

(Civil Jurisdiction)

BETWEEN : ANDRÉE MARIE FROUIN

- Plaintiff

AND : GILLES HENRI JEROME DANIEL

- Defendant

Coram : Mr Justice Oliver A. Saksak

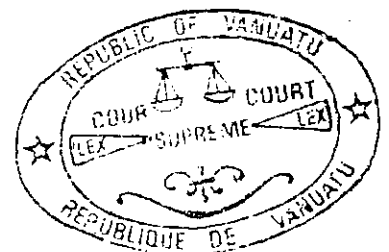
Mr Robert Sugden for the Plaintiff

Mr Gilles Daniel appears unrepresented

JUDGMENT

This was a hearing in Chambers. This judgment is given in respect of a Summons filed by the Plaintiff on 20th February 1997. The Plaintiff sought the following Orders :-

1. That the Plaintiff have leave to amend her Statement of Claim.
2. That there be judgment for the Plaintiff as follows :-
 - (a) The sum of Vatu 8,982,786 and interest at the rate of Vatu 2,762 per day from 15th February 1997 until payment.
 - (b) Such other and further sum as may be assessed to secure the lifting of the aforesaid mortgage for the Plaintiff's land.
 - (c) In the alternative to (a) and (b) damages to be assessed in the event that the National Bank of Vanuatu exercises its powers as Mortgagee.
 - (d) The sum of Vatu 4,137,246 unpaid rent as at 5th February 1997.
 - (e) Rent from 5th February 1997 at the rate of Vatu 10,000 per day until the Plaintiff vacates the premises.



- (f) That the Defendant pays the Plaintiff's costs of and incidental to the application and the action.

In support of the Application the Plaintiff filed and served an affidavit dated 20th February 1997. Counsel for the Plaintiff sought leave to file and serve a further affidavit on 7th July, 1997. Leave was granted and a further affidavit was filed and served on the Defendant on 29th July 1997.

The Application was heard in the afternoons of the 1st 6th 8th and 12th August respectively. On 1st August the Defendant sought an adjournment on the basis that he had not had sufficient notice. He argued that as 30th and 31st July were public holidays the requirement of 2 days notice under the Rules was not complied with. Mr Daniel argued that an affidavit is part of pleadings and under Order 57 Rule 7 two clear days are required for service. He further argued that Order 64 applies to commutation of time in all circumstances. Whilst I am persuaded to accept the first part of Mr Daniel's argument I hesitate to accept the second argument regarding commutation of time. Under Order 64, Rule 2 only Sunday, Christmas and Good Friday and specifically excluded from commutation of time. The two days being 30th and 31st July are clearly not excluded.

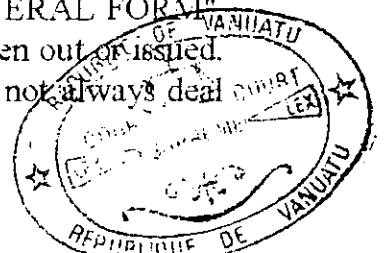
Mr Sugden on the other hand argued that under Order 40 Rule 21 the amount of notice required to be given to either party is not specified. And he objected to the application for an adjournment and relied on the case of **Roberts -v- Plant (1895) 1 QB at p.597**. That case was concerned with the issue of amendment of indorsement after summons had been taken out. Here we are concerned with an affidavit which is a different document from an amendment of indorsement.

The end result was that although the Defendant would not have been entitled to an adjournment the Court exercised its powers to enlarge time under Order 64 Rule 5 of the High Court Rules 1964. An adjournment was therefore allowed and the costs thereof was awarded to the Plaintiff.

In the course of his lengthy arguments and submissions the Defendant raised many technical objections to the Plaintiff's application for judgment. One of these was that the Defendant did not know under what provision of the Rules was the application being made. He argued that he did not know whether it was under Order 14 or Order 15 that the application was brought.

In response Counsel for the Plaintiff had to clarify that the application was brought under Order 14 of the High Court (Civil Procedure) Rules 1964.

When I examine the Document it is headed "SUMMONS GENERAL FORM"
There is no indication as to what provision of the Rules it is taken out of issued.
This is a serious omission. Lawyers must know that they will not always deal



with lawyers in Vanuatu. In some cases they will have to deal with persons who have no knowledge of the Rules of Court or the law. The Defendant here is a layman. He has no legal representation. Counsel for the Plaintiff knew this. Whether or not the omission was deliberate or a mistake or oversight this Court does not know. But whatever it was this Court must make it clear to lawyers that as Officers of the Court they are expected to do a lawyers job. That is what they are paid for.

