

BETWEEN: PRAVINESH CHAND

Claimant

**AND: NORTHERN ISLANDS STEVEDORING
COMPANY LIMITED**

Defendant

Coram: *Justice Oliver.A.Saksak*

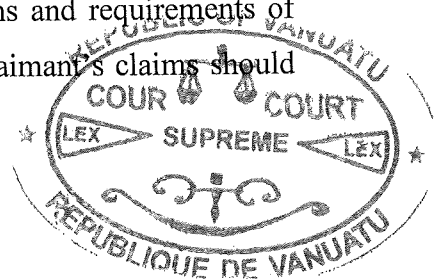
Counsel: *Lent Tevi for the Claimant
Godden Avock for the Defendant*

Date of Hearing: *26th October 2018*
Date of Judgment: *1st March 2019*

JUDGMENT

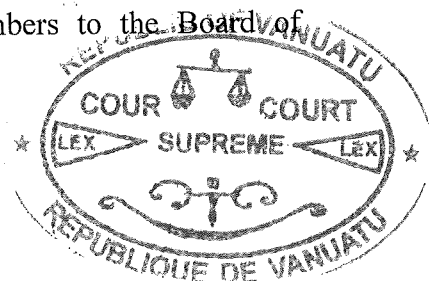
Introduction

1. The Claimant Mr Pravinesh Chand from Fiji was employed under a contract with the defendant company as an accountant from 9th October 2013. The contract was extended on 10th October 2015 for a further 2 years and expected to end 9th October 2018. However on 27th June 2016 Mr Ryan Philip Chief Executive Officer (CEO) of NISCOL issued a letter terminating the claimant's employment. The Claimant challenges that termination claiming his termination was unlawful. He claims damages in the sum of VT 21,101,818 his unexpired contract of VT 2,109,092, common law damages at VT 100,000 interest and costs.
2. The defendant opposes the claims. The defendant says the contract is void from the beginning and that the decisions of the Board of Directors extending the Claimant's made in September 2015 were made ultra vires the provisions and requirements of NISCOL's Articles of Association. The defendant says the claimant's claims should be dismissed with costs.



Agreed Facts

3. Pursuant to the orders of the Court issued on 26th October 2018 Counsel filed a joint memorandum of agreed facts and issues on 27th November 2018. The agreed facts are-
- a) Mr Chand is Fijian of 35 years old and is an accountant by profession.
 - b) Any employees who take up employment or directorship within the company are bound by the Memorandum and Articles of Association of Niscol Company.
 - c) The Claimant applied for the position of Chief Accountant through email on 12th August 2013 sent to the former CEO Mr Seremiah Matai which application was acknowledged on the same day.
 - d) The Claimant's initial contract was approved by NISCOL shareholders meeting on 19th September 2013.
 - e) The Claimant held a valid work permit under Vanuatu Immigration law, Number 15616 which expired in 9th October 2014.
 - f) Under the Claimant's contract of 10th October 2013 the contract was renewable for a further period on similar terms and conditions at the sole discretion of the defendant.
 - g) The Claimant's contract was discussed by the shareholders on 4th September 2015.
 - h) The Claimant's employment was terminated effective from 27th June 2016.
 - i) On 4th September 2015 the shareholders resolved to terminate Mr Alfred Maliu as Board chairman and appointed new members to the Board of Directors namely Mr Kevin Wass and Mr Jay Ngwele.



- j) The Claimant received his employment entitlement payout for the period 10th October 2013 to 9th October 2016 and sought a balance from 10th October 2016 to 9th October 2018. The Claimant submitted his calculations and the defendant company has paid all claimants in accordance with the claimant's calculations.
- k) The list of directors confirmed by the financial services commission during the time of extension of the claimant's contract from 10th October 2015 were messrs: Alex Samsen, Livo Langi, Warelelav, Charley Ulas, Timothy Nov, Jonathan Sisai, Kevin Wass and Jay Ngwele.

