

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Civil Jurisdiction)

Civil

Case No. 19/107 SC/CIVL

BETWEEN: Ben Dick Dali
Claimant

AND: John Vira Mavuti
First Defendant

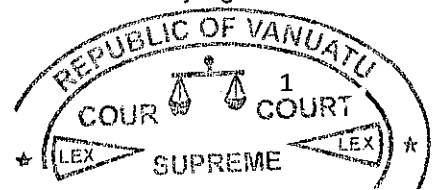
AND: Republic of Vanuatu
Second Defendant

Date of Trial: 5 February 2020
Before: Justice V.M. Trief
In Attendance: Claimant – Mr M. Hurley
Second Defendant – Ms J.E. Toa
Date of Decision: 5 May 2020

RESERVED JUDGMENT

A. Introduction

1. In 2015 the Claimant Mr Dali paid money to the First Defendant Mr Mavuti, then Deputy Sheriff of the Supreme Court, for the purchase of a re-possessed leasehold property under process with the Sheriff's office. That property was eventually sold via tender process to someone else. The Second Defendant the State subsequently dismissed Mr Mavuti for serious misconduct. Mr Mavuti has not returned Mr Dali's money and the State denies responsibility.
2. Mr Dali sued the Defendants, on a joint and several basis, for the VT2,000,000 paid to Mr Mavuti. Default judgment has issued against Mr Mavuti. This judgment determines the claims against the State.



B. Statements of the case

3. The claims against the State are set out in paras 27 and 31-25 of the Amended Supreme Court Claim:

Liability of the First Defendant

Theft and/or Misappropriation

27. On or after 24 April 2015 the First Defendant seized and took the money for his own use without any authority of the Claimant.

...

Liability of the Second Defendant

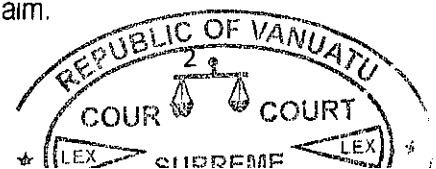
Negligence

31. The Second Defendant owed a duty of care to the Claimant to ensure that the First Defendant was properly trained for, and supervised in respect of, his duties as Deputy Sheriff.
32. The Second Defendant breached this duty of care, and was negligent in supervising and retaining the First Defendant.
33. The negligent actions and/or inactions of the Second Defendant caused injury to the Claimant, a consequence the Second Defendant knew or ought to have known would occur as a result of its negligence.
34. Without restricting the generality of the foregoing, the negligence of the Second Defendant included that it knew or ought to have known that it failed to maintain appropriate supervision and control over the First Defendant and/or retained him.

Vicarious liability

35. Further and/or in the alternative, the Second Defendant is vicariously liable for:
- a) the First Defendant's theft and/or misappropriation of the money as pleaded in paragraph 27 above; and
 - b) the First Defendant's actions which exhibited contumelious disregard for the Claimant's rights.

4. The State says that Mr Mavuti's actions in relation to Mr Dali fell outside the scope of his employment and denies any negligence on its part. It denies that it is vicariously liable.
5. Mr Dali must prove on the balance of probabilities that Mr Mavuti stole and/or misappropriated the money that he paid to him for the purchase of the property. If he succeeds in doing so, I will then consider whether or not the State is vicariously liable for that theft and/or misappropriation by Mr Mavuti and/or was negligent.
6. Mr Dali's claims against the State are in the alternative. So he need succeed only on his vicarious liability claim, or in the alternative, on the negligence claim.



C. The Evidence - Agreed Facts

7. It is agreed that:

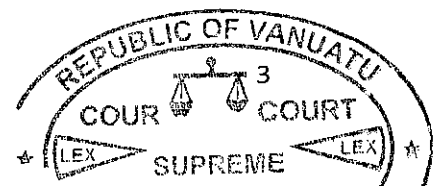
- 7.1 On 10 May 2010, the State appointed Mr Mavuti as Deputy Sheriff.
- 7.2 On 9 August 2016, the State issued a Job Description to Mr Mavuti. His key tasks included serving Court documents, executing Enforcement Warrants, and assisting with administration.

