

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

Civil Case No. 11 of 2013

BETWEEN : KWANG SING 1

Claimant

AND: PUBLIC WORKS DEPARTMENT

First Defendant

AND: REPUBLIC OF VANUATU

Second Defendant

Coram: Justice Aru

Counsel: Mr. C. Leo for the Claimant
Mr. S. Kalsakau for the first and second Defendants

JUDGMENT

Background

1. The claim which is the subject of these proceedings is a claim by Kwang Sing 1 for unpaid invoices in relation to works carried out on Malekula and Pentecost (Malekula/Pentcost Road Works) under various contracts with the Government through the Public Works department (the PWD). On 6 March 2013 a default judgment was entered against the defendants. The defendants then applied to have the default judgment set aside.



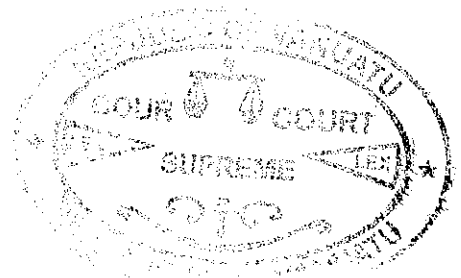
2. On 3 July 2013 the application to set aside the default judgment was dismissed. The defendants then appealed to the Court of Appeal in **Republic of Vanuatu v Kwang Sing 1 [2013] VUCA 35**.
3. On 22 November 2013 the appeal was heard and allowed by the Court of Appeal. When directing that the matter be returned to the this Court, the Court of Appeal made the following remarks:-

"It is clear that had all these pieces of the Appellant's further evidence, as contained in the sworn statements of Samuel Namuri, Agnes Tari Siro and Viran Molisa Trief, been placed before the primary Judge he would have set aside the default judgment.

16. Having put this to the parties in the course of the hearing, it was accepted that it would be appropriate to set aside the default judgment on the basis that the Appellant pays to the Respondent the sum of Vt 10 million by the end of the year and then go to trial in respect of the remaining sum of Vt 6 million. That is because the Appellant now accepts that in addition to what had already been paid, it cannot dispute liability for the further amount of Vt 10 million.

17. In the circumstances, on the condition that the Appellant pays to the Respondent by the end of the year the sum of Vt 10 million, the appeal is allowed and the default judgment is set aside. The matter is remitted to the primary judge to hear the remaining issues. The Appellant must pay the Respondent's costs of the appeal at the standard rate. If the Vt 10 million payment is not made on time, the appeal will be dismissed and the default judgment will stand."

4. The parties confirm that the amount of VT10 million has been paid by the defendants as directed.



Claim

5. The claim is for a liquidated sum of VT16, 057, 621. At paragraph 4 and 5, the claimant pleads his claim as follows:-

"4. On or about 2009 to November 2011 the claimant and the defendant entered into various written agreements whereby it was agreed between the parties that the claimant would carry out a number of tasks on the defendants' public road on Pentecost and Malekula including side clearance erosion / land slide clearance and road formation.

Particulars

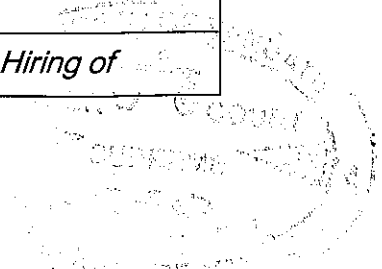
- i) the claimant will rely on the written contracts executed between the claimant and the defendant as if the same is set out in full herein;*
- ii) as part of the road maintenance services pleaded in paragraph 4 above the defendant hired the claimant's daewo dump truck, compactor , grader together with the claimant's necessary tools and equipment and hired the services of the claimant to undertake road maintenance in Penetcost and Malekula as agreed upon by the claimants and the defendants*
- iii) further, the terms of the agreement was for the claimant to undertake road maintenance and the defendants would pay for the claimants services .*

5. In accordance with the agreement and the matters pleaded in in paragraph 4 i) and ii) above , the claimant executed the tasks as agreed and completed all the works as required by the defendants and then demnded payment from the defendants but the defendants refused to pay the claimants

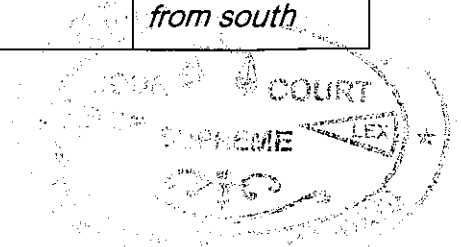
Particulars of completed work undertaken by the claimant

