

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

Company
Case No. 25/1450 SC/COMP

Under the Companies (Insolvency and Receivership Act) 2013

**BETWEEN: ENTERPRISE DINH VAN TU LIMITED
(CN-37324)**
Claimant

**AND: ETMAT BAY ESTATE LIMITED
(CN-31105)**
Defendant

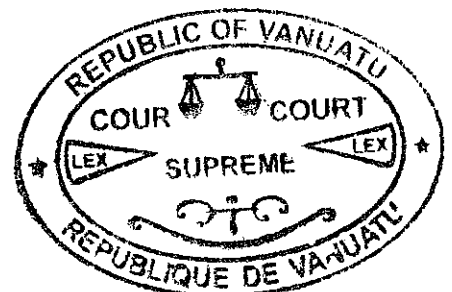
Before: Justice M A MacKenzie
Counsel: Claimant – Mr M Fleming
Defendant – Mr J Malcolm

**REASONS FOR ORDERS PUTTING DEFENDANT COMPANY INTO LIQUIDATION AND
APPOINTING A LIQUIDATOR**

Introduction

1. On 22 May 2025, the Claimant filed an application to put the Defendant Company into liquidation. ("the application") The application was filed pursuant to clause 2, schedule 2 of the Companies (Insolvency and Receivership) Regulation Order No.111 of 2015 ("the regulation order").
2. The application was filed because a statutory demand for a debt of VT 187,787,244 (plus interest at 8.5 percent) had been served on the Defendant, who failed to pay the debt within 15 working days of the date of service¹ or take any steps to seek that the statutory demand be set aside.
3. The application was made by way of claim in form 3, schedule 3 of the regulation order. The claim and associated documents were served on the Defendant on 22 May 2025. However, a notice of proceeding in form 5 of schedule 3 was not served with the claim,

¹ the statutory demand was served on the Defendant on 8 April 2025



as required by clause 3, schedule 2 of the regulation order. That was because the Supreme Court Registry was tardy in allocating the claim to a judge, so the notice of proceeding was not endorsed with the hearing date of the application as it should have been.

4. By Minute dated 6 June 2025, I directed that the claim be re-served in compliance with clause 3, schedule 2 of the regulation order. All documents as required by clause 3 were served on the Defendant on 10 June 2025.
5. The Defendant did not file a defence within 14 days of service as required by clause 14, schedule 2 of the regulation order.
6. On 18 June 2025, a response was filed but that is not provided for under the regulation order. Clause 13 of the regulation order says:

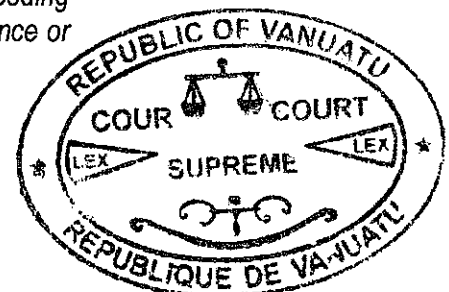
13 Defence

- (1) *The provisions of the Court rules relating to the time within which a defence must be filed do not apply to a proceeding commenced by the filing of a claim under clause 2.*
- (2) *Any person who, being the defendant company or a creditor or shareholder of that company, intends to defend a proceeding commenced by a claim filed under clause 2, must file a defence in the office of the Court named in the notice of proceeding.*
- (3) *A person who files a defence must serve a copy of that defence on:*
 - (a) *The claimant; and*
 - (b) *Any other person who, when the defence is filed, has filed a defence in the proceeding.*
- (4) *If the defendant company has filed a defence, any defence filed by a creditor or shareholder of that company must state specifically any grounds of opposition that are additional to those appearing in the company's defence.*

7. Given that a defence was not filed, clause 17 of the regulation order is applicable. It says:

17 Effect of failure to file defence or appearance

If a person who is entitled to file a defence or an appearance in a proceeding commenced by a filing of a claim under clause 2, fails to file a defence or

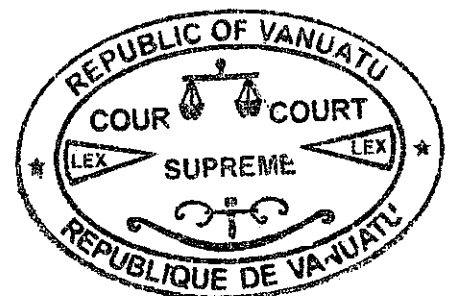


an appearance within the time prescribed by these rules, that person is not, without an order for extension of time granted on application made under clause 19 or the special leave of the court, allowed to appear on the hearing of the proceeding.

