

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

Civil Case No. 137 of 2009

BETWEEN: JACK I. KILU

Claimant

AND: HON. STEVEN KALSAKAU

Defendant

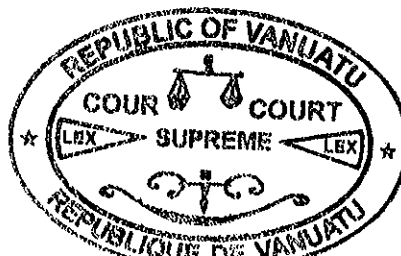
Coram: Justice D. V. Fatiaki

**Counsels: Mr. Jack I. Kilu in person
Mr. John L. Napuati for the Defendant**

Date of Decision: 20 April 2012

JUDGMENT

1. This is an application for summary judgment against the defendant. The original claim is for outstanding fees owed to the claimant in respect of legal services and representation provided to the defendant in a criminal prosecution in which the defendant was jointly charged with 4 others for an offence of **Conspiracy to Defeat the Course of Justice** contrary to **Section 79 (a)** of the **Penal Code**.
2. The trial in the case before **Bulu J.** lasted for **24** hearing days and concluded with a successful submission at the end of the prosecution case, that the 5 accuseds (including the defendant) had no case to answer on the charge. The defendant was accordingly discharged. (see: PP v. Benard [2006] VUSC 44)
3. The reported case (ibid) records the appearance of the claimant "*for the Mr. Kalsakau*", and, at **paragraphs 5 and 10** of Bulu J's judgment, particular mention is made of the claimant making a submission of no case to answer on behalf of the defendant. The trial "*... began on 1st September 2005 and lasted for approximately two and a half months. The Public Prosecutor called in a total of 29 witnesses*". All of the foregoing is admitted by the defendant including that he is "*an elected Member of the Vanuatu Parliament*".
4. In his defence filed personally by the defendant, he pleads:



- (a) that he paid the claimant a total sum of **VT520,000** "in consideration" of 2 invoices provided by the claimant;
 - (b) that he never agreed to pay the claimant **VAT** "on top of his legal fees";
 - (c) that he "was unhappy with the work done by the claimant since (he) was mostly sleepy in Court and that he had never really represented (the defendant's) interests"; and
 - (d) on "two occasions he had instructed the claimant to cease to act on his behalf on the grounds that he will not pay for no service".
5. In reply, the claimant admits receiving two (2) payments from the defendant totaling **VT320,000** which are accounted for in the defendant's **Statement of Account** dated 30 January 2006. Other than that admission the claimant strongly refutes all other averments as "all nonsense and untrue". The claimant also accepts that the defendant "had very minimal involvement (in the case) in simply signing the Fishing Licence". As for including **VAT** in the defendant's invoices, the claimant says: "... (it) is not something to be agreed on between the parties. The claimant is duly registered for VAT and therefore is entitled to claim VAT".
6. On **13 April 2011** the claimant filed an application for summary judgment supported by a sworn statement. In the application the claimant asserts that the defendant "has no real prospect of defending the applicant's claim" and "there is no need for a trial of the claim" because –

"..... The defendant has filed a defence but has continually failed to file any sworn statement in support of his defence despite being ordered by the Court on a number of occasions to file his sworn statement to support his alleged defence".

7. Written submissions were ordered and despite being served with the claimant's comprehensive submissions, and despite the court's order, no submissions were ever provided by defence counsel.
8. **Rule 9.6** of the **Civil Procedure Rules No. 49 of 2002 (CPR)** is relevant. It provides in **subrules (5), (7) and (9)** as follows:

"(5) The defendant:

- (a) may file a sworn statement setting out the reasons why he has an arguable defence; and



- (b) *must serve the statement on the claimant at least 7 days before the hearing date.*

.....

(7) *If the court is satisfied that:*

- (a) *the defendant has no real prospect of defending the claimant's claim or part of the claim; and*
(b) *there is no need for a trial of the claim or that part of the claim;*

the court may:

- (c) *give judgment for the claimant for the claim or part of the claim; and*
(d) *make any other orders the court thinks appropriate.*

.....

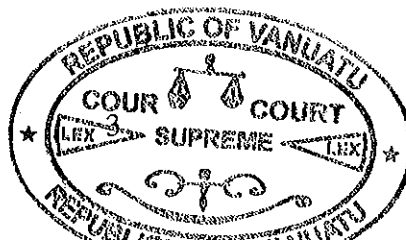
(9) *The court must not give judgment against a defendant under this rule if it is satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law."*

9. From the foregoing there is no doubting the Court's power to grant summary judgment if it is satisfied that:

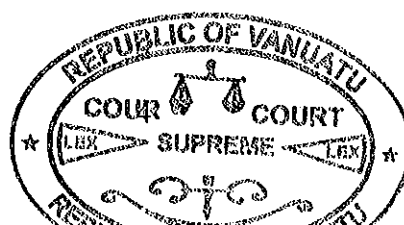
"(a) the defendant has no real prospect of defending the claimant's claim; and
(b) there is no need for a trial of the claim....."

