

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Civil Jurisdiction)

CIVIL CASE No. 98 OF 1996

Between : Mr JOSIAS MOLI of c/o
Nambatri Area, Port Vila, Efate in
the Republic of Vanuatu

Plaintiff

And : Mr PETRE MALSUNGAI,
Chairman, Vanuatu National
Provident Fund, P O Box 420,
Port Vila, Efate in the Republic of
Vanuatu

First Defendant

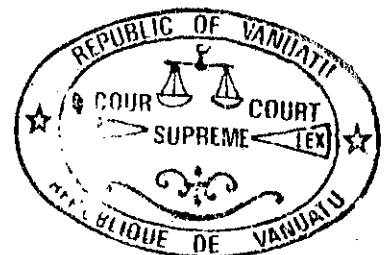
And: VANUATU NATIONAL
PROVIDENT FUND, P O Box 420,
Port Vila, Efate in the Republic of
Vanuatu.

Second Defendant

Coram: LUNABEK J
Mr Saling STEPHENS for the Plaintiff
Mr John MALCOLM for both Defendants

INTERLOCUTORY JUDGEMENT

This is an application by way of Summons issued by Mr Malcolm, Counsel for the First and Second Defendants seeking to set aside the ex-parte Orders made by this Court on 14 June 1996. On the said 14 June, 1996, upon the Ex-parte application of the Plaintiff and having read the Plaintiff's affidavit and the letters annexed and whereupon hearing Mr Saling Stephens for the Plaintiff and upon the Plaintiff's undertaking to file his statement of claim within seven (7) days hereof, and his further undertaking as to damages and costs, this Court ordered in the interim as follows:

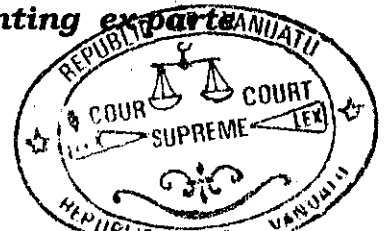


- 1) That the Defendants, their servants and Agents be restrained from acting upon or taking any steps to implement and/or put into effect the purported decision made by the Defendants on or about 9 May 1996 to terminate the services of the Plaintiff.
- 2) That the Defendants, their Servants and Agents be restrained from taking any steps whatsoever in respect of purported decision made by the Defendants to terminate the Plaintiff's service and employment in the Vanuatu National Provident Fund.
- 3) That the Defendants, their servants and Agents be restrained from removing the Plaintiff and his family from the National Provident Fund quarters or house situated at Nambatri Area, Port Vila, Efate in the Republic of Vanuatu.
- 4) That the costs of and incidental to this application be reserved.
- 5) That there be liberty to apply reserved.

This Summons is filed on the grounds, inter alia, that the Plaintiff was wrong to apply for the orders ex-parte. Further, that a claim of contractual breach in such circumstances, if the Plaintiff is correct can only lead to damages in which circumstances injunctive relief is inappropriate. This application is made with two (2) supporting Affidavits: those, respectively of Mr Petre Malsungai, Chairman of the Board of the Vanuatu National Provident Fund and the First Defendant and that of Mrs Ietonga AIONG, secretary to the Board of the V. N. P. F.

It is submitted on behalf of the Defendants that the injunction should never have been applied for ex-parte. The Plaintiff's solicitors were aware that the Defence Counsel was available and that there is no urgency requisite for such ex-parte order. Further that Mr Moli was dismissed some 4 1/2 weeks prior to the ex-parte orders. He then tendered to the Court three (3) pages from Sharp on injunction. On paragraph 129 (at p. 60) it reads:

" To justify an ex-parte injunction, there must be such urgency that the delay necessary to give notice might entail serious and irreparable injury to the Plaintiff. Granting an injunction before the Plaintiff's right has been established at trial often entails a serious risk of infringing the rights of the Defendant. That risk is significantly heightened if an injunction is granted without been giving the Defendant notice and an opportunity to be heard. For this reason, the Courts are especially cautious in granting ex-parte



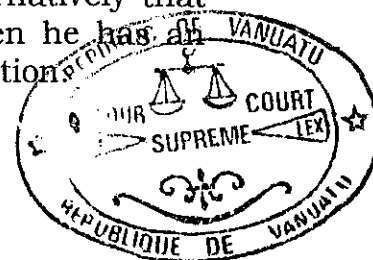
injunctions. More important is the obligation on Counsel to see that full and frank disclosure is made of all material facts. Failure to make full disclosure has been dealt with severally, and will almost always result in the injunction being set aside as a punitive measure on the motion to continue once the Defendant has been served."

