

BETWEEN: **NATHALIE LAWAC**
 Appellant

AND: **EGLISE CATHOLIQUE DE VANUATU
COMMITTEE (INC)**
 Respondent

Coram: *V. Lunabek – CJ*

Counsel: *Mr Colin Leo for Appellant*
 Mrs Marie Noelle F. Patterson for the Respondent

JUDGMENT

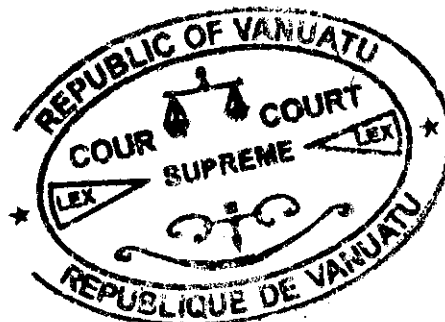
This is an appeal by the defendant, Nathalie Lawac against Order 2 of the decision of her Worship Magistrate Nalau Ilo at Port Vila Magistrate’s Court on 22 May 2013 whereby the Defendant was ordered to pay the claimant, Eglise Catholique the sum of Vatu 870,000 damages for loss of rental profits in respect of her wrongful occupation of 3 bedroom house at Porte du Ciel, Port Vila, Vanuatu.

On 22 May 2013, Her Worship issued a summary judgment with the following orders against the Defendant:

- “1. The Defendant Nathalie Lawac, her family members, relatives and / or agents vacate themselves from the House on land lease title number 11/OE24/029 belonging to the Catholique Church of Vanuatu within 28 days.

2. The Defendant pay damages for loss of rental profits in the sum of VT870,000. [Emphasis].

3. The Defendant to pay accumulated wasted costs in the amount of VT9,000.



4. The Defendant to pay costs of proceedings in this matter to be agreed between the parties or failure of which will be taxed by the court.
5. The Defendant to pay all monies herein ordered with 28 days."

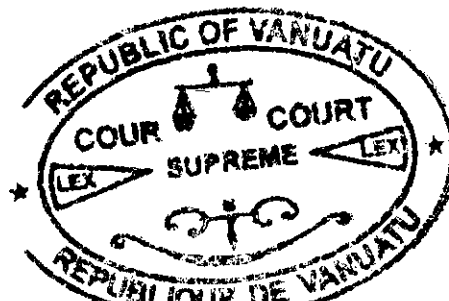
The Defendant appealed only against order 2 of the orders of 22 May 2013. There was no appeal filed against the other orders of the Magistrate's Court of the same date.

The facts are simple. The claimant is a church registered as a Charitable Association under the relevant law [Cap140] and is also known as Mission Catholique. The Defendant is a Ni-Vanuatu citizen and was working as a Secretary/Accountant at the Education Branch of the claimant with Direction de l'Enseignement Catholique ("DEC") under an Agreement ("The Agreement") since January 1992. This Agreement appeared to be an oral agreement. As part of the agreement between the Claimant and the Defendant, the Claimant provided a House located at Porte du Ciel, Port Vila to the Defendant. The House was on a Leasehold land Title no. 11/OE24/029 in the name of the claimant. The Defendant used the house to accommodate herself and her family during her employment with the claimant.

In 2008, the Department of Catholic Education encountered substantial problems of management and accounts. The DEC hired an independent auditor, Mrs Claire Yvonne Francois who did a financial and accounting audit and issued a report in June 2008. The Additional sworn statement of Cyril Tofor filed 25 September 2012 attached a copy of the audit report showing missing amount of cash monies and "unknown" cheques paid cash to the then Director of the DEC, Mr Jules Bong Nembu. It also showed many examples of mismanagement. The claimant's accounts showed a deficit balance of VT3,083,724.

The audit report also showed that concerning the Defendant's attendances in the office, she is frequently late and often absent, the time being spent on outside tasks with no relationship with DEC. There were important short comings in the accounting and the lack of any data being entered in the computer.

The Defendant was employed at the DEC since 1992 and no contract of commitment was signed or specifies her commitments and benefits.



There was a letter signed by Mr Jules Bongnembu, on February 11th 2002, attributing the Defendant a superior professional category P11.3 and a monthly salary of 63,448 Vatu. The Defendant is accommodated without compensation in the premises of the claimant.

As a result of the audit and account report, the Defendant was dismissed by the claimant on 25th July 2008 by the interim Director of the DEC, Justin Tari in a letter of same date after she was paid her employment benefits.

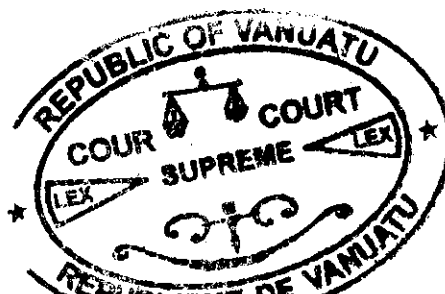
The claimant asked the Defendant to vacate the premises she was occupying. She refused to vacate the premises.

