

BETWEEN : PENTECOST PACIFIC LTD and  
PHILIPPE PENTECOST  
(Appellants)

AND : PALENE HNALOANE  
(Respondent)

JUDGMENT

Background:

During the month of July 1982 negotiations took place between Pentecost Pacific Ltd (hereinafter called "the Company") of Port-Vila and Mr Palene (hereinafter called "P.H.") who was then employed by Burnus Philp Ltd, as the result of which P.H. was engaged by the Company from October 1st 1982.

On June 3rd, 1983, the Company terminated P.H.'s contract, justifying this dismissal by the fact that the Company was ceasing to carry on business, and paid to P.H., in addition to his other entitlements, a month's salary in lieu of notice.

P.H. did not accept this dismissal and took action against the Company in the Supreme Court of Vanuatu, seeking damages on the grounds that the broken contract was a contract for a definite period of 5 years, although this condition did not appear in the contract which he signed. He claimed from the Company an amount of damages equivalent to the total sum of his salary for the period of the contract yet to run, namely the sum of 5,200,000 VT and various other sums.

In his claim before the Court, P.H. joined the Company and Philippe Pentecost (hereinafter called "P.P.") personally as defendants, and included a claim for damages in the sum of 2,000,000 VT exemplary damages in view of the manner of his dismissal, and claimed as well the sum of 500,000 VT for legal costs and outlays.

P.H. proposed to prove from evidence of witnesses that the written contract of September 28th, 1982, made between him and the Company did not completely set out the verbal arrangements previously made between P.P. and himself, and that the agreement made was a contract which was to enure for a period of 5 years.

The Supreme Court accepted that parol evidence by witnesses could be given. In its judgment of May 4th, 1984, it found that the contract the subject of the claim was for a definite period of 5 years, but it reduced the period to 3 years in accordance with the provisions of the Employment Act. The Court therefore awarded P.H. a sum equivalent to his salary for the period the contract had

yet to run from the time of his dismissal, namely 26 months, a sum of 2,600,000 VT. It also found the method of dismissal improper, and awarded P.H. the sum of 2,000,000 VT by way of exemplary damages; and the sum of 500,000 VT for legal costs and fees. In the course of the hearing, Vanua Navigation Ltd was held to be free of liability, and the awards of the Court were made against the Company and P.P. only. These two defendants appealed the judgment on the following grounds:-

1. The contract made between the Company and P.H. was a written contract for an indefinite period, the terms of which were clear. The trial judge had allowed to be given parol evidence of an oral variation of the written contract contrary to the rules of evidence laid down in Article 1347 of the French Civil Code, which was the law applicable to this matter in view of the provisions of Article 93 (2) of the Constitution of Vanuatu;

2. The contract could not be a contract for a definite term, as it had not been made in accordance with the requirements of Articles 5 and 10 of the Joint Regulations 1969 which were in force at the time of the signing of the contract;

3. There was no improper dismissal, but dismissal caused by P.H.'s poor carrying-out of his duties;

4. The dispute concerns the Company and P.H. only, and not P.P. whose involvement in the matter was only in his capacity as an officer of the Company.

Accordingly, the appellants request that the judgment of May 4th, 1984, be reversed, and P.H. be non-suited. Further, should the dismissal be held to be improper, the appellants request that the damages be considerably reduced.

The respondent, represented by Maître TEHIO, claims that the contract of service made between him and the Company was a contract for a period of 5 years, although this condition does not appear in the written contract dated September 28th, 1982; he claims that this term of 5 years had been formally agreed during the negotiations. He claims moreover that the termination of the contract was improper and effected in such a way that the damages awarded to him by the lower Court were justified and he asks that they be confirmed.

#### As to the Law Applicable

The Court must first decide which law is applicable to the dispute, as this question has been raised by the parties, and as moreover it controls an important part of the proceedings, namely the rules of evidence.

#### The Substantive Law

Counsel for the respondent made many references to "custom" and "customary law". He emphasized that the parties are adherents of the Melanesian way of life, which accords great importance to verbal undertakings, and that according to custom, no writing is necessary to support parol agreements.

