

CF.

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

CIVIL CASE No.146 OF 2008

BETWEEN: LENNOX VUTI
Claimant

AND: GOVERNMENT OF VANUATU
Defendant

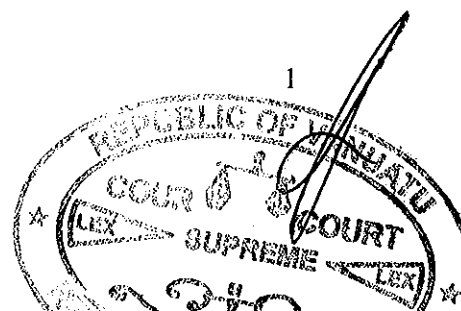
Coram: Chief Justice Vincent Lunabek

Counsel: Mr Bill Bani for the Claimant
Ms Florence Williams for the Defendant

JUDGMENT

This is an Amended claim for unjustified dismissal filed by the Claimant on 3rd July 2010. The Claimant is a Ni-Vanuatu and is the former Programme Director of the Millennium Challenge Account (MCA) - Vanuatu. The Claimant says he has suffered loss and damages as a result of the Defendant's unjustified termination of his employment agreement (the "Agreement") and he claims for a total sum of VT43,192,500 being for claim under contract, benefits, leave and damage entitlements. He claims also for 12% interests and costs and any other orders as the Court shall deem fit. The Claimant filed a sworn statement in support of his claim on 13 July 2009 and gave oral testimony.

The Defendant filed an amended defence on 3rd December 2009 denying each and every allegations of the Claimant. The Defendant say that they will refer to the compact Agreement signed between the Government of United States of America and the Government of Vanuatu on 2 March 2006 for their full terms and effects; they also say they will refer to the Agreement signed between the MCA- Vanuatu and the Claimant on 24 August 2007 for and their full terms and effects; they further say that they will refer to the Employment Agreement (the Agreement ") (as amended) between MCA- Vanuatu and the claimant of 26th August 2007 for their full terms and effects. They finally say that the Claimant has failed to mitigate his loss and that the Claimant is not entitled to the relief he is seeking or any other relief.



Mr Gregoire Nimbtkik, Director, Department of Strategic Policy, Planning and Aid Coordination, Office of the Prime Minister and Mr Simeon Malachi Athy, Director General, Office of the Prime Minister both filed respectively sworn statements on 18 September and 1 December 2009 in support of the Defence and they are both cross-examined orally by counsel for the Claimant.

Both counsel provided a common statement of agreed and disputed facts signed by both counsel and filed on 13 November 2009. It is set out below:

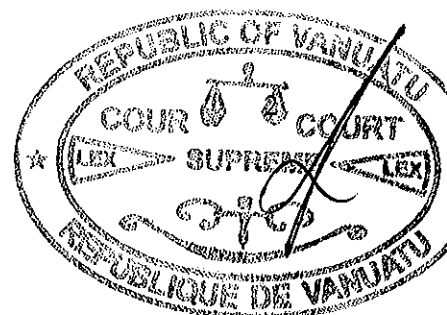
AGREED AND DISPUTED FACTS

AGREED FACTS

1. On 2 June 2006, the Claimant entered into an employment agreement with MCA-Vanuatu, an independent unit within the Ministry of Finance and Economic Management (MCA-Vanuatu) pursuant to which he was appointed the Director of the Management Unit of MCA-Vanuatu.
2. The employment agreement was varied twice; on 24 August 2007 and on 26 August 2007.
3. On 26 June 2008, the MCA-Vanuatu wrote a letter to the Claimant.
4. On 27 June 2008, the Claimant's lawyer sought details of the allegation against the Claimant set out in the letter of 26 June 2008.
5. On 3 July 2008, the MCA-Vanuatu responded to the Claimant's lawyers' letter.
6. On 20 July 2008, the MCA-Vanuatu received a letter from the Claimant in response to the letter of 26 June 2007.

DISPUTED FACTS

7. By letter dated 26 June 2008, the Claimant was given 30 days notice of the termination of his employment.
8. The termination of the Claimant's employment was effective as 30 days after receipt of the MCA-Vanuatu's letter of 26 June 2008.
9. The Claimant has received all of his entitlements.



