

Between : **FRANCOIS XAVIER CHANI**
Trading as **FX & BM**
CLEANING SERVICES

Appellant

And : **THE GOVERNMENT OF THE
REPUBLIC OF VANUATU**
(represented by the **ATTORNEY
GENERAL**)

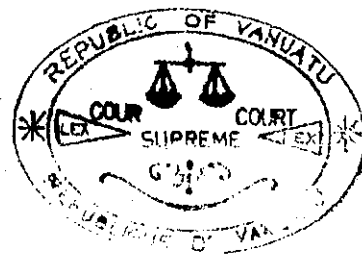
Respondent

Coram : Acting Chief Justice Lunabek J
Mr Dadley Aru for the Plaintiff/Appellant
Mr Jack Kilu , Solicitor General, for the Defendant/Respondent

JUDGMENT

This is an appeal from the whole of the Judgment of His Worship Mr. Jerry Boe sitting as a Magistrate in the Senior Magistrate's Court in Port Vila, made on the February 11th 1997, whereby it was ordered as follows:

1. That the contract signed on 1st July 1996 between Mr. Xavier and the then Minister of Civil Aviation, Mr. Albert Ravutia, is void ab initio.
2. That the Plaintiff repay the Defendant the sum of VT3,333,332 within two (2) months, being for money paid at the rate of VT833,333 per month for the months of July, August, September and October of 1996.
3. Plaintiff to pay costs of this proceedings to be taxed or agreed.
4. Thirty (30) days to appeal.



The facts before the Magistrate's Court are straightforward. The Plaintiff Francois Xavier, is a local businessman. The defendant is the Government of the Republic of Vanuatu.

By an Agreement in writing dated July 1, 1996, made between the Plaintiff and the Defendant, it was agreed the Plaintiff would carry out cleaning services of both the domestic and international airport premises at Bauerfield in Port Vila for a term of two (2) years.

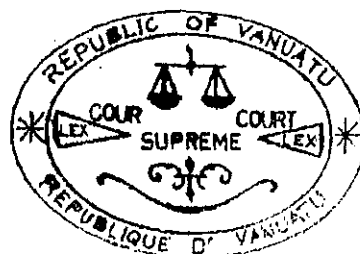
By Clause 2 of the said agreement, it was agreed, inter alia, that the Defendant shall during the currency of the agreement pay the Plaintiff so long as the Plaintiff performs its obligation under the contract, the sum of VT833,333 per month to be paid on or before the last day of the month in which such cleaning is done.

On or about November 28, 1996, the Plaintiff alleged that the Defendant in breach of the said agreement failed to pay the Plaintiff the sum of VT833,333 for cleaning services carried out by the Plaintiff for the month of November 1996. The Plaintiff said that by reason of the said breach, he had suffered loss and damages. The Plaintiff claims the sum of VT833,333 and costs.

It is conceded by both Counsels before this court that at the hearing of the matter before the Magistrate's Court, no oral evidence was called, no affidavit was filed but Counsel for the Plaintiff tendered before the Magistrate's Court the Cleaning Services Contract of July 1, 1996, invoices substantiating the particulars of claims, and a letter dated November 18th, 1996, from Donald Tony, (Acting Service Accountant, Civil Aviation Department). There was no objection taken by the Respondent to the tendering of these materials and the hearing proceeded on the common ground that the material fact was consensually admitted without necessity for formal proof of matters hearing there upon.

It transpires also clearly from the proceedings that the learned Magistrate did exercise his discretion to entertain a Counter-claim exceeding his jurisdiction on behalf of the Defendant on the following grounds that :

- .a. The contract was signed under undue influence.*
- b. The contract is vexatious and frivolous in that it:*
 - 1. intends to defraud public revenue.*
 - 2. is contrary to public policy.*



The Defendant had not filed a notice stating the concise statement of the grounds of such counter-claim and has not paid the corresponding fees in respect to same. Further, no evidence nor affidavit was filed by the Defendant to support the Counter-claim. No particulars of the counter-claim were ever filed in accordance with the provisions of Order 10 of the Magistrate's Court Rules of 1976. It is also significant to observe that no prior notice of repudiation of the Cleaning Service Contract was given by the Respondent until the hearing date where the counter-claim was raised by the Respondent's Counsel .

The Ombudsman's Report of 25th October, 1996, was tendered to His Worship by Counsel of the Defendant during his submissions as material evidence in support of the counter-claim. Counsel for the Plaintiff/Appellant strongly objected to the tendering and admissibility of the said Ombudsman's Report .

