

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

**CIVIL APPEAL
CASE NO. 20/1223 COA/CIVA**

BETWEEN: REPUBLIC OF VANUATU

Appellant

AND: BEN DICK DALI

First Respondent

AND: JOHN VIRA MAVUTI

Second Respondent

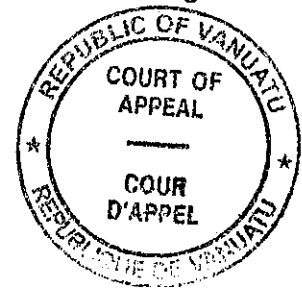
Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice Oliver A. Saksak
Hon. Justice John Mansfield
Hon. Justice Dudley Aru*

Counsel: *Adeline Bani for Appellant
Mark Hurley for First Respondent*

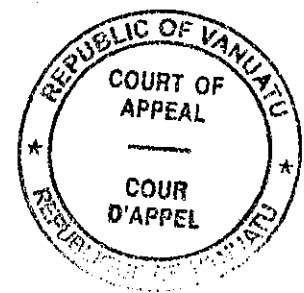
Date of Hearing: 10th July 2020
Date of Judgment: 17th July 2020

JUDGMENT

1. The Republic of Vanuatu appeals against a decision of the Supreme Court delivered on 5 May 2020 where it was held vicariously liable for the theft and /or misappropriation of VT2,000,000 paid by the first respondent Mr Dali in 2015 to the second respondent a Deputy Sheriff. There had been an alternative allegation of breach of duty of care which was not established and is not a live issue before this Court.
2. There is no material argument about the historical narrative which is full canvassed in the Supreme Court judgement and can be summarised.
3. In 2010 John Vira Mavuti was appointed as Deputy Sheriff. A job description of August 2016 noted key tasks as serving documents, executing Enforcement Warrants and assisting with administration.



4. The first Respondent Ben Dick Dali who was manager for the recovery section within the National Bank of Vanuatu in January 2016 contacted Mr Mavuti and enquired about the possibility of purchasing repossessed property under process with the Sheriff's office. He was told of a particular lease. In February in the office of the Sheriff Mr Malachi, Mr Dali offered to pay VT2,000,000 for that lease.
5. On 6 March 2015 the Sheriff issued a notice of sale for the property and invited tenders by 15 May 2015. Mr Dali emailed the Sheriff an offer on 22 April for VT2,000,000. On 24 April he paid cash of VT2,000,000 to Mr Mavuti. The Sheriff received 3 letters of offer and another person was successful.
6. On August 2019 in answer to an enquiry from Mr Dali the Sheriff's Secretary informed him that VT 2,000,000 had never been received. It was surprising that the reasons for such an inordinate delay in finding out where the money was, but that is not an issue agitated in the Supreme Court.
7. Formal claims were thereafter advanced including the initiation of these proceedings. On 9 August 2019. A default judgement was entered against Mr Mavuti for the total sum claimed and the case continued on its other aspects.
8. There are some other matters of relevance in the background. On 6 March 2015, VT1,324,558 had been paid into Mr Mavuti's personal account which was proceeds of sale of 2 vehicles. This came to the notice of the Registrar of the Supreme Court within a few weeks and on 1 June a final warning letter was issued to Mr Mavuti with regard to depositing public funds into his personal account.
9. Notwithstanding that direction on 25 February 2016 Mr Mavuti obtained VT5,250,000 cash from a person interested in acquiring a lease. He retained that money in his control. The Court Personnel Disciplinary Board confirmed in April 2016 that this had occurred. Leading to his termination for serious misconduct, a decision which was upheld on appeal. Although this was subsequent it demonstrates a clear course of behaviour.



10. On the first issue identified in the Supreme Court that Mr Mavuti without Mt Dali's authority seized for himself the relevant money, the trial Judge made pertinent findings:

"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.*

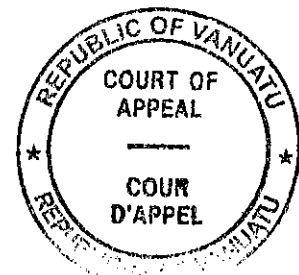
12. It is undisputed that on 24 April 2015, Mr Dali paid cash of VT2,000,000 to Mr Mavuti for purchase of the property. I accept Mr Dali's evidence that based on Mr Mavuti's representations to him set out above, Mr Dali handed the sum of VT2,000,000 in cash to Mr Mavuti on 24 April 2015 in the NBV's 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."

11. There is no sensible challenge to these and we accept them as the correct historical narrative leading to the conclusion reached.

12. The Judge next addressed the critical issue of the vicarious responsibility of the State for this wrongful behaviour.

13. Ultimate Courts around the world have wrestled with a comprehensive and workable definition of the concept of vicarious liability but it is clear that at its core is a proper assessment of the factual position established. Mr Mavuti was an employee of the State. Did his relevant acts and omissions fall within that employment or was it so closely connected with his employment that it would be fair and just to hold the employer liable? It is important not to be mesmerised by labels or slogans but to look carefully at the factual position.

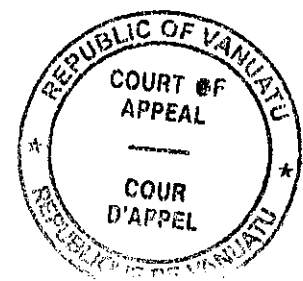
14. The trial Judge concluded:-

"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.

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."

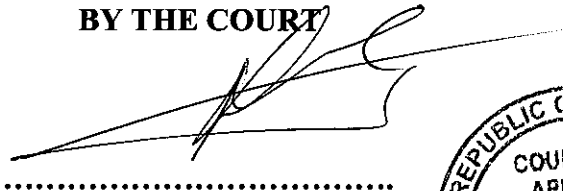


15. We have weighed with care the challenges now advanced by the appellant. What was done was outside of his formal job requirements but it was something which was so associated with and relevant to it that his employer should be responsible. This was not an out of the blue deviation and wrongful course of action. It was something which could and did too often happen in his employment. There is no available challenge to the conclusion as to vicarious liability reached by the Supreme Court Judge.

16. The appeal is dismissed with costs at VT 25,000 payable to the First Respondent only.

DATED at Port Vila this 17th day of July 2020

BY THE COURT



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Vincent LUNABEK

Chief Justice

