

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

Civil Case No. 28 of 2007
Civil Case No. 7 of 2008

BETWEEN: C L AGENCIES COPRA CRUSHING
Represented by its Owner Claire Dornic
Claimant

**AND: VANUATU COMMODITIES
MARKETING BOARD**
Defendant

In Chambers

Coram: J.L. Dawson, Acting Master.

**Counsel: Mr. Felix Laumae T Kabini for Claimant.
Mrs. Marisan Vire for Defendant.**

Date of hearing: 7 July 2009, 10 August 2009

Date of Determination: 12 February 2010

DETERMINATION

Background

- (1) This is a taxation hearing matter concerning costs charged by Counsel for the successful Claimant in Civil Case no 28 of 2007 and Civil Case no 7 of 2008. As regards Civil Case no 28 of 2007, Mr Justice Saksak delivered the judgment in this case on 19th day of February 2008 and made the following order:

The Defendants will pay the Claimants costs of and incidental to this action on a party/party basis to be agreed, or determined by the Court.

As regards Civil Case No. 7 of 2008, Mr Justice Saksak delivered the judgment in this case on 10th day of July 2008 and made the following order:

The Defendant will pay the Claimant's costs of and incidental to this action on an indemnity basis to be agreed or determined by the Court.

- (2) Following the ruling by the Court on 19th February 2008 and 10th July 2008, Bills of Costs in relation to both matters were, according to the Sworn Statement of Felix Laumae T Kabini, served on the Defendant's lawyer and request made for payment.

- (3) The said Sworn Statement further records that no response or offer of payment was made by Counsel or offer of payment was made by Counsel for the Defendant and this has prompted Counsel for the Claimant to make application to the Court for Determination of Costs.
- (4) In the Defence to Application for Taxation of Costs, Counsel for the Defendant states that the Bills of Costs referred to in relation to Civil Case 28 of 2007 and Civil Case 7 of 2008 were not received by the office. There was consequently not an opportunity to respond to the same prior to filing of the Application for Determination.
- (5) Reference is made also to the Sworn Statement of Rina Vire which notes that one Bill only was transmitted to the office of the Counsel for the Defendant, that in respect of Civil Case No. 28 of 2007. Rina Vire, also states that by letter dated 17 March 2008 (& attached to the Sworn Statement) Counsel for the Claimant was requested to itemize his Bill of Costs.
- (6) Counsel for the Defendant has filed detailed Responses to the Application for Taxation of Costs in respect of Civil Claim 7 of 2008 and Civil Claim 28 of 2007, both dated 1 December 2008.
- (7) Counsel for the Claimant filed a Reply to Response in respect of both claims on 19 March 2009.
- (8) It may be observed that Notices of Hearing in relation to costs assessment and determination were sent to Counsel for the Claimant and to the Defendant on a number of occasions. The matter was set down for hearing on 12th June 2009 and 7th July 2009. On no occasion was there an appearance by both Counsel.
- (9) By order dated 8th July 2009 the Claimant to file and Serve a Sworn Statement as to disbursements claimed, enclosing receipts and proof of VAT registration within 7 days of the date of order.
Respondent to file and serve objection to same within 14 days of the date of the order.
- (10) Sworn Statement of Roman Mulonturala as to certain disbursements claimed by Claimant filed on 13th day July 2009.
- (11) Subsequent Notices of Hearing in relation to costs assessment and determination for 29th July 2009 & 10th August 2009 were given to Counsels for the Claimant and the Respondent.
- (12) By Direction dated 10th August 2009, matter to be adjourned for 4 weeks from the date of direction to enable parties to discuss cost issues further with a view to settlement. Claimant to notify Court if settlement not reached by the expiration to this time.
- (13) By further Direction dated 29th September 2009, Counsel for the Claimant to file & serve submissions as to amount of costs sought from the Defendant together with particulars of any offer or made by the parties.
- Counsel for Claimant to file and serve such submission by way of response by 21st October 2009.
- (14) Submission by the Claimant in support of the Bill of Costs & Disbursements filed on 26 October 2009.
No Submission by Counsel for the Defendant in response to same has been filed and served.

(15) Issues

For consideration in this determination.