Grounds of the Appeal.

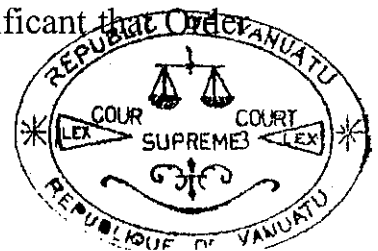
The grounds of the appeal were contained in the Notice of Appeal filed on 17th March 1997. The Appellant advanced six (6) grounds. For the matter of convenience I decide to deal with these Grounds in the following manner: 6,2&3,4,1&5.

Ground 6.

Under this ground, the Appellant contended that the arbitrary position of 30 days time limit for appeals offended against Order 60 Rule 3 of the Magistrate Court (Civil Procedure) Rules of 1976. Order 60 regulates civil appeals from the Magistrate's Court. Rule 3 (1) limits the time of bringing an appeal against the **final decision**, as indeed, was the case, here, to three (3) months subject to a residual discretion in the Magistrate's Court or this Court to enlarge the time.

•It is contended on behalf of the Defendant that the decision was made on 11th January 1997. An Ex-parte Order was issued and a stay of the execution of the Judgment was also granted. The Appeal was filed within time and it is no longer a relevant point in issue.

Despite the fact that this is no longer a life issue on the basis that the appeal was filed within time, it is my view, that a clear error of law is apparent from the learned Magistrate decision. It is significant that



60 Rule 1 confers upon the Magistrate's Court and this Court **the power to enlarge the time for bringing appeals and not to restrict or abridge that time in respect to final decisions** and thereby affect the exercise of the statutory right of appeal contained in Section 16 of the Courts Act [CAP. 122]. (my emphasis).

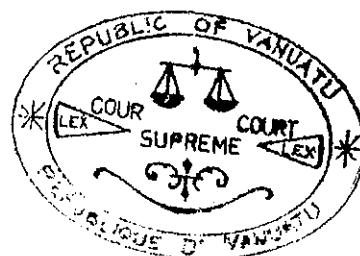
Grounds 2 and 3.

The Appellant contended that the learned Magistrate misdirected himself in law as to the proper standard of proof required in civil matters by applying the criminal standard requiring proof of beyond reasonable doubt. It is not disputed that throughout the text of the Judgment under appeal the learned Magistrate repeatedly refers to and applies the criminal standard of proof of beyond reasonable doubt.

The Appellant is absolutely right by pointing out that in doing so the learned Magistrate disregarded centuries of hold jurisprudence and established legal principle which holds that the standard of proof in civil cases is upon the balance of probabilities. (See Miller -v- Minister of Pensions (1947) KB 372, 375) (See Hickman -v- Peacay (1945) 2 ALL ER 241 220).

Further, I agree with the Appellant's submission, that it is right law that our judiciary operates on the adversary system of adjudication. In civil cases the parties control the pace momentum and direction of proceedings subject to the overall supervision of the presiding judicial officer. At no stage of the civil trial is the Judge allowed to descend to the field to wage battle on behalf of one party against another. Our judicial system will be brought into disrepute if a Magistrate perceived his role as both pleading and proving to himself/herself matters which properly befall the parties and their advocates. Yet this is clearly what the learned Magistrate expressly states in his Judgment at paragraph 2 line 3 of page 7 "*The Court must prove beyond reasonable doubt...*" and again at paragraph 4 line 1 of page 14 "*This Court proves beyond reasonable doubt that ...*". This is of course a gross error or misdirection as to the Magistrate's proper role and function and would ordinarily be inexcusable and, as such, vitiates the learned Magistrate's decision.

Ground 4.



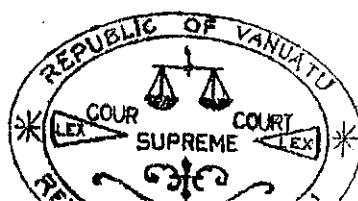
Under ground 4, the Appellant contended that : *“the learned Magistrate erred in law by failing to rule on the Appellant’s objection on the admissibility of the report of the Ombudsman dated October 25th 1996, as evidence and wrongly exercised his discretion in admitting and relying upon evidence which would otherwise be inadmissible.”*

It is submitted for the Appellant that the learned Magistrate’s failure to rule on the Appellant’s objection on the substantive issue (indeed the only possible evidentiary basis upon which his Judgment rested) is a fundamental error. The Ombudsman’s report was tendered as evidence from the Bar Table by the learned Solicitor General, as it is conceded by the learned Solicitor General himself in Court.

