

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 18/764 CoA/CIVA

BETWEEN: VANUATU NATIONAL TOURISM OFFICE
Appellant

AND: LINDA TUPOU KALPOI
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Oliver A. Saksak
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Gus Andrée Wiltens

Counsel: *Mr M. Hurley for the Appellant*
Mr J. Malcolm for the Respondent

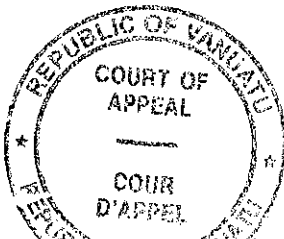
Date of Hearing: *Friday 17th April, 2018*

Date of Judgment: *Friday 27th April, 2018*

JUDGMENT

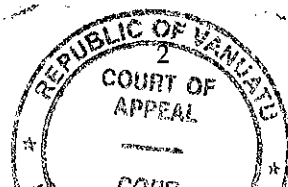
Introduction

1. The issue that arises in this appeal is whether a valid contract of employment was entered into between the appellant the Vanuatu Tourism Office (VTO), and the respondent Linda Kalpoi. The alleged contract was for her employment as General Manager. Geoghegan J in his judgment *Kalpoi v The Government of the Republic of Vanuatu and others* [2018] VUSC, held that there was a valid contract which was wrongly terminated by the VTO, and that Mrs Kalpoi was entitled to damages. This is the judgment under appeal. Damages were awarded and the amount of those damages is not at issue. The question is whether there was a valid contract, and therefore an invalid termination.
2. We record that the focus of this appeal has been different from the focus in the High Court. It has been on the validity of the contract rather than issues of fraud. However Mr Malcolm accepts that the issue is properly pleaded and available to the appellant.



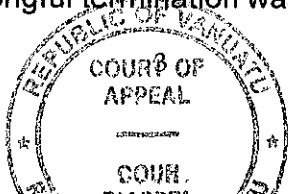
Background

3. Mrs Kalpoi had been employed as the general manager from 1984 to 2007, and then from 2011 to 2016. Her term of employment had expired on 1 June 2016, and was extended for a short term until 1 November 2016. As the judge recorded, there is no suggestion that Mrs Kalpoi was anything other than a loyal and hardworking employee.
4. The VTO is a statutory body created by the Vanuatu Tourism Office Act (VTOA). That act created a body corporate known as the Vanuatu Tourism Office, which has perpetual succession and a common seal (see s.1 of the VTOA). Under s.5(1) the Office consists of 16 members. Its functions and powers are broadly set out in the Act. At s.9 there is a detailed provision for meetings of the VTO, which appears to function like a Board. We will refer to the VTO in the narrative as the Office.
5. As the expiry of Mrs Kalpoi's employment contract approached, a decision was made by the Office to re-advertise the General Manager position. The possibility of someone other than Mrs Kalpoi being appointed was contemplated. In May 2016 a sub-committee was elected by the Office to conduct a review of all candidates, and after preparing a short list, a selection committee was formed. It was to report to the Office. There were two final candidates, Mrs Kalpoi, and Mrs Adela Aru. The Committee voted in favour of Mrs Aru by three votes to two. The issue of the appointment of the new General Manager was placed on the agenda for the Office meeting on 29 September 2016.
6. At that meeting on 29 September the agenda item of the appointment of a new general manager was brought forward, and discussed and determined by secret vote. Unusually for someone whose employment was at issue, Mrs Kalpoi assisted in briefing the outer island Board members about matters including her re-appointment. She attended the meeting but not the discussion about the General Manager's position.
7. Ultimately a secret ballot was held by the Office, and the result was seven votes in favour of Mrs Aru and six votes for Mrs Kalpoi. So on the basis of that vote it could be expected that Mrs Aru was to be appointed. Mrs Kalpoi appears to have been absent for the vote, and the minutes record that she returned to the meeting after the vote. Although the minutes are clear that the vote was in favour of the appointment of Mrs Aru, there was no resolution appointing her. The minutes, recorded by the secretary Mrs Kalorib, are detailed. Although an alternative set of minutes was at one stage produced, in the end they were unchallenged.
8. It is clear that the chair of the Council Mr Paul Fred, very much wanted Mrs Kalpoi to continue as General Manager, and did not want Mrs Aru appointed. He appears to have been committed to this course. In this regard he was



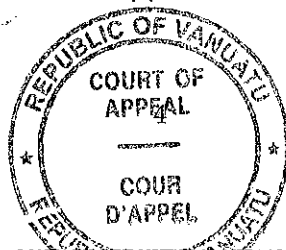
enthusiastically supported by Mrs Kalpoi who wanted to retain her job. After the Board meeting Mr Fred instructed Mrs Kalpoi to contact Mr Gary Blake, a lawyer, to seek legal advice on the legality of the process of appointment of general manager. Draft advice was obtained, although Mr Blake was never called, and no notes of advice were produced.

