

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

**Criminal Appeal**  
**Case No. 21/1455 CoA/CRMA**

**BETWEEN:** **Public Prosecutor**  
**Appellant**

**AND:** **Luganville Municipality**  
**Respondent**

**Date of Hearing:** 5 July 2021

**Coram:** **Chief Justice V. Lunabek**  
**Justice J Mansfield**  
**Justice R. Young**  
**Justice D. Aru**  
**Justice G. Andrée Wiltens**  
**Justice V.M. Trief**

**Counsel:** **Mr S. K. Nathan for the Appellant**  
**Mr L. Tevi for the Respondent**

**Date of Decision:** 16 July 2021

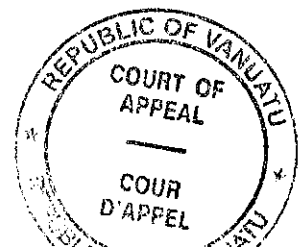
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**JUDGMENT**

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**Introduction**

1. The Vanuatu National Provident Fund (VNPf) requires all employers to pay to the VNPf appropriate contributions for and by all their employees each month. If the contributions are not paid the failure can attract a surcharge on the contributions unpaid (Section 26 Vanuatu National Provident Fund Act) and criminal sanctions (Section 50 Vanuatu National Provident Fund Act).
2. The Public Prosecutor brought two charges against the Luganville Municipal Corporation (LMC) alleging that in a period in 2015 (Count 1) and again in 2018 (Count 2) it failed to pay monthly contributions to the Board for a number of its employees.
3. The prosecution case came before the Supreme Court in 2021. The Judge of the Supreme Court concluded that the charges had been laid out of time (Section 15 Penal Code Act). Further, the Judge said that named employees of LMC had also been charged with offences against the VNPf Act. He concluded those employees were not criminally liable because they were not identified as being in positions of authority in the LMC (Section 53 VNPf Act). Accordingly, the Judge said that Section 53 of the VNPf Act was not engaged. As a result, the Judge dismissed all the charges.
4. The Public Prosecutor now appeals that dismissal.

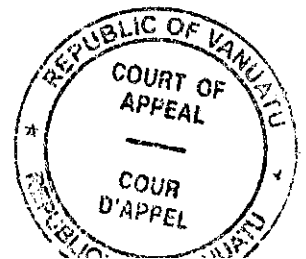


5. After discussion with counsel, the issues raised on appeal significantly narrowed. Counsel for the Public Prosecutor accepted that the charge in Count 1 was out of time and therefore should properly be dismissed as a nullity.
6. Counsel for the Public Prosecutor however, wished to pursue the appeal with respect to the dismissal of Count 2 as being out of time.
7. The Public Prosecutor also informed the Court that the Judge in the Supreme Court had misunderstood the extent of the criminal charges being faced. The Prosecutor confirmed that the two criminal charges were laid only against the LMC. Despite the Judge's decision the prosecutor said that no charges were laid against the employees of the LMC.
8. The Public Prosecutor laid three sets of charges against the LMC. The original charges were laid on 30 October 2020. The first amended charges were laid on 6 November 2020 and the second and final amended charges were laid on 26 November 2020.
9. The final set of charges on which the prosecution proceeded (the second amended charges) had two charges. The first Count alleged that the LMC, between April and August 2015, failed to make the deductions and payments required under the VNPf Act. The second Count was similarly framed but alleged the offending occurred in the months of January, April, May, August and October 2018.

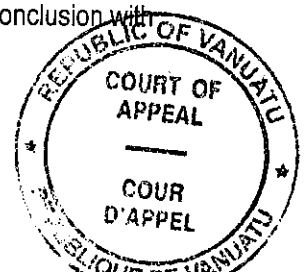
#### **Judgment appealed against**

10. Before the trial the Supreme Court Judge identified two preliminary issues. Whether there was a "time bar" for the charges to be laid and if so, whether the charges were out of time. The second issue the Judge identified was based on his understanding that as well as the LMC being charged, every member of the LMC's staff was also charged with the offences and so the issue arose as to whether those charges could be maintained.
11. When the trial commenced the Judge invited written submissions on the two points from counsel. Neither counsel complied with the direction which no doubt contributed to the confusion over whether employees of the LMC were in fact ever charged with any criminal offending. So, the Judge was not assisted by any counsel's submissions.
12. The Judge concluded that both counts were filed out of time. The Judge said that each of the two counts involved only a penalty of a fine in terms of Section 50 of the Vanuatu National Provident Fund Act. The Judge said at paragraph [20]:

"[20] Section 50 of the VNPf Act specifies the penalty for non-payment of contributions to be a fine. The alternative penalty is a term of imprisonment not exceeding six months, but the substantive penalty is a fine only. The offence is a statutory one as opposed to it being a criminal offence."



