

**BETWEEN: Ietonga Aiong, Philip Dovo, Anthony Tal,
Kalo Nial, James Roy Matariki**

First Claimants

AND: Sam Karie, John Josiah, Albert Maltock

Second Claimants

AND: Governor of the Reserve Bank of Vanuatu

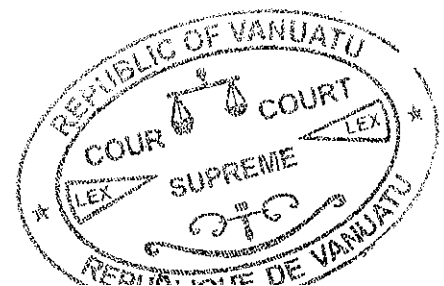
Defendant

Date of HEARING: 8th July 2022
Date of Judgment: 14th July 2022
Before: Justice Oliver A Saksak
In Attendance: Mr Avock Godden of Sugden Lawyers for the
Claimants
Mr Mark Hurley of Hurley Lawyers for the
Defendant

JUDGMENT

Introduction

1. By an urgent application filed on 23rd November 2021 the First and Second Claimants challenged the Governor's powers to issue Directives on 15th October 2021 removing each and all of them from their positions as Directors and Officers of the Vanuatu Agriculture Development Bank (the Bank). The claimants assert that their removals were unlawful.
2. The claimants seek a declaration that-
 - a. The Directives to remove each of them as directors or officers of the Bank under section 37C of the Act, as amended were unlawful,
 - b. An order be issued by the Court reinstating the Second Claimants to their respective positions and to clear the names of the First Claimants as Directors,
 - c. An order be issued by the Court allowing access, by all the claimants to their personal bank accounts,



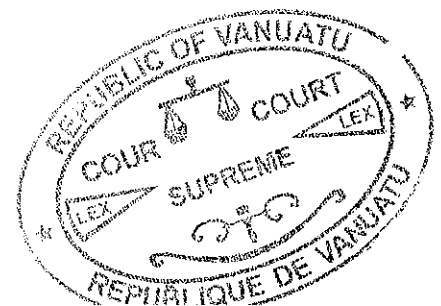
- d. Damages be awarded to the claimants, and
- e. Costs of and incidental to this proceedings be paid to them by the defendant.

Evidence by Claimants

3. The claimants filed sworn statements on 23rd November 2021 in support of their applications by:
 - Ietonga Aiong as Chairlady and Director,
 - Philip Dovo, as Director,
 - Anthony Tal, as Director,
 - Sam Karie as General Manager,
 - Albert Maltock as Manager Finance and Administration, and
 - John Josiah as Manager Lending.
4. The claimants filed additional evidence in response to the defendants' statements by Albert Maltock on 30th June 2022 and by John Josiah on 1st July 2022.

Defence and Evidence by Defendant

5. The defendant filed a defence on 14th February 2022 in essence denying that the defendant's directives dated 15th October 2021 for removals of the claimants were unlawful.
6. The defendant filed evidence in support of the defendant by-
 - a) Simeon Malachi Athy as Governor of the Reserve Bank of Vanuatu dated 23rd February 2022.
 - b) Johnny Koanapo Nies as Minister of Finance and Economic Management dated 3rd March 2022.
 - c) Alex Ralph as Manager for Supervision of other Financial Institutions at the Reserve Bank of dated 23rd February 2022.
 - d) Roger Douglas Jenkins as Principal of Business Management Services and appointed Auditor of the Bank dated 7th March 2022, and
 - e) Glen Graig as Managing Partner of Grand Isles Holdings trading as Pacific Advisory and as the current appointed Administrator of the Bank.



Issue

7. The facts are not disputed. The only issue being a legal one is whether the Governor of the Reserve Bank has the power under section 37C of the Act as amended to issue the directives on 15th October 2021 removing all the claimants from their respective positions.

Submissions

8. The Court received helpful written submissions from Mr Godden and Mr Hurley. I heard oral submissions from Counsel on 8th July 2022. I am indebted to Counsel for those submissions.

Discussion

9. There are two limbs to the issue. The first is whether the defendant Governor of the Reserve Bank has the power to issue the Directives of 15th October 2021?

