

(Appellate Jurisdiction)

IN THE MATTER OF: ON APPEAL FROM THE SENIOR  
MAGISTRATES' COURT OF THE  
REPUBLIC OF VANUATU

BETWEEN: MELCOFFEE SAWMILL LTD

Appellant

AND: DONOVAN & SONS

Respondent

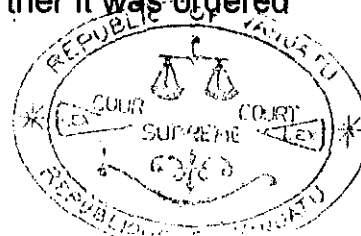
Coram: Mr Justice Oliver A Saksak  
Mrs Marilyn Sese-Clerk

Counsel: Mr Mark Hurley for the Appellant  
Mr Edward Nalief for the Respondent

**RESERVED REASONS FOR DECISION**

This Appeal was heard on 9th July 1999. After hearing submissions and legal arguments, the Court dismissed the appeal with costs, and reserved its reasons to be published, which I now do.

The Respondent was the Plaintiff in Civil Case No. 103 of 1998 and the Appellant was the Defendant. In that Action the Plaintiff/Respondent instituted proceedings against the Defendant/Appellant in respect of goods delivered to them by the Plaintiff/Respondent under a 'business dealings' entered into between them. The goods were only partly paid for by the Defendant/Appellant and the balance outstanding were the sum of vt615,828. The Plaintiff/Respondent filed their summons on or about 16th November 1998 in the Senior Magistrates' Court in Luganville, Santo. The Summons was returnable on 15th December 1998. On that date, on the application of the Defendant/Appellant who were then not represented, the matter was adjourned to 21st January 1999. On that date the hearing was vacated due to cyclone causing flights from Port Vila to Luganville being cancelled. The matter was adjourned to 18th February, 1999. On this same date Counsel for the Defendant/Appellant filed a Defence and a Notice of Motion, seeking a stay of civil proceedings No.103 of 1998 due to concurrent criminal investigation until such time as the Criminal investigation (and any subsequent prosecutions) has been fully determined. The Notice of Motion was dismissed with costs being reserved. Further it was ordered



that if no appeal was filed within 14 days from the date of the Order, Civil Case No.103 of 1998 be listed for hearing. A Notice of Appeal was filed on behalf of the Appellant on 4th March, 1999, a day after the 14 day period allowed had expired. The Defendant/Appellant's main grounds is that the Learned Senior Magistrate had erred in law by failing to consider the circumstances of the case in their totality when refusing the application for stay of proceedings.

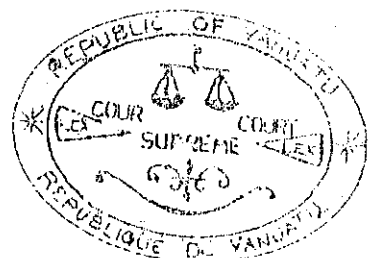
Arguing the case for the Appellant, Mr Hurley referred the Court to the case of Jefferson Ltd -v- Bhetcha [1979] 2A11ER 1108, Wonder Heat Pty Ltd -v- Bishop [1960] V.R 489 and para. 443 Vol.37, Halsbury's Laws of England at p.332-33 in support of the proposition that the Court has a discretion whether to stay the civil proceedings pending the conclusion of the criminal proceedings, "taking into account all the circumstances ....."

There is no difficulty with accepting that proposition. Indeed it is incumbent on the Court to do that in all cases. The Court has to weigh all the circumstances of both the Plaintiff and the Defendant and where the scale dips, it does so to the detriment of the party on that end of the scale. Taking the history of the matter as clear from the given facts, there was been a series of failures by the Appellant. Firstly he failed to file an Appearance and Defence within a reasonable time. Here no Defence was filed until after 3 months. That is not a reasonable time in my view.

Secondly, the Appellant failed to comply with the Order of the Senior Magistrate dated 18th February 1999 by not filing his Notice of Appeal within the clear 14 days allowed by the Court.

Thirdly, it has been deposed to by Neil Croucher for the Appellant in his affidavit of 18th February 1999 in paragraph 2 that -

- "I have provided a statement to the Santo CID and provided Santo CID with various witness statements in respect of allegations of heft of business records by Mr Mark Donovan and Aaron Gilchrist employees of the Plaintiff). Those business records are relevant to the present proceedings."



Further at paragraph 3 he deposed to the fact that -

- "On Tuesday, 16 February 1999 whilst I was attending the Defendant's Solicitor's Office in Port Vila, I received a copy of the letter from Kelson Bule of CID Sanma Patrol dated 15 February 1999 in relation to my aforesaid Criminal complaint. Annexed hereto and Marked with the letter "A" is a true copy of the Defendant's Solicitor's letter to the Plaintiff's solicitor dated 16th February 1999."

The letter of 15 February 1999 from the Santo CID reads -

From: cc CID SANMA PATROL

To: WHOM IT MAY CONCERN

**RE: DOCUMENTS REMOVED FROM MELCOFFEE SAWMILL OFFICE**

This is to confirm that our office have received official complaint from Mr Neil Crbucher, owner of Melcoffee Sawmill, that log tally sheets have been removed from the company's office last year 1998.

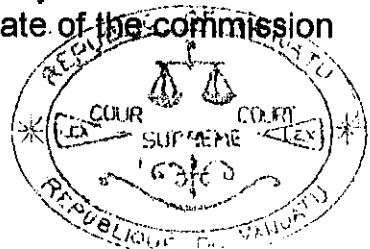
We have now opened our docket file for investigation to be carried out into the report for which two possible charges can be laid two of which are unlawful entry and theft.

