

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 17/3501 CoA/CIVA

**BETWEEN: JOHN MORRISON WILLIE, SANDY
KALVEN, HENRY NIN, TIRO VANUA AND
KAL DAVID**
Appellant

AND: JOEL PATH
First Respondent

**AND: NORTHERN ISLANDS STEVEDORING
COMPANY LIMITED (NISCOL)**
Second Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Oliver A. Saksak
Hon. Justice David Chetwynd
Hon. Justice Gus Andrée Wiltens*

Counsel: *Mr. Collin Leo for the Appellants
Mr. Avock Godden for the Second Respondent
No appearance for the First Respondent*

Date of Hearing: *Monday 23rd April, 2018*

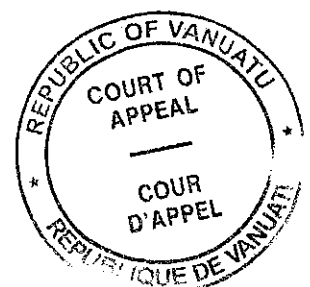
Date of Judgment: *Friday 27th April, 2018*

JUDGMENT

Introduction

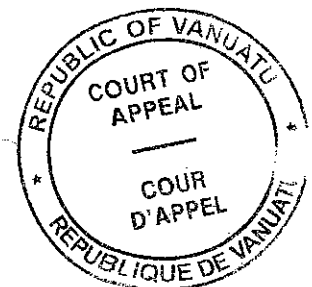
1. This is an appeal against the judgment of the Supreme Court dated 26th October 2017 dismissing the Appellants' claims for unjustified dismissal. The judge concluded:

"33. The Claimants are therefore not entitled to claim for unjustified dismissal for the reasons given. When taking up their directorships of NISCOL, they are bound by its Memorandum and Articles of Association. Their claim for unjustified dismissal fails and is hereby dismissed"



Background

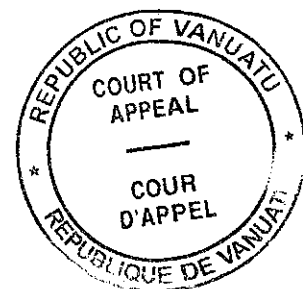
2. The Appellants were appointed as members of the Board of Directors of the Second Respondent, Northern Islands Stevedoring Company Limited (NISCOL), which is a local company incorporated under the provision of the Companies Act [CAP 191] between 16 March 2012 and 30 August 2012. The appointments were made by the shareholders. The precise dates of appointment were on 19 March 2012 for John Morrison Willie and Henry Nin, on 31 May 2012 for Sandy Kalven, on 27 June 2012 for Tiro Vanua and on 30 August for Karl David.
3. John Morrison Willie entered a contract with the Second Respondent on 19 July 2012 in a position of Chief Executive Officer (CEO) of the Second Respondent with a salary of VT400, 000 per month. Sandy Kalven entered a contract with the Second Respondent on 19 July 2012 in a position of the chairman with a salary of VT300, 000 per month. Henry Nin entered a contract with the Second Respondent on 19 July 2012 in a position of Accountant with a salary of VT300, 000 per month.
4. The evidence establishes that these contracts were approved by the appellants sitting as a board of directors, and later signed by members of the board in their capacities as directors, secretary, chairman of the board or employee, as appeared appropriate for each contract. The appellants argued that the contracts were by inference approved by the shareholders as the chairman of NISCOL was a witness to the affixing of the company seal to each contract. However, the witness was not the chairman of the shareholders, but the chairman of the board of directors – the appellant John Morrison Willie.
5. There is no evidence that the shareholders of NISCOL approved any of the contracts of employment with the appellants.
6. The Appellants say they were also supplied with vehicles as envisaged in their respective contracts. Their respective terms of the contracts were for one (1) year period and was subject to renewal for a further period after July 2013 upon similar terms and conditions at the sole discretion of the Employer (Second Respondent).



7. Board meetings occurred on 26 September 2012 and 2 April 2013 and it was resolved by the Board that the respective contracts of the Appellants were to be extended to 29 November 2015.
8. On 10 April 2013, the shareholders of NISCOL held an extraordinary meeting which considered and approved by resolutions the removal of the Appellants as directors of the Second Respondent. The reasons for their removal are not relevant to the outcome of this appeal.
9. Following these resolutions, notices of intention to remove the Appellants as Directors were issued on the same date by the chairman of the shareholders to Kal David, Sandy Kalven, Livo Langi and Tiro Vanua. Similarly on the same date, notices of termination were issued to Henry Nin as the Accountant and John Morrison Willie as a member of the Board of Directors of NISCOL and as the CEO. And on 23 May 2013, notices of termination were issued to Sandy Kalven, Livo Langi, and Karl David as members of the Board of Directors of NISCOL.