1)

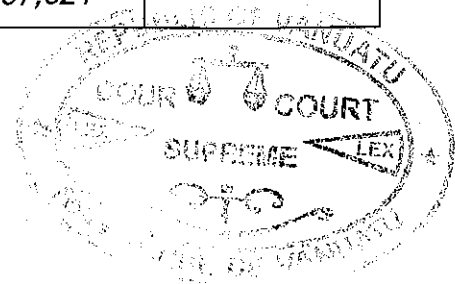
<i>BILL NUMBER</i>	<i>INVOICE DATE</i>	<i>INVOICE NUMBER</i>	<i>AMOUNT</i>	<i>DETAILS</i>
<i>1</i>	<i>12/9/11</i>	<i>0467</i>	<i>VT 2,826,140</i>	<i>Hiring of</i>



				<i>daewo dump truck contracted for 384 hrs but only worked 239 hrs</i>
<i>2</i>	<i>12/9/11</i>	<i>0466</i>	<i>VT 1,659,656</i>	<i>Hiring of daewo dump truck contracted for 384 hrs but only worked 140.25hrs</i>
<i>3</i>	<i>12/9/11</i>	<i>0465</i>	<i>VT 1,080,000</i>	<i>Hiring of compactor for 80hrs and worked 80hrs</i>
<i>4</i>	<i>12/9/11</i>	<i>0464</i>	<i>VT3,150,000</i>	<i>Hiring grader for 350hrs but only worked 224hrs</i>
<i>5</i>	<i>22/3/11</i>	<i>0452</i>	<i>VT1,890,000</i>	<i>Hiring of D8 bulldozer to compile , quarry in South West Bay Malekula</i>
<i>6</i>	<i>15/10/11</i>		<i>VT450,000</i>	<i>Demobilization of bulldozer from south</i>



				<i>west bay using LC MGY</i>
<i>7</i>	<i>28/11/11</i>		<i>VT450,000</i>	<i>Demobilization of bulldozer from Lolowai , Ambae</i>
<i>8</i>	<i>2009</i>		<i>VT1,685,325</i>	<i>10% retention payment for tender No 3/9/09 South Pentecost road maintenance Melsisi- Ranwas road</i>
<i>9</i>	<i>2009</i>		<i>VT2,866,500</i>	<i>10% retention payment for tender No 382/09 – Malekula road maintenance project</i>
	<i>2009</i>			<i>(Litz litz – lamap road) for Malekula</i>
			<i>TOTAL CLAIM VT 16,057,621</i>	



2) letter of demand by the claimant 's solicitor to the defendants solicitor dated 15 November 2012.

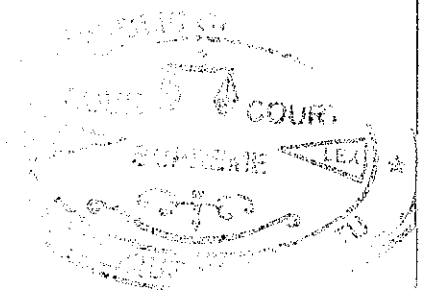
6. As I mentioned above, the payment of VT10 million is resolved and is no longer an issue. The only remaining issue to be determined by this Court is whether the claimants are entitled to a further payment of VT 6 million.

Evidence

7. The evidence for the claimants at trial is a sworn statement of John Salong filed on 29 September 2016 and tendered as Exhibit 'C1'. He was cross examined on his evidence. The defendants on the other hand relied on two sworn statements filed by Sam Namuri on 28 January 2015 and 22 February 2017 respectively. These sworn statements were tendered as Exhibit 'D1' and Exhibit 'D2'.

Submissions

8. The claimant submits that the balance outstanding on the works executed under the various contracts was VT 6 million. It was submitted that Mr. Salong confirmed that Invoice No 0452 in the sum of VT1, 890, 000 and Invoice No 0464 in the sum of VT3, 150, 000 are still outstanding and these two invoices total up to VT 5, 040, 000.
9. It was further submitted that Mr. Salong acknowledged that Invoice No 0458 in the sum of VT 4, 921, 875 is also still outstanding although the work was completed. Secondly it was submitted that Mr. Salong confirmed that work was carried out in relation to each individual contract and the invoices were issued to the defendant.



