**IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU**
(Appellate Jurisdiction)

Civil Appeal Case No. 12 of 2014

**BETWEEN:** **KYEONG SIK JANG trading as JK GENERAL MACHINERY**
Appellant

**AND:** **SANTO EARTH WORKS**
First Respondent

**AND:** **RANIHAL SCRAP & METAL COMPANY**
Second Respondent

**AND:** **YOON (Korean National)**
Third Respondent

***Coram:*** ***Hon. Chief Justice Vincent Lunabek***
***Hon. Justice John von Doussa***
***Hon. Justice Raynor Asher***
***Hon. Justice Daniel Fatiaki***
***Hon. Justice Dudley Aru***
***Hon. Justice Mary Sey***
***Hon. Justice Stephen Harrop***

***Counsel:*** *Mr. Jack Kilu for the Appellant*
*Mr. James Tari for the First Respondent*
*No appearance for the Second and Third Respondents*

***Date of Hearing:*** *15 July, 2014*

***Date of Judgment:*** *25 July 2014*

# JUDGMENT

1. This is an appeal against the whole of the judgment in the Supreme Court dated 14th April 2014 in CC39 of 2012. That decision rejected an application by the appellant, Keyong Sik Jang trading as JK General Machinery, to be joined as a party to Civil Case No. 39 of 2012 for the purpose of his seeking to set aside an enforcement warrant which authorized the seizure of property which the appellant claimed was his. The refusal of the Supreme Court to

join him as a party had the consequence that he could not challenge the enforcement warrant which had been granted in proceedings in which he was not a party.

2. The order refusing leave to be joined as a party, strictly speaking, was an interlocutory order so that an appeal to this Court lies only by leave. The proposed appeal raises substantial issues which we consider require the consideration of this Court, and we granted leave to appeal at the commencement of the hearing.

**Background facts**

3. The claimant in CC39 of 2012 is Santo Earth Works (SEW), the first respondent in this appeal. SEW sued Ranihal Scrap and Metal Company (Ranihal) and Mr. Yoon to recover a substantial debt. The claim pleads that Ranihal is a foreign company operating a scrap metal business in Luganville, and Mr. Yoon is the manager and agent of Ranihal. The claim alleges that Ranihal hired the services of SEW for cutting, removing and transporting scrap metal. SEW rendered invoices for its services but was not paid.

4. The proceedings were filed in the Supreme Court at Luganville, Santo on 12 September 2012. On 20th September 2012 SEW applied under the CPR r. 7.8 for an order in the nature of a "*Mareva Order*" to freeze as security for the alleged debt three items of machinery, a truck, a forklift and an excavator (the machinery) then situated on the wharf of Northern Island Stevedoring Limited (Niscol). The application was supported by a sworn statement from the proprietor of SEW saying that he was aware that Ranihal's mother company in Korea had sent the machinery to Vanuatu. He annexed a bill of lading relating to the machinery which he had obtained from the customs agent. The bill of lading named Ranihal and Mr. Yoon as the consignees.

5. The Supreme Court accepted this evidence as sufficient evidence of ownership of the machinery by Ranihal to support a freezing order in favour of SEW which was granted on 1st October 2012.

6. On 22nd November 2012 SEW obtained a default judgment against Ranihal and Mr. Yoon for VT7,794,870. An enforcement order requiring the defendants to pay that sum within 28 days was made on 5th December 2012.

7. The judgment debt was not paid and on 24th February 2013 SEW applied for an enforcement warrant in respect of the frozen machinery that was still on the Niscol wharf awaiting customs clearance. The Supreme Court issued an enforcement warrant on 7th March 2013. The warrant was addressed to the assistant sheriff in Luganville and directed him as follows:

> *"YOU ARE HEREBY AUTHORISED TO:-*
> 1. *Enter the NISCOL Warehouse and Wharf in Luganville, Santo and seize the keys and the following machinery:-*
>
>  *(a) One (1) Doosan Excavator, Model Dx LCA;*
>  *(b) One (1) Daewo Forklift, Model D35S; and*
>  *(c) One (1) Flat Deck Rhino Truck Serial KN3LAP8Y23K020976.*
>
> 2. *Deliver the keys and possession of all three machinery to the claimant Steven Andre Remy.*
>
> 3. *Return this warrant within 21 days from the date hereof."*

8. The assistant sheriff reported back to the Supreme Court that on 11th March 2013 he entered the Niscol premises and seized the keys of the vehicles which were then handed on to the claimant, SEW.

