

BETWEEN: **AUGUST LETLET**
Applicant

AND: **CHARLOT SALWAI TABIMASMAS** as the Prime
Minister of the Republic of Vanuatu
First Respondent

AND: **THE REPUBLIC OF VANUATU**
Second Respondent

AND: **THE RESERVE BANK OF VANUATU**
Third Respondent

Hearing: 1 December 2023

Before: Justice W. K. Hastings

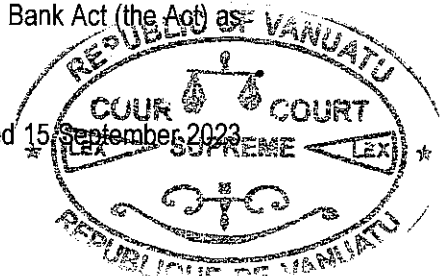
Counsel: GM Blake for the Applicant
DK Yawha for the First Respondent
L Huri for the Second Respondent
JC Malcolm for the Third Respondent

DECISION ON INTERIM ORDERS

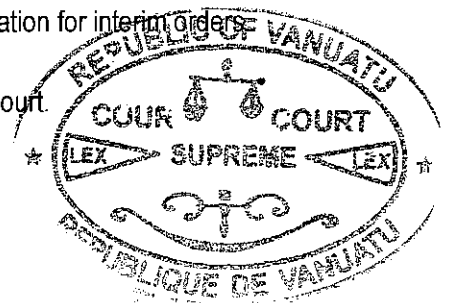
1. This is an urgent application by the claimant Mr Letlet for interim relief as a result of the decision of the first defendant Prime Minister Charlot Salwai Tabimasmamas to revoke his appointment as Governor of the Reserve Bank of Vanuatu (RBV).

Procedural history

2. On 21 November 2023, August Letlet filed and served a claim for judicial review seeking:
 - a) A declaration that the first defendant, Prime Minister Charlot Salwai Tabimasmamas, unlawfully exercised his power when he purported to revoke in a letter to the claimant dated 8 November 2023 (the decision):
 - (i) the claimant's appointment under s 8A(1) of the Reserve Bank Act (the Act) as Governor of the RBV; and
 - (ii) the claimant's contract of employment with the RBV dated 15 September 2023 (the contract);



- b) An order quashing that decision; and
 - c) An order requiring the first defendant to reaffirm to the RBV the appointment of the claimant as Governor of the RBV pursuant to the terms of the contract.
3. Also on 21 November 2023, the claimant filed and served an urgent application for interim relief, together with a sworn statement with annexures A to T, a sworn statement of urgency from Mr Blake, and an undertaking as to damages from the claimant. The application for interim relief was amended on 23 November 2023 to seek the following orders:
- a) That the effect of the decision of the first defendant to revoke the claimant's appointment as Governor of the RBV and to revoke the contract of employment between the claimant and the RBV be stayed pending the determination of the substantive claim for judicial review or further order of the Court;
 - b) That the applicant take up his employment as Governor of the RBV pending determination of the substantive claim for judicial review or further order of the Court;
- Or alternatively
- That pending determination of the substantive claim for judicial review or further order of the Court, the RBV shall pay to the claimant all entitlements arising under the contract as and from 10 November 2023, whether or not the RBV accepts the applicant physically to take up his appointment as Governor of the RBV in the interim;
- c) That the first defendant be prohibited from making an additional appointment as Governor of the RBV pending determination of the substantive claim for judicial review or further order of the Court.
4. On 23 November 2023, after hearing from counsel, the RBV was added as third defendant, the interim order set out in paragraph 3(c) above was granted without opposition, and the rest of the hearing was adjourned to 28 November 2023 to give Mr Malcolm time to obtain instructions from the third defendant, and for the first defendant to obtain representation.
5. On 28 November 2023, Mr Yawha on behalf of the first defendant sought and was granted a further adjournment to file and serve sworn statements from the first defendant and the Minister of Finance. These were filed and served on 30 November 2023. I directed that counsel were to make the deponents available for cross-examination unless excused by opposing counsel. The hearing of the urgent application for interim orders was adjourned to 1 December 2023.
6. In the meantime, the first and third defendants filed and served defences on 28 November 2023. The first defendant also filed and served his opposition to the application for interim orders.
7. The second defendant indicated it would abide the decision of the Court.