Further, article 45 (1) of the Constitution of Vanuatu provides: "If there is no rule of law applicable to a matter before it, a Court shall determine the matter according to substantial justice and whenever possible in conformity with custom."

In other words, Courts should make decisions in accordance with substantial justice and if possible with custom, if there is no legislation with reference to contracts of service. Indeed, there is such a law, the Employment Act of 1983 (replacing the Labour Code No. 11 of 1969) which contains 80 sections and which covers all aspects of the subject.

Moreover, this law was passed by Parliament after Independence, it expresses the will of the people of Vanuatu, and applies to all persons living and working in the Republic. Accordingly it is on the basis of this law that the contract in dispute will be interpreted since section 80 provides: "The provisions of this Act will apply to every contract of service in existence at the date of its proclamation."

Matters of Procedure

The Court must now examine what procedural rules apply to the action, and this is a matter of importance as it concerns the rules of admissibility of evidence raised by the appellants. There is no special procedural Code which applies to the Courts of Vanuatu, including the Supreme Court and the Court of Appeal. The procedure followed in these Courts is as a general rule governed by the substantive law applicable to the matter, when either French or English law applies pursuant to the provisions of Article 93 (2) of the Constitution of Vanuatu.

In this dispute, the substantive law applicable is a law of Vanuatu: procedure must therefore be decided by interpretation of Article 93 (2) of the Constitution and the choice between French law and English law will be decided according to the nationality of the defendant, in this particular case French law.

In the French court system, there exist Tribunals whose responsibility it is to decide disputes related to employment; these Tribunals apply simple and expeditious procedural rules. This procedural Code of December 15th, 1952, for the French Overseas Territories was in force in New Caledonia at the date of the proclamation of the Constitution of Vanuatu, and the Court has decided to apply it to the present dispute.

Code of 1952.

This procedural Code renders admissible the widest possible selection of types of evidence as to the content and to the existence of a contract of employment, in contrast to the rules of evidence under the Civil Code. Therefore the Court is unable to find that the decision of the Judge in the lower Court to admit parol evidence in conflict with the written contract of employment was incorrect.

As to the Nature of the Contract

The Judge in the lower Court accepted the evidence of the witnesses who stated that the contract made between P.H. and the Company was a verbal contract made for a period of 5 years,

and that the clause referring to its duration had been omitted in the contract dated September 28th 1982 signed by P.H. on September 30th 1982. There is nothing in the pleadings put forward by the appellants which refutes the above-mentioned evidence, and therefore the Court must adopt the decision of the Judge in the lower Court, on the grounds set out.

It must therefore be accepted that the contract in dispute was a contract for a definite period of which the term must be limited to 3 years in accordance with the provisions of Article 15 of the Employment Act of 1983.

As to "Improper Dismissal"

The appellants claimed at first that the dismissal of P.H. was due to the Company's ceasing to carry on business; they then abandoned this claim and submitted that the reason for his dismissal was his unsatisfactory performance. There was produced in support of this claim a letter dated May 17th, 1983, written by the manager of the Company, criticising P.H. for not being present at a delivery of vehicles which had arrived by ship.

P.H. has been able to show that this letter was merely a blind, as to take delivery of vehicles was not among his responsibilities under the contract; his duty was to promote their sale. Moreover it is the Court's view that even if the criticism had been justified, the employer did not act in accordance with the requirements of section 50 (4) of the Employment Act of 1983, which provides: "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."

The fact was that P.H.'s dismissal took place on June 3rd, 1983, without his being given the opportunity to put his case.

The final document produced to the Court is one dated June 1st, 1983, according to which the Company and P.P. agree with Vanua Navigation Ltd as follows: "Mr Pentecost acknowledges that Pentecost Pacific Ltd will take all necessary steps to dismiss all its employees in Vanuatu before the new Company commences its operations. Mr Pentecost undertakes that Pentecost Pacific Ltd and he himself personally discharge and indemnify jointly and singularly the new Company from all actions, suits, claims for payment, damages, and other demands of all kinds which may arise either out of the dismissal of all or any of the employees of Pentecost Pacific Ltd or alternatively out of the employment of any of those persons by that Company."

