

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

Civil Appeal
Case No. 21/914 CoA/CIVA

BETWEEN: Joshua Kalsakau
Appellant

AND: ANZ Bank (Vanuatu) Limited
Respondent

Date of Hearing: 11 May 2021

Coram: Hon. Chief Justice V. Lunabek
Hon. Justice R. Asher
Hon. Justice R. White
Hon. Justice O. Saksak
Hon. Justice D. Aru
Hon. Justice V.M. Trief

In Attendance: Mr M. Fleming for the Appellant
Mr M. Hurley and Mrs C. Hamer for the Respondent

Date of Judgment: 14 May 2021

JUDGMENT

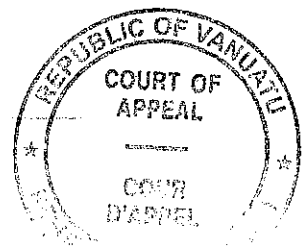
A. Introduction

1. This is an appeal against the dismissal of the appellant Joshua Kalsakau's damages claim against the respondent ANZ Bank (Vanuatu) Limited (the 'ANZ Bank'). Mr Kalsakau had alleged that the ANZ Bank had improperly repossessed an excavator that belonged to him rather than to his company Maltauriki Trans Ifira Developments Limited ('MTI Developments'). The ANZ Bank counter-claimed for loan monies owed by Mr Kalsakau. After trial, the primary Judge dismissed the Claim and entered judgment for the ANZ Bank on the counter-claim. He ordered Mr Kalsakau to pay the ANZ Bank's costs on an indemnity basis.

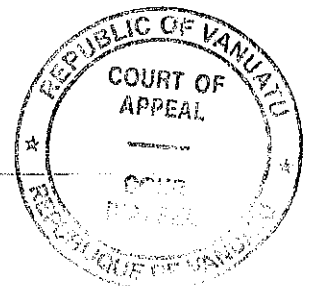
B. Background

2. The facts were set out as follows by the primary Judge:

5. In 2014, Mr Kalsakau ran an earth-moving company while also being a Member of Parliament. To start with, while the business was a small enterprise, he operated it informally. It was only on 17 November 2014 that the business commenced to operate a bank account in the name of MTI Developments. Until then, all the company's finances had been intermingled with Mr Kalsakau's personal banking.



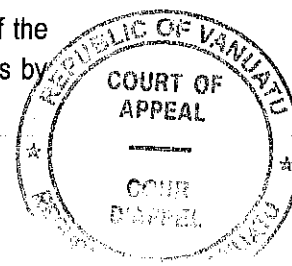
6. As at 1 September 2014, Mr Kalsakau's personal bank account with the ANZ had a large negative balance. It was in overdraft.
7. On 18 September 2014, Mr Kalsakau negotiated a first loan from the ANZ. The loan comprised of an overdraft facility of VT3 million to support MTI Developments' working capital, an advance of VT5 million to assist with the purchase of a new crusher machine, and an advance of VT27 million to assist with the purchase of the excavator machine the subject of this case.
8. The security taken by ANZ for this loan was a mortgage over Mr Kalsakau's leasehold title No. 11/X212/003.
9. In October 2014, Mr Kalsakau went about purchasing some machinery. As part of that he obtained a quote from Bodiam Engineering for the excavator he subsequently purchased. The quote was addressed to MTI Developments and forwarded by way of an e-mail to Mr Kalsakau and an ANZ employee, Mr Takoar. The quoted cost for the excavator was VT11,249,250. On 28 October 2014, Mr Kalsakau paid the full quoted price by way of a personal cheque.
10. On 31 October 2014, Mr Kalsakau's personal account had a debit balance of VT27,585,578. The VT27 million advance was drawn down on 3 November 2014, and transferred to Mr Kalsakau's personal account. Similarly, the VT5 million advance was also drawn down and transferred to Mr Kalsakau's personal account.
11. On 15 April 2015, Mr Kalsakau negotiated a second loan from ANZ. In addition to the two personal advances of VT5 million and VT27 million already drawn down, the ANZ opened an overdraft facility for MTI Developments in the maximum amount of VT15 million to support the trading business with working capital.
12. The security for this second tranche of funding was the mortgage already held by ANZ and an additional General Security Agreement ("GSA") over the undertakings and business assets of MTI Developments. Mr Kalsakau also provided a Director's Guarantee as additional security.
13. In preparation for this second advance, Mr Kalsakau had provided certain information to the ANZ setting out his personal, and MTI Developments', financial positions. It is of note that in the material provided to ANZ the excavator was valued at VT8 million as of 6 March 2015.
14. On 18 August 2015, Mr Kalsakau negotiated a third loan from ANZ. In addition to the fully drawn down personal loans of VT5 million and VT27 million, there was a fully drawn MTI Developments advance of VT13 million to assist with the purchase of 3 tipper trucks. As well, there was a new VT15 million overdraft facility for MTI Developments to support the business by way of working capital.