13. We are satisfied the Judge was wrong in his interpretation of Section 50 as having a penalty of a fine only as the substantial penalty.
14. As relevant, Section 50 of the VNPF Act provides as follows:
- “(1) Any person who...
- (c) *fails to pay to the Board any amount which under Section 26(1) is liable to pay in that month in respect of any employee.*
- shall ...*
- be guilty of an offence and shall be liable on conviction to a fine not exceeding VT100,000 or to a term of imprisonment not exceeding six months or to both such fine and imprisonment.”*
15. Section 50, therefore, makes it plain that the penalty for a failure to make deductions in terms of the statutory obligations under the VNPF Act is either a fine or imprisonment or a fine and imprisonment. The maximum term of imprisonment is six months. And so, it cannot be said as the Judge did, that the “*substantive penalty is a fine only*”. It is not. A person committing such a crime can be imprisoned for up to six months and can be fined.
16. Section 15 of the Penal Code Act provides for the relevant periods of limitation where a prosecution cannot be commenced.
17. Section 15(1)(b) provides as follows:
- “In the case of offences punishable by imprisonment for more than three months and not more than ten years – five years.”*
18. A prosecuting authority therefore has five years from the alleged criminal act within which to commence the prosecution where, as here, the maximum penalty includes a sentence of imprisonment of six months.
19. Applying that conclusion to the facts of this case shows that Count 1 was out of time and Count 2 within time.
20. Count 1 alleges the failure to deduct contributions from April 2015 to August 2015. The first set of charges were laid on 30 October 2020, between five years and six months and five years and two months after the alleged criminal conduct. And so, the Judge was correct to dismiss Count 1 as filed out of time although we have reached this conclusion for reasons that are different than the primary Judge.
21. Counsel for both the Appellant and Respondent accepted that this was the correct conclusion with respect to Count 1.



22. As to Count 2, the charges alleged a failure to make the required deductions in various months of January to October 2018. These charges were first filed in October 2020, well within the five-year limitation period.
23. The Judge was therefore wrong to dismiss these charges based on the time bar rules in Section 15 of the Penal Code Act. They were filed well within five-year limitation period. Once again, counsel for the Appellant and Respondent accepted that was the correct conclusion.

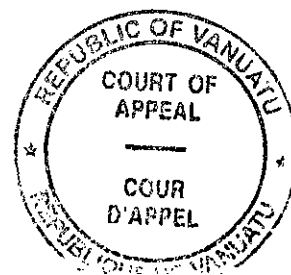
## **Second issue**

24. The Judge identified the second issue as to whether or not the named 61 persons in the two charges were criminally responsible by virtue of their liability as officers of LMC.
25. Counsel for the Public Prosecutor said they had never intended to prosecute any of the employees of LMC. The list of names contained in the charge were simply a list of employees who had not had the appropriate deductions made and paid by the LMC to the VNPF. The Judge therefore had been wrong to even consider such a matter.
26. The Respondent agreed.
27. We accept the Appellant and Respondent's submissions that the employees did not face any criminal charges. We note that the Judge's confusion could easily have been avoided if counsel for the prosecuting authority and the LMC had filed submissions as the Judge asked.
28. One further matter arose during the course of the Respondent's submissions. The Respondent raised what was effectively a new matter in support of the Judge's decision to dismiss Count 2.
29. Counsel submitted that LMC was not criminally responsible because for a successful prosecution of any failure to make the relevant deductions the Appellant had to name an individual within the LMC who would be the person charged with the crime. Counsel submitted the prosecution could not proceed against the LMC by name.
30. The basis of that submission was Section 64 of the Municipality Act. It states:

*"Section 64 representation of counsel in Courts -*

- (1) *In any prosecution by or on behalf of the Council, the Council may, subject to any directions of the Public Prosecutor, be represented by the clerk or by any officer of the Council authorised by him in writing to do so."*

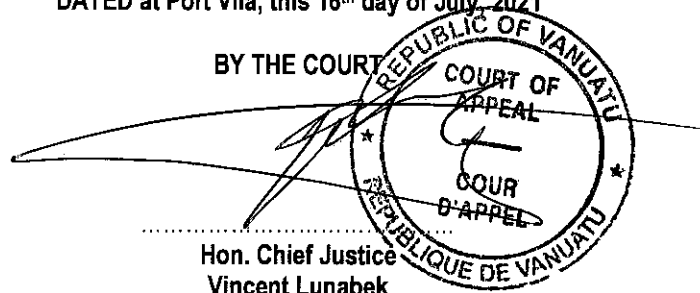
31. Counsel submitted that in fact the prosecution should not have been against the LMC but either the Lord Mayor or the Town Clerk at the relevant time.



32. We reject this submission. It confuses representation in Court with criminal liability. As Section 18 of the Penal Code Act notes, a Corporation can be "*criminally liable to the same extent as a natural person*".
33. Section 64 is not concerned with who might be liable for prosecution but who can represent a Corporation in litigation involving civil and criminal cases. Self-evidently, a Corporation must be represented by a person in Court. Ordinarily that is a person who has appropriate authority to do so. Here, Section 64 identifies who that person should be for municipalities.
34. We therefore reject the submission that Count 2 could not allege criminal conduct against the LMC.
35. We are satisfied the prosecution correctly charged LMC in Count 2.
36. In summary the appeal against the dismissal of Count 1 as being out of time is dismissed.
37. The appeal against the dismissal of Count 2 is allowed, the count is reinstated and may now proceed to trial.
38. We record the employees of LMC have never been charged with any crime arising from the alleged failures to make VNPf deductions by LMC in 2015 or 2018.
39. Finally, we wish to record that counsel for the Appellant was not appropriately prepared for this appeal. He did not have command of the relevant facts or the relevant law. It is our expectation that counsel appearing before the Court of Appeal will be thoroughly familiar with both.

DATED at Port Vila, this 16<sup>th</sup> day of July, 2021

BY THE COURT



Hon. Chief Justice  
Vincent Lunabek