Sign: Kelson Bule  
Santo Police Station  
SANMA PATROL

15 February 1998"

I found that the evidence in paragraph 2 is incomplete. The deponent did not annex a copy of his own statement or complaint which he should have done to reinforce his evidence that a complaint has been lodged. The letter of 15 February 1999 does not assist him because even the police failed to annex a copy of the official complaint and any other statements obtained from witnesses to show that an investigation had in fact commenced. Their evidence is therefore incomplete and the Court cannot rely on in-complete evidence.

I found that in paragraph 1 of the letter from the Santo CID confirming that the Police had received official complaint from Mr Neil Croucher in relation to log tally sheets removed from the company's office in 1998. I asked Counsel for the Appellant about the actual date of the commission



of the offence and he had slight difficulty in giving an immediate answer. However during his reply to Counsel for the Respondent's submission Mr Hurley confirmed to the Court that the alleged unlawful entry and theft took place on 11th November 1998. The Plaintiff/Respondent filed his summons on 16th November 1998, that is some 5 days after the alleged unlawful entry and theft. If the Defendant/Appellant was serious and so concerned about such break and enter and theft, he could have made an official complaint on 12th November or on 17th November 1998. Why he waited until February 1999 to lodge an official complaint remains to be answered by the Appellant but in my view it is apparent that the intention to use the issue of criminal proceedings overlapping with the civil proceedings is purely to delay justice being done to the Plaintiff/Respondent.

Further, the Defendant/Appellant sought to reply on a further document by the Police deposed to and annexed as "A" in the affidavit of Mr Hurley filed at 1405 hours on 9th July 1999 just prior to hearing the appeal. The document is dated 9th July 1999 addressed to the Solicitors for the Appellant. It reads:-

**"RE: MARK DONOVAN & ARON CILCHRIST (POLICE CR 55/02/99)"**

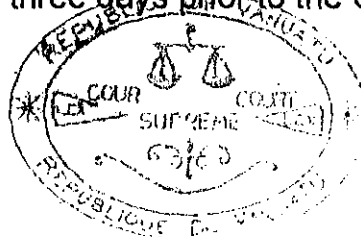
Dear Sir,

I wish to confirm that the above mention will go before the Court, on the 14th July 1999 in Luganville.

Regards

Signed: Insp. Wilson D. Garae  
O/C Prosecution Department  
Luganville/Santo"

Again for the Court to accept that evidence, a copy of the actual charged sheet should have been annexed. It was not done. On the date of publication of these reasons, Cr. 55/02/99 has not and was not brought before the Court on 14th July, 1999 as confirmed. Again the Court noted that this letter was faxed in at 10:31 am on the morning of 9th July, 1999. The hearing of the appeal took place at or about 1415 hours in the afternoon that day. As to why the letter had to be faxed that day and not in June or one week prior to hearing again remains to be answered by the Appellant. For the Court, this is a repetition of what happened on 15 February 1999 just three days prior to the Court hearing



the Appellant's/Defendant's Notice of Motion and is telling of the Defendant/Appellant's intention not of the seriousness and/or overlapping of the Criminal proceedings with the civil proceedings but the undue delay of justice being done to the Plaintiff/Respondent. In my view this is not an acceptable practice. Having said all that I have said, Jefferson Ltd -v- Bhetcha is accepted only as authority for the Court's discretion taking into account all the circumstances and not as authority for granting a stay of proceedings where there is the same defendant in both the criminal and civil proceedings and there is arising between the two proceedings the same subject-matter. The Appellant has conceded that the present case is different and nothing further need be said.

On the question of this Court's inherent jurisdiction to stay any proceedings before it where it is appropriate to do so, again the Respondent did not take issue and therefore nothing further need be said about that aspect.

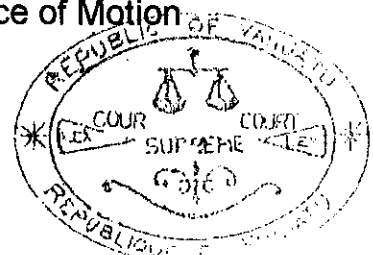
On the Appellant's contention that the Plaintiff cannot come before the Court in Civil proceedings and attempt to benefit from its unlawful acts, was supported by the famous equity maxim that "he who comes to Court must come with clean hands", or "he who seeks equity must do equity."

For the reasons advanced, it is apparent that it is the Appellant who has come to Court with unclean hands.

As regards the Defendant's right of silence, the Defendant/Appellant is not the Defendant in the Civil proceedings but the Plaintiff/Respondent is. He should have been the appropriate person to apply to have the Criminal proceedings stayed claiming that it might prejudice his right to silence.

But the Plaintiff/Respondent and Defendant in the Criminal proceedings has not done so. There is therefore no prejudice to the Defendant/Appellant. If there is any prejudice, it is to the Plaintiff/Respondent because he is being denied justice to have his claims heard and settled by the Court.

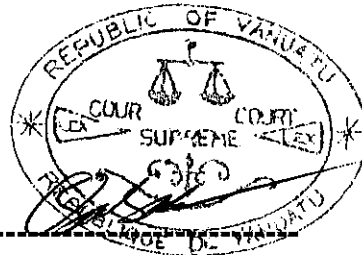
For those reasons, the Learned Senior Magistrate correctly and appropriately refused the Defendant/Appellant's Notice of Motion



seeking a stay of civil proceedings No.103 of 1998 on 18th February 1999. And for those reasons the Appellant's appeal was dismissed with costs to the Respondents.

**PUBLISHED at Luganville this 16th day of July, 1999.**

**BY THE COURT**



**OLIVER A. SAKSAK**  
Judge