

In support of the application for taxation Counsel for the Defendant intended to rely on the Affidavit of Mr Jan Mark Pozdena, the Managing Director of the Defendant company. Mr Malcolm served the Plaintiff and the Court with a copy each of the said Affidavit. The affidavit was not filed and no notice of intention to use the affidavit was given to Mr Sugden. Notice is required under Order 40, Rule 21. In my opinion that affidavit could not be admitted into evidence and I so rule.

In his submission Mr Malcolm urged the Court to consider the matter as a matter for taxation. He told the Court that the matter started on 12th February 1997 and not on the date on which the Bills were sent. As such the matter is still within the 12 months rule. Mr Malcolm did not refer any provisions to the Court relating to this. He further argued that if the Courts refuses taxation, Mr Pozdena would be left without remedy to challenge. He argued that taxation is the only avenue for a client to challenge a solicitor's account. Further, that solicitors as officers of the Court must do an honest job and deliver an honest bill. Mr Malcolm told the Court that he did not dispute that the Plaintiff is entitled to a judgement but opposed any judgement given at this stage before the case for taxation is heard. If Judgement were given, that it be stayed. Finally Mr Malcolm told the Court that there must be some sureness as to who owns what and how much and that justice required that the matter be taxed.

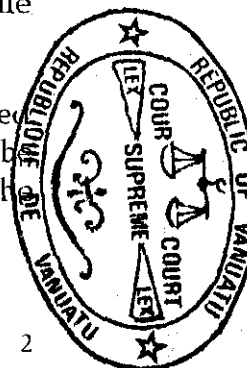
Mr Sugden in response said that there was no evidence of the note of costs or invoice before the Court. Secondly Counsel referred the Court to the Orders of this Honourable Court dated the 27th Day of May 1997 and told the Court that pursuant to paragraphs 6 and 7 of the said Order, Counsel had written to the Chief Registrar asking for the matter to be listed for hearing. Mr Malcolm conceded and told the Court that the letter should determined and judgement be entered.

Mr Sugden further argued that there was no note of costs before the Court. He submitted that if the Court gave judgement it could not be stayed as there was also no application for stay before the Court. He further argued that the Court would be clogged if every solicitor's bill was brought for taxation.

Mr Sugden relied on his own affidavit dated 23rd May 1997. Mr Sugden read relevant parts of his affidavit and Counsel for the Defendant/Applicant agreed that the unread parts should be taken as read. This is the only admissible documentary evidence before this Court on which the Court bases its judgement.

Mr Malcolm however objected to paragraph 7 of Mr Sugden's affidavit on the grounds that it was hearsay. I am bound to accept that and accordingly rule that part of the affidavit is inadmissible as evidence.

The issue I have to decide is whether or not the sum of VT 2, 107, 121 claimed by the Plaintiff as outstanding from the Defendant/Applicant should be taxed. In answering that issue I have to ask myself also the question: Does the Defendant/Applicant have any right to claim for taxation of costs?



No rules or legislation in Vanuatu has been referred to me and I find none. Therefore I have had to resort to the law in England. Section 68 of the Solicitors Act 1957 states:

"(1) Subject to the provisions of this Act, no action shall be brought to recover any costs due to a solicitor until one month after a bill thereof has been delivered in accordance with the requirements set out in the next following subsection: ..."

By this provision the answer to my question would be in the affirmative. However that is a limited or restricted right in the sense that it can and should be exercised only within one month. One month here means one calendar month. If the Defendant has failed to apply for Taxation within that time and the Plaintiff has clearly established that he did deliver his bills, that right is lost.

From the evidence before me, Mr Sugden has deposed to the fact that he delivered monthly bills to Mr Pozdena as often as he could. (See paragraph 13 of his Affidavit).

In paragraph 21 Mr Sugden says:

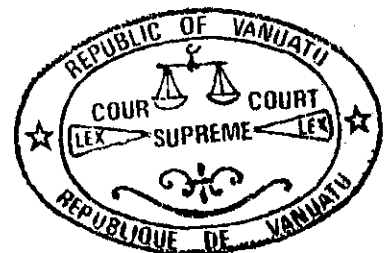
"I then drew bills to date in all matters and forwarded a letter with the bills, a copy of which is annexed and marked "F"."

