

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

Criminal Case No.67 of 2012

**PUBLIC PROSECUTOR**  
**-V-**  
**STEPHEN KALSAKAU**  
**YOAN KALSAKAU**

**Coram:** Justice D. V. Fatiaki  
**Counsel:** Ms. K. Tavoia for the State  
Mr. J. L. Napuati for the defendants  
**Date of Ruling:** 6 March 2013

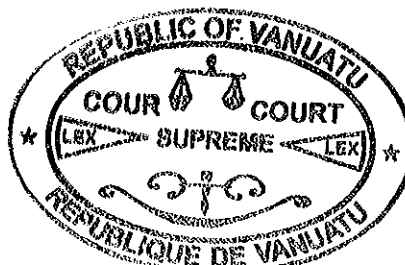
**RULING**

1. **Section 164(1)** of the **Criminal Procedure Code** [CAP. 136] states:

*"If when the case for the prosecution has been concluded, the judge rules, as a matter of law that there is no evidence on which the accused person could be convicted, he shall thereupon pronounce a verdict of not guilty."*

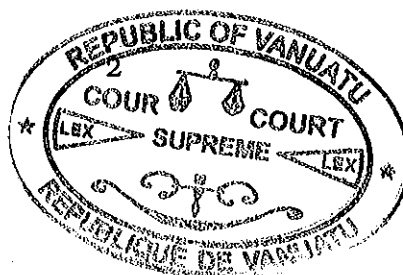
2. Several features are immediately obvious from a reading of the section including –

- (a) The section only applies after the close of the prosecution case;
- (b) The judge is required to consider the prosecution's evidence led in the case;
- (c) The question at this stage of the case is whether there is or is not any evidence to establish or prove an essential element or ingredient of the offence charged against the accused person; and
- (d) The test or standard that the prosecution's evidence must reach or attain to the judge's satisfaction is whether "*the accused could (NOT would) be convicted*".



3. What then must the prosecution establish against each defendant to prove an offence of "Misappropriation" and Obtaining Money by Deception?
4. **Section 123** of the **Penal Code Act** [CAP. 135] defines "*misappropriation*" in the following terms:

*"A person ... who destroys, wastes or converts any property capable of being taken which has been entrusted to him for custody, return, accounting or any particular manner of dealing ..."*
5. In the present Information the charge of Misappropriation against each defendant specifically alleges that between 10 – 29 September 2010 the defendants "... converted an amount of VT24,250,000 belonging to Willie Ben Karie which has been entrusted to (them) for custody" (whatever that may mean).
6. **Nowhere** in the charge is there any mention of a purpose or reason for the money given to the defendants **nor** is there any mention of the capacity in which the defendants received the money **or** how each is said to have converted the money. **Nowhere** in the particulars of the charge is **Steven Kalsakau** identified as having done anything with the money **nor** is **Willie Ben Karie** mentioned in the Particulars although he is allegedly the owner of the money that was given to the defendants.
7. Significantly, **Greg Soak Bae Koh** is not jointly charged with the defendants (as he should have been) yet the Particulars allege that it was he who deposited the money into the **Tamau Trading Company Limited** account with Bred Bank and subsequently, hand-delivered the **Tamau Trading Company Limited** cheque for **VT24,000,000** payable to **Goodies**.
8. If I may say so, the charges as framed left much to be desired but as no objection was raised by defence counsel and the prosecution's case against the defendants is sufficiently clear from the evidence produced, I am satisfied, given the nature of the defendants' defence and the fact that they are legally represented, that no misunderstanding or prejudice has occurred due to the wording of the charges against them.
9. The prosecution's case as disclosed in the evidence, is that the defendants with Greg Koh Soak Bae are co-directors of Tamau Trading Company Limited. That Tamau Trading Company Limited agreed to sell a barge named "*Hanlim Ferry*" to **Willie Ben Karie** and **Leikin Karie** and the agreement was signed by **Greg Soek Bae Koh** and **Steven Kalsakau**. Furthermore in part payment of the agreed purchase price a cheque for **VT24,250,000** was ceremoniously handed over to **Greg Koh** on 10