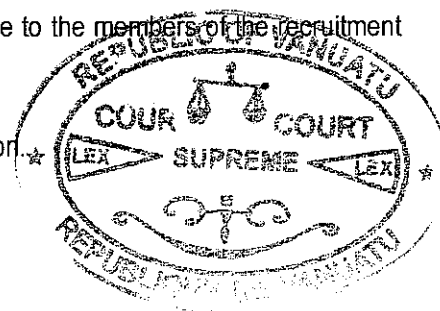


Rule 7.2 or 7.5?

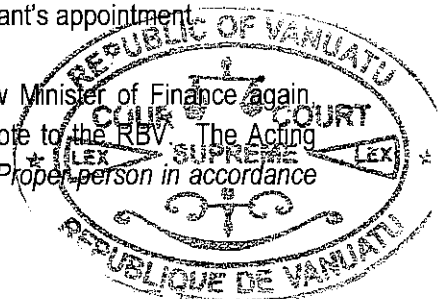
8. This application was brought under rule 7.5 of the Civil Procedure Rules 2002. That rule concerns applications for interlocutory orders made *before* a proceeding is started. This application was filed *at the same time* as the claim for judicial review. To my mind, rule 7.2 is more appropriate because it concerns applications for interlocutory orders *during* a proceeding. I note that a claim for judicial review and an application for interlocutory orders were filed at the same time in *Letlet v Republic of Vanuatu* [2016] VUSC 79, a case concerning the revocation of the claimant's appointment as Director General of Finance by the then Prime Minister, who is also the Prime Minister in this case. In the earlier case, neither the Supreme Court nor the Court of Appeal took any issue with adopting the procedure set out in r.7.5 instead of r.7.2. In any event, r.7.5 sets a higher bar, so this application will be considered under r.7.5.
9. Rule 7.5 is focused on the applicant. It requires the applicant to set out the substance of his claim, briefly state the evidence on which he will rely, set out the reasons why he would be disadvantaged if the order is not made, and swear a statement in support of the application. The Court may make the order if it is satisfied that the applicant has a serious question to be tried, that if the evidence remains as it is, the applicant is likely to succeed, and that the applicant would be seriously disadvantaged if the order is not made. Nothing in the rule refers to the respondent or the respondent's evidence. I nevertheless permitted the first respondent to file and serve a sworn statement from him and a sworn statement from the Minister of Finance in order to do justice to the applicant and the respondents. Both deponents were cross-examined by Mr Blake and Mr Malcolm, with the result that I obtained better information which was relevant to deciding whether or not to grant the interim orders sought. All counsel agreed I could take into account the evidence from the first defendant's witnesses notwithstanding the applicant-centric nature of r.7.5.
10. The reasons set out in this judgment are also relevant to the "*partial decisions on urgent application for interim relief*" issued on 23 November 2023.

Background

11. These facts are not in dispute:
 - a) On 17 June 2023, the claimant saw an advertisement seeking applications for the position of Governor of the RBV.
 - b) On 11 July 2023, Prime Minister Kalsakau directed that an appointment panel should be established and who should be on it.
 - c) On 14 July 2023, Minister of Finance Salong wrote to the members of the recruitment panel advising they were appointed.
 - d) On 19 July 2023, the claimant lodged his application.

