

BETWEEN: **SOCIETE DE SERVICES PETROLIERS**
Claimant

AND: **VANUATU NATIONAL WORKERS**
UNION
First Defendant

AND: **THE REPUBLIC OF VANUATU**
Second Defendant

Coram: *Justice Aru*

Counsel: *Mr. M. Hurley for the Claimant*
Mr. G. Avock for the First Defendant
Ms. J. Toa for the Second Defendant

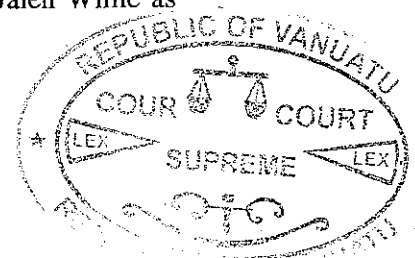
JUDGMENT

Introduction

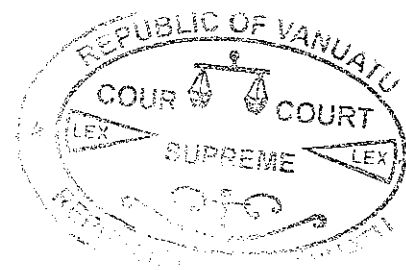
1. The claimant Societe de Services Petroliers (SSP) is an overseas company registered in Vanuatu. Its main business activity is supplying petroleum throughout Vanuatu. SSP filed this claim on 31 March 2017, it was later amended with leave and an amended claim was filed on 8 June 2017. The claim arises out of a dispute over entitlements of some of the workers contracted by SSP. These workers were members of the Vanuatu National Workers Union (VNWU).

Background

2. The following chronology of events is not disputed by the parties and sets out how the events unfolded leading to the claim being filed.
3. From 5 April 2016 to 11 October 2016 the parties exchanged correspondence and held various meetings regarding SSP workers entitlements.
4. On 24 October 2016 the VNWU issued a notice of strike by its members (the First Strike Notice) concerning the unsettled grievances of the workers.
5. On the same date the Commissioner of Labour (COL) appointed Mr. Jalen Willie as conciliator of the matter between the claimant and the first defendant.



6. On 23 November 2016 the Minister of Internal Affairs signed and issued a Notice of Discontinuance of the industrial action Order No 199 of 2016 pursuant to s 34 (1) (2) and (3) of the Trade Disputes Act [CAP 162] (the Act).
7. On 26 January 2017 SSP and VNWU entered into a Deed of Settlement and Release.
8. On 27 January 2017 a Memorandum of Conciliation (MOC) was signed by representatives of SSP, the VNWU and Mr Jalen Willie pursuant to s 6 of the Act.
9. On 2 February 2017 individual deeds were entered into separately between SSP and individual workers.
10. On 28 February 2017 the VNWU issued a further strike notice (the Second Strike Notice) against the SSP.
11. Following the notice, on the same date, 28 February 2017, Mr Jalen Willie was again appointed by the COL as conciliator of the dispute between SSP and VNWU.
12. On 7 March 2017 Mr Willie by letter invited SSP and VNWU to a meeting on 9 March at the labour office.
13. On 8 March 2017 two SSP workers namely Guilain Meltelili and Jean Marc Giovani were terminated allegedly for serious misconduct. A strike or industrial action was then taken by the VNWU members.
14. On the same date, 8 March 2017, SSP and VNWU entered into an Agreement to Continue Social Dialogue. Following this agreement, the conciliation continued on 9 March 2017.
15. On 10 March 2017 Mr Willie produced a Memorandum of Conciliation (MOC) pursuant to s 6 of the Trade Disputes Act [CAP 162].
16. Between 10 March and 30 March 2017 there were further exchanges of correspondence between the parties concerning a further conciliation meeting. The meeting was scheduled but then deferred for Mr Willie to obtain legal advice from the state law office.
17. On 31 March 2017 the Minister signed a notice of discontinuance of the Industrial Action Order No 39 of 2017 pursuant to s 34 (1) (2) and (3) of the Act.
18. On 3 April 2017 the VNWU members and SSP workers went on strike.
19. On 4 April 2017 the Ministerial Order of Discontinuance of Industrial Action Order No 39 of 2017 was gazetted in the Official Gazette
20. On 5 April 2017, Saksak J upon granting an urgent application filed by SSP issued the following orders:



"1) Pending the final hearing of this proceeding:-

(a) the first defendant Vanuatu National Workers Union (VNWU) and its servants and agents are refrained from taking any industrial action in respect of the subject matter of its Notice of Strike dated 28 February 2017;

(b) the claimant (SSP) is not required to take any steps in respect of any purported trade dispute the subject of the Notice of strike dated 28 February 2017 whether as a result of any Ministerial order or otherwise;

(c) costs of the application be reserved."

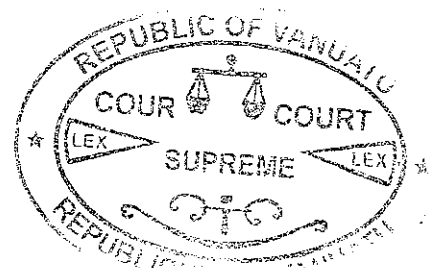
Claim

21. The amended claim seeks the following relief:

- a) a declaration that the terms of the MOC and/or the Deed are a bar to the Second Strike Notice;
- b) a declaration that the MOC and/or the Second Strike Notice has been issued in breach of the terms of the mutual release in clause 3 of the Deed and is therefore ineffectual at law;
- c) a declaration that the strike out action on 8 March 2017 was unlawful;
- d) a declaration that the strike action on 3 April 2017 was unlawful; and
- e) an order or injunction that:-
 - i) the VNWU and its servants and agents are restrained from taking any industrial action in respect of the subject matter of the Second Strike Notice; and
 - ii) SSP is not required to take any steps in respect of any purported trade dispute the subject of the Second Strike Notice whether as the result of any Ministerial order or otherwise.

Defence

22. A defence was filed by the second defendant although no allegations or relief are sought against it. The first defendant in their defence at Paragraph 9 admit that there was an irregular industrial action which occurred on 8 March 2017 after the termination of Mr Guilain Meltelili and Mr Jean Marc Giovanni.



Evidence

23. The claimant relies on the following sworn statements filed in support of the claim:-

- Sworn statement of Nicholas Leflon filed on 31 March 2017 [Exhibit “C1”];
- Sworn statement of Nicholas Leflon [No 2] filed on 29 June 2017 [Exhibit “C2”];
- Sworn statement of Nicholas Leflon [No 3] filed on 4 August 2017 [Exhibit ‘C3’].

24. For the first defendant, the VNWU relies on the sworn statement of Jean Pascal Saltukro filed on 26 July 2017 [Exhibit ‘FD1’].

25. And the second defendant relies on the following sworn statements filed in support of its defence:-

- Sworn statement of Jalen Willie filed on 28 July 2017 [Exhibit ‘SD1’]; and
- Sworn statement of Jalen Willie filed on 24 August 2017 [Exhibit ‘SD2’] in response Nicholas Leflon’s [No 2] and [No 3] sworn statements and Jean Pascal’s sworn statement filed on 26 July 2017 .

Issues

26. The issues can be summarised as follows:-

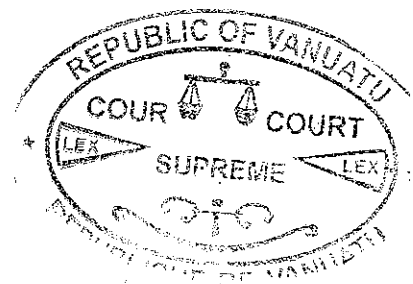
- i) Whether the Deed of settlement dated 26 January 2017 and the MOC dated 27 January bar the Second Strike Notice dated 28 February 2017;
- ii) Whether the industrial action taken by VNWU members on 8 March 2017 was in breach of s33A of the Act.
- iii) Whether the strike action of 3 April 2017 was in breach of the Notice of Discontinuance of Industrial Action Order No 39 of 2017.