LEGAL ISSUES

10. Did the Defendant breach the employment agreement?
11. Was the termination of the Claimant's employment unjustified?
12. Is the Claimant entitled to the damages sought or to any damages?
13. Is the Claimant entitled to severance?

EVIDENCE AND FINDINGS

The evidence in the present case is substantially agreed apart from the meaning and effect to be given to the letter written by the chairman of MCA-Vanuatu on 26th June 2008 to the Claimant. Another aspect is whether any endorsement by the council of Ministers of the recommendation of the MCC's letter of 11 June 2008, constituted the termination of employment of the Claimant.

What follows derived from the content of the sworn statements and oral testimonies of the witnesses of the Claimant and of the Defendant.

On 2nd March 2006, a Millennium Challenge Compact Agreement was entered into by the Government of United States of America, acting through the Millennium Challenge Corporation (MCC) and the Government of Vanuatu.

In accordance with the terms of the Compact Agreement, the Government of Vanuatu designated MCA-Vanuatu to implement the Government responsibilities and such other responsibilities, rights and obligations of the Government.

Pursuant to the terms of the Compact Agreement, the Government of Vanuatu established an independent unit within the Ministry of Finance and Economic Management, in Vanuatu known as Steering Committee MCA-Vanuatu which is responsible for the oversight and management of the Program.

On 2nd June 2006, the Claimant entered into an Employment Contract (the "Agreement") with MCA-Vanuatu. It was deemed to have commenced on 28th April, 2006 for an initial term of 5 years.

On 6th August 2007, John Hewko, Vice President, Operations, Millenium Challenge Corporation (MCC), United States of America, wrote a letter to the Minister of Finance



and Economic Management, then Hon. Willie Jimmy Tapangararua, raising concerns over the Claimant as Director of MCA-Vanuatu. That letter was annexed "SM2" to Simon Athy's statement. The relevant part of that letter states:

"Dear Minister,

...

MCC considers Mr. Vuti's admission that he misappropriated Government of Vanuatu funds a serious matter, based on the following factors:

- *Mr. Vuti was entrusted with Government of Vanuatu funds and he intentionally misused those funds for his own benefit.*
- *Mr. Vuti initially tried to cover up his misuse of Government funds,*
- *Mr. Vuti did not voluntarily inform the selection panel that considered his application for Director of MCA-Vanuatu that there was a pending investigation into the Government funds misuse.*
- *Mr. Vuti repaid the Government funds he misused only after questions had been raised about the expenditures.*
- *Mr. Vuti is responsible for the day-to-day oversight of Vanuatu's Compact with MCC, which involves a significant investment of U.S. taxpayer money.*

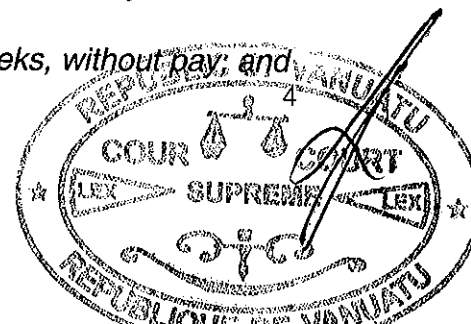
MCC is also aware that there are several mitigating circumstances:

- *The offense occurred in 2002, several years before Mr. Vuti was engaged to assist Vanuatu in preparations for a Compact with MCC, and before he was formally selected as Director of MCA-Vanuatu.*
- *Mr. Vuti made restitution by repaying Government of Vanuatu funds that he had misappropriated, though under duress.*
- *Although Mr. Vuti's behavior was inexcusable, we do not believe this behavior is part of pattern of illegal activity on Mr. Vuti's part, and we have been informed that there are no other criminal or administrative actions pending or contemplated against Mr. Vuti.*
- *MCC's experience with Mr. Vuti up until now is that he is a proactive and effective Director of MCA-Vanuatu.*

We also considered that MCC-financed programs must be executed with the highest level of integrity, and that MCC selects partner countries that rule justly and, in particular, that control corruption.