9. Mr Fred instructed Mrs Kalpoi to contact Mrs Kalorib and to notify Office members that an Office meeting would be held at 3pm on 30 September at the Melanesian Hotel. This was a different venue from that of the monthly meeting of the previous day. The notice went out by email on the Monday morning at 11.39am, approximately four hours before the meeting. It purported to call an extraordinary general meeting.
10. As we will discuss later, only nine Board members were able to attend the later 30 September meeting. There was a preliminary meeting over lunch on 30 September prior to the meeting, of some of those Office members who appeared to support the appointment of Mrs Kalpoi.
11. The minutes of the Office meeting that afternoon show that it was all about re-visiting the appointment of Mrs Aru that had been voted on the previous day. The Chairman reported that he had consulted with the first political advisor to the Minister, who had said that the appointment of the General Manager was entirely a matter for the Board. Mr Fred proceeded to say that he had received legal advice from Mr Blake and there was doubt about the legal standing of four of the Board members who had voted at the previous meeting. So three members who were present could not vote. He said that the vote the previous day was invalid. Unsurprisingly, at some stage after this decision the three members there who were told they could not vote on the appointment, left the meeting. They did not vote. A vote was held approving Mrs Kalpoi's appointment.
12. Later that day Mrs Kalpoi signed an employment contract by which she was appointed as General Manager for the next four years. The contract was signed under seal on behalf of the VTO by Mr Fred.
13. However, that was not the end of the matter. Mr Fred was subsequently replaced as chair, and on 12 October Mrs Aru was appointed as General Manager and Mrs Kalpoi was required to vacate her office. Her effective date of termination was 1 November 2016, that being the end of her short term contract.
14. Mrs Kalpoi then issued these proceedings, claiming that her employment was unlawfully terminated, and seeking damages. In its statement of defence VTO denied the lawfulness of the 30 September 2016 meeting, and pleaded that her employment contract of 30 September 2016 was invalid, and had been obtained through fraud, and that therefore no issue of unlawful termination arose. Her claim for damages for wrongful termination was denied.



The Supreme Court decision

15. The judge concluded that the meeting of 30 September had the necessary quorum and should be treated as a valid meeting. He rejected a submission that it should be treated as an extraordinary general meeting and invalid because of a failure to follow correct procedure. He determined that in fact the later meeting was a continuation of the 29 September meeting, which had not been closed but rather adjourned for further discussion.
16. He was strongly critical of Mr Fred, saying that "... *he engaged in a deliberate commercial gerrymander...*" to create a situation where Mrs Kalpoi was appointed. He conducted himself in a "... *divisive and inappropriate way ...*" He was not however prepared to find Mrs Kalpoi to be a party to fraud, stating that although she acted very unwisely she had not been guilty of deliberately misleading conduct.
17. He concluded that at the continued meeting of 30 September the Office had acted within its lawful capacity in passing a resolution appointing Mrs Kalpoi, and that accordingly her employment contract was valid and binding. He then proceeded to consider her entitlement to damages for unlawful termination. He rejected aspects of that damages claim, and in the end awarded a total sum of VT12,926,311 together with standard costs against the VTO. There were no costs sought against the State, and the State took no part in this appeal.
18. Mr Hurley for VTO has not pursued the fraud point in this appeal. His focus is simple. He submits that the meeting of 29 September authorised the appointment of Mrs Aru, and the meeting of 30 September was not a properly constituted meeting and could give no authority to appoint Mrs Kalpoi. Mrs Kalpoi's contract of appointment was therefore invalid, and the VTO's refusal to abide it terms was lawful, and could give rise to no claim for damages. Her employment expired at the end of the short term employment contract on 1 November 2016. Mr Malcolm for Mrs Kalpoi on the other hand supports the judgment and the judge's reasoning. He submits that she was validly appointed for a further term of four years, and then shortly thereafter subjected to an unlawful termination. There is no cross-appeal.
19. In an appeal such as this an appellant has the obligation to set out why it says the judgment below was wrong. This has been done. Our role as the appeal Court is to consider the material that was before the Supreme Court afresh, in the light of the Supreme Court judgment and the submissions that have been made, and it is our duty to decide what we think is the correct interpretation of the law and facts, and decide the appeal accordingly.



Was the meeting of 29 September a valid meeting?