It is put on behalf of the Plaintiff that on 13 June 1996 the VNPF's Solicitor has written to the Plaintiff's solicitor advising him that they are taking steps to remove the Plaintiff from his official quarter at Nambatri Area. On the same date, the Plaintiff was informed that water and electricity will be cut from his house on 14 June 1996 on the advice of the V. N. P. F.'s solicitor, despite the fact he has knowledge that the Plaintiff protests against his purported dismissal. (See a letter dated 13 June 1996 from V. N. P. F. to Unelco to cut the Plaintiff's supply of water and Electricity attached in Annex "A" to Mr Moli's Affidavit). On that basis, it is submitted, the Plaintiff seeks to protect his status quo until such time that the issue of his unjustified dismissal, as he claimed, could be properly determined by a competent Court and thus, the Plaintiff's solicitor is of the view that it would be justified to applying for a restraining order ex-parte.

It is further put on behalf of the Plaintiff that:

On 8 May, 1996 the Disciplinary Committee purported to try the Plaintiff on an alleged misconduct and subsequently recommended his dismissal whereas it has no such authority to have dealt with the Plaintiff's case as, it is said, the Plaintiff is only subject to the V.N.P.F. Board under the terms and provisions of his contract and the Vanuatu National Provident Fund Act (CAP 189) and no-one else. Further, the so-called Disciplinary Committee is a body appointed by the Staff Manual, a regulation approved by the V. N. P. F. Board and not the Minister of Finance who has the legislative powers under the Act to make such regulation. The so-called Staff Manual has never been gazetted in the Government Gazette so as to attain the legislative approval of the National Parliament. Further that the disciplinary Committee is comprised of three (3) members who are also ordinary members of the V. N. P. F. Board and that since the Disciplinary Committee comprises of ordinary members of the Board, any findings of the Committee would significantly prejudice the decision making of the Board and therefore would not conform to the rules of natural justice.

It is submitted for the Defendants that the termination of the plaintiff was made by the VNPF Board and not by the Disciplinary Committee. The fact of the matter, it is argued, is that the Plaintiff has been dismissed pursuant to the terms of his contract. If he believes as stated he was given insufficient right of hearing or alternatively that the decision was actually made by the wrong party then he has an action in damages just as in any breach of contractual action.



It is common ground that the Court will not usually restrain an employer from terminating an employee's contract, but will leave the employee to his remedy in damages. In the case of Cresswell -v- Board of Inland Revenue, (1984) 2 All ER 713, at p. 719 Walton J. stated that **"damages and not an injunction is the proper remedy in virtually every case of breach of contract, especially one relating to master and servant"**. The basis of this rule is the need for mutual trust and confidence. In the case before the Court, one can ask whether this is a simple case of master and servant governed by an ordinary contractual relationship or whether this case involves a situation where the "body" employing the man is under statutory or other restrictions as to the kind of contract that it can make with its servants or the grounds on which it can dismiss them.

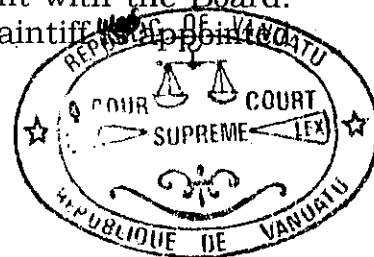
Section 2 of the Vanuatu National Provident Fund provides:

- "
- 1) ***There is hereby established a body corporate to be known as the Vanuatu National Provident Fund Board.***
 - 2) ***The Board shall have perpetual succession and a common seal and may sue and be sued in its corporate name."***

Section 8 of the same Act (as Amended) says that :

- "
- 1) ***The Board shall with the prior approval of the Minister and subject to subsection (2) appoint upon such terms and conditions as the Board may think fit a General manager who shall be an employee of the Board.***
 - 2) ***The General Manager who shall be the chief executive of the Board and of all its operations, shall be appointed for a term not exceeding five years, and may with the prior approval of the Minister be eligible for reappointment"***.