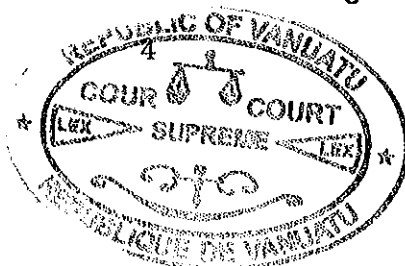
September 2010 and was deposited in **Tamau Trading Company Limited's** account with **Bred Bank**.

10. On the same day, **Goodies Limited** issued a Westpac cheque for the sum of **VT12 million** in favour of **Seok Bae Koh** in his personal name. The **Goodies Limited** cheque was immediately deposited into the personal account of **Greg Koh** maintained at Westpac.
11. The prosecution's evidence further reveals that between **10 to 17 September Greg Koh** wrote several personal cheques drawn on his Westpac account to several payees for varying sums including a "*cash*" cheque for **VT2 million**. During that same period **Goodies** made several payments upon the instructions of **Greg Koh** from the remaining **VT12 million** that it held in its account for **Tamau Trading Company Limited**. The payments were made to companies in Korea and totaled in excess of **VT9 million**.
12. From the foregoing it is patently clear that by the end of September 2010 almost all of the **VT24,250,000 (i.e. VT21 million)** that had been paid by **Belair Shipping to Tamau Trading Company Limited** had been expended or utilized for purposes that are not clearly or readily related to the purpose for which the **VT24,250,000** was paid or entrusted.
13. **Willie Ben Karie** testified that after the payment of **VT24,250,000** as a deposit for the purchase of a barge he and his son went with **Greg Koh** to Korea on **27 September 2010** to see the vessel. He said the vessel needed about 4 days of works to be done to it in accordance with the Sale & Purchase Agreement and before it could be inspected by Ports and Harbour officials or be brought and operated in Vanuatu waters.
14. Upon his return from Korea, in his words: "*the delays started from then*". He returned to Korea again in **November 2010** but still no work had been done to the ship. He returned and wrote emails to **Greg Koh** about his concerns and he sought and had several meetings with the directors of **Tamau Trading Company Limited** at **Chantilly's**.
15. At the second meeting at **Chantilly's** he was told that the sale of the "*Hamlin Ferry*" had fallen through and he was shown pictures of a similar vessel called the "*Joto Ferry*" which the defendants offered as a replacement. **Ben Karie** then paid for **John Nasak** an officer from the Vanuatu Ports & Harbours office, to fly to Korea to inspect the ship and assess its suitability for use in Vanuatu. **John Nasak** produced an inspection report dated **31 December 2010** which outlined numerous "*Defects*" that needed to be repaired before the vessel could operate in Vanuatu waters.
16. On receiving the report **Willie Ben Karie** followed up again with the directors of **Tamau Trading Limited** in January/February 2011 mainly with



**Greg Koh** and **Yoan Kalsakau** as **Steven Kalsakau** was a busy serving Minister in the Government. Again nothing happened about the required repairs and finally, at a meeting with the directors of **Tamau Trading Company Limited** at **Chantilly's**, he requested a refund of the **VT24,250,000** he had paid as a deposit for the purchase of a vessel.

