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

Civil Case No.95 of 2000

BETWEEN: **VANUATU COMMODITIES MARKETING BOARD**
Plaintiff

AND: **AZONE ABC (VANUATU) LTD.**
First Defendant

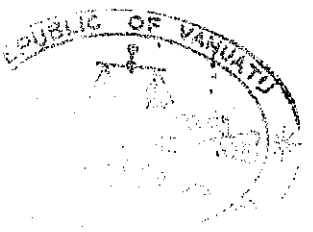
AND: **THE MINISTER OF INFRASTRUCTURE AND PUBLIC UTILITIES AND PORTS AND MARINE**
Second Defendant

RULING ON COSTS

The Writ of Summons was filed in this case on 25th August 2000. On 10th October 2002 the case was struck out, save for costs. The source of contention between the parties had disappeared. Written representations on costs were filed. I now rule on costs.

The plaintiff claims its costs from the two defendants. Both defendants claim their costs from the plaintiff. The arguments are set out in the written submissions. I will not reiterate them. This ruling necessarily must look at the claim, its viability particularly in the light of the factual background and the behaviour of the parties.

Some discrete awards of costs have been made. They must stand, and this Ruling does not affect them.



Three of the four claims were for declaratory relief. Whilst that is not determinative in this Ruling, I bear it in mind. The same applies as to whether or not this action should have been brought by way of judicial review. Injunctive relief was also sought. That was wide in its terms, but in any event depended upon the declaratory relief.

It is wrong for the plaintiff to say it was wholly successful and costs should follow. No adjudication was made on the questions raised. The claim, if properly brought, became of no consequence by reason of a change in the factual circumstances.

The claim was struck out to bring this case to a speedy conclusion and focus the minds of the parties on costs. There is no inference adverse to the plaintiff to be drawn from the fact of the striking out.

Nevertheless this whole case is a prime example of legalities and procedure running away with costs whilst the commercial reality of the parties was ignored and they suffered loss. An early, robust meeting of the parties could have stopped this action before or shortly after its commencement.

The plaintiff is a statutory body set up as a "*body corporate having perpetual succession and a common seal and may sue and be sued in its corporate name*", (Section 2, VCMB Act [CAP. 133]). Its purpose is to control and regulate the marketing of prescribed commodities, (copra), (see the Act's preamble and section 6).

Section 22 states:

> "*The Minister, after consultation with the Board may give to the Board such directions of a general character with respect to the performance of any functions of the Board as appear to the Minister to be requisite in the public interest.*"

The Minister wrote to the Chairman of the VCMB on 9th July 2001, enclosing a copy of his letter of 11th June to the deputy Prime Minister. Whilst this might not have been strictly in accordance with Section 22, the Minister was saying: stop this action, resolve it out of Court, lets look again at section 9 of the Deed of Agreement and section 6, where the company (Azone) has failed to perform. He hoped the Board would "*tekemap issue ia kwick taem*".

The Minister was right to take this approach and pointed precisely to the areas that were causing the trouble and needed attention. The action he urged could have been done before launch of the proceedings or soon after.

The whole case revolves around the Deed of Agreement made between the first and second defendants on 1st February 2000. It is not a well-worded document and there are some gaps. That has given rise to some of the misunderstandings and disagreements in this case.

The agreement apparently:

(a) Gives Azone a 10 year lease over the site of an old shed.

(b) Requires Azone to demolish the "*old Kava shed*" and build a new one to certain specifications

(c) Requires Azone to repair and maintain other sheds on the wharf at its expense.

(d) Give Azone unrestricted access to, and use of, those copra storage facilities and sheds.

(e) Sets out other clauses for payment, termination etc...

The whole action is premised on the basis that the plaintiff was completely excluded from use of the wharf for copra storage

and export by itself or through its agents or persons authorised in writing. Even assuming as a matter of law that is something the second defendant could not do in this way, it appears that the factual reality was that they were not so excluded. And if there was lack of clarity it could easily have been resolved. The agreement gave exclusive use of the kava shed and its ground but only unrestricted access to everywhere else.

The first defendant asserts there were other usable sheds, the one the plaintiff sought access to was in need of demolition, nothing special is required for a copra shed. Further, Coconut Oil Production of Vanuatu (COPV) asked for use of "*the smaller of the two VCMB sheds*" for a period of 5 months and "*we undertake to carry out repair and upgrade the condition of the shed within the next two weeks*". It would also appear a big new shed could be constructed in a similar time. This action has been running for over two years.

The agreement came into force on 1st February 2000. By 1st August the first defendant had not started work. At that point, without seeking to induce a breach of contract, the plaintiff could have called a halt to the proceedings and enquired about the first defendants exclusive use of the one shed and what was happening about the agreement.

There are a number of other factors. It is a matter of speculation as to whether the second defendant consulted the plaintiff before signing the agreement with the first defendant. The defendants have on occasion not complied with orders for progress of this case. There have been interim costs orders to meet this, and they remain unchanged. At one stage there might have been confusion as to who exactly was talking on behalf of the first defendant. The plaintiffs have argued there were two unsuccessful attempts to strike out the action and no appeals therefrom, albeit interlocutory appeals should only be made if really necessary.

There is a lurking suspicion the applications for copra export permits by the first defendant were refused by the plaintiffs as a

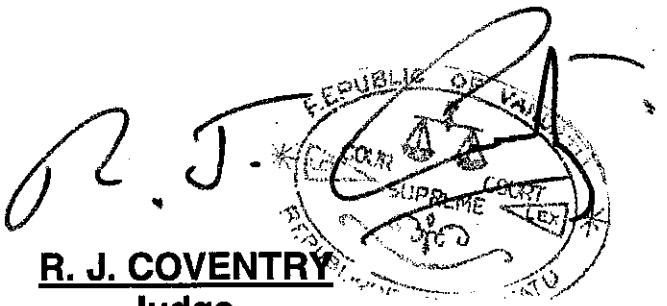
lever to get the first defendants to abandon the lease. The first defendant say their business was wrecked. I must disregard that. The stage was reached, months ago, when the futility of the litigation was recognised but it continued purely by dint of the argument over costs.

This action has wholly or partly ruined what was a valuable agreement whereby the Government received a new shed, had other sheds repaired and maintained and was paid money in exchange for a lease of the new shed, and access to the others. In any event it was limited to ten years. It was terminable by either party on five months notice.

The pure point of law raised by the plaintiff in its claim was certainly arguable. However, given the factual background and commercial reality this was a case which should not have been started or at worst should have been resolved at an early stage.

In these circumstances I order that the plaintiff pay the costs of the first and second defendants.

Dated at Port Vila, this 16th day of December 2002.



R. J. COVENTRY
Judge.