IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

CIVIL APPEAL CASE No.14 OF 2010

BETWEEN: **VANUATU COMMODITIES MARKETING BOARD**
Appellant

AND: **CLAIRE DORNIC t/as CL AGENCIES**
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Nevin R. Dawson
Hon. Justice Daniel Fatiaki

Counsel: *Mr A. Jenshel for the Appellant*
Mr F.L.T. Kabini for the Respondent

Date of hearing: *5th July 2010*
Date of Judgment: *16th July 2010*

JUDGMENT

1. The Appellant moves by way of appeal that:
   (i) That whole of the judgment of Saksak J of 25 June 2010 be set aside;
   (ii) Civil Case 15 of 2009 be remitted to a different judge; and
   (iii) The Respondent pay the Appellant's costs of the appeal on an indemnity basis.

2. When Saksak J dealt with Civil Case No.15 of 2009 on 25 June 2010 there was also an application on file by the Respondent to have the Appellant dealt with for contempt. However that application was not considered and no orders were made on that application. The alleged contempt has since been rectified, and there is no issue in this appeal arising from the contempt application.

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

3. The background to this matter is as set out in the judgement of this Court in **Vanuatu Commodities Marketing Board v. Claire Dornic** T/as C.L. Agencies in CAC No.2 of 2010, 30th April, 2010. That case concerned a claim for copra subsidy payable by the Appellant to the Respondent from May, 2007 to 5 November, 2008, i.e. up to the day on which the Supreme Court Claim was filed. The present Case before this Court arises out of a different Supreme Court Claim commenced on 8 July 2009 for a copra subsidy claimed by the Respondent from the Appellant at the rate of VT13,000 per tonne for the period from 1st September, 2008 to May, 2009. The Appellant filed a defence to the claim in August 2009. In January 2010 an amended claim was filed and an amended defence was filed in early March 2010.

4. On 4 June 2010, after judgment of the Court of Appeal in CAC No.2 of 2010, the Respondent made an Application for Summary Judgment before the Supreme Court which was set down for a hearing at 9:00am on 25th June, 2010. Counsel for the Appellant did not book a seat on a flight to Santo for the hearing in a timely manner. When he attempted to travel to Santo on the 24th June, 2010, he found that the flights were fully booked for that day and for the first flight on 25th June, 2010. He was able to book a flight later on 25th June, 2010 which would have enabled him to appear before the Supreme Court at Santo by 2:00pm on the same day. He sent an e-mail to the Supreme Court at Santo on 24th June, requesting an adjournment of the hearing until 2:00pm, 25th June. The Judge received that e-mail at 8:40am, 25th June.

5. When the matter was called before the Supreme Court at Santo at 9:00am, 25th June 2010, the Appellant's request for an adjournment of five hours to 2:00pm the same day was opposed by counsel for the Respondent. The judge was persuaded that there was no purpose served by any adjournment. The Judge said that liability was no longer an issue because of the Court of Appeal's decision in CAC No.02 of 2010. As to quantum the Judge rejected the Appellant's defence that no subsidy was

paid to anyone and none was payable from 1 September 2008 to 25 May 2009. The Judge held that sufficient evidence had been presented to establish the subsidy at the rate of VT13,000 per tonne and the tonnages of copra. He entered judgment in favour of the Respondent calculated at VT13,000 per tonne from 1 September 2008 to May 2009.

6. The issues before this Court are:

(i) Should the hearing before the Supreme Court have been adjourned until 2:00pm, 25th June, 2010?

(ii) Should the Application for Summary Judgment have been granted?

It is convenient to deal with issue (ii) first.

7. The Respondent's application for summary judgment was supported by a sworn statement as required by the Civil Procedure Rules. The statement was sworn by the Respondent. Whilst the statement deposes to a belief that the Respondent is entitled to the subsidy claimed, the statement is notable for what it does not say to the Court, and for mis-statements of fact contained in it.

8. In the Application for Summary Judgment and in the Respondent's sworn statement, it is stated that the copra subsidy from 1st September, 2008 onwards was VT13,000 per tonne. As proof of the payment per tonne the Respondent attached to her sworn statement a letter from VCPL dated 18th August, 2008 which says the new subsidy rate of VT13,000 per tonne would be effective from 19th August, 2008. The sworn statement omits to mention the evidence accepted by this Court in CAC No.2 of 2010 set out in paragraph 11, as follows:-

"11. A further sworn statement of Gabriel Bani date 14th September, 2009 says at paragraph 5(b):-

'(b) The subsidy was not 10,000 p/t. it was in fact 3,000 p/t from January 2008 to June 2008 and then VT13,000 for the month of August only. There was no subsidy for the balance of the year. What I said in my sworn statement dated 29th July 2009

was incorrect. I only discovered the error recently when providing instructions to the State Law Office.'"

