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

Civil Case No. 16/2239 SC/CIVL

BETWEEN: RICK TCHAMAKO MAHE

Claimant

AND: NORTHERN ISLAND STEVEDORING COMPANY LIMITED (NISCOL)

Defendant

Coram: *Chief Justice Vincent Lunabek*

Counsel: *Mr. Clifton Rau for the Claimant*
Mr. Avock Godden for the Defendant

Dates of Hearing: 5 December 2017

Date of Delivery of Judgment: 25 March 2019

REASONS FOR JUDGMENT

Introduction

1. The Claimant was appointed as Acting Chief Executive Officer of the Defendant company for a period of 6 months from 11 May 2015 to 18 November 2015 ["The First Contract"]. Before the end of the First Contract, the Claimant executed an Amended contract for an extension of 3 years starting from 30 November 2015 to 20 November 2018, this time as Chief Executive Officer of the Defendant company ["The Second Contract"]. However, on 3 November 2015, before the expiry of the first contract and before the second contract became effective, the Claimant was dismissed for serious misconduct by the Board of Directors of the Defendant.

2. The Claimant, then, filed this claim in the Supreme Court on 8 July 2016 seeking for his employment entitlements in the sum of VT2, 331, 818 and also claimed for the damages of breach of employment contract in the sum of VT28, 614, 545.

Background

3. The Claimant is a citizen of Vanuatu.

4. The Defendant, Northern Island Stevedoring Company Limited, is a local company and is duly registered to operate in Vanuatu.

5. The parties through their respective Counsel filed the following statement of Agreed and disputed facts and issues to be tried:-

   a) On 7 May 2015, the Claimant Mr. Rick Tchamako Mahe was offered employment as Acting Chief Executive Officer of Northern Island Stevedoring Limited (NISCOL), for the period of 11 May to 18 November 2015.

   b) On 8 May 2015, the Claimant accepted the offer.

   c) In a letter dated 5 May 2015, the Chairman of the Board of Directors of the Defendant, Alfred Maliu, consulted the Chairman of the Board of Shareholders on the appointment of the Claimant.

   d) On 11 May 2015, the Claimant (Mr. Mahe) and the Chairman of the Board of Directors of NISCOL (Mr. Alfred Maliu) signed the employment agreement for a period of 6 months (the original contract).

   e) Mr. Mahe took up the post of Acting Chief Executive Officer as per the offer of employment and was paid remuneration for his services on the original contract.

   f) On 1- 2 September 2015, the Board of Directors of the Defendant met and extended the employment contract of Mr. Mahe for another three (3) years (the Amended contract).

   g) On 2 September 2015, Mr. Mahe executed the Amended contract that was signed by the Chairman of the Board of NISCOL, Mr. Alfred Maliu.

   h) The Amended contract was for an extension of 3 years starting from the 30 November 2015 to 20 November 2018.

i) On 3 November 2015, Mr. Mahe was terminated by the Board of Directors of NISCOL on the ground of serious misconduct for disclosure of confidential information. The termination was said to be in respect to the Amended contract.

j) Mr. Mahe was not provided with any information or particulars about the allegations concerning the disclosure of confidential information that is disclosed.

k) Mr. Mahe was not given an adequate opportunity to respond to the allegations of disclosure of confidential information relating to his termination.

l) Mr. Mahe wrote three letters offering for settlement but they were declined by the Defendant.

Issues

6. The issues to be tried are:

1) Whether the Claimant's contract of 11 May 2015, as amended on 2 September 2015, was unlawfully terminated?
2) Whether the Claimant has a valid employment contract?
3) Whether the Claimant is entitled for his employment entitlements and damages.

Evidence

7. The claim is supported by the following sworn statements:

- Two sworn statements of Rick Tchamako Mahe filed respectively on 30 August 2016, 15 February 2017 and 4 August 2017.
- A sworn statement of Alex Samson filed on 4 August 2017.
- A sworn statement of Pravinesh Chand filed on 2 February 2017 and
- A sworn statement of Justin Ngwele filed on 17 November 2017.

8. The defence filed the following sworn statements in support of the Defence:-

- A sworn statement of Philip John Ryan filed on 10 May 2017.

- A sworn statement of Ketty Napuat filed on 10 October 2016; and
- A sworn statement of Jones Ephraim filed on 25 July 2017.

