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

CIVIL CASE No.12 OF 2007

BETWEEN: **RAYMOND VALETTE and JOSETTE VALETTE**
First Claimants

AND: **CENTER GARAGE**
Second Claimant

AND: **THE REPUBLIC OF VANUATU**
Defendant

Mr Bill Bani for the Claimants
Ms Jennifer Harders and Ms Christine Lahua for the Defendant

JUDGMENT ON STRIKING OUT CLAIM

On 9 June 2009, the Defendant applied to strike out the Claimants' Amended Claim filed 6 April 2009 ("the Claim"). The Claimants allege that they entered into a contract with the Defendant in or about June 2006.

The Defendant filed a defence to the Amended Supreme Court Claim on 27 April 2009 denying the existence or formation of a binding contract. They say that the matter alleged in the claim did not give rise to any enforceable obligation on the part of the Defendant to make any payment in any sum to the Claimants or any of them. Further the Defendant say the Claimants are not entitled to the relief claimed. The Defendant amplified its position by its application to strike out the claim filed 9 June 2009 which is the subject of this Judgment.

The main ground of the Defendant's application is that the claim discloses no cause of action in contract. In particular it:

- fails to identify offer or acceptance; and
- fails to identify any consideration.

The following background is necessary to understand the circumstance of this case and the conclusion reached by the Court on the application.

After the riots of 12 January 1998, the First and Second Claimants filed three (3) separate proceedings related to the damages caused by the rioters on 12 January 1998.

In 1998, the Claimants commenced proceedings against the Government of the Republic and the Commissioner of Police in Civil Case No. 11 of 1998.

In 1998, the Claimants commenced proceedings against Vanuatu National Provident Fund (VNPF) in Civil Case No.12 of 1998.

In 1998, the second Claimant, Center Garage Ltd commenced proceedings against UAP Assurance in Civil Case No.13 of 1998.

On 6 October 2000, the Court issued an oral Judgment dismissing an application made by the Applicant/Defendant to dismiss the claim in CC 11 of 1998. That order was then appealed before the Court of Appeal. The Court of Appeal on 21 April 2001 dismissed the appeal and gave directions that CC 11 of 1998 will go forward in conjunction with and together with CC 13 of 1998. Before the trial hearing the Claimants discontinued CC 12 of 1998 against VNPF by Notice of Discontinuance filed 4 October 2002 and on 4 March 2003, the Claimants discontinued their claim against the Defendant in CC 11 of 1998 and the Claimants paid the costs of the Defendant on 30 January 2004.

The Claimants proceeded with their claim in CC 13 of 1998 to trial against UAP Assurance. Coventry J delivered a Judgment in that case on 4 July 2003. At page 5 of his Judgment he stated: *"Accordingly I find that there was a valid policy of assurance of the Defendants in force in January 1998. That policy covered the riot damage at the plaintiff's premises. It is now a matter of that policy, to attempt to arrive at a figure for the insured loss."* He then awarded the Claimant their costs on the standard basis.

In January 2007, the Claimants in this action have renewed their claim to compensation from the Defendant Republic. Clearly lengthy negotiations took place. The claim (as amended) is principally a contract claim to enforce an agreement settlement. The sworn

statements show an agreed settlement was almost reached in 2006. This is transparent from:

- a letter from Center Garage Limited to the Prime Minister dated 7 June 2006;
- a letter from Prime Minister to Center Garage Limited dated 21 June 2005;
- Internal Government Memorandum to Director of Finance dated 26 June 2006.

These material documents are attached as exhibits I, J, K, to sworn statements of Raymond Valette of 13 March 2007.

On perusal of the pleadings, it appears that the material evidence were pleaded in the Amended Supreme Court Claim. However, there does not appear to have been any actual acceptance of the offer by the Defendant pleaded. Mr Valette's sworn statement does not refer to written document accepting it. Also, the Internal Memorandum of 26 June 2006 refers to the need to prepare an agreement to *"specify terms and conditions of implementing the Council of Ministers Decisions of 26 April 2006, and how payments were to be made."*

Mr Valette, however, obviously knew of the proposal to pay Center Garage Limited VT116,000,000. He had some discussions and correspondence in late 2006 about getting the payment in two instalments.