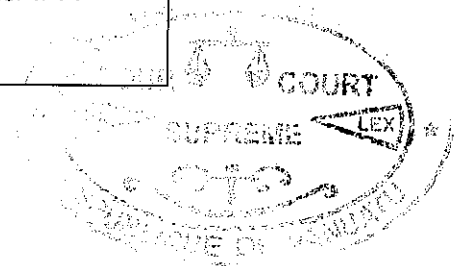
10. The defendants on the other hand submit that Mr. Salong says in his sworn statement that the remaining contract amount is VT 6, 811, 875 which shows that the claimants are unsure of the correct figure. They say that Invoice No 0458 in the sum of VT 4, 921, 875 was never pleaded in the claim and was objected to and granted by the Court. Furthermore, it was submitted that Mr. Salong was not able to produce invoices Nos. 0467, 0466, 0465 dated 15/10/11, 28/11/11 and 2009. It was submitted that the claimant failed to prove that there are outstanding payments as pleaded in paragraph 5 of the claim - items 1, 2, 3 and 6 to 9 referred to in the above table. It was finally submitted that the claimants are not entitled to a further VT 6 million and the claim should be dismissed.

Discussions

11. The claimant has the onus to prove his case on the balance of probabilities. The claimant submits that all works under the various contracts were executed by the claimant and the balance outstanding to be paid as directed is VT 6million. Mr Salong says in his sworn statement **Exhibit 'C1'** that the total amount outstanding is VT6, 811,875 and provides the evidence of the various contracts in **Annex 'JS1'**.

12. However, Mr. Salong does not specify in his sworn statement which invoices relate to Malekula/Pentecost Road Works which is the subject of these proceedings. Out of the Invoices disclosed in **Exhibit 'C1'**, the only invoice that relates to Malekula/Pentecost Road Works as pleaded at paragraph 5 of the claim is Invoice No 0452 for the sum of VT 1,890,000. The details are as follows:-

<i>INVOICE NUMBER</i>	<i>INVOICE DATE</i>	<i>AMOUNT</i>	<i>DETAILS</i>	<i>CONTRACT DATE</i>
0452	22/3/11	VT1,890,000	Hiring D8 Bull to	25/1/11



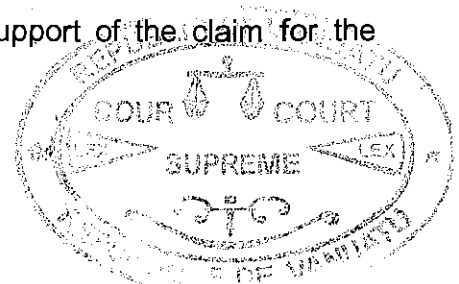
			stockpile quarry South West Bay (Malekula)	
--	--	--	--	--

The rest of the invoices totalling up to VT 8,071,875 are for road works on Santo and are not related to Malekula/ Pentecost Road Works as pleaded in the claim and are therefore rejected. The details of these invoices are as follows:-

<i>INVOICE NUMBER</i>	<i>INVOICE DATE</i>	<i>AMOUNT</i>	<i>DETAILS</i>	<i>CONTRACT DATE</i>
0458	7/4/11	VT4,921,875	Hiring grader for Banban/Suranda road upgrade 14KM for tar seal (SANMA)	5/4/11
0464	12/9/11	VT3,150,000	Hiring grader for Banban/Suranda road upgrade (SANMA)	NO CONTRACT

The inclusion of Invoice No 0464 in the particulars of paragraph 5 of the claim is misleading as the works were carried out in Santo not on Pentecost or Malekula as shown in **Exhibit 'C1'**.

13. When cross examined on his evidence, Mr. Salong confirmed that **Exhibit 'C1'** which was filed and tendered as the evidence in support of the claim for the



remaining VT 6 million does not show Invoices Nos: 0467, 0466, 0465, Invoice dated 15/10/11, Invoice dated 28/11/11, Invoice dated 2009 for the sum of VT 1, 685, 325 and Invoice dated 2009 for the sum of VT 2, 866,500 which are particularised at paragraph 5 of the claim.

14. Mr. Salong agreed when cross examined that the only invoice regarding the Malekula/Pentecost Road Works provided in Exhibit 'C1'- Invoice No. 0452 for the sum of VT 1, 890, 000 has been paid and is included in the VT10 million payments ordered by the Court of Appeal. Mr Namuri when cross examined confirmed that Invoice No 0452 had been paid.

15. Having considered the evidence and the submissions made I am not satisfied that the claimant has proved his case to be entitled to a further payment of VT 6 million therefore the claim is dismissed. The defendants are entitled to their costs to be agreed or taxed by the Master.

DATED at Port Vila, this 24 day of August, 2017

BY THE COURT

D. Aru
Judge