Law

27. The legislation under consideration is the Trade Disputes Act [CAP 162]. Under the Trade Disputes (Essential Services) Order No 34 of 2005, the supply and distribution of fuel and petrol was declared as an essential service.

28. Part 3 of the Act deals with conciliation and arbitration in trade disputes. Sections 8, 9 and 10 provide:-

“8. Appointment of conciliator



If the Commissioner considers that there is a reasonable prospect of bringing about a settlement of a trade dispute by conciliation he may appoint a person to be a conciliator in the dispute.

9. Duties of conciliator

(1) It shall be the duty of the conciliator without delay to endeavour to promote a settlement of the dispute by conciliation and, for this purpose, he shall have the powers of a labour officer set out in section 5 and may require all or any of the parties to submit to him a report in writing:-

(a) setting out the matters in issue between them; and

(b) stating the efforts if any, that have been made by any party or other person with a view to bringing about a settlement.

(2) Section 5(2) shall apply in relation to proceedings before a conciliator as it applies in relation to proceedings before a labour officer.

10. Effects of conciliation

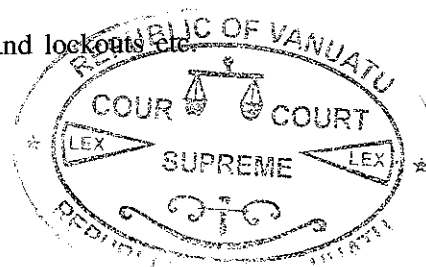
(1) If the conciliator succeeds in bringing about a settlement of a trade dispute, in full or in part, he shall prepare a memorandum setting out the terms and conditions of the settlement. The memorandum shall be signed by all the parties to the dispute and shall be endorsed by the conciliator, and thereupon the terms of the settlement shall have the effect of an award made by a board.

(2) If the conciliator fails to bring about a settlement of a trade dispute within 21 days of the date of his appointment, or such further period as the Commissioner may allow, he shall prepare and furnish to the Commissioner a full report on the subject matter of the dispute, the process of conciliation and such matters, if any, as may have been settled between the parties in the course or as a result thereof."

29. Part 4 of the Act deals with trade disputes affecting essential services. The supply and distribution of fuel and petrol was classified by order No. 34 of 2005 as an essential service. Under s26 of the Act, the Minister is vested with powers to issue directives towards settlement of the trade dispute in accordance with Part 3 of the Act, if it constitutes a threat to serious disruption of the essential service. Where a state of emergency is proclaimed by the President of the Republic (s28), the Minister nominated in the proclamation assumes the powers vested by s.29.

30. For the purposes of this case no state of emergency was proclaimed by the President.

31. Part 5 of the Act covers general provisions with respect to strikes and lockouts etc.
Section 33A provides:-



“33A. Notice of strike or other industrial action

(1) Where any strike or other industrial action is contemplated by a trade union or workers the following procedure shall be followed –

(a) at least 30 days’ notice of the proposed strike or other industrial action shall be given in writing to the Commissioner and to the employer of every worker who may be involved in the action;

(b) the notice shall be signed by the person or persons giving it and if given by a trade union, shall specify the name of such trade union and, if not given by a trade union, shall specify the names, addresses and employment of all persons by or on behalf of whom it is given;

(c) the notice shall state the date on or after which the strike or other industrial action is contemplated; and

(d) the notice shall be delivered by hand or by forwarding the same by registered post.

(2) Any person contravening or failing to comply with any of the requirements of subsection (1) shall be guilty of an offence:

Provided that no prosecution in respect of such offence shall be instituted except with the written consent of the Attorney General.

(3) The immunity against liability in tort conferred on a registered trade union or any other person by, or in pursuance of, sections 18 of 19 of the Trade Unions Act [Cap. 161] shall not apply with respect to any action taken without complying with the provisions of subsection (1).

(emphasis added)”

32. And section 34 provides:-

“34.

