

**BETWEEN: Alick Kalmelu**

*Claimant*

**AND: Ifira Land Corporation Ltd**

*Defendant*

**Dates of Hearings :** *9<sup>th</sup> June 2021, 20<sup>th</sup> July 2021, 5<sup>th</sup> November 2021, 15<sup>th</sup>  
December 2021 and 31<sup>st</sup> January 2022*  
**Date of Decision:** *15<sup>th</sup> July 2022*  
**Before:** *Justice Oliver A Saksak*  
**In Attendance:** *Mr Stephen T Joel for the Claimant  
Mr Sakiusa Kalsakau for the Defendant*

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## JUDGMENT

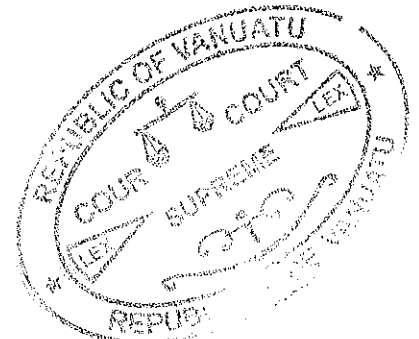
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### Introduction

1. This judgment is formulated on the papers as filed by the parties pursuant to the orders and directions issued by the Court on the given dates ( as above).

### Background Pleadings

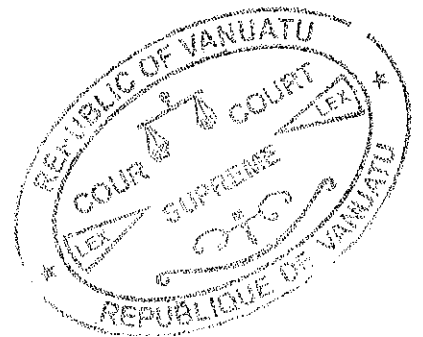
2. The claimant filed his claims on 7<sup>th</sup> June 2021 claiming damages in the total amount of VT 2, 860, 250 which comprised of:
  - Notice- VT 306,000
  - Unpaid salary- VT 20,400
  - Leave- VT 82,450
  - Severance-VT 350,200
  - Damages- VT 2,101,200 ( multiplier of 6 times)
3. The claimant claimed for interest at 12% per annum and for legal costs.



4. The defendant filed its defence on 9<sup>th</sup> August 2021, essentially denying the claimant's claims. They assert in paragraph 4 of the defence that the claimant has been paid all his employment entitlements and having signed a " *quit claim*" , he is not entitled to anything more.
5. The defendant says this claim is misconceived and should be dismissed with costs.

**Management Conferences/ Directions**

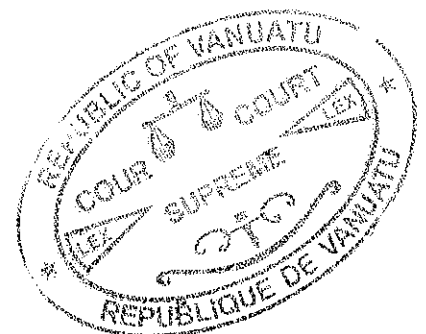
6. The first conference was held on 9<sup>th</sup> June 2021. Both Counsel were in attendance. The Court issued directions at paragraph 3 for filing and service of response and defence sworn statements by the claimant and the replies by the defendant and making the matter returnable on 20<sup>th</sup> July 2021.
7. On 20<sup>th</sup> July 2021 both Counsel were present. Mr Kalsakau apologized for his oversight of paragraph 3 and sought an extension. The Court granted the extensions to 10<sup>th</sup> September 2021 for further conference.
8. On 10<sup>th</sup> September 2021 the Court did not sit. Previously on 9<sup>th</sup> September 2021 Mr Joel filed a summary judgment application with a supporting sworn statement of Mrs Mary Joel.
9. The defendant had filed its defence on 9<sup>th</sup> August 2021 and Mr Joel filed a reply on 24<sup>th</sup> August 2021 together with an application to disclose documents including the " *quit claim*" document.
10. The Court issued a Notice of Hearing of the application on 4<sup>th</sup> November 2021 returnable on 5<sup>th</sup> November 2021. Both Counsel were in attendance on that date.
11. Mr Kalsakau objected to the application and said the documents sought to be disclosed should be made available with sworn statements. The application was dismissed but the Court issued directions that the defendant would file and serve its sworn statements ( with disclosures) by 26<sup>th</sup> November 2021 and made the matter returnable on 15<sup>th</sup> December 2021.



12. On 15<sup>th</sup> December 2021, Mr Kalsakau did not attend. Mr Joel informed the Court the defendant had not filed any sworn statement(s) as ordered.
13. On that date the Court ordered that pleadings be closed and adjourned the matter to 13<sup>th</sup> January 2022.
14. On 31<sup>st</sup> January 2022 Mr Kalsakau sought to be excused being on extended leave to end of February 2022. On the same date Mr Joel filed his written submissions in support of his client's application for summary judgment.
15. Mr Joel sent a number of emails to the Court enquiring as to the progress of his client's application. The Court in turn responded that it had been awaiting submissions from Mr Kalsakau, the earliest being that of 6<sup>th</sup> June 2022. Mr Kalsakau responded on the same date saying his submissions would be forthcoming "by the end of the week the latest." It did not come.
16. A reminder/follow-up email was sent on 28<sup>th</sup> June 2021 at 11:12am. Mr Kalsakau filed his written submissions on 28<sup>th</sup> June 2022 at 2:30pm opposing the application for summary judgment.

