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

Civil Case No. 130 of 2009

BETWEEN: MAISON DU VANUATU
Claimant

AND: VANUATU COMMODITIES MARKETING BOARD
Defendant

Coram: *Justice D. V. Fatiaki*

Counsels: *Mr. R. Warsal for the Claimant/Applicant*
Mr. F. Gilu for the Defendant/Respondent

Date of Ruling: *28 April 2011.*

RULING

1. This is an application for leave to appeal out of time against a judgment of McDonald J. delivered on 22 October 2010. The application was filed on 17 January 2011 some 5 days out of time. The application does not append a draft notice and grounds of appeal as indicated but is supported by a sworn statement filed by the manager of the applicant which deposes "*that the learned judge failed to place any weight on the evidence adduced by the appellant.*" The deponent also deposed "*... that the counsel who had carriage of this matter Mr. Bill Bani was unwell on or about early November, 2010 to December, 2010 thus making it hard for us to file any appeal on time*".

2. Respondent's counsel whilst accepting that the court has an unfettered discretion in the matter nevertheless opposes the application on the basis that Mr. Bani's illness is not a matter within (the deponent's) own knowledge and therefore should have been verified by a sworn statement from Mr. Bani deposing to the details of his illness.

3. Furthermore counsel submits that in the absence of detailed grounds of appeal identifying the evidence adduced by the appellants which the deponent claims the trial judge place no weight on, this court has "*... nothing on which ... to properly exercise its discretion in the applicant's favour*".

4. Applicant's counsel accepts that no notice or grounds of appeal has been filed and in recognition that the applicant is a foreign company with no assets in the jurisdiction, counsel proffers a sum of VT1.5 million as security for the costs of the appeal in the event the application is granted.

5. In ***Laho v. QBE Insurance*** *[2003] VUCA 26* the Court of Appeal whilst accepting that a decision to grant or refuse leave to appeal out of time is "*entirely a discretionary one for the Court*", nevertheless, identified appropriate factors to be taken into account including the following"

> *"1. The length of the delay;*
>
> *2. The reasons for the delay;*
>
> *3. The chances of the appeal succeeding if time for appealing is extended; and*
>
> *4. The degree of prejudice to the potential respondent if the application is granted."*

6. In this latter regard respondent's counsel after tracing the history of the proceeding between the parties which extended over 7 years including an earlier proceeding between the parties which concluded with a Court of Appeal decision in the applicant's favour (***see***: Civil Appeal Case No. 12 of 2007), forcefully submits that the respondent "*... has a strong interest in the finality of his litigation*".

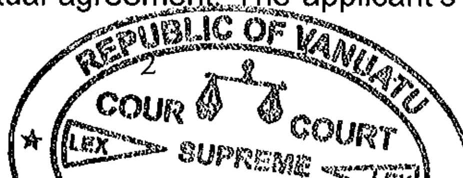
7. No sworn statement has been filed in support of this submission (as there could have been if actual prejudice would occur by the grant of leave) **nor** is it clear whether or not the respondent has altered its position in the meantime **or** that third party interests are or would be prejudiced by granting the application.

8. As was said by the Court of Appeal in ***Toara v. Simbolo*** *[1999] VUCA 6:*

> "*Prejudice is not an absolute requirement but in this situation where there is absolutely no question of any prejudice as evidenced by the inaction, good justice is not achieved by refusing the Plaintiff/Appellant his right of appeal when he filed his documents one day late and no detriment was created as a result.*"

9. I turn then to consider the applicant's chances of success on the appeal as asserted in its notice of appeal and in the context of the solitary ground deposed. **ie.** the trial judge failed to place weight on the (applicant's) evidence.

10. In this regard without deciding the merits of the appeal, I note that the exclusive importer/distributor agreement entered into between the parties for the supply of Vanuatu kava into the New Caledonia market had an initial term of 5 years and therefore would expire on 7 October 2011 unless renewed by mutual agreement. The applicant's claim was that the



respondent unlawfully terminated the agreement by its conduct causing the claimant to lose the benefit of the agreement and thereby sustaining loss and damages of over VT1 billion.

11. The applicant's evidence before the trial judge comprised two witnesses whose evidence is clearly dealt with in the judgment which also identified the numerous evidential short-comings in the claimant/applicant's case including a concession by Mr. Bani "*... that the claimant had failed to prove its loss*". The trial judge also records Mr. Bani's unresponsiveness to the possibly limiting effect of the penalty clause (clause 9) in the agreement.

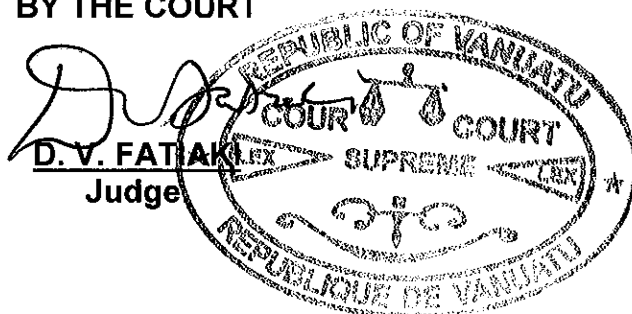
12. Finally the trial judge concluded that the claimant had neither proved any breach of contract or the loss of VT1 billion claimed.

13. In light of the foregoing there is not the slightest doubt in my mind that there is no merit at all in the assertion that the trial judge failed to consider the evidence led on the applicant's behalf. In reaching this conclusion I am not unmindful that the pleading in a claim is **not** evidence upon which a court can act and that the issuance of the proceeding by the claimant/applicant constitutes a termination of the contract on the part of the claimant.

14. The application is accordingly dismissed with costs to be taxed if not agreed.

DATED at Port Vila, this 28th day of April, 2011.

BY THE COURT



D. V. FATIAKI
Judge