2 The Court further noted there was confusion as to which Counsel was representing the Claimants and granted Counsel 14 days to file written submissions. The Court issued directions accordingly on 6th August 2012. Judgment was to be delivered on a date to be fixed and notified.

12 Mr Warsal had filed initial written submissions dated 3rd August 2012. Those are the only submissions the First and Second Defendants rely on.



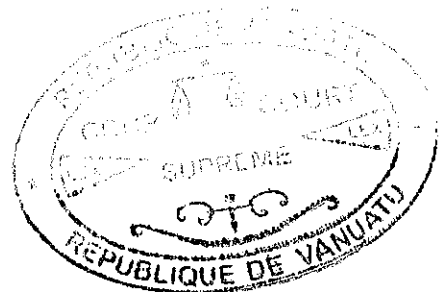
- 13 On 18th December 2012 the Court endorsed a Consent Order signed by Mr Boar, Mr Warsal and Mr Stephens recording that-
- a) Kuvu Noel (Chairman), Graham Tavue, Joel Paul, Calisto Cevuard and Kalfau Moli (Chief Executive Officer) were duly appointed Directors of the Company.
 - b) Kuvu Noel as Chairman and Kalfau Moli as Chief Executive Officer were authorised signatories to the First Claimant's Bank Accounts at ANZ Bank, Bred Bank and Westpac Banking Corporation.
 - c) The Registrar of Companies to be advised to rectify the register accordingly.
 - d) The claims by the Claimants and the counter-claims by the Defendants be discontinued.
 - e) The First Claimant to pay all the parties costs of and incidental to the action as agreed or taxed.
- 14 This Consent Order was recalled by the Court on 26th September 2013 due to irregularities and further managed by the Court to progress to hearing.
- 15 On 21st November 2013 Mr Thornburgh entered appearance for the First Claimant. Mr Boar was present and indicated he did not have instructions to act for First Claimants. Mr Warsal appeared for First Defendant. Mr Stephens did not appear for the Second Defendants. The effect of the Consent Orders being recalled was discussed. In effect the Court noted the claims remain on foot and should be progressed by way of further directions. The Court issued those directions.
- 16 Mr Boar indicated that as at 3rd July 2013 a Deed of Release had been signed and payments were made to Kalfau Moli, First Defendant. As such all his claims had been resolved and his claims should be struck out. Counsel indicated that standing of the remaining defendants was still in issue and should be decided. Mr Warsal clarified the position of the defendants again that their cause was not an employment case but was one in which declarations were sought in respect of the Resolutions of 16th and 19th March 2012.
- 17 Further conference was held on 14th April 2014. Mr Stephens did not appear. Mr Boar did not appear. Mr Thornburgh and Mr Warsal appeared and proposed a time-table program for written submissions and replies returnable on 28th May 2014.
- 18 On 28th May 2014 both Counsel appeared and sought extensions. The Court reissued Orders to 7th July 2014. On this date both Counsel appeared and sought further extensions and the Court allowed extensions to 13th August 2014.

On 13th August Mr Warsal was ill. Mr Thornburgh appeared and sought adjournment and extensions of previous Orders. The Court allowed the adjournment and issued directions extending time by 14 days for the defendants and 10 days for the Claimants to file and serve responses.



Discussions

- 19 No such written submissions have been filed and served. More than ample time and opportunities have been given and therefore the Court will dispense with those submissions.
- 20 The Court will determine the issues raised based on Mr Warsal's submissions dated 3rd August 2012 and based on the pleadings and evidence filed by all parties in the course of this proceeding, and previous judgments and decisions made by this Court and by the Court of Appeal.
- 21 The Defendants filed their defences and Counter-claims well after this Court had issued a Judgment on 26th March 2012 dismissing their application seeking to set aside the ex parte Orders of 21st March 2012 and for a stay of the Resolutions of 16th and 19th March 2012. Later on 18th April 2012 the Court again dismissed the Defendant's application for leave to appeal the Orders of 26th March 2012.
- 22 The issues raised by the Defendants about the validity of the Resolutions of 16th and 19th March 2012 were raised in their applications both of which were dismissed. The main reason for dismissing those applications were:-
 - a) The defendants had come to Court with unclean hands, and
 - b) They had not filed any defences and counterclaims at the time.
- 23 The Defendants only filed defences and counter-claims on 30th May 2012 about a month and a half later, and subsequent to the judgment of the Court. Their defence raised the issues of the validity of the appointments of the Second Claimants and the then General Manager, John Morrison Willie and the validity of the Resolutions of 16th and 19th March 2012. When the Court dismissed the Defendant's applications on 26th March 2012 and on 18th April 2012, it did so having considered those issues and for that reason it is implied this matter is now res judicata.
- 24 In their counter-claims the defendants extended their pleadings to include 12 others namely. Arsen Maliu, Frederick Maso, Peter James, Abraham Jack, Edward Tutipia, Muboi Bani, Malon William, Langi Tavua, Young Sale, Siemeon Seler, Gregory Taranban and Johnson Bule. The defendants did not apply to have those men joined as defendants nor did they seek leave to do so. It appears the Defendants did not pay the appropriate filing fees in respect of their counter-claims. These men were not parties to the original claim filed by the Claimants and for them to be counter-claimants they had to seek leave to be joined. Accordingly these persons have no standing to bring their counter-claims in the way they did.
- 25 The reliefs sought by the Defendants are technically speaking, declaratory reliefs. The proper process is by way of a judicial review under Part 17 of the Civil Procedure Rules. It was therefore an abuse of process for the Defendants to seek declaratory Orders through the ordinary claim as they did.




- 26 Further the reply and defence to the counter-claims filed by Mr Boar raised further issues such as-
- a) The payments made to the First Defendant in July 2013 pursuant to a Deed of Release.
 - b) The First Defendant owes the First Claimant the sum of VT 30.086.361 and
 - c) Through their mismanagement, control and responsibility the Defendants had caused losses to the Frist Claimant in the sum of VT 441.917.142.
- 27 When the Court ruled on 26th March 2012 that the Defendants had come to Court with unclean hands, the Court had taken account of the evidence of Kuvu Noel which was filed on 23rd March 2012 which revealed those outstanding debts. But the Court does not have to determine liability for those debts. Those are matters for another separate proceeding.
- 28 Those reasons alone are sufficient to dismiss the Defendant's defences and counter-claims. But for completeness so that these claims do not resurface in the future, the Court rejects all the submissions filed by Mr Warsal dated 3rd August 2012 and rules that the Resolutions dated 16th and 19th March 2012 respectively are valid.

Conclusion

- 29 **The Counter-claims of the Defendants fail and are hereby dismissed. All Orders and declarations sought by them are declined.**
- 30 **In the circumstances of this case, there will be no Order as to costs. Each Party will pay their own costs.**

DATED at Port Vila this 3rd day of October 2014.

BY THE COURT



OLIVER.A.SAKSAK
Judge

