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

Civil
Case No. 23/1963 SC/CIVL

BETWEEN: JAMES WILLIAM THOMPSON
Claimant

AND: MISFER MOHAMMED MOHAMMED
Defendant

Date of Trial: *23 August 2024*

Date of Decision: *28 August 2024*

Before: *Justice M A MacKenzie*

Counsel: *Claimant – Mr J Ngwele*
Defendant – Mr N Morrison

DECISION

(Reasons for dismissing the claim)

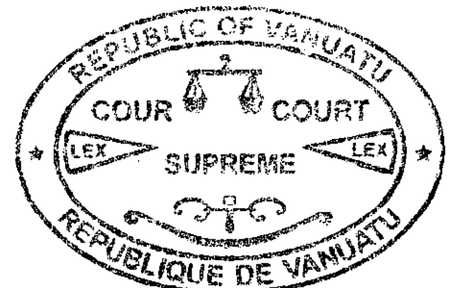
Introduction

1. This was a claim for breach of contract. Mr Thompson alleged that he loaned Mr Mohammed two separate and distinct sums of money. The sum of money are;

    a. VT 1.5 million

    b. VT 5.9 million for the purchase of a motor vehicle. Mr Thompson's position is that he paid the purchase price for the vehicle.

2. An amount of money was repaid to Mr Thompson. The claim was for repayment of the balance of the alleged loan.



3. The defence case was that Mr Thompson did lend Mr Mohammed money in the sum of approximately VT 2 million. However, the defence disputed that Mr Thompson loaned Mr Mohammed money to purchase the motor vehicle. Mr Mohammed's position is that he purchased the vehicle with his own funds. Therefore, Mr Mohammed disputed that any funds were owing to Mr Thompson.

4. There was a direct conflict in the sworn statements about the purchase of the vehicle, and who paid the purchase price. Both cannot be correct. Either Mr Thompson or Mr Mohammed was not telling the truth.

Result

5. The trial on 23 August 2024 ended prematurely. This is because when Mr Thompson, the Claimant, was giving evidence he terminated the zoom link after indicating a lack of enthusiasm for the claim. The circumstances are discussed at paragraphs 10 - 18.

6. Mr Morrison then made an application to dismiss the claim. I dismissed the claim and made an order for costs in favour of Mr Mohammed. I said I would give written reasons. These are my reasons.

7. In addition, I said there would be a referral to the police given Mr Thompson's abusive and threatening comments whilst giving evidence.

8. In order to understand why the claim was dismissed, it is important to set out the procedural history for context purposes and what happened at the trial.

Procedural history

9. Key dates are set out below;

26 July 2023– Urgent without notice application for seizing order.

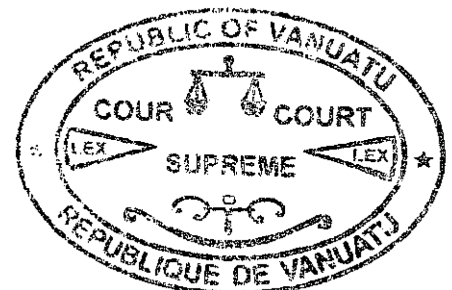
27 July 2023 – Supreme Court claim filed.

27 July 2023 – Seizing order.

17 August 2023 – Seizing order set aside. Trial date allocated, 21 September 2023.

5 September 2023 – Defence filed.

8 September 2023 – Trial date of 21 September 2023 was vacated. New trial date was set, being 2 November 2023.



2 November 2023 – An adjournment of the trial set for 2 November 2023 was granted without opposition. Mr Ngwele had only just received the file. New trial date was set (21 February 2024) but varied to 6 March 2024 as the February date fell on a public holiday.

1 March 2024 – Minute issued adjourning the trial set for 6 March 2024 at the request of Mr Thompson's counsel. This is on the basis that Mr Thompson was overseas and quite difficult to reach. A new trial date was set, being 27 May 2024.