Minister may order industrial action to be discontinued or deferred

(1)

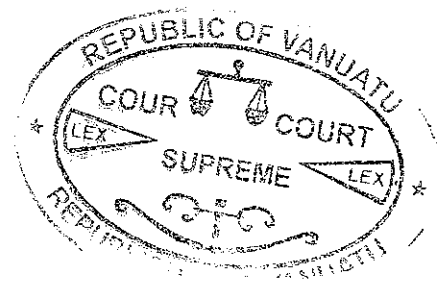
Where it appears to the Minister –

(a)

that in contemplation or furtherance of a trade dispute, industrial action, consisting in a strike, or irregular industrial action short of a strike, or a lock-out, has begun or is likely to begin; and

(b)

that the condition stated in subsection (2) is fulfilled; and



(c)

that it would –

(i)

be conducive to a settlement of the dispute by conciliation or arbitration under this Act; or

(ii)

assist in the exercise of its functions by a Commission of Inquiry set up in pursuance of section 38;

if the industrial action were discontinued or deferred;

the Minister may make an Order directing that during the period for which the Order remains in force, no person or a member of a class of persons specified in the Order shall –

(i)

call, organise, procure or finance a strike, or any irregular industrial action, or threaten to do so;

(ii)

institute, carry on, organise, procure or finance a lock-out or threaten to do so.

(2)

The condition referred to in subsection (1)(b) is that the industrial action in question has caused or would cause an interruption in the supply of goods or in the provision of services of such a nature, or on such a scale, as to be likely –

(a)

to be gravely injurious to the national economy, to imperil national security or to create a serious risk of public disorder; or

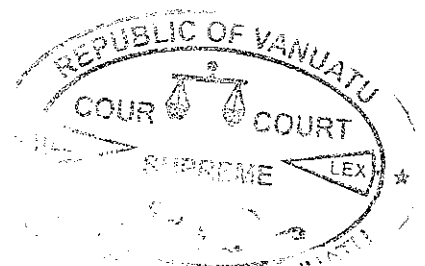
(b)

to endanger the lives of a substantial number of persons, or expose a substantial number of persons to serious risk of disease or personal injury.

(3)

An Order under this section shall specify –

(a)



the industry, undertaking (or a part thereof), and the description of workers in respect of which the Order is to have effect, or all or any of these matters;

(b)

the persons or description of persons who are to be bound by the Order;

(c)

the date on which the Order is to take effect and the period, not exceeding 60 days, for which the Order, unless revoked earlier, shall remain in force.

(4)

Any person contravening or failing to comply with any of the directions contained in an Order under this section shall be guilty of an offence:

Provided that no prosecution in respect of such offence shall be instituted except by, or at the instance of, or with the written consent of the Attorney General.

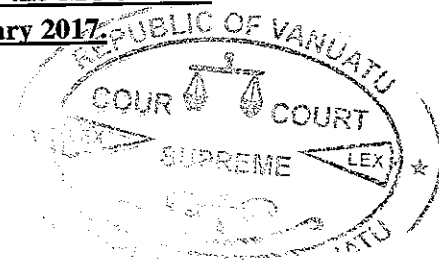
(5)

The immunity against liability in tort conferred on a registered trade union or any other person by, or in pursuance of, section 18 or 19 of the Trade Unions Act [Cap. 161] shall not apply with respect to any act which constitutes an offence under this section."

Discussions

33. No issue is taken with the First Strike Notice issued on 24 October 2016. VNWU gave the required 30 days' notice to take industrial action if no acceptable conclusion is reached over their members claims for payment of entitlements of annual and other contracts and negotiations on their current work contracts are not resolved. Following the issuance of the notice, Mr Jalen Willie was appointed conciliator by the COL to bring the parties to the negotiating table to resolve their issues. On 23 November 2017, the Minister responsible signed an Order of Discontinuance of any intended strike action: Order No 199 of 2016. A Deed of Settlement was then signed on 26 January 2017 between VNWU and SSP. On 2 February 2017 individual deeds were signed with the workers concerning payment of their various entitlements.
34. In relation to the Second Strike Notice issued on 28 February 2017, it purported to give 30 days' notice to take industrial action after 30 March 2017 if there is "*non-payment of entitlements of annual and other contracts as per signed Deed of Settlement between SSP and VNWU*".
35. On 8 March 2017 an alleged strike action was taken by members of the VNWU employed by SSP at various locations.

