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

CIVIL APPEAL CASE No. 1690 OF 2018

BETWEEN: **WILLIE SACKSACK**

Appellant

AND: **VANUATU INVESTMENT PROMOTION AUTHORITY**

Respondent

Coram: ***Hon. Justice John Mansfield***
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice David Chetwynd

Counsel: ***Mr L Malantugun for the Appellant***
Mr M Hurley for the Respondent

Date of Hearing: *11th July 2018*

Date of Judgment: *20th July 2018*

JUDGMENT

1. The appellant, Willie Sacksack, was employed by the respondent Vanuatu Investment Promotion Authority ("VIPA"). Mr Sacksack and Smith Tebu, the CEO of VIPA, signed a contract of employment on the 8th of January 2010. The contract was for a period of five years. On the 8th of January 2015 Mr Tebu wrote to Mr Sacksack advising him his contract had come to an end and that VIPA intended to re-advertise the post of public relations officer then held by Mr Sacksack. The letter went on to say VIPA had decided to extend Mr Sacksack's employment on a temporary basis for one month "*to allow recruitment process to take its course*".

2. In September 2016 the appellant filed a Supreme Court claim alleging VIPA had unlawfully terminated him from office. He claimed VIPA had not complied with a clause in the employment contract which said such contract, *"would be renewed by the board base (sic) on performance".* Mr Sacksack complained that there had been no recent performance assessments conducted by VIPA so his dismissal was unjustified as he should have been automatically given a new contract. The clause does not specify a renewal term or how performance is to be measured. We note the Employment Act [Cap 160] specifies a maximum period of 3 years in section 15,

so the status of the contract of 8th January 2010 may have been confined to that term. That aspect did not arise before the primary judge.

3. VIPA filed a defence stating the appellant had not been terminated from his employment, his contract had come to an end by effluxion of time in accordance with its terms and with section 48 of the Employment Act. There was also a counterclaim for the repayment of VT 758,520 said to represent six months payment in lieu of notice. VIPA said they had paid this to Mr Sacksack *"in the mistaken belief that it was liable to make...."* the payment.

4. What happened in the course of the litigation is set out in the decision being appealed :-

> *"This matter was scheduled to be heard commencing at 9am on 28 May 2018, as counsel had previously advised there were no outstanding issues preventing the matter being set down for trial.*
>
> *However, subsequently, in the process of getting ready for trial, Mr Hurley discovered he had inadvertently made concessions he should not have. He accordingly sought leave to withdraw the relevant concessions and to file an amended statement of defence.*
>
> *Additionally, Mr Hurley's attention was drawn to clause 14 of the contract of employment. That clause requires the parties to revert to arbitration in the event of any dispute arising. As a result Mr Hurley raised the issue of jurisdiction.*
>
> *An urgent conference was convened to deal with those matters.*
>
> *Mr Hurley submitted, in line with the precedent cases of Dick v Property Ltd [2013] VUSC 2 and SPIE-EGC Ltd v FIFA [2003] VUCA 11, that Vanuatu follows the position of the United Kingdom in this area of the law.*
>
> *In particular, the case of Scott v Avery (1856) 5 H.L. Cas. 811 is apposite. That is good authority for the position here, namely that the parties to a contract of employment can, and have, made arbitration and an attempt at amicable resolution a condition precedent to resorting to legal action; and further, that such a condition in a contract is valid and binding on the parties.*
>
> *Mr Hurley's submission is unanswerable, even though Mr Malantugun tried his best.*
>
> *It is regrettable that the point was only picked up at this late stage of the proceedings, but that cannot alter my decision.*
>
> *I consider that the Court has no jurisdiction, at this point in time, to consider this dispute. Even though Mr Malantugun had argued against this, he eventually conceded that was correct. Accordingly, the claim is dismissed."*

5. Clause 14 referred to in the decision set out above reads as follows :-

"Any dispute arising out of this contract shall be dealt with amicably by both parties, failure of which an independent arbitrator shall be agreed upon by both parties to consider the matter. The decision of the independent arbitrator shall be final."

This type of clause is often referred to as a *Scott v Avery* clause.

6. The Notice and Grounds of Appeal filed on the 19th of June 2018 contains eight grounds and the appellant's submissions, 9 grounds. Both make it clear the appeal can be conveniently consolidated into 3 arguments. First, the general effect of a *Scott v Avery* clause is not good law in Vanuatu and the two local cases cited (see paragraph 4 above) are in any event distinguishable because in them (and in *Scott v Avery*) the arbitration clauses contained a condition precedent. There was no specific condition precedent in clause 14 in the employment contract.

7. The second line of argument related to alleged prejudice suffered by the appellant due to the very late application and submissions by the respondent and the subsequent order by the primary judge to dismiss the claim. This was, said the appellant, especially unfair as the decision was in the face of very strong evidence in favour of the appellant in his substantive claim.

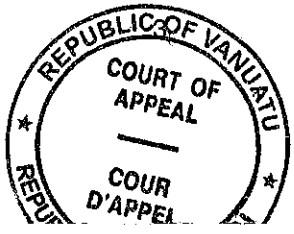
8. Thirdly it was said the dismissal of the claim infringed and/or interfered with certain Constitutional provisions and therefore the appellant's Constitutional rights. It was argued that Article 47(1) required the judiciary to *"resolve proceedings according to law"* and because there is no legislation governing arbitration in Vanuatu the case should have been referred to mediation or otherwise determined according to substantial justice. By not doing so the appellant's rights under Articles 5 and 6 of the Constitution were infringed.