Mr Dali's payment for purchase of the property

- 7.3 In January 2015, Mr Dali contacted Mr Mavuti in his capacity as Deputy Sheriff and asked about the possibility of purchasing re-possessed property under process with the Sheriff's office. Mr Mavuti advised Mr Dali that property lease title no. 12/0912/361 (the 'property') was the subject of an enforcement warrant in Supreme Court Civil Case No. 11/205.
- 7.4 In February 2015, Mr Dali advised the then Sheriff, George Malachi and Mr Mavuti in Mr Malachi's office of his offer to pay VT2,000,000 for the property.
- 7.5 On 6 March 2015, the Sheriff issued the notice of sale of the property. Tenders were to be submitted by 15 May 2015.
- 7.6 On 22 April 2015, Mr Dali emailed the Sheriff an offer of VT2,000,000 for the property.
- 7.7 On 24 April 2015, Mr Dali paid cash of VT2,000,000 to Mr Mavuti for purchase of the property.
- 7.8 Over April and May 2015, the Sheriff received written letters of offer from Mr Dali and two others. In June 2015, the Tender Board of the Supreme Court approved a third party's offer for the property. The Sheriff issued a tender outcome letter and a receipt for the payment for the property.
- 7.9 On 29 August 2018, the Sheriff's secretary advised Mr Dali that the Accounts office of the Supreme Court had no record of any monies received from him. In October 2018, Mr Dali's lawyers wrote to the Acting Chief Registrar in relation to Mr Dali's payment of VT2,000,000 for the property. The Chief Registrar responded denying responsibility.

Mr Mavuti's dismissal for serious misconduct

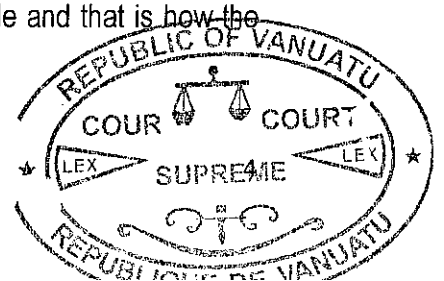
- 7.10 On 6 March 2015, Mr Mavuti deposited VT1,324,558 into his personal account at National Bank of Vanuatu Limited ('NBV') from the proceeds of sale of 2 vehicles as part of enforcement in Supreme Court Civil Case No. 2008/26.



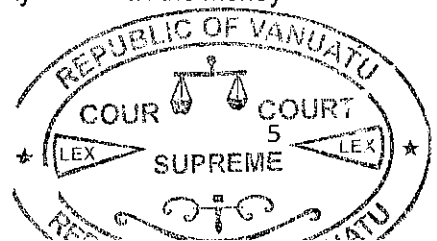
- 7.11 On 23 April 2015, the then Chief Registrar of the Supreme Court acquired knowledge of the 6 March 2015 event and enquired with Mr Mavuti.
- 7.12 On 1 June 2015, the then Chief Registrar wrote to the Chief Justice about the 6 March 2015 event and recommended that Mr Mavuti be issued a strong and last letter of warning not to use his personal accounts to deposit funds from Sheriff's sales or other public funds.
- 7.13 Also on 1 June 2015, the then Chief Registrar issued Mr Mavuti with a First and final warning letter in relation to the 6 March 2015 event of depositing public funds into his personal account.
- 7.14 On 25 February 2016, Mr Mavuti obtained VT5,250,000 cash from Richard and Sophie Mera in his capacity as Deputy Sheriff – these were the findings by the Court Personnel Disciplinary Board ('CPDB') dated 19 April 2018.
- 7.15 On 25 May 2018 and 21 June 2018, the JSC reviewed the CPDB decision and found Mr Mavuti guilty of the 5 charges against him in relation to his improper use of Mr and Mrs Mera's monies and recommended that he be terminated from his position as Deputy Sheriff on the ground of serious misconduct.
- 7.16 On 25 May 2018, 21 June 2018 and 2 March 2019, the JSC dismissed Mr Mavuti's appeal.

D. Issue 1: Did Mr Mavuti seize and take Mr Dali's money paid to him for the purchase of the property for his own use without any authority of Mr Dali?

8. Mr Dali must prove on the balance of probabilities that Mr Mavuti stole and/or misappropriated the money that he paid to him for the purchase of the property.
9. It is undisputed that on 6 March 2015 the Sheriff commenced the tender process for the property and that on 22 April 2015 Mr Dali emailed the Sheriff his offer of VT2,000,000.
10. Mr Dali's evidence, confirmed in cross-examination, was that in April 2015 Mr Mavuti approached him at the NBV and stated to the effect that given that Mr Dali was the highest bidder, he should give the Sheriff the sum offered to be held in the Chief Registrar's Trust Account pending the outcome of the tender.
11. During that same discussion Mr Mavuti advised Mr Dali to the effect that:
- a. It is easy and fast when the funds are readily available and that is how the Sheriff does business;
 - b. There was no reason for him to worry; and