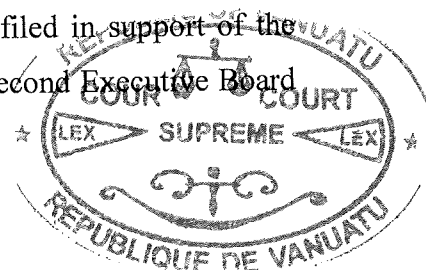
Agreed Issues

4. The agreed issues are-

- a) Whether the meeting of 1st and 2nd September 2015 was held in accordance with the Company's Articles of Association?
- b) Whether the meeting of 4th September 2015 was held in accordance with the Company's Articles of Association?
- c) Whether the Claimant's employment contract dated 2nd September 2015 in accordance with the Company's Articles of Association?
- d) Whether the termination letter dated 27th June 2016 in accordance with the Company's Articles of Association?
- e) Whether the claimant is entitled to claim any reliefs upon his dismissal?

Discussion and Consideration

5. The first issue concerns the meetings of 1st and 2nd September 2015. The relevant evidence is contained in the sworn statement of Livo Langi filed in support of the Claimant's claim on 2nd February 2017. The Minutes of the Second Executive Board

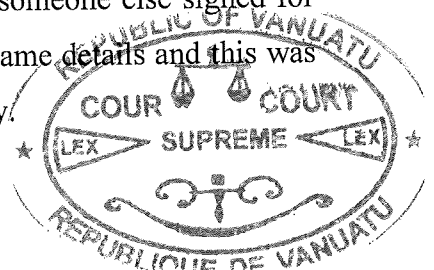


Meeting of Niscol held on 1st and 2nd September 2015 are annexed as “LL3”. The meeting is headed “EXECUTIVE MEETING”. The members present were: Alfred Maliu (Chairman), Alex Samson (Vice), Livo Langi (secretary), Warelevav, Charley Ulas, Derek Bulu and Timothy Nov. Also present were Rick Tichamoko Mahe (CEO) and Pravinesh Chand (Claimant) as Chief Accountant and vice secretary of the Board.

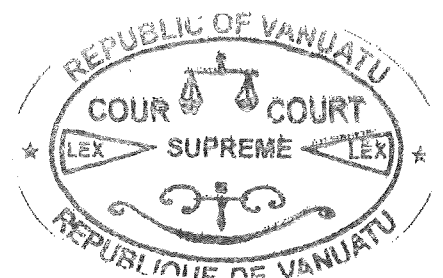
6. Agenda Item No. 10 was the review of the Chief Accountant’s contract. The Board resolved unanimously that the claimant’s employment contract be extended for a further 3 years from 10th October 2015 to 9th October 2018.

The Law

7. Article 74 (2) of the Articles of Association provides that the power to appoint the directors and the accountant vests with the shareholders.
8. It is clear from the evidence that the meeting of 1st and 2nd September 2015 was not a shareholder’s meeting. It was a Director’s meeting. It is clear therefore that the Board’s decision to extend the contract of employment of the claimant as accountant was done ultra vires the powers of the shareholders under Article 74 (2). I reject Mr Tevi’s submissions on this point. The first issue is therefore answered in the negative. Further, record from the Financial Services Commission shows that Alfred Maliu and Derek Bulu were not members of the Board at the time.
9. The second issue concerns the meeting of 4th September 2015. The evidence is again found in the sworn statement of Livo Langi dated 2nd February 2017. He annexed as “LL4” a copy of the Notice of the shareholders extra-ordinary sitting/meeting. It included an agenda. Item 8 was about the extension of the claimant’s contract of employment. The sitting/meeting was called for 3:00pm. The venue was DLA conference Room in Port Vila. Notification is indicated to be by way of “flying Minutes”.
10. There are 2 sets of Notices and Agenda dated 4th September 2015. The first notice and agenda indicates someone else signed for the chairman and someone else signed for the secretary. The second set of notice and agenda have the same details and this was signed by Manuel Ure as Chairman and Ata Palen as secretary.



