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

Civil
Case No. 22/2640 SC/CIVL

BETWEEN: NAIANY KARU
Claimant

AND: REPUBLIC OF VANUATU
First Defendant

Date of Hearing:	*10 September 2024*
Date of Decision:	*16 September 2024*
Before:	*Justice M A MacKenzie*
Counsel:	*Claimant – Ms M Mala (Holding papers for Mr S Kalsakau)*
	Defendant – Mr J Wells

DECISION

The application

1. The Defendant applies to strikeout the claim. This is opposed by the Claimant.

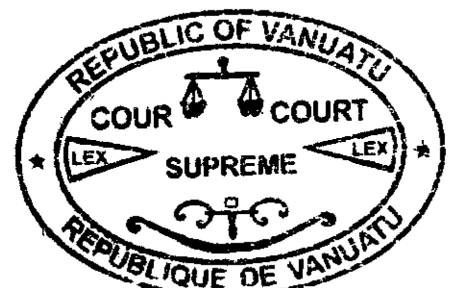
Result

2. After hearing submissions, I advised counsel that the application to strike out the claim was refused. Instead, I made a wasted costs order and made timetabling directions to ensure the proceeding is ready for hearing, as well as listing the matter for trial.

3. These are my reasons for declining to strike out the claim.

Basis for strike out application

4. Mr Wells relies on Rules 6.8 and 18.11 of the Civil Procedure Rules. Mr Wells submits, as can be seen by the various minutes issued by the Court, this matter has been plagued by repeated non-compliance by the Claimant.



5. At various points, judges have commented on the non-compliance and delays, one judge noting that the matter had moved at a "glacial" pace.

6. Therefore, the claim should be struck out. In the alternative, there should be an order for wasted costs due to delays and non-compliance.

Basis for opposing strike out of claim

7. Mr Kalsakau acknowledges some failures and delays on the part of the Claimant. While that may be the case, Mr Kalsakau submits that the matter should go to trial and should be dealt with on the merits.

8. Various reasons were proffered for the non-compliance and delays. For example, a file went missing which contained documentation relevant to the claim.

9. Finally, Mr Kalsakau submits that the Defendant has also been non compliant with timetabling directions and a trial date had to be vacated.

Procedure timeline

10. As is evident from the procedural timeline detailed below, this matter has been marred by delay and noncompliance, particularly the Claimant. But the Defendant does not come to this with entirely "clean hands".

21 September 2022 – Claim filed.

6 October 2022 – Response filed.

20 October 2022 – Defence filed.

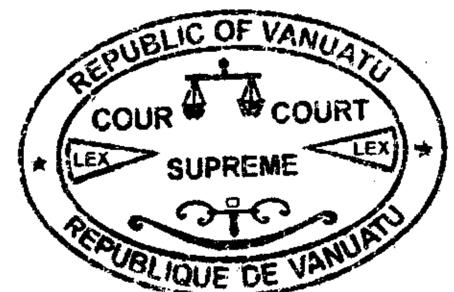
20 October 2022 – Timetabling directions made.

2 December 2022 – Revised timetable because of non-compliance with directions for filing of sworn statements by **both parties.**

14 February 2023 – further revised timetabling directions. Warning to claimant regarding non-compliance. Prospect of wasted costs order or dismissal for want of prosecution raised by the court.

30 May 2023 – Claimant's sworn statement still not filed. Warning given to Claimant regarding non-compliance.

22 June 2023 – Claimant's sworn statement filed.



27 June 2023 –Conference held. While Claimant's sworn statement filed, it had not yet been served on State Law.

19 July 2023 – Neither counsel appear at conference. Counsel reminded about the "glacial" pace of this matter.

21 July 2023 – Trial date set, and timetabling directions made. Defendant's sworn statement to be filed by 11 August 2023.

7 September 2023 – Defendants sworn statement filed.

8 September 2023 – New trial date allocated, being 20 October 2023.

6 October 2023 – Trial date vacated.

20 October 2023 – New trial date of 1 February 2024 set.

26 February 2024 – New date set for 22 July 2024.

18 July 2024 – Application file to strike out claim. Mr Kalsakau indicated his unavailability for the trial date.

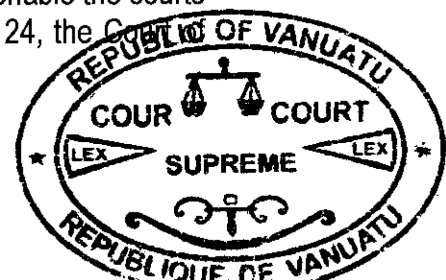
19 July 2024 – Trial unable to proceed on 22 July 2024 due to the court needing to conclude a criminal trial.

Should the claim be struck out?

