

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

Civil
Case No. 24/1608 SC/CIVL

BETWEEN: THE REPUBLIC OF VANUATU
Claimant

AND: NORTHERN ISLAND STEVEDORING COMPANY
LIMITED (NISCOL)
Defendant

Date of Hearing: 1 August and 7 October 2024
Before: Hon. Justice Oliver A. Saksak
Counsel: Sammy Aron for the Claimant
Avock Godden for the Defendant
Date of Judgment: 7 March 2025

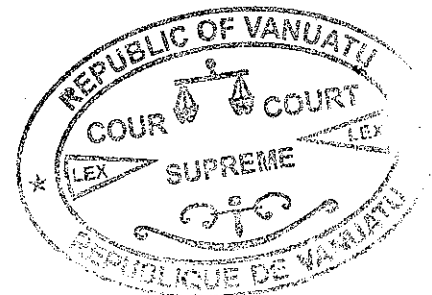
JUDGMENT

Introduction

1. This is a claim by the Republic for annual concession fees in the total sum of VT6,000,000 including 25% in surcharges made pursuant to a Ministerial Order No. 188 of 2022.

Background Facts

2. On 29 November 2025 the Government and the Defendant executed a Concession Agreement (the Agreement) whereby the Government granted to the Defendant the sole right to carry out stevedoring activities and services at the Santo International Wharf and elsewhere. The Agreement is to exist until 29 November 2065.
3. The Shareholders of the Defendant are the:
 - (a) Government holding 10% shares;
 - (b) Sanma Provincial Government Council holding 30% shares;

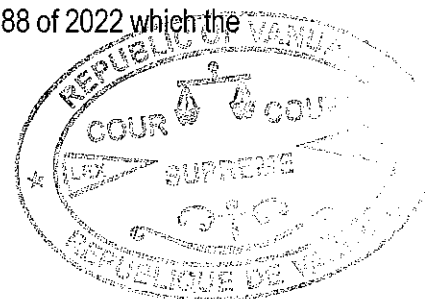


- (c) Penama Provincial Government Council holding 20% shares;
- (d) Malampa Provincial Government Council holding 20% shares;
- (e) Torba Provincial Government Council holding 10% shares; and
- (f) Luganville Municipal Council holding 10% shares.

4. On 19 April 2017 the Maritime Sector Regulatory Act No. 26 of 2016 came into force.
5. On 23 June 2022 the Maritime Sector Regulatory Act was amended to become the Vanuatu Maritime Safety Authority Act retaining the same number as No. 26 of 2016.
6. On 1 September 2022 the responsible Minister prescribed and issued the concession and levy fees as Regulation No. 188 of 2022 pursuant to Section 56(2)(1) of the Act, as amended.
7. On 6 October 2022 an invoice was issued by the Office of the Vanuatu Maritime Safety Authority (VMSA) to the Defendant for the payment of VT2,000,000. This was the first invoice. The defendant did not pay the fees for 2022 resulting in a surcharge of 25% for that year.
8. On 29 May 2023 the VMSA issued the second invoice again for VT2,000,000. The Defendant did not pay and a further 25% surcharge became due.
9. Finally on 24 May 2024 the third invoice was issued. Still the Defendant made no payments.
10. In total the Defendant did not pay the fees for the years 2022, 2023 and 2024 in the sum of VT2,000,000 each resulting in 25% surcharges for each of those 3 years accumulating to VT 7,500,000.