- Whether each item of work listed in the Statement of Costs, and its time and costs allocation, was reasonable.
- Whether each item of work was necessary for and related to the proper conduct of proceedings.
- Whether the itemized disbursement claims should be allowed as necessary for the conduct of the case and supported by appropriate documentary evidence.
- Whether offers to settle were made.
- considering each in turn:

(16) Offer to Settle

Counsel for the Claimant has stated in Submission by the Claimant in support of the Bill of Costs and Disbursements that following judgment and orders in both Civil Case no 28 of 2007 and Civil Case no 7 of 2008, no offer to settle was made by the Defendant despite service of a Bill of Costs & Disbursements on the Defendant's Solicitor.

In the Defence to Application for Taxation of Costs, Counsel for the Defendant states that she did not receive bills for either Civil Case No. 28 of 2007 or Civil Case 07 of 2008 and thus was unable to consider the Bills of Cost prior to the application to the Court.

The Sworn Statement of Rina Vire to Support Defence states that are the only Bill of Costs received by the office of the Defendant's Counsel was one in respect of Civil Case No. 28 of 2007. The Statement records that a request was made of Counsel for the Claimant to itemize the Bill.

It may be observed that the Bill of Costs attached to this Statement does not in any way comply with the requirements of Rule 15.7 (3) Civil Court Practice Rules and would have been difficult to read and consider with a view to settlement or otherwise.

However, it may be further observed that the proceedings for costs assessment and determination have been very drawn out. There have been numerous opportunities to consider settlement of costs in this matter. Neither party has chosen to avail themselves of such opportunity.

Considering the issue of

(17) Fairness and reasonableness of cost claimed & necessity for & relation to the proper conduct of proceedings.

Firstly, as regards the Bill of Costs in Civil Case 28 of 2007.

The Statement of Costs as now before the Court sets out various items of work done, in order. They are not, however numbered consecutively as required by Rule 15.7(3) Civil Court Practice Rules. For the purposes of this Determination work items concerning the period 22/5/2007- 19/2/08 and an additional item for the preparation of Bill of Costs for taxation have been numbered 1-30 respectively. The hourly rate of VT 10,000 is reasonable. There are however some issues in relation to time allocation claimed and also necessity for and relation to the proper conduct of proceedings.

Items 1-12 relate to work done prior to the commencement of proceedings. While it is accepted that work will have to be undertaken in receiving instructions and

appropriate consideration of legal issues the total time claimed in respect of them is manifestly excessive. The time allocation for items 1-12 is accordingly reduced to 983 Minutes.

Item 13 Clearly some repetition in this work item since research work already undertaken prior to commencement of any proceedings. A claim of 520 minutes for preparation of documents described is excessive and has been reduced to 300 minutes.

Item 14. Attendance in Santo to file Claim. It may be observed in relation to this item and also item 18 that attendance at Court Registries for filing claims is work that is usually carried out by clerical staff rather than Counsel.

This point was clearly made by his honour Vincent Lunabeck CJ in, Hudson & Co v. Sunrise Limited (1996) VUSC 2; Civil Case 059 of 1995 (4 January 1996) where it was observed that *"it has to be understood that the attendance to the Registry for filing documents and arranging for subsequent service are the type of work done by clerical staff of law firms. They should not be done by lawyers and then be charged on the clients."* The amount claimed in relation to items 14 & 18 has accordingly been reduced to 300 minutes.

Item 15 - Allowed.

Item 16 - Unnecessary duplication of effort and 60 minutes excessive in circumstances Reduced to 20 minutes.

Item 17 - Allowed.

Item 18 - (see above)

Item 19 - 460 minutes claimed excessive for conference attendance and perusal of document. Reduced accordingly to 180 minutes.

Item 20 - Duplication – already covered in items 19. Disallowed.

Item 21 - Attendance at Santo for pre-trial Conference. Submitted by counsel for Defendant that Counsel for Claimant also attending in relation to 3 other cases on that day and that some cost split equitable. This is accepted and the amount claimed is reduced to 115 minutes.

Item 22 - 45 minutes for activities described clearly excessive and has been reduced to 20 minutes.

Item 23 - Attendance at Santo for pre-trial conference. Again, Court listings for day indicate attendance for 3 cases by Counsel for Claimant and amount claimed has been reduced accordingly to 153 minutes.

Item 24 - Clearly some duplication since such research would have occurred prior to the commencement of proceedings and has already been allowed under other items. Amount claimed reduced to 60 minutes.