Having regard to the language of Sections 2 and 8 of the V. N. P. F Act CAP 189, it is clear that V. N. P. F. Board is a body corporate established by statute, thus a statutory body having specific statutory powers. One of the V. N. P. F. Board statutory powers is to appoint a General Manager of the Board who shall be the Chief Executive of the Board. It should be noted that the General Manager has two functions that of Manager and Officer of the Board and that of an employee with special authority to exercise any or all of the Board's Management powers. In view of the significance of the position, the General Manager enters into a formal contract of employment with the Board. In our case, such a contract was made when the Plaintiff was appointed



as the General Manager of the V. N. P. F. Board on 18th March, 1994
(See Affidavit of the Plaintiff in the Annexure marked "A").

Clause 1 of the said contract reads:

"1- TERM OF APPOINTMENT:

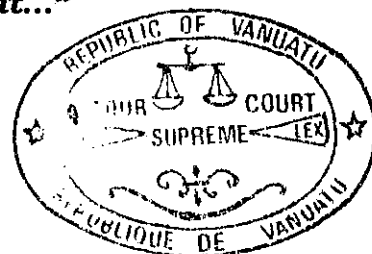
- 1.1 *The V. N. P. F. appoints the Employee as its General Manager for a period of three (3) years and continuing thereafter until terminated in accordance with the provisions of Clause 8.***

Clause 8 of the same contract reads:

"8- TERMINATION

- 8.1 *The employment of the employee may be terminated forthwith by the V. N. P. F. (without any requirement to give notice or payment in lieu of Notice to the Employee) in any of the following events:***

- a) *If the employee shall become bankrupt or make any arrangement with or assignment for the benefit of his creditors;*
- b) *If he shall so misconduct himself as to be likely thereby to injure the operations of the V. N. P. F. or be guilty of any other gross misconduct;*
- c) *If he shall wilfully disobey or neglect any lawful order or direction of the V. N. P. F.;*
- d) *If he shall commit any offence whereby his conviction therefore would result in material detriment to the V. N. P. F.;*
- e) *If he becomes permanently incapacitated by accident or ill-health from performing his duties under this Agreement and for three consecutive months or three months in agreement in any period of twelve months shall be deemed to be permanent incapacity; and*
- f) *If he commits any breach of the terms and conditions of this Agreement..."*



Provided that the employee shall be afforded reasonably opportunity to answer any allegation made against him before the V. N. P. F makes a decision terminating his employment.

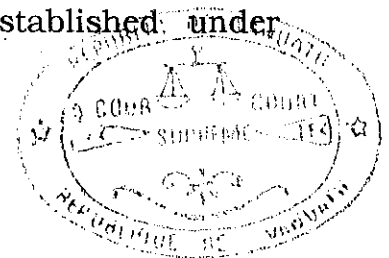
8.2 Notwithstanding the provisions of Clause 1.1, the employment may also be terminated by either the V. N. P. F. or the Employee at any time by giving the other three (3) months written notice or three months payment in lieu of Notice..."

This is a clear evidence of the fact that, in this case, we have a situation of Master and Servant relationship. In that respect, the Law regarding Master and Servants is clear Law. The equitable remedies of injunction and/or specific performance are not granted to enforce employment contracts on unwilling parties. If this is true, it means that the Plaintiff/General Manager cannot prevent the V. N. P. F. Board from terminating his appointment but can only obtain damages for wrongful dismissal. The principle of the Law was stated in a decision of the House of Lords in the case of Ridge -v- Baldwin and Others (1963) 2 All ER 66; at p. 71 (1964) A.C. 40 at p. 65 by Lord Reid as follows:

" The Law regarding Master and Servants is not in doubt. There cannot be specific performance of a contract of service, and the Master can terminate the contract with his Servants at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of Master and Servant does not at all depend on whether the Master has heard the Servant in his own defence: it depends whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its Servants, or the grounds on which it can dismiss them."