On 11th November 2011, the claimant filed a claim in the Magistrate's court in Port Vila against the Defendant claiming the following orders:

- (1) An order that the Defendant, her agents and members of family vacate immediately the Accommodation on Lease no. 11/OE24/029.
- (2) An order that the Defendant pays to the claimant the amount of VT600,000 as damages for her illegal occupation of the Accommodation representing loss.
- (3) Costs
- (4) Any other Orders as the court may deem fit

The claim was served on the Defendant's Lawyer on 16 November 2011 as evidenced in the sworn statement of service of Rose Banga filed 28 November 2011.

The Defendant filed and served a defence and a counter-claim to the claimant on 9 February 2012. In her defence, she admits she was employed by the claimant between 3 January, 1992 and 25 July, 2008. She denies that it is a term of the agreement that she pays rent of VT15,000 per month, and no rent was imposed on her during the contract period. She says she was accommodated as part of her employment benefits. She admitted that since her termination, she refused to vacate the accommodation provided by the claimant as she awaits the claimant to pay the balance of her termination entitlements.



In her counter-claim, she says her termination by the claimant on 25 July, 2008 was unjustified. She claimed damages of VT4,097,399; interests at 10% per annum from 25 July 2008 and costs.

On 21 September 2012, the Claimant through Counsel filed an Amended Magistrate's Court Claim seeking the following additional order: **"that the Defendant pays an additional amount of moneys of VT15,000 per month from 04.11.11 till the date she vacates the claimant's premises as additional damages in lieu of loss of use of money"**.

I consider the effect of this Amended Claim is for the claimant to bring the action to cover the amount due after the claim.

The Amended Magistrate's Court Claim was served on Stephen Joel and Associates, Counsel for the Defendant on 24 September 2012 [see sworn statement of service of Rose Banga filed 27.09.2012]. There was no defence filed to the Magistrate's Court Claim as amended.

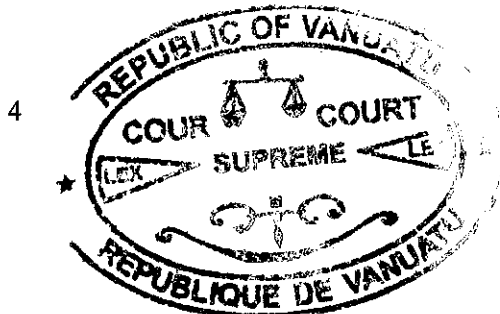
On 26 April 2013, the claimant applied for summary judgment against the Defendant. The summary application was filed on 29 April 2013 and served on the Defendant's counsel on 03 May 2013.

On 6 May 2013, the Court made orders striking out the counter-claim of the Defendant on the grounds that the Defendant failed to attend court conferences on various occasions in 2012 and 2013 and also that the Defendant has disregarded and failed to comply with various court orders issued to pursue her counter-claim in 2012 and 2013 as specified in the Magistrate's Court Orders of 6 May 2013.

There is no appeal against the striking out orders of the counter-claim of 6 May 2013. The Defendant has filed a Supreme Court claim against the Claimant challenging her termination and claiming damages which is now pending in Civil Case 156 of 2013.

On 22 May 2013, Her Worship issued the summary judgment with orders referred to earlier order 2 of which is currently appealed against in the Supreme Court.

The Defendant filed an Amended Notice of Appeal on 16 January 2014 and sought for the following orders:



1. That order 2 of the Summary Judgment of Magistrate Nalau Ilo H. dated 22 May 2013 Civil Case 159 of 2011 be Struck Out.
2. That the matter of quantum be return to the Magistrate's Court for rehearing.
3. The Respondent pays the costs of this Appeal.

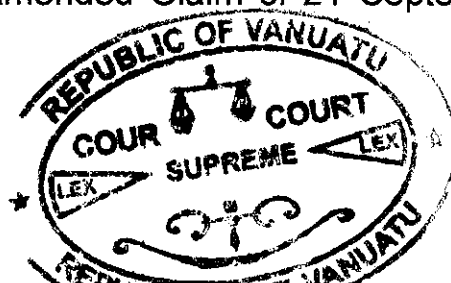
The ground for this appeal is that the amount of VT870,000 awarded as damages for loss of rental profits is excessive and not justified.

Mr Leo submitted that the application for Summary Judgment does not meet the requirement of Form 15 of Rule 9.6(3) of the Civil Procedure Rules in that the date of hearing does not appear in the application for Summary Judgment before the Magistrate's Court. Mr Leo submitted and relied on the case of *Gidley -v- Mele [2007] VUCA 7 Civil Appeal Case No. 34 of 2006*.