10. The relevant legal provision is section 37C of the Act as amended by Act No.16 of 2021.

It reads:

“37C unsound or unsafe practices

(1) If the Reserve Bank is of the opinion that Bank:

a) Is following unsound or unsafe practices in the conduct of its banking business that are:

(i) likely to jeopardize its obligations or its depositions or other creditors, or

(ii) likely to adversely affect the operation or stability of the financial system in Vanuatu, or

b) has contravened or failed to comply with the terms and conditions of its licence or any of the provisions of this Act,
the Reserve Bank may issue a directive to the Bank.

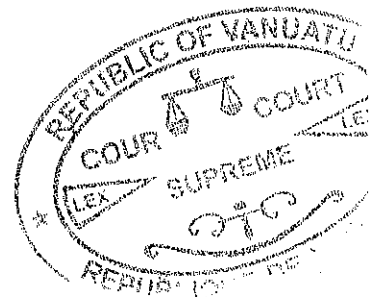
(2) The directive may require the Bank:

a) to cease the practice, contravention or non-compliance ; and

b) to take such action (including action to replace or strengthen management) as may be specified in the directive to correct the conditions resulting from the practice, contravention or non-compliance.”

(My emphasis)

11. It is very clear from section 37C that the Governor of the Reserve Bank has the power to issue the Directives of 15th October 2021.



12. The second limb of the issue is whether the Governor has the power to remove the claimants from their respective positions?

13. Firstly section 37C subsection (2)(b) can be implied to convey a power to remove on the Governor by the words in the brackets:

“ (including action to replace or to strengthen management) ”

(My emphasis)

14. But even if that is disputed, section 34M of the Act provides a discretionary power of the Reserve Bank to remove a person. It states:

34M The Reserve Bank may remove a director, manager, secretary or other officer

(1) The Reserve Bank may direct, in writing, the Bank to remove a person who is a director, manager secretary or other officer of the bank of the Reserve Bank is satisfied that the person:

a) is a disqualified person under section 34L

b) does not meet any other fit and proper criteria in this Act or the guidelines.

(2) *Before directing the Bank to remove a person, the Reserve Bank must give a written notice*

a) *The person; and*

b) *the Bank,*

(3) *A directing takes effect on the day specified in it, which must be at least 7 days after it is made.*

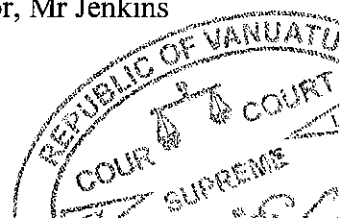
(4) *If the Reserve Bank directs the Bank to remove a person, the Reserve Bank must give a copy of the direction to the person and the Bank.*

(5) *If the Bank fails to comply with the directions under subsection (1), commits an offence and is liable on a conviction to a fine not exceeding VT 10,000,000.*

(My emphasis)

15. Mr Godden argued and submitted that pursuant to section 34M subsections (2) and (3) a 7-day notice was required to have been issued prior to removals. Counsel argued there were no notices issued by the Reserve Bank.

16. Mr Hurley responded by submitting that in the circumstances of the claimants no notices were necessary. That was simply because the claimants had terminated themselves in or about June 2021 and having paid themselves a total of VT 18,500,000 in exgratia payments. Those payments were irregular payments according to the Auditor, Mr Jenkins



and his evidence by sworn statement. Those payments are not denied by the claimants and the only explanation they gave for the payments was that it had been made following the Board's decision. That may well be but section 16 of the Act, as pointed out by Mr Jenkins to the Governor does not in any way permit such exgratia payments.

17. What the claimants as the Board did by paying themselves ex gratia payments outside the requirement of the law amounted to unsound or unsafe practices under section 37C of the Act. Once a report is submitted by the Auditor under section 37C, subsection (3) (c) and (d) showing "*a criminal offence involving fraud or dishonesty has been committed*", or "*serious irregularities have occurred....*" and enabling the Reserve Bank to form an opinion that unsound or unsafe practices had been committed by the Bank, the Governor had the discretion to issue the directives that he did. The exercise of that discretionary power of the Reserve Bank by its Governor was lawful.

