

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

**Criminal Appeal  
Case No. 23/1797 COA/CRMA**

**BETWEEN:** **IPAK INVESTMENT LIMITED**  
Appellant

**AND:** **PUBLIC PROSECUTOR**  
Respondent

**Date of Hearing:** **9 November 2023**

**Coram:** **Hon. Acting Chief Justice Oliver A. Saksak**  
**Hon. Justice Dudley Aru**  
**Hon. Justice Mark O'Regan**  
**Hon. Justice Richard White**  
**Hon. Justice Edwin P. Goldsbrough**  
**Hon. Justice William K. Hastings**

**Counsel:** **J Boe for the Appellant**  
**K Nathan for the Public Prosecutor**

**Date of Judgment:** **17 November 2023**

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**JUDGMENT OF THE COURT**

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**Introduction**

1. The appellant, Ipak Investments, was found guilty in the Magistrates' Court and convicted on five charges of failing to pay monthly employees' contributions to the Vanuatu National Provident Fund, contrary to s.50(1)(c) of the Vanuatu National Provident Fund Act [CAP. 189].
2. The issue the Magistrate had to resolve was whether the appellant, which provided funds to the Custom Land Owners Steering Committee (CLOSC) to find and pay workers to clear land on which a resort was to be built, or CLOSC, was the employer of the five workers. Having considered the evidence, the Magistrate found that an employment relationship existed between the appellant and the five workers. The appellant was therefore liable to pay the monthly employees' contributions. The Magistrate returned a guilty verdict and convicted the appellant.
3. In the course of the trial, the Magistrate considered a "Memorandum of Collaboration" signed in 2019 which purported to establish that CLOSC employed the five workers, and that as a result, the



appellant was not liable to pay the employees' contributions. The Magistrate said "*the written Memo signed in 2019 between Ipak Investments Limited and CLOSC is not considered by the Court as it cannot be interpreted retrospectively to include actions and decisions that occurred prior to the date of its signature*". It is not clear if the Magistrate ruled the Memorandum inadmissible, or whether she admitted it but gave it little weight.

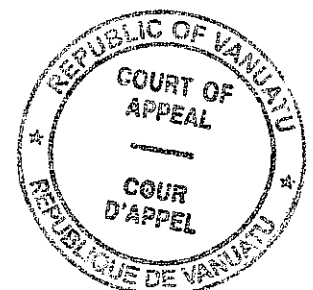
4. The appellant appealed the Magistrate's verdict to the Supreme Court (*Ipak Investment Limited v Public Prosecutor*, [2023] VJSC 218).
5. The appellant argued in the Supreme Court that the Magistrate misunderstood the evidence, and that there was insufficient reasoning to support the verdict. The Supreme Court Judge found that the Magistrate understood the evidence correctly, provided sufficient reasoning to support the verdict, and agreed with the Magistrate that the 2019 memorandum could not be used retrospectively to explain what the business arrangement was between Ipak and CLOSC in the relevant years.

#### Leave to appeal

6. A matter commenced in the Magistrates' Court which has been appealed to the Supreme Court requires the appellant to obtain leave from the Court of Appeal for a further appeal. Section 30 of the Judicial Services and Courts Act 2000 states:

*(4) The Supreme Court is the final court of appeal for the determination of questions of fact. However, an appeal lies to the Court of Appeal from the Supreme Court on a question of law if the Court of Appeal grants leave.*

7. Section 201 of the Criminal Procedure Code [CAP. 136] requires that every appeal shall be brought by notice in writing within 14 days of the order appealed against.
8. Counsel for the appellant Mr Boe did not file and serve a written application for leave to appeal. We instead heard an oral application. This was an indulgence and is not to be taken as permission or the establishment of a rule of practice. He submitted that the Supreme Court Judge erred in not recognising that the Magistrate misunderstood the evidence, and that the Supreme Court Judge erred in not finding that the Magistrate was wrong not to consider the 2019 Memorandum.
9. The first ground of appeal advanced by Mr Boe is not a question of law. Whether or not the evidence was misunderstood is a question of fact.



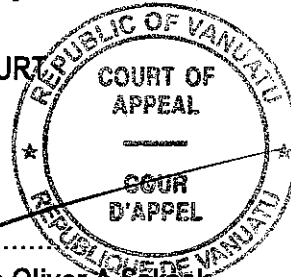
10. If the 2019 Memorandum was admitted into evidence but given little weight, the second ground of appeal does not disclose a question of law either. It was for the Magistrate to decide what weight to give it. If the Magistrate effectively ruled the 2019 Memorandum inadmissible, then a question of law regarding its admissibility may arise. An agreement purporting to have retrospective effect may be admissible if it captures an earlier oral agreement. However, given the circumstances of its making and the paucity of evidence that it reflected an earlier oral agreement, we are of the view that very little weight would have been given to the 2019 Memorandum in any event. The appeal therefore has little prospect of success.

**Result**

11. For these reasons, leave to appeal to this Court is declined.
12. Costs in the agreed amount of VT75,000 are awarded to the respondent.

**DATED at Port Vila, this 17<sup>th</sup> day of November, 2023.**

**BY THE COURT**



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**Hon. Acting Chief Justice Oliver A Saksak**