11. The claimant and Mr Mahe say in their sworn statements that it was Jones Ephraim who signed on behalf of the chairman in absence of Manuel Ure. It is not known who signed for the secretary.
12. Jones Ephraim deposed to a sworn statement filed on 24th May 2017 responding to the claimant's statement of 9th December 2016 and Mr Mahe's statement of 15th February 2017. At paragraph 3 and 7 Mr Ephraim denies he was ever appointed as a shareholder of NISCOL Company. At paragraph 4 and 5 he denies ever being present at the meeting of 4th September 2015 which resolved to extend the claimant's contract of employment.
13. Manuel Ure deposed to a sworn statement filed on 5th April 2017. He explains amongst other things that on 4th September 2015 he was removed and Jones Ephraim replaced him. After the meeting had taken place and the decision made, he was recalled to his position. That explains why Jones Ephraim signed the Notice and agenda on his behalf on 4th September and he was made to sign the same document at some point later. It is clear Mr Ure was not present at the meeting that sat on 4th September 2015. He had signed a resolution that he was not part of and Mr Ephraim or someone else was made to sign the resolution for which he was not a shareholder or part of.
14. Palen Ata deposed to a sworn statement dated 2nd March 2017. At paragraph 3 he gives reasons why the meeting of 4th September 2015 was not properly constituted being-
- a) 10 days' notice was not given,
 - b) Meeting was not quorate with only one member present,
 - c) No proxies were available,
 - d) Notice given 1 day before meeting.
 - e) He confirmed Mr Ure's statement that after the meeting Mr Ephraim was again removed and Mr Ure resumed position as Acting SG for Penama.



15. Article 41 of the Articles of Association requires a written notice to be given to every shareholder and to each director and any auditor not less than 10 days before such meeting. As for quorum Article 40.4 states that a meeting is to be adjourned if there is no quorum and no business should be transacted. Article 42 provides for two methods of holding meetings.

16. According to the evidence of Palen Ata there was no quorum on 4th September 2015 and the meeting should not have proceeded. However it is clear business was transacted on that day without a quorum and outside of the time requirement of 10 days' notice.

17. Livo Langi annexed a copy of the email sent by Ms Cherol Ala on 3rd September 2015 to the shareholders namely: Ketty Napwatt, Edward Kaltamat, Manuel Ure, Rick Mahe, Pravinesh Chand, and Jane Agnes Tari. It states:

"Dear Shareholders,

Good afternoon all,

I have just received urgent Ministerial Instruction for an extra ordinary meeting to be convened to consider the following business,

- 1. Appointment of Kaven Wass as Director to Niscol Board*
- 2. Removal of Alfred Maliu as Director of Niscol Board and Chariman.*
- 3. Appointment of Jay Ngwele as Director of Niscol Board and Chairman of the Board.*

I will prepare a proper meeting agenda and circulate during meeting. I understand most of you are in Port Vila now so please propose a time that suits for this short sitting.

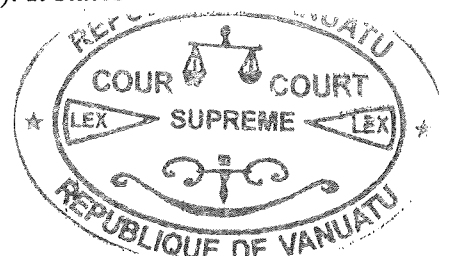
CEO and Accountant please facilitate the above meeting to convene soonest

Kind Regards

Director"

18. Further Mr Langi annexed a copy of the email of 4th September 2015 at 4:37pm to Mahe Rick, Pravinesh Chand and Hon. Hosea Nevu (copied). It states-

"Dear CEO and Accountant,



Further to our meeting held this morning, I have forwarded through my secretary agenda and resolution of extra ordinary meeting held today via telephone/ flying minutes and all have agreed to all resolutions. Please note also the representative for Penama is Jones Ephraim who is Acting Secretary for Penama in the absence of Manual Ure who could not be reached due to communication problems.

