

PUBLIC PROSECUTOR

V

LUGANVILLE MUNICIPAL COUNCIL

AND OFFICERS

Defendants

Date of Hearing: 8th March 2021
Date of Judgment: 16th April 2021
Before: Justice Oliver Saksak
In Attendance: Mr Kevin Nathan for Public Prosecutor
Mr Lent Tevi for Defendant

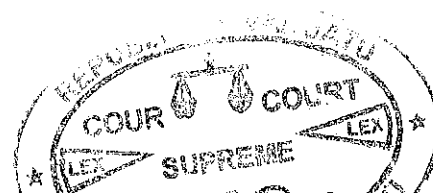
DECISION

Introduction

1. The Court issued directions on 8th March 2021 upon requests by Counsel for the defendants to file and serve written submissions by 22nd March 2021, and for Mr Nathan to file and serve responses by 6th April 2021 and for Mr Tevi to file and serve replies by 13th April.
2. No written submissions have been filed in compliance with those directions.

The Facts

3. The Vanuatu National Provident Fund (the VNPF) through the Public Prosecutor laid 2 charges against the Municipality of Luganville (the LMC) and all its officers and staff occupying their respective posts in 2015.
4. The charges are laid under sections 26 (1) and 50 (1) (c) of the VNPF Act [CAP 189].
5. The charges alleged that between April and August 2015 the LMC and its officers and staff failed to pay monthly contributions in respect of its employees in the sum of VT 335,864 (Count 1). Secondly it is alleged that between January, April, August, and



October 2018, the LMC, its officers and staff failed to pay VT 714,002 in monthly contributions in respect of its employees. It is further alleged the failure is a continuing one.

The Original Charges

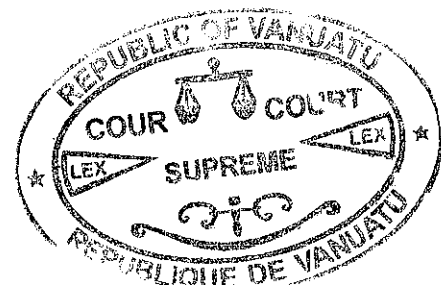
6. The original charges filed on 6th November 2020 had a total of 78 Counts. They were amended charges.
7. When the case was called before me on 25th November 2020 I raised the issue of time limitation under section 15 (b) of the Penal Code Act and invited Mr Nathan to consider the point of law raised. I adjourned the matter to 26th November 2020 at 2:00pm.
8. At 2:00pm on 26th November 2020, Mr Tevi raised a further legal problem pursuant to section 53 of the VNPF Act. Accordingly Mr Tevi entered not guilty pleas on behalf of the LMC and its officers and staff as named. The Court then adjourned the matter for trial.

Second Amended Charge

9. The second amended charge was filed on 26th November 2020 at 11:45am. It was reduced substantially down to only 2 counts. They related to failures of payments of contributions only for April to August 2015 and January, April, May, August and October 2018.

Previous Listings

10. The matter was transferred to Justice Aru and called on 23rd February 2021. As Mr Nathan did not appear due to another Court commitment in Port Vila, the matter was again adjourned for reallocation to another judge.
11. The file was reallocated to me. On 8th March 2021 when the case was called in Luganville, Santo Counsel asked for time to file and serve written submissions (See paragraphs 1 and 2



Discussion

12. As an old matter in terms of occurrences of the alleged non-payments, the Court will dispense with written submissions.

The Issues

13. In my view there are 2 simple issues. The first is whether there is a time bar for the charges to be laid? The second is whether the officers and staff of the LMC named are liable in law to pay the monthly contributions and be made liable for the failures to pay contributions for the periods alleged?

The Law

14. Section 26 of the VNPF Act provides:

"26. Payment of contributions

(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. (emphasis added)

(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 VT 50 the surcharge payable shall be VT 100; 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."

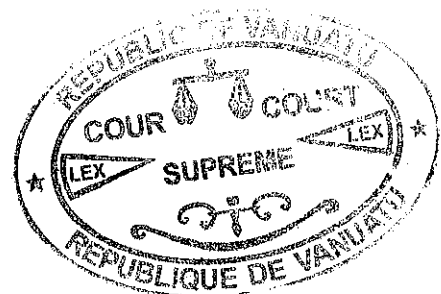
15. Section 50 of the VNPF provides

"50. Offences and penalties

(1) Any person who –

(a) for any purpose connected with this Act –

(i) knowingly makes any false statement;



(ii) produces or furnishes or causes or knowingly allows to be produced or furnished any document which he knows to be false in a material particular;

(b) in respect of whom the provisions of either section 22 or section 23 apply fails to apply for registration;

(c) fails to pay to the Board in any month any amount which, under section 26(1), he is liable to pay in that month in respect of any employee;

(d) obstructs any member, officer, employee, agent, adviser or consultant of the Board in the discharge of his duties and functions as such;

(e) fails to pay to the Board within such period as may be prescribed any surcharge which he is liable to pay under section 26(2);

(f) being or ever having been a member, officer, employee, agent, adviser or consultant, of the Board directly or indirectly communicates or reveals to any person any matter relating to the business of the Board which shall have become known to him in his capacity as member, officer, employee, agent, adviser or consultant except as may be required for the due discharge of his duties as such member, officer, employee, agent, adviser or consultant or as may be permitted by the Board;