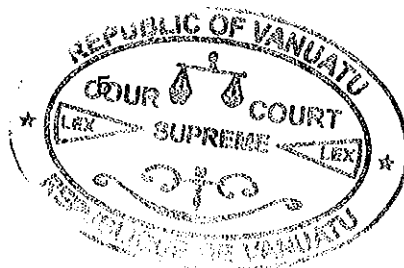
17. On **18 February 2011** at another meeting with the directors of **Tamau Trading Company Limited** at his residence, **Greg Koh** handed to him four **(4)** Westpac cheques drawn on his personal account each for **VT6 million** being the refund of part of the deposit amount of **VT24,250,000**. When the cheques were deposited, all bounced because there was no money in **Greg Koh's** account.
18. **Willie Ben Karie** continued to press the directors of **Tamau Trading Company Limited** for a refund and was successful in recovering an amount of **VT2 million** received in three **(3)** cash payments from **Greg Koh**. He recovered nothing more and after several unsuccessful attempts to recover the balance of the deposit, he lodged a complaint with the police in **May 2011**.
19. He understood that police investigations revealed that the **VT24,250,000** that was entrusted to **Tamau Trading Company Limited** on **10 September 2010** was used up before the Sale & Purchase Agreement was signed on **15 September 2010**.
20. In cross-examination **Willie Ben Karie** agreed that the **VT24,250,000** was given in the form of a **Bred Bank** crossed cheque made payable to **Tamau Trading Company Limited** on the basis of an Invoice issued by **Tamau Trading Company Limited** on **8 September 2010** for the amount of **VT48,500,000** and after he had agreed to pay a **50%** deposit as a sign of his commitment to the deal. He agreed that most of his dealings were with **Greg Koh** the managing director of **Tamau Trading Company Limited** and he asserted that the money was misused because it was given for the specific purpose of buying a ship which never eventuated.
21. He was unaware if **Yoan Kalsakau** had signed the **Tamau Trading Company Limited** cheque for **VT24,000,000** to **Goodies** as a blank cheque, but, he was adamant that **Tamau Trading Company Limited** has misused the money and not **Greg Koh** its managing director.
22. There is also evidence in the case to the effect that **Tamau Trading Company Limited** did not have a business office or premises, has not paid **VNPF** dues for employees and did not maintain an electricity or water account with **Unelco**, all of which, the prosecution says would be expected of a company that was genuinely trading and operating normally. **Tamau Trading Company Limited** did however, have printed Invoices and a post box address: "**PO Box 202, Port Vila**" which co-incidentally is the same as that used by **Yoan Kalsakau**. **Tamau Trading Company Limited** also



maintained a “*business current account*” with **Bred Bank** where **Yoan Kalsakau** also had his own personal current account.

23. An examination of **Tamau Trading Company Limited’s** current account bank statement shows a cheque deposit of VT24,250,000 on 10 September 2010 and a cheque withdrawal of VT24,000,000 on the same day and thereafter there were eight (8) cheque withdrawals and **no** additional deposits between **14 September 2010** and **28 September 2010** resulting in the account being overdrawn with a debit balance and a **Tamau Trading Company Limited** cheque **No. 80** for the sum of **VT43,538** being returned dishonoured. In simple terms, all the proceeds of the complainant’s cheque for VT24,250,000 which was handed over on 10 September 2010 had been dissipated and spent by 28 September 2010.
24. So much then for the prosecution’s evidence, I now return to the ingredients or elements that the prosecution must establish against each defendant to prove an offence of Misappropriation. These are:
- (a) There must be an entrusting of money for some purpose to the defendant;
  - (b) There must be a converting or use of the money by the defendant for a purpose other than that for which the money was entrusted to him; and
  - (c) The money was not a loan or money intended for consumption as the defendant wished.
25. The defence(s) raised in defence counsel’s cross-examination of the prosecution witnesses and in counsel’s submissions relies on the well-established 19<sup>th</sup> Century principle of the separation, in law, between a company and its shareholders and directors for which the leading authority is the decision of the House of Lords in **Salomon v. A. Salomon & Co. Ltd.** [1897] AC 22.
26. For present purposes it is only necessary to refer to the following brief extract in the judgment of **Lord MacNaghten** where he describes the legal principle: (at pp. 51 – 54):

*“The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers as members liable, in any shape or form, except in the manner provided by the Act.”*



(**See also:** the judgment of the **Privy Council** in the New Zealand case of **Lee v. Lee's Air Farming Ltd.** (1961) AC 12 which might be considered the high point of the separate personality principle).

