

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

CIVIL CASE No.116 OF 1994

**Between :** Fraser Sine of Port-Vila, Efate in  
the Republic of Vanuatu

Plaintiff

**And :** The Minister of Agriculture,  
Forestry, Fisheries & Livestock  
of c/- P.M.B 039, Port-Vila,  
Efate, in the Republic of  
Vanuatu

First Defendant

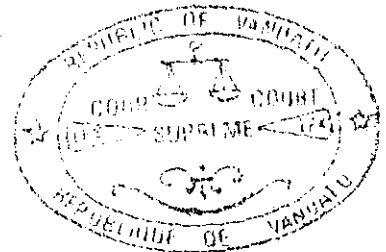
**And :** Port-Vila Fisheries Limited of  
C/- P.O.Box 883, Port-Vila, Efate  
in the Republic of Vanuatu

Second Defendant

Counsel : *David Hudson and Robert Sugden* for the plaintiff  
*Jack Kilu* for the first defendant  
No appearance of or for the second defendant

Hearing: 31 August, 1 September 1998

Judgment: 7 September 1998



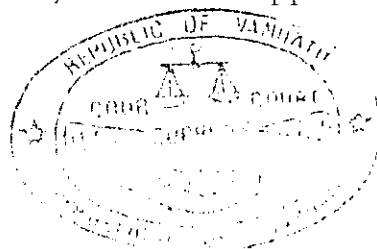
## JUDGMENT OF TOMPKINS J

### **Introduction**

This action came before the Court on Monday 31st August 1998 on what was then an oral application that had been made at a directions conference on 17 February 1998, to dismiss the plaintiff's claim against the first defendant on the grounds, first there had been unexcusable delay in the prosecution of the action, and secondly that the action had been settled by a deed of release and discharge dated 4 September 1997 ("the deed").

At the commencement of the hearing Mr Kilu, who appeared for the first defendant although he had sworn a contentious affidavit in the proceedings, asked for an adjournment on the grounds that he was unable to continue to act as counsel for that reason, and no other counsel was available from the Attorney General's Chambers to conduct the proceedings. That application for adjournment was dismissed for reasons set out in a minute dated 31 August 1998. I stood the matter down until 9.00am on 1 September 1998 to enable the first defendant to instruct other counsel. When it was called then Mr Kilu renewed his application for adjournment. It was again dismissed for the same reasons. On that day Mr Kilu filed a formal notice of motion seeking the same relief on the same grounds.

However, I then raised with Mr Hudson for the plaintiff matters which appeared to me to be very real difficulties in the plaintiff's way. Having heard submissions on them, I adjourned to enable me to deliver a written judgment. At Mr Sugden's request, the Court convened again at 2.00pm, and Mr Sugden, who then appeared as



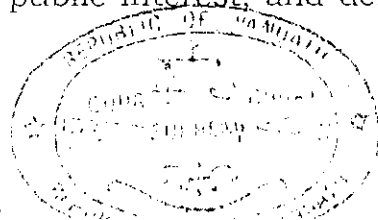
counsel for the plaintiff although he too had sworn a contentious affidavit in the proceedings, advanced submissions why the plaintiff should be permitted to proceed with his action. Nothing he submitted caused me to change the view I had formed at the hearing earlier in the day.

### **The proceedings**

The plaintiff, in his amended statement of claim, alleges that he was employed by the second defendant ("PVFL") in a managerial position. He alleges that PVFL ceased to carry out its obligation under the contract of service with him, and that servants or agents of the Ministry of Agriculture, Forestry, Fisheries and Livestock ("the Ministry") coerced the plaintiff into leaving the premises, and that the first defendant ("the Minister") took over PVFL. He alleges that the Minister caused or induced PVFL to breach its contract with the plaintiff. He claims from both defendants special damages for the second defendant's breach of contract and the first defendant's wrongful inducement of that breach totaling VT7,275,070. He also claims against PVFL a declaration that it is in breach of its contract with the plaintiff.