In the case before this Court, it is claimed on behalf of the Plaintiff that the decision of the Disciplinary Committee of 8th May, 1996 which was endorsed by Mr P. Malsungai, Chairman of the V. N. P. F. Board in his letter of 9th May, 1996 to dismiss the Plaintiff/General Manager of the V. N. P. F Board is void and of no effect by reason of the fact that the V. N. P. F. Board had no legislative power to delegate its power to a disciplinary committee.

Pursuant to Section 1 of the V. N. P. F. Act CAP 189, "Board" means the Vanuatu National Provident Fund Board established under Section 2 (1).



Section 3 of the same Act states:

" 1) The Board shall consist of:

- a) Six members appointed by the Minister and who shall be:**
 - i) Two persons employed by the Government one of whom shall be a representative of the Ministry responsible for finance;**
 - ii) Two representatives of employers not being persons employed by the Government or by the Board;**
 - iii) Two representatives of employers not being persons employed by the Board; and**
 - b) the General Manager, ex-officio member.**

2) ... "

Section 63 states:

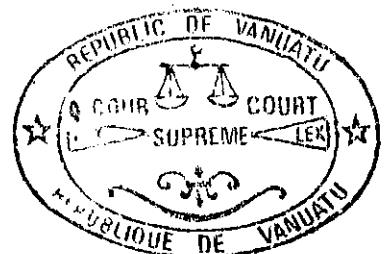
"1) The Minister may by Order published in the Gazette make regulations not inconsistent with the provisions of this Act for the better carrying into effect the provisions of this Act and may prescribe in such regulations all things and matters which are necessary or required to be prescribed there under."

Under Section 7 (1) the Board shall meet not less than 4 times in every 12 months.

"7 (4) The quorum at meetings shall be the Chairman or in his absence the Deputy Chairman and four other members of whom at least one shall be a member who is appointed under Section 3 (1) (a) (ii) and at least one shall be a member who is appointed under Section 3 (1) (a) (iii).

7 (10) Subject to this Act, the Board may make internal rules regulating its procedure.

7 (11) Any rules made in accordance with subsection (10) shall be issued under the hand of the Chairman.



Section 13 of the Interpretation Act CAP 132 states:

S 13. Every statutory Order shall be published in the Gazette and shall be judicially noticed.

Under Section 14 (1) of the same Interpretation Act

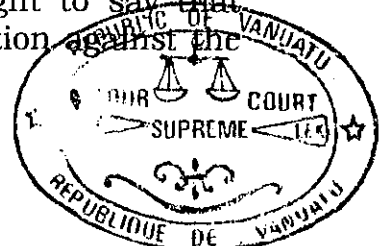
- (a) **The commencement of the statutory order shall be such date as is provided in or under the Order the date of its publication as notified in the Gazette.**
- (b) **Every statutory Order shall come into force immediately on the expiration of the day next preceding its commencement.**

It should be mentioned that the Staff Manual to which the Plaintiff's solicitor made reference in this case, has never been gazetted nor is there a commencement date stipulated. The Manual may intend to be the V.N.P.F. Board Rules under Section 7 (10) of the V.N.P.F. Act CAP 189 and not therefore regulations under section 63 (1) of the same Act. The difference being that under Section 7 (10) the instructions are for internal rules regulating the Board's procedure and therefore constitute and/or form part of the conditions of service of the officers of the V.N.P.F. Board; they are therefore, the contractual terms upon which officers employed by the V.N.P.F. Board are engaged, save the General Manager. The said Manual does not provide for disciplinary rules and procedure to be adopted concerning the dismissal of the General Manager of the Board in the case of misconduct and the V. N. P. F. Act CAP 189, itself, is not very helpful either in that respect. It is the V.N.P.F. Board who appointed the General Manager of the Board (Section 2 (1)) of the V.N.P.F. Act CAP 189, and it is the V.N.P.F. Board who can dismiss him. Under Section 21 of the Interpretation Act CAP 132:

"Where an Act of Parliament confers powers on any authority to make any appointment that authority shall also have power... to remove ... any person appointed in the exercise of the power."

