

**BETWEEN: Francoise Naung**  
*Claimant*

**AND: Republic of Vanuatu**  
*Defendant*

**Coram: Justice Aru**  
**Counsel: Mr. W. Kapalu for the Claimant**  
**Mr. F. Bong for the Defendant**

---

**JUDGMENT**

---

**Introduction**

1. This is a claim against the Government for breach of a building contract awarded to Nakaip Builders Association to build four (4) classroom blocks for Ikakahak Primary School on Tanna.

**Background**

2. On 29 January 2018 the Ministry of Education entered into a building contract with Nakaip Builders Association fronted by the claimant. The contract was for the construction of three (3) new classroom blocks at Ikakahak Primary School at a cost of VT 2,420,000 excluding VAT. The contract period to completion of the works was from 5 February 2018 to 15 May 2018. Building materials were provided to the building site on Tanna in February.
3. On 15 March 2018 the parties agreed on a variation of the contract to increase the number of new classrooms to be built from 3 to 4 buildings. The labour costs for the additional classroom was agreed to be VT 1,200,000 increasing the total contract price for four buildings to VT3,620,000.
4. Within the agreed period for the completion of the first three classrooms, the claimant only completed one building and was paid VT2,413,065, almost 72% of the new contract sum of VT 3,620,000 which was for 4 buildings.
5. The Ministry of Education then terminated the contract on the basis that the claimant failed to complete the works within the agreed time frame and the building did not conform to the building plans set out in the building specifications.
6. On 10 March 2021 the claimant filed his claim alleging breach of contract.

### **The claim**

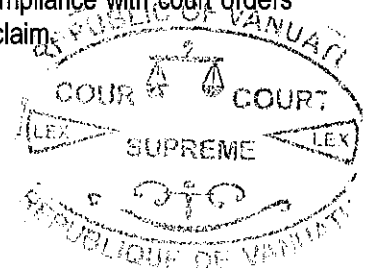
7. The claimant alleges that it completed the first building and was paid. He then proceeded to begin work on the second building. He completed the footing, beams and walling before he was ordered by the defendant to stop work and another builder was engaged to complete the building.
8. The agreed contract price he alleges is VT3,370,000. The claimant claims the full contract price and additional VT 1.5 million he took as a loan from the National Bank of Vanuatu to cover his initial costs resulting in a total claim of VT 4,870,000 plus interest at 10%.
9. In support of the claim, the claimant relies on his two sworn statements filed on 12 March 2021 and 15 October 2021. A further sworn statement in support of the claim was filed by Andrew Natap on 25 October 2021.

### **Defence and counterclaim**

10. The defendant says that the contract price for three (3) buildings was VT 2,420,000 and not VT 3,370,000. With the variation of the contract to include a fourth classroom, the total contract sum was increased by VT 1,200,000 to a new total of VT3,620,000.
11. The defendant denies the claim and asserts in its counterclaim that the claimant failed to complete the works within the agreed construction period and failed to complete a new 4 classroom block in accordance with the technical specifications.
12. The defendant asserts that as a result of the claimant's breach, it suffered damages as it had to engage another company to complete the works at a cost of VT 1, 985,000. As it had paid the claimant VT 2,413,000 despite not completing the works, the defendant claims the difference of VT 778,065 in damages.
13. In support of the defence and counterclaim, the defendant relies on the sworn statements of Bergmans Iati filed on 7 September 2021, Robert David filed on 19 July 2021 and Richard Setak filed on 19 July 2021.

### **Discussions**

14. The trial of the matter had been adjourned several times since 21 October 2021 due to the unavailability of witnesses on either side. Some witnesses were overseas and some were on the other islands. On the second adjournment of the trial on 28 September 2022 the claimant was ordered to pay wasted costs of VT 50,000. The reason being the defendant was ready for the trial and had flown its witnesses in from Ambae only to face an application by the claimant for adjournment. The claimant was ordered to pay these costs before the next conference. The costs were not paid as ordered. On 25 November 2022 the claimant was ordered to settle those costs before the trial. The claimant did not comply and on 24 January 2023 he was given a further 14 days to comply. Again, the claimant did nothing and on 26 June 2023 he was allowed time to settle those costs before the next mention date. He did not comply.
15. On 2 February 2024 the claimant's claim was struck out for non compliance with court orders and the matter was listed for formal proof of the defendant's counterclaim.