On balance, we recommend that Mr. Vuti be permitted to retain his position as Director of MCA- Vanuatu, However, in light of the number of aggravating factors associated with Mr. Vuti's misuse of Government of Vanuatu funds, we strongly recommend that the Council of Ministers:

- *Publicly reprimand Mr, Vuti. Given that the Council of Ministers endorsed Mr. Vuti's employment by a resolution, we believe this is the appropriate body to issue the reprimand;*
- *Suspend Mr. Vuti from duty for a period of not less than two weeks, without pay; and*



Amend Mr. Vuti's contract to permit his removal, with thirty days notice, for the reasons indicated in Section 10 of the contract or for any other conduct that jeopardizes the implementation or integrity of the Compact program or puts U.S. Government funds at risk. A draft contract amendment and proposed discipline agreement are attached to this correspondence..."

On 24th August 2007, MCA-Vanuatu and the Claimant entered into an agreement, among other matters, concerning the discipline of the Claimant over the matters raised by John Hewko Vice President, Operation, Millennium Challenge Corporation (MCC) of August 2007. Pursuant to the Agreement of 24 August 2007, the MCA-Vanuatu decided not to remove the Claimant from the position of Director of the Management Unit of MCA-Vanuatu but the Claimant agreed to be suspended from work for ten work days without pay from October 8, 2007 until October 19, 2007, after which time the Claimant returned to work with all his privileges and benefits and a reprimand from the MCA-Vanuatu.

Further by the terms of the Agreement between the MCA-Vanuatu and the Claimant of 24 August 2007, the MCA-Vanuatu and the Claimant agreed to amend the Employment Agreement of the Claimant (the Agreement").

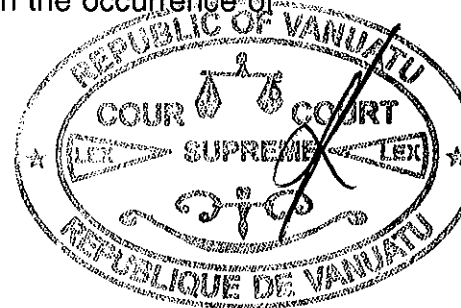
On 26th August 2007, the Employment Agreement of the Claimant was amended. The relevant parts of the Agreement (as amended) are set out below for ease of reference:

"WHEREAS

- A. On 2 June 2006 MCA-Vanuatu and the Employee entered into an Employment Agreement ("the Agreement"); and
- B. MCA- Vanuatu and the Employee now wish to amend the Agreement.

THIS AGREEMENT PROVIDES

- A. The Agreement between the Government and the Employee, dated June 2, 2006, is amended as follows:
 - 1. The phrase "MCA-Vanuatu may terminate the Employee forthwith without notice in any of the following events;" is deleted and the following is substituted for it: "MAC-Vanuatu may after 30 days written notice to the Employee, terminate the Employee for any reason MCA-Vanuatu deems appropriate or upon the occurrence of any of the following specific event:".



2. Paragraph 10.2 is revised to read as follows: "During the 30 days following written notice of termination, the Employee shall be given the opportunity to respond to MCA-Vanuatu regarding any allegations made against him;".
3. Paragraph 10.3 is revised to read as follows "Termination made under Article 10.1 shall not be subject to payment of any severance."

B. Except as amended herein, the Agreement remains in force.

..."

On 11th June 2008, Darius Mans, Vice President Compact Implementation, Millennium Challenge Corporation, United States of America, wrote a letter to the Minister of Finance and Economic Management, Hon Willie Jimmy Tapangararua, regarding the Claimant. The letter is attached to Simon Athis sworn statement "(SM3)" and as far as relevant it says:

"Dear Minister Tapangararua:

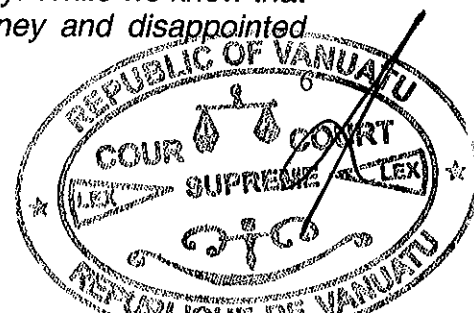
I must regretfully inform you that the Millennium Challenge Corporation (MCC) has lost confidence in our ability to work with Mr. Lennox Vuti, Director of the Millennium Challenge Account-Vanuatu (MCA), to achieve the objectives of the Millennium Challenge Compact with Vanuatu, and we are not prepared to continue disbursing funds to support compact activities as long as Mr. Vuti remains as Director of MCA.