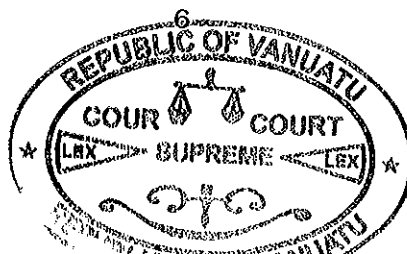
27. I say "*high point*" because in **Lee's** case Lee, for the purpose of carrying on his business of aerial top-dressing formed a company of which he beneficially owned all the shares and was the sole governing director. He was also appointed as the company's chief pilot. When Lee was killed in a flying accident, his widow unsuccessfully sued the company's insurers for compensation in the New Zealand courts who said Lee was not a "*worker*" of the company. The **Privy Council** in England however upheld the widow's claim in overturning the decision of the New Zealand court.
28. Having said that, there have been occasions over the years since the **Salomon** decision where the courts have been willing to look behind or lift the veil of corporate personality of an incorporated company to hold its officers personally liable instead of the company. In such cases the company is often described as: "*a sham*"; "*mask*" "*device*", "*stratagem*" and "*puppet*".
29. The Public Prosecutor in her written submissions dated **4 March 2013** refers to some of those authorities and submits that (on the evidence): "*the court can infer from these facts that (Tamau Trading Limited Ltd.) was a mere facade to conceal the true facts or intentions of the operations*".
30. In an earlier submission entitled **Response to No Case** dated **27 February 2013** the Public Prosecutor writes in answering the question: "Could the defendants be held liable for this offence?" in the affirmative:

*"Yes they could be held liable as they Agreed Facts and Agreed Documents (that) show:*

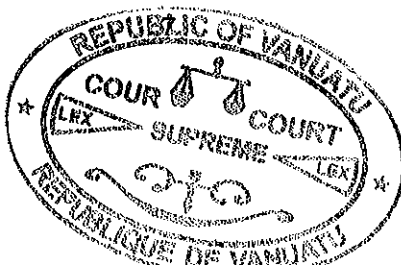
- (1) that they are members of the Board (of Tamau Trading);*
- (2) the money/cheque was placed in their (sic) account for purchase of a barge;*
- (3) the very fact that a cheque left their account and went to Goodies and others makes them accountable;*
- (4) the cheque is clear this money was entrusted into their company for certain purpose;*
- (5) it was not used for that purpose so the two defendants as Board of Directors (sic) should be held accountable.*

*... the two defendants have no excuse as they have 51% shares in the company so it is vital to them as shareholders and members of the board to know how and what the money was used for as they were present at the negotiating stage."*

(my formatting, numbering and insertions in brackets)

