

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Civil Jurisdiction)

Civil Case No. 165 of 2002

**BETWEEN: JOSELITO WOKON
CHARLES CYRIAQUE
RAYMOND BONGNAIM
SYLVANU ORREN
ALPONSE LASSE**
Claimants

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

AND: THE MINISTER OF PUBLIC UTILITIES
Second Defendant

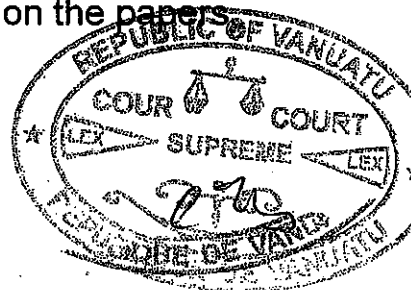
AND: LOUIS WORWOR
Third Defendant

Coram: *Justice Tuohy*

Counsels: *Mr. Boar for Claimant
Ms. Harders for 1st and 2nd Defendants*

RULING AS TO COSTS

1. In my Minute of 6 September 2007, I gave the Claimants' counsel until 14 September to file any submission in writing in relation to the Government's request for "penalty" costs following which the Court would make a decision on the papers



No submission was received but by letter dated 24 September, Claimant's counsel sought further time. No submission has been filed to date.

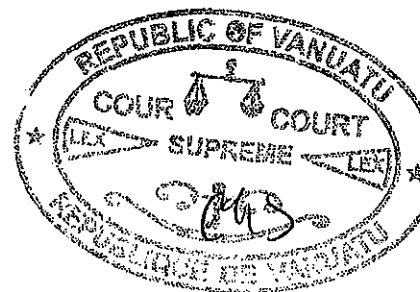
2. This present application for costs by the Government relates to events subsequent to the Court of Appeal's judgment on the appeal from Treston J's judgment of 12 June 2006 (CAC 23/2006, 26/2006, 6 October 2006). After dismissing the appeals, the Court of Appeal said:

"The farmers and the custom land owners in these appeals are each entitled to costs of VT 50,000 against the Government of the Republic of Vanuatu".

3. On 24 April 2007, the Claimants' (the farmers') counsel wrote to the Chief Registrar stating:

"We write to advice (sic) that the judgment sum in this matter being VT8.179.649 has been settled by the Government but this exclude VT50,000 cost which the Court of Appeal has order to be paid to each of the Claimant whose names appeared on the list that was approved by the Council of Minister to be paid. Thus, we seek a conference in this matter for direction as to this costs payments and await your advices".

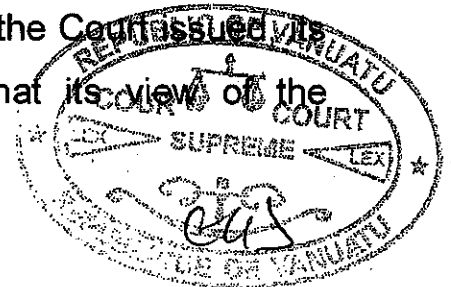
4. The Court understood from this that the Government had not paid the costs ordered by the Court of Appeal and that the Claimants were seeking an enforcement order. The Chief Registrar replied as follows:



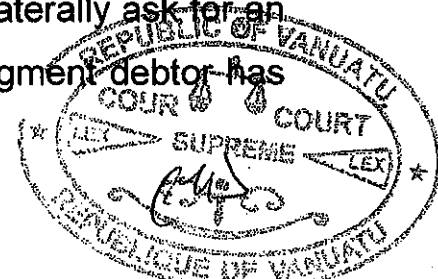
"The Judge of this matter has asked that we advise you that he does not propose to hold any enforcement conference for the purposes of issuing enforcement orders against the Government as he is of the view that the Court does not have the power to issue enforcement orders against the Government.

If you wish to take the matter further through the Court, you should consider filing written submissions in re: jurisdiction".

