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

Civil Appeal Case No. 19/1682 COA/CIVL

BETWEEN: Willie Kalia

Appellant

AND: Jimmy Toara as administrator of the Estates of the late Toara Seule and Tompson Seule

Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John Hansen*** ***Hon. Justice Richard White*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Gustaf Andrée Wiltens*** ***Hon. Justice Viran Molisa Trief***
Counsel:	***Pauline K Malites for the appellant*** ***Daniel Yawha for the respondents***
Date of Hearing:	***11th February 2020***
Date of Judgment:	***20th February 2020***

JUDGMENT

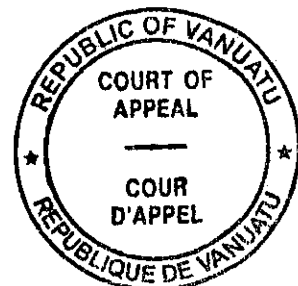
Introduction

1. The appellant sought leave at the call-over conference on Monday 10th February 2020 to appeal against three different judgments-

    a) Judgment of the Master dated 24th August 2017 striking out the appellant's defence for non-compliances with Court's directions and orders.

    b) The order dated 27th November 2017 issued by Justice Chetwynd in the Supreme Court, dismissing the appeal against the Master's judgment and

    c) Judgment on the assessment of damages dated 17th May 2019 issued by Justice Felix in the Supreme Court.



2. At the call-over conference the Court pointed out to Mrs Malites there was no right of the appeal to this Court against the judgments of the Master and Justice Chetwynd. Mrs Malites accepted the proposition and withdrew the appellant's application for leave in relation to those two judgments.

3. We granted leave to the appellant to be heard in relation to the judgment on damages issued by the Supreme Court on 19th May 2019. The action at first instance involved a claim for damages in respect of the partial destruction of a fence and the consequential loss of the cattle.

4. The judge awarded general damages to the respondents in the sum of VT 2,500,000 and, in addition costs in the sum of VT 50,000 to each of the two respondents.

The Facts

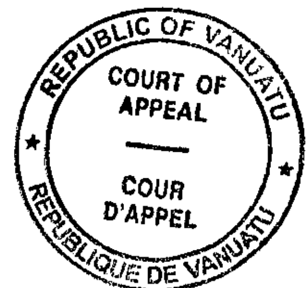
5. Toara Seule and Tompson Seule were the original claimants in Civil Case No. 91 of 2008. Both of them are now deceased. Jimmy Toara applied for probate and has been granted letters of administration of the estate of the deceased. He is now the current respondent in this appeal. In order to make these reasons more understandable, we will refer to the late Toara Seule and Tompson Seule as the respondents.

6. The respondents lived at Epule Village, North Efate. In the 1960s they had obtained consent from the custom owners to settle at Epule. They started a cattle farm in the 1970s, erecting fences and raising cattle.

7. In early October 2007, the appellant entered the land and damaged the cattle fence by cutting the posts supporting it. This allowed the respondents' cattle to stray, causing loss. The appellant damaged the fence further on 25 December, 2007.

8. The respondents damaged and replaced the damaged fences. They hired relatives for this work, paying them for their labour and feeding them for the periods of work. Their original claim was VT 5,525,000 made up of-

   (a) Fuel (Benzine)- VT 250,000
   (b) Oil- VT 100,000
   (c) Stolen or lost cattle- VT 2,500,000



(d)	Damaged barbed wire (500 metres)-	VT 52,000
(e)	Staples and nails-	VT 6,000
(f)	Escaped cattle-	VT 2,500,000
(g)	Food at 1,500vt per day for 78 days -	VT 117,000

	TOTAL	**VT 5,525,000**

9. For these amounts the respondents relied on a report from an inspector employed in the Vanuatu Livestock and Quarantine Department following his inspection of the damage on 10 October 2007.

Judgment appealed

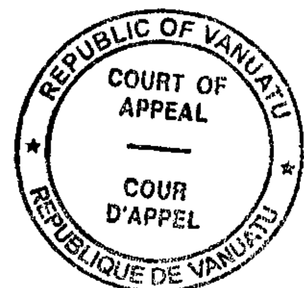
10. The Judge assessed these claims on 17th May 2019 and awarded general damages for VT 2,500,000. In doing so he referred to the paucity of evidence from both parties. But he also recorded that both parties were insistent that the assessment proceed on the limited material provided.

11. The appellant appeals against that assessment on grounds that the amount is excessive and that there was no evidence in support of the amount.

Submissions

12. Mrs Malites submitted that the damages awarded by the judge were excessive and that the proper amount should only be VT 70,000. Counsel further submitted that the respondents had undertaken the risks involved in erecting new fences after they had been served notice by the appellant contesting their right to occupy the cattle farm. In that circumstance the respondent should be liable for their own losses. Further, counsel submitted there was no, or no sufficient evidence to support the amount of damages awarded by the judge.

13. Mr Yawha on the other hand submitted that in all the circumstances of the case the judge's award of VT 2,500,000 was fair and reasonable and that it should be upheld by this Court.