(g) procures any member, officer, employee, agent, adviser or consultant of the Board or any person who has ever been such member, officer, employee, agent, adviser or consultant to communicate or reveal any such matter as is set out in paragraph (f);

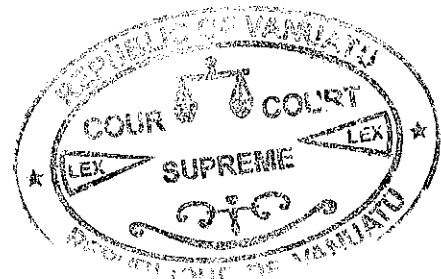
(h) fails to pay any contribution or surcharge which he is required to pay under section 48(3);

(i) fails to produce at the time specified, any document required to be produced by notice in writing under section 58(c),

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding VT 100,000 or to a term of imprisonment not exceeding 6 months or to both such fine and imprisonment.

(2) Any person who deducts from the remuneration wages of an employee any sum greater than that permitted to be recovered under this Act or, having made any deduction, fails to pay to the Fund in the time required by section 26(1) the contribution in respect of which such deduction has been made, shall be guilty of an offence and liable on conviction to a fine not exceeding VT 200,000 or to a term of imprisonment not exceeding 1 year, or to both such fine and imprisonment."

(My underling for emphasis)



16. Section 53 of the Act provides

“53. Liability of officers of corporations

Where an offence against this Act or any order or regulation made thereunder has been committed by a body corporate, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer or a partner of the body corporate, firm, society or other body of persons or was purporting to act in such capacity shall, as well as such body corporate, firm, society or other body of persons, be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.” (emphasis added)

17. Section 15 of the Penal Code Act provides:

“15. Limitation in criminal prosecutions

No prosecution may be commenced against any person for any criminal offence upon the expiry of the following periods after the commission of such offence –

(a) in the case of offences punishable by imprisonment for more than 10 years – 20 years;

(b) in the case of offences punishable by imprisonment for more than 3 months and not more than 10 years – 5 years;

(c) in the case of offences punishable by imprisonment for 3 months or less or by fine only – 1 year.” (My emphasis)

18. Section 18 of the Penal Code Act provides:

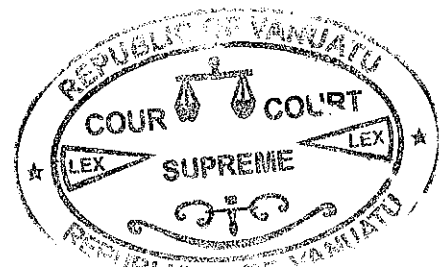
“18. Liability of corporations

A corporation may be criminally liable to the same extent as a natural person, provided that the acts and intentions of its principals or responsible servants may be attributed to the corporation.”

The First Issue

19. Are the 2 charges filed out of time?

The charge in Count 1 relates to failure to pay contributions from the months of April, May, June, July and August 2015. Section 50 (1) (c) makes it a statutory offence when there was or is a failure by any person to pay to the Board the contributions due for the month at which that contribution is payable. Section 26 (1) of the VNPF Act states that liability to pay starts or commences at the end of the following month.



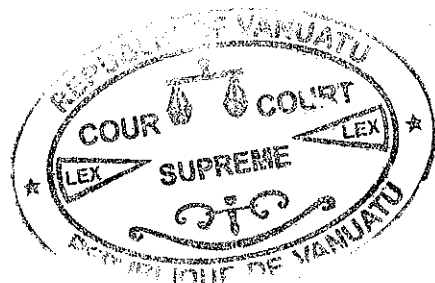
20. Section 50 of the VNPF Act specifies the penalty for non-payment of contributions to be a fine. The alternative penalty is a term of imprisonment not exceeding 6 months but the substantive penalty is a fine only. The offence is a statutory one as opposed to it being a criminal offence.
21. As such it is my considered view that section 15 (c) is applicable. And the time period in which prosecution should have been brought is 1 year from September 2015 and from November 2018.
22. The periods complained of are April to August 2015 and January to October 2018. The charges were filed initially on 6th November 2020 and the second amendment filed on 26th November 2020. From 2015 it was 5 years out of time. From October 2018, it was over 2 years out of time.
23. The first issue is answered in the affirmative.

The Second Issue

24. Are LMC and its officers liable?

The charges laid state that all the 61 named persons in the particulars were “*employees*” of the LMC at the relevant times.

25. Section 53 of the VNPF Act however requires that for these named persons to be liable, they had to occupy positions of “*a director, manager, secretary or other similar officer....*” or that each of them purported “*to act in such capacity.*”
26. The defendants have denied acting in those positions. The charges therefore are wrongly laid against those named persons as just employees. They had to occupy some managerial positions in order to be made liable under section 53 of the Act.
27. The named persons are therefore not liable.



The Result

28. The end result regrettably is that all the charges laid against the LMC and its officers or staff in Counts 1 and 2 are hereby dismissed, and the accuseds are hereby acquitted.

DATED at Port Vila this 16th day of April 2021.

BY THE COURT



OLIVER.A.SAKSAK

Judge