23 March 2024 – Minute vacating trial set for 27 May 2024 due to a communication mix-up. New trial date, 25 July 2024

25 July 2024 –

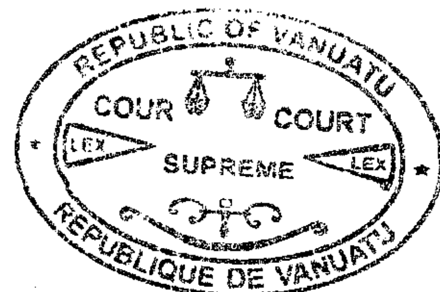
(i) The trial did not proceed. A Minute was issued on 25 July 2024 detailing why the trial did not proceed. The trial did not proceed because Mr Thompson wanted to give evidence via video link form overseas. He proposed to give evidence from Thailand. No application had been made pursuant to r 11.8 of the Civil Procedure Rules. Instead, an email was sent to the Court on 23 July 2024 which did not contain the information required by r 11.8(3)(b).

(ii) Mr Morrison made an application to strike out the claim. I declined to strike out the claim. I did however make a wasted costs order and set a further trial date, 16 August 2024. The date was suitable to both counsel.

16 August 2024 –

(i) The trial did not proceed. A Minute was issued on 16 August 2024 detailing why the trial did not proceed. A last-minute application pursuant to r 11.8 was made by Mr Ngwele. Mr Ngwele and not Mr Thompson provided the sworn statement to the Court. Mr Ngwele said that Mr Thompson had indicated he would give evidence via video link from his office, although Mr Ngwele was not in a position to advise the Court if that was proposed to be from his office in Vietnam or Thailand. He further deposed that Mr Thompson would have access to the necessary technology and a stable internet connection to facilitate his participation by video link.

(ii) Mr Thompson was not however at his office but at his home in Hong Kong, and without any technology support. Mr Thompson could not connect via zoom. There was no issue with the link at the Supreme Court. A screenshot taken by Mr Thompson indicated that the page would not load. Mr Ngwele proposed (on Mr Thompson's instructions) that a witness, Mr Silo give evidence and that the trial then be adjourned until Monday 19 August 2024. Mr Thompson could then be in his office and connect with the assistance of someone versed in IT. I declined to adopt that approach for the reasons detailed in the Minute.



(iii) Another application was made to strike out the claim. I declined to strike out the claim. While the trial could not be accommodated on Monday 19 August 2024 (due to the schedule for that day), it could proceed on 23 August 2024. I made a further wasted costs order.

21 August 2024 – Application for Mr Thompson to give evidence via video link was filed.[1]

22 August 2024- Application for Mr Thompson to give evidence from Crystal Bay, Kho Samui, Thailand, granted. In his sworn statement, Mr Thompson said he may have the assistance of tech support to arrange the necessary technology and a stable internet connection.

22 August 2024- Testing of the zoom link by the Court IT officer, at my direction. No issues identified. Mr Thompson raised no difficulties with the audio.

The trial - 23 August 2024

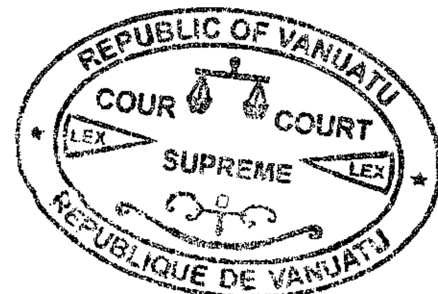
10. As noted above, a test was conducted by the Supreme Court IT officer the day before the trial. No issues were identified to me with the zoom link or the audio quality. Specifically, Mr Thompson raised no issue about any issues or difficulties with the audio.

11. At the outset of the trial, Mr Thompson indicated that whilst he could hear counsel, he could not hear me. Mr Thompson, despite deposing in his sworn statement filed on 21 August 2024 that he may have tech support available, did not. This is also despite the difficulties he said he encountered with the zoom link on 16 August 2024. I delayed the start of the trial for arrangements to be made to ensure that Mr Thompson could both see and hear what was happening in the court room. One of the steps taken was that I moved from the judge's bench, initially to the registrar's bench and then to a table within the body of the court room. There is because Mr Thompson continued to have difficulties hearing me whilst I was seated at the registrar's bench.

