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

CIVIL CASE No.12 OF 1992

BETWEEN : Frederick Brysten
Appellant

AND: Simon Dorsen
Respondent

Counsels

Robert Sugden for the Appellant
Silas Hakwa for the Respondent

REASONS FOR JUDGEMENT OF LUNABEK J. ACJ.

This appeal from a judgement by the Senior Magistrate's Court at Port Vila in favour of the Respondent arises out of a claim about the costs of repairs of materials due to damages caused by the Appellant/Defendant into the Respondent/Plaintiff's property, namely a store.

The Defendant has appealed and the short facts appearing from the limited material before the Court may be described in this way.

The Appellant and the Respondent are both businessmen of Port Vila. The Respondent was the owner of a property consisting of a shop and residential quarters. Since 1981, both parties entered into a tenancy agreement whereby the respondent agreed to let his property to the Appellant for 5 years and part of the agreement was that the tenant would be responsible for all repairs or costs thereof for damages done by him. The tenancy agreement was extended by both parties for a further term of five years on the same terms and it was to end in December 1991. Sometime in December 1991, the Appellant vacated the property. Then after, the Respondent inspected the property and discovered that it was in a poor state of repairs. The Respondent carried out the necessary repairs, which costed him vatu 249, 000. After the repairs done, he demanded the Appellant to pay his expenses of vatu 249, 000. It appeared then that the Appellant refused to do so. The Respondent/Plaintiff, therefore, brought an action against the Appellant/Defendant to recover the said sum of vatu 249, 000.

On 26 March 1992 the Senior Magistrate's Court gave judgement in favour of the Respondent/Plaintiff in the sum of Vatu 220, 400 to be paid within 5 months. (This is 3/4, total claim of Vatu 294, 400).

Following the notice of Appeal the Defendant, as Appellant, contented that the Learned Senior Magistrate erred because his finding that the total award of vatu 294, 400 for damages was wrong. Mr Sugden said the learned Senior Magistrate used the wrong basis for awarding damages. He stressed that the total claim for the costs of repairs is not 294, 400 vatu, but it should be 249, 000 vatu. Furthermore, he argued that the Learned Senior Magistrate has a duty to record his finding of facts and give reasons for his decision.

I believe there is merits in some of these arguments.

On the first point Mr Robert Sugden's principal agreement was that the initial claim was vatu 249, 000. The Learned Senior Magistrate took the figure 294, 400 vatu by adding the initial claim of vatu 249, 000 plus Court fees of vatu 7, 000 plus 15% interest. Mr Sugden pointed out that vatu 7, 000 for Court fees should not be ordered as damages but as costs. Therefore, the Learned Senior Magistrate used the wrong basis for awarding damages. It seems to me that Mr Sugden is right in pointing out that the learned Senior Magistrate used the wrong basis for awarding damages. Further Mr Sugden is also right when he argued that the Learned Senior Magistrate was erred in granting 15% interest where no interest had been claimed in the first place in the Statement of claim by the Respondent/Plaintiff. There is no basis for claiming interest.

Mr Silas Hakwa, on behalf of his client (Respondent) conceded on these two points of arguments forwarded by Counsel for the Appellant. Therefore, the right total amount of claim should only be vatu 249, 000.

On the second point that the initial claim of vatu 249, 000 is not made out by the evidence. Counsel for the Appellant said the Senior Magistrate should have gone through each item, look at the evidence and said who he believed and made award for that item then proceed to consider the following item.
He contended that the Respondent did not produce receipts for the material claimed and that he did not submit the hourly rate made on the Labour Department Scales. Therefore, he submitted there is no sufficient evidence to justify the decision of the Senior Magistrate to award 3/4 of the Respondent's/Plaintiff's claim.

Mr Hakwa on behalf of the Respondent replied that the Learned Senior Magistrate listened to the evidence. He concluded that there is enough evidence which satisfied him that damages were caused to the Respondent's property and that repairs were done which cost money and labour. So that, although, the Respondent/Plaintiff did not produce receipts made for the payment of materials and that neither

hourly rate was made on the basis of the labour Department Scales, the Learned Senior Magistrate should not ignore totalling oral evidence from the witness box. That is the reason why the Learned Senior Magistrate having listened to the Plaintiff/Respondent and the Defendant/Appellant and the witnesses and being satisfied there is some truth in the claim, decided in this case that the claim be reduced in the manner that he decided that is he believed 3/4 for the Plaintiff/Respondent's evidence are true and 1/4 for the Defendant/Appellant and he, thus, ordered accordingly.