In any event the Defendant conceded and accepted that it was an Order 14 application. What therefore did he, the Defendant have to prove to the Court? First let us see what Order 14 says :-

"1.(a) Where the defendant appears to a writ of summons specially endorsed with or accompanied by a statement of claim under Order 3, Rule 5, the Plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to damages claimed, if any, apply to the Court for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Court thereupon, unless the defendant shall satisfy the court that he had a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed".

(b) ...

(c) ...

(d) ...

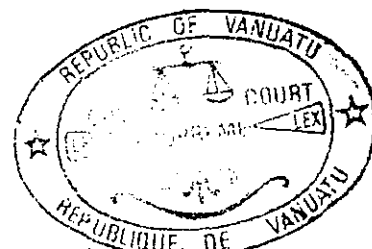
2. ...

3.(a) The defendant may show cause against such application by affidavit, or the Court may allow the defendant to be examined on oath.

(b) ...

(c) ...

4. If it appears that the defence set up by the defendant applies only to a part of the Plaintiff's claim, or that any part of his claim is admitted,



the Plaintiff shall have judgment forthwith for such part thereof into Court by the Sheriff, costs or otherwise in the discretion of the Court. And the defendant may be allowed to defend as to the residue of the plaintiff's claim."

Now for the issues :-

- (1) Has the defendant entered an appearance to the specially endorsed writ?

The answer is yes. A memorandum of appearance dated 11th September 1996 was filed on 24th September 1996.

- (2) Is there a specially endorsed writ accompanied by a statement of claim under Order 3 Rule 5 of the Rules?

The Plaintiff filed a specially endorsed writ dated 21st August, 1996 on the same date. It is not issued under Order 3 Rule 5 as it is clearly required by Order 14 (1)(a).

- (3) Has the Plaintiff filed an affidavit in support of her cause of action? The answer is no.

- (4) Has any other person filed an affidavit to support the plaintiff's cause of action? The answer is yes. Mr Frouin, the husband of the plaintiff swore an affidavit dated 11th February 1997. It was filed on 20th February 1997 at the Court Registry.

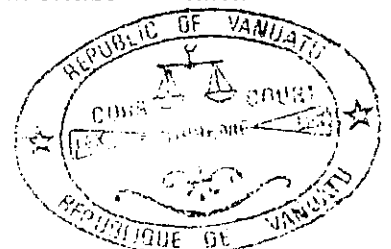
It was an incomplete affidavit because it failed to contain the belief that the defendant has no defence to the action. That is why counsel sought leave on 7th July to file and serve a further affidavit. A further affidavit to that effect was sworn dated 17th July 1997 and filed on 29th July 1997.

- (5) Did the Defendant have a defence to the action? The answer is yes. His defence is dated 8th October, 1996. He filed it on 16th October 1996.

- (6) Is the Defendant's defence a good defence? In my judgment it is a good defence. For example paragraph 2 of the original statement of claim reads :-

"2. On or about the 22nd February, 1995, by an Agreement in writing ("the property contract"), the Defendant agreed to purchase the land and some electrical equipment."

The Defendant answered as follows in his Defence:-



"2- le défendeur reconnaît qu'il y ait eu un accord mais nie le paragraphe 2 de l'exposé des faits."

I understand that to mean that the defendant acknowledges that there was an agreement but denies that he agreed to purchase the land and some electrical equipment.

When the Court's attention is drawn to such a defence as this it raises the question of the whole validity of the agreement and it becomes an issue which cannot be disposed of summarily. It must be tried in a full hearing.

- (7) Has the defendant disclosed facts as may be deemed sufficient to entitle him to defend the action generally? The answer is yes. For instance the defendant submitted that the mortgage was not consented to by the Plaintiff. He also argued and submitted that the contract was a conditional contract.
- (8) Has the defendant shown cause against the application by affidavit? The answer is yes. He sought adjournment for that reason on 1st of August 1997. He filed his affidavit dated 5th August on the same date. This was in accordance with Order 14 Rule 3(a). The Court did not hear any cross-examination of the defendant by Counsel for the Plaintiff.
- (9) Did the Defence set up by the Defendant apply to the whole or only to a part of the Plaintiff's claim?