12. Even whilst I was directly in front of and speaking into a microphone, Mr Thompson maintained that he was having difficulty hearing me. He could though hear his counsel, Mr Ngwele. Then Mr Thompson indicated that he could hear what was being said if his camera was off, so I gave him permission to turn his camera off.

13. Mr Thompson's evidence in chief commenced after he was sworn in. I required him to turn his camera on. He said that he could only hear if he put his phone up to his ear. Whilst unorthodox, in the interests of Mr Thompson being able to give evidence, I allowed him to hold his phone in that manner, which meant that he could not be seen in the courtroom.

[1] *Mr Thompson's sworn statement was filed at 4.15pm on 21 August 2024*



14. Mr Ngwele was able to ask Mr Thompson how he met Mr Mohammed. Shortly thereafter, Mr Thompson continued to indicate that he was having difficulty hearing. Before I had the chance to tell him that he could turn the camera off, Mr Thompson became very angry and appeared to indicate that he did not wish to pursue the claim. He also used threatening and abusive language. I inferred it to be a threat to kill those in the courtroom. If not, at the very least, he used threatening and abusive words. Of his own volition, he then terminated the Zoom link.

15. I directed that the relevant portion of Mr Thompson's evidence was played back in open court. Mr Thompson said;

> *"You know what. You know what. Fuck the case yeah. I'm over it. Let Mohammed win. Yeah. The terrorist bastard. The Saudi fucking bastard terrorist.* ***I will burn every single one of you. Fuck"*** [2]

16. Mr Thompson was disproportionately angry about the issues he was experiencing with the zoom link, yet no issue was raised or identified when the link was tested the day prior. So, I adjourned the trial briefly for Mr Ngwele to take instructions from Mr Thompson as to his position with respect to the claim and whether he did or did not wish to pursue the claim as it seemed that he was indicating that he was no longer pursuing the claim, when he said "*Fuck the case yeah. I'm over it. Let Mohammed win.*" And then said he was going to burn every person.

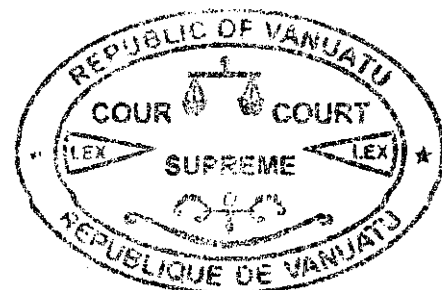
17. When Court resumed, Mr Ngwele said that Mr Thompson's instructions were "*fuck the claim*" and that Mr Ngwele had all the documents he needed and that he was to "*deal with it.*"

18. Perhaps unsurprisingly, Mr Morrison made an application to dismiss the claim on the basis that Mr Thompson has shown that he is not prepared to attend a trial and give evidence despite this and earlier attempts. He submitted that it was through Mr Thompson's own behaviour that the Zoom link failed.

Discussion

19. Mr Thompson did appear at the trial, but decided very soon after his evidence in chief commenced, to terminate his involvement in the trial and the claim. Evidence in chief beyond his sworn statement had barely got underway. There was no opportunity for Mr Morrison to cross examine him, due to Mr Thompson's decision to terminate the zoom link after seemingly abandoning the claim, by both his words and actions. This was

[2] *I have listened to the audio recording and directed that it be downloaded to a flashdrive*



confirmed by his instructions to Mr Ngwele, with the caveat that Mr Ngwele was to deal with matters.

The law

20. Rule 12.9(2) of the Civil Procedure Rules 2002(CPR) addresses how a Court may respond to a Claimant not appearing at trial. Rule 12.9(2) says:

    Failure to attend

    ...

