

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

Civil Appeal
Case No. 20/3320 CoA/CIVA

BETWEEN: George and Rinnah Boar
Appellants

AND: National Bank of Vanuatu Limited
Respondent

Coram: Hon. Chief Justice V. Lunabek
Hon. Justice J. Mansfield
Hon. Justice J. Hansen
Hon. Justice O. Saksak
Hon. Justice D. Aru
Hon. Justice G. Andrée Wiltens

Counsel: Mr. G. Boar Appellant in person
Mr. A. Kalmet and Mr. M. Hurley for the Respondent

Date of Hearing: 15 February 2021

Date of Judgment: 19 February 2021

JUDGMENT

Introduction

1. This is an application for leave to appeal and then to appeal against a decision of the Court below dismissing the appellants' appeal against enforcement orders issued by the Deputy Master.

Background

2. The background to the proceedings was set out by the primary Judge as follows:-
 - 8 September 2015 – Power of Sale orders were issued in favour of the respondent in CC15/104 in respect of a debt in the order of VT 1.8 million;
 - 2 August 2016 – the parties negotiated and agreed payment of VT1,700,000 as full and final settlement of loan monies owed by the appellants to the respondent then in the sum of VT 1,932,604 and as discussed below provided that sum was paid within a specified time;



- The appellants then paid the respondent the sum of VT 1,700,000 as follows:-

a.	8 August 2016	VT500,000
b.	28 December 2016	VT1,000,000
c.	11 May 2017	VT200,000

- The appellants made no further payments to the respondent and interest on the loan continued to accrue;

- 10 March 2017 - the appellants filed an application to for a permanent stay of the proceedings on the basis that all outstanding monies owed have been settled. The application was not served until 4 March 2019;

- 1 March 2019 – the respondent's lawyers by letter informed the appellants that they owed the respondent an outstanding balance of VT 455,561 and requested payment in full within 7 days;

- 14 March 2019 – As no payments were received, the respondent's lawyers issued a letter to the appellants demanding payment in full within 7 days;

- 8 May 2019 – the respondent applied for an enforcement warrant which was heard by the Deputy Master on 30 September 2019;

- 30 October 2019- An enforcement warrant was issued for the sale of the appellants' property to recover the unsettled balance of the loan still owing.

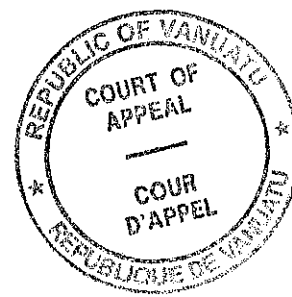
Decision under appeal

3. The main issue raised by the appellants on appeal before the primary Judge was that they no longer had any debts with the respondent as they had paid the full sum of VT 1,700,000 as agreed with the respondent on 2 August 2016.

4. The primary Judge found otherwise and stated that:-

"There can be no doubt that the Bank's counter-offer on 2 August 2016 required payment of VT1,700,000 in full and final settlement in one lump sum, the very next day. Mr and Mrs Boar agreed with the amount of VT1,700,000 but obviously never agreed with the timing set out in the Bank's counter-offer as they instead paid the VT1,700,000 by three separate payments on 8 August 2016, 28 December 2016 and 11 May 2017. The Deputy Master also set out in her Minute the payment by way of three separate instalments. It cannot be said therefore that the parties reached an agreement in August 2016 as to the outstanding loan."

5. On that basis the appeal against the Deputy Master was dismissed.



The Appeal

6. The relief sought by the appellants on this appeal is for leave to appeal and the appeal to be allowed or in the alternative a declaration that all sums owing to the respondent have been paid and the enforcement warrant for sale of the appellants' property be stayed permanently and the mortgage over the property be discharged.
7. No separate application for leave to appeal has been filed.
8. The appeal is pursued on seven (7) grounds. In summary the appellants say that they had paid the respondent the sum of VT 1,700,000 in full and final settlement as agreed and there was nothing owing. Second that they had applied for a permanent stay of the enforcement orders but their application was not listed for hearing but a later application by the respondent for enforcement was heard which they say was unconscionable and unfair.
9. Thirdly, the appellants say that their evidence opposing the grant of power of sale orders to the respondent was not considered as they had constructed a coconut oil factory on the mortgaged property after paying VT1, 700,000 in full settlement but their requests for additional loans, opening of new accounts and discharge of the mortgage were all refused by the respondent.

Discussion

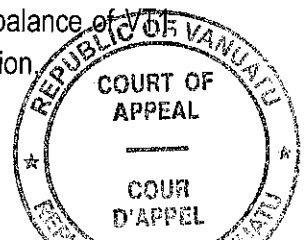
10. Given the nature of the proceedings in the Court below, for the purpose of this appeal the proper starting point of consideration would be s42 (4) of the Judicial Services and Courts Act [CAP 270] as amended which states:-

" ...

(4) A person may appeal to a judge of the Supreme Court against a decision of the master or a deputy master made under paragraphs (3) (a) and (b). The appeal is to proceed by way of a hearing de novo and the judge's decision on appeal is final.

....."

11. The appellants made no submissions on this point. The respondent submitted that the primary Judge's decision is final as provided above and for that reason alone the appeal should be dismissed. We do not need to decide that issue on this appeal.
12. Although the appeal raises several grounds, the genesis of the dispute was whether the outstanding loan was fully settled as agreed to by the parties. On 27 August 2016 the appellants via email were informed by Mr Dali an officer of the respondent that they had an outstanding loan balance of VT 925,441. The appellants on 2 August made an offer to settle the matter for VT1, 5 million.



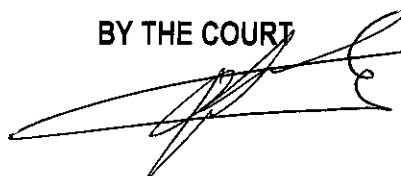
13. The respondent made a counter offer of VT 1, 700,000 the same day as full and final settlement. In addition, Mr Dali said "bring that money in tomorrow morning. We'll discharge your mortgage and we all walk away happy". By e-mail the next day 3 August Mr. Boar responded and accepted that counter offer.
14. As set out above, the amount of VT 1,700,000 was paid in three instalments. The first payment was also not made until 8 August 2016 in the sum of VT 500,000 which was a breach of the settlement agreement. That meant that interest continued to accrue from the 3 August onwards.
15. The respondent made several follow ups with the appellants to settle the loan balance after each instalment payment without success. The respondent's only option after that was to apply for enforcement of power of sale orders which it did on 8 May 2019. The short answer to the appeal is that the primary Judge was correct. The agreement on 2 August 2016 was for the payment of VT 1, 700 000 to be accepted in full settlement if it was paid the following day. The appellants accepted those terms. They did not make the payments as agreed. The result is that the full indebtedness still exists subject to the payments which have been made to reduce it. The full debt has not been satisfied.
16. This Court has set out the factors which require consideration when making an application for leave to appeal out of time in **Laho Ltd v QBE Insurance (Vanuatu) Ltd** [2003] VUCA 33. Having heard the submissions from the appellant we are not satisfied that the application for leave is made out. To the contrary, there is no prospect of the appeal succeeding. On the material before the Court there would be no entitlement to a stay of the recovery procedures on the basis of there no longer being any debt.

Result

17. Leave to appeal is refused and the appeal is hereby dismissed. The respondent is entitled to costs in the sum of VT 50,000 to be paid within 21 days.

DATED at Port Vila this 19th day of February, 2021

BY THE COURT



Hon. Chief Justice
Vincent Lunabek