9. On 28th January 2014 the appellant made application to the Supreme Court to be joined as an interested party in CC39 of 2012 and for orders suspending the enforcement warrant and for the return of the machinery to

him. In his supporting sworn statement he said that the machinery was his property. He had purchased it in Korea and arranged its shipment to Luganville where he was preparing to open a new business for which the machinery was intended. The appellant denied that he had any interest whatsoever in Ranihal or with Mr. Yoon. He explained that their names on the bill of lading as consignees was because he had encountered difficulties in consigning the equipment to himself and his proposed business as he was yet to obtain the necessary approvals from the Vanuatu Investment and Promotion Authority (VIPA) and to have his business name registered. For this reason he arranged with his friend Mr. Yoon to use his name and that of Ranihal as consignees.

10. The appellant said he came to Vanuatu from Korea in October 2012 to complete the legal and regulatory formalities to commence his business in Luganville. He says he paid the customs duty to clear the machinery and the storage fee claimed by Niscol, but on 4th October 2012 (3 days after the freezing order had been made) Niscol refused to release the machinery to him. He instructed lawyer to take action to obtain the machinery. Civil Claim 178 of 2012 was commenced in the Supreme Court, Port Vila registry on his behalf against Niscol and the proprietor of SEW. The claim pleaded that after the payment of customs duty and storage costs Niscol had refused to release the machinery because of a court order and because it was the property of Ranihal. The proceedings sought damages for conversion. In the months that followed the pleadings in CC178 of 2012 were amended to include reference to the enforcement warrant issued on 7th March 2013. The appellant's action was eventually struck out in December 2013 for the appellant's failure to take steps to prosecute the claim. The appellant says this occurred as he had a dispute with his lawyer over fees, and the lawyer ceased acting for him.

11. In passing, we note our difficulty in understanding how the proceedings in CC178 of 2012 could ever have succeeded as the actions of Niscol in withholding the machinery, and later those of SEW in taking possession of

the machinery, were in lawful compliance with the orders of the Supreme Court. To succeed with a claim for conversion it would have been necessary to have the orders of the Supreme Court set aside, and that could only have been done by an application by the appellant made in CC39 of 2012.

12. In his sworn statement the appellant said he had been told in October 2012 that there was a court order, but he says he was unaware of CC39 of 2012 at that time. It is likely that his lawyer would have obtained that information for the purpose of commencing his claim.

13. It seems that the appellant returned to Korea after completing the formalities for the establishment of his business in late 2012, and left it to his lawyer to attend to the machinery.

14. The appellant says he first learned of the details of CC39 of 2012 from his lawyer when he returned to Vanuatu in May 2013. By that time the enforcement warrant had been executed. However he says he was only told by his lawyer that there was a likelihood that his equipment would be taken from him. As he understood that the equipment was still in the customs area of Niscol, he thought that in law ownership of the machinery remained under the control of the consignor, and could not be taken from him. It was not until December 2013 that the reality of what had happened under the enforcement warrant became clear to him. At that time he went to the Niscol wharf to check on his machinery. He saw the forklift being used by Niscol and he was informed by Niscol staff that Ranihal had recently given the forklift to Niscol.

15. The appellant instructed other lawyers who then made the application dated 28th January 2014 for him to be joined as a party to CC39 of 2012 and for orders to return the equipment to him. It is the judgment refusing that application which is the subject of this appeal.

**The reasoning in the judgment under appeal.**

16. The trial judge treated the application as one based on CPR r. 14.50 which sets out a procedure for a third party who claims ownership in goods seized under an enforcement warrant to apply to the Court for relief. That rule must be read with rule 14.49 that requires the third party to notify the sheriff of the claim to ownership and the sheriff is then required not to sell or otherwise dispose of the goods for 7 days. Rule 14.50 requires the third party to file an application seeking relief within 7 days of giving notice to the sheriff.

17. The judge held that the giving of notice to the sheriff is a mandatory pre-condition to an application under Rule 14.50 and there was no evidence that the appellant had given notice to the sheriff. The judge observed that presumably the notice was not given as the enforcement warrant had been acted upon and the machinery had been seized and distributed to make good the debt. The judge said *"in other words CC39 of 2012 has been brought to an end"*.