    12.9 (2) If a claimant does not attend when the trial starts:

    (a) the court may adjourn the proceeding to a date it fixes; or

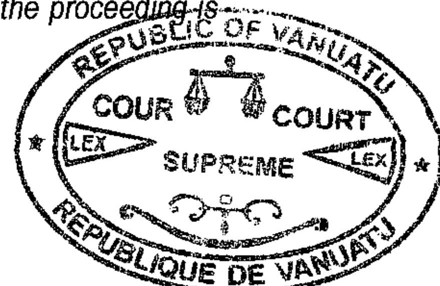
    (b) the court may dismiss the claimant's claim and give judgment for the defendant; or
    (c) the defendant, with permission of the court, may call evidence to establish that he or she is entitled to judgment under a counterclaim against the claimant.

21. Mr Thompson did attend when the trial started. It was shortly after the trial commenced that he decided not to take part in the proceeding. So, does r 12.9(2) apply here ?

22. After considering how a similar provision is interpreted in New Zealand, I consider that r 12.9(2) should be construed so that it applies not only to the start of the trial, but throughout the proceeding until judgment is given. I respectfully adopt the reasoning applied in *Chase Wellington Properties Ltd v Hughes* (1989) 3 PRNZ 121 at 125-126, which cited the well know English case, *Armour v Bate* [1891] 2 QB 233(CA) at 234-235.

23. In New Zealand, r 10.8 of the High Court Rules 2016 ("HCR") provides that if the defendant appears, but the plaintiff does not, the defendant is entitled to judgment dismissing the proceeding, if the claim is not admitted. Rule 10.8 of the HCR applies not only when the proceeding is first called but throughout the proceeding until judgment is given. It covers a situation where a plaintiff abandons its proceeding during the trial, as occurred in *Chase Wellington Properties Ltd v Hughes.*

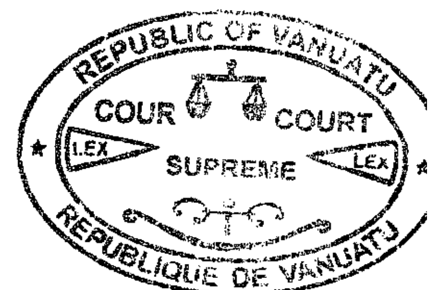
24. In *Chase Wellington Properties Ltd v Hughes*, the plaintiff was placed in statutory management and abandoned its proceeding after 20 days of trial. The Court considered that more directly applicable were the rules as to the non-appearance of parties, rr 483 to 487. They began with r 483. When neither party appears "*when the proceeding is*



called", the Court had a discretion to strike out the proceedings. The relevant rule was r 485, the predecessor of r10.8 of the HCR, and which provided that if the defendant appeared but the plaintiff did not, then the defendant was entitled to "judgment dismissing the claim". Greig J was of the view that it was sensible to construe r 485 so that it applied not only when a proceeding was first called but throughout the proceeding until judgment was given. If that was not the case, there would then be no provision for or sanction against a plaintiff simply abandoning his action after commencement of the trial.

25. Greig J said (at pp125 and 126):

> *"More directly applicable are the rules as to the non-appearance of parties which are rr 483 to 487. They begin with r 483 when neither party appears "when the proceeding is called" in which case the Court may strike out the proceedings. It may be reinstated on good cause being shown. Rule 484 provides for the plaintiff alone appearing. Then the plaintiff is to prove his cause of action so far as the burden of proof lies on him. Rule 485, if the defendant appears but the plaintiff does not then the defendant is entitled "to judgment dismissing the proceeding" and his right for any proceedings for a counterclaim will continue thereafter. In Armour v Bate [1891] 2 QB 233 (CA), where on the calling of the case the plaintiff did not appear, judgment was given for the defendant on the basis that the action was dismissed for want of appearance of the plaintiff at the trial. Lord Esher MR, at p 235, stated that the effect would be the same as if the action had been dismissed on the merits, thus giving the defendant the costs of the action and of the issues that were determined between him and the plaintiff. That decision is based upon a rule which is in substance the same as r 485. Rule 486 provides that any verdict or judgment given where there is only one party appearing may be set aside if there has been a miscarriage of justice. Rule 487 then provides for the situation where both the plaintiff and defendant appear.*
>
> *Only r 483 makes express reference to the time at which the appearance is relevant, that being ID that case when the proceeding is called. It is, I think, implicit in r 487 that that rule contemplates the continuing appearance of both parties because it provides for the procedure after the party who begins has closed his case and the order in which addresses are to be given. I think it is sensible to construe r 485 so that it applies not only when the proceeding is first called but throughout the proceeding until judgment IS given. If that were not the case then there would be no provision for or sanction against a plaintiff simply abandoning his action after commencement of the trial. Nonsuit, which has a different result and effect, is not an adequate sanction in those circumstances because it permits the plaintiff to reconstitute his action, subject to payment of costs, without any further restriction."*