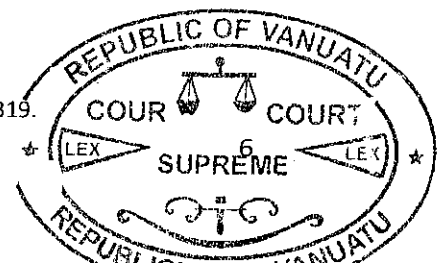


- c. When the result of the tender is known he will attend at the Lands Records office and transfer the property to Mr Dali.
12. It is undisputed that on 24 April 2015, Mr Dali paid cash of VT2,000,000 to Mr Mavuti for purchase of the property. I accept Mr Dali's evidence that based on Mr Mavuti's representations to him set out above, Mr Dali handed the sum of VT2,000,000 in cash to Mr Mavuti on 24 April 2015 in the NBV's interview room. Mr Dali had in his evidence a copy of the acknowledgement slip signed by Mr Mavuti upon receipt of the money. Mr Dali also evidenced a copy of his statement of account held with the NBV showing his withdrawal of the sum of VT2,000,000 on 24 April 2015.
13. Mr Dali was challenged in cross-examination that he was an experienced manager in enforcement processes for the NBV and yet he made this payment without any written confirmation that he was the successful tenderer? Mr Dali confirmed repeatedly in cross-examination that even without any written confirmation that he was the successful tenderer, he believed Mr Mavuti because he trusted him.
14. His evidence was that he as Manager Recovery in the employ of the NBV had worked with Mr Mavuti as Deputy Sheriff to ensure that a number of enforcement warrants issued on the NBV's behalf were executed in a timely manner. Over that time, Mr Dali had come to know both the Sheriff and Mr Mavuti, and trusted Mr Mavuti. He did not expect that Mr Mavuti would take his money as he did.
15. Ms Toa also challenged Mr Dali about the lack of a receipt. Mr Dali's evidence was that he had asked Mr Mavuti about the money he had paid and was told by Mr Mavuti that he had given the money to Albano Lolten, the Court's accountant. Mr Dali asked Mr Mavuti a couple of times for a receipt but was never given a receipt. He trusted Mr Mavuti that he had given Mr Dali's money to Mr Lolten – he had no reason to believe otherwise.
16. When Mr Dali learnt that Mr Mavuti's employment was suspended, he told him that he was no longer interested in the property. Mr Mavuti informed Mr Dali that he was denied access to the court premises but he promised to have the money released back to Mr Dali when he was reinstated. However, he was never reinstated and the State terminated Mr Mavuti's employment.
17. Mr Dali's answers in cross-examination were consistent with the account in his sworn statement. He was unwavering in his answers even when repeatedly questioned by Ms Toa on the same point. In my view, Mr Dali was a witness of truth and I accept his evidence.
18. The Accounts office of the Supreme Court confirmed that it had no record of any monies received from Mr Dali.
19. Accordingly, I am satisfied that Mr Dali has proved on the balance of probabilities that Mr Mavuti seized and took for his own use without any authority of Mr Dali the money that Mr Dali paid to him for purchase of the property.



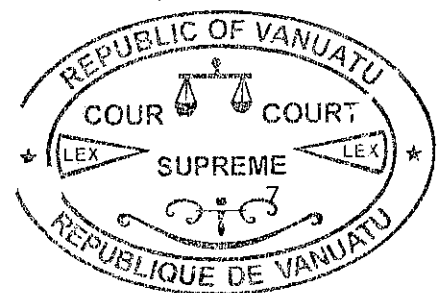
20. My answer to the question, "Did Mr Mavuti seize and take Mr Dali's money paid to him for the purchase of the property for his own use without any authority of Mr Dali?" is, "Yes".
- E. Issue 2: Is the State vicariously liable for Mr Mavuti's theft and/or misappropriation of Mr Dali's money paid to him for the purchase of the property?
21. At all material times Mr Mavuti was the employee of the State.
22. Vicarious liability can be imposed on a person for those torts or wrongful acts he has authorised or subsequently ratified. In addition, vicarious liability can also be imposed in respect of acts that have been neither authorised nor ratified – involving an employee's intentional wrongdoing – if the employee's tort was "so closely connected with his employment that it would be fair and just to hold the [employer] vicariously liable" as per the House of Lords' judgment in *Lister v Heselley Hall Ltd* [2002] 1 A.C. 215, at para. 28 per Lord Millett.¹
23. Mr Hurley relied on the judgments in *Lloyd v Grace, Smith & Co.* [1912] AC 716, *Morris v CW Martin & Sons Ltd* [1966] 1 QB 714 and *Brink's Global Services Inc & Ors v Igrox Ltd & Anor* [2010] EWCA Civ 1207. Mr Hurley submitted that the test for vicarious liability involved evaluating the closeness of the connection between the tort and the purposes for which the tortfeasor was employed.
24. Mr Hurley relied also on the High Court of Australia case of *Prince Alfred College Incorporated v ADC* [2016] HCA 37 where the majority considered the correct approach to be taken to the question of the employer College's vicarious liability for the criminal acts of its employee. The majority espoused what it referred to as the "relevant approach", which involves considering a range of factors in the employer-employee relationship.
25. There was a factual dispute as to what Mr Mavuti's authorised duties were. Mr Dali alleges that he handed the sum of VT2,000,000 for the purchase of the property to Mr Mavuti in his capacity as Deputy Sheriff. The State alleges that collecting money for Sheriff sales was not part of Mr Mavuti's job description and authorised duties.
26. It is undisputed that Mr Mavuti's involvement in the collection of the proceeds of sales of 2 vehicles pursuant to Orders in Supreme Court 2008/26 resulted in him depositing on 6 March 2015 those proceeds into his personal account. The then Chief Registrar's letter dated 1 June 2015 to the Chief Justice also mentions Mr Mavuti's routine collection of monies. In my view, the Chief Registrar's mention of the routine collection of monies was about Mr Mavuti doing so in his capacity as Deputy Sheriff.
27. Mr Mavuti's job description was issued to him on 9 August 2016. The wording of Mr Mavuti's key tasks of executing Enforcement Warrants and assisting with administration is wide enough to include Mr Mavuti collecting monies from Sheriff's sales.