...

Accordingly, we will not issue a "No Objection" for any future Disbursement Request until Mr. Vuti has been given written notice of his termination as the Director of MCA, as required by his contract, and has been informed that he may not hold any other position with MCA, nor be in a position to have any direct or indirect control over or influence on MCA's activities, including during any notice period before his termination.

In addition, you should be aware that MCC is not prepared to issue a "No Objection" to any Disbursement Request in which guaranteed bonuses for MCA staff appear, directly or indirectly. For some time, MCC has been pressing for a resolution, without success, of this difficult long-standing issue. We must now take action.


We are well aware that the next Disbursement Request was due on 10 June 2008 (it has not yet been submitted) and that the ground-breaking ceremony of the road is scheduled for 18 June 2008. Unfortunately, we feel that we must act now before the critical construction phase is fully underway. While we know that failure to proceed would be costly in terms of both money and disappointed



expectations, the alternative of proceeding without a change in management is unacceptable.

We sincerely hope that you and your Government will take appropriate action sooner rather than later, but we respect your need to work through whatever procedures and decisions may be required. Again, we very much regret that we have come to this point we await your decision as to how you will proceed.

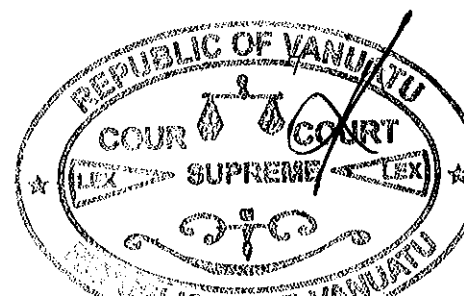
A copy of this letter is being sent to the Office of the Prim Minister as specified for communications under the compact..."

d On 16th June 2008, around 8.30 pm, the Claimant received a mobile telephone call from the secretary of Mr. Simeon Athy that the Director-General of Finance and Acting Chairman of the MCA steering committee is instructing the claimant to meet Mr Athy and the Minister of Finance, next day, on 17th June 2008 at 12.00 pm. The Claimant attended Mr Athy's Office whereby he managed for them to meet in the Ministry of Finance conference room with the Minister of Finance. 

At the meeting Mr Athy and the Minister of Finance, then Hon Willie Jimmy Tapangarua advised the Claimant that the Millennium Challenge Corporation (MCC) in America has sent a letter to the Government of Vanuatu requesting the Claimant's removal from the position of program Director of MCA Vanuatu. The Claimant then questioned what has he done wrong and what were the allegations against him. He also asked that he wanted to have access to the letter that the Minister referred to and to see for himself what exactly were the allegation against him. Mr Athy advised the Claimant to refrain from attending the ceremonial Ground Breaking Ceremony of the Efate Ring Road subproject until the Government of Vanuatu deliberated on MCC's demand.

On 20 June 2008, the Claimant read through Vanuatu Daily Post issue No: 2354 a headline article titled "MCA Director Vuti dismissed" with his most recent photo published.

It is an accepted fact that sometimes between 11 June 2008 and 26 June 2008, the Council of Ministers endorsed the letter from Darius Mans of MCC dated 11 June 2008 because there was threats to funding compact activities as testified by Mr Athy Simeon. It is also an accepted fact that the endorsement by the Council of Ministers does not constitute the termination of the Agreement. This is so because on 26 June 2008 the acting Director General and the Chairman of the MCA-Steering committee wrote the following letter to the Claimant:



*"Millennium Challenge Account-Vanuatu
Reducing Poverty through Improved Infrastructure*

*Mr. Lennox Vuti
Port Vila Vanuatu*

26 June 2008

You are hereby notified pursuant to Article 10.1 of your employment contract dated 2 June 2006 as amended (the "Contract") that your employment as the Director of the MCA-Vanuatu will be terminated 30 days after receipt of this letter.

The MCA-Steering Committee has determined that it is appropriate to terminate your employment because it has come to MCA Steering Committee's attention that the MCC has lost confidence in its ability to work with you and is not prepared to continue disbursing funds to support compact activities while you remain employed as the Director of the MCA-Vanuatu.