9. Notices of objections were filed and heard in relation to the statements filed by the Claimant, Rick Tchamako and that of Pravinesh Chand both filed on February 2017. The objections were noted and ruled upon by the Court before the trial began.

10. The Claimant, Mr. Rick Tchamako Mahe, Mr. Alfred Maliu, Mr. Alex Samsen and Mr. Chand were cross-examined on their statements.

11. The Defendant did not call any of its witness for cross-examination.

12. The facts are straight forward. The Claimant accepted an offer and executed a contract of employment as Acting Chief Executive Officer of NISCOL on 11 May 2015. He was paid a monthly salary of VT400,000 and other allowances and benefits are described in clause 6 of that contract dated 11 May 2015 ["The First Contract"]. We will return to them later on.

13. The terms of the first contract began 11 May 2015 and was to end on 18 November 2015.

14. But before the first contract ended, the Claimant signed what he called an "amended contract" with the Chairman of the Board of Directors of the Defendant (Mr. Alfred Maliu) which intended to extend the first contract to 3 years ["The Second Contract"] on 2 September 2015. The second contract not only intended to extend the first contract for a period of 3 years, but it also set up a different date to be effective (30 November 2015) and it further intended to appoint the Claimant as Chief Executive Officer of Niscol for a period of 3 years from 30 November 2015 to 20 November 2018.

15. On 4 September 2015, there was a shareholders' extraordinary meeting alleged to have been held at the DLA conference room. The minute and resolution was said to have been signed by Ephraim Jones for the secretary of the shareholders of the Defendant and another person as Chairman of the shareholders (RM6).

16. The evidence illustrated also that on the same date of 4 September 2015, there was another alleged shareholders extra ordinary meeting held at the DLA conference room, the minute and resolutions were now signed by Mr. Manuel Ure and Mr. Palen Ata (RM7).

17. It is a fact that the above meetings took place on Friday 4 September 2015 at DLA conference room, at 3.00pm, which is the same day (Friday) same place, same time but different people signed the agreed resolutions of the purported meeting.

18. The shareholders of the company were not consulted prior to the Claimant being appointed for the second contract. Mr. Alfred Maliu confirmed, he, as the Chairman of the Board of Directors of the Defendant consulted the Chairman of shareholders for the first contract but not for the second contract.

19. On 3 November 2015, it is a fact that the Chairman of the Board of Directors terminated the Claimant, Mr. Mahe.

20. At that time of termination the Claimant was the Acting Chief Executive Officer of NISCOL. His acting position will end on the 18 November 2015.

21. It is a fact that at that time of termination (3 November 2015), the Claimant's individual Employment Agreement (the second contract) was not effective and it was not yet effective.

22. It is a fact that the Claimant, Mr. Mahe, never commenced employment under the individual Employment Agreement (the second contract).

23. It is also a fact that the Claimant, Mr. Mahe, stood for the National Elections and was declared a Member of Parliament for the Santo Constituency on 1 February 2016.

24. I now turn to the three issues in this case. I propose to consider them in turn.

Issue 1: <u>Whether the Claimant's contract of 11 May 2015, as amended on 2 September 2015, was unlawfully terminated?</u>

25. The Claimant submitted that his first contract of employment dated 11 May 2015 has been overridden and replaced or preceded by the terms and conditions of the second contract of employment he signed with the Chairman of the Board of Directors company, Mr. Alfred Maliu, on 2 September 2015 which extended the first contract for 3 years beginning 30 November 2015 to 20 November 218.

26. It is noted that the Claimant treated the first contract as taken over by the second contract and the relief therein are the relief claimed under the second contract.

27. The second contract is "the contract" that the Claimant said is effective and that the Defendant has breached when it dismissed the Claimant on 3 November 2015. The Claimant submitted, therefore, that it was unlawfully terminated and the said termination of the Claimant on the basis of the contract was unjustified because the Defendant failed to give opportunity to the Claimant to make submissions in respect to section 50 (1) (3) (4) of the Employment Act.

28. The Defendant contended that the contract executed on 2 September 2015 is a new contract but it is not an amended contract or an extension of the first contract because the terms of the contract are different.