¹ *Clerk & Lindsell on Torts* (19th ed.) (2006) Sweet & Maxwell, London at para. 6-01, p. 319.



28. For those reasons, I find that Mr Mavuti's collection of monies for Sheriff sales was part of his job and authorised duties, and that he collected the Claimant's money on 24 April 2015 for the purchase of the property in his capacity as Deputy Sheriff.
29. Applying the *Lister v Hesley Hall Ltd* test, I find that Mr Mavuti's theft and/or misappropriation of Mr Dali's money was so closely connected with his employment that it would be fair and just to hold the State vicariously liable.
30. My answer to the question, "Is the State vicariously liable for Mr Mavuti's theft and/or misappropriation of Mr Dali's money paid to him for the purchase of the property?" is, "Yes".
31. Mr Dali has succeeded on his vicarious liability claim. However, I will now also consider the alternative claim in negligence.
- F. Issue 3: Did the State owe a duty of care to Mr Dali to ensure that Mr Mavuti was properly trained for, and supervised, in respect of his duties as Deputy Sheriff?
32. The Court of Appeal held in *Vanuatu National Provident Fund v Aruhuri* [2001] VUCA 16 that s. 2 of the *Health and Safety at Work Act* [CAP. 195] imposes a statutory duty on every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees. The Court of Appeal held that this must include a duty to warn employees and to provide information, instruction, training and supervision. This is a duty each employer owes to its employees.
33. However, I am not persuaded that the State owed such a duty to persons that are not its employees. Hence I am unable to find that the State owed a duty of care to Mr Dali as alleged.
34. Mr Dali's pleading as to breach of duty included that the State was negligent in retaining Mr Mavuti. That is, in retaining Mr Mavuti and not at the least suspending his employment as from 23 April 2015 when it through the then Chief Registrar acquired knowledge of the 6 March 2015 event and enquired with Mr Mavuti. Mr Dali relied for this point on the Illinois Supreme Court decision in *Doe v Coe*, 2019 IL123521.
35. I am not persuaded that a duty to reasonably retain employees is part of the common law in the United Kingdom, Australia and New Zealand such that I should find it is part of the law in Vanuatu.
36. Accordingly, my answer to the question, "Did the State owe a duty of care to Mr Dali to ensure that Mr Mavuti was properly trained for, and supervised, in respect of his duties as Deputy Sheriff?" is "No".

G. Result and Decision



37. In conclusion, I answer each of the issues as follows:
- a. Did Mr Mavuti seize and take Mr Dali's money paid to him for the purchase of the property for his own use without any authority of Mr Dali? **"Yes."**
 - b. Is the State vicariously liable for Mr Mavuti's theft and/or misappropriation of Mr Dali's money paid to him for the purchase of the property? **"Yes."**
 - c. Did the State owe a duty of care to Mr Dali to ensure that Mr Mavuti was properly trained for, and supervised, in respect of his duties as Deputy Sheriff? **"No."**
38. I enter judgment for Mr Dali as follows:
- a. The Second Defendant is to pay to the Claimant the sum of VT2 million;
 - b. The Second Defendant is to pay to the Claimant interest on the sum of VT2 million from 24 April 2015 at the rate of 5% p.a. until the sum is paid in full; and
 - c. Costs should follow the event. The Second Defendant is to pay the Claimant costs to be agreed, or failing agreement, to be taxed by the Master. Once settled, the costs are to be paid within 21 days.

H. Enforcement

39. Pursuant to rule 14.3(1) of the *Civil Procedure Rules*, I now schedule a Conference **at 4pm on 29 May 2020**, to ensure the judgment has been executed or for the judgment debtor to explain how it is intended to pay the judgment debt. For that purpose, this judgment must be personally served on the Second Defendant.

**DATED at Port Vila this 5th day of May 2020
BY THE COURT**

..... *UM Trief*
Viran Molisa Trief
Judge