As an alternative cause of action the plaintiff sues the Minister in defamation, alleging that on or about 28 September 1993 he was defamed by a public statement issued by the Minister. For that defamation he claims unspecified compensatory and exemplary damages

The Minister, in his statement of defence, effectively denies all the allegations made against him by the plaintiff in both causes of action. In defence of the defamation cause of action he pleads justification, fair comment on a matter of public interest, and denies



that the plaintiff suffered any damages. The Minister also brought a counter-claim against the plaintiff , but that counter-claim has been discontinued.

The second defendant has filed a defence in which it denies the allegations against it and specifically denies that it is in breach of the contract of service with the plaintiff and that the plaintiff is entitled to any relief against the second defendant. It also brought a counterclaim against the plaintiff for damages. The second defendant is now unrepresented. At a conference before me on 13 August, Mr Hurley, who until then had been counsel for the second defendant, sought and was granted leave to withdraw.

In none of the pleadings was any relief sought in connection with the deed. The plaintiff has not sought an order that the deed be set aside. The Minister has not pleaded the deed as a defence to the plaintiff's action, nor has he applied for a stay in reliance on the deed. He has, as I have indicated, belatedly filed a notice of motion seeking an order that the action be dismissed on grounds that include reliance on the deed.

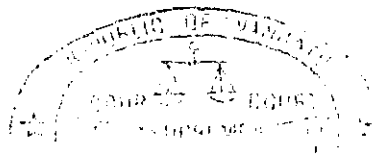
### **The deed of release and discharge**

The deed reads as follows :

“REPUBLIC OF VANUATU

DEED OF RELEASE AND DISCHARGE

**I, FRAZER SINE**, of Port-Vila, Efate in the Republic of Vanuatu in consideration of the sum of *FOUR HUNDRED AND NINETY SEVEN THOUSAND-FIVE HUNDRED VATU* (VT497.500) being the full and final settlement of all claims whatsoever in relation to the Civil Case : *FRASER SINE -v- THE MINISTER OF*



AGRICULTURE, FORESTRY, FISHERIES & LIVESTOCK, CIVIL CASE No. 116 OF 1994 paid to me by the Government of the Republic of Vanuatu, the receipt of which I hereby acknowledge;

**DO HEREBY RELEASE**

and forever discharge the Government of and from all actions, suits, causes of actions, claims and demands whatsoever which I have or may have in respect of Civil Case No.116 of 1994.

**AND HEREBY AGREE**

to indemnify and to hold indemnified the Government from all claims, actions and demands which may be made by any family member or any other persons against the Government in respect of this matter and anything arising out of same.

DATED at Port-Vila this 4th day of September, 1997.

"Frazer"

IN WITNESS whereof the ]  
said FRAZER SINE has ]  
hereunto set his hand the ]  
day and year aforesaid ]

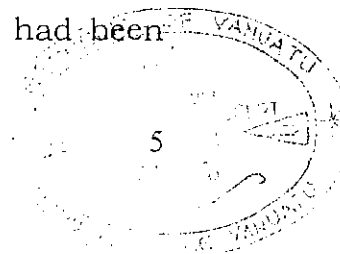
.....  
FRAZER SINE

"J Willfred"  
.....  
JEFFREY WILFRED  
Director General of Finance"

"J.I.Kilu"  
.....  
WITNESS

The circumstances surrounding the execution of the deed are the subject of much controversy, but the following summary appears to be undisputed.

The action was commenced in August 1994. In early 1996, the plaintiff himself approached the Ministry trying to negotiate a settlement. The Ministry's attitude then, and at all times, had been



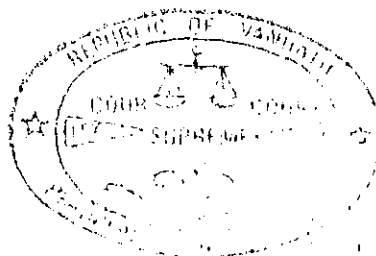
settlement. The Ministry's attitude then, and at all times, had been that it was prepared to pay VT697,500 but no more. The plaintiff has deposed that during 1997 he went several times to the Attorney General's Office in an attempt to push the action along or settle the case. On a number of occasions he spoke with Mr Kilu who then as now was acting as counsel for the first defendant. By July 1997, when the plaintiff financial needs were becoming pressing, he made a further offer to settle on 16 July 1997, which was declined.