29. I agree with the Defendant's submission that the first and second contracts are different contracts. The first contract was about the acting appointment and the terms and conditions of the Acting Chief Executive Officer. It is for a period of 6 months. The Acting Chief Executive Officer is paid VT400, 000. It was to come to an end on 18 November 2015. The second contract was about the appointment of the Chief Executive Officer of the Defendant company and his terms and condition of employment.

30. But on the Claimant's case, arguments and submissions, the first contract was taken over or preceded by the second contract. However, the second contract is not yet effective and was not effective by 3 November 2015.

31. The purported second contract is about substantiating the post of the Chief Executive Officer of the Defendant company with new terms and conditions. It was for 3 years. It was not supposed to start before or at the expiry date of the

first contract (18 November 2015). It was supposed to start on 30 November 2015 and end on 20 November 2018, with a monthly salary of VT540,000.

32. It is clear the first and second contracts are two different contracts. The second contract was not the amended or extended version of the first contract. The terms of these two (2) contracts are different.

33. The Defendant referred to the Articles of Association of Niscol and in particular clauses relating to appointment of the Chief Executive Officer of Niscol, the notice of the meeting and the methods of holding such meetings and submitted that they are not followed in the purported appointment of the Claimant in this case and, this, rendered the appointment null and void.

34. I take it that the appointment of the Claimant as Acting Chief Executive Officer (First Contract) and as Chief Executive Officer (Second Contract) are matters within the internal business of the Defendant company (Niscol) to ensure that a meritorious and a qualified person is appointed within the Articles of Association of the Defendant company. The Acting Chief Executive Officer of Niscol or its substantive appointment is the most senior staff of the Defendant company. I think it is relevant that the indoor management rules have application here as this is not about the directors of the company who are not employees of the Defendant company but it was about the agreement the Defendant company made with its staff and in this case, the Claimant (as Acting Chief Executive Officer or Chief Executive Officer). This rule is sometimes called the Rule in Turquand's case because of the decision in **Royal British Bank –v- Turquand (1855) E4 B 248: [1855] Engr 531, 119 ER 474** that gave rise to the rule.

35. The **House of Lords in Morris –v- Kansen [1946] AC 459** confirmed the rule in the following manner:

> *"But persons contracting with a company and dealing in good faith may assume that the acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular..."*

36. Some aspects of the rule for the internal management of Niscol are contained in the Articles of Association of Niscol (clause 70) but it was not applied here.

37. I think I would not listen to the Defendant's arguments and I reject them in this respect. I think the company Niscol's position could not be affected by failing to make sure all of its internal workings have been properly carried out according to its Articles of Association.

38. The company Niscol was, therefore, bound by the contract. The next question is which contract (the First Contract effective from 11 May 2015) or (the Second Contract effective from 30 November 2015)?

39. The first contract was effective from 11 May 2015 to 18 November 2015. It was for a period of 6 months. It was about the Acting position of Chief Executive Officer of Niscol with a salary of 400,000VT. The Claimant was paid that amount per month until terminated on 3 November 2015.

40. The second contract was signed on 2 September 2015. But it was to be effective on 30 November 2015 and expire on 20 November 2018. It was for 3 years. It was about the substantive position of the Chief Executive Officer with a monthly salary of VT540,000.

41. Despite the Claimant's execution of the second contract on 2 September 2015, it was yet to be effective. It was not effective and the Claimant was dismissed for serious misconduct on 3 November 2015. It is clear that the first contract was the only contract that was effective until the dismissal of the Claimant on 3 November 2015. The second contract is irrelevant for the purpose of the relief sought. The only relevant and appropriate contract was the first contract effective for a period of 6 months (from 11 May 2015 to 18 November 2015) and a monthly salary of VT400,000 paid to the Claimant until dismissed on 3 November 2015.

42. The Claimant confirmed in his cross-examination evidence that he did not start working as Chief Executive Officer pursuant to the second contract. He was dismissed on 3 November 2015. He stopped working for the Defendant Company (Niscol) on 4 November 2015. But it was the Claimant's

understanding that his dismissal on 3 November 2015 constituted a termination of his contract of 11 May 2015 which was amended on 2 September 2015.

43. In this case, it is not in dispute that the Claimant was dismissed by the Board of Directors of the Defendant company on 3 November 2015 for serious misconduct in disclosing confidential information of the Defendant company to third parties.