The Respondent was also the Respondent in CAC No.2 of 2010, knew of the sworn statement of Gabriel Bani, and knew of this Court's reliance on that sworn statement in reaching its decision in that case.

9. In addition, the Respondent relies upon invoices from the copra suppliers claiming a subsidy from the Appellant at the rate of VT13,000 per tonne after the 1st September, 2008. This evidence also came up in CAC No.2 of 2010. Once again, this Court is obliged to point out that an invoice is not an evidence of payment, it is not evidence that VT13,000 per tonne subsidy actually applied at that time and does not contradict the Appellant's submission that these invoices dated 29th August 2008, 1st September, 2008, and 5th September, 2008 related to supplies of copra made before the 31st August, 2008 when the subsidy at that rate did apply.

10. Of greater significance is the Respondent's failure to disclose in her sworn statement, and the failure of counsel on the hearing of the Application for Summary Judgment to inform the Judge that the Court of Appeal in CAC No.2 of 2010 had disallowed her subsidy claim from 1 September 2008 to 5 November 2008 and in so doing had rejected the very evidence now relied on to establish an entitlement to subsidy. Had this information been put to the Judge, it would have been obvious that the direction in Rule 9.6(9) required the Application for Summary Judgment to be dismissed.

11. Rule 9.6(9) says:-

"(9) The court must not give judgment against a defendant under this rule if it is satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law."

12. The Appellant's Amended Defence denied that any subsidy had been paid to copra buyers during the period 1 September 2008 to 25 May 2009. That denial was an important consideration that was, for at least part of the

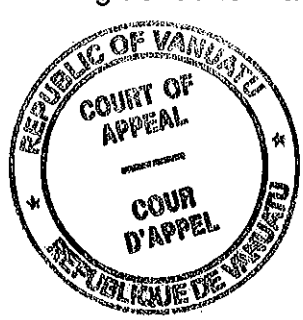
period, borne out by the decision of the Court of Appeal in CAC No.2 of 2010.

13. During the hearing of the Application for Summary Judgment the Judge was shown a sworn statement made on the Appellant's behalf by Jane Bulesa on 24 June 2010 which had been served on the Respondent's lawyer, but not yet filed. That statement in part dealt with the issue of contempt which is not presently relevant, but it also contained the following statement:-

"10. I also wish to state that the State Law Office has been instructed previously that there was no subsidy for the period of September 2008 to 2009. Annexed hereto and marked 'JB4'is a true copy of the sworn statement of Gabriel Bani deposing to that instruction at paragraph 5(b)of his statement filed in CC 46 of 2008."

14. The 24th June, 2010 sworn statement of Jane Bulesa was not formally before the Court as the Respondent had successfully persuaded the judge not to grant the adjournment to 2:00pm the same day. However, counsel for the Respondent knew of the sworn statement of Gabriel Bani from earlier proceedings but did not explain its significance to the Judge. Had the Judge had all this evidence explained to him, he could not have properly granted the Application for Summary Judgment for there were triable issues of fact to be resolved.

15. Many of the same procedural errors that were dealt with by this Court in CAC No.2 of 2010 have re-occurred in this appeal. This Court said in CAC No.02 of 2010, paragraph 29 that "Ambush by stealth is no part of the legal system." Once again, the Respondent has obtained Summary Judgment against the Appellant without the Appellant being represented, based upon the same unproven evidence, and without making full disclosure to the Supreme Court judge of the evidence known to the Respondent that was very relevant to the decision the judge was being asked to make.



16. Having come to these conclusions, it is clear that the adjournment of five hours requested by the Appellant should have been granted. The Respondent was well aware that the Application for Summary Judgment was opposed and the same evidence accepted by this Court in CAC No.2 of 2010 favouring the Appellant in its opposition to the Application that should have been disclosed to the judge by the Respondent should also have persuaded the judge to grant the adjournment.

17. This Court has previously observed in **Maltape v. Aki** [2007] VUCA 5; Civil Appeal Case 33 of 2006:-

"... the learned Trial Judge erred in not granting an adjournment as requested by the Appellant through his counsel in the letter dated 13 September 2006. Clearly the letter was drawn to the attention of the Court. The Appellant had asked the Court for the adjournment on the basis that he "is unable to secure a seat up to Santo today as the place was fully booked." We do not agree with the reasoning of the Trial Judge that "the matter had been delayed for too long and this has been largely due to the defendants failure to attend previous hearings" as good cause to refuse the Application for adjournment on this occasion.