This document, in no way queried by the appellants, shows that the Company and P.P. had decided, from before June 1st, 1983, and doubtless since the time of the negotiations in respect of the take-over of the Company by Vanua Navigation Ltd, to dismiss the personnel of the Company generally, and in particular P.H., in breach of the provisions of Section 11 of the Employment Act, 1983 which regulates the transference of service contracts in the case of a change in the employer's legal status.

Moreover, it is not disputed by the appellants that P.H. was

the sole employee of the Company to be dismissed.

The Court's interpretation of these facts is that the warning letter sent to P.H. was nothing but a pretext to provide a justification for his dismissal and to cover up an attempt to evade the requirements of the law.

The dismissal was clearly improper and illegal.

#### As to the Quantum of Damages and the Other Claims

Section 48 of the Employment Act 1983 provides: "Subject to the provisions of this Part a contract of employment shall terminate on the last day of the period agreed in the contract..." The employee can therefore rely on receiving his salary during the whole of the agreed period, and the unjustified unilateral termination of the contract by the employer gives to the employee the right to compensatory damages as provided in Section 53 (1) of the Employment Act 1983 which must be equivalent to the lost salary on the receipt of which the employee was entitled to rely. A clear line of decided cases in the Industrial Courts of the French Overseas Territories, which are not applicable in this case but which may be of use by way of comparison, produced awards of such levels of damages in cases of improper termination of fixed-term contracts.

As P.H. was dismissed after 10 months' service, he had still 26 months to serve at his monthly salary, including living allowance of 100,000VT. The Court awards him the sum of 2,600,000VT.

P.H. was also awarded in the lower Court a sum of 2,000,000VT as exemplary damages, and 500,000VT for legal costs and expenses. The Court regards these two claims as unjustified: on the one hand there cannot be awarded two separate amounts of damages in respect of one single action, and on the other hand the legal costs and expenses will be covered by an award of costs against the unsuccessful party to the dispute.

P.H. withdrew his other claims, namely, for damages in lieu of notice and for holiday pay, which in any case were paid by the employer at the time of his dismissal. There appears from the wages-sheet handed over by the Company and dated June 3rd, 1983, that P.H. received 100,000VT, one month's salary, in lieu of notice.

This award of damages based upon the unilateral termination of a contract for an indefinite term cannot be added on to the award for unjustified termination of a fixed-term contract. Notice is indeed one of the conditions of a contract for an indefinite term, but is a condition which does not appear in a fixed-term contract, and it therefore cannot provide a legal ground for damages. Accordingly, the sum of 100,000VT must be deducted from the award of 2,000,000VT already made.

#### As to Dismissal of Philippe Pentecost from the Action

Mr Pentecost asked the Court to rule that he should be dismissed as a party to the dispute on the ground that the legal relationship

of employer and employee existed only between the Company and P.H., and that P.P.'s involvement in the matter was only in his capacity as an officer of the Company. However, examination of the document dated June 1st, 1982, which has already been referred to above, (the agreement between the Company and Vanua Navigation Ltd), provides a direct contradiction of this argument. It is clear that P.P. undertook personally, and jointly with the Company, to dismiss P.H. He cannot now have himself exonerated from responsibility.

On these grounds, the Court, sitting in its appellate jurisdiction, in open Court and after hearing full argument for all parties to the action, receives as being in proper form the appeal lodged by Pentecost Pacific Ltd and by Philippe Pentecost against the judgment of the Supreme Court of Vanuatu dated May 4th, 1984, and orders as follows:

The said judgment of the Supreme Court is varied; Pentecost Pacific Ltd and Philippe Pentecost are ordered jointly and severally to pay to Mr Palene Hnaloane the sum of two million five hundred thousand vatu (2,500,000VT) as damages in respect of dismissal, and in full settlement of all claims.

Interest at the legal rate accrues from the date of the judgment.

Costs are awarded against the appellants.

Dated December 12th, 1984, at Port-Vila.

J. WILLIAMS

L. CAZENDRES