You are required to serve the notice period out of the Office of the MCA-Vanuatu. You are also required to immediately deliver up any vehicle, keys mobile phones, computer equipment files or other property of the MCA-Vanuatu or which relate in any way to the business of the MCA-Vanuatu and which may be in your possession or control.

You may, during the 30 days notice period, provide a response to the MCA-Vanuatu regarding the allegations made against you.

The steering Committee expect that you will be fully cooperative in implementing this termination.

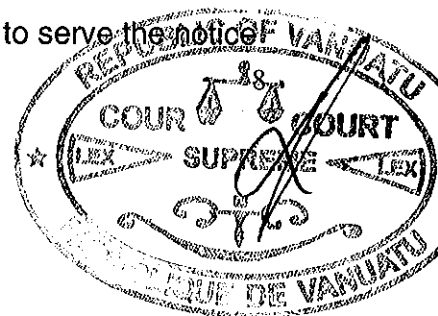
Yours truly,

Gregoire NIMBTIK

*Acting Director General & Chairman of MCA Steering Committee
Ministry of Prime Minister"*

On perusal of the letter of 26 June 2008, it is an accepted fact that this letter provides factual evidence for the following:

First, it was a notice to the Claimant pursuant to Article 10.1 of the Agreement (as amended) that the Claimant's employment as the Director of the MCA-Vanuatu will be terminated 30 days after receipt of this letter (paragraph 1). Second, it has provided the Claimant with the allegation and the reason for the termination of his employment 30 days after receipt of the notice period. Third, it required the Claimant to serve the notice



period of his employment's termination out of the office of the MCA-Vanuatu and to deliver proprieties belonging to the MCA-Vanuatu (Paragraph 3). Finally, it gave an opportunity to the claimant, during the 30 days notice period, to provide a response to the MCA-Vanuatu regarding the allegation made against him.

On 27 June 2008, the claimant's lawyer sought details of the allegation against the claimant set out in the letter of 26 June 2008. On 3 July 2008, the MCA-Vanuatu responded to the claimant's lawyer's letter.

On 20 July 2008, the MCA-Vanuatu received a letter from the Claimant in response to the letter of 26 June 2008.

On 26 July, The termination of the Claimant's employment was effective as of 30 days after receipt of the MCA-Vanuatu's letter of 26 June 2008.

THE LAW AND ITS APPLICATION

The relevant law to apply is the Agreement (as amended) between the MCA-Vanuatu and the Claimant dated 26 August 2007. Article 10 of the Agreement provides:

"10. TERMINATION

10.1 MCA-Vanuatu may after 30 days written notice to the Employee, terminate the Employee for any reason MCA-Vanuatu deems appropriate or upon the occurrence of any of the following specific event:

...

10.2 During the 30 days following written notice of termination, the Employee shall be given the opportunity to respond to MCA-Vanuatu regarding any allegations made against him.

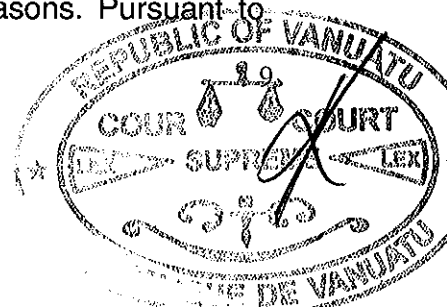
10.3 Termination made under Article 10.1 shall not be subject to payment of any severance.

..."

I now answer to the legal issues the Court is asked to determine.

DID THE DEFENFANT BREACH THE EMPLOYMENT AGREEMENT?

My answer to the question is in the negative for the following reasons. Pursuant to



clause 10.1 of the Agreement (as amended), the MCA-Vanuatu can terminate the claimant's employment for any reason it deems appropriate OR upon the occurrence of any specify event described in 10.1 (a)-(h). (Emphasis added)

In its letter of 26 June 2008, MCA-Vanuatu determined that it is appropriate to terminate the Claimant's employment because the MCC has lost confidence in its ability to work with the Claimant and MCC is not prepared to continue disbursing funds to support compact activities while the Claimant remains employed as the Director of the MCA-Vanuatu.