However, Pravinesh, please upload the attached letters onto your letterhead and revert back to me for signature soonest

Many thanks,

Cherol”.

From this email it is clear that Jones Ephraim was not physically present but was contacted only by telephone.

19. Item 3 of the Agenda of 4th September 2015 meeting indicates a waiver of the relevant section of the Articles of Association of Niscol. And Item 1 of the shareholders resolutions of 4th September 2015 indicates there was a waiver.

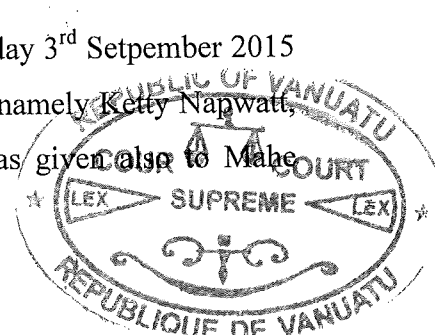
20. Article 41 (3) of the Articles states:

“Any irregularity in a notice of a meeting is waived if all the shareholders entitled to attend and vote at the meeting without protest as to the irregularity, or if all such shareholders agree to the waiver.”(My emphasis)

21. Applying the law to the facts first, it is common knowledge that Niscol Company has 6 shareholders namely: Sanma Provincial Government, Penama Provincial Government, Torba Provincial Government, Luganville Municipal Council and the National Government.

22. Article 41(1) requires that written notice “ must be given to every shareholder entitled to receive notice of the meeting and to each director and any auditor of the company not less than 10 working days before the meeting”
(my emphasis)

23. This is a mandatory requirement. However the email of Thursday 3rd September 2015 given by Ms Cherol Ala was made only to three shareholders namely Ketty Napwatt, Edward Kaltamat and Manuel Ure. The purported notice was given also to Mahe



Rick, Pravinesh Chand (Claimant) and Jane Agnes Tari but these were not shareholders. The purported notice was not given to the Directors of the Company as required by Article 41.1.

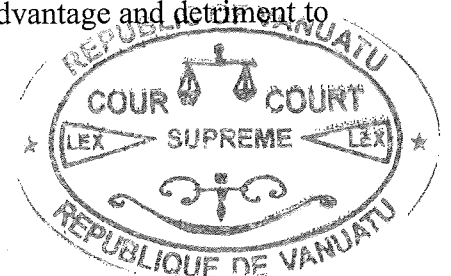
24. Further, the email of Friday 4th September 2015 at 4:37pm indicates and confirms that the meeting notified was not held at 3:00pm in the DLA Room in Port Vila as notified. Instead it confirms the meeting was held “via telephone/ flying minutes” and that “all had agreed to all resolutions” and that it was held in the morning via telephone/flying minutes.

25. Article 42 of the Articles requires that a shareholders meeting may be held either-

- a) By a number of shareholders who constitute a quorum being assembled together at the place, date and time appointed for the meeting, or
- b) By means of audio, or audio and visual communication by which all shareholders participating and constituting a quorum, simultaneously hear each other throughout the meetings. (my emphasis)

26. Mr Palen Ata’s evidence is that on 4th September 2015 only one shareholder was present and there was no quorum. There is no evidence from Ms Cherol Ala to challenge or disapprove that evidence. The Court accepts the evidence of Palen Ata as the only evidence as to quorum. For a meeting to be properly constituted through telephone, Article 42(b) requires that a quorum should be present and that all present should simultaneously be hearing each other throughout the meeting. That is not the scenario that is reflected in the email of 4th September 2015.

27. Then there was the waiver. By Article 41(3) a waiver can be made only if there is any irregularity in a notice of meeting. It is not a waiver to waive a mandatory requirement of, say giving a 10 days’ notice or to continue to meet when there is no quorum available. To use a waiver of the Articles in the circumstances in which it was done on 1st, 2nd and 4th September 2015 is a dangerous precedent which opens the flood gate for all types of actions that would be of great disadvantage and detriment to Niscol Company.



