

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

**Civil Case
No. 20/808 SC/CIVL**

BETWEEN: Adonai Limited
Claimant

AND: Martin Jones
Defendant

AND: Michael Brancatisano
Second Defendant on the Counter Claim

Date of Hearing: 4 April 2023
Before: Justice V.M. Trief
In Attendance: Claimant & Second Defendant on the Counter Claim – Mrs S. Motuliki
Defendant – Mr N. Morrison
Date of Decision: 4 August 2023

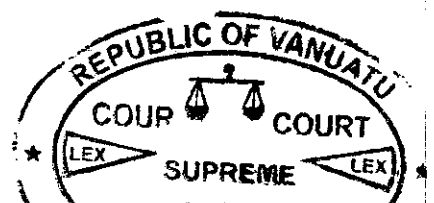
**DECISION AS TO SECOND DEFENDANT'S URGENT APPLICATION
FOR SECURITY FOR COSTS**

A. Introduction

1. This was a contested application for security for costs.

B. Background

2. The Claimant Adonai Limited ('Adonai') is a local company incorporated in Vanuatu.
3. In 2018, the registered lease of leasehold title no. 12/0523/034 (the 'subject land') was transferred to the Second Defendant on the Counter Claim Michael Brancatisano and Adonai (which is beneficially owned by Mr Brancatisano) took possession of the subject land.
4. At all material times, the Defendant Martin Jones was the sub-lessee of commercial premises known as the Wahoo Bar located on the subject land. Adonai inherited the existing lease agreement between the previous proprietor and Mr Jones.



5. Adonai alleges in the Claim that Mr Jones committed several breaches of the lease agreement. The Claim is disputed.

6. Mr Jones in turn alleges in his Counter Claim that Adonai committed breaches of the lease agreement. That too is disputed.

C. Application and Submissions

7. By the Urgent Application for Security for Costs filed on 16 December 2022 (the 'Application'), Mr Brancatisano seeks an order for Mr Jones to pay security for costs in the amount of VT5,000,000. The grounds of the Application are as follows:

a. That the *Civil Procedure Rules* ('CPR') rules 15.19(d), (e) and (f) allow for security for costs to be ordered;

b. That Mr Jones now lives in Australia and is no longer a resident of Vanuatu;

c. There is reason to believe that Mr Jones has insufficient fixed property and/or has no known assets in Vanuatu that will be available to satisfy costs orders or a judgment;

d. The justice of the case requires the making of this order; and

e. The amount for security is well under the Claim amount and is not oppressive nor would stultify the proceedings.

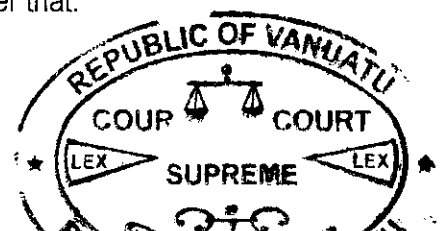
8. The Sworn statement of Michael Brancatisano was filed in support. He deposed that his reason to believe that Mr Jones has insufficient fixed property in Vanuatu for the payment of costs are unpaid bills for Vanuatu Brewing Limited of VT1,256,640 and Vila Distribution of VT312,397, and that the entitlements of Wahoo Bar staff remain unpaid.

9. Mrs Motuliki submitted that an order for security of VT2-3 million would suffice. Further, that Mr Brancatisano would be happy to also provide security for costs in the same amount as Mr Jones.

10. In response, Mr Morrison confirmed that Mr Jones is ordinarily resident in Australia (he left in 2020 or earlier) and does not have fixed property in Vanuatu. He submitted that no application for costs was made previously and only now after the matter has been listed for trial twice has it been filed therefore in his submission, the intent of the Application is to stifle the proceeding and is an attempt to end the case in a procedural manner. He submitted that Mr Jones' lack of means is due to Adonai's conduct therefore the Court should decline to order security for costs. Further, that the debts referred to do not fall under any of the matters for the Court to consider.