It is common ground in this case that the V.N.P.F. Board delegated its power to remove and/or dismiss its General Manager to three (3) of its members who constitute the so-called Disciplinary Committee under the Staff Manual referred to earlier. The Sections of the V.N.P.F. Act which are important for this purpose appear to me to be sections 2, 3, 5, 7 (10), 8 (as Amended) and 63.

As there is no clear authority to remove or dismiss the General Manager of the V.N.P.F. Board under the V.N.P.F Act CAP 189, I turn now to the formal contract between the V.N.P.F. Board, as the Employer and the Plaintiff as the Employee. It is right to say that when the Disciplinary Committee took disciplinary action against the



Plaintiff / General Manager, they purported to be acting under section 8 of the V.N.P.F. Act No. 1 of 1986 (as Amended) in the sense that the V.N.P.F. Board in its capacity as the employer, appoints the Plaintiff/General Manager, as its employee and by operation of section 21 of the Interpretation Act CAP 132, the Board can remove and/or dismiss him which is also provided in clause 8.1 of the contract of service between both parties.

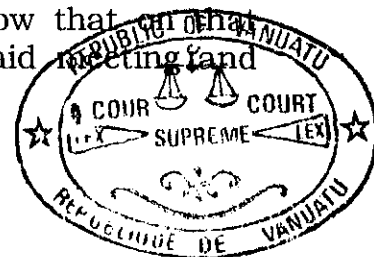
The situation, here, resembles to the situation of a company where a Director is removed prior to the expiry of his term, the question arises whether he can restrain the company from so acting or obtain damages for wrongful dismissal. A director cannot prevent the company from exercising its right to remove him. The equitable remedies of injunction and specific performance are not granted to enforce personal relations on unwilling parties: Atlas Steel (Aust.) Pty Ltd-v- Atlas Steel Ltd (1948) 49 S. R. (N.S.W) 157.

Nevertheless, it should be noted that a company's articles usually confer broad powers of management on the board of directors collectively. In addition, the articles bestow specific powers on the board. It has long been held that unless there is some provision in the Memorandum or articles to the contrary, the Board cannot delegate its powers to others: Tottered -v- Foreloom Blue Brick Co. (1866) L. R. 1. C. P. 674. Furthermore, in the case of small proprietary companies it may be that there is no necessity for delegation of the Board's powers. However, even in such cases, it is unusual for the articles to enable the board to delegate broad powers to one or more of their numbers. In the case of large companies there is a trend toward compartmentalisation whereby the board delegates its powers in relation to specific matters to particular director having special skills (For example a Director with an accounting expertise can be delegated powers to deal with financial affairs of the company).

In our case, there is no authority for the Disciplinary Committee to exercise the functions of the Board. It is the V.N.P.F. Board to exercise them itself. It would be a great convenience if the V.N.P.F. Board, who have many duties, were able to delegate certain questions to some of their members, but by doing that which they did in this case, without authority to do so, they excluded from sitting those members who were not nominated to sit.

Section 3 (1) of the V.N.P.F. Act provides that the Board shall consist of (a) six members appointed by the Minister...; (b) the General Manager, ex-officio member. Under Section 7(4) of the same Act, the quorum at meetings shall be the Chairman or in his absence the Deputy Chairman and four other members. Thus, the quorum for the Board to sit is five (5) members.

A copy of the minute of the meeting of 8 May 1996 held by the so-called Disciplinary Committee (attached with the Affidavit of Mrs Ietonga AIONG and Marked with the letter "A") show that on that meeting, three (3) Directors were present in the said meeting and



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heard the Plaintiff's case. The three Directors constituted the Disciplinary Committee, and they exercised the quasi-judicial disciplinary functions of the V.N.P.F. Board.

Further, the following can be read from the minute of the said meeting of 8 May:

"The disciplinary Committee studied Mr Moli's report and ... the following points were raised:

-Mr Moli is 100% guilty ...