On 25 July 1997, the plaintiff again spoke to Mr Kilu and pointed out his pressing financial circumstances. Mr Kilu repeated the Ministry's offer to settle for the same figure. It is Mr Kilu's evidence that the plaintiff accepted this offer. As a result of that acceptance, on 5 August 1997 the plaintiff was paid an initial payment of VT200,000.

On 4 September 1997, the deed was signed and the balance of VT497,500 was paid.

Mr Kilu has accepted that when he, as counsel for the Minister, dealt directly with the plaintiff in person when he knew that the plaintiff had solicitors and counsel acting for him, acted in an unprofessional manner. He has tendered his apology to Mr Sugden for doing so. In view of the course that matters between the parties are likely to take in the future, it is not appropriate that I comment any further on Mr Kilu's actions, save to record my view that in dealing with plaintiff directly, as a result of which the plaintiff signed the deed of release and discharge, Mr Kilu acted in a manner contrary to the ethics of the legal profession.

#### **The effect of the settlement**

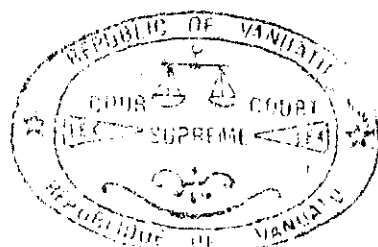


For so long as the deed stands, it is a bar to the plaintiff pursuing the action. In *Halsbury's Laws of England* 4th ed. para.391 it is stated that the effect of the parties settling or compromising pending proceedings are:

- “(i) to put an end to the proceedings for they are thereby spent and exhausted;
- (ii) to preclude the parties from taking any further steps in the action except where they have provided for liberty to apply to enforce the agreed terms ; and
- (iii) to supersede the original cause of action altogether.”

The principal authority cited in support of this passage is *Green v. Rozen* [1955] 2 All ER 797. An action had been compromised by the parties. There was no formal court order although the Judge was informed of the terms of settlement. The settlement required one party to make payments by instalments. He paid some instalments, but then defaulted. The plaintiff sought judgment on the original action for the balance due. That application was refused because, the court having made no order in the action, the agreement compromising the action between the parties completely superseded the original cause of action, and the court had no further jurisdiction in respect to that cause of action. Slade J. at 801 expressed the conclusion “...that...the new agreement between the parties to the action supersedes the original cause of action altogether, that the court has no further jurisdiction in respect to the original cause of action which has been superseded by the new agreement...”.

In the Supreme Court Practice 1997 para. 4619 it is stated that “If it is desired to set aside, on the ground of fraud, mistake of law or facts...a compromise already approved a new action must be brought...”. The authority for this proposition is *Emeris v Woodward* (1890) 43 Ch.D 185. An agreement was entered into for the



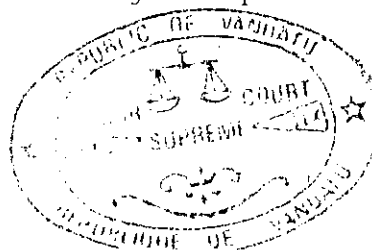
compromise of an action. That agreement had been approved by a Judge in another action. The plaintiff took out a summons in the action to set it aside. North J held that the plaintiff's proper course was to bring a new action to set aside the compromise, and that he cannot, by means of a summons, set aside the agreement and re-opened the controversy. The summons was dismissed. It is correct, as Mr Sugden has pointed out, that in that case the compromise had been approved by a judge. But I see no reason why that affects the position. North J's conclusion accords with that of Slade J. in *Green*. If, as Slade J. held, the effect of the compromise is that the proceedings are at an end and the Court no longer has jurisdiction in the proceedings, it follows that, if the plaintiff seeks to have the compromise set aside, that must be done by a separate action. It can, however, be done by a counterclaim to an action seeking to enforce the compromise; *in re Roberts, Roberts v Roberts* [1905] 1 Ch 704.

In the present case the plaintiff has taken no action to set aside the deed, either in the present proceedings or otherwise.

### **Should the action be stayed ?**

Mr Sugden submitted that, despite the authorities to which I have referred, the action should proceed because of Mr Kilu's unprofessional conduct. Mr Sugden submitted that the Minister was in effect seeking equitable relief, and that on the principle that he who seeks equity must do so with clean hands, the Court should hold that, because of Mr Kilu's conduct, the Minister's hands are not clean, and that therefore a stay should be refused.

