

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No. 345 of 2017

BETWEEN: MOLEAN KILEPAK
Claimant

AND: MELANESIAN SPEARHEAD GROUP
First Defendant

AND: AMENA YAUVOLI
Second Defendant

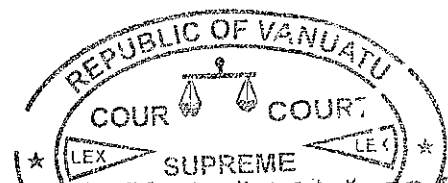
Conference: 23rd March 2017
Before: Justice Chetwynd
Counsel: Mr Napuati for the Claimant
Mr Leo for the Defendants

Decision on Preliminary Issue

1. The Claimant Molean Kilepak ("Mr Kilepak") was employed by the Melanesian Spearhead Group ("MSG") as a Deputy Director General on or about 25th March 2014. He had a three year contract which expires in March 2017. The Second Defendant ("Mr Yauvoli") is the Director General of MSG. At the risk of insulting the reader, MSG is an intergovernmental organization, composed of the four Melanesian states of Fiji, Papua New Guinea, Solomon Islands and Vanuatu together with the Kanak and Socialist National Liberation Front of New Caledonia. It was formed to promote economic growth among Melanesian countries. The stated purposes of the group are:

1. To promote and strengthen inter membership trade, exchange of Melanesian cultures, traditions, values and sovereign equality;
2. To foster economic and technical cooperation between the members; and
3. To align member country's policies and further member's shared goals of economic growth, sustainable development, good governance and security.

2. The MSG Secretariat ("the Secretariat") is the administrative arm of the organisation and was established by an agreement first made in 2008. There was a revised agreement in 2015 which acknowledges the Secretariat was formed to provide for the "purpose and operation" of the MSG. The Secretariat is based in Port



Vila. That arrangement was facilitated by way of an agreement between the Government of the Republic of Vanuatu and MSG and made on 10th January 2013. A copy of the Host Country Agreement is annexed to the sworn statement of Mr Yauvoli filed on 24th February 2017. I will return to that agreement shortly.

3. In June 2016 the MSG governing body agreed there was a need to conduct a study concerning the possible restructuring of the Secretariat. That study resulted in a report being published by an organisational development and HR consultant in December 2016. Without going into great detail and in general terms, the report recommended reductions in salaries and non-renewal of contracts of employment of certain staff members. According to the Claim filed on 20th February 2017 the salary reductions were effected from 1st January 2017. By a letter dated 10th February the Claimant was also "instructed/forced" to go on leave. The Claimant seeks to have his contracted salary paid and other ancillary orders.

4. There is need for a preliminary issue to be resolved. Alternatively the defendants have applied for an order the proceedings are dismissed.

5. The Host Country Agreement referred to earlier states at Article 5:-

ARTICLE 5

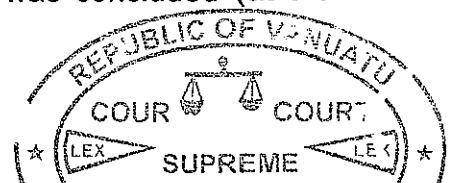
1. The Secretariat shall be immune from suit and legal process and its premises, archives and property shall be inviolable.

There are a further 8 sub articles in Article 5 which deal with exemption from taxes and duties, staff immunity, import freedoms and other such matters which are commonly dealt with under the heading Diplomatic Immunity. The Host Country Agreement specifically refers to the 1963 Vienna Convention on diplomatic privileges.

6. Unfortunately, the provisions of the Host Country Agreement mean that the Claimant cannot sue either MSG or Mr Yauvoli in Vanuatu. Both MSG and Mr Yauvoli are immune from suit in Vanuatu.

7. There was some suggestion that because the appropriate Order under the Diplomatic Privileges and Immunities Act [Cap 143] was only made in 2015 (by Order 35 of 2015) and because the Claimant entered into the employment contract with MSG in 2014 he was not caught by the immunity from suit provision. His contract had been entered into before Diplomatic Immunity was implemented. That is not correct.

8. Article 5 of the Host Country Agreement can stand on its own. It needs no formal confirmation under the Diplomatic Privileges and Immunities Act. The agreement between the Republic of Vanuatu and the MSG was concluded (at the



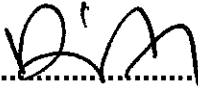
latest) in January 2013 and applies from that date. Whether there was an earlier agreement is irrelevant. If there was a later agreement then it would only be relevant to the extent that it revoked any provision of the 2013 agreement. There are no submissions to that effect. In short the 2013 agreement still applies.

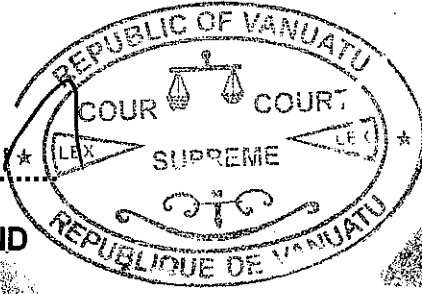
9. The end result of my finding that both defendants have immunity from suit in Vanuatu is that the Claim cannot possibly succeed and must be and is hereby dismissed. I bear in mind the comments of the Court of Appeal in *Noel*¹ and in *Kalses*² that the power to strike out proceedings must be used sparingly and only if the Claimant's case "*is clearly untenable*". The Claimant has been unable to advance any reason why the Diplomatic Immunity provided by the 2013 Host Country Agreement would not apply to the defendants. Unfortunately that means his claim is clearly untenable.

10. So far as costs are concerned the equitable result is that there should be no order for costs.

DATED at Port Vila, this 6th day of April 2017

BY THE COURT


.....
D. CHETWYND
Judge



¹ *Noel v Champagne Beach Working Committee* [2006] VUCA; CAC 24-06 (6 October 2006)

² *Kalses v Le Manganese de Vate Ltd* [2004] VUCA 8 Civil Appeal 34 of 2003 (11 June 2004)