-With all the evidence and advice produced Mr Moli does not have a chance in maintaining his position as General Manager. He should be dismissed.

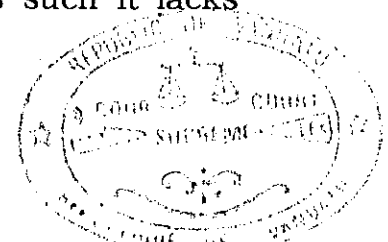
It is clear from the said minute of the meeting of the so-called Disciplinary Committee that this was the recommendation made by the committee in the Plaintiff's case. But yet, the minute of the meeting, further records:

"The Committee resolved the following:

Mr Moli be dismissed from his position as General Manager..."

The expression "***The Committee resolved...***" means "***the committee decided...***". Thus, it is clear that from the minute of the meeting of the so-called Disciplinary Committee of the 8 May 1996, the said Committee resolved or decided to dismiss the Plaintiff as the General Manager of the V.N.P.F. Board. The Plaintiff was not dismissed by the V.N.P.F. Board. The Disciplinary Committee substituted itself to the V.N.P.F. Board. The so-called Disciplinary Committee usurpates the power of the Board. The Directors are not to be blamed. There is a lacuna within the scheme of the V.N.P.F. Board in terms of disciplinary proceedings against the General Manager of the Board.

The VNPF Act provides for the Board to delegate some of his duties to the General Manager. There is no provision for a delegation of any of the Board's powers to a Disciplinary Committee. If there is a Disciplinary proceedings by operation of section 8 of the V.N.P.F. Act and of section 21 of the Interpretation Act, it must be according to the terms of the V.N.P.F. Act, and if, by reason of delegation such as that which is made in this case, other members are excluded from sitting upon the VNPF Board and therefore there is no decision of the VNPF Board. The letter of 9 May 1996 which was signed by Mr Petre Malsungai Chairman of the VNPF Board purporting to dismiss the Plaintiff is not the decision of the VNPF Board but it was the decision of the disciplinary committee of 8 May 1996 and as such it lacks legislative authority and thus void and of no effect.



It is in my view bad and dangerous for such Disciplinary Committee to exercise the Board's function without express or implied provision to that effect. It is bad and dangerous to delegate a power given by the legislature without any legislative authority to do so because the usurper could insidiously act upon it and the delegated legislation could become an evil in this way:

"...this insidious evil on our community, for that is what it is, an insidious evil. It is insidious because it is creeping all around us, slowly, silently and steadily, ever, increasing its scope; and it is an evil because, if unchecked, it will filch from us the freedom which we at present enjoy under the law..." (per A.C. Stephens, "The abuse of delegated Legislation" (1947) N.Z. I.J. 80).

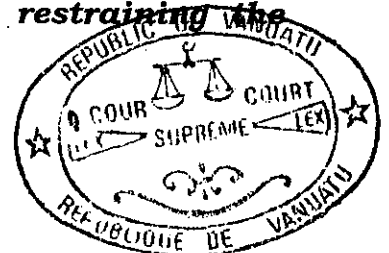
The Decision of 8 May 1996, and its endorsement by the letter of the Chairman of the V.N.P.F. Board of 9 May 1996 were thus, nul and void and of no effect. It seems to me that this case constitute an exception to the general rule, referred to in Re Ridge -v- Baldwin and other (1963) 2 All ER 66; Cresswell -v- Board of Inland Revenue (1984) 2 All ER 713; Atlas Steel (Aust.) Pty Ltd -v- Atlas Steel Ltd (1948) 49 S.R. (N.S.W.) 157.

I am not prepare to allow the V.N.P.F. Board to break the law and leave a man without a remedy. This is a good case for an injunction to be granted.