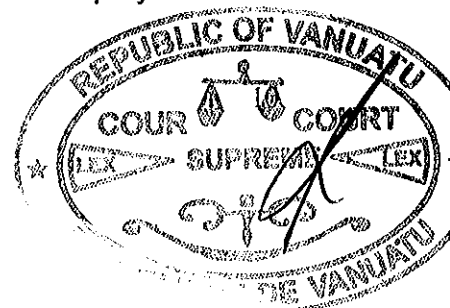
Again, pursuant to clause 10.2 of the agreements, the MCA-Vanuatu has given an opportunity to the Claimant to respond to the allegation that the MCC has lost confidence in its ability to work with the Claimant and is not prepared to continue disbursing funds to support compact activities while he remains employed as the Director of the MCA-Vanuatu. In the present case, Counsel for the Claimant sought details of the allegations against the Claimants and the MCA-Vanuatu responded to the Claimant's letter. The Claimant himself responded to the allegations made against him. The difficulty in this type of arrangement is summarised in Mr Lenox's response letter dated 20 July 2008 when he said:

"I understand that although my employer is steering committee (of the MCA-Vanuatu) my financier is the MCC."

In essence, in this type of arrangement when the MCC lost confidence in the Claimant, it is inevitable that the Claimant's Employment Agreement be terminated bearing in mind that the MCC (USA) has discretion to terminate the compact activities under Article 5.4 of Millennium Challenge Compact Agreement between the United States of America, acting through the Millennium Challenge Corporation (MCC) and the Government of the Republic of Vanuatu.

This is one of such cases where the employer cannot in good faith be expected to take any other course. The dismissal on notice is, thus, inevitable with an opportunity given to the Claimant to respond to the allegation. This is the scenario envisaged under section 50(3) and (4) of the Employment Act [cap 160].

In the present case, the Defendant terminated the Claimant's employment in accordance with the Agreement and the law.



WAS THE TERMINATION OF THE CLAIMANT UNJUSTIFIED?

The answer is no. The termination of the Claimant is made in accordance with the Agreement and the law

IS THE CLAIMANT ENTITLED TO THE DAMAGES SOUGHT OR TO ANY DAMAGES?

The Claimant is not entitled to damages he is seeking in his Amended Supreme Court claim. However, the Claimant claims for his outstanding leave under the Agreement from 2006-June 2008. If the Claimant's leave entitlements before his termination are due and still outstanding they should be paid out to him. I will ask counsel for assistance on this point.

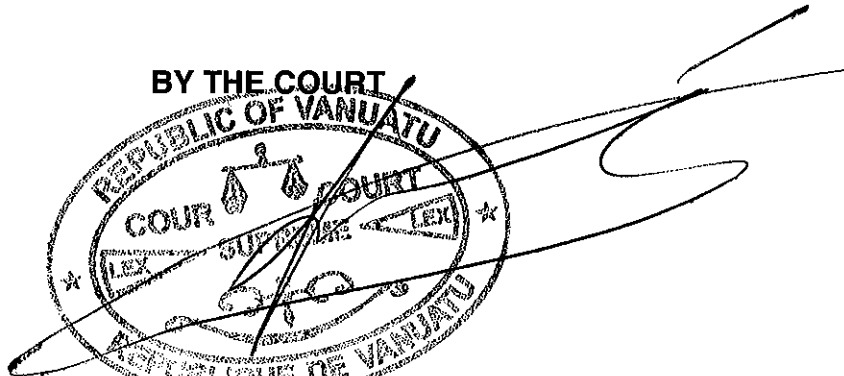
IS THE CLAIMANT ENTITLED TO SEVERENCE?

The Claimant was dismissed under Article 10.1 of his Employment Contract ("the Agreement"). Article 10.3 of the Agreement states that "termination made under Article 10.1 shall not be subject to payment of any severance." Pursuant to Article 10.3 the claimant is not entitled to any severance.

ORDER

1. The Amended Supreme Court claim is dismissed except outstanding leave entitlement of the Claimant from 2006 – July 2008 (if not yet paid to him).
2. The Defendant is entitled to her Costs to be agreed or determined.

DATED at Port-Vila this 15th day of March 2011

BY THE COURT

Vincent LUNABEK
Chief Justice