

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

Civil Appeal Case No. 2 of 2010

**BETWEEN: VANUATU COMMODITIES MARKETING
BOARD**

Appellant

AND: CLAIRE DORNIC t/as CL AGENCIES
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice John von Doussa
Hon. Justice Nevin R. Dawson
Hon. Justice Daniel Fatiaki*

Counsel: *Mr. A. Jenschel for the Appellant
Mr. F. L. T. Kabini for the Respondent*

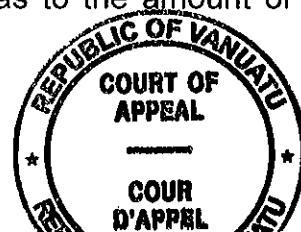
Hearing Date: *19th and 26th April 2010*

Decision Date: *30th April 2010*

JUDGMENT

1. The Appellant moves by way of appeal that:
 - (i) The whole of the judgment of Saksak J. of 17th December, 2009 be set aside;
 - (ii) That Civil Case No. 46 of 2008 be remitted to a different judge for assessment of quantum;
 - (iii) The Respondent pay the Appellants costs of appeal.

2. A short background to this matter is that the Respondent is a grower and exporter of copra and with the fall in world prices for copra, the Appellant agreed to pay a subsidy to copra growers. The amount of that subsidy varied from time to time. The parties are in dispute as to the amount of subsidy the Appellant should pay to the Respondent.



3. This appeal relates to the events that have taken place since the decision of this Court of Appeal dated 30th October 2009. The decision determined that the Respondent was entitled to received a subsidy but its quantum need to be determined.
4. As part of that decision this Court imposed the following conditions:-
 - (a) The Appellant was to file a Statement of Defence within 14 days of 30th October 2009;
 - (b) The amount of VT5,347,279 transferred from the Appellants bank account would continue to be held by the Respondent as an advance payment on the amount of subsidy owed to the Respondent;
 - (c) Interest on the unpaid subsidy amount would run at 5%.
5. The Appellant did not file a Statement of Defence in the time period specified.
6. In an Application filed in the Supreme Court on 27th November, 2009 the Respondent applied for judgment for a subsidy entitlement of VT291,974,662 plus interest at 5%. This was more than the sum this Court previously thought was sustainable. On the 8th December, 2009 the Court issued a Notice of Hearing for a hearing date of 15th December 2009. On the 15th December, 2009 the Court issued a further Notice of Hearing for a hearing to be held on Thursday 17th December, 2009. Under Rule 7.3 (2) of the Civil Procedure Rules the Respondent was required to serve the Appellant with the Application 3 days prior to the hearing date. The Appellant was in fact not served until Tuesday 15th December, 2009. The Interpretation Act [CAP. 132] says:-

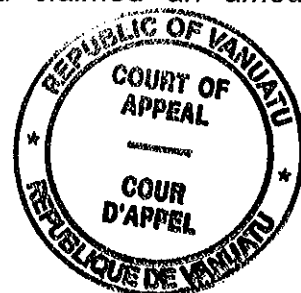
"33. Computation of time etc.

(1) In computing time for the purpose of an Act of Parliament –



(a) a period of days from the happening of an event or the doing of any act or thing shall be exclusive of the day in which the event happens or the act or thing is done."

7. The 3 days did not expire until the end of Friday 18th December, 2009, and therefore the hearing could not take place before Monday 21st December, 2009.
8. The Appellant had a lawyer in Santo on the 17th December, 2009 on another matter and she sat in at the hearing but was not familiar with the details and was unable to contribute meaningfully to the hearing beyond requesting an adjournment which was declined by the judge.
9. The figure of VT291,974,662 claimed by the Respondent was accepted by the judge who entered judgment in favour of the Respondent for VT291,974,662 with interest at 5%. That amount was calculated by assuming the subsidy amount was VT10,000 per tonne up to 19th August, 2008 and VT13,000 per tonne thereafter. The volumes were as asserted by the Respondent.
10. This Court indicated at the beginning of this appeal hearing that the judgment amount entered in the Supreme Court could not be sustained. The Appellant was not served by the Respondent 3 days prior to the hearing. The calculation of the subsidy amount claimed was not supported by the evidence. The sworn statement of Gabriel Bani dated 29th July 2010 says at paragraph 18:-
 - "(ii) Copra weight need to be substantiated;*
 - (iii) Copra subsidy was not granted during certain times within the duration of time claimed by the Claimant;*
 - (iv) The subsidy grants vary from VT7,000 to VT10,000 per tonnage, whereas the Claimant had claimed an amount of VT10,000 per tonnage."*