18. Next, Mr Godden argued the Governor did not have the power to remove the claimants. That is plainly wrong.

19. The Governor exercised the powers given to the Bank under sections 34M and 37C of the Act on the authority of the Minister of Finance and Economic Management. In his evidence, the Minister gave clear instructions in his letter of 13th October 2021. See Annexure SMA1. Those instructions were based on the Auditor's Report showing irregularities which were not permitted by section 16 of the Act.

20. The Minister's evidence by sworn statement dated 3rd March 2022 confirms his clear instructions to the Governor. He gave 7 instructions to the Governor, the first of which was to "*immediately remove the Board and Management of "VADB" (the Bank)*". The fifth is to "*Ensure Criminal proceedings must also follow.*"

21. Mr Alex Ralph of the Reserve Bank's evidence confirmed and is consistent with Mr Jenkins's report.

22. The claimants had failed to comply with the provisions of section 37C and section 16 of the Act. The Governor acting under the instruction which amounted to the express authority of the Minister to remove the claimants had in doing so acted as the Minister's



alter ego. That statutory power is clearly envisaged in section 37C of the Act and cannot be a mystery. The Courts have recognized that vested authority as can be seen clearly from the case or Ranch De La Falaise v Republic of Vanuatu [2013] VUSC 162.

23. Further it is trite that the power to appoint includes the power to remove or revoke pursuant to section 21 of the Interpretation Act [CAP.132]. The Minister of Finance has the power to terminate, remove or revoke. Section 37C of the Act extends that authority to the Governor and there can be no doubt or question about it.

24. Next, the claimants argued no notice was issued prior to their removals as required by section 34M (2) and (3). However I accept Mr Hurley's submissions that that provision could not be invoked by the claimants in the circumstances of their case.

25. From the evidence which is not challenged, the First Claimants had exceeded their terms of engagements under section 14 (5) of the Act. When they paid themselves ex gratia payments on June 2021 they terminated themselves from that date.

26. That they remained for an additional 3 months to 22nd October 2021 was so by operation of the law in particular section 28 of the Amendment Act No.16 of 2021 which states:

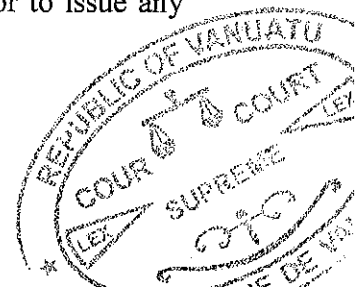
“ Transitional Provisions for Board of directors, General Manager or Deputy General Manager

(1) A person who occupies the position of director, General Manager or Deputy General Manager immediately before the commencement of this Act is to continue to be employed as a director, General Manager, or Deputy General Manager for a period of 3 months commencing from the date on which this Act comes into force.

(2) The employment of a director, General Manager or Deputy General Manager is deemed to be terminated on the expiry of the period provided under subsection (1).

27. On 15th October 2021 when each of the claimants were issued directives for their removals they had 7 days left of the 3 months required by section 28.

28. As they had already terminated themselves in June 2021, the law had given a grace period (as it were) of only 3 months to be in their positions only until 22nd October 2021. There was therefore no obligation on the Reserve Bank and the Governor to issue any




notices to the claimants prior to their removals. Section 34M of the Act therefore was not available to both the First and the Second Claimants.

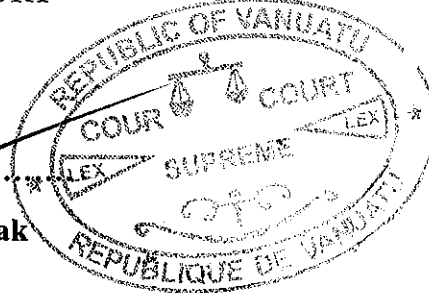
Conclusion and Result

- 29. For the reasons given, the Claimants were lawfully removed from their respective positions by the Governor of the Reserve Bank.
- 30. Their claim or application fails in its entirety and they are not entitled to any of the reliefs that they seek. The application is dismissed.
- 31. The defendant is entitled to costs on the standard basis as agreed or be taxed by the Master, and be payable within 28 days after taxation or agreement.

DATED at Port Vila this 14th day of July, 2022

BY THE COURT


.....
Oliver Saksak
Judge



The seal is circular with the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom. In the center, it says "COUR SUPREME" and "COURT SUPREME" with a scale of justice icon. The word "LEX" is written on either side of the scale.

