

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

**Civil**  
**Case No. 20/3092 CVL/Civil**

**BETWEEN:** **Harrison T Vaka'Matan Luen**  
First Applicant  
**Allen Collins Faerua**  
Second Applicant

**AND:** **Public Service Commission**  
First Defendant  
**Republic of Vanuatu**  
Second Defendant

*Date:* 12 November 2020  
*Before:* Justice G.A. Andrée Wiltens  
*In Attendance:* Mr S. Kalsakau for the Applicants  
Ms Williams Samuel and Ms J. Toa for the Defendants  
*Date of Decision:* 19 November 2020

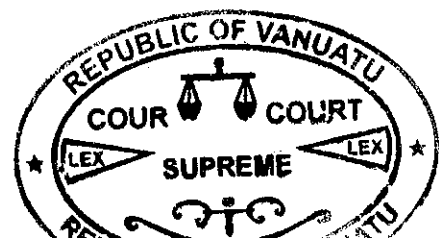
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**Judgement**

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A. Introduction

1. This was an urgent application for certain interim orders pending Supreme Court determination of the validity of the terminations of the applicants from their Government employment, as follows:



- Staying or suspending the Public Service Commission ("PSC") decision to terminate Mr Luen as Director General for the Ministry of Public Utilities ("MIPU") and Mr Faerua as Director of the Public Works Department ("PWD");
- Directing PSC to not advertise or appoint to the positions of Director General of MIPU and Director of PWD;
- Directing the State to satisfy payment of salary and benefits pursuant to the applicants' employment contracts dated 4 January 2019 and 26 February 2019 respectively; and
- Directing reimbursement of unpaid salary and benefits to both applicants since 9 October 2020.

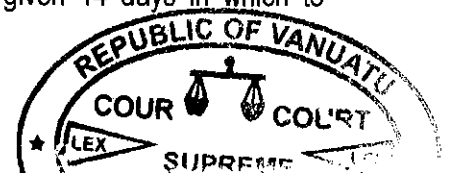
2. The application was opposed.

B. Background

3. Mr Luen was appointed as the Director General of MIPU on a 4-year contract commencing from 4 January 2019.
4. Mr Faerua was appointed as the Director of Public Works Department on a 3-year contract commencing from 26 February 2019.
5. On 22 March 2019 the Council of Ministers ("COM") in decision 047/2019 approved the implementation of the VT 3 billion Vanuatu Rural Feeder Roads project with the condition the procurement and expenditure of the project was to adhere to the "*Tenders Act mo Government Financial Regulation*".
6. On 10 June 2020, the Minister of MIPU lodged a complaint against the applicants to the Chair of the PSC. The 3-page complaint centred on their alleged non-performance of the applicants' core roles, as set out in section 20 of the Public Service Act [Cap 246] in relation to COM decision. Much of that infrastructure work involved roading contracts. As well, the Minister had set up an investigation into all the contracts awarded in pursuance of the work plan to ensure the contracts awarded complied with the Government Contracts and Tenders Act [Cap 245] and the Public Finance and Economic Management Act [Cap 244]. The Minister alleged the applicants had deliberately delayed in co-operating with the inquiry.
7. On 22 June 2020, the applicants responded to the complaint to the Chair of the PSC in writing. The substance of both aspects of the complaint were denied, with statements to the effect the applicants remained committed to the performance of their roles.
8. Due to the PSC's Chair's term of office coming to an end, he was replaced in early July 2020. The Minister of MIPU re-lodged his complaint to the new PSC Chair on 2 July 2020.