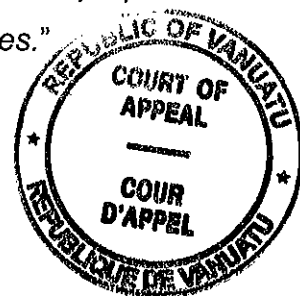


11. A further sworn statement of Gabriel Bani dated 14th September, 2009 says at paragraph 5 (b):-

"(b) The subsidy was not VT10,000 p/t. It was in fact VT3,000 p/t from January 2008 to June 2008 and then VT13,000 for the month of August only. There was no subsidy for the balance of the year. What I said in my sworn statement dated 29th July 2009 was incorrect. I only discovered the error recently when providing instructions to the State Law Office ."

12. Judgment against the Appellant has therefore been entered on incorrect interpretations of the evidence and for a large and excessive amount. For these reasons and because of the inadequate notice given to the Appellant, the judgment of the 17th December, 2009 cannot be maintained.
13. 18th December, 2009, (the day following entry of judgment) the judge issued an Enforcement Warrant (Money Order). It noted that the Court had issued an Enforcement Warrant on 18th September, 2009, that VT5,347,270 had been paid to the Respondent, and it was due to expire on 18th December, 2009. The judge extended the original Warrant to 18th March, 2010 and:-

- (a) Included the Judgment Debt of VT291,974,662 from the decision of 17th December, 2009, plus interests and enforcement costs, less the VT5,347,270 already seized to arrive at a figure of VT301,416,865;
- (b) Amongst other authorizations, directed the Vanuatu Financial Services Commission to transfer shares owned by VCMB in Vanuatu Coconut Product Limited (VCPL) into the Respondent's name.
- (c) Directed the Assistant Sheriff to ensure that the Respondent *"maintains security for the VCPL premises and properties to avoid any unlawful dealings with the said properties."*



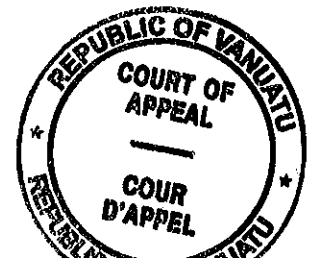
14. An order in these terms cannot be made by the Court. A judgment creditor is not entitled to simply received the property of a judgment debtor by that type of transfer. Nor can the possession of a building leased by the judgment debtor be handed over to the judgment creditor. This Court has previously set out the requirements for seizure and sale of property in Financière du Vanuatu Ltd. v. Morin [2008] VUCA 4 Civil Appeal Case 05 of 2008 (30 April, 2008 as follows:-

"In our view, that document has significant defects by reason of the following requirements of the Rules:-

- (1) As the document was for the seizure and sale of property, it had to be given to an enforcement officer: Rules 14.13 (2) and 14.16 (2), who is defined in Rule 14.1 as the Sheriff or a police officer.*
- (2) An Enforcement Warrant may authorize only an enforcement officer (as defined) to seize and sell real or personal property of an enforcement debtor: Rule 14.16 (1), and only the enforcement officer may seize and take control of the property: Rule 14.16 (3).*
- (3) The enforcement officer (as defined) must sell the seized property by public auction, unless the Court otherwise orders, and must endeavour to get the best price reasonably obtainable: Rule 14.18, and must advertise the sale: Rule 14.19.*
- (4) The enforcement officer (as defined) must pay the proceeds of sale to the Court, which then pays first the enforcement officer the costs of enforcing the sale, then the judgment creditor, and finally the balance to the judgment debtor: Rule 14.21.*
- (5) An Enforcement Warrant must also state the date the warrant ends: Rule 14.13 (1) (b) and the amount recoverable under the warrant: Rule 14.13 (1) (c)".*

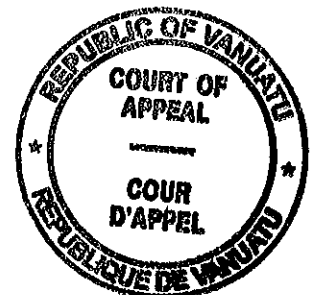
15. Rule 14.18 (1) says:

"Unless the court orders otherwise, the enforcement officer must sell the seized property by public auction."