8. I granted Mr Malcolm special leave to appear at the hearing, as his submissions for the Defendant were both relevant and important. Mr Malcolm advised the Court that no defence had been filed because there was no defence to the claim, and that there was no objection or opposition to the order seeking that the Defendant company be put into liquidation. However, he did seek an adjournment of the hearing to see if the Claimant and the Defendant could negotiate a resolution, as there will likely be complexities with a liquidation due to issues with custom ownership of the land at Etmat Bay.
9. Mr Fleming opposed an adjournment, particularly given the length of time the core debt had been outstanding. He also that the proposed liquidator, Mr Steve Adams would be well placed to work through the any potential difficulties in selling the sections at Etmat Bay. Mr Fleming sought an order putting the Defendant company into liquidation pursuant to s 21(2)(b) of the Companies (Insolvency and Receivership) Act No.3 of 2013 ("the Act").
10. Given the concession that there is no defence to the claim, I did not consider it to be in the interests of justice to adjourn the hearing. The debt has been outstanding since 2018, and I agree that an experienced liquidator will be able to work through whatever complexities there are in liquidating the sections.

Brief background

11. The Claimant was engaged by the Defendant to undertake various works at Etmat Bay in Erakor. The Claimant undertakes road building works, land clearing, machinery hire and labour. The Defendant is a land holding company. On or about 1 June 2015, the Claimant and Defendant entered into a contract for the Claimant to carry out various works on a number of leasehold titles at the Etmat Bay Development.
12. The Claimant performed various services for the Defendant between 1 June 2015 and 6 December 2022, when the contract ended. The total cost of the works under the contract was VT 398,182,489. The Defendant paid VT 210,395,245 to the Claimant. However, a number of invoices issued between 20 January 2018 and 26 September 2018 and totalling VT 187,787,244 were not paid.



13. There appear to have been discussions between Mr Dinh, a director of the Claimant Company and Mr Burton on behalf of the Defendant Company about the debt, with an acknowledgement that the debt was owing but that the Defendant lacked funds to pay.

Discussion

14. The Claimant seeks orders putting the Defendant Company into liquidation, and for the appointment of a liquidator. After hearing from both counsel, I made orders putting the Defendant Company into liquidation, and appointing a liquidator. I said I would give brief reasons. These are my reasons.
15. There are various relevant provisions. Jurisdiction to make an order putting a company into liquidation and appointing a liquidator can be found in ss 15 and 21 of the Act.
16. Section 15 says:

15 Court may appoint liquidator

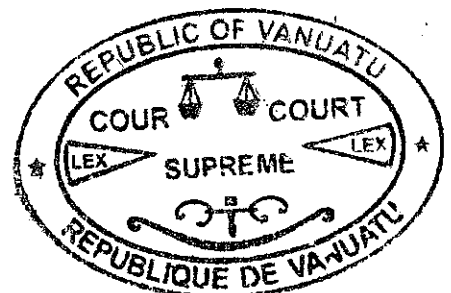
(1) A liquidator may be appointed by the Court on the application of:

- (a) the company; or*
- (b) a director of the company; or*
- (c) a shareholder of the company; or*
- (d) a creditor of the company (including any contingent or prospective creditor); or*
- (e) the Registrar.*

(2) The Court may appoint a liquidator if it is satisfied that:

- (a) the company is unable to pay its debts; or*
- (b) the company or the directors have persistently or seriously failed to comply with this Act; or*
- (c) it is just and equitable that the company be put into liquidation.*

(3) The Court must record in the order appointing the liquidator the date and time on which the order was made.



17. Section 21 says:

21 Additional powers of Court

(1) *If, on the application of a creditor whose statutory demand has not been met or who establishes that a company has not complied with an approved compromise, the Court is satisfied that,*

(a) *there is a debt due by the company to the creditor that is not the subject of a substantial dispute, or*

(b) *there is a debt due by the company that is not subject to a counterclaim, set-off, or cross-demand,*

The Court may, on the grounds that the company is unable to pay its debts make an order under subsection (2).