Item 25 - Allowed.

Item 26 - Time claimed excessive and has been reduced to 15 minutes.

Item 27 - Point must again be made that attendance at court for filing purpose is a matter for clerical staff and will be viewed accordingly for taxation purposes. 460 minutes is also excessive for the time spent in the drafting of the 2 documents described and 1 letter and has been reduced to 300 minutes.

Item 28 - Excessive time claimed Reduced to 10 minutes.

Item 29 - Attendance at Supreme Court in Santo to receive judgment. Further reference in this item to "other attendance at Court - meeting" must be taken to

include work already allowed for in items above. 460 minutes claimed is excessive and has been reduced to 240 minutes.

Item 30 – 310 minutes claimed for work involved is excessive and has been reduced to 120 minutes.

(18) Disbursements claimed in respect of Civil Case No 28 of 2007

The Statement of Costs lists a number of disbursements, including telephone, fax, photocopy, return air fares, accommodation and meals.

It is submitted by Counsel for the Claimant that in cases such as this when the lawyer is in Port Vila and the client and proceedings are in Santo, communication must occur through phone, fax and email and that a record is not always kept of the same.

This may indeed be the case. It is accepted that in proceedings such as this, some disbursements will have been incurred as items of expenditure necessary to the conduct of the case:

However, it must be strongly emphasized that disbursement claims should be justified by the production of receipts or some form of documentary evidence. Records of all disbursements must be kept if a claim in relation to the same is to be made.

The submission of Counsel for the Claimant that a blanket allowance of 50 % should be made in respect of all such claims in the absence of documentary proof is clearly unsustainable.

Accordingly, the sums claimed for telephone, fax and email (for which no receipts have been produced) are disallowed.

The following disbursements are allowed to the extent that they are supported by documentary evidence.

- Air fares	87,450
- Meals	17,570
- Supreme Court filing fees	<u>20,000.</u>
	125,020.

Evidence of registration for Value Added Tax also produced and allowed accordingly.

The amount allowed in respect of the Statement of Costs in respect of Civil Case No. 28 of 2007 is as follows.

Time allowed in respect of work covered out in conduct of proceedings
3368 minutes = 56.13 hours = 561 300.00.

a) VT 10,000 ph.		
	+ VAT: '12.5'%	70 162 .50
		<hr/>
		6 31 462.50
+ Disbursements		125.020
as allowed.		<hr/>
		= 756 482.50

TOTAL SUM allowed for statement of costs in relation to Civil Case No 28 of 2007 = VT 756,482.50.

Considering now the same issues in relation to the Statement of Costs in respect of Civil Case No. 7 of 2008.

(19) Fairness & reasonable of costs claimed & relation of same to conduct proceedings.

The Statement of Costs sets out each item of work done, in order, and is numbered consecutively. The stated hourly rate of VT 20,000 is reasonable. The various items of work set out in the Claimant's Statement of Costs will now be considered as to reasonableness in terms of time allocation and necessity for and relation to the proper conduct of proceedings.

Both Counsels have referred to Rule 15.5.2 Civil Court Practice Rules in this regard.

Rule 15.5.2 states that:

Costs awarded or an indemnity basis.....are all costs reasonably incurred & proportionate to the matters included in the proceeding, having regard to.....

(a)

(b) *charges ordinary payable by a client to a lawyer for work.*

Counsel for the Claimant has submitted that since the Claimant has actually paid her lawyer the sum claimed in the Bill of Costs, this should be the exact amount now payable by the Defendant. This argument is again, unsustainable as the costs claimed might, for instance, be considered unreasonable or disproportionate to proceedings despite the fact of payment. It should be noted also that in the context of a cost determination, this must be work carried out in relation to proceedings. It should not include work carried out for a client prior to a proceeding and perhaps well before court proceedings are contemplated.

Items 1-9 Fall into this category in that they relate to various work undertaken by the Counsel for the Claimant prior to the commencement of proceedings in this case. For this reason, they will be disallowed for the purposes of this Determination.

Items 10-14 - Clearly relate to the conduct of proceedings in this case. While research and preparation necessary, the Claim for Judicial Review was a 3 page document, as was the Sworn Statement of Madam Claire Dornic.