20. Meetings of the VTO are specifically covered by s 9 of the VTOA. It provides:

"9. Meetings of the Office

- (1) *The Office shall meet once every month.*
- (2) *The first meeting of the Office shall be convened by the Minister.*
- (3) *Subject to subsection (4) the Chairman shall convene all other meetings.*
- (4) *The Minister after consultation with not less than seven members by 30 days prior notice in writing signed by them may convene extraordinary meetings.*
- (5) *The quorum at meetings shall be six members.*
- (6) *The proceedings at any meeting shall not be invalidated by any vacancies in the membership of the Office provided the number of such vacancies does not exceed four.*
- (7) *Any member of the Office may appoint another member to be proxy for him and vote on his behalf at any meeting that he does not attend.*
- (8) *The Office may invite any persons to participate in meetings but they shall have no vote.*
- (9) *Decisions of the Office shall be made by a majority vote of members present and voting, the Chairman of the meeting having a casting vote.*
- (10) *(Repealed)*
- (11) *Subject to this Act, the Office may make internal rules regulating its procedure for the chairmanship, calling, conducting and adjournment of meetings of the Office."*

21. After the first inaugural meeting of the Office, there are therefore two types of meetings, monthly and extraordinary. The 29 September meeting was a monthly meeting. We have discussed what happened at that meeting in relation to the appointment. The final entry of the meeting reads as follows.

"Apologies and last remarks

The Chairman apologizes for any harsh words there were exchanged in the Meeting and requested for a handshake with the Member Bryan Death. He again acknowledge all Board Members for their contribution to today's meeting.

The Chairman continued to advise that the Minister will give his advice however, another urgent Meeting will be convened to formalise the General Manager's appointment.

The Meeting was declared closed after a word of prayer."



22. There is no suggestion in this entry, or any part of the minutes, that the 29 September meeting was not a full meeting, concluded in the usual way. With respect to the learned judge we do not agree that "...the meeting of the 29th was simply adjourned to the 30th for further discussion regarding the general manager". The meeting of 29 September was in fact "declared closed" and there was a prayer.
23. Further, the minutes we have referred to treat the Board's vote in favour of Mrs Kalpoi as final. The Minister was to give "his advice" (whatever that might have been) and there would be "another" urgent meeting to formalise the appointment. The word "another" rather than "further" is consistent only with the present meeting terminating. The meeting of 29 September was over. We add that we see the reference to the Minister's advice as a ploy by Mr Fred to give him time to do something to preserve Mrs Kalpoi's job. We record the Minister's predictable reaction when he was approached, that the appointment was a matter for the Board.
24. Indeed, that the meeting of 29 September was over and not adjourned seems to be Mr Fred and Ms Kalpoi's view, as the next day Mr Fred called an "extraordinary meeting", rather than calling for a resumption of an adjourned meeting. The minutes of that meeting the next day refer to "this meeting" and it opens and closes in the usual way for a stand alone meeting. There is no suggestion that it was a resumption of the previous meeting. Plainly it was not.

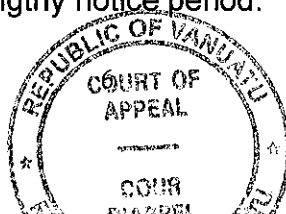
The validity of the meeting of 30 September

25. We have already found that the 29 September meeting was concluded. The next morning Mr Fred decided to hold a further meeting. The email that he instructed the secretary to send out read:

"Dear Board Members

I was instructed by the VTO Chairman, Mr. Paul Fred Karie to call upon all to attend an Urgent Extra Ordinary Board Meeting to be held at the Oasis Conference Room, the Melanesian Port Vila this afternoon at 3:30pm".

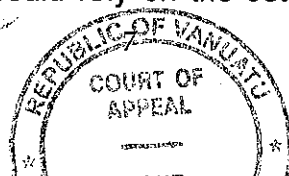
26. It is called an extraordinary meeting, and we have found it was not an extension of the lawful monthly meeting of the previous day. And yet it could not be a valid extraordinary meeting. There had not been any meeting called by the Minister after consultation with at least seven members as required by s.9(4) for an extraordinary meeting, and there had not been thirty days prior notice given to members. Plainly under s.9(4) of the VTOA, the intention was for any meeting additional to the monthly meetings to be truly extraordinary, and subject to clearly stated requirements and a lengthy notice period.