44. It is also not in dispute that the Defendant did not provide an opportunity to the Claimant to make submission pursuant to section 50 (3) (4) of the Employment Act [Cap 16] before dismissing him as Acting Chief Executive Officer or Chief Executive Officer of Niscol. Section 50 (1) (3) (4) provides:

> *"50. Misconduct of Employee*
>
> *(1) In the case of a serious misconduct by an employee it shall be lawful for the employer to dismiss the employee without notice and without compensation in lieu of notice.*
>
> *(2) ... (Not applicable)*
>
> *(3) Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course.*
>
> *(4) No employer shall dismiss an employee on the ground of serious misconduct unless he has given the employee an adequate opportunity to answer any charges made against him and any dismissal in contravention of this subsection shall be deemed to be an unjustified dismissal.*
>
> *(5) ... (Not applicable)"*

Findings

45. I find the contract of 11 May 2015 was terminated when the Claimant was dismissed for cause on 3 November 2015 but before its expiry terms on 18 November 2015.

46. I also find that the second contract signed on 2 September 2015 was not yet effective when the Claimant was dismissed in 3 November 2015. The second contract was intended by the parties to be effective on the date of 30 November

2015 and it was for a period of 3 years. The remuneration per month was intended to be VT540,000. It was not effective when the dismissal of the Claimant happened on 3 March 2015.

47. I further find that the contract of 11 May 2015 (First Contract) was the contract that the Claimant was entitled to claim employment entitlements and damages for its breach.

48. I finally find that the Defendant did not provide an opportunity to the Claimant to answer or make submissions pursuant to subsections (3) and (4) of section 50 of the Employment Act.

Conclusion on Issue 1

49. I reach the conclusion on issue 1 that the Claimant was unlawfully and unjustly dismissed on 3 November 2015.

50. **As to Issue 2, whether the Claimant has a valid contract**, I answer affirmatively (yes) given my findings on issue 1 above. I deal now with issue 3.

Issue 3: Whether the Claimant is entitled for his employment entitlements and damages.

51. The Claimant submitted that he is entitled to the relief sought in his claim and he relies on **Vanuatu Maritime Authority –v- Timbaci [2005] VUCA 19** in relation to assessment of damages for unpaid remuneration for the loss of the 3 years contract and the principle in **Troyone Maun –v- Air Vanuatu Limited.** The gravity of the circumstances leading to the Claimant's termination which includes blatant disregard for the Claimant's contract and resolutions call for multiplier of 6. The Claimant seeks interest and costs.

52. The Defendant contended that the Claimant never commence work under the individual employment agreement or never work under the agreement. This was confirmed by the Claimant in his cross-examination.

53. The Defendant further said that the allowances and entitlements were attached with the employment agreement, they cannot be isolated with the agreement, in

any event, the agreement was never performed after 3rd November 2015, when the Claimant was terminated from his employment.

54. The Defendant submitted that since there is no performance of purported agreement, the allowances and entitlements cannot be claimed and should be dismissed.

Consideration on Issue 3

55. In the circumstances of this case, I need to consider the two (2) aspects of this issue, first, the employment entitlements on the basis of the effective contract of 11 May 2015 and the corresponding damages and second, the damages relating to unserved period of the second contract (if any).

Employment entitlements

56. The Claimant claimed for annual leave. This was a contract of 6 months duration period. He had worked for a period of 5 months and 23 days before it was terminated on 3 November 2015. There is no specific evidence of leave entitlements, it is refused.

57. The Claimant claimed for payment of 3 months' notice on the basis of the intended monthly salary of the "amended contract". I think it is wrong. He shall be entitled to 3 months' notice in lieu but on the basis of the monthly salary of the contract which was effective at the time of his dismissal. The appropriate monthly salary was VT400, 000 and the three months' notice is VT 400,000 x 3 = VT1, 200, 000.

58. The Claimant claimed severance pay based on the monthly salary of the "amended contract". The base is wrong. He shall be entitled to severance allowances in accordance with the contract of 11 May 2015. The basis for calculation is section 56 (2) (b) of the Employment Act. The contract was for a period of 6 months. He worked under this contract for 5 months and 23 days before it was terminated on 3 November 2015. If the period served is 2 months; the calculation formula should be VT 400,000/12 x 2 months = VT 67,000.