The claimant (Respondent) accepted that there was no date for hearing on the application form. It was an oversight. However, the claimant says the application was filed and served on the Defendant (Appellant) and her lawyer. The Notice of Hearing of the Application for summary judgment was also served on the Defendant with the hearing date of 22 May 2013 at 10.00am o'clock (see sworn statement of Rose Banga filed 06.05.2013).

The Defendant was therefore notified of the application for summary judgment and of the date of its hearing. The case of *Gidley -v- Mele [2007] VUCA 7* does not assist the Defendant's case as the facts of the present case are different from *Gidley* case. Further there is no dispute that the Defendant occupies premises belonging to the Claimant. The premises were used by the Defendant to accommodate her during her employment with the Claimant. The Defendant's employment with the Claimant (Respondent) ended on 25 July 2008. The Defendant was asked to vacate the claimant's premises. She refused to vacate the premises. She continued to occupy the claimant's premises without the claimant's permission or authorisation. She becomes a trespasser on the said premises.

The Defendant is notified by the Claimant to vacate the premises when the claim was served on her on 16 November 2011; again the Defendant is notified by the Claimant when the Amended Claim of 21 September



2012, was served on her on 24 September 2012. The Defendant's submission on the first point of appeal is dismissed as it has no substance.

Mr Leo also submitted in substance that the amount of VT870,000 was excessive and unjustified as there was no evidence in support of that award and that there was no monthly rent imposed on the Defendant during her employment with the claimant.

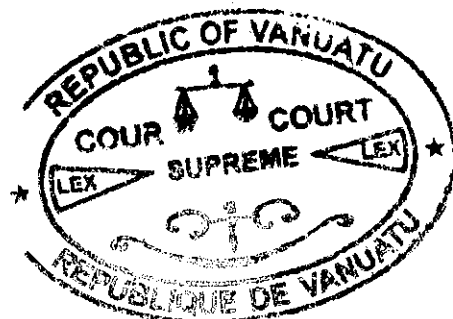
Mrs Patterson submitted in response that the amount of VT870,000 was awarded damages for mesne profits to compensate the loss the claimant would have made if it had not been for the Defendant's wrongful occupation of the claimant's premises.

In this case, there was no monthly rent imposed on the Defendant during her employment with the claimant. This appeal is not about the amount of rent or arrears of rent. It is about the damage for mesne profits and its calculation.

In the circumstance of this case, if the claimant as land lord can prove no actual damage caused to her by the Defendant's trespass, the claimant may recover as mesne profit the amount of the open market value of the premises for the period of the defendant's wrongful occupation. Mesne profits, being a type of damages for trespass, can only be recovered in respect to the Defendant's continued occupation after the expiry of her legal right to occupy the premises [see Halsbury's Laws of England – 4th Edition - Parag.225].

The sworn statement of Cyril Tofor filed 14 February 2012 in support of the claim indicated that the open market value of the premises occupied by the Defendant was of VT30,000 per month. However, the claimant says she does not claim for that amount of rate per month. The claimant says she claims for mesne profits at the rate of VT15,000 from the date of 04.11.2011 to the date of delivery of possession.

In this case, the claimant as the landlord re-enters possession of her premises by issuing a claim claiming possession (as opposed to physically re-entering the premises). Mesne profits may only be claimed from the date of service of the claim to the date of delivery of possession: see *Canas Property Co. Ltd –v- KL Television Services Ltd* [1970] 2 QB 433, [1970] 2 All ER 795.



It is also noted that in this case, the claimant brought an Amended claim to bring the action to cover the amount due after the claim. It is not necessary for the claimant to do so as the claimant has always been able to claim mesne profits to the date of delivery of possession: see *Southport Tram Ways Co. -v- Candy [1897] 2 QB66*. The date of service of the claim is not the date of service of the Amended Magistrate's court claim as the amendment of the claim is not necessary being the nature of the cause of action in the claim. So, in this case, the date of service of the claim is 16 November 2011 which is the starting date for calculation of damages for mesne profits.

The claimant is entitled to damages for mesne profits at the rate of 15,000 Vatu from 16 November 2011(date of service of the claim) till the date of delivery of possession.

On simple calculation, the summary judgment entered by Her Worship on 22 May 2013 should be in the amount of Vatu 285,000 but not Vatu 870,000. There was an error in the calculation which is excessive.

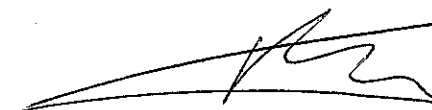
The appeal is allowed on this point. The orders of Her Worship dated 22 May 2013 will be varied in its order 2 to the effect that the amount of VT870,000 is removed and replaced with the amount of VT285,000.

ORDERS

1. The appeal is allowed
2. The amount of 870,000 Vatu in order 2 of the Summary Judgment of the Magistrate's Court dated 22 May 2013 is removed and replaced with the amount of VT285,000.
3. Both parties to pay their own costs of this appeal.

DATED at Port-Vila this 29th day of April 2014

BY THE COURT



Vincent LUNABEK
Chief Justice