Mr Sugden argued further that it is the duty of a Magistrate/Judge to record his finding of facts and gave reasons for his decisions. He contended that in this case, the basis of the finding of facts did not reflect the decision made by the Learned Senior Magistrate.

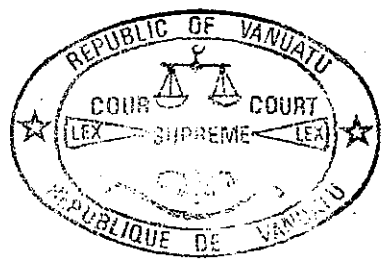
It is important to note that : "... in the exercise of their judicial functions, justices are not exempt from the duty which attaches to every judicial officer to state, to the best of his ability, the facts he finds, and the reasons for his decision *"As per Irvine, CJ in Donovan -v- Edwards (1992) V.L.R. 87, at p. 88)*

Such a statement is desirable for the information of the parties, and in order to afford assistance to the Court of Appeal in the event of there being an appeal. Therefore, *"where no reasons are given for a particular decision, it becomes extremely difficult for a judge to follow it, because he does not know the principle on which the decision proceeded".*
(As per Jessel, M. R. in re Merceron (1877), 7 ch. D. 184. at p. 187)

It has to be understood that there is no necessity requirement imposed on the Magistrates of producing long and elaborate reasons for their decisions, but the statement of grounds which lead the Magistrates to make their decisions must be explicitly stated.

In Public Service Board of New South Wales -v- Osmond (1986) 159 CLR 656, the High Court of Australia (at 667) said that it was right to describe the giving of reasons as "an incident of judicial process" although a normal but not a universal one. *In Soulenezis -v- Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, Mc Hugh JA* says this: *"the failure to explain the basis of a crucial finding of fact involves a breach of the principle that justice must not only be done but must be seen to be done" (at 281).*

In the present case, his worship set out the reason of his decision in this way: (The attached copy of his reasons for decision is to be included and be part of this judgement)



Reason for Decision

1) Facts - a) The Complainants evidence shows that there were damages done to property which needed repairs.

b) That there were repairs done and this cost money and labour.

c) However, there was no receipts obtained for costs of repairs done.

d) No hourly rates for payment of Labours based on the Normal Labour Dept. Scales.

Defendant's evidence:

e) Did give evidence but only denied the cost and also damage done. Says some property was not damaged.

f) Was most concerned about the Lease Agreement and it's breaches not about the present case.

g) Said he had a witness who would come but now could not due to political commitment.

2. General Observation:

a) Parties complainant's evidence is about 3/4(three quarter) true and Defendant is about ¼ true.

b) Both parties seem to have no respect for each other thus affecting the Lease Agreement between themselves.

c) The Defendant is talking about breach of Lease Agreement but why talk now when it's too late. This should have been done immediately when breach takes place.

d) This case is getting to be almost malicious in nature. This is evident in the manner parties were giving evidence in Court the way they spoke.

3. Mr Brysten wish to make a Courter claim but this was not accepted due to Order 24 of Magistrate's Court Rules, no notice 4 days before return date and amount exceeded value of Magistrate Court Jurisdiction (VT500,000).

I have had the opportunity of reading through the reason for the decision as set out above.

I consider the Appellant's arguments that the learned Senior Magistrate failed to consider all the evidence in the case by failing to take item by item, look at the evidence and said who he believed and which argument he rejected and made award to that effect and proceed then to consider the following item on the same basis.