Issue 1 – Whether the Deed of Settlement dated 26 January and the MOC dated 27 January 2017 bar the Second Strike Notice issued on 28 February 2017.



36. The MOC was signed following the signing of the Deed of Settlement and reflects more or less what was agreed in the Deed. The real question is whether the signing of the Deed bars the issuance of the Second Strike Notice. The essential provisions of the Deed are clauses 3 and 6.

37. Clause 3 states:

“3. Mutual Release

Save for any rights under this Deed, the parties hereby mutually release each other from any liability, actions, suits, causes of actions, claims, demands, costs, (including legal costs and interest) and expenses that the parties may now have, or at any time in the future may have had or but for the execution of this Deed could or might have had however arising from the agreement, the Act, the strike notice or any other matter incidental to the recitals hereto.

(emphasis added)”

38. Clause 6 states:

“6. Bar to Proceedings

This Deed may be pleaded by the parties as a bar to any actions, suits, demands, or legal proceedings, instated by the other party in respect of any matter referred to in this Deed except for any proceedings instituted for breach of this Deed.

(emphasis added)”

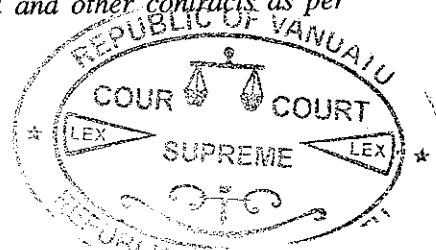
39. This Deed was signed by Mr Ephraim Kalsakau on behalf of the VNWU and Mr Nicolas Leflon on behalf of SSP. It constituted the entire agreement of the parties and was intended to be legally binding on both parties.

40. By signing the deed each party agreed to release each other mutually from *“any liability, actions, suits, causes of actions, claims, demands, costs, (including legal costs and interest) and expenses that the parties may now have, or at any time in the future may have had or but for the execution of this Deed could or might have had however arising from the agreement, the Act, the strike notice or any other matter””*.

41. Furthermore, the parties agreed that the Deed is binding and can be pleaded *“as a bar to any actions, demands, or legal proceedings..””*

42. Having considered these provisions, I am satisfied that the parties intended to resolve all their disputes that arose as a result of the First Strike Notice by signing the Deed. They agreed to release each other from any demands or actions or claims they may then have or *“at any time in the future.”*

43. The Second Strike Notice was therefore barred by the Deed as it related to matters agreed in the deed: *“payments of entitlements of annual and other contracts as per signed Deed of Settlement between SSP and VNWU”*.



Issue 2 – Whether the industrial action taken by the VNWU members on 8 March 2017 was in breach of s 33A of the Act

44. In their defence at paragraph 9, the VNWU admits that there was an irregular industrial action which occurred after the termination of Mr Guilain Meltelili and Mr Jean Marc Giovanni.

45. An “irregular industrial action short of a strike” is defined in s 1 of the Act to be:

“any concerted course of conduct (other than a strike) which in contemplation or furtherance of a trade dispute –

*a) is carried on by a group of workers with the intention of preventing, reducing or otherwise interfering with the production of goods or the provision of services; and
b) in the case of all or some of them is carried on in breach of their contracts of employment.”*

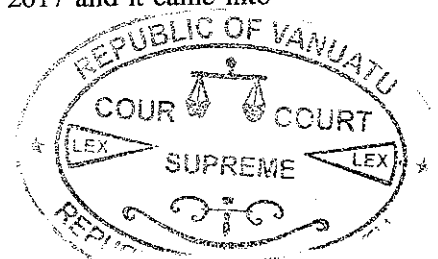
46. Section 33A 1) (a) requires that where any strike or other industrial action is contemplated by the members of a trade union as in this current case, at least 30 days notice of the proposed strike or other industrial action shall be given to the Commissioner and to the employer. The term “*other industrial action*” used in s 33A is in my view all encompassing. Any strike or any other industrial action of whatever nature requires the giving of a 30 days notice. That is a mandatory requirement. Any non-compliance with the requirement to give such notice invalidates the intended action.