11. In reply, Mrs Motuliki submitted that there was no delay in filing the Application as Mr Brancatisano only became aware on 26 October 2022 that he was party to the Counter Claim and the Application was filed 2 months after that.

D. Discussion



12. Rules 15.19 and 15.20 of the CPR provide as follows:

15.19 *The court may order a claimant to give security for costs only if the court is satisfied that:*

- (a) *the claimant is a body corporate and there is reason to believe it will not be able to pay the defendant's costs if ordered to pay them; or*
- (b) *the claimant's address is not stated in the claim, or is not stated correctly, unless there is reason to believe this was done without intention to deceive; or*
- (c) *the claimant has changed address since the proceeding started and there is reason to believe this was done to avoid the consequences of the proceeding; or*
- (d) *the claimant is ordinarily resident outside Vanuatu; or*
- (e) *the claimant is about to depart Vanuatu and there is reason to believe the claimant has insufficient fixed property in Vanuatu available for enforcement to pay the defendant's costs if ordered to pay them; or*
- (f) *the justice of the case requires the making of the order.*

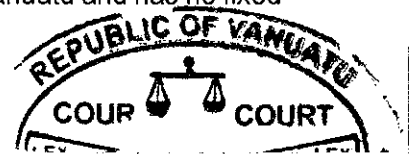
15.20 *In deciding whether to make an order, the court may have regard to any of the following matters:*

- (a) *the prospects of success of the proceeding;*
- (b) *whether the proceeding is genuine;*
- (c) *for rule 15.19 (a), the corporation's finances;*
- (d) *whether the claimant's lack of means is because of the defendant's conduct;*
- (e) *whether the order would be oppressive or would stifle the proceeding;*
- (f) *whether the proceeding involves a matter of public importance;*
- (g) *whether the claimant's delay in starting the proceeding has prejudiced the defendant;*
- (h) *the costs of the proceeding.*

13. It is accepted that Mr Jones is ordinarily resident outside Vanuatu, thus satisfying rule 15.19(d) of the CPR. It is also accepted that he does not have fixed property in Vanuatu, thus satisfying rule 15.19(e) of the CPR. These two matters being satisfied, the Court may order Mr Jones to give security for costs pursuant to rule 15.19 of the CPR.

14. However, I take into account that Mr Jones is not the Claimant in this matter but the Counter Claimant. He filed the Counter Claim consequent to the Claim being filed against him. It is pleaded in the Defence and Counter Claim that Mr Jones vacated the sub-leased premises in September 2020 (para. 11) having suffered loss caused by Adonai and Mr Brancatisano's alleged continual breaches of Mr Jones' lease. Mr Morrison submitted that Mr Jones' resultant lack of means was due to Adonai and Mr Brancatisano's conduct.

15. In the circumstances, I decline to order Mr Jones to give security for costs in the amount sought. However, as he is not ordinarily resident in Vanuatu and has no fixed



property in-country, I will order security for costs albeit in a lower amount and also order Mr Brancatisano to give security for costs as submitted by Mrs Motuliki.

E. Result and Decision

16. For the reasons given, the Second Defendant's Urgent Application for Security for Costs is **granted** and it is ordered as follows:

- a) The Defendant is to pay security for the Second Defendant on the Counter Claim's costs in the sum of VT500,000 into the Chief Registrar of the Supreme Court's Trust Account **by 4pm on 4 October 2023**.
- b) The Second Defendant on the Counter Claim is to pay security for the Defendant's costs in the sum of VT500,000 into the Chief Registrar of the Supreme Court's Trust Account **by 4pm on 4 October 2023**.
- c) In default of such payment, the Defendants are at liberty to apply to strike out the Claim or Counter Claim, as applicable.

4.1 Costs reserved.

17. As previously ordered, this matter is listed for Pre-Trial Conference **at 1pm on 18 October 2023** and for Trial (2 days) **at 9am on 20 & 22 February 2024** at Dumbea Courtroom.

DATED at Port Vila this 4th day of August 2023
BY THE COURT


Justice Viran Molisa Trief