16. The words “*unless the court orders otherwise*” cannot be taken to mean that a judge is empowered to order the transfer of ownership of property or possession of property direct to a judgment creditor. Its purpose is to allow the judge to consider the best way to sell the assets eg. by tender. Regardless of the method of sale ordered the enforcement officer must account for the proceeds of sale to the Court: Rule 14.21.
17. A practical difficulty that arose from the Assistant Sheriff taking over the VCPL premises was that the Appellant lost access to its records which show the subsidy amounts the Appellant would pay, the applicable dates for the varying rates of subsidy, and the tonnages of copra. This impasse has not been resolved by the parties but by any measure the steps taken to enforce the judgment by such precipitate action was wholly unsustainable.
18. Notwithstanding the difficulties it faced due to not having access to all its records, the Appellant has been able to construct a schedule of dates for the subsidy period, quantity of copra produced by the Respondent and the applicable subsidy rates, principally from the Ombudsman's Report dated 1st December, 2009, as attached to the Sworn Statement of Godden Avock, dated 5th February, 2010. From this information a calculation can be made of the amount due to the Respondent, as follows:-

	% of the month	Qty/Tonne	Subsidy rate	Totals	Int. @ 5%
May 07					
1-10 May	0.323	2883.879	6000	5,588,958	
11-31 May	0.677	2883.879	1000	1,952,386	
Jun 07		1494.258	1000	1,494,258	
Jul 07					
1-19 Jul	0.613	2059.845	1000	1,262,685	
20-31 Jul	0.387	2059.845	0	0	
Jan 08		831.605	3000	2,494,815	
Feb 08		1618.763	3000	4,856,289	
Mar 08		1802.67	3000	5,408,010	
Apr 08		1983.669	3000	5,951,007	
May 08		2604.187	3000	7,812,561	
Jun 08		2057.554	3000	6,172,662	
Jul 08		1066.057	3000	3,198,171	
Aug 08					
1-18 Aug		0.581	3000	2,469,604	



19-31 Aug	0.419	13000	7,717,691 56,379,096		
				Nov 08 – Nov 09	2818378.068
				Nov 09 – Apr 10	1327456.07
					4145834.138
					60,524,930.14
			Less ADJ (Bank account money)		5,437,270
			Int @ 5%		158,496.4205
					5,595,766.421
					<hr/> 54,929,164

19. The parties both previously and again during this appeal have been encouraged to pool their knowledge as to dates, tonnages and subsidy amounts applicable, and to do the necessary arithmetic to calculate the figure to be paid by the Appellant to the Respondent. They have not been able to achieve that outcome.

20. This case is long overdue for resolution and there does not appear to be any further or better information ever likely to be available beyond what has now been set out in paragraph 17 above. Normally an appeal Court would remit the matter for further hearing but we can see no point in doing so.

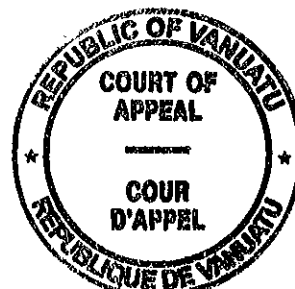
21. This Court therefore quashes the order of the Supreme Court dated the 17th December 2009 and enters judgment in favour of the Respondent for the sum of VT54,929,164 as at 26th April, 2010 plus interest at the rate of 5% per annum until the date of payment. This amount and interest accrued is to be paid in full by 20th May 2010.