(2) *The Court may;*

(a) *order the company to pay its debt within a specific period and that, in default of payment, the creditor may make an application to put the company into liquidation; or*

(b) *immediately made an order putting the company into liquidation.*

(3) *For the purposes of the hearing of an application to put the company into liquidation under an order made under section (1)(a), the company is presumed to be unable to pay its debts if it failed to pay the debt within the specified period under the order.*

18. I consider that the statutory demand which was served on the Defendant met the criteria set out in s 19(2) of the Act, which says:

19 Statutory demand

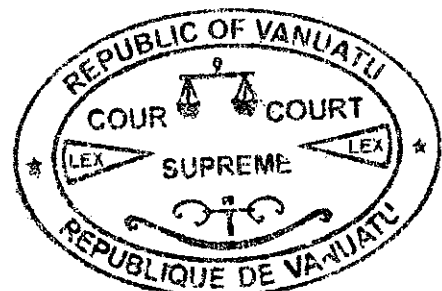
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(2) *A statutory demand must:*

(a) *be in respect of a debt that is due and payable and is not less than VT 120,000 (one hundred and twenty thousand), or such greater amount as may be prescribed; and*

(b) *be in writing; and*

(c) *be served on the company; and*



(d) require the company to do any of the following things to the reasonable satisfaction of the creditor, within 15 working days of the date of service, or any other period that the Court may order;

- (i) pay the debt; or
- (ii) enter into a compromise under Division 1; or
- (iii) otherwise compound with the creditor; or
- (iv) give a charge over its property to secure payment of the debt.

19. I am satisfied that:

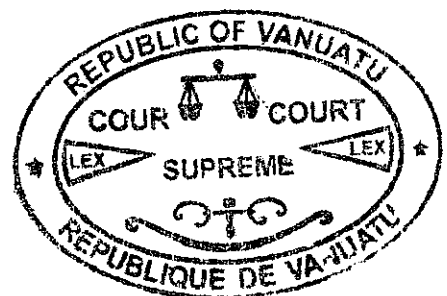
- a. The demand was in respect of a debt due and payable. As was held in *Vanuatu Indigenous Development Alliance Limited v Jezabelle Investments PTY Limited* [2009] VUCA 33, the claim and supporting documents must show both a basis in law for the indebtedness of the Company, and that the debt was due at the time of the claim. The statutory demand explicitly sets out that the debt is due and payable. Further, Mr Malcolm implicitly acknowledged that when he submitted there was no opposition to the application and conceding there was no defence. The only observation I make is the debt is said to include interest from 2018 to payment at 8.5 percent. There is however no evidence before the Court that there was a contractual term that interest on unpaid accounts would be paid and at a rate of 8.5 percent.
- b. The statutory demand was in writing.
- c. It was served on the Company.
- d. The statutory demand required the Company to do any of the things set out at s 19(2)(d) of the Act within 15 working days of the date of service.

20. After service of the statutory demand, the Defendant did not pay the debt, enter into a compromise under Division 1, otherwise compound with the creditor, or give a charge over its property to secure payment of the debt within the time prescribed in s19.

21. The Defendant could have applied to set aside the statutory demand but did not.²

22. Pursuant to s 15 of the Act, a liquidator may be appointed by the Court if it is satisfied that the Company is unable to pay its debts. Pursuant to s 21 of the Act, may make an order putting a Company into liquidation where a statutory demand has not been met, on the ground that the Company is unable to pay its debts.

² Footnote - See s 20 of the Act



23. The meaning of "unable to pay its debts" is set out at s 17 of the Act, which says:

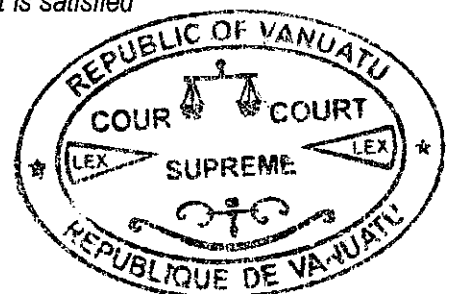
17 Meaning of unable to pay its debts

- (1) *Unless the contrary is proved, and subject to section 18, a company is presumed to be unable to pay its debts if:*
- (a) *the company has failed to comply with a statutory demand; or*
 - (b) *an execution issued against the company in respect of a judgment debt has been returned unsatisfied in whole or in part; or*
 - (c) *a person entitled to a charge over all or substantially all of the property of the company has appointed a receiver under the document creating the charge; or*
 - (d) *a compromise between a company and its creditors has been put to a vote in accordance with Division 1.*

24. Section 17 is subject to s 18 of the Act which says:

18 Evidence and other matters

- (1) *On an application made to the Court for an order that a company be put into liquidation, evidence of failure to comply with a statutory demand referred to under section 19 is not admissible as evidence that a company is unable to pay its debts unless the application is made within 30 working days after the last date for compliance with the demand.*
- (2) *To avoid doubt, section 17 does not prevent proof by other means that a company is unable to pay its debts.*
- (3) *Information or records acquired under section 56, 58, or 61 of the Companies Act or, if the Court so orders, under section 62 of the Companies Act, may be received as evidence that a company is unable to pay its debts.*
- (4) *In determining whether a company is unable to pay its debts, contingent or prospective liabilities may be taken into account.*
- (5) *An application to the Court for an order that a company be put into liquidation on the ground that it is unable to pay its debts may be made by a contingent or prospective creditor only with the leave of the Court; and the Court may give such leave, with or without conditions; only if it is satisfied*