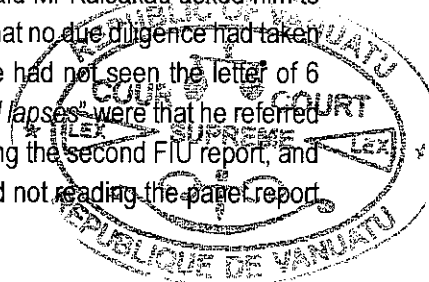


- e) On 28 August 2023, Minister of Finance Salong emailed the interview panel to suggest it obtain Financial Intelligence Unit (FIU) clearances for all four candidate before, rather than after, the interviews. Also on 28 August 2023, the Director of the FIU emailed the chair of the interview panel and said "*The panel may proceed with the interview tomorrow as scheduled and we can conduct the check thereafter.*"
- f) On 29 August 2023, Simon Athy, the Governor of the RBV, wrote to Minister Salong to register his concern about the composition of the panel.
- g) On 30 August 2023, the panel interviewed the claimant.
- h) On 4 September 2023, the government changed and a new Minister of Finance, Johnny Koanapo Raso, and a new Prime Minister, Sato Kilman Livtunvanu, were appointed.
- i) On 6 September 2023, the FIU responded to a due diligence request by email from the panel. It noted proceedings involving the claimant were complete except for a recommendation from the Ombudsman, and that none of the candidates had any convictions.
- j) On 7 September 2023, the panel's Evaluation Report was sent to the Minister of Finance. It ranked the claimant above the other three candidates and recommended him for appointment. It stated the "fit and proper" checks "*are currently in progress.*" It also stated "*Communication was made through email with FIU and so they proceeded conducting FIT and proper checks for the shortlisted candidates.*" Also on this day, the Minister of Finance wrote to the Prime Minister recommending the claimant for appointment.
- k) On 11 September 2023, the claimant resigned as Director General of Finance.
- l) On 12 September 2023, Prime Minister Kilman offered the claimant appointment as Governor of the RBV.
- m) On 15 September 2023, the claimant accepted the offer of appointment and entered into a contract of employment with the RBV. His employment was to start on 10 November 2023.
- n) On 6 October 2023, the government changed and the first respondent Charlot Salwai became Prime Minister.
- o) On 18 October 2023, Mr Salong, now no longer Minister of Finance, wrote as a Member of Parliament to Mr Athy, the RBV Governor that it was advisable that he write to the Prime Minister and Minister of Finance to review the claimant's appointment.
- p) On 20 October 2023, Mr Athy wrote to Mr Salong, now Minister of Finance again, attaching a report that the Acting Director of the FIU wrote to the RBV. The Acting Director wrote "*I do not find Mr Letlet as being a Fit and Proper person in accordance*"



with the Anti-Money Laundering and Counter-Terrorism Financing Fit & Proper Criteria". On the same day, the Minister Salong wrote to the Prime Minister to advise him to cancel the claimant's appointment. Mr Salong also emailed the Attorney General to seek advice "on how the employment contract between RBV and Mr Letlet can be terminated."

- q) On 26 October 2023, the Acting Attorney General Ms Samuel advised the Minister of Finance "that you may recommend to the Prime Minister to terminate the employment contract".
 - r) On 31 October 2023, Prime Minister Salwai instructed the Attorney-General to revoke the claimant's appointment.
 - s) On 6 November the Attorney General Mr Loughman wrote to the Prime Minister. He wrote that the Minister of Finance on 20 October 2023 "wanted the advice from the AG to lean in a particular direction." He advised "we are of the view that the recruitment process has been completed", that "a selection process has taken place which in our view was fair and transparent and through which a candidate was recommended for the post." He also stated "in our view this employment contract for all purposes is valid, binding on the government and enforceable on its terms." If the claimant were to bring a claim for breach of contract, Mr Loughman advised "it is our view that the chances of the state successfully defending such a claim would be slim."
 - t) On 8 November 2023, the first defendant wrote to the claimant advising him his appointment was revoked because "the process followed was not fair and transparent" and "you have not met the fit a proper criteria required by law".
 - u) On 10 November 2023, when the claimant arrived to commence work as Governor, he was denied entry to the building.
12. In his oral evidence, Mr Salong said it was Mr Athy, not Mr Salong, who asked the FIU for the report it made on 20 October 2023. Mr Salong repeatedly said he was concerned to ensure the integrity of the process and to protect the RBV and Vanuatu from risk. Mr Salong was Minister of Finance at the time the interview panel was constituted. He said he did not object to its membership then (although he does now) because he did not want to confront the Prime Minister.
13. Mr Salwai was taken through his sworn statement. At paragraph 3(c) he said the Minister of Finance received a letter expressing concerns about the political nature of the panel. He said it came from the RBV but he could not remember how he knew what the Minister of Finance received. In paragraph 3(f) he said "the new administration" recommended the appointment of the claimant "at the personal request of Former Prime Minister Ishmael Kalsakau Maau'koro, without prior due diligence." When asked how he knew this, he said Mr Kalsakau asked him to support the claimant, and that he "was informed" on 29 July 2023 that no due diligence had taken place (this was of course well before the interviews). He said he had not seen the letter of 6 September 2023 from the FIU. He was asked what the "procedural lapses" were that he referred to in paragraph 3(j). He referred to the letter from the RBV attaching the second FIU report, and the first letter from the Acting Attorney General. He acknowledged not reading the panel report