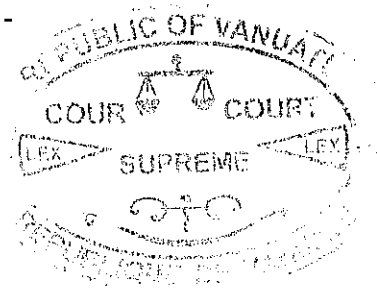


Was there a breach of the contract by the claimant?

16. There was no appearance from Mr Kapalu. He later filed written submissions. I heard Mr Bong on his oral submissions. He later filed written submissions as well. He submitted that the defendant suffered damage as a result of the claimant's breach of their contract.
17. The contract is a standard Ministry of Education contract based on the claimant's quotation for "**labour only**" reference: **RFQ WORKS: MoET – ERP 2017 – Lot 38L IKAHAKAHAKA PS** (the Contract). The parties intended that the defendant would provide the building materials and the claimant would provide all the labour which would be paid by the Defendant. The Contract was signed by the parties on 29 January 2018 for the building of three new classroom blocks at a cost of VT 2,420,000. The works were to start on 5 February 2018 and to be completed by 15 May 2018.
18. On 15 March 2018 the terms of the Contract were varied to include construction of an additional classroom block which increased the total number of classrooms to be built to four (4) with an increase in the consideration sum from VT 2,420,000 to VT 3,620,000. Work commenced around 27 March 2018 and it was understood that time would be extended to build the additional classroom.
19. Pursuant to the Contract, three classrooms were to be built within 14 weeks from 5 February 2018 to 15 May 2018. With an additional classroom, the understanding was the works would be completed by 14 August 2018. By mid August only one classroom was built. This was confirmed by Robert David as the site supervisor for the Ikakahak building project. He confirmed that only one classroom was completed and advised the Project Manager, Gordon Graig to hire another contractor to complete the job which they did.
20. Richard Setak stated that he was the claimant's foreman in the first phase of the project and a lot of the workers were unskilled and required a lot of supervision and direction on what to do. He states that the first building was 95% complete and around 9 October 2018 he starting doing the profiling for the second building.
21. For the one complete classroom building, the claimant was paid a total of VT 2,413,475, almost 70% of the new contract sum. This is not disputed by the claimant. Pursuant to clause 25 of the contract the defendant had the option to terminate the contract if the claimant did not comply with the terms.
22. In answering the first issue, I am of the view that the claimant was in breach of the contract by not completing three (3) classroom buildings as stated in his quotation: "*works to start by 5th February & be completed by 15 May 2018.*" The defendant had no other option but to terminate the contract and engage a third party to complete the job.

*Is the defendant entitled to damages of VT 778,000*

23. The defendant says in its counterclaim that it engaged another company to complete the remaining buildings at a cost of VT 1,985,000. Robert David in his evidence says a company by the name Bulan was hired and successful completed the project. As a result, the defendant claims the sum of VT 778,065 in damages worked out as being: -



*Total labour expenses for the whole project from start to completion is VT4,398, 065 (VT 2,413,065 payment to claimant) + (VT1,985,000 payment to Bulan) - VT3,620,000 (total contract sum) = VT778,065*

24. The defendants have not provided any evidence as to how Bulan was engaged. The only evidence of Bulan's engagement is Robert David's evidence at paragraph 6, 7 and 8 of his sworn statement where he says he suggested Bulan to the Project Manager, Mr Graig for Bulan to complete the job as they had done similar jobs before, and that Mr Graig agreed and instructed him to take Bulan to the work site to start on the job.
25. The defendant has not filed any evidence of a quotation received from Bulan to complete the job or a contract between Bulan and the defendant. There is also no evidence of any invoices from Bulan for the work done and no receipts of any LPO payments to Bulan in the sum of VT 1,985,000.
26. This leads me to conclude that the defendant has not proved on the balance of probabilities that it is entitled to damages of VT 778,000. In the absence of any evidence to substantiate the counterclaim, there is no basis to sustain the counter claim.

#### **Result**

27. The counterclaim is also dismissed.
28. The parties to bear their own cost.

**DATED at Port Vila this 6<sup>th</sup> day of June, 2024**

**BY THE COURT**

**Dudley Aru  
Judge**