18. However that was not the only basis on which the application was refused. The judge went on to say that in any event he agreed with a submission made by counsel for SEW that the application was an abuse of process because the appellant had been fully aware of CC39 of 2012 as appeared from his amended claim in CC178 of 2012 and with that knowledge he failed to apply to be joined as a party to CC39 of 2012 and to seek a stay of the enforcement warrant.

19. The judge also held that at all times Ranihal had held himself out as owner of the machinery and when Ranihal was sued by SEW Ranihal did not challenge this assertion. Thus no issue of ownership arose.

20. Finally the judge rejected the appellant's argument that he had no other recourse if his application was refused. However the judge did not indicate what other recourse he considered would be open.

**Discussion**

21. The grounds of appeal are directed only to the reasoning of the trial judge. We shall deal with that reasoning first but we note at the outset that there is a fundamental problem going to the validity of the enforcement warrant which we shall then address.

22. The sworn statement of the appellant in support of his application exhibited extensive primary material including invoices and bank records to prove his purchase of the machinery in Korea. Those documents include commercial invoices showing JK General Machinery as the consignee. The appellant says that these were invoices originally prepared before he realized there would be difficulty consigning the machinery to his business name before it was approved and registered in Vanuatu. Also exhibited are commercial invoices that were then prepared showing Ranihal and Yoon as consignees. Of particular importance official customs clearance documents are exhibited which show the consignee (being a party required to pay the import duty) as JK General Machinery. All these documents provide very strong evidence of ownership of the machinery by the appellant trading as JK General Machinery at all stages. None of this evidence was challenged by SEW.

23. If the finding of the trial judge that there was no issue of ownership refers only to the matters considered by the Supreme Court at the time the enforcement warrant was issued that may be correct (although the evidence of Ranihal's ownership of the machinery was at best weak). However it is an erroneous finding if it was intended to deal with all the material filed in support of the application. Unfortunately that material was not referred to in the judgment. We have no hesitation in exercising our power as the Court of

Appeal to find that ownership of the equipment at all material times has been with the appellant.

24. It is plain from the text of CPR r. 14.49 and r. 14.50 that the procedure set out in those rules is intended to apply whilst the process of execution of an enforcement warrant is taking place. Once the execution is complete, that procedure has ceased to be available as a meaningful remedy. In our opinion those rules were not relevant to the application. A third party owner of property seized under an enforcement warrant in the mistaken belief that it was the property of the debtor is not barred from exercising rights as an owner that would otherwise be available once the time for taking action under rules 14.49 and 14.50 has passed.

25. The principal obstacle that a third party will face in asserting rights of ownership where an enforcement warrant has been executed will be the order of the court granting the enforcement warrant. The sheriff's action in seizing the property will be authorized by the order of the court, and the first step to enforcing rights of ownership will require the third party to have the enforcement warrants set aside or quashed. This will require an application to be made by the third party in the proceedings in which the enforcement warrant was granted.

26. We consider that the trial judge was in error to conclude that the appellant had recourse to an alternative remedy. Other remedies would not be possible whilst the enforcement warrant remained.

27. We do not agree that CC39 of 2012 had come to an end in the sense that the court ceased to have any further jurisdiction in relation to matters arising in the course of the proceedings once the debt due to the judgment creditor was satisfied. As the appellant's counsel points out, the court clearly would have jurisdiction to entertain an application to set aside the default judgment. We consider the Supreme Court had jurisdiction to consider the

application before it, and to make the orders sought by the appellant if justified on the merits.

28. Delay in making an application will be a matter relevant to the exercise of a discretionary power, but we do not consider the circumstances of this case gave rise to any basis for holding that the application should be refused because of delay. We consider the finding that the application was an abuse of process because the appellant did not apply to be joined and to seek a stay of enforcement misunderstands the evidence. At best the facts show that when CC178 of 2012 was commenced the applicant knew only of the freezing order, and he did not learn of the enforcement warrant until May 2013, well after it had been executed. Later amendments made to the pleadings in CC178 of 2012 do not establish that the applicant knew of the enforcement warrant sooner than he asserts.

29. Further, the appellant in his sworn statements says that he did not realize that the machinery was not still held safely on the wharf until December 2013. His application to the court was soon after this.

30. We consider the reasons given by the trial judge for refusing the application were in error.

31. We turn now to the validity of the enforcement warrant, an issue not raised in the grounds of appeal. There is a fatal error in the terms of the enforcement warrant. By its terms the warrant not only authorizes the assistant sheriff to enter premises and seize property, it also authorizes the property seized to be given over to the judgment creditor. The Supreme Court has no power to make such an order, and moreover the authorization given by it is contrary to the express provision of CPR r. 14, division 4, under which the enforcement warrant was issued.