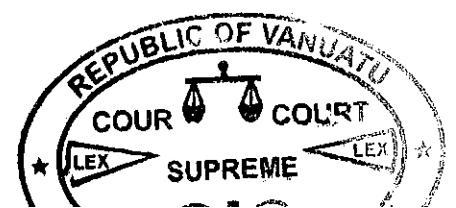
9. On 8 July 2020, the PSC Secretary, in a 3-page letter, advised both applicants that the PSC had suspended them on full salary pending an investigation being carried out into the complaint. The letter stated that the complaint, the applicants' employment contracts, and an investigation report of 19 June 2020 had been considered by the Commission prior to the decision being made. The investigation to be carried out was looking into 5 allegations, with detailed particulars described but summarised as the following:
- Failure to exercise responsibilities under s.20 of the Public Service Act,
  - Failure to provide clear advice to the Minister for MIPU,
  - Failure to properly consult with the Department of Finance and the Department of Strategic Policy and Aid Co-ordination,
  - Delay in disclosing all relevant documents by the MIPU Director General, and
  - Confirmation of the involvement by the MIPU Director General with Contract Awardees.
10. On 13 August 2020, the PSC provided a copy of the Investigation Report to both applicants, seeking their responses to the same. The report is 38 pages long, with 30 attached annexures comprising of relevant exhibits and statements by 13 witnesses. The recommendations by the investigation team included that the PSC consider transferring both applicants to other posts commensurate with their abilities and experience, issue a first warning to both applicants, and dismiss Mr Luen for serious conduct in awarding certain stated roading contracts. There were further recommendations, but they are not relevant to the issues before the Court.
11. On 20 August 2020, Mr Kalmet, a solicitor, provided a 3-page response on behalf of the applicants to the PSC. The response was a total denial of all the allegations and confirmation of personal non-involvement in the tendering processes undertaken. It sought immediate reinstatement on former terms. Mr Luen also personally provided two additional responses. They were detailed 6-page documents dealing separately with each of the allegations and refuting them in respect of the 8 July 2020 PSC letter and the 13 August 2020 report.
12. On 3 September 2020, the applicants were advised by the PSC Secretary that their suspensions were extended. This decision was taken having regard to the investigation team's recommendations and the responses made by both applicants. The extended suspension was on half pay, and stated to be so that the Public Service Disciplinary Board could undertake detailed analysis of the case. Both applicants were told they would be asked to attend before the Board and provide further clarification of their positions. However, no such further analysis ensued, and neither applicant was requested to attend before the Board.
13. The PSC wrote further letters to the applicants dated 18 September 2020, indicating that prior to a final determination being made, the applicants were being given 14 days in which to



provide submissions as to why each should not be terminated. There was no explanation provided why the PSC's previous decision a fortnight earlier had been over-turned.

14. Mr Faerua responded on 29 September 2020 by means of a comprehensive 18-page document which not only set out his reasons for the various actions he had taken in relation to the matters being looked at, but also relevant exhibits.
15. Mr Luen responded by means of a further letter by Mr Kalmet of 2 October 2020. The allegations of misconduct were vehemently denied. Without in any way conceding merit in any of the allegations, Mr Luen indicated he could abide by the investigation team's first recommendation of a transfer.
16. On 9 October 2020, the PSC terminated both applicants from their employment.
17. In Mr Luen's case this was stated to be for actions amounting to serious misconduct. The PSC stated that in good faith it had no other course than to terminate his employment, effective from 6 October 2020. The PSC further stated it was not satisfied with Mr Luen's response and considered his actions "...for awarding Government contracts No. 597/19 and No. 598/19 to Prime Roadwork Limited for value of more than VT 5 million for similar works amount to contract splitting, contrary to section 13A of the Government Contracts and Tenders Act".
18. In Mr Faerua's case the PSC explained it was not satisfied with his response and in good faith had no other choice than to terminate for serious misconduct, effective from 6 October 2020. The reason provided was:

"As the Director of the Department of Public Works you failed to exercise due diligence check on recommendations put forward by Technical Evaluation panel leading to awarding and signing of Government Contracts No 597/19 and No. 598/19 by the Director General to Prime Road works Limited for value of more than VT 5 million for similar works which amounts to contract splitting contrary to section 13A of the Government Contracts and Tenders Act."
19. The applicants dispute any wrong-doing on their part and contend their terminations are wholly unjustified. They accordingly seek re-instatement.
20. Both applicants are married with dependent families for whom they are the sole providers. Accordingly, since their terminations on 9 October 2020 and the cessation of salary and other benefits, the applicants and their families have struggled financially. As well as re-instatement, they seek to have their former salaries and benefits resumed, with back pay from the date of termination.
21. Both applicants have subsequently attempted to find alternative employment, without any success. The media have exacerbated matters with widespread coverage of their terminations, including details of the allegations leading to the same. The prospects of alternative employment are accordingly significantly diminished.