The Claim

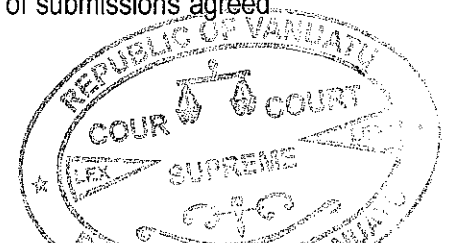
11. The Claimant filed its claim on 24 May 2024 together with the sworn statement of Mr Less John Napuati in support of the claim.
12. The Defendant filed its defence on 12 June 2024 basically denying liability for the payments of the presented fees. They assert amongst others that:-
 - (a) Section 56 of the Act does not apply to any concessionaire or holder of a concession agreement;
 - (b) Section 56 does not give power to the Minister to make the Order No. 188 of 2022 which the Defendant asserts is ultra vires the Act;



- (c) Pursuant to the On-Lending Agreement entered into between the Government and the Defendant, Clause 2.1 of which requires the payment of 35% of the dividend comprised of 25% of the annual profit and 10% of the Government dividend, thus to pay another VT2,000,000 annually amounts to paying the Government twice the same fee;
 - (d) Section 36 of the Act does not authorize the VMSA to issue the invoices in 2022, 2023 and 2024;
 - (e) The Defendant is an agency of the State and should not be required to pay the fees requested by the VMSA. The Defendant relied on the definition of "Government Agency" in the Public Finance and Economic Act [CAP. 244].
13. On 23 June 2024 the Defendant filed a strike out application seeking an order to strike out the claim filed on 24 May 2024 with costs at VT50,000 based on the defences raised. The application is supported by the sworn statement of Hollingsworth Ala Ngwele filed on the same date.
 14. On 1 August 2024 counsel for the parties executed a consent order endorsed by the Court giving leave to the Defendant to file and serve an Amended Defence by 6 August 2024, and for any reply by 20 August 2024, and for written submissions by 10 September 2024 by the Claimant, and by the Defendant by 24 September 2024.
 15. The Defendant did file an amended defence on 13 August 2024 some 7 days later thus disturbing the timetable orders as agreed on 1st August 2024. The Claimant filed its reply to the Amended Defence on 11 November 2024.
 16. The Claimant filed its responding submission on 16 July 2024.
 17. On 7 October 2024 counsel sought extensions of time to file and serve written submissions by 21 October 2024 for the Claimant and by 11 November 2024 for the Defendant.
 18. Finally the Defendant filed an application to show cause on 2 November 2024 with a supporting sworn statement of counsel. They complained that the Claimant had not filed its submissions for over 3 months following Court directions and therefore sought orders for the Claimant to show cause why their claim should not be struck out.

Discussion

19. From the record the Claimant actually filed its submissions in response to the Defendant's strike out application on 16 July 2024 earlier than 10 September 2024 being the date of submissions agreed to in the Consent Order of 1 August 2024.



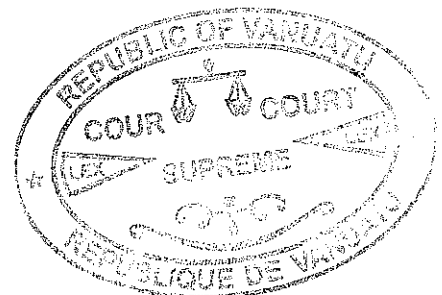
20. It appears therefore the application to show cause by the Defendant was academic and not necessary or warranted. It was indeed the Defendant who filed their written submissions late on 5 December 2024 when they should have done so by 24 September 2024 as consented to in the Consent Order.
21. The application to show cause by the Defendant is therefore dismissed.
22. I turn now to consider the strike out application. First I consider the issue of whether the Defendant is an agency of the Government pursuant to the Public Finance and Economic Management Act. The Claimant submitted that the position has changed since the Act was amended repealing the definition by Amendment Act No. 15 of 2009. It is correct that the previous definitions have been repealed and replaced in sub-section 2(1). "Agency" now means:
- "(a) a Ministry; or*
(b) an office of a Government Minister; or
(c) an office or a body established by or under the Constitution; or
(d) an office or body established by or under an Act of Parliament; or
(e) a prescribed agency."
23. The Concession Agreement defines "Government Agency" as meaning "any government or any governmental, semi-governmental or judicial entity or authority. It also includes any self-regulatory organization established under statute or any stode exchange".
24. In my considered view the Defendant does not fall within these definitions and is therefore not an agency of the Government. I therefore reject the submissions of counsel for the Defendant in that regard.
25. Next, Order No. 188 of 2022. It states:

"Maritime Concession and Levy Fees Regulation Order No. 188 of 2022.