In my judgement, I share and adopt the view expressed by *Samuels JA. in Mifsud -v- Campbell (1991) 21 NSWLR 725, when he* says *(at p. 728)*:

> *"... it is an incident of judicial duty for the judge to consider all the evidence in the case. It is plainly unnecessary for a judge to refer to all the evidence led in the proceedings or to indicate which of it is accepted or rejected. The extent of the duty to record the evidence given and the findings made depend, as the duty to give reasons does, upon the circumstances of the individual case. Accordingly, a failure to refer to some of the evidence does not necessarily, whenever it occurs, indicate that the judge has failed to discharge the duty which rests upon him or her. However, for a judge to ignore evidence critical to an issue in a case and contrary to an assertion of fact made by one party and accepted by the judge may promote a sense of grievance in the adversary... It tends to deny both the fact and the appearance of justice having been done. If it does, ... then it will have worked a miscarriage of justice and have produced a mis-trial and resulted in ... an error of law which is reviewable on appeal. Whether it is an error of law or an error of fact, it seems to me a failure by the judge to do what the nature of the office requires..."*

In this case, the Learned Senior Magistrate finding of facts indicates that (a) the complainant/Respondent' s evidence shows that there were damages done to property which needed repairs; (b) that there were repairs done and this cost money and labour; (c) However, there was no receipts obtained for costs of repairs done; and (d) no hourly rates for payment of labour based on the normal Labour Department Scales.

The Defendant (Appellant) did give evidence but only denied the cost and also damage done. The Defendant said some property was not damaged. His worship held that the complainant's (Respondent) evidence is about 3/4 true and the Defendant is about 1/4 true.

My reading of the judgement and the reasons of the decision of the Senior Magistrate delivered on 26 March 1992 shows that he did not refer to all the evidence led in the proceedings or indicate which of it is accepted or rejected. This, in my view, is plainly unnecessary for his worship to do so. Therefore, the failure for the Learned Senior Magistrate to refer to some of the evidence does not necessarily indicate that he has failed to discharge the duty which rests upon him.

Although the Learned Senior Magistrate said there was no receipts obtained for costs of repairs done and that no hourly rates for payment of labour based on the normal Labour Department Scales, I accept the submission of Counsel of the Respondent/Plaintiff that the Learned Senior Magistrate had some evidence from the Respondent/Plaintiff in the witness box about what he thought and the learned Senior Magistrate believed 3/4 of what the Respondent/Plaintiff said and 1/4 of what the Appellant/Defendant said.

I accept further the submission that the Learned Senior Magistrate's notes are the summary but not all detailed set of facts. Therefore no record about some detailed fact. But the Magistrate listened carefully to all the parties and their witnesses and at the end had made the decision which is the subject of this appeal.

The Learned Senior Magistrate has had the opportunity of listening to both parties. He observed that both parties seem to have no respect for each other... Further he went on to say that this case is getting to be almost malicious in nature. This is evident in the manner parties were giving evidence in Court the way they spoke.

On the basis of the above considerations, the judgement established that the Learned Senior Magistrate awarded damages on a wrong principle by taking the initial amount of the claim which is 249, 000 vatu adding with the Court fees of vatu 7, 000 (which is the costs) and by also calculating the interest of 15% where there is no basis for him to do so because the interest is not pleaded in the statement of claim.

However, considering the information the Senior Magistrate had before him, the difficult relationship between both parties, the way they conduct their case before the Magistrate, it seems to me that the Learned Senior Magistrate was in a better position to make an over all assessment of the claim and therefore, I am not prepare to disturb his conclusion that he believed 3/4 of what the Respondent/Plaintiff said and 1/4 of the Appellant/Defendant.

Further I should add that, it was correct to say that in this case, the Learned Senior Magistrate failed to record detailed evidence of his findings of facts and, thus, failed to refer to some of the evidence. I hold the view that the failure to so doing is not critical and/or fatal to

the overall assessment of damages in relation to the circumstances of this particular case.

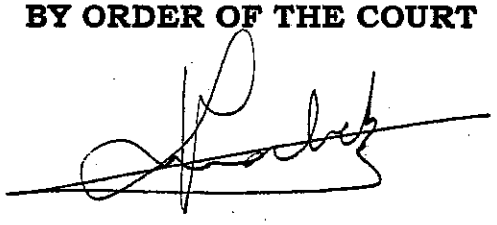
Accordingly, I propose that this appeal should be allowed, but the judgement and orders made below be varied in this way:

Judgement for complainant/Respondent in the sum of vatu 186, 750 to be paid at the end of January 1997 in default distress. (This is 3/4 (three quarter) of the total claim of vatu 249, 000.

The Appellant/Defendant pays the costs below of the Respondent/Plaintiff. There be no costs of the appeal.

DATED AT PORT VILA this 2nd Day of December 1996

BY ORDER OF THE COURT



VINCENT LUNABEK J
Acting Chief Justice