47. Regarding the industrial action of 8 March 2017, the 30 days notice was not given. There is no evidence that specific notice of the intended action was given. Even if the VNWU were to rely on the Second Strike Notice of 28 February 2017, the mandatory 30 days notice requirement had not lapsed before the action occurred. The 8 March industrial action was therefore illegal as it was taken in breach of the Act, more specifically s 33A 1) (a).

Issue 3 – whether the strike action of 3 April 2017 was in breach of the Notice of Discontinuance of industrial action Order No 39 of 2017 .

48. The Second Strike Notice was issued on 28 February 2017 giving notice that VNWU members were to go on strike “*on or after 30 March 2017*”. On 28 March 2017 the Minister of Internal Affairs instructed the State Law Office to prepare the discontinuance order. His instructions were: “*to prepare an order in accordance with the powers vested upon me in section 34(1), (2) and (3) of the Act for the discontinuance of any industrial action*”.

49. The Minister signed the Notice of Discontinuance on 31 March 2017 and it came into effect the same day. Clause 5 of the Order is specific that:



"5. Commencement

This Order is taken to have commenced on 31 March 2017 and ceases to have effect of 28 May 2017."

50. The strike action which begun on 3 April 2017 occurred after the Order of Discontinuance came into effect prohibiting any strike action.
51. Parties or classes of persons covered by the Order were specifically SSP employees and the VNWU. The fact that the strike took place on 3 April after the Order of Discontinuance came into effect was a clear breach of the Order and the provisions of the Act under which the Order was made. Although the Order was gazetted at a later date on 4 April 2017 that has no relevance whatsoever to the effect and commencement of the Order.
52. On the same date, 31 March, a signed copy of the Order was forwarded by Mr Jalen Willie by email to: Ephraim Kalsakau, Jean Pascal Saltukro, Mark Hurley and Nicolas Leflon and copied to COL and the Minister of Internal Affairs. In his email Mr Willie advised:

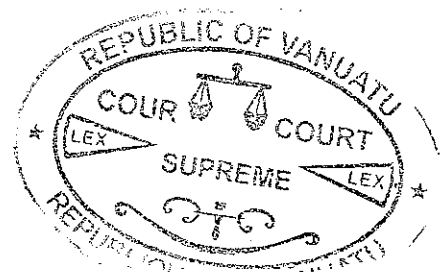
*"Dear VNWU
Forwarding the Order signed by the Minister this afternoon for your perusal.
Hard copy will be handed to you on Monday morning.*

*Best regards
(signed)
Jalen Willie"*

(emphasis added)

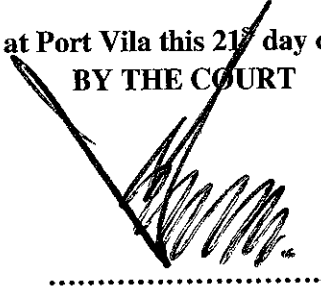
Conclusion

53. Having answered the three issues in favour of the claimant, I grant the orders sought as follows:
- a) A **DECLARATION** that the terms of the MOC and /or the Deed are a bar to the Second Strike Notice;
 - b) A **DECLARATION** that the MOC and / or the Second Strike Notice were issued in breach of the terms of the Mutual release in clause 3 of the Deed and is therefore ineffectual at law;
 - c) A **DECLARATION** that the strike action or industrial action which took place on 8 March 2017 was unlawful;
 - d) A **DECLARATION** that the strike action or 3 April 2017 was unlawful;
 - e) An **ORDER** that:



- i) the SSP is not required to take any steps in respect of any purported trade dispute the subject of the Second Strike Notice whether as the result of any Ministerial Order or otherwise;
- ii) the claimant is entitled to costs against the VNWU to be agreed or taxed by the Master. No costs are ordered against the Second defendant.

**DATED at Port Vila this 21st day of June 2018
BY THE COURT**



**D. Aru
Judge**