I am supported in this view by a number of authorities:

In re Hill -v- C.A. Parsons Ltd (C.A.) (1972) 1 ch. 316 per Lord Denning M.R., it was said:

"If ever there was a case where an injunction should be granted against the employers, this is the case. It is quite plain that the employers have done wrong...They have purported to terminate Mr Hill's employment by a notice which is too short by far. They seek to take advantage of their own wrong by asserting that his services were terminated by their own "say so"... to the grave prejudice of Mr Hill. They cannot be allowed to break the law in this way. it is, to my mind, a clear case for an injunction. the judge said he felt constrained by the law to refuse an injunction. But that is too narrow a view of the principles of law. He has overlooked the fundamental principal that, whenever a man has a right, the law should give a remedy. The Latin maxim is ubi jus ibi remedium. This principle enables us to step over the trip-wires of previous cases and to bring the law into accord with the needs of today. I would ... grant an injunction restraining the



Defendants from treating the notice dated July 30, 1971 as having determined the Plaintiff's employment".

In Re Barnard and Others -v- National Dock Labour Board and Others (C.A.) (1953) 2 Q.B. 18 (as per Singleton, Denning and Romer 2 JJ.) it was held:

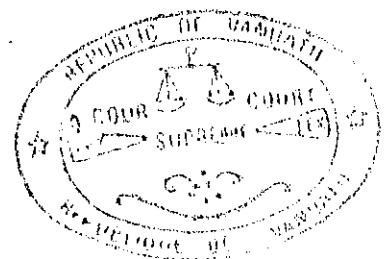
- "1) That the local Board had no power, express or implied, to delegate its quasi-judicial disciplinary functions to the port Manager or to ratify his purported exercise of those functions, and the original notices of suspension were thereof a nullity, and the decisions of the appeal tribunal based on them were equally a nullity;***
- 2) That in proper cases where persons would otherwise be without a remedy for an injustice, the Court had a discretionary power to intervene by way of declaration and injunction in the decisions of statutory tribunals."***

The last authority to support our view is the case of Vine -v- National Dock Labour Board (1956) 1 Q.B. 656 in which it was held:

- "1) That the local dock labour had no power under the scheme to delegate its disciplinary powers given by clause 16 of the Order of 1947 to a disciplinary committee of the Board and that the purported dismissal was therefore invalid" (as per Singleton Parker LJJ and Jenkins LJ (dissenting))***

In this case, as I see it, the plaintiff has a right and the law should give him remedy. I am aware of the fact that in this case the Plaintiff had lost the confidence of the employer (Board of VNPF) but because the decision of the Disciplinary Committee is bad in law, I hold that this Court must intervene to maintain the status quo before the final determination of the matter between the parties. In considering whether to grant an interlocutory injunction, the right course for me is to look at the whole case. I have regard not only to the strength of the claim but also to the strength of the defence, and then I am satisfied that an interlocutory injunction is the appropriate remedy to be granted in this case.

In view of the above consideration, and in particular the circumstances of this case, I am prepare to vary the terms of the ex-parte Orders made by this Court on 14 June 1996 and grant an Interlocutory Injunction against the dismissal of the Plaintiff on the basis that the Plaintiff being suspended on full pay and the defendants being allowed to appoint a temporary substitute.

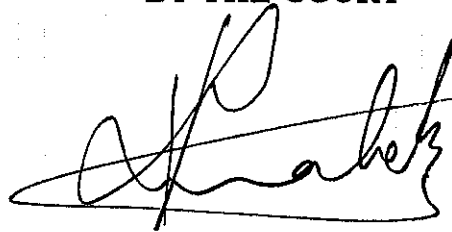


I therefore make the following Orders:

- 1) That the Defendants, their servants and Agents be restrained from acting upon or taking any steps to implement and/or put into effect the purported decision made by the Defendants on or about 9 May 1996 to terminate the services of the Plaintiff.
- 2) That the Plaintiff being suspended on full pay and the Defendants being allowed to appoint a temporary substitute.
- 3) That the Defendants, their servants and Agents be restrained from removing the Plaintiff & his family from the National Provident Fund quarters or House situated at Nambatri Area, Port Vila, Efate in the Republic of Vanuatu.
- 4) That the costs of this application be reserved.
- 5) Liberty to both parties to apply.

DATED AT PORT VILA this 25th day of JUNE 1996.

BY THE COURT



LUNABEK VINCENT J
Judge.

