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

Civil Case No.104 of 2006

BETWEEN: **MOSES APET ARIASIA**
Claimant

AND: **SHEFA PROVINCIAL COUNCIL**
Defendant

Coram: *Chief Justice, Vincent Lunabek*

Counsel: *Mr Willie Daniel for the Claimant*
Mr James Tari for the Defendant

JUDGMENT

1. This is a claim for breach of contract and damages arising from such breach. The Hearing of the claim occurred in April 2011. The submissions of Counsels are filed by May 2011. Additional evidence is needed in relation to the loss of profit that the claimant could have been made for the construction of four (4) houses. The Claimant files a sworn statement to this effect on 18 May 2015 and a response sworn statement was filed by the Defendant ("Council") on the same date.

2. The proceedings were brought after the Claimant and Defendant entered into a contract on 3 April 1998 (April 1998) for the Claimant to build and renovate the Defendant's main office for a contract price of VT 591,250 and to renovate the main chamber for VT 30,000.

3. The Claimant had to supply the labour the Defendant was to supply the materials. The Claimant says he started work but there was substantial delays, eventually 6 years, over the supply of the material. Eventually another building company completed the contract.

4. The Defendant's case is that the Council supplied the materials but the Claimant used the materials on other building work and so any fault in the delay in completing the building is the Claimant's responsibility.

5. As well as the payment for the whole of the contract price of the renovations the claimants seek damages of over VT 23 million. This is based on a term of the contract (which is in Bislama) which the claimant says entitles him to damages for the Defendant's delay calculated on a daily rate (the total contract price of VT620,250 divided by the contract period 42 days is to VT14,768 per day).

6. This daily figure is then multiplied by the time delay of six years to obtain the VT 23,392,522 claim (VT 14,768 per day x 22 work days per month x 6 years x 12m (72 months).

7. The parties then tried to negotiate a settlement of the claims. The Claimant says he reached a settlement with the Defendant on 12 August 2003. The Claimant says both parties agreed to settle on the basis that the Defendant would pay the Claimant the balance of the contract sum remaining and losses and expenses incurred totaling a sum of Vatu 1,019,375 plus interest at 10% and the Claimant would be given 4 further houses to build in 2004. The Claimant says the Defendant did not honour this settlement agreement.

8. In the meeting of 12 August 2003, the Claimant and his lawyer (Mr Laumae) were present. The President of the Council and the executive members of the Council were present. Although, there was no Shefa Council meeting the Development Committee of the Council attended the meeting with the Claimant.

9. The meeting of 12 August 2003 was held between the Claimant and the Defendant to compensate the Claimant for breach of the contract. The terms of the agreement are that the Defendant pays the 1,019,375 which is the balance of the contract sum remaining (after they paid VT 173,000) and losses and expenses incurred plus 10% interest. It is agreed also that the claimant to build four (4) hours of the Defendants in 2004, namely:

-Council chambers;

-Shed for generator and tractor;

-House for Secretary; and

-House for Treasurer.

10. The Defendant do not deny the terms of the 12 August 2003 agreement. They make the following two points in response:-

a) First, the statement of claim is a mixture of a claim relating to the breach of the original contract and the settlement agreement. The Claimant cannot sue on both. The Defendant says the Claimant's claim is that the parties settled their differences and so the Claimant's only cause of action is to try to enforce that settlement agreement.

b) Second, the settlement is not valid because the Decentralization Act requires the Council to agree by a majority vote before there can be settlement of this dispute by an agreement. There is no evidence the Council agreed to this arrangement by a majority vote therefore it is not an enforceable settlement.

11. Several points can be made about the claim:-

12. First, given the Claimant acknowledges he settled his claim against the Council (who also agreed) the claim should be limited to a claim based on that settlement agreement.

13. Second, the damages agreed in that settlement were VT 1,019,375 plus interest at 10% from the settlement date (12 August 2003). The Claimant can sue for that amount.

14. Third, the other part of the settlement was the agreement to allow the claimant to build four (4) houses for the Council in 2004. But, the Claimant's claim for damages is for the total cost of building the houses as it transpires on the claim.

15. Fourth, this is not the correct claim. The correct damages claim is the profit the claimant could make from building the four (4) houses. That is his real loss. And so the settlement agreement is the VT 1,017,375 plus 10% interests from 12 August 2003 plus the profit from the construction of the four houses the claimant would have made if he had built the houses. There is no evidence as to the profit that would have been made for the four houses. Further evidence will need to be called by the claimant to establish this figure.