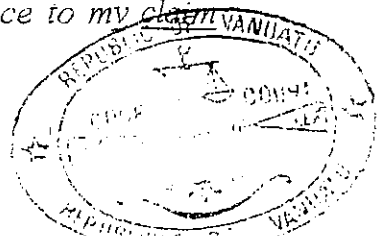
In my judgment the Defendant's defence applies to the whole of the plaintiff's claim. This can be clearly seen from his defence of 16th October 1996 and his affidavit of 5th August, 1997.

In my judgment therefore the reliance by the Plaintiff on Order 14 Rule 4 to obtain part judgment fails. Similarly the Plaintiff's reliance on Order 14 Rule 1 to obtain judgment fails.

Examining the documents before me further in particular the affidavit of Mr Frouin of 17th July 1997 which was filed on 29th July 1997 it has two paragraphs as follows :-

"(i) I refer to my affidavit sworn the 11th day of February, 1997 and filed herein.

(ii) I verily believe that the Defendant has no defence to my claim in this action"



The defendant objected to the second paragraph in particular where the deponent being Mr Frouin says "my claim". The defendant argued rightly in my view that this was not the witness' claim. The witness is and has never been the plaintiff. The Plaintiff is Mrs Frouin the wife of Mr Frouin the deponent.

Counsel for the Plaintiff conceded that this was a mistake and undertook to file an amended affidavit forthwith. At the time of delivery of this judgment this has not been done.

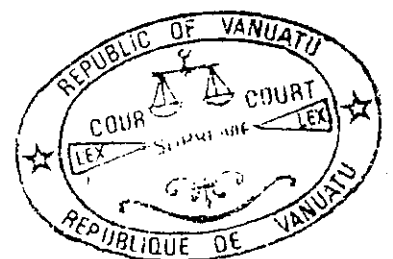
In any event it is my judgment that paragraph two of Mr Frouin's affidavit is a complete lie. How can it be said that there is no defence when clearly a Defence was filed on 16th October, 1996? Whether or not it is a good defence is another matter and I have already held that is a good defence to entitle the defendant to defend the action generally.

There are many questions in my mind that raises the genuinness of the plaintiff's claim. For instance, why cannot the plaintiff herself depose to an affidavit?

Mr Sugden submitted that because Mr Frouin is the Plaintiff's husband he is acting as an agent. This submission bears no weight in my view. Neither Counsel for the Plaintiff nor the defendant addressed the Court in relation to powers of attorney. But if counsel's submission was to have any weight this Court might be more at ease if that relationship had existed by virtue of a power of attorney registered under section 88 of the Land Leases Act [CAP. 163]. But there is no evidence of this and in any event the Court is unable to accept the Plaintiff's submission on this point.

One such question relates to the Vatu 7,200,000 which the Plaintiff claims in her paragraph 3 of the original statement of claim that the Defendant has paid to her. In his Defence the Defendant denies this. I ask the question why has not the plaintiff or Mr Frouin provide evidence by affidavit to show :-

- (a) which of them have actually received the money;
- (b) who paid the money (the Bank or the defendant);
- (c) the date of the transaction;
- (d) where the money is currently held; and
- (e) in whose name.



In the absence of such evidence it is in my view legitimate that the defendant should deny payment for fear that if he is to gain out of the transaction he is entitled to know exactly with which party he is dealing. As it is even this Court cannot tell which party the defendant is dealing with and as such I accept that the defendant has a right to defend the action.

For the foregoing reasons I therefore conclude that, except for the relief sought in her summons in relation to leave to amend her Statement of Claim, the Plaintiff's application for judgment in relation to the discharge of the mortgage and rent including mesne profits must fail. And I dismiss that part accordingly. I therefore make the following Orders:-

- (1) The Plaintiff be given leave to amend her Statement of Claim in accordance with the Annexure (as annexed to the application).
- (2) The Defendant is likewise given leave to amend his defence within 21 days from the date of this Order.
- (3) The Parties be at liberty to seek further directions in relation to interrogatories within 14 days after the filing and service of the defendant's amended defence.
- (4) The Plaintiff will pay the Defendant's costs of and incidental to this application to be taxed if not agreed.

DATED at Port Vila this 29th day of August 1997.

BY ORDER OF THE COURT



OLIVER A. SAKSAK

Judge

