

BETWEEN: David Nelson

Claimant

AND: Toyota Tusho (Vanuatu) Limited

Defendant

Date of HEARING: 11th March 2020
Date of Decision: 23rd April 2020
Before: Justice Oliver.A.Saksak
In Attendance: Mark Hurley for Kalmat Abel for Applicant/ Defendant
Mary Grace Nari for the Respondent/ Claimant

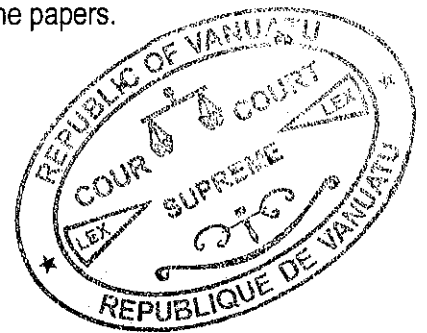
DECISION

Background

1. The Court issued judgment in favour of the Claimant (respondent) on 7th February 2020. His original claim was in the total sum of VT 21, 346,814.
2. The defendant (applicant) disputed the amount but in May 2019 made an offer to settle by offering the sum of VT 2 million. The respondent refused the offer but reduced his claims to VT 15 million.
3. The matter went to trial hearing on the evidence. And the Court analysing the evidence, gave judgment in favour of the respondent but for a reduced sum of VT 1, 137, 985. The Court awarded interest of 5% bringing the amount up to VT 1, 265, 658. The Court also awarded costs in favour of the respondent on the standard basis, as agreed or taxed by the Master.

Request for Further Hearing on Costs

4. By letter dated 26th February 2020 Mr Kalmat of Counsel for the applicant sought a recall of the judgment and an opportunity to be heard on costs pursuant to the Rules.
5. The Court issued a notice of enforcement conference for 11th March 2020 on 7th February. It was during that conference counsel agreed to a timetabling order for written submissions on costs by 20th March for the applicant, and by 27th March for responding submissions for the respondent. Counsel agreed the Court would formulate judgment on the papers.

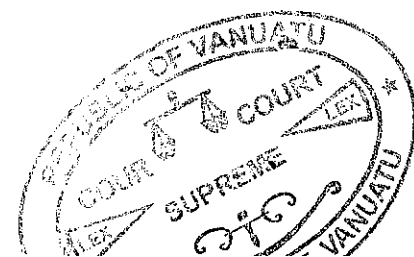


Submissions

6. Mr Kalmet filed written submissions on costs on 23rd March 2020. Mrs Nari filed responding submissions on 2nd April 2020.
7. Mr Kalmet submitted that based on the Calder Bank principles established in Calder Bank v Calder bank [1975] 3 All ER 333 and on the fact the applicant having made an offer by letter dated 29th May 2019 to settle the matter at VT 2 million, and the respondent having refused the offer of comprise, the applicant should be awarded indemnity costs or that the respondent pays the defendant's costs on the standard basis from 29th May 2019. In the alternative that the Court orders that each party pays their own costs.
8. Mr Kalmet relied on the other case authorities of TVL v Kalsau Langwor [2003] VUSC 36 Triwood Industries Ltd v Stevens [2012] VUSC 199 and Inter- Pacific Investment Ltd v Sulis[2007] VUSC 49.
9. Mr Kalmet refers the Court to Part 15 of the Civil Procedure Rules in relation to costs and in particular Rules 15.1, 15.6, and 15.11.
10. Mrs Nari opposed the applicant's submissions. First counsel referred to the costs order in paragraph 12 of the judgment and said this was a final order and the judgment should not be amended unless by way of an appeal by the applicant. Counsel says further those submissions are late and should have been made during submissions as to quantum on 9th December 2019. Further counsel says these should come during the taxation of costs.
11. Third, Mrs Nari says the respondent made a further counter-offer in September 2019 but the applicant declined the offer, resulting in the case going to trial hearing. Further, Mrs Nari submitted the proper course is for the respondent to submit his Bill of Costs and if it is not agreed, it would be a matter for taxation before the Master.

Discussion

12. At the outset the Court accepts Mrs Nari's submissions that the costs order at paragraph 12 of the judgment is final. The request by the applicant made in their counsel's letter of 26th February 2020 is not a proper application. It is an abuse of process and it must be declined.
13. The Calder bank principles in my view do not apply to the applicant's offer. The late Mr Stephens replied to the letter of 29th May 2019 on 31st May 2019 accusing the applicant of serious delay of earliest possible settlement in 2017. What I understand that to mean simply is that had the applicant made the offer in 2017, it would have settled the matter. It was therefore delayed by about 2 years and taking into consideration a further counter-offer in September 2019 by the respondent being declined by the applicant, their request for costs on the standard basis or on indemnity basis, or alternatively that each party pays their own costs is unjustified and unreasonable in the circumstances, and these must be declined.



14. Next, in the claim filed on 9th November 2019 in his reliefs in paragraphs 15 the claimant claims costs of and incidental to the action. In their defence filed on 8th January 2018 the applicant as defendant makes no specific defence or denial to the costs claimed. There was no counter-claim made for a dismissal of the claim and for costs on an indemnity basis.
15. In her submissions filed on 30th October 2019, Mrs Nari states at paragraph 36 the claimant claims the costs of the proceeding together with interest. In the defendant's submissions filed on 9th December 2019 at paragraph 21 it was submitted that the Court should enter judgment in the defendant's favour and award indemnity costs or on such other basis as deemed appropriate.
16. The Court however entered judgment in favour of the Claimant. The Rules on Costs are clear. The Court has a discretion in deciding whether and how to award costs (Rule 15.1). The general rule is that costs of a proceeding are payable by the losing party (Rule 15.1 (2)). The Court complied with the Rules by ordering that costs be paid by the defendant on the standard basis as agreed or taxed. The Claimant had claimed costs and there was no defence to it. The Court rejected the defendant's submissions that judgment should be entered for the defendant with indemnity costs or other basis as submitted, although this was not stated in the judgment.
17. I therefore see no need to depart from the general rule to follow Inter-Pacific Investment Ltd v Sulis and the Calderbank case.
18. This case cries out for settlement. There has been considerable delays and this request is in my view another form of delay by the applicant to the execution of a judgment which can easily be settled without the need of an unnecessary request to recall the judgment to review the award costs. In my view it is an appeal in disguise.

The Result

19. The request by the applicant is declined and is accordingly dismissed.
20. Mrs Nari claimed cost of VT 20,000 against the applicant. The respondent is entitled to that additional cost to be paid within the next 14 days.
21. The matter will be returnable for an enforcement conference on Thursday 30th April 2020 at 9:00am in Chambers.

DATED at Port Vila this 23rd day of April 2020

BY THE COURT


OLIVER.A.SAKSAK ★

Judge