In the Supreme Court

10. The Appellants, in the Supreme Court, filed their claim for unjustified dismissal, as noted by the Primary judge, on the assumption that as directors of the Second Respondent Company, they were also employees of the Second Respondent Company and the provisions of Employment Act [CAP160] regarding termination of employment applied to them. In addition they argued that the provisions of the Employment Act applied to their Employment contracts in any event.
11. The judge rejected the submissions of the Appellants that as directors they had claim under the provisions of the Employment Act [Cap 160]. Being a director did not make them an employee of the Second Respondent Company.
12. The judge observed that the Memorandum and Articles of Association of NISCOL provided that the Company is owned by the shareholders (art. 74) and it is the shareholders who have the powers to appoint and also to remove members of the Board of Directors (art. 51 and 74).



13. The judge held that as the removal of the appellants as directors was in accordance with the resolution of the shareholders there was nothing high handed about their removal. Their removal as directors did not give them any claim for compensation.
14. The judge then turned to consider the claims for wrongful dismissal made under the Appellants' written contracts of employment. He held that each of the contracts was entered into in breach of provisions of the Articles of the Memorandum of Association and were for that reason unlawful and unforceable. Reference was made of the following Articles:

Art.58 (1) - Any remuneration or benefit of directors must be approved by shareholders.

Art. 52 (2) – A director must not vote on a resolution concerning remuneration or benefits to be received by him.

Art. 69 - The person appointed CEO must be made after consultation with the shareholders.

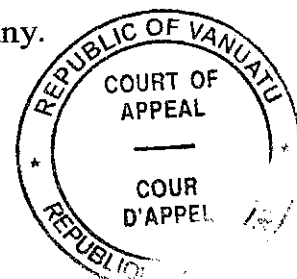
Art. 74 (2) – The power to appointment the accountant is vested in the shareholders.

There was no evidence that the shareholders approved any of the contracts of employment.

15. On the basis of the evidence before him, the judge was satisfied that the contracts of the CEO, the Accountant and the chairman of the Board were unlawful and unenforceable as they were made in breach of the provisions of the Memorandum and Association of NISCOL.

On this Appeal

16. The Appellants advance their appeal on a number of grounds but substantially they say that they were employees of the Second Respondent Company and that their contracts were sanctioned by the shareholders.
17. During the hearing of this appeal, Mr. Leo could not point us to any evidence that the contracts and extended contracts of the Appellants including the salaries and benefits provided therein were sanctioned by the shareholders. There was no evidence that the Appellants were duly appointed employees of the Second Respondent company.



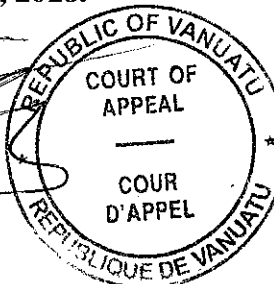
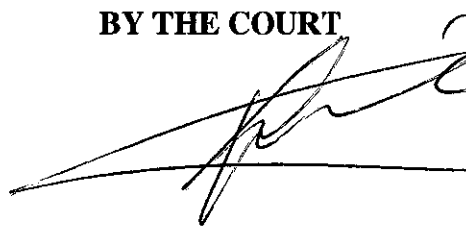
18. We are of the view that the primary judge correctly identified the relevant articles of the Memorandum of Association of the Second Respondent company and in particular Article 58. We are also of the view that the judge was correct when he came to the conclusion that the contracts of the Appellants were unlawful and unenforceable from their formation (*void ab initio*) as they were made in breach of the provisions of the Memorandum and Association of NISCOL (second Respondent).

Conclusion

17. The appeal is dismissed. The Second Respondent is entitled to its cost in this Court assessed at Vatu 80,000 against the Appellants. The Appellants are jointly and severally liable for these costs. Such costs are to be paid to the Second Respondent by the Appellants within 30 days.

DATED at Port Vila, this 27th day of April, 2018.

BY THE COURT



Hon. Vincent LUNABEK

Chief Justice.