32. The power of the Supreme Court to order execution against the property of a judgment debtor is a power to order seizure and sale. The proceeds of sale are then applied in satisfaction of the judgment. The court has no power to order seizure and transfer of the debtor's property directly to the judgment creditor.

33. This basic principle of law is reflected expressly in CPR rule 14.17 which requires that the enforcement officer must seize and sell the property. Rules 14.18 - 14.20 then deal with steps necessary to effect the sale, and rule 14.21 and 14.22 deal with the distribution of the proceeds of sale. Rules 14.49 and 14.50 which we have already referred to are premised on the understanding that seized goods must be sold.

34. The provisions of rule 14, division 4, must be strictly followed and the requirement of sale is of central importance. In **Financière du Vanuatu Limited v. Morin** [2008] VUCA 4 the Court of Appeal said:

> "*The procedure by which a judgment may be enforced is carefully prescribed in Rule 14 of the Rules. That is to enable the court to control those procedures in the interest of both the judgment creditor and the judgment debtor. One of those procedures is the seizure and sale of the property of a judgment debtor under an enforcement warrant. That is a very invasive power. It may involve the sale of real or personal property of great significance to a judgment debtor. When the court authorizes the seizure and sale of the property of a judgment debtor, it is therefore important that it be done by a proper officer, and generally the sheriff, who must comply with the Rules and is accountable for their compliance as an officer of the Court, and who is independent of the parties.*"

35. The requirements of rule 14, division 4, were again considered by the Court of Appeal in **Vanuatu Commodities Marketing Board v. Dornic** [2010] VUCA 4. In that case an enforcement warrant purported to authorize and direct the transfer of shares held by the judgment debtor direct to the judgment

creditor. The Court of Appeal quashed the enforcement warrant, saying at [14]:

> *"An order in these terms cannot be made by the Court. A judgment creditor is not entitled to simply receive the property of a judgment debtor by that type of transfer. Nor can the possession of a building leased by the judgment debtor be handed over to the judgment creditor."*

36. The Court of Appeal referred to the judgment in **Financière du Vanuatu Limited v. Morin** and went on to explain the meaning of rule 14.18 at [15] - [16]:

> *"15. Rule 14.18 (1) says:*
>
> > *"Unless the court orders otherwise, the enforcement officer must sell the seized property by public auction."*
>
> *16. The words "unless the court orders otherwise" cannot be taken to mean that a judge is empowered to order the transfer of ownership of property or possession of property direct to a judgment creditor. Its purpose is to allow the judge to consider the best way to sell the assets eg. by tender. Regardless of the method of sale ordered the enforcement officer must account for the proceeds of sale to the Court: Rule 14.21."*

37. Regrettably notwithstanding these clear statements of principle the Supreme Court granted an enforcement warrant in this case which had the effect of transferring seized property direct to the judgment creditor. The enforcement warrant is bad on its face and must be quashed.

38. We consider this Court has jurisdiction to order the return of the machinery (or its value) by SEW to the appellant. However we do not consider that the Court has jurisdiction in this appeal to go further and entertain a claim for consequential loss. Separate proceedings would be required if the appellant wishes to pursue a claim for depreciation in value of the equipment since it was seized, or for consequential loss of use.

## Conclusion

39. We consider the appellant must succeed in this appeal and is entitled to an order for costs both in this Court and in the Court below at the standard rate. Accordingly the Court makes the following orders:

(1) Leave to appeal is granted, and the appeal is allowed;

(2) The orders made on 14th April 2014 are set aside in their entirety;

(3) Leave is given to the appellant to be joined as a defendant in CC39 of 2012;

(4) The enforcement warrant issued on 7th March 2013 is quashed;

(5) The respondent SEW is ordered to return the machinery seized under the enforcement warrant (or its present value) to the appellant within 14 days;

(6) The respondent SEW is to pay the appellant's costs in this court and in the court below on the standard basis;

(7) Liberty to apply including as to the assessment of the present value of the machinery or part thereof if it is no longer in the possession of the first respondent;

**DATED at Port Vila, this 25th day of July, 2014.**

**BY THE COURT**

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

**Hon. Vincent Lunabek**
**Chief Justice.**