IN THE MAGISTRATE'S COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 165 of 2003

BETWEEN: **YVON FIRIAM**
Plaintiff

AND: **GOVERNMENT OF THE REPUBLIC OF VANUATU**
First Defendant

AND: **COMMISSIONER OF POLICE**
Second Defendant

AND: **SUPERINTENDENT OF PRISON**
Third Defendant

DECISION ON APPLICATIONS

By way of 2 separate applications the defence counsel prayed to the court seeking the following.

1. To award costs against the Plaintiff's counsel pursuant to Rule 15.25 & 15.26

2. To strike the case out as provided under Rule 9.10.

For ease of clarification and better understanding, the genesis of the case is in the following record .

The plaintiff in this case is pursuing a civil claim for negligence alleged to have been caused by the prison authorities (represented by the State Law). The case was partly heard which saw the plaintiff presented its case. The case was listed for continuation of trial on 27 & 28th of February, 2003 .

Mr Toa failed to attend the scheduled dates because he was involved in a Supreme Court matter of PP –v- Stephen Iarput & Ramona. The plaintiff's counsel did not undertake to make proper application and or inform the court as a matter of courtesy in advance except that he wrote a letter dated 28th February, asking the court to re schedule a trial date.

Subsequent to that, on the 27th February, through communications with the State Law Office both advocates have agreed to continue trial on the 28th February. A letter was forwarded to this court concerning the above proposal and was approved.

In addition, I have been personally approached by the respective Judge presiding over the case aforesaid asking me to adjourn the case. This is because the scheduling of the Supreme Court case was made sometime in 2002 prior to this case trial date. As a result of this mismanagement of diary, the case was re scheduled for 27 & 28 March with the consent of both parties counsels.

However, at the above date, the plaintiff's advocate made no appearance or proper application neither any notice made to the court or defence counsel explaining the reasons for his absence. Except that a representative from the Public Solicitor was present on the date to adjourn the matter to the 15/04/03 for a conference. The defence witnesses were also present at Court to proceed with the hearing. Following this further delay, the defence filed an application for wasted costs dated 27 March 2003. This application was to be heard on 15/04/03.

On the 15/04/03 it was noted that the learned counsel was not even ready to make submissions. As such, the court re directed the parties and ordered that Mr Toa file its defence to the application in 14 days. Costs were reserved. Despite the direction, no response was filed until recently on 28/08/03 upon enquiry of the Court. To gather for that, the court patiently allocated 30/05/03 as the day for hearing the application.

At the above day, Mr Toa made no appearance and costs of adjournment awarded to the defendant in the amount of VT 3000. The case was re listed for 2/06/03, this time Mr Toa was present and agreed that trial should go ahead on 9th & 10th July, 2003.

On the 9th & 10th of July, there was no appearance of Mr Toa. Miss Bangash was present on instructions to further adjourn the case. It is noted that on 4th of July, Mr Toa had communicated a letter to the court asking for re listing of the matter for further hearing. His reason was that he was directed to appear for the defendant in the Supreme Court case of PP v Roland Hake in Ambae on 9th July.

A second application was made orally to the Court to strike the matter out. Upon hearing the parties advocates the court further postponed the matter to 12/08/03 so that Mr Toa could be heard. The court made another directions for Mr Toa to file a Sworn Statement in 14 days to show cause why the case should not be strike out, a copy of the direction was served to the parties.

On the 12/08/03 Mr Toa, is still not ready to answer the application. Further more, he has not file the Sworn Statement has ordered on 9th of July, 2003. Given the delay on the part of the plaintiff's representative, the case was again adjourned to 27/08/03.

On 27/08/03, despite the directions made on 9th of July, 2003 Mr Toa still has not comply with the order dated 15/04/03. The case was moved to 29/08/03 with costs of VT 3000 to defendant.

Given the historical background of the case, the first issue for determination is whether the plaintiff's counsel be ordered to pay wasted costs?

I have considered, Mr Toa's sworn statements filed herein to answer the application for striking out the case. Upon perusal of this documents, in my view, Mr Toa's absence on the 9th and 10th of July cannot be fully seen as acts done oppressively to delay the matter. I take into consideration the amount of task and the insurmountable circumstances that the Public Solicitor's office is currently facing. For instance; shortages of qualified legal officers as opposed to its legal duty to provide legal assistance to flooding needy people. Such scenario would in my view inevitably expand beyond ones control and affect the management of cases.

Despite the above, there are weaknesses noted from the overall performance towards the disposal of this case.

It transpired clearly from the totality of the facts surrounding the delay with greatest respect Mr Toa has not of taken any reasonable steps to attending the continuation of the trial as scheduled. He has skipped conferences and trial dates without proper notification.

It is my view that Mr Toa has a problem of managing his diary and he seemed to have not spent sufficient time in managing this case. This is particularly noted from his appearances in court notably in setting timetables for hearing. Given the discussions, I find Mr Toa to have no reasonable explanation with respect to his failure to attend Court on the 27th & 28th of February & March.

Secondly, Mr Toa has not complied with this court's directions. This has largely affected this courts management of case. Due to these actions, the court and the defendant have wasted valuable time . Since the 11/02/03 the case has not progressed at all. It was listed for 3 consecutive dates for trial whereby 2 days have been reserved for trial. The case was adjourned 8 times. Despite these adjournments, the counsel has continuously failed to appear. It is now 6 months without progress to complete the hearing of the defence side.

Thirdly, as a consequence of the delay caused by the plaintiff counsel, the defendant has incurred minor unnecessary expenses and disturbances, for calling witnesses off their work to attend court. Such scenario has also forced the defendant to change counsel due to the departure of Miss Robertson. The question to answer is whether this delay is prejudicial to the defendant. This issue may be subjected to broader legal arguments however, my opinion is in the negative. The defendant still has its opportunity to present its defence to the plaintiff's case. It is further noted that the defendants witnesses are in Vila and I do not think that there is any substantial expenses has been incurred.

Most importantly, the overriding objectives prescribed by the CPR 2002 are to enable the court to deal with cases expeditiously, to warrant end justice of the parties. For example, the case must be dealt with justly, fairly and speedily to avoid unnecessary expenses. To guarantee this duty to manage cases critically requires that the parties must fully cooperate. This extends to duty of giving directions and orders to ensure the efficient disposal of the case. One of the fore most duty I must emphasis is for counsel to assist the Court as for as practicable to fulfill the overriding goals. It is apparent that these objectives have not been tentatively observed.

The learned counsel may prioritize Supreme Court matters over Magistrate's Court matters. However, I am not in favour of this view because all constitutional courts are treated the same with the outmost respect regardless of their jurisdiction. The rules of the courts must be observed at all times.

In light of the discussions and in consideration of the substance of the case, I am persuaded that there is a prima facie case against the defendant which must be answered .To warrant such, that the whole case must be fully heard to ensure justice to prevail. Despite the inconveniences caused on the part of the claimant's counsel together with the solicitor's office, I decline to apply rule 9.10 but grant the relief sought under the first application for cost accordingly.

The Public Solicitor's Office and Mr Toa are jointly ordered to pay costs for time wasted at VT 12.000, VT 3.000 as cost for adjournment on 30/05/03 and VT 3.000 cost of this application. These costs must be settled before trial on 19th and 20th November at 8:30 AM.

Dated at Port Vila this 5th day of September, 2003

BY THE COURT

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EDWIN MACREVETH
Magistrate