28. By way of comparison, I examine the resolution of 4th September 2015 purportedly signed for the chairman and the secretary and the second Minutes signed by Mr Manuel Ure and Mr Palen Ata in the sworn statement of Langi Livo, and that contained in the sworn statement of the claimant filed on 18th April 2017 in reply to Mr Ure and Mr Ata's statements. He annexes as PC1 the minutes of shareholders meeting held on 19th September 2013. First it is noted the names of the shareholders are stated right at the beginning, followed by the agenda, then the Minutes and resolutions. Then right at the end, all the shareholders signed with their relevant stamps. And it is done on Niscol's letterhead.

29. The minutes of 4th September 2015 bears only one stamp of Niscol. The resolutions are not on letterhead. It is not indicated at the front which shareholders were present. There is a big contrast between the agenda and resolution of 4 September 2015 and those of 19 September 2013. And it is unusual.

Findings and Declarations

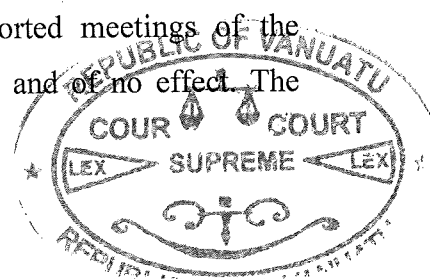
30. I therefore find that the meeting held on 4th September 2015 was held contrary to Articles 40 (1), (2) and (3) , 41 (1), (2) and (3) and 42 of Niscol's Articles of Association. I therefore hereby declare the meetings of the Directors held on 1st and 2nd September 2015 void and of no effect. I also declare the purported shareholders meeting held on 4th September 2015 together with its resolution, null and void and of no effect.

The second issue is answered in the negative for the reasons given.

31. And for the same reasons and findings, I answer the third issue: Whether the claimant's contract (as extended) from 2nd September 2015 in accordance with NISCOL's Articles of Association, in the negative.

32. The fourth issue concerns the letter issued by Mr Ryan on 27th June 2016 terminating the claimant's employment.

33. As found and held in the preceding paragraphs the purported meetings of the Directors of 1st and 2nd September 2015 were null and void and of no effect. The



obvious result is that the extension of contract was also null and void and of no effect. In effect no contract of employment existed after 4 September 2015.

34. Under those circumstances the CEO Mr Philip Ryan, given his powers and duties under Article 72(1) of the Articles, having the day to day management and administration of NISCOL was entitled to take the course that he took. It was really not necessary for him to do that at all in any event.

35. If anyone were to challenge the exercise of the CEO's power, it had to be the Board or the Shareholders of NISCOL, not the claimant. And a judicial review case would have been the appropriate course. In the absence thereof, the CEO took the measure he took for the advantage and benefit of NISCOL management. And it was a proper exercise of his power under Article 72(2) to put an end to an illegal contract and save Niscol funds being paid out as salaries during the period. This issue is answered in the affirmative.

36. The fifth and last issue: whether the claimant is entitled to any reliefs? For the reasons and findings made, this issue can be shortly answered in the negative.

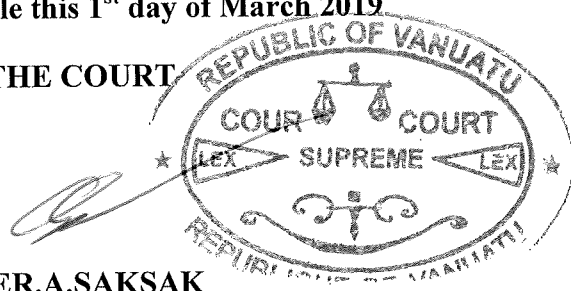
The Result

37. The claimant is unsuccessful in all his claims and those claims are dismissed in their entirety.

38. In the circumstances of the case, there will be no order as to costs. Each party will bear their own costs.

DATED at Luganville this 1st day of March 2019

BY THE COURT



OLIVER.A.SAKSAK

Judge