I do not accept that submission for two reasons. First, I do not regard an order for stay as an equitable remedy. The power to order a





stay arises from the Court's inherent jurisdiction to prevent an abuse of process. I also note the power to order a stay given by Order 27 Rule 4. Secondly, and perhaps more importantly, the submission overlooks the effect of the compromise as described by Slade J in *Green*. If the plaintiff completing the deed means that his cause of action has been superseded by the agreement entered into, so that the Court has no further jurisdiction, the grant of a stay is the means by which effect is given to that result. That is unaffected by any professional misconduct by Mr Kilu.

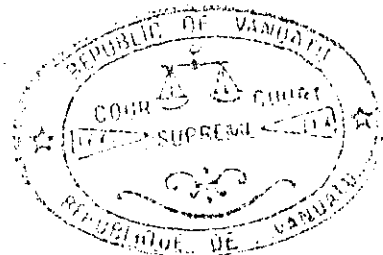
### **The effect of Order 21 Rule 16**

This rule provides that a party "must raise by his pleadings all matters which show the action... not to be maintainable...".

The Minister did not plead the deed in his statement of defence. He ought to have done so. Mr Sugden submitted that, in the absence of the deed being pleaded, the Minister should now be barred from relying on it.

Although there is some force in this argument, it does not avail the plaintiff. The deed of release and discharge is before the Court as an annexure to one of Mr Kilu's affidavits. It is now expressly the ground for the relief sought in the notice of motion filed on behalf of the Minister. But perhaps more importantly, I am not prepared to ignore a fundamental and significant document that can affect the validity of the proceedings and the jurisdiction of the Court, because of a pleading omission, culpable though that omission may be.

### **Conclusion**

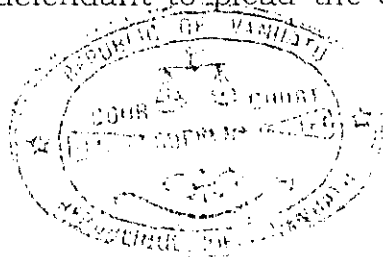


This action cannot continue for as long as the deed remains an effective document of the plaintiff. The proper course is to stay the plaintiff's action. The plaintiff will be free to bring a separate action seeking to have the deed set aside. That action will need to plead the cause or causes of action relied upon, and seek appropriate relief. If that action is successful and the deed is set aside, the stay of proceedings will, without any further steps by any party, cease to take effect. The plaintiff will then be free to prosecute his action. The first defendant will also be able to proceed with his application to have the action dismissed for want of prosecution.

It will be for the Judge hearing that application, if the first defendant proceeds, to decide the effect any further delay resulting from the action to set aside the deed. It is my preliminary view that, provided that action is pursued diligently by the plaintiff, the time that it takes should not be taken into account in considering whether that the plaintiff had been guilty of inexcusable delay in the prosecution of his action, although I accept the possibility of some express prejudice arising during this time that may become relevant to whether the action should be allowed to proceed.

### **Costs**

I award costs for the two days of the hearing against the first defendant in favour of the plaintiff for these reasons. The first defendant ought to have been ready to proceed to a hearing. The applications for adjournments, that were refused, should not have been made. The ground on which I have ordered a stay was not advanced by the first defendant. It was raised by the Court. I also have regard to the failure of the first defendant to plead the deed in



his statement of defence, the belated filing of the formal motion seeking relief, and the conduct of Mr Kilu in negotiating directly with the plaintiff when he knew that the plaintiff had solicitors and counsel acting for him.

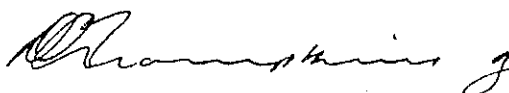
I fix the party and party costs at VT50,000, and order that the first defendant also reimburse the plaintiff for the cost of his air fare in coming to Vila from Santo for the hearing.

**The result**

There will be an order that this action be stayed on the terms set out above. Costs awarded as above.

**DATED at Port-Vila, this 7<sup>th</sup> day of SEPTEMBER, 1998**

**BY THE COURT**



.....

**Tompkins J**