16. As to the claim by the Council that they were not authorized to settle the claim because of the provisions of the Decentralization Act such a claim was never pleaded by the Defendant. On the evidence, the Defendant seems to have held themselves out to the Claimant as able to settle the Claimant's claim.

17. The Defendant did not call any evidence which established the settlement was invalid. And so it is my view that the Claimant could succeed on the settlement agreement claim. The damages would be the VT 1,017,375 for the balance of the contract sum remaining and loses and expenses as agreed by the Claimant and Defendant on 12 August 2003 plus the profit that could have been made from the construction of the four houses plus interest.

18. As to the further evidence needed to establish the profit that could have been made from the four (4) houses, both parties and Counsels are notified of the court's tentative view of additional evidence required on the profit the Claimant would have been made for the four houses. The Claimant files and serves on 18 May 2015 a sworn statement to establish his profit for building the houses and the Defendant files and serves a response on the same date.

19. In the sworn statement filed 18 May 2015, the Claimant restates as evidence his estimated labour costs for building the 4 houses totaling Vatu 3,646,500. The estimated costs of labour are not the evidence of the profit that the Claimant could have been made from the four buildings. The estimated costs of Vatu 3,646,500 is the amount to which Mr Moses Mariasia would be entitled if he had executed the contract of building the 4 houses. The fact of this case is that there was a settlement agreement for the Claimant to build 4 houses in 2004. The Claimant did not execute the works because of the acts or failure of the Defendant Council. The damages sought are the damages where the owner of the contract (Defendant) acts so as to bar execution of the contract by the builder (the Claimant). The general principles would put the normal measure of damages at the contract price less the costs to the builder of executing the work. In calculating the builder's costs the indirect as well as the direct costs must be included, especially overheads (see McGregor on Damages para- [26-018][26-019][26-020]). In this case, for Mr Moses Mariasia to earn the amount of Vatu

3,646,500 he would have had to spend money on wages, fuel and overheads. He has not had to expend that money (Vatu 3,646,500) on these items. What the Claimant has lost is the profit that he could have made on the work if the contract had been executed. There is no evidence led of the profit margin which the Claimant would have made on this contract but for the Defendants' repudiation. The claim for damages of loss of profit has not been made out and I refuse to make the award as claimed. However, on the evidence, I am satisfied that the Claimant was prevented from earning profit on performing the works of building the 4 houses.

20. There are occasions in the course of making an assessment of damages when a judge is required to adopt a figure which is little more than a guess, when the evidence as a reason to value that head of damage at zero: *Jones -v- Shiffmen [1971] HCA52; (1971) 124 CLR 303 at 308 per Menzies J. and the Commonwealth –v- Amann Aviation Pty Ltd [1971] HCA 54; (1971) 174 CLR 64 at 83.* In the absence of particulars established by evidence I am only prepared to make a token award of Vatu 80,000.

21. The Claimant has claimed interest. I will allow 10 percent interest as agreed between the parties. The 10% interest will be calculated from the filing of the claim until judgment, on the judgment sum. The judgment sum is Vatu 1,017,375 for the balance of the contract sum remaining as agreed between the parties, Vatu 80,000 for loss/profit for being prevented from executing this contract. The total judgment sum is Vatu 1,097,375. Interest is at 10% on the total judgment sum from the filing of the claim until the judgment (ie- from 21 June 2006 to 5 August 2015) which is Vatu 987,638. I add interest to the judgment sum giving a total of Vatu 2,085,013. Costs follow the event. Shefa Provincial Council shall pay Moses Apet Ariasia costs of action on the standard basis to be agreed or taxed.

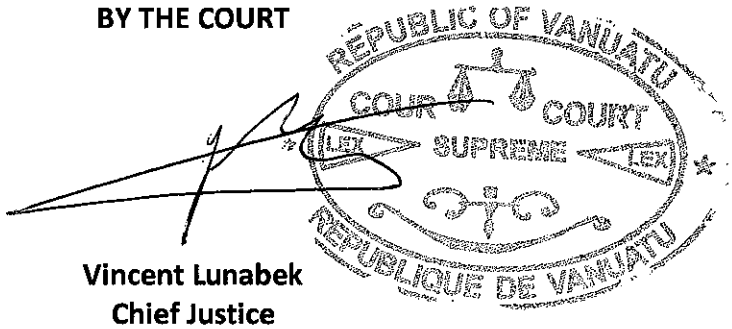
22. **ORDERS**

a) Judgment for the Claimant in the sum of Vatu 2,085,013.

b) Defendant to pay the Claimant's costs of the action on standard basis to be agreed or taxed.

DATED at Port Vila this 5th Day of August 2015

BY THE COURT



Vincent Lunabek
Chief Justice