In exercise of the powers conferred on me by paragraph 56(2) of the Vanuatu Maritime Safety Authority Act No. 26 of 2016, I the Honourable JAY NGWELE Minister of Infrastructure and Public Utilities, make the following Order:

1. *Concession fees*

- (1) *A person must pay a concession fee to the Authority if he or she:*
- (a) Is a holder of a concession; or*
 - (b) Is a holder of a licence; or*
 - (c) Has an operating right,*



To operate a port facility or to provide stevedoring services in Vanuatu.

- (2) The person under sub-clause (1) must pay a concession fee of VT2 million annually and that fee is to be paid within on calendar month from the date of invoice;*
- (3) If the person fails to comply within the required period stated under sub-clause (2) on 25% surcharges shall be added".*

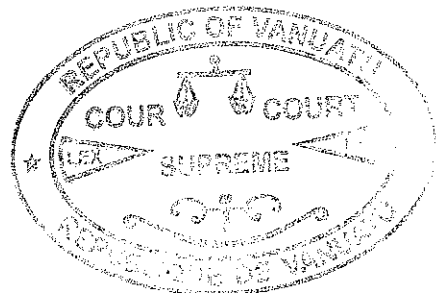
- 26. This Order is trite and clear. The Defendant is a concessionaire holding the sole right to operate the Santo International Wharf and provide stevedoring services.
- 27. Section 56 of the VMSA Act gives clear discretionary powers to the Minister to issue Order No. 188 of 2022. Sub-section (1) states:

"The Minister may by Order make such Regulations as may be necessary or convenient to give effect to the provisions of this Act".

Sub-Section 2 states:

"Without limiting the generality of sub-section (1), Regulations may be made for and in relation to the following matters:

- (a) To facilitate the proper and effective discharge of the functions and powers of the Authority ...;*
- (e) To prescribe requirements and processes relating to the setting and approval of tariffs and charges for port services, including tariff setting processes, requirements for the publication of tariffs, setting tariffs for services to other provider of port services, and methods to be applied to costs studies and for the regulation of prices by any other means;*
- (j) to prescribe fees, levies, charges or duties;*
- (k) to provide for the collection and recovery of any fees, levies, charges or duties by the Regulator".*



28. The Regulation Order No. 188 was issued on 1 September 2022. The Defendant has argued and submitted that the Order is ultra vires the Act, but failed to challenge it by way of a judicial review proceeding. Their argument and submissions in that regard is untenable and is rejected.
29. In relation to the assertion that the Defendant is being made to pay the same fees twice, it is misconceived. Dividend is not a fee or levy. It is an entitlement for the 10% shareholding allocated to the Government under the Agreement. The concession fee is a different matter. Clause 16 of the Agreement places the obligation on the Defendant to pay these fees.

Conclusions

30. The Defendant is therefore required by law to pay the annual concession fees for the years 2022, 2023, 2024 and so on including the 25% surcharge for each of the three years. And their continued failures to so pay the fees tantamount to a breach of their concession Agreement unless it is remedied sooner. The two issues raised by the Claimant are answered in the affirmative.
31. The claimant is therefore successful in its claim and Judgment is entered in their favour for the payment of the um of VT 6 million plus 25% surcharge for three years being 2022, 2023 and 2024 by the Defendant within the next 28 days, by 7th April 2025. The total amount in VT 7.500.000.
32. This judgment must be served on the Defendant through its Counsel and be returnable on 7th April 2025 at 0815 hours to check on its execution.
33. The Claimant is entitled to the costs this proceeding on an indemnity basis, as agreed or be taxed.

**DATED at Port Vila this 7th day of March 2025
BY THE COURT**


Hon. Oliver A Saksak
Judge