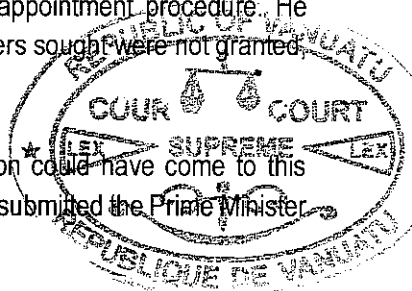
or the first FIU letter, not contacting the FIU directly, and not speaking to the panel or reading the claimant's application. When asked about the "exhaustive scrutiny, including comprehensive consultations and meticulous examination of pertinent documents" he referred to in paragraph 7, he said that referred to the second letter from the FIU, discussions with the RBV and the recommendation from Minister Salong.

The Reserve Bank Act and the Anti-Money Laundering and Counter-Terrorism Financing Act

14. The Reserve Bank Act sets out the criteria and process for appointment of the Governor in s 8A. The Prime Minister "is to appoint" the Governor on the recommendation of the Minister of Finance. This is mandatory wording. The appointment "must be based on merit and must follow a fair and transparent process." The process itself is not spelt out beyond that. The person appointed as Governor must have "at least 10 years of work experience in financial matters and in managing an organisation", have a Master's degree or higher qualification in economics and not have been declared bankrupt. There is no dispute that the claimant was appointable on merit on these criteria. The Prime Minister determines the terms and conditions of the Governor's appointment. The Governor holds office for 5 years and may be reappointed once. The Governor's terms and conditions of employment "may not be altered to his disadvantage during his term of office."
15. The RBV is a reporting entity under the AML Act. Section 50I states that the Director of the FIU may direct a reporting entity to remove a person who is a director, manager, secretary or other officer of the reporting entity if the Director is satisfied that the person is a "disqualified person" within the meaning of s 50J. A process to ensure that natural justice is followed is then set out. A disqualified person is defined in s 50J to include persons who have convictions, are bankrupt or who do not meet any other fit and proper criteria prescribed by the Regulations.
16. It is not clear at this stage whether the Acting Director of the FIU wrote the letter of 20 October 2023 under the authority of these provisions. He did not direct the removal of the claimant. It is apparent however that the claimant was not given the opportunity to make submissions in respect of the letter's content. Although no direction was made in this case, if a reporting entity fails to comply with a direction to remove a disqualified person, it risks being charged under s 50I(6) and fined.

Submissions

17. Mr Blake submitted there is a serious question to be tried and if the evidence brought by the claimant remains as it is, the claimant is likely to succeed. He submitted the evidence so far shows that the appointment process was "fair and transparent" as required by s 8A of the Reserve Bank Act, that the claimant was not given an opportunity to respond to the letter of 20 October 2023, and that there was no meticulous review of the appointment procedure. He submitted the claimant would be seriously disadvantaged if the orders sought were not granted, and that the balance of convenience is in the claimant's favour.
18. Mr Malcolm submitted the issue was whether a reasonable person could have come to this decision made by the Prime Minister on *Wednesbury* principles. He submitted the Prime Minister



was advised that there were problems with the appointment process (the composition of the panel and the fit and proper person assessment coming after, not before, the interviews). He submitted that on the basis of that advice, it was reasonable for the Prime Minister to require the process to restart, and that the claimant could have reapplied. He submitted the risk to the RBV was that the FIU could suspend the RBV as a reporting entity under the Anti-Money Laundering and Counter-Terrorism Financing Act if the Governor was found not to be a fit and proper person.