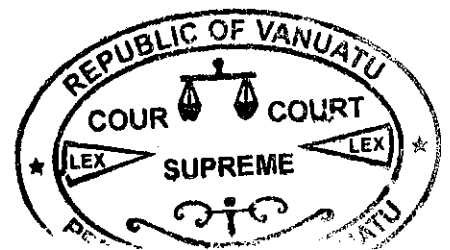
22. Mr Kalsakau relied on the sworn statements of both applicants, with voluminous supporting exhibits.
23. Ms Williams Samuel relied on the evidence of Mr Bibi, the PSC Secretary. He too appended numerous documentary exhibits.
24. There was a great deal of commonality as to the background I have set out above.

C. Submissions

25. Mr Kalsakau relied on Civil Procedure Rule 7.5 which deals with interlocutory orders prior to a proceeding having started. There is no doubt this Court has jurisdiction where an applicant has a serious question to be tried, which on the evidence presented if unchanged would likely succeed, and where an applicant would be seriously disadvantaged if the order is not granted.
26. Mr Kalsakau submitted that there were 3 matters which amounted to "serious questions to be tried" as that requirement was discussed in *Valele Family v Touru* [2002] VUCA 3.
27. Firstly, Mr Kalsakau submitted that the letters of 9 October 2020 did not comply with the law and were in breach of the applicants' employment contracts. He submitted the authority of *Letlet v Republic of Vanuatu* [2016] 79 was apposite.
28. Section 19(B) of the Public Service Act [Cap 246] requires the PSC to give written notice of the Commission's decisions, but also to give "...the reasons for the decision". That legislation was discussed in *Republic of Vanuatu v Mele* [2017] VUCA 39. The Court held:

"The obligation on the Public Service Commission to give reasons for its decision to dismiss a Director of the Public Service is an important one. It protects the Director. He or she can see that in its decision the Public Service Commission has identified all the relevant evidence, where there is a conflict it has given a rational reason for rejecting or accepting evidence and there is rational credible evidence to support the conclusion. And so the Director can be satisfied that a fair process has been held."

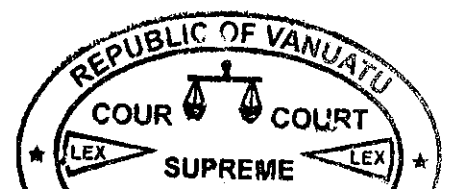
29. Secondly, Mr Kalsakau summarised the position in this way – the applicants were dismissed for alleged contract splitting. That suggestion, Mr Kalsakau submitted, amounted to a fundamental misunderstanding by the Technical Evaluation Panel of the Request for Tender and Request for Quotation process involved in the letting of Government contracts. He contended to be guilty of contract splitting the primary requirement to be established is that the process undertaken was for the purpose of avoiding the requirements of the tender process provided for by the relevant legislation. Mr Kalsakau submitted there was a paucity of evidence to support such a finding as to purpose. To the contrary, Mr Kalsakau submitted that the evidence demonstrated that all the correct procedures in respect of Government Contracts No. 597/19 and No. 598/19 had been followed.



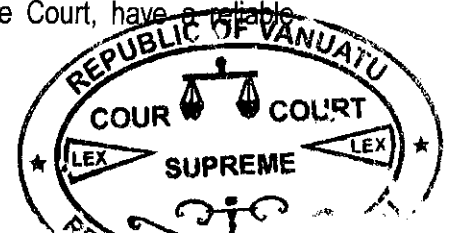
30. Thirdly, Mr Kalsakau posited that there was political motivation behind the dismissals. He submitted that the PSC had been pressured into dismissing the applicants and that the decision to terminate their employment was not a truly independent decision.
31. Ms Williams Samuel essentially submitted that the PSC had throughout followed correct procedure in this matter. She pointed to the nature of the backwards and forwards communications as giving the applicants due notice throughout and every opportunity to present their versions of events and justifications for the steps taken. She submitted it was incorrect to simply consider the letters of 9 October 2020, when in fact there was far greater communication which met the requirements of the applicants' contracts of employment and the requirements of section 19(B) of the Public Service Act.
32. The actual letter of termination, in her submission, should be read in conjunction with all the other communications. When that is done, it is clear, she submitted, that the PSC had followed the law and that both applicants were at all times afforded due process of law. She sought to distinguish the *Letlet* case, where there had been opportunity for the applicant to respond, quite unlike in the present case.
33. Ms Williams Samuel pointed to the evidence of Mr Bibi, where he explained that Government contracts No. 597/19 and No. 598/19 were "...awarded to the same company for the same nature of work, at the same location, and distance, same period of contract, thus amount to contract splitting contrary to Contracts Act". She submitted there was clear evidence of contract splitting, as the value of the contracts came to more than VT 7 million and accordingly the tender process should have been followed. It wasn't only due to the splitting of the contracts. As a result Mr Luen ought not to have awarded the contracts and Mr Faerua ought to have exercised due diligence and discovered the issue and prevented the contracts being awarded.
34. She denied the allegation of political interference or manipulation.