26. The Court said that in the circumstances of the case, a claim for specific performance, the clear implication from the terms of the plaintiff's notification of the plaintiff's decision is that it does not wish to pursue its claim for the remedy it sought.

27. Rule 12.9(2) is framed in similar terms to r 10.8 of the HCR, although r12.9(2) does specifically refer to the appearance of the Claimant "when the trial starts"- which r 10.8 of the HCR does not. However, r 10.6 of the HCR sets out (like its predecessor r 483) that if neither party appear when *"the proceeding is called"*, it may be struck out.

28. It is logical that the New Zealand approach is adopted in so far as r 12.9 (2) is concerned. Otherwise, there would be a lacuna in terms of a situation where a Claimant decides to abandon a claim during a trial. That cannot be right.

29. I do not think in such circumstances that striking out the claim is the appropriate remedy. Rule 9.10 of the CPR is not applicable, and it is not a situation where there is no reasonably arguable cause of action, nor is it frivolous or vexatious or otherwise an abuse of process, where the Court could invoke its inherent jurisdiction.

30. And nor do I consider that the Court ought to have simply carried on with the trial and held an evidential hearing, given Mr Thompson's stance. That could have been a possible option, given for example, *Toara v Loughman* [2024] VUCA 28. However, the situation here is very different to a Claimant simply not appearing.

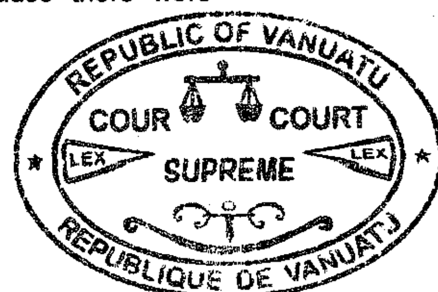
31. Pursuant to s 28(1)(b) and s 65(1) of the Judicial Services and Courts Act [Cap 270], the Supreme Court has jurisdiction to administer justice in Vanuatu, and such inherent powers as are necessary to carry out its functions. Rules 1.2 and 1.7 of the Civil Procedure Rules give the Supreme Court wide powers to make such directions as are necessary to ensure that matters are determined in accordance with natural justice. So, if I am wrong and r 12.9(2) should not be construed in the manner discussed above, the Court's inherent jurisdiction, in combination with Rules 1.2 and 1.7 must surely mean that there is a power and discretion to dismiss a claim when a Claimant abandons a claim during a trial, signalling they no longer seek the remedy sought.

Did Mr Thompson abandon the claim?

32. The circumstances of the premature termination of the trial on 23 August 2024 are unusual.

33. I consider that the procedural background is relevant as it contextualises what happened at the trial on 23 August 2024;

    a. The trial date was vacated on 4 separate occasions in the lead up to the trial on 23 August 2024, either at Mr Thompson's request or because there were



difficulties with Mr Thompson appearing remotely, as detailed in the procedural timeline and Minutes.

b. Mr Thompson had a more than sufficient opportunity to make arrangements to give evidence at the trial, either in person or via a video link. That is because the trial was initially due to proceed on 2 November 2023, 9 nearly 10 months earlier than the 23 August 2024 trial date.

c. Clearly, the Civil Procedure Rules provide for evidence to be given by video link. The fact that Mr Thompson experienced difficulties with the zoom link on 16 August 2024 (there were no issues at the Supreme Court) ought to have put him on notice that he may need some technical assistance on 23 August 2024. He recognised that himself in his sworn statement filed on 21 August 2024. He did not raise any issue when the testing of the zoom link was undertaken on 22 August 2024, and he did not have any technical assistance available to him during the trial.