11. A claim can be struck out pursuant to either rule 6.8 or 18.11 for non-compliance with orders and directions. As the Court of Appeal said in *Gidley v Mele* [2007] VUCA 7;

> *"The exercise of discretion under rule 6.8 of the Civil Procedure Rules must be done very sparingly. It is a discretion to be exercised only when it is clear that the non-appearing party does not intend to participate in the action. Sometimes that will be clear from the persistent ignoring of the Court's orders, especially if there has been no one appearing at any directions hearing or conference.*
> *Where a party has played some part in the proceeding, (as the Appellants had done by filing a defence and counterclaim), there is likely to be some other reason for their non-appearance. Generally, in such case, Rule 18.11 is the appropriate rule to follow if a party fails to comply with an order of the Court...."*

12. As rule 1.2 of the CPR says, the overriding objective of the rules is to enable the courts to deal with cases justly. In *Dinh v Polar Holdings Ltd* [2006] VUCA 24, the Court



Appeal affirmed observations previously made in *Fujitsu (NZ) v International Business Solutions Limited and others* [1998] VUCA 13 that "*...the Rules of Court are intended to further the interest of fairness and justice, and they must be applied with common sense in a realistic way to ensure that the purpose, not just the letter, of the Rules is achieved*"

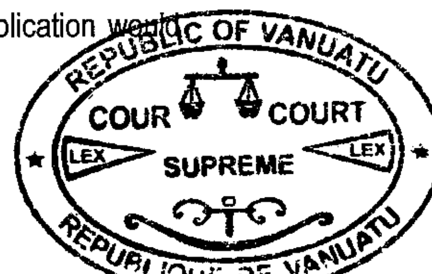
13. That does not mean that non compliance will always be excused. As was said in *Western Pacific Cattle Co Ltd v Mass (trading as Raw for Beauty)* [2019] VUCA 26 (at 32);

> *"A liberal approach to excusing non-attendance, and non-compliance generally with court rules and their technicalities is justified where a party to the proceedings would otherwise be denied a fair opportunity to put the case relied upon to advance or resist the claim. Every case is likely to be different, but where in all the circumstances the party in default has had a reasonable opportunity to advance its case, and the other party has given the defaulting party reasonable opportunity to do so before seeking to rely on strict form, the substantial justice of the matter is likely to favour the application of the rules according to their strict requirements. In our opinion this is such a case".*

14. There have been delays and noncompliance with the timetabling directions. The Claimant did not comply with the timetabling directions on a number of occasions. Her sworn statement was filed 9 months late. It is not a situation though where the Claimant has not filed a sworn statement at all. Reasons have been proffered for the delay, which appear, in part, to relate to a difficulty in locating various documents. This may in part explain the delay, but not fully. The circumstances are not in the same category though as for example, *Ferrieux Patterson v Vanuatu Maritime Authority* [2024] VUSC 69, where the Defendant refused to comply with disclosure orders, filed only a pro forma defence and refused or neglected to file any sworn statements as ordered. While it might be that it is approaching the point where the Claimant has had a reasonable opportunity to present her case, I do not think the point has been reached where substantial justice requires a strict application of the rules.

15. The claim is for a severance payment and constructive dismissal. The Claimant was employed as the Assistant Director of the Civil Aviation Authority Vanuatu ("CAAV") and resigned in December 2021. She alleges that her resignation was not voluntary and that she has not been paid out all her entitlements, namely severance. The defence position is that the Claimant resigned voluntarily and has been paid out severance entitlements. I assess then that there are triable issues, which are both factual and legal.

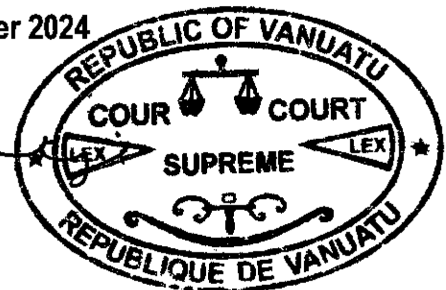
16. Just in time, two further sworn statements have been filed by the Claimant which demonstrate that she wishes to advance the claim. The strike out application would



have been redundant if the trial proceeded on 22 July 2024. That it did not has nothing to do with the parties. The Court needed to finish a criminal trial. Also, as noted above, the Defendant does not come to the application with completely "clean hands". The Defendant did not comply with the timetabling directions either. On one occasion, the noncompliance led to a trial date being vacated.

17. In all of the circumstances outlined above, and taking into account the overriding objective in rule 1.2, the application to strike out the claim is refused. I accept that the Claimant did not comply with the timetabling directions made on a number of occasions. This caused delays. But the Defendant also did not comply with timetabling directions which led to a trial date being vacated. Substantial justice means there should be a hearing of the claim on its merits. In accordance with rule 18.11(4)(d), a wasted costs order is appropriate to reflect the delays and noncompliance by the Claimant.

DATED at Port Vila this 10th day of September 2024
BY THE COURT



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Justice M A MacKenzie