It is further submitted on behalf of the Appellant that the report is not proof itself of the truth of facts and matters contained within it.

In my judgment, I accept the Appellant’s submissions that the learned Magistrate made clearly errors of law both in failing to rule on the Appellant’s objection to the reception of that evidence in the proceedings and to base his entire decision upon it. I, therefore, share the view that the ombudsman is the creature of the Constitution [Article 61]. The constitutional role of the Ombudsman is to inquire into and report on the conduct of constitutionally designated persons. Article 63 (4) of the Constitution gives the Ombudsman considerable discretion in her/his reporting functions. The report is entitled to be made public unless the Ombudsman decides to keep it confidential. The public aspect of the Ombudsman’s report should not be confused with its quality as an evidential document. The fact that the Ombudsman has published a report on an inquiry does not mean that whatever is contained in the report is necessarily true. There are a number of obvious reasons for this conclusion. Firstly, as the Court of Appeal emphasized in *Maurice Michel –v- The Attorney General* [Civil Appeal Case No. of 1997(C.A. Decision-Unreported)] ,the Ombudsman’s functions are recommendatory only. Secondly, the Ombudsman cannot usurp judicial power or exercise judicial functions. The Ombudsman reports and findings cannot be equated to the stature of judicial decisions. They are, therefore, not admissible in legal proceedings as truth of what they contain or assert. Thirdly, the now repealed and replaced Ombudsman Act No. 14 of 1995 which was operatively in force during the time those proceedings were before the Magistrate’s Court states, categorically in Section 17 (5) that:

“Except on the trial of any person for perjury in respect of his sworn testimony, no statement made or answer given to that or any other person



in the cause of an inquiry by or any proceedings before the Ombudsman is admissible in evidence against any person in any Court or any inquiry or either proceedings and no evidence in respect of proceedings before the Ombudsman shall be given against any person including the person under investigation except in relation to enforcement proceedings under Section 30." Of the same Act.

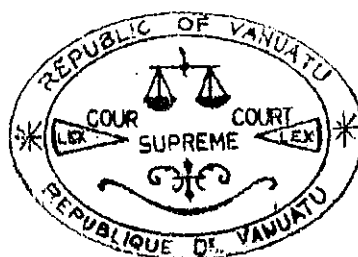
Further, Section 30 (4) of the then Ombudsman Act provided that:

"On considering an application under the above sub-section (2), the Court shall give the person responsible an opportunity to be heard and may re-open issues decided by the Ombudsman, examine any witnesses examined by the Ombudsman or other witnesses and generally conduct the proceedings in the manner required to do justice to the case."

- The present proceedings are not enforcement proceedings and have no connections whatsoever with Section 30 of the former Ombudsman Act.
- Section 17 (5) foreclosed any prospect of reliance on testimony given to the Ombudsman or contained in the Ombudsman's report. In the present case, there was not a single person giving evidence in Court on all aspects of the Respondent's counter-claim. There was no opportunity to cross-examine any of the persons whose testimony or statements to the Ombudsman are relied upon or quoted in the extenso as in the learned Magistrate's Judgment.

Fourthly, the Ombudsman is not an officer of this Court and has not been specifically empowered by the Court to take evidence on commission or to act as a referee and prepare a referee's report [in accordance with Order 6 Rules 19 and 20 of the Magistrate's Court Rules of 1976; Order 38 Rules 14 to 21 of the High Court [Civil Procedure] Rules of 1964].

The effect of this is that the Ombudsman's report are not judicially sanctioned and have only the limited role that Section 30 of the former Ombudsman Act had decreed them to play in future legal proceedings. As such, it is my view, that the report of the Ombudsman has no evidentiary value at all except in relation to enforcement proceedings under Section 30 of the Ombudsman Act No. 14 of 1995, which is not the case in the present case.



Grounds 1 and 5.

Under ground 1, it is alleged that the learned Magistrate misdirected himself in law and upon the evidence and upon the weight and balance of the evidence in finding that the contract dated July 1, 1996:

- a. Was procured by undue influence.
- b. Was procured with the attempt to defraud public revenue.
- c. Is invalid and illegal in all circumstances being contrary to public policy.