5. The Claimant did file lengthy written submissions on the jurisdiction issue dated 26 June 2007. After reconstruction of the file (destroyed in the Court house fire), the Court issued to both parties its Minute dated 31 July 2007. This produced the First Defendant's submissions of 6 August 2007 and the sworn statement of Jennifer Harders.
6. These made clear to the Court something it was not previously aware of: that the Government had paid VT 50,000 costs to the Claimants on 21 December 2006 after the Claimants' counsel had sought not VT 50,000 but VT 5,950,000 on the basis that there were 119 individual farmers and the Court of Appeal was intending to award each one of them VT 50,000 rather than VT 50,000 to each group, the farmers and the custom owners. In paying the VT 50,000, the First Defendant's legal advisers had made clear their disagreement with the Claimants' counsel's interpretation of the judgment of the Court of Appeal.
7. Having become aware of the true position, the Court issued its Minute of 6 September 2007 advising that its view of the

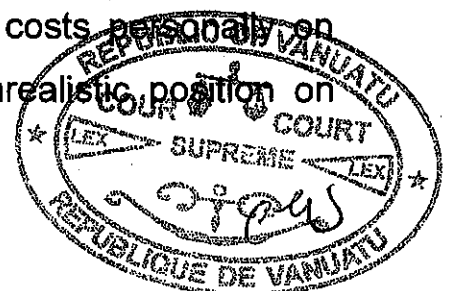


- meaning of the Court of Appeal's judgment coincided with that of the First Defendant's advisers and there was thus nothing left to enforce. The Claimants' counsel was invited to apply to the Court of Appeal for clarification of its judgment if he disagreed.
8. The First Defendant seeks a "*penalty*" costs order, citing R 15.5 (5). The phrase "*penalty*" costs is not used in the Civil Procedure Rules and is better avoided. What is actually sought is indemnity costs. The circumstances in which they can be granted are set out in R 15.5 (5). R 15.5 (5) (d) is particularly widely phrased but must be read in the light of R 15.5.3 and the preceding sub paragraphs (a), (b) and (c) of R 15.5.5.
 9. The First Defendant claims that the actions of the Claimants in seeking to enforce the judgment (i.e. to obtain enforcement orders for VT 5,950,000 for costs) are unreasonable in that they had no prospect of success and their counsel had been told so. Complaint is also made that the request for an enforcement conference was made ex-parte and that the Claimants' counsel had corresponded directly with Government Ministers in an attempt to circumvent the State Law Office.
 10. As to the last two points: in retrospect, the letter of Claimants' counsel may not have been intended as a request for an enforcement conference. The Court read it as that because it was unaware (and not told) of the underlying dispute about the meaning of the costs award. In any event, it is quite appropriate for a party with a judgment to unilaterally ask for an enforcement conference to be fixed. The judgment debtor has



its chance to be heard at the conference. With regard to direct correspondence with the client, that is not a matter for the Court on a costs application, it is a matter for the body responsible for professional ethics.

11. The appropriate course for the Claimants to have taken if they disagreed with the First Defendant's interpretation of the Court of Appeal's costs order was to go back to the Court of Appeal for clarification of its judgment – not to approach this Court for directions without telling it the full story. However the party that has been put to most unnecessary work by this is the Court itself. The First Defendant has had only to prepare and file its submission and sworn statement. That would not have been necessary if the Court had been told in the first place what had gone before between the parties. My view is that in those circumstances, the Claimants should pay costs but only in respect of that work. The circumstance justifying an order is not so much the untenability of the Claimants' interpretation but counsel's failure to tell the Court the full story in the first place.
12. Therefore, the basis for a costs order is that these costs were unnecessarily incurred in terms of R 15.25 (1) (c). R 15.25 (5) enables the Court to order these to be paid by a party's lawyer personally if the court is satisfied that the unnecessary costs were incurred because of conduct by the party's lawyer. Here it is not the interpretation contended for by counsel which is the Court's concern. Counsel may have acted on instructions and it would be a dangerous thing to impose costs personally on counsel just because he espouses an unrealistic position on



behalf of his clients. It is rather the way in which the Court was left unaware of the full story which is the cause of the unnecessary expense – and that is the responsibility of the lawyer not the client. Therefore I consider it proper to order that the costs be paid personally. I do not however consider that costs should be awarded on an indemnity basis. Although the interpretation contended for ignores context and common sense, it is arguable on a narrow and literal reading.

13. There will be an order for costs on a standard basis in favour of the First Defendant in respect of the preparation of submissions and the sworn statement of Jennifer Harders only to be agreed or fixed by the Court. These costs are to be paid personally by the Claimants' lawyer, Mr. Boar.

Dated at Port Vila, this 13th day of November, 2007

BY THE COURT



C.N. TUOHY
Judge