19. Mr Yawha submitted that the evidence shows the Prime Minister was advised the appointment process was flawed. He submitted *"the crux of the matter lies in the breach of essential statutory procedures in the Claimant's appointment process."* He submitted the then Prime Minister should not have directed that particular persons be on the interview panel, and that the appointment process did not wait for the fit and proper person assessment to be completed. He submitted it is rare for a Court to order the specific performance of an employment contract, and that the claimant would not suffer serious disadvantage if the orders were not granted because he could reapply for the position if it were readvertised, and he could sue for damages under the employment contract.
20. Mr Blake in reply submitted the issue is not specific performance of an employment contract; the question is whether the Prime Minister acted lawfully. He also submitted that having to engage in litigation qualifies as serious disadvantage.
21. I turn now to the test under the rules.

Rule 7.5

Urgency

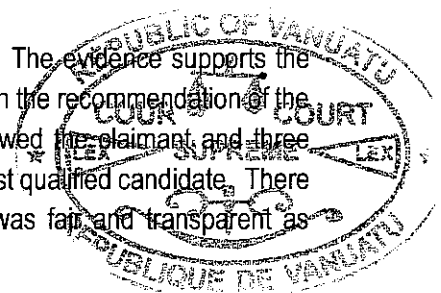
22. Mr Letlet has provided evidence of personal financial implications associated with the first defendant's decision to revoke his appointment. That decision will affect the ongoing governance of the Reserve Bank. The matters under review will also have implications for Vanuatu's sovereign risk profile. As a result, I have no difficulty in finding urgency.

Is there a serious question to be tried?

23. The primary question to be tried is whether the Prime Minister's decisions to revoke the claimant's appointment as Governor of the Reserve Bank of Vanuatu and his contract of employment were lawful or unlawful. An antecedent question is the extent to which the appointment process complied with the law. There can be no doubt these are serious questions.

Is the applicant likely to succeed if the evidence brought by the applicant remains as it is?

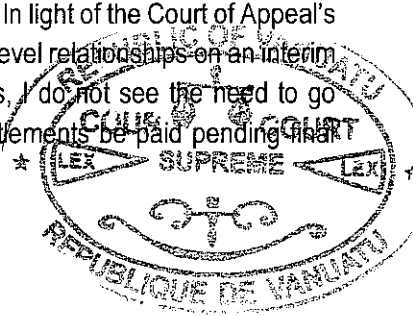
24. If the evidence remains as it is, the claimant is likely to succeed. The evidence supports the proposition that the claimant was appointed by the Prime Minister on the recommendation of the Minister of Finance following a process in which a panel interviewed the claimant and three others and produced a report recommending the claimant as the best qualified candidate. There is evidence of the Attorney General's opinion that the process was fair and transparent as



required by law and that the claimant's employment contract is binding on the government. There is of course evidence from the defence witnesses about possible flaws in the appointment process, and the FIU letter of 20 October 2023. There will be submissions as to whether that evidence was sufficient for the Prime Minister to lawfully revoke the appointment. If Mr Letlet was properly appointed, the grounds relied upon to revoke his appointment might not exist.

Would the applicant be seriously disadvantaged if the order is not granted?