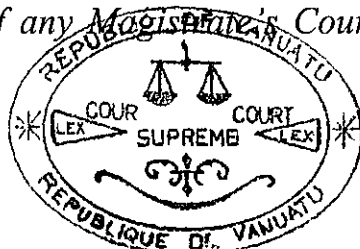
The Appellant contended that the Respondent's counter-claim was never reduced to writing and no prior notice thereof had been given to the Appellant until the Solicitor General stood up to respond to the Appellant's submissions. In view of the ultimate decision of the Magistrate to award the Respondent the sum of VT3,333,332, the Appellant contended that non-compliance with the prescribed procedure for prior notification of counter-claims had the effect of depriving the Appellant of his legitimate rights and expectations to prepare his defence thereto.

The Appellant contentions are based on the provisions of Order 24 Rules 1 and 2 of the Magistrate's Court (Civil Procedure) Rules 1976, and the provision of Section 3 of the Magistrate's Court (Civil Jurisdiction) Act [CAP. 130].

It is conceded on behalf of the Respondent that no Notice of Counter-claim was filed, the proceedings before the Magistrate's Court began on informal basis. Counsel conceded on behalf of the Respondent that the legal position in respect of the procedure were not considered on that basis. It is, further, submitted for the Respondent that the Magistrate has a discretion to hear the counter-claim. Under Section 16 (2) of the Courts Act [CAP. 122] the Court of Appeal or this court sitting on its appellate jurisdiction, cannot interfere with the exercise of discretion conferred by any written law unless it is wrongly exercised. It is, therefore, submitted on behalf of the Respondent that in the present case the Magistrate has exercised his discretion and that discretion has been rightly exercised and cannot be interfered with by this Court.

Section 16 (2) of the Courts Act [CAP. 122] says:

"16 (1) The Supreme Court shall have jurisdiction to hear and determine such appeals from the Judgments of any Magistrate's Court on



any question of law or fact or question of mixed law and fact as provided by this Act or any other law and for that purpose to exercise such powers and authorities as may be prescribed by or under any law for the time being in force in the Republic of Vanuatu; and subject to the provisions of any such law for all purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, the Supreme Court shall have the powers, authority and jurisdiction vested in the Court from which the appeal is brought.

(2) On every such appeal the procedure and the findings, whether of fact or law, of the court appealed from shall be subject to review by the appellate court which shall be entitled to substitute its own judgment or opinion thereon save that the appellate court shall not interfere with the exercise by the court appealed from of a discretion conferred by any written law unless the same was manifestly wrong.

(3) The Supreme Court may in its discretion deal with the appeal on the notes of evidence recorded in the case without hearing any such evidence again."

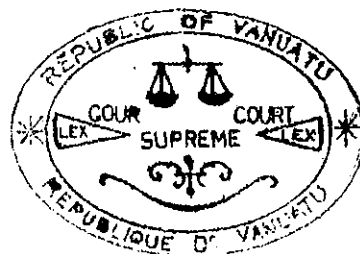
Section 3 of the Magistrate's Court (Civil Jurisdiction) Act [CAP. 130] provides that:

"3. The Magistrate's Court may hear the Counter claim in a suit where the original claim is within its jurisdiction although the counter claim exceeds its jurisdiction.

4. The Magistrate may refer a case where the counter claim exceeds the original claim to the Supreme Court for hearing.

5. Where a case is referred under Subsection 4 the Supreme Court shall either hear the case or direct the Magistrate's Court to hear it."

It transpires from the language of Section 3 of the Magistrate's Court [Civil Jurisdiction] Act [CAP. 130] , that the power of the Magistrate's Court to hear a counter claim which ordinarily exceeds its jurisdiction, is a discretionary power of the Magistrate.



Order 24 of the Magistrate's Court Rules of 1976, prescribes the conditions for the exercise of that discretionary power in the following terms:

“1. A Defendant in an action may set- off or may settle by way of counter-claim against the claim of the Plaintiff, any right or claim, whether such set- off or counter- claim sound in damages or not, and such set off or counter- claim shall have the same effect as a statement of claim in a cross action so as to enable the Court to pronounce the final Judgment in the same action both on the original and on the cross claim:

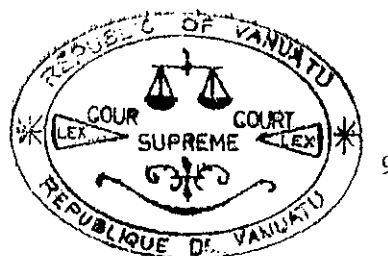
provided that if in the opinion of the Court the set- off or counter-claim cannot conveniently be disposed of in the pending action or otherwise ought not to be allowed, the Court may refuse permission to the Defendant to avail himself thereof, and the Court shall refuse such permission in respect of any counter-claim for an amount or value exceeding the jurisdiction in that respect of the Court.