For present purposes, I would highlight in the above, the use of the word "real" (as opposed to incredible or fanciful) in **paragraph (a)** and the word "need" (as opposed to desirable or convenient) in **paragraph (b)**.

10. Although the filing of a sworn statement by the defendant is optional in terms of **Rule 9.6 (5)**, the failure to do so leaves the Court with only the undisputed sworn evidence of the claimant in considering the application for summary judgment. The absence of a sworn statement from the defendant is some indication that there is no dispute about the facts of the claim or if there is a dispute raised or pleaded in the defence, that the defendant does not wish or seek to verify his pleaded facts on oath.
11. Given the nature of the defence(s) raised which alluded to conversations the defendant had with the claimant and the details of the fee arrangement reached between them coupled with the court's order(s) for the defendant to file a sworn statement, the failure on the part of the defendant to file a sworn statement is particularly poignant.



12. Be that as it may it is possible to briefly comment on the disputed defences raised by the defendant. Concerning the complaint about the claimant not being present in court or not representing the defendant properly during the trial, the particulars provided lacks any specific dates or times when it is alleged the claimant did not attend the trial as would be expected if the defendant had kept a record, and the other particulars, relating to what the claimant did or did not do during the trial is readily explained on the basis that the defendant had a relatively "*minor role*" in the alleged conspiracy, viz signing a licence, and therefore, presumably, fewer witnesses (if any) were called against him.
13. Furthermore, the fact that the defendant was the third-named of the four (4) defendants charged in the criminal case means that his counsel was the third or last counsel to cross-examine the prosecution's witnesses and also the last counsel to address the court on the "*no case*" submission (see: **Sections 162 (8) and 170 (b) of the Criminal Procedure Code**).
14. In the above circumstances it is only necessary, in my view, for defence counsel to cross-examine any "*witness produced against* (his client)" on matter not already dealt with by preceding senior counsels of which there were two. To do otherwise, would add to costs and unnecessarily prolong an already lengthy trial, and could even prove prejudicial to the defendant's interests. This ground of defence, if it can be called that, is quite unmeritorious and reflects a common misunderstanding or unrealistic expectation amongst lay-clients about what a lawyer should or should not do in conducting a defence at trial, rather than being an objective assessment of counsel's professional competence.
15. As for the complaint about **VAT** being included in the claimant's two (2) invoices, **Sections 10 and 11 of the Value Added Tax Act [CAP. 247]** creates and imposes a value added tax of **12,5%** in respect of the value of any "*taxable activity*" which includes any regular and continuous professional activity involving the supply of services for a consideration by a "*registered person*". In this latter regard the uncontroverted evidence is that the claimant is registered for the VAT purposes and is therefore entitled to charge and include VAT in his invoices. Whether or not he has actually declared and paid the invoiced amounts to the relevant authority is irrelevant and does not disentitle their inclusion in the claimant's invoices.
16. The defendant's other complaint about instructing the claimant to cease acting for him is unparticularised as to date(s) and is unverified by a sworn statement as might be expected if there was any truth in the matter. In this regard I note that the claimant's invoices identifies the exact dates he claims he attended the defendant's trial and the varying times (in minutes) that each attendance entailed. There is also no suggestion that the



defendant had objected to the invoices when they were first delivered to him in November 2005 or in response to the claimant's reminder letters in January 2006 and July 2007.

17. After considering the pleadings and the claimant's sworn statements filed in support of the claim and application for summary judgment, and mindful of the complete failure on the defendant's part, despite several orders for him to do so, to file a sworn statement in support of his defence or which might have raised a triable issue, I am satisfied in the words of **Rule 9.6 (7)** of the **CPR**, that "*the defendant has no real prospect of defending the claim*" and further, that there is "*no need for a trial of any part of the claim*".
18. Accordingly, I enter judgment for the claimant in the sum of **VT1,105,000** with interest of **5%** per annum calculated from **20 October 2009** until fully paid up.
19. The claimant is also entitled to recover **all** disbursements incurred in pursuing the claim and this application for summary judgment.

DATED at Port Vila, this 20th day of April, 2012.

BY THE COURT


D. V. FATIAKI
Judge.