25. I accept that if the position were advertised, the claimant could reapply. I also accept that he would be entitled to seek damages equivalent to one month's salary and allowances at the time of termination multiplied by the number of months remaining in his term under clause 9.5 of the employment contract. On the other hand, as mentioned earlier, neither of these scenarios could be considered advantageous or even neutral. The claimant does not want money; he wants the job to which he was appointed. In his 15 page application letter, he sets out how he will take the RBV "into the future" with an 11 point plan. Not granting the interim orders would set back the potential achievement of these aspirations. In his sworn statement, the claimant also provides evidence of loan commitments undertaken to support his son's tertiary studies in Australia. There are also financial implications arising from his resignation as Director General of Finance to accept appointment as RBV Governor.
26. There was some discussion of whether an interim order should be made for the claimant to take up his position as Governor, or whether an order that the RBV pay the claimant his salary and entitlements from 10 November 2023 until the judicial review claim is resolved is sufficient. The Court of Appeal in *Republic of Vanuatu v Letlet* [2016] VUCA 36 said at paras 13 and 14 that "we are of the view that it was not an available exercise of the discretion to direct the reinstatement of Mr Letlet as DG-MFEM pending the hearing and determination of his claim." The Court went on to say "the relationship between the employer and employee at such a high level should not be imposed on an interim basis where necessarily it is a close one, involving mutual trust and confidence (as is arguably the case between the Prime Minister and the DG-MFEM). This reflects Mr Hakwa's submission about specific performance of employment contracts. Mr Blake submitted the first *Letlet* case is distinguishable because in the present case, his relationship as Governor is not with the Prime Minister, but with his Board and its Chair.
27. I accept the relationship in this case is different, but I am persuaded by the Court of Appeal's comment about the caution necessary in high level employment relationships. There will need to be a relationship of trust and confidence between the Governor and Board of the RBV which is as yet, relatively unformed and which should not risk being compromised by an interim order. Ordering the RBV to pay the claimant his salary and entitlements, remedies the financial disadvantages he has identified in his sworn statement, and having ordered the process of recruiting a new Governor in the Court's order of 23 November 2023, ensures the claimant remains RBV Governor until the judicial review claim is resolved. In light of the Court of Appeal's comment that the Court should be cautious about imposing high level relationships on an interim basis, and notwithstanding the claimant's expressed aspirations, I do not see the need to go further than an interim order that the claimant's salary and entitlements be paid pending final determination of the claim.



Where does the balance of convenience lie?

28. On the considerations above, in terms of interim relief, the balance of convenience is in the claimant's favour.

Rule 17.8

29. There is sufficient evidence for me to be satisfied of the matters in r.17.8, some of which are canvassed above in the discussion of r.7.5. I am satisfied that the claimant has an arguable case, that he is directly affected by the decision to which the claim relates, that there has been no undue delay in making the claim, and that there is no other remedy that resolves the matter fully and directly. The claim for judicial review will be heard.

Result

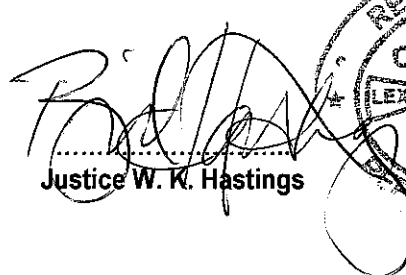
30. For the reasons above, I make the following interim orders:

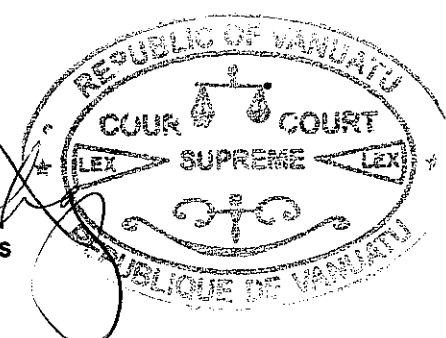
- a) That the effect of the decision of the first defendant to revoke the applicant's appointment as Governor of the Reserve Bank of Vanuatu and to revoke the contract of employment between the applicant and the Reserve Bank of Vanuatu be stayed pending determination of the substantive claim for judicial review or further order of the Court;
- b) That the interim order of 23 November 2023 which prohibited the first defendant from advancing any process, including interviews of candidates for the appointment of Governor of the Reserve Bank of Vanuatu, and which prohibited the first defendant from making any additional appointment as Governor of the Reserve Bank of Vanuatu, pending the determination of the substantive claim for judicial review, or further order of this Court, is confirmed;
- c) That pending determination of the substantive claim for judicial review or further order of the Court, the Reserve Bank of Vanuatu shall pay to the applicant all salary and entitlements arising under his contract of employment as of and from 10 November 2023;

31. There will be a pre-trial conference on 16 January 2024 at 10am.

Dated at Port Vila, this 6th day of December, 2023

BY THE COURT


Justice W. K. Hastings



The seal of the Supreme Court of Vanuatu is circular. It features a central emblem with a scale of justice and a book. The text 'REPUBLIC OF VANUATU' is written around the top inner edge, and 'REPUBLIQUE DE VANUATU' is written around the bottom inner edge. In the center, the words 'COUR SUPREME' and 'COURT SUPREME' are written in French and English respectively, with 'LEX' on either side.