Discussion

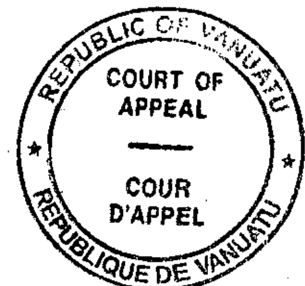
14. Mrs Malites accepted the appellant had admitted damaging the respondent's fences on at least two occasions. Counsel further accepted that the judge had awarded damages for the damaged fence but not for the lost cattle. This was evident in paragraph 1 of the judgment in which the Judge said *"the assessment of damages will be made only in relation to the cattle project and in particular the fence"*. Paragraphs 3, 9 and 11 of the judgment are to the same effect.

15. In making his assessment the judge considered the sworn statements and submissions filed by Counsel in support of the claims and defences but only those regarding the damage to the fence.

16. In general, the correct approach in a case like the present is to award the Claimant such damages as will reasonably put the Claimant back into the position he would have been had the defendant not engaged in the wrongful conduct. In this case, this could have involved the judge awarding damages to the claimants for the cost of repair or replacement of the damage to the fence and damages for the value of the cattle which strayed and were not recovered. However, as the judge was not satisfied that the respondents had proven a loss of cattle, no damages could be awarded on that aspect of the claim.

17. It is for the appellant to satisfy the Court that the award of VT 2,500,000 million for general damages was excessive. A number of matters bear on this exercise.

18. The first is that the appellant admitted damaging the respondent's fences. Secondly, the damage was substantial as the photos attached to the Inspector's report indicate. Thirdly, it is obvious that the replacement fence had to be solidly constructed if it was to be strong enough to hold cattle. Fourthly, despite the appellant's claim that the respondent should not be compensated for the cost of replacing an old fence with a new one, the respondents had no choice but to erect a new fence. It would not have been practical for the respondents to have erected a replacement old fence. This being so, there is no scope for the application of the " betterment" principle discussed in Harbutt's Plasticine v Wayne Tank & Pump Co. [1970] 1Q3 447, 468, 472-3 and 476.



19. It is to be remembered that the judge also assessed damages in respect of the damage caused by the appellant in the second incident on 25 December 2007. Although the judge was not prepared to accept in full the evidence of the inspector as there were no receipts produced in support, we note that the inspector was independent of both parties and his evidence confirmed that the appellant had caused substantial wanton damage to the fence with some 500 metres of fencing suitable for the holding of cattle having to be replaced because the posts had been cut at their base by a chainsaw.

20. The judge's approach to the assessment is seen in [10] of the judgment as follows-

"In determining the amount to be awarded, I take into account the following factors:

a. The time period spent in developing the cattle project and building the fence which started around 1970 according to the claimants.

b. The length of the fence damaged by the Defendants which is 500 meters according to the Claimants' evidence.

c. The general assessment report submitted by the Livestock Department.

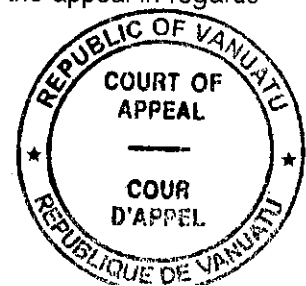
d. The risks taken by the Claimants in extending their fence onto a land that is disputed by the Defendants."

21. There was no error in principle in the judge awarding general damages by way of a lump sum.

22. The parties had agreed that the judge should make the best assessment he could on the limited materials provided. It is almost inevitable in such a case that a judge will have to make a broad assessment. This Court should not readily permit litigants who have requested a judge to proceed in that way to complain on appeal about the outcome.

23. Having regard to all these matters, the judge's assessment and award of general damages of VT 2,500,000 has not been shown to be excessive. Accordingly we uphold that part of the judgment.

24. However, we do need to make a correction to the costs award. Initially there were two claimants. Both of them died and the proceedings were continued by their sole administrator Jimmy Toara. Moreover, the respondents had common representation at the trial .The respondents should therefore receive one set of costs only. Accordingly the appeal in regards



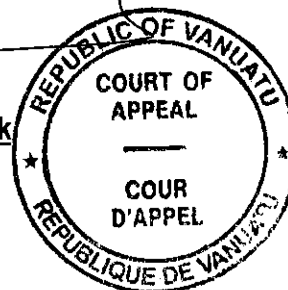
to costs is allowed and there will be an order for costs of VT 50,000 to the claimant in the Court below.

The Result

25. The result of the appeal is that-
    a) The appeal is allowed so as to set aside the order with respect to the costs of the proceedings at first instance,
    b) In place of that order, the appellant is to pay the respondents costs in the proceedings in the Supreme Court fixed in the sum of VT 50.000 for both respondents,
    c) Otherwise the appeal is dismissed.
    d) The appellant is to pay the respondents' costs of and incidental to the appeal fixed in the sum of VT 25,000.

DATED at Port Vila this 20th day of February 2020

BY THE COURT



Hon. Vincent Lunabek

Chief Justice