On 24 November 2006, following a meeting of the Council of Ministers of 22 November 2006 revoking its previous decisions, Mr Valette was notified that no payment would be made [Exhibit 0 to sworn statement of Raymond Valette].

The next step taken by the Claimants was to file this Supreme Court Claim on 2 February 2007 which was then amended on 6 April 2009.

By perusing the pleadings, and the statements filed therein, there was no concluded agreement to pay Vatu 116,000,000 to the Claimants in 2006. There is also no conduct by the Defendant Republic which the Claimants could fairly have acted on to their detriment to support any form of promissory estoppal.

Although, it is not entirely clear, the claim (at paragraph 7) seems to suggest that the Claimant refrained from *"reinstituting"* Civil Case No.11 of 1998 or from taking *"any other legal remedy against the Defendant."*

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It is noted that the Claimants have discontinued their claim against the Defendant Republic and costs were paid to the Defendant Republic on 30 January 2004.

Rule 9.9(4)(a) does not allow the Claimants to reinstitute their claim.

It is also noted that the claim arose out of the riots occurring on 12 January 1998. By the passage of time (which is now more than 9 years) the claim is barred by operation of the provisions of the **Limitation Act** [CAP.212] (s.3).

At the time of submissions hearing, Mr Bani conceded on behalf of the Claimants that there is no consideration in the alleged agreement pleaded by the Claimants.

Despite this concession, Mr Bani submitted on behalf of the Claimants that the negotiating agreement occurred in 2006 and the consideration suggested by the Claimants which is the forbearance by the Claimants to refrain from *"reinstituting"* Civil Case No.11 of 1998 or from taking *"any other legal remedy against the Defendant"* was made in 2006 and so is still within the limitation period.

There is a misapprehension from the Claimants' position for the following reasons. In contract law, consideration is the basic feature and it is an essential part of the cause of action. Consideration must be not merely *"something of value"*, but *"something of value in the eye of the law"*. The law in certain cases refuses to recognise the "value" of acts or promises even though hey would, or might, be regarded as valuable by a layman. [See **Chitty on Contracts – General Principles** (20th ed.), **Sweet & Maxell** (paragraphs 153 & 154)].

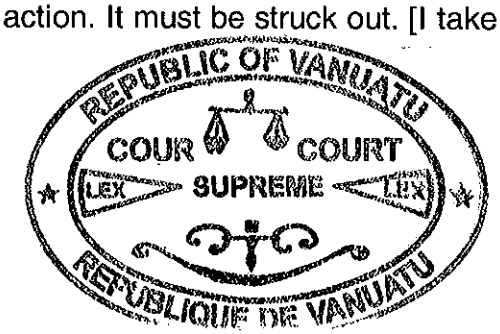
Even if it were suggested that, in return for the Defendant's promise, the Claimants expressly or impliedly promised to forbear from *"reinstituting"* Civil Case No.11 of 1998 or from taking any *"other legal remedy against the Defendant"*, that is a promise in return for a promise. There would clearly be no consideration because the Claimant's promise would not be binding on them and therefore, would worth nothing. Notwithstanding the Claimants' promise, they could always apply to the Court to enforce their right. No agreement by the Claimants could take away that right. On the pleadings and material statements, there was no promise by the Claimants, express or implied, to forbear from applying to the Court. It appeared that all that happened was that the Claimants did, in fact, forbear, that is, they did an act in return for a promise. The

Amended Supreme Court Claim does not show any acceptance or consideration by the Defendant that the Claimants should forbear from *"reinstituting"* Civil Case No.11 of 1998 against the Defendant or any request by the Defendant, express or implied, that the Claimants should so forbear. [See **Combe v. Combe** [1951] 1 All ER 767]. Where the consideration is alleged to consist of an actual forbearance, such forbearance can only be valuable consideration where the Claimants (as promisees) have reasonable grounds for believing, and do believe, that they have a good cause of action. [HALSBURY'S LAWS OF ENGLAND; Fourth Edition, Vol 9 paragraph 322]