Accordingly it should appear that a total time allowance of 1615 minutes in respect of these items is excessive and has been reduced to 960 minutes.

Items 15 - Some reduction in time- allowance given in early items to work on Judicial Review Claim and Sworn Statement.

150 minutes claimed excessive in circumstance and has been reduced to 360 minutes.

Item 17 -Time claimed for conference in Santo should be reduced to reflect fact that attendance for 4 other cases also.

Reduction to 102 minutes.

Item 18 - Allowed .

Item 19 - May be some question as to the necessity of this conversation. In any case time claimed excessive and has been reduced to 10 minutes.

Item 20 - Excessive time claimed in view of fact that Application & Sworn Statement are neither of great length nor complexity. Time claimed reduced to 270 minutes.

Item 21 -Excessive time claimed- reduced to 60 minutes.

Item 22 -Allowed.

Item 23 -Duplication as time of research & preparation allowed for in earlier items above. Time reduced to 300 minutes.

Item 24 - Allowed.

Item 25 - Again, duplication of claim as time for research & preparation already allowed. Issue in question already researched at this point.

The claim of 880 minutes manifestly excessive and has been reduced to 400 minutes.

Item 26 - Allowed.

Items 27- 30 - Claim in relation to work activities by Counsel for Claimant that occurred after judgment and cost orders in this matter. They relate to enforcement activities post- proceedings and accordingly are disallowed.

Item 31- Allowed.

(20) Disbursements Claimed in respect of Civil Case No 7 of 2008.

The Statement of Costs lists a number of items in respect of disbursements claimed.

Reference is made to comments in paragraph 18 above as to the necessity of record keeping and the fact that disbursement claims should be justified by the production of receipts or some form of documentary evidence.

The Statement of Costs lists disbursements such as telephone, fax, email, air-freight, photo- copy & airport tax. There are no receipts or documentary evidence of any of these claims. Accordingly they are disallowed. The following disbursement claims are supported by receipts and will be allowed:

- Meals	VT 3 200.
- Air Fares	VT 90, 610
- Supreme Court Filing Fees	<u>VT 35,000</u>
	<u>VT 128 810</u>

Evidence of registration for Value Added Tax has been produced and will be allowed accordingly.

Total allowed in terms of Statement of Costs in respect of Civil Case 7 of 2008 is as follows:

Time allowed in respect of work carried out in conduct of proceedings.

= 3807 Minutes	= 63.45 hours.
a) 20,000 VT per hr	= 1 269 000.VT
+ VAT: 12.5%.	158,625
	<hr/>
	1,427 625 VT
+ Disbursements as allowed.	128,810.

Total sum allowed for statement
Of costs in relation to Civil Case
No. 7 of 2008.

1,556 435 VT

- (21) Counsel for Claimant in his Sworn Statement in support of Application for Determination of Costs has sought additional costs on the basis that the Respondent has not responded to his Bill of Costs and letters sent. It has been noted that Counsel for the Respondent in the Response to Application for Taxation of Costs denies receiving a Bill of Costs. This is further supported by the Sworn Statement of Rina Vire.

The various items of work for which Counsel for the Claimant claims additional costs are set out as items a) – d) & will be considered as follows:

- a) – b) letters, service of same & various telephone calls enquiring about payment of call - 60 minutes allowed.
- c) Drafting application for determination.
- Time allowance already given in relation to item 31 above.
Declined.
- d) Estimated costs in relation to attendance at Santo. Declined as such hearing did not in fact proceed in Santo.

Additional cost allowance:

= 60 minutes =	1 hour
	& VT 20,000
VAT & 12.5%	<u>2 500</u>
=	<u>VT 22 500</u>

There are a number of items claimed as disbursements including air fare, tax, transport, photocopy and fax.

As no receipts or documentary evidence are provided for such claims, there are disallowed.

After taking, into account the factors referred to in paragraphs 16-21 herein, the submission of Counsel for the Claimant and Counsel for the Defendant and the Court file relating to this matter, it is the view of this Court that the appropriate sum of costs payable by the Defendant to the Claimant pursuant to the two cost rulings of Justice Saksak is a total Sum of **VT 2, 335, 417-50.**

Dated at Port Vila this 18th day of March, 2010.

BY THE COURT


J.L. Dawson
Acting Master of the Supreme Court