9. All these arguments can be subsumed into the basic proposition that the requirement for the parties to go to arbitration before instituting legal action is wrong in that it ousts the jurisdiction of the Court or alternatively, there was no condition precedent in the clause and so the parties can litigate without first going to arbitration.

10. The reference to the two previous cases decided in this jurisdiction, the *FIFA* case and the *Dick* case, is misconceived. In neither of those cases was the requirement to arbitrate specifically stated to be a condition precedent. In the *FIFA* case the relevant clause said :-

"En cas de litige les parties s'engagent à désigner d'un common accord..."

Or roughly translated into English "*In case of dispute the parties undertake to appoint by common agreement.....*" There was a default provision governing the



selection of an arbitrator if the parties did not agree. In the case of *Dick* the relevant clause read in part:-

> *"If any dispute, question or difference shall arise between the parties as to the meaning, operation or effect of any of the provisions of this Agreement or the rights or liabilities of any of the parties hereto, such dispute, question or difference shall be referred to the arbitration of an independent arbitrator...."*

11. In the *FIFA* case the Court of Appeal said:-

> *"The question whether or not the dispute should have been referred to arbitration before any relief was sought before a Court was not, apparently, argued before the Chief Justice."*

As a result the Court held the matter should be sent back to the Supreme Court for further consideration. Before that happened FIFA went to arbitration.

12. In neither case did the Court say that an arbitration clause was unlawful because it purported to oust the jurisdiction of the Courts. As Justice Sey In *Dick* remarked:

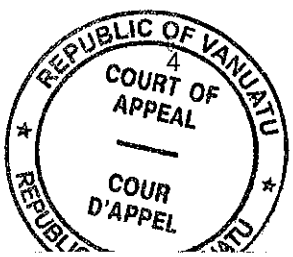
> *"Parties to a contract may, however, make arbitration a condition precedent to a right of action for breach of the contract, and such a condition is valid."*

In our view that is the position in Vanuatu and has been so in this jurisdiction for many years, certainly since the *FIFA* case in 2003.

13. It is also clear to us that in this case the words "*condition precedent*" do not need to appear in the clause setting up arbitration in order for the requirement for arbitration to be considered as a condition precedent. On a logical construction of the clause under consideration, the parties intended first that they would try and deal with the dispute amicably between themselves and then if they failed in that endeavour, the parties would be required to use their best efforts to agree on an independent arbitrator to consider the matter.

14. The only possible difficulty with this case is that there is no provision in the relevant clause for the selection and appointment of an arbitrator if the parties do not agree one. In many other jurisdictions there are provisions in the local arbitration legislation for an appointment to be made by a third party in the case of a failure of the parties to agree. There is no legislation in this jurisdiction dealing exclusively with arbitration but there are provisions for arbitrations in Trade Disputes Act [Cap 162]. It was not argued in the Court below, nor was it put to us, that this was a trade dispute.

15. There is ample precedent in the common law that the parties to an arbitration clause or agreement owe each other a duty of good faith to abide by the clause or agreement just as they have with any other provision in the contract. Not to act in good faith would be an actionable breach in itself. The parties must therefore try to agree an arbitrator before they resort to legal action to resolve the dispute arising



out of the contract. Not to do so is actionable[1]. They have not yet tried to reach agreement on an arbitrator.

16. Having determined that Clause 14 is not unlawful and that it does not oust the Court's jurisdiction, the arguments as to the infringement of the appellant's Constitutional rights do not arise. All clause 14 has done is to require the parties to the contract of employment dated 8th January 2010 to first try, in good faith, to resolve their dispute by arbitration. It has long been a part of the common law that such an agreement is not invalid to the extent that it gives a non-judicial body power to make final and binding decisions on questions of fact[2].

17. Nor are there any arguments that can be sustained about prejudice or unfairness. It was the appellant who commenced the legal action and there is no suggestion that the Judge below was wrong *not* to order that the costs should go to him. The submissions on wasted costs and expenses were aimed at the lawfulness of clause 14 in general and not as to the proper exercise of discretion concerning costs. The "*strong evidence*" referred to by the appellant can be used in the arbitration.

18. The only real question for this Court is whether the Judge at first instance was right to dismiss the case before him. The alternative was to order a stay. On balance the Judge was right to dismiss the claim. Much of what the appellant wanted to rely on was a question of fact, the purview of an arbitrator. There is no injustice in requiring the parties to give effect to their contract, indeed, as this Court mentioned to the parties, the claim by the appellant in his claim and the respondent in its counterclaim is suspect. Clause 3.1 which underpins the appellant's claim is, on the face of it, so vague as to be unenforceable. Looking to the respondent, it appears to rely on the doubtful proposition a mistake as to fact will enable it to recover the overpayment. Mr Hurley accepts that at the present time the counterclaim stands dismissed together with the claim. Given its defence, there is little reason to assert the payment was made by reason of either an error of fact or an error of law. This represents the most equitable result.

19. The appeal is dismissed and there will be no order for costs.

DATED at Port Vila this 20th day of July, 2018

BY THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

Hon. Oliver SAKSAK
Judge.

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[1] *Doleman & Sons v Ossett Corp* [1912] 3 K.B. 257
[2] *Brown v Overbury*(1856) 11 Exch. 715; *Ciprianni v Burnett*[1933] A.C. 83; *The Glacier Bay*[1996]1 Lloyds Rep. 370