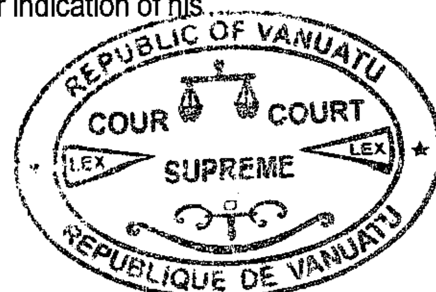
34. Mr Thompson was disproportionately angry about the difficulties he was experiencing with the zoom link. It was tested the day prior, and no issues were identified. He had not availed himself of any technical support as he indicated he might.

35. Barely had evidence in chief got underway when Mr Thompson said "*Fuck the case. I'm over it. Let Mohammed win*", and then terminated the zoom link. But before he did so, Mr Thompson said he was going to burn every single person present.

36. I adjourned so that Mr Ngwele could take updating instructions. Mr Thompson reiterated the "*fuck the case*" position when Mr Ngwele spoke to him with, as I have noted, the caveat that Mr Ngwele was to "*deal with it*".

37. Mr Thompson made a conscious decision to seek to give evidence via a video link. He could have travelled to Port Vila to give evidence in person. He was on notice that the zoom link could be problematic at his end because of the difficulty he experienced on 16 August 2024. I infer he recognised that because he deposed in his sworn statement filed on 21 August 2024 that he may have technology support to help him with the zoom link. He did not. That was his choice. He did not identify any issue with the zoom link either when it was tested the day before. Therefore, his response to the issues with the zoom link (which did not seem to be insurmountable) is inexplicable.

38. After considering Mr Thompson's words and actions during the trial, I infer that he abandoned the claim. Mr Thompson made a deliberate and conscious decision to terminate his involvement in the trial and the claim, signalling he no longer wanted to seek repayment of the funds he claimed were owing to him. He demonstrated this by his words, as set out above. His threat to burn every person is a further indication of his

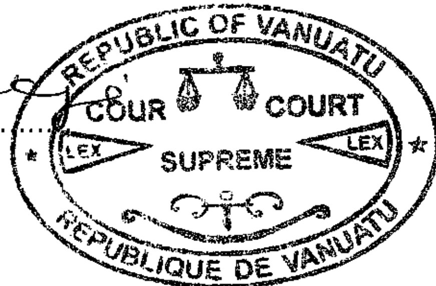


unwillingness to prosecute the claim in the usual manner. Mr Thompson also demonstrated this by his actions. Of his own volition, Mr Thompson terminated the zoom link and thus his evidence. Mr Thompson was disproportionately angry about the difficulties he was experiencing at his end with the zoom link and so his comments could be seen to be a fit of "*pique*" on his part. However, he maintained his "*fuck the case*" approach in his instructions to Mr Ngwele when the case was adjourned briefly.

39. There was no suggestion on his part after the matter was adjourned that he was willing to continue with his evidence and the claim. The only glimmer was his instruction to Mr Ngwele to "*deal with it*". In my view, that does not alter the Court's assessment that Mr Thompson abandoned the claim. He deliberately failed to take steps himself to prove his claim that Mr Mohammed had failed to repay a loan, and to make himself available for cross examination in circumstances where there was a direct and irreconcilable conflict in the evidence between he and Mr Mohammed about who paid the purchase price for the vehicle.

40. A party who files a claim and in doing so, puts a defendant to the time and expense of answering the claim, is obliged to take part in the claim. Mr Thompson made a deliberate decision to abandon the claim by his words and actions on 23 August 2024. I consider that the implication was that Mr Thompson no longer wanted to seek repayment of the funds he claimed were outstanding to him. Therefore, having regard to r 12.9(2), or the Court's inherent jurisdiction and *Chase Wellington Properties Ltd v Hughes*, the claim is dismissed.

DATED at Port Vila this 28th day of August 2024
BY THE COURT



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Justice M A MacKenzie