27. Mr Malcolm for Mrs Kalpoi referred to the judge's statement at paragraph [58] of his judgment that no evidence was given of any internal rulings made in accordance with s.9(11) of the VTOA. We are unable to see how this assists the argument that the 30 September meeting was valid. Any such internal rulings cannot change the requirements of s.9, and in any event it is for Mrs Kalpoi, if she wishes to rely on any such rulings, to produce them and show their relevance.
28. The minutes also record that Mrs Kalpoi was herself at the meeting of 30 September, and outlined the legal advice about those who could not lawfully have voted. She left the room for the vote. Prior to the meeting Mr Fred had met for lunch with a group of members, which Mrs Kalpoi explained as a follow up meeting relating to the appointment. It can be inferred that it was to lobby for her appointment. She appears to have been present.
29. So, by unfair process on the Monday, where Mrs Kalpoi played a key role, the appointment of the previous day was reversed. For the reasons we have outlined, the gathering was not a valid meeting under s.9. There could be no valid business done at such a meeting. It was no more than a get together of some Office members. The purported resolution of the gathering that a contract be signed with Mrs Kalpoi was legally meaningless, and had no legal effect. Moreover, it was a process tainted by Mr Fred's manipulation, and the main beneficiary, Mrs Kalpoi's active involvement. The period of notice was four hours, an unfairly short time. There was no agenda and no business signalled. For that reason also the decision of the meeting may have been invalid, but we do not need to make a finding to that effect.
30. Because there was no lawful meeting on the Monday, the decision of the previous day that Mrs Aru be appointed continued to be the legally valid decision, binding on the VTO.

Reliance on the contract

31. On the face of it a sealed contract is binding. However, as was recorded in *Northside Development Pty Ltd v Registrar General* (1990) 170 CLR 146, a corporation's seal on a document is not binding if it has not been affixed with authority, absent any estoppel. Plainly the contract was signed and sealed without the authority of the Office, and could not bind it.
32. The judge having found that the meeting of 30 September was valid, did not need to go on to consider the question of whether despite the invalidity of the meeting of 30 September authorising her appointment, Mrs Kalpoi could rely on the indoor management rule and the doctrine of ostensible authority. However, Mr Malcolm submitted that Mrs Kalpoi could rely on the ostensible authority of the sealed

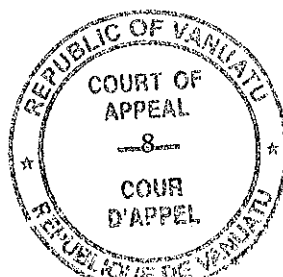


contract of employment that was signed by Mr Fred for the Office and by her on that day. The issue of estoppel is raised.

33. However, these doctrines were developed to protect those who are entitled to assume, because they are not familiar with the circumstances of the person they are dealing with, that the person has the authority with which it is cloaked. However, if the party seeking to rely on such doctrines has knowledge of the relevant facts showing no authority, then such doctrines cannot be invoked. Such doctrines are designed to avoid unfairness, not to perpetrate it.
34. To apply them here would be to perpetrate unfair dealing, and to allow Mrs Kalpoi to take advantage of her own wrongful participation in the process that lead to her invalid appointment. We have set out her intimate connection with the events of 29 and 30 September, where she acted as Mr Fred's assistant in manipulating the Office's meeting processes to secure her position. She knew or should have known that she was not the majority choice of the Office members who lawfully voted for Mrs Aru's appointment on 29 September, and knew or should have known that the events of 30 September that ended up in the contract being signed were an unlawful contrivance. The judge rightly described her actions as "*inappropriate*" and her evidence "*rather disingenuous*" (paragraph [25] of the judgment), and the permission given to her to interpret and explain to the members draft legal advice about her own job, as "*astonishing*", (paragraph [32]).
35. Therefore we reject the purported authority submission put forward, and find that Mrs Kalpoi has not shown that she was validly appointed.

Conclusion

36. Our findings that there was no valid meeting on 30 September and no valid appointment of Mrs Kalpoi, mean that the VTO did not unlawfully terminate her employment. Her employment came to an end lawfully at the end of the short term contract. The appeal must be allowed.
37. Despite a suggestion to the contrary at the conclusion of Mr Malcolm's submissions, the judge's calculation of damages was based on the unlawful termination, and the amount paid to Mrs Kalpoi when her employment came to an end was not found to be incorrect. We find that Mrs Kalpoi was paid all of her outstanding entitlements on her termination.




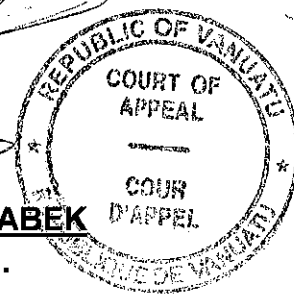
Result

- 38. The appeal is allowed, and the orders including the costs orders made in the High Court, are set aside.
- 39. Mrs Kalpoi is to pay the VTO's costs in the Supreme Court and in this Court on a standard basis.

DATED at Port Vila this 27th day of April, 2018.

BY THE COURT


Hon. Vincent LUNABEK
Chief Justice.



The seal is circular with the text "REPUBLIC OF VANUATU" at the top and "COURT OF APPEAL" in the center. Below that, it says "COUR D'APPEL" and "REPUBLIQUE DE VANUATU" at the bottom. There are small stars on either side of the central text.