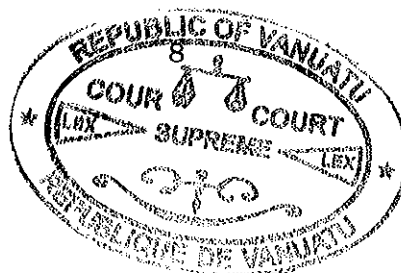


31. In considering my ruling on defence counsel's No-Case submission I have carefully re-read my notes of the evidence and carefully considered the Agreed facts and Agreed documents and other documentary exhibits tendered in the case. I have also reminded myself of the burden and standard of proof required and the relevant test or standard required to be attained by the prosecution's evidence at this stage of the trial. I have also borne in mind counsel's oral and written submissions.
32. I am not satisfied however, that this present case is an appropriate occasion to "*lift the veil of incorporation*".
33. I say this for the following reasons:
- (a) **Tamau Trading Company Limited** was incorporated in **August 2009** and had existed and traded for several months before negotiations began with the complainant for the purchase of a vessel. In other words, it was not created solely and specifically by the defendants to be the "*device*" through which the vessel would be sold;
  - (b) The principal documents in support of the prosecution's case such as the Invoice, Sale and Purchase Agreement and cheques are all in the name of **Tamau Trading Company Limited** either as vendor, payee or drawer; and
  - (c) The principal complainant in the case **Willie Ben Karie** was adamant in cross-examination that he dealt with the company: **Tamau Trading Company Limited** and not personally with any of its directors.
34. In my view the mere fact that a **Tamau Trading Company Limited** cheque for **VT24,000,000** was issued on 10 September 2010 in favour of **Goodies** does not establish that the complainant's VT24,250,000 had been converted or misappropriated at that time and by that act.
35. It cannot be ignored that **Goodies Limited** is a foreign exchange dealer and as part of its normal business, facilitates international payments and transfers of funds to overseas countries. Indeed in the present case, it made payments, totaling almost **VT9 million** from the VT24 million Tamau Trading Limited Co. Ltd. cheque which was deposited with it on 10 September 2010, on the instructions and direction of Greg Koh the managing director of Tamau Trading Company Limited. Neither defendant had anything to do with those payments.
36. In other words, the mere fact that most of the proceeds of the complainant's cheque was transferred to **Goodies Ltd.** on the same day that the cheque was delivered, is equally consistent with a continuing



intention and desire on the part of the directors of Tamau Trading Limited Co. Ltd. to perform the agreement to sell a vessel to the complainant.

37. I turn next to consider the prosecution's evidence led so far against each of the defendants as orally outlined by prosecuting counsel in addressing the court. Against **Steven Kalsakau** the following is the evidence that the prosecution relies upon to support the charges of Misappropriation and Obtaining Money by Deception:
- (a) **Steven Kalsakau's** directorship and shareholding in **Tamau Trading Company Limited**;
  - (b) The fact that he was involved in the negotiations leading up to the signing of the Sale & Purchase Agreement and being a co-signatory to the Agreement as a Vendor; and
  - (c) The admitted fact that he attended several meetings at **Chantilly's** with the complainants in **November 2010** and in **February 2011**.
38. Unfortunately, no clear evidence has been led as to what **Steven Kalsakau** said at these meetings (if anything) which discussed the offer of a replacement ship as well as the return of the complainant's deposit.
39. Crucially however, prosecuting counsel accepts that there is no evidence or paper-trail establishing that **Steven Kalsakau** received any money from the **VT24,250,000** crossed cheque that was made out in favour of **Tamau Trading Limited Company Limited**.
40. There is also not a shred of evidence to suggest that **Steven Kalsakau** who was a serving Minister of the Government at the time, had any personal knowledge or agreed and supported the actions of his co-directors in dissipating the **VT24,250,000** received from the complainant.
41. Furthermore, when the provisions of **section 19** of the **Penal Code** [CAP. 135] was drawn to prosecuting counsel's attention, she conceded that there was no evidence to establish that **Steven Kalsakau** never intended to perform the Sale and Purchase Agreement he signed nor is there evidence that he practiced any "*deception*" on anyone to obtain the payment of **VT24,250,000** to **Tamau Trading Company Limited**.
42. In light of the foregoing and in terms of **Section 164(1)** of the **Criminal Procedure Code** [CAP. 136], I rule, as a matter of law that there is no evidence on which the accused **Steven Kalsakau** could be convicted of the offence of Misappropriation as charged and I therefore pronounce a verdict of "*not guilty*" in favour of Steven Kalsakau who is immediately released from these proceedings and free to leave.





43. In respect of **Yoan Kalsakau** however, I am satisfied that he has a case to answer and I call upon him to make his defence to the charge.

**DATED at Port Vila, this 6<sup>th</sup> day of March, 2013.**

**BY THE COURT**

  
**D. V. FATIAKI**  
Judge.