15. *As security for the third loan, a further GSA was signed for MTI Developments by Mr Kalsakau as sole Director. The specified assets included, but were not limited to, 2 Daewoo dump trucks. Importantly, the GSA recorded that the instrument secured "...all present and after acquired property".*
16. *In late 2016, due to significant arrears of payments due under the loan arrangements, the ANZ served a letter of demand on Mr Kalsakau. That was not complied with.*
17. *On 9 June 2017, ANZ and Mr Kalsakau entered into a Deed of Settlement in relation to the debt owed. Part of the arrangement required Mr Kalsakau to sell the lease which was the subject of the mortgage, which he failed to do within the permitted time set out in the Deed. Accordingly ANZ took the matter to Court and obtained consent orders enabling the sale of leasehold title No. 11/X212/003. The sale was settled on 28 January 2018 and just over VT30 million was credited to Mr Kalsakau and TDI Development's overall indebtedness with ANZ.*
18. *There followed several settlement proposals to sort out the remaining debt, all of which unfortunately came to no fruition.*
19. *A subsequent review of the file led ANZ to the realisation that the valuable excavator was secured by the later GSA executed as part of the third loan arrangements. Accordingly, steps were taken by ANZ to repossess it and advertise it for sale. In response, two written offers were received, and the highest of VT4 million was accepted by ANZ. In the end, this sale transaction did not proceed as Mr Kalsakau obtained restraining orders and then brought this litigation before the Supreme Court – that had the effect of frustrating the sale agreement due to the lapse of time.*

C. The Judgment

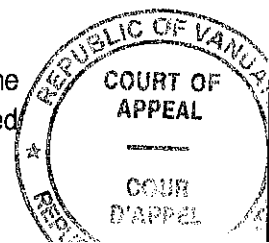
3. The primary Judge recorded the background facts, the pleadings and then set out in detail the parties' evidence.
4. He stated that the first issue to consider was who was the actual owner of the excavator? He concluded that it was more likely than not that the excavator was the property of MTI Developments as a result of the following:
 - a. Mr Kalsakau's use of a personal cheque to purchase the excavator was not determinative of the true ownership of the excavator due to his intermingling of personal and business funds, both before and after the opening of MTI Developments' bank account;
 - b. Further, the company's bank account had not yet been opened at the time of the purchase therefore Mr Kalsakau's only means of paying for the excavator was by personal cheque;



- c. Given that Mr Kalsakau was a Member of Parliament and it was his business, MTI Developments, which needed to operate an excavator, he considered it inherently implausible that the excavator was Mr Kalsakau's personal property. To own such a machine in Mr Kalsakau's personal capacity would have negated the purpose of his operating MTI Developments; and
- d. There was no reason for Ms Kalpat (who worked for Bodiam Engineering) to take it upon herself to advise the ANZ Bank that the excavator was to be purchased by MTI Developments if in fact that was not the case. The primary Judge did not accept Mr Kalsakau's evidence to the contrary.

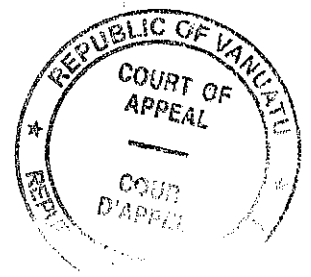
D. The Appeal

5. Mr Kalsakau sought leave to file new evidence in this appeal. This was declined. The aspect of the appeal relating to the counter-claim was then abandoned. The remaining grounds of appeal related to the dismissal of the Claim and the indemnity costs order against Mr Kalsakau.
6. Mr Fleming submitted that the primary Judge erred in holding that MTI Developments was the owner of the excavator by misdirecting himself as to the criteria by which ownership of the excavator was to be determined, basing his findings on the credibility of witnesses. In response, Mr Hurley submitted that for the reasons set out in the primary Judge's judgment, the Judge had decided correctly that the excavator was the property of MTI Developments and was part of the secured property under the General Security Agreement ('GSA') between MTI Developments and the ANZ Bank. Therefore, Mr Kalsakau's claim that the ANZ had unlawfully repossessed and sold the excavator was dismissed.
7. It was common ground that the ownership of the excavator never changed. The real question then is who purchased the excavator? Mr Fleming submitted that the contents of the ANZ Bank Diary Note made in early 2015, Mr Sileye's belief three and a half years later that the excavator was covered by the terms of the GSA and that the deposit for the sale of the repossessed excavator was paid into Mr Kalsakau's personal account were factors rebutting Mr Sileye's belief that the excavator was an asset under the GSA. With respect, the primary Judge did not find that the excavator was the property of MTI Developments based on Mr Sileye's belief or credibility.
8. The primary Judge's starting point was Mr Kalsakau's intermingling of his personal and business funds, both before and after the opening of MTI Developments' bank account. This was an inescapable finding on the evidence. It was not challenged in this appeal. In that context, it was open to the primary Judge to find that Mr Kalsakau's use of a personal cheque to purchase the excavator was not determinative of its true ownership and that he had no other means of payment as the company's bank account had not yet been opened.
9. Mr Fleming submitted that the Bodiam Engineering quotation issued in the company name was irrelevant as what Ms Kalpat, who was not called to give evidence, thought or believed.