The circumstances of this case show that the Claimants discontinued Civil Case No.11 of 1998 against the Defendant and the Claimants paid the Defendant's costs in January 2004. They cannot reinstitute Civil Case No.11 of 1998 by the operation of Rule 9.9(4) (a) of the Civil Procedure Rules. Further, there is no acceptance by the Defendant of the alleged agreement between the Claimants and the Defendant, pleaded in the Amended Supreme Court Claim of 6 April 2009. Furthermore, the decision of the Council of Ministers dated 20 April 2006 is not a contract and, thus, it cannot be enforced against the Council of Ministers. In the present case, the Claimants (as promisees) did not have reasonable grounds to believe that they had any right which could be enforced at law or in equity. Therefore, any alleged forbearance did not amount to valuable consideration.

Finally it is noted that the Claimants obtained judgment against UAP Assurance in Civil Case No.12 of 1998. The Claimants and in particular Center Garage Limited has been covered for their loss by their insurer. On any sense, if the Defendant were required to pay VT116,000,000, the Claimants will be unjustly enriched after having been obtained compensation from their insurance company. If UAP Assurance indemnified the Second Claimant, Center Garage Ltd, it may also by subrogation own any right of action on behalf of Center Garage Limited against the Government. The Second Claimant, Center Garage Ltd may have no right to sue the Defendant. In any event, whether or not there is consideration, the action in Civil Case No.12 of 2007 is time-barred. The cause of action arose on 12 January 1998. It was more than 9 years before the filing of the claim. Equally, the First Claimants' right to sue the Defendant Republic is statute-barred.

I reach the conclusion that, the Amended Supreme Court Claim filed 6 April 2009 in Civil Case No.12 of 2007 discloses no cause of action. It must be struck out. [I take this



opportunity to thank counsel for their valuable assistance]. The Court makes the following Orders:

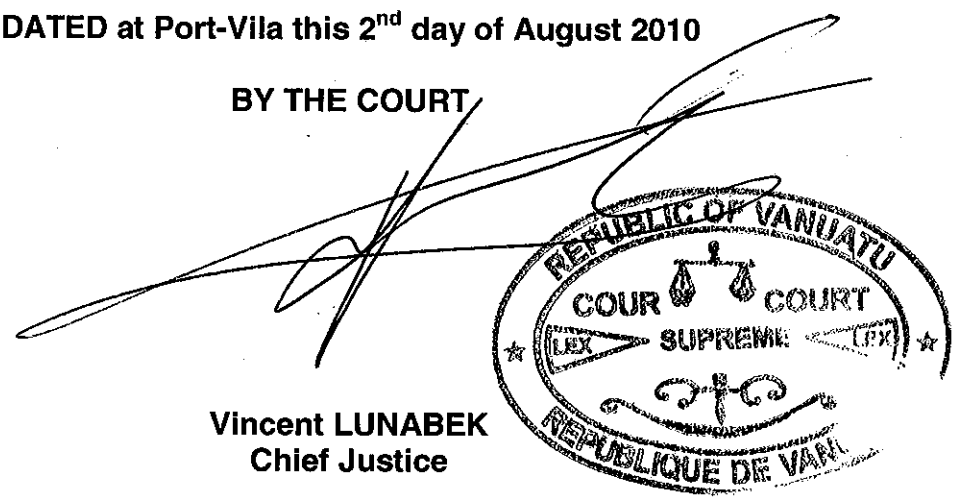
ORDERS

1. The Amended Supreme Court Claim filed 6 April 2009 in Civil Case No.12 of 2007 is struck out. It discloses no cause of action.

2. The Defendant is entitled to its costs to be agreed or assessed by the Court.

DATED at Port-Vila this 2nd day of August 2010

BY THE COURT



Vincent LUNABEK
Chief Justice