He then referred the Court to the correspondences that ensued over the following days annexed and marked "G", "H"; "I" and "J" respectively.

I find that what is said at paragraph 13 is not consistent with what is said at paragraph 21.

The Bills referred to in paragraph 21 are:

| | | |
|----|--------------------|-------------|
| a) | 14th October 1996 | VT 365, 168 |
| b) | 16th October 1996 | VT 158, 430 |
| c) | 22nd October 1996 | VT 117, 280 |
| d) | 28th October 1996 | VT 360, 770 |
| e) | 31st October 1996 | VT 228, 247 |
| f) | 19th November 1996 | VT 330, 250 |
| g) | 19th November 1996 | VT 101, 122 |
| h) | 19th November 1996 | VT 192, 164 |
| i) | 20th November 1996 | VT 174, 006 |
| k) | 13th December 1996 | VT 72, 620 |
| l) | 13th December 1996 | VT 110, 414 |
| m) | 13th December 1996 | VT 57, 102 |



In a letter dated 12th February 1997 referenced "LEGAL MATTERS" which is referred to in the affidavit as Annexure "F", Mr Sugden says this at the first paragraph:

"We refer to recent communications and enclose bills in respect of all matters in which we act for you until such times as you dismiss us (by Notice to the Court in matters involving Court Proceedings)".

- From this I draw the conclusion that ALL bills as listed above from a) to m) were only enclosed in the letter of the 12th February 1997 to the Defendant company and that they were not sent to the Defendant company earlier. I find no evidence to suggest that bills were sent earlier by the Plaintiff.

Furthermore, the second paragraph of Mr Sugden's letter reads:

"If these bills are not paid in full within 30 days, we will issue process to recover these sums as well" (emphasis, mine)

The Defendant faxed the Plaintiff on the same day saying at second paragraph of Annexure "G":

"Again we have come up with a different figure as per advises and again I still contest the full amount of close 2, 5 million vatu."

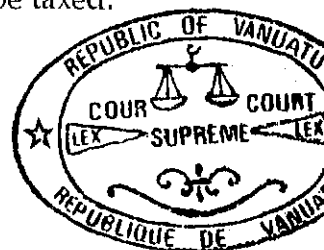
Already by this statement the Plaintiff was aware that the Defendant was disputing the amount being claimed. The defendant acknowledged receipt of the letter of 12th February 1997 together with copies of the bills by letter dated 13th February 1997. The letter is Annexure "I".

However, contrary to what the Plaintiff stated in their second paragraph to their letter of 12th February 1997, they issued a Writ of Summons dated and filed the 13th day of February 1997.

In my judgement, clearly the Plaintiff was bound to abide by his undertaking to afford the Defendant 30 days to pay. When the Plaintiff filed a Writ of Summons on 13th February 1997, clearly he did so without regard to the Defendant's right to have the bills taxed. The Defendant/Applicant applied by way of a Summons for Orders to have the bills taxed which was filed on 27th March 1997. The Defendant/Applicant was in my judgement within the one month requirement.

Finally, therefore as to the issue of whether or not the Defendant had a right to have the amount of VT 2, 107,121 taxed is answered in the affirmative. Therefore, the following Orders are granted.

- 1) THAT the note of costs submitted by the Plaintiff dated 13th Day of December 1996 for an amount of VT 2, 107, 121 be taxed.
- 2) THAT the Plaintiff provide an Invoice in taxable form.



- 3) THAT the Writ of Summons issued by the Plaintiff dated the 13th day of February 1997 is adjourned sine die.
- 4) THAT any or all subsequent actions by the Plaintiff in connection with or incidental to the Writ of Summons are stayed pending the Taxation.
- 5) THAT the Plaintiff pays the Defendant's costs of the summons to be taxed if not agreed.

DATED AT PORT VILA this 2nd Day of July 1997.

BY THE COURT



OLIVER A. SAKSAK

Judge