59. In the circumstances of this case a multiplier of 2 is awarded to compensate the Claimant from the gravity of the circumstances of his dismissal. He is entitled to a severance of VT 67,000 x 2 = VT 134,000

60. I award the Claimant a common law damage of VT30, 000 on the basis of Timbaci case 2005.

61. The total of the Claimant's employment entitlements is Vt 1, 401, 000.

62. The Claimant is entitled to interest at 5% on the principal amount of VT1, 401,000 per annum from the date of dismissal (3 November 2015) until the amount is duly settled.

Damages for breach and unserved period of the contract.

63. The Claimant claimed for breach for the second employment agreement.

64. It is clear from the facts the claimants never commence work under the individual employment agreement or he had never work at all under the agreement (the second agreement). This is confirmed by the Claimant in his cross examination evidence. The entitlements and allowances were attached with the employment agreement, they cannot be isolated from the agreement, in any event, the agreement was never effective or performed after 3 November 2015, when the Claimant was terminated from his employment.

65. I accept the Defendant's contention that since there is no performance of the purported agreement, the allowances and entitlements cannot be claimed.

66. For completeness, I accept the Defendant's contention that in terms of the unserved period of the contract, a contract of employment cannot in any way remained valid after its termination, the employment contract is subject to an exceptional principle, sometimes referred to as "no work no pay" accordingly, the Claimant has not work or even commenced working on the individual employment contract and as such he cannot claimed unserved period of that contract. The Court Of Appeal in **Robertson –v- Luganville Municipal Council [2001] VUCA 14, Civil Appeal Case 09 of 2001 (November 2001)** stated as follows:

Although not specifically argued on the appeal, the claims for relief in paragraphs 3 and 5 of the Plaintiff's original claim appear to reflect a common misunderstanding about contracts of employment. Although with other contracts the general rule is that a purported termination that is ineffective in law does not bring the contract to an end, and that rights may continue to accrue under the contract until it is lawfully terminated, that rule is modified in contracts of employment. Contracts of employment are subject to an exceptional principle, sometimes referred to as 'no work, no pay'. The most comprehensive statement of this principle is that of Dixon J in Automatic Fire Sprinklers v. Watson **[1946] HCA 25; (1946) 72 CLR 435** at 465 who said that a contract of employment:

"is commonly understood as involving no liability for wages or salary unless earned by service, even though the failure to serve is a consequence of the master's wrongful act. It is, of course, possible for the parties to make a contract for the payment of periodical sums by the master to the servant independently of his service... But, to say the least, it is not usual. The common understanding of a contract of employment at wages or salary periodically payable is that it is the service that earns the remuneration and even a wrongful discharge from the service means that wages or salary cannot be earned however ready and willing the employee may be to serve and however much he stand by his contract and decline to treat it as discharged by breach."

An employee who is wrongfully dismissed cannot recover wages after the date of his dismissal. The employee may have other remedies based on breach of contract, but in the present case the appellant's employment was terminated lawfully that question does not arise.

67. I finally agree with the contention of the Defendant that since the entitlements and allowances are part of the terminated contract, the Claimant's individual employment agreement once terminated brings the individual employment agreement to an end. The Claimant cannot, therefore, claim for entitlements and allowances under it.

Result

68. On the circumstances of the present case, the judgment is entered for the Claimant, the summary of which is as follows:

1. Three months' salary notice in lieu - VT 1,200,000;

2. Severance pay of - VT67,000;

3. Section 56(4) entitlement of multiplier (x 2) on the circumstances of this case under the Employment Act [CAP 160] - VT134,000;

4. Common law damages on basis of Timbaci - VT30, 000;

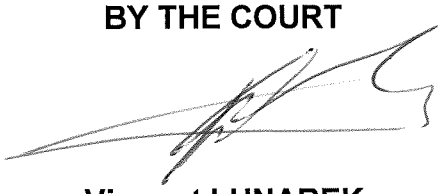
5. The total awards is - VT1,401,000;

6. Interests at 5% on the principal sum of VT1,401,000 from date of dismissal (3 November 2015) until the principal sum is duly settled.

69. The Claimant is entitled to his costs on the standard basis; such costs shall be determined failing agreement.

Dated at Port-Vila, this 25th March 2019

BY THE COURT



Vincent LUNABEK
Chief Justice