D. Discussion

35. It is not of significance, in my view, that the PSC initially advised the case would be closely analysed by the Disciplinary Board. Although the change of approach remains unexplained, the situation is that the applicants would have received notification had there been any Disciplinary Board sessions. If there had been in the absence of the applicants that may be cause for some concern, but there is no suggestion of that. The complaint is that having been told this would happen, it did not eventuate. In my view there is no deprivation of opportunity for the applicants to explain themselves as a result of this.
36. In my view Mr Kalsakau is seeking to impose an extremely onerous obligation on the PSC. To set out the precise reasons for termination of the applicants' employment in the manner contended for by Mr Kalsakau would, in this particular case, involve considerable effort and time.



37. The reality is that neither applicant was ever in any real doubt as to what was alleged against each of them, and that their exculpatory explanations were rejected by the PSC. Mr Kalsakau is counselling perfection, when all that is required is that the applicants be treated fairly by understanding what is alleged against them.
38. I do not consider there is a real question to be tried in respect of the 9 October 2020 letters of termination complying with the law and the employment contracts.
39. The second issue relates to the process adopted in awarding Government contracts No. 597 and No. 598. Pursuant to the Government Contracts and tenders Act, if the cost of the work to be undertaken comes to more than VT 5 million, the tendering process must be followed. If the value of the work comes to less than VT 5 million then all that is required is for quotations to be sought and the contract awarded on the basis of an analysis of the quotations.
40. It is a common belief that "contract splitting" occurs in order to avoid having to follow the more expensive and time-consuming tender process. In that way, in order to avoid the tender process, one contract is quoted at VT 4 million; another is quoted at VT 3.5 million. As Mr Kalsakau summarised, effectively that is what is alleged to have occurred here, with Mr Luen awarding split contracts for the same work to the same contractor, and with Mr Faerua not adopting due diligence and therefore acquiescing in that contrary to his obligations. Ms Williams Samuel maintained that was what had occurred and led to the terminations; Mr Kalsakau maintaining the opposite, namely that there was no or insufficient evidence of that.
41. On the evidence presented, Government contracts No. 957 and No. 598 awarded to Prime Road Works both relate to:
- Stockpiling of Graveling material (3,800 cubic meters) between Sele and Miraymiray quarry sites, and
  - The works are to commence on 25 November 2019 and be completed by 30 January 2020.
42. It is difficult to see any difference between them.
43. Contract No. 597 is for VT 4.193 million; contract No. 508 is for VT 3.91 million. Combined, the total expenditure is VT 8.203 million – well in excess of the VT 5 million threshold which requires the tender process to be adopted. The exhibits presented to the Court dovetail closely to the evidence of Mr Bibi.
44. As a result, I am not persuaded that there is a real issue to be tried in relation to this. The evidence is there for all to see. It was properly laid out before Mr Luen and Mr Faerua and their attempts to persuade the PSC that there was another innocent explanation were not accepted. The terminations, on the face of the evidence currently before the Court, have a reliable foundation.



45. In respect of Mr Kalsakau's third serious issue to be tried, I note that at this point in time there is scant evidence to support the allegation of political manipulation. I do not consider this aspect of the case to be apposite to my present considerations. It may be that other evidence comes to light, but it is wrong to place any reliance of the submission at this point in time.

E. Result

46. Interim relief is declined.

47. The application is dismissed.

48. The applicants are to pay the costs of this application to the Respondent, which are set at VT 60,000 within 21 days. The costs are payable on a joint or several basis.

**Dated at Port Vila this 19th day of November 2020  
BY THE COURT**

*Gendie Uel*  
Justice G.A. Andrée-Wiltens