22. This Court also quashes the Enforcement Warrant (Money Order) dated 18th December 2009 and directs that all assets, property possession and shares in VCPL to be returned to the Appellant immediately. The Enforcement Warrant dated 18th September, 2009 is not affected by this direction. The VT5,347,270 paid to the Respondent pursuant to that Enforcement Warrant remains the property of the Respondent, and a

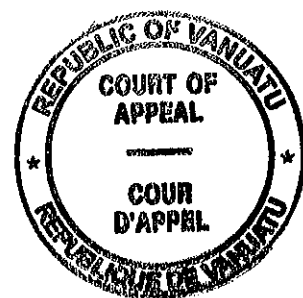


credit for that amount has been allowed for in the calculation in paragraph 17 herein.

23. During the time the Respondent was in possession of the premises of VCPL, it paid the sum of VT296,322 for two months of rental arrears unpaid by the Appellant. The Respondent also paid the sum of VT759,460 for the insurance premiums relating to the premises and chattels of VCPL. As the Enforcement Warrant (Money Order) dated 18th December, 2009 has been quashed and the Respondent is not entitled to be in possession of these premises, it is necessary for the Respondent to be repaid these amounts, totaling VT1,055,782. This Court therefore orders the Appellant to pay to the Respondent the sum of VT1,055,782 plus interest at the rate of 5% per annum from 30th April, 2010 up to the date of payment. This amount is in addition of payment set out in paragraph 22 and is also to be paid no later than 20th May, 2010.
24. Both parties have been in error during these proceedings since this Court's decision on 30th October, 2010. The lack of communication between them to establish the necessary facts upon which this claim is based and payments due is astonishing. This matter appears to have developed a life of its own where its purpose has become the contest instead of its resolution.
25. The Appellant was in error in failing to observe the direction of this Court to file a Statement of Defence within 14 days of 30th October, 2009. Much of the following proceedings would have been unnecessary if it had.
26. The Respondent has been in error in:-
- (i) filing an Application for an order for judgment in the Supreme Court which it failed to serve upon the Appellant 3 days prior to the hearing date;



- (ii) misleading the Supreme Court as to the subsidy claimed from the Appellant by applying for a subsidy at a rate unsupported by the evidence;
 - (iii) Seeking an Enforcement Warrant (Money Order) based upon the wrong amount referred to in (ii) above;
 - (iv) Obtaining under the Enforcement Warrant (Money Order) dated 18th December, 2009 a transfer of shares to the Respondent in a privately owned company (VCPL).
27. Both parties must share responsibility for the conduct of these proceedings since this Courts decision on 30th October, 2009. Each party will therefore be responsible for its own costs since that date.
28. The purpose of civil litigation like this in the Courts is to achieve a just resolution of a dispute. It is premised on the fact than an independent and impartial Judge will have placed before them all material which the parties can establish is relevant. The opposing party must know what they have to be able to answer or respond to ahead of the hearing and must be provided with the opportunity to challenge it and provide other relevant material.
29. Ambush by stealth is no part of the legal system. Having hearings without proper service and without sufficient notice in the long run gains nothing. Where a party fails to appear at a hearing the Court should not proceed to hear the case until it has sufficient proof that there has been proper service on all parties effected in a timely manner.
30. Where the lawyer for a claimant has a date of hearing the sensible and responsible practitioner will at least a week before telephone the lawyers for other parties to ensure they know the case is on and that everyone is prepared for a hearing which will get to the issues so the Court can provide a just answer.



31. All participants must provide evidence and submissions to the other parties before they come to Court.
32. Judgments which will withstand appeal on issues of process need to have been obtained strictly in accordance with the Rules and after there has been a sensible opportunity for all interested and effected parties to be considered.
33. Every year millions of vatu of litigants money is wasted because of matters not being properly presented and advanced. That is an abuse of the client's position and a waste of the finite judicial resource.
34. The appeal is allowed with the consequences noted in paragraphs 21, 22 and 23 of this judgment.

DATED at Port Vila, this 30th day of April, 2010.

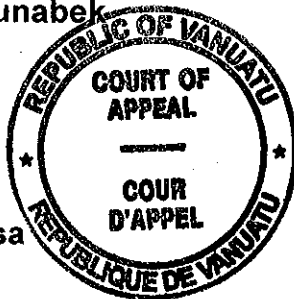
BY THE COURT

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Chief Justice Vincent Lunabek

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Justice J. Bruce Roberston

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Justice John von Doussa

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Justice Nevin R. Dawson



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Justice Daniel Fatiaki