### **Submissions**

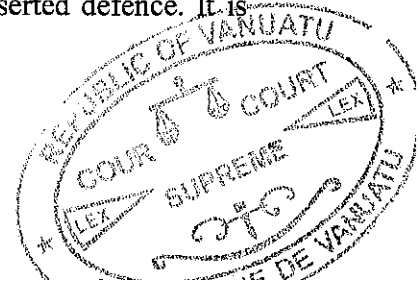
17. Mr Joel filed extensive written submissions in support of the claimant's claims based on the evidence by sworn statements of both Mr Kalmelu and Mrs Joel.
18. Mr Joel further submitted that despite Mr Kalsakau assuring the Court he would disclose relevant documents as requested by way of a sworn statement, including the "*quit claim*", Counsel and his client failed to file any sworn statement as evidence to show they had a good defence. Counsel submitted a defence without the evidence to support it standing alone was not a good defence, and therefore entitling the claimant to a summary judgment.



19. Mr Kalsakau made a 2 paged submission opposing the claimant's application. Counsel relied on paragraph 4 of the defence that the " *claimant has been paid his employment entitlements and has signed a "quit claim" confirming the same.* "
20. Mr Kalsakau submitted on the basis of ANZ Bank Ltd v Traverso [2012] VUSC 222 and Bokissa Investments Ltd v RACE Pty Ltd ( in Liquidation) [2003] VUCA 22 that the Court must be satisfied there is a realistic defence as opposed to just a fanciful one.
21. Mr Kalsakau also relied on Jiang Su Provincial Construction Group ( Vanuatu) Ltd v Zhinjian Pang [2021] VUCA 33 where the Court of Appeal said:
- " The purpose of the summary judgment is to satisfy whether the defence and sworn statements filed in support of the defence have a real prospect of success. If they have no prospect of success, then, the judge must grant the summary judgment application. If they have prospect of success in defending against the claim, then the Judge is duty bound to dismiss the summary judgment application and allow the claim to go to trial. ( See Rules 9.6 (a) of the Civil Procedure Rules)."*
- ( My emphasis)
22. Mr Kalsakau submitted ultimately the Court should dismiss the application of the claimant and allow the matter to go to trial.

### Discussion

23. First the defence of the defendant standing alone without any evidence distinguishes this case with the Pang's case. The Court gave clear directions for the defendant to file and serve its sworn statement on 5<sup>th</sup> November 2021 by 26<sup>th</sup> November 2021. By 15<sup>th</sup> December 2021 being the next returnable date, the defendant had not complied. It was Mr Kalsakau as Counsel for the defendant who opposed on 5<sup>th</sup> November but undertook to file the document with a sworn statement. Despite Counsel's undertaking Mr Kalsakau did not fulfill his undertaking as an officer of the Court, and then sought to be excused from the hearing on 31<sup>st</sup> January 2022.
24. The cases of Traverso, RACE and Pang are therefore distinguished and are of no help to the defendant. The defendant has no evidence in support to their asserted defence. It is



trite law that he who asserts must adduce evidence to substantiate his assertion. Without the defence of the defendant is not realistic and has no prospect of success.

25. Accordingly I allow the claimant's application and grant judgment in his favour.

26. By letter of 22<sup>nd</sup> April 2021 Mr Kalsakau advised the claimant was entitled to unpaid salary, annual leave and severance totaling VT 277,352 and also that the claimant owed the defendant the sum of VT 244,856. The defendant has no evidence to substantiate this claimed debt.

27. The Court will accept the calculations made by Mr Joel as follows:-

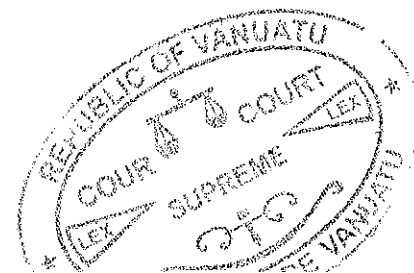
- Unpaid Salary- VT 20,400
- Leave payments- VT 82,450
- Severance – VT 350,200 x 2 ( multiplier) = VT 700,400
- Notice – VT 306,000

28. The claimant claims a multiplier of 6 times severance. However the Court will allow only 2 times. This is because by letter of 22<sup>nd</sup> December 2020 the Chairman of the defendant assured the claimant of a renewal of contract in paragraph 2 where he says “.... You will be reinstated once your employment contract is renewed upon the formation of the new Board in 2020.”

29. I am of the view the reference to “2020” should have been 2021. That implies that in 2021 Mr Kalmelu was entitled to a renewed contract for another 12 months. Absent that renewal of contract, there was a breach entitling the claimant to a multiplier of 2 times amounting to VT 700,400.

30. The claimant has judgment for the sum of VT 1,109,250. His initial claim for VT 2,860,250 is reduced by VT 1,751,000.


31. The claimant claims interest of 12% per annum. I allow the commonly accepted rate of 5% per annum on VT 1,109,250 from 22<sup>nd</sup> December 2020 to the date of judgment.



32. The claimant claims for costs. He is entitled to his legal costs and costs of and incidental to his proceeding on the standard basis, as agreed or be taxed by the Master, and be paid within 28 days once settled.

**DATED at Port Vila this 15<sup>th</sup> day of July, 2022**

**BY THE COURT**

  
.....

**Oliver Saksak**

**Judge**