2. (1) No Defendant shall be allowed to avail himself of any set- off or counterclaim unless he shall have filed with the Magistrate or the clerk of Court, as the case may be, four days before the return date a notice in original and as many copies as there are Plaintiffs in the suit, stating his name and address and a concise statement of grounds of such a set- off or counter claim and shall have paid the same fees as would be payable if he were claiming by Writ of summons:

provided that the Court may, in its discretion and on such terms as to adjournment or otherwise as may appear to it to be just, allow a defendant to avail himself of a set- off or counter claim notwithstanding that such notice has not been duly filed within the time specified above.

(2) Upon receipt of notice of set off or counter claim and upon payment of the prescribed fees the Magistrate or the Clerk of the Court shall cause a duplicate of such notice to be served upon the Plaintiff or each of them.

(3) The provisions of Order 10 relating to particulars of claim shall apply as far as they are applicable to ever set off or counter claim.



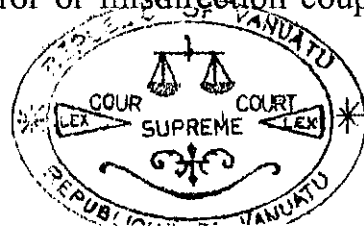
3. *Where in any action a counter claim is established as a defense against the Plaintiff's claim the Court may if the balance is favor of the Defendant give judgment for the Defendant for such balance and may otherwise adjust to the Defendant such relief as he may be entitled to upon the merits of the case.*
3. *The Court if it thinks fit may order that a defense of partial set off shall be accompanied by payment into Court of the amount to which on the Defendant's on showing the Plaintiff is entitled unless the Plaintiff's claim is resisted on some other ground of defence; and in default of such payment the Defendant shall be liable to pay the costs of the suit even though he may succeed in his defense to the extend of the set off on which he relies."*

In this case, it is not disputed that the learned Magistrate has a discretionary power to hear a counter-claim which exceeds the original claim within the Magistrate's court jurisdiction. The question asked then, is whether the exercise of the discretionary power, is manifestly wrong to warrant the supervisory role of this Court .

By perusing the language of Order 24 of the Magistrate's Rules 1976, I accept the Appellant submission that the Respondent should not have been allowed to avail itself of the counter claim because it had failed firstly to file within the prescribed period the requisite written notice of counter claim in Court stating the grounds thereof and secondly to pay the prescribed fee thereof. Further the proviso to Order 24 Rule 2 (1) enables the Magistrate's Court to dispense with time limitations for filing of the written notice and not to dispense with the requirements of the written notice. Further, no duplicate of the non-existent notice of counter claim was ever served upon the Appellant on the basis of Order 24 Rule 2 (2).

I, therefore, accept the Appellant's contention that non-compliance with the above provisions of the Magistrate's Court Rules, materially deprived the Appellant of the opportunity to adequately prepare for and controvert the Respondent's counter claims and thereby prejudice the Appellant's rights. Because of the surprise the Appellant was unable to put in its defense to a counter claim notice of which had never been given by the Respondent.

In deciding the matter without granting the Appellant an opportunity to prepare his defence to the counter-claim, the learned Magistrate has improperly exercised judicial power. That error or misdirection coupled

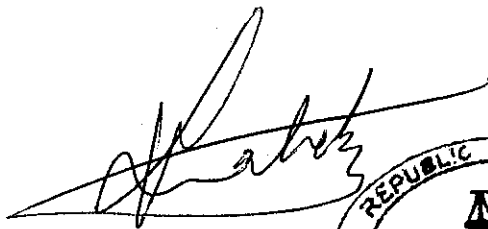


with the resultant deprivation, is a sufficient basis for the setting aside of the judgment under appeal. There is no need for me to consider grounds 5 as stated in the notice of appeal on the basis that it will be premature for me to do so.

On the basis of the above considerations the following orders are made:

1. The Appeal is allowed.
2. On the basis of Section 16 of the Courts Act [CAP. 122], this Court substitutes its own Judgment to the Magistrate's Court Judgment appealed from and Ordered the Respondent to pay VT833,333 to the Plaintiff/Appellant as claimed in the writ of summons filed before the Magistrate's Court on 5 December, 1996 .
3. The Respondent is ordered to pay the Applicant his costs of this appeal and of the decision appealed from and the costs be taxed failing agreement.

Dated at Port Vila, this 18th day of June 1999.



Vincent LUNABEK
Acting Chief Justice.

