

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

Judicial Review
Case No. 14/25 SC/JUDR

BETWEEN: Unelco
Applicant

AND: Utilities Regulatory Authority
First Defendant

AND: The Government of the Republic of Vanuatu
Second Defendant

AND:

Judicial Review
Case No. 15/745 SC/JUDR

BETWEEN: Unelco
Applicant

AND: The Government of the Republic of Vanuatu
First Defendant

AND: Utilities Regulatory Authority
Second Defendant

AND:

Judicial Review
Case No. 15/30 SC/JUDR

BETWEEN: Unelco
Applicant

AND: Utilities Regulatory Authority
First Defendant

AND: The Government of the Republic of Vanuatu
Second Defendant

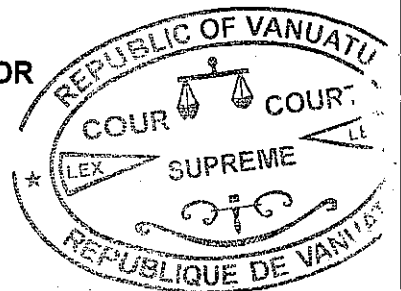
AND:

Judicial Review
Case No. 15/04 SC/JUDR

BETWEEN: Unelco
Applicant

AND: Utilities Regulatory Authority
First Defendant

AND: The Government of the Republic of Vanuatu
Second Defendant



Hearing: 12th December 2017

Before: Justice David Chetwynd

Counsel: Mr Mark Hurley for UNELCO
Mr Garry Blake for the Utilities Regulatory Authority
Mr Sakiusa Kalsakau for the Republic of Vanuatu

Judgment on Costs

1) This decision is in respect of the costs before the Supreme Court of the four Judicial Review matters listed above. They were originally dealt with by me in September 2016 when a judgment was handed down on a preliminary issue. That judgment was appealed to the Court of Appeal. The appeal was in part successful and in part not.

2) What the Court of Appeal actually said was this ¹:

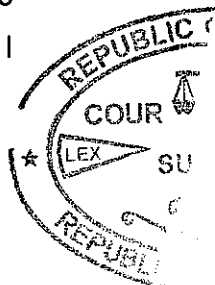
"Finally, as to costs, as UNELCO has succeeded in part and has not succeeded in part upon this appeal, the Court considers it appropriate to make no order as to the costs to the appeal."

The Court then went on to say:

"In the matter, generally, each of the issues arising under the several JR claims is remitted to the Supreme Court for further hearing and determination in accordance with these reasons for judgment. There is no order as to costs of the appeal."

3) I understand from the parties that there is no need to have any further hearings leading to a determination of the issues as they are likely to be filing consent orders in all matters. All that I am expected to deal with now is the issue of costs. Obviously, that is only the costs in the Supreme Court because the Court of Appeal has already dealt with the costs before them. It hardly seems necessary to state the obvious but I will, simply for the sake of completeness, say that any order I

¹ *Union Electrique Du Vanuatu Ltd v Republic of Vanuatu* [2016] VUCA 50; Civil Appeal Case 3472 of 2016 (18 November 2016)



make can have no effect on the conclusions reached by the Court of Appeal or the orders it made.

4) Counsel have submitted extensive submissions and I also heard oral submissions from them. I thank them for their assistance.

5) I accept that, on the question of costs, the general rule is as set out in the Civil Procedure Rules (Rule 15.1(2)) and that the costs of a proceeding are payable by the party who is not successful in the proceeding. However that does not detract from the basic starting point that costs are discretionary (Rule 15.1(1)).

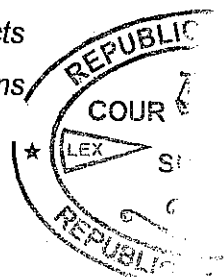
6) I also accept that the order made by the Court of Appeal (at paragraphs 198 and 199) does not cover the costs in the Supreme Court and I do not think there is any doubt the Court of Appeal only dealt with the costs of the appeal. It is common for the Appeal Court to make an order for costs "*in the Court below*" but it did not do so in the appeals in these matters. The cases were remitted to the Supreme Court and presumably the Court of Appeal expected this Court to deal with costs as well as the substantive issues.

7) It should be noted that no order for costs was made in the decision appealed. That was because the decision dealt with a preliminary issue and the question of costs was going to be left until the final decision in each of the Judicial Reviews. On the basis that the parties intend to file consent orders that means the cases can now be disposed of (in regard to costs) in accordance with Rule 15.1(1).

8) In reaching my decision on costs I bear in mind the Court of Appeal's words "*each of the issues arising under the several JR claims is remitted to the Supreme Court for further hearing and determination in accordance with these reasons for judgment.*" Clearly the Court of Appeal expected any determination(s) made by the Supreme Court to be made in accordance with what they had said in the appeal. In other words and in relation to costs, I should exercise my discretion (Rule 15.1(1)) bearing in mind the reasons given by the Court of Appeal and the decision it reached in the appeal.

9) At paragraph 186 of its judgment the Court of Appeal said:

"For the reasons given the Court proposes to allow the appeal in some respects as it has indicated and dismiss the appeal in other respects again for the reasons it has indicated."



In short there was no clear winner and it could not be said there was one successful party. The Court of Appeal acknowledged that it had not, "...made final orders disposing of each of the JR claims" because there was a counterclaim by the URA which was not the subject of appeal. As regards outstanding matters the Appeal Court said:

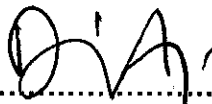
"Again, the Court of Appeal anticipates that, in the light of these reasons, the appropriate orders will be agreed between the parties (that is, agreed as appropriate having regard to the reasons for decision now published), and can readily be made."

10) The Court of Appeal then dealt with other outstanding issues of possible bias and possible breach constitutional rights. The Court explained why those issues were no longer live issues. Whilst the Court of Appeal did not make *final orders disposing of each of the JR claims* it clearly felt it had provided sufficient guidance to enable such orders to be agreed and it had done so whilst maintaining the position that a costs order was inappropriate.

11) In my view I should take that same position with regards to the costs in the Supreme Court. I make no order as to costs.

DATED at Port Vila this 26th day of January, 2018

BY THE COURT


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D. CHETWYND
Judge