was irrelevant to the issue of ownership. He submitted that this was hearsay and inadmissible. With respect, we disagree. There was no objection raised at trial in relation to the admissibility of the quotation. The Judge was entitled to treat that evidence as admitted. Further, Mr Kalsakau received the quotation and gave evidence about it. Finally, business records are an exception to the hearsay rule: subs. 4(1), *Civil Evidence Act 1968* (UK). The quotation was a business record of the ANZ Bank, received via email from Ms Kalpat. It was not hearsay evidence.

10. The quotation was dated 2 October 2014 and addressed to MTI Developments. On 23 October 2014, Ms Kalpat emailed the quotation to Mr Kalsakau and the ANZ Bank. In cross-examination, Mr Kalsakau stated that he did nothing to correct who the quotation was addressed to because Ms Kalpat knew he was going to purchase the excavator with his own cheque. When asked how she knew that, he stated that it was because he had the cheque with him to confirm he had the money. However, Mr Kalsakau did not draw the cheque to purchase the excavator until 5 days later, on 28 October 2014.
11. We consider it more likely than not that the quotation was addressed to the company because Mr Kalsakau requested that it be made out to the company. Further, that on 23 October 2014, Mr Kalsakau spoke with Ms Kalpat that he wanted to go ahead with the purchase of the excavator and requested her to send the quotation to the ANZ Bank to organise payment. Like the primary Judge, we do not see any reason for Ms Kalpat to take it upon herself to advise the ANZ Bank that the excavator was to be purchased by MTI Developments if in fact that was not the case.
12. For the reasons set out above, we consider that no error has been shown in the reasoning and conclusions of the primary Judge. The primary Judge correctly decided in that circumstance that the claim should fail. The appeal against the dismissal of the claim must be dismissed.
13. The remaining aspect of this appeal was against the indemnity costs order in the ANZ Bank's favour. Mr Fleming submitted that the primary Judge erred in finding that based upon a letter of offer dated 1 October 2020, that indemnity costs should be awarded. He submitted that the offer was not capable of being seen as a Calderbank offer and that the timeframe of 24 hours for the offer's acceptance was unrealistic.
14. The offer was subject to Mr Kalsakau providing a sworn statement of his assets/liabilities and income/expenses for the ANZ Bank's review and satisfaction within some 24 hours. The offer was therefore a conditional offer and could not be seen as a Calderbank offer. More importantly, the timeframe given of 24 hours to accept the offer was unreasonable. That was too short a period of time to have expected Mr Kalsakau to digest the contents of the offer, to have sought and obtained legal advice and to respond including with the requisite sworn statement. In the circumstances, the appeal against the indemnity costs order must be allowed.

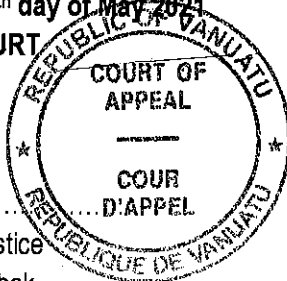
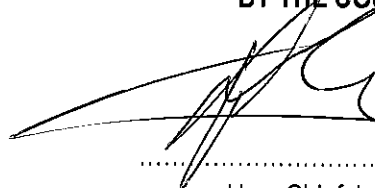


E. Result and Decision

15. The appeal against the dismissal of the claim is dismissed.
16. The appeal against the indemnity costs order is allowed and substituted by an order that the Appellant pay the Respondent's costs in the Supreme Court on the standard basis, as agreed or taxed by the Master. Once settled, the costs are to be paid within 21 days.
17. The Appellant is to pay the Respondent's costs of the appeal, as agreed or taxed by the Master. VT40,000 is to be deducted from the sum agreed or taxed as the Appellant was successful on the aspect of the appeal relating to indemnity costs. Once settled, the costs are to be paid within 21 days.

DATED at Port Vila this 14th day of May 2021

BY THE COURT



Hon. Chief Justice
Vincent Lunabek