The request for adjournment was for a period of approximately 7 days. Another date could have been easily managed then or soon thereafter. Costs against the Appellant would have been the appropriate remedy then, not striking out the defence and counter claim and then entering default judgment against the Appellant."

18. This Court also respectfully agrees with the observations in **Maxwell v. Keun** [1928] 1 KB 645 at 653 per Atkin LJ:

"I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied

would be an injustice to one or other of the parties, then the Court has power to refuse such an order, and it is, to my mind, its duty to do so."

19. The Appellant was at fault for not being at Court by 9:00am on 25th June, 2010 but natural justice required that the Appellant be given the right to be heard and the delay should have been dealt with by an order for costs.

20. The Appellant has moved by way of this appeal for Civil Case No.15 of 2009 to be remitted to a different Judge. Although the Judge has been closely involved in many applications involving the parties over the subsidy dispute which have led to appeals which have succeeded, the errors and resulting delays have been contributed to by the conduct of both parties to the dispute. We do not think that as a matter of law the Judge is disqualified from further involvement in those parts of the dispute which remain to be determined. However, we think the point has been reached where it is desirable that the matter be taken over by another Judge whose mind is not burdened by the past events where the Judge has been mislead by the way applications and information has been presented. This is a matter for the administration of the business of the Court, not a matter for this Court to direct.

21. The final issue is that of the costs. The Appellant has moved that the Respondent pay the Appellant's costs for this appeal on an indemnity basis. The Civil Procedure Rules say:-

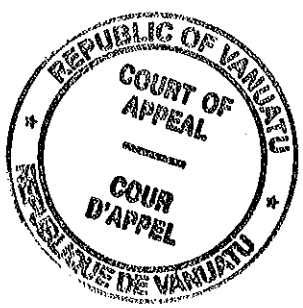
"15.1(1) The court has a discretion in deciding whether and how to award costs.

(2) As a general rule, the costs of a proceeding are payable by the party who is not successful in the proceeding."

Then Rule 15.5(3):-

"(3) Costs are normally to be awarded on a standard basis unless the court orders the costs to be awarded on an indemnity basis."

Then Rule 15.5(5):-



"(5) The court may also order a party's costs be paid on an indemnity basis if:

(a) the other party deliberately or without good cause prolonged the proceeding; or

(b) the other party brought the proceeding in circumstances or at a time that amounted to a misuse of the litigation process; or

(c) the other party otherwise deliberately or without good cause engaged in conduct that resulted in increased costs; or

(d) in other circumstances (including an offer to settle made and rejected) if the court thinks it appropriate."

22. In its submissions, the Appellant properly accepts and is prepared to pay any wasted costs for not attending the hearing at 9:00am on the 25th June, 2010. However, it submits that the Respondent has failed to heed the reasoning and findings of this Court in CAC No.2 of 2010. The Respondent has once again, on the same evidence which this Court found was insufficient for the purpose in CAC No.4 of 2010 to obtain Summary Judgment, gone ahead and used it to obtain a further Summary Judgment against the Appellant. Once again it is submitted the Respondent has done so without the Appellant being represented and without counsel for the Respondent fulfilling his duty of placing all the relevant evidence known to the Respondent and favourable to the Appellant before the primary Judge.

23. The Respondent's submission that the Appellant should have been in Santo for the hearing at 9:00am on 25th June, 2010 is accepted by this Court and conceded by the Appellant. However, in the terms of Rule 15.5(5), the Respondent in making the Application for Summary Judgment has:-

(a) prolonged the proceedings by taking a step that has no prospect of success, instead of getting this matter to a trial;

(b) accordingly, has misused the litigation process; and

(c) deliberately or without good cause engaged in conduct that unnecessarily caused increased costs.

24. The Respondent:

(a) relied on evidence that this Court had already held in CAC No.2 of 2010 did not prove anything.

(b) knew there was a dispute and should not have applied for summary judgment.

(c) had no prospect of success for its summary judgment application.

(d) should not have opposed the Appellant's adjournment application.

25. In all these circumstances it is proper to award indemnity costs to the Appellants for this appeal, less an amount for wasted costs for the failure of the Appellant to appear in Court at 9:00am, 25th June, 2010. The costs shall be as agreed between the parties or as taxed by the Supreme Court.

DATED at Port-Vila this 16th day of June 2010

BY THE COURT

.....
Hon. Vincent LUNABEK CJ

.....
Hon. John von Doussa J

.....
Hon. Ronald YOUNG J

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

.....
Hon. Nevin R. Dawson J

.....
Daniel FATIAKI J