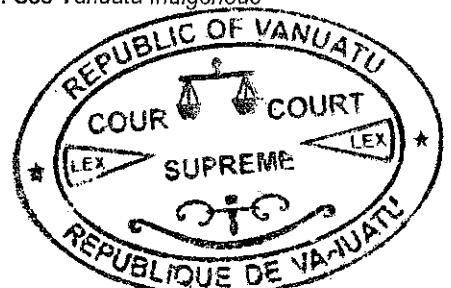


that a prima facie case has been made out that the company is unable to pay its debts.

25. By virtue of s 17(a) of the Act, the Defendant is presumed to be unable to pay its debts as it has failed to comply with the statutory demand which was served on 8 April 2025. In this case, the evidence that the Defendant failed to comply with the statutory demand is admissible as evidence that the Defendant is unable to pay its debts because the application to put the Company into liquidation was made within 30 working days after the last date for compliance with the demand.³
26. Further, the evidence filed indicates that the Company is unable to pay its debts as and when they fall due. For example, there is an email annexed to Mr Dinh's sworn statement filed on 22 May 2025 referring to correspondence between Mr Dinh and Mr Burton on behalf of the Defendant Company to the effect that the Defendant acknowledged the debt but had been unable to pay due to a lack of funds.
27. This is not a case where there is a judgment in the Claimant's favour.⁴ But in all the circumstances, I am satisfied that the Defendant is unable to pay its debts. Firstly, the Defendant is presumed to be unable to pay its debts pursuant to s 17 of the Act as the Defendant did not comply with the statutory demand. Secondly, there is an acknowledgement that the debt was owing but could not be paid. Thirdly, Mr Malcolm conceded that there was no defence to the claim. Implicit in that is an acceptance that the Company is unable to pay its debts, reinforced by the fact that invoices rendered in 2018, some years ago, remain unpaid.
28. As noted above, I consider that the Defendant is unable to pay its debts. Further, I am satisfied that the criteria set out in s 21 of the Act are met, so that an order putting the Defendant Company into liquidation can be made, given that:
 - a. The statutory demand has not been met: s 21(1); and
 - b. There is a debt due by the Defendant to the Claimant that is not the subject of a substantial dispute: s 21(1)(b). I refer to the discussion at paragraphs 26 and 27.
29. As I am satisfied that the Company is unable to pay its debts, for the reasons already stated, I will make an order appointing Steve Adams as liquidator pursuant to s 15(2)(a) of the Act. Mr Adams has consented in writing to be appointed as liquidator pursuant to clause 3, schedule 3 of the Act. There is no evidence that he has withdrawn his consent.

³ Refer s 18(1) of the Act

⁴ That does not preclude an order putting a Company into liquidation from being made. See *Vanuatu Indigenous Development Alliance Limited v Jezabelle Investments PTY Limited* [2009] VUCA 33

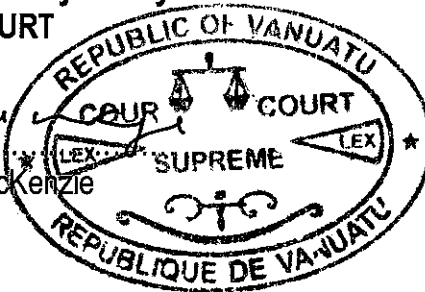


Result and Orders

- 30. Pursuant to s 21(2) of the Act, I make an order putting the Defendant into liquidation.
- 31. Pursuant to s 15(2)(a) of the Act, I make an order appointing Steve Adams as liquidator.
- 32. I make an order that the costs as sought by the Claimant of VT 3,462,362 are paid as a first priority claim pursuant to clause 15(b), schedule 7 of the Act.
- 33. Leave is granted for the liquidator to seek directions from the Court, as provided for in clause 22, schedule 2 of the Act.

**DATED at Port Vila this 3rd day of July 2025
BY THE COURT**

Mackenzie
.....
Justice M A Mackenzie

The seal of the Supreme Court of Vanuatu is circular. It features a central emblem with a scale of justice and a sword. The text "REPUBLIC OF VANUATU" is written along the top inner edge, and "REPUBLIQUE DE VANUATU" along the bottom inner edge. In the center, the words "COUR" and "COURT" are on either side of the scale, and "SUPREME" is below it. Two small triangles containing the word "LEX" are positioned on either side of "SUPREME". A star is located on the right side of the seal.