

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

Civil Case No. 4 of 2013

BETWEEN : EZ Company Ltd

Claimant

AND: George Lapi

Second Claimant

AND: Republic of Vanuatu

Defendant

Coram: Justice Aru

Counsel: Mr. E. Molbaleh for the Claimant
Mr. L. Huri for the Defendant

JUDGMENT ON ASSESSMENT OF DAMAGES

Introduction

1. The assessment of damages arises from the claimant's claim for damages for breach of contract. Judgment was given in this Court by Justice Sey in favour of the defendant when the claim was struck out on 2 February 2015. The claimant appealed to the Court of Appeal and on 8 May 2015 the appeal was allowed and the matter was returned to this Court for damages to be assessed.

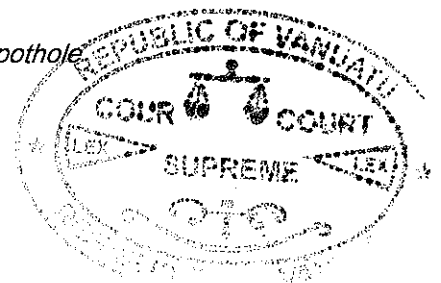
Background

2. The relevant background facts accepted by the Court of Appeal are:-

a) " On 25th January 2011 George Lapi (second appellant) entered into an agreement on behalf of EZ Company Ltd (first appellant) with the Public Works Department(PWD) as agent of the respondent.

b). The agreement (contract) is referenced 113/11/Malampa.

c). The nature of the work was specified as roadside clearance, pothole



patching and regrading of roads on Malekula Island.

- d). EZ was to supply fuel and four machines namely 1 dumptruck, 1 loader, 1 grader and 1 roller at the rate of VT 10.000 per hour per machine for the specified works to be carried out.*
- e). The maximum completion period for the contract was six months and the period for the works was to be two months.*
- f). The contract provided that the Republic would fix the commencement date for the works and when it did so the contractor was obliged to begin work within 7 days.*
- g). By letter dated 20/02/12 the contract was suspended by the Republic pending further notice."*

Discussions

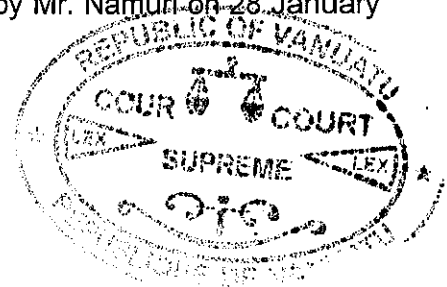
3. The assessment is restricted to what has been identified by the Court of Appeal in its remarks on the damages sought, as follows:-

"23.EZ is entitled to claim the loss of profit made over the 44 days, effectively the hourly rate of a machine or machines operating, less the cost of operating the machine (for example diesel, maintenance, drivers wages). No such calculation has been undertaken by EZ.

24. Further EZ may have other damages claims arising from the suspension and effective cancellation of the contract.

25. In those circumstances the appropriate course is to send this matter back to the Supreme Court to hear evidence on and to assess damages."

4. In the course of managing this case to hear arguments on the assessment, the parties agreed that judgement be issued on the submissions filed. The claimant filed with his submissions a memorandum and three sworn statements sworn by the second claimant and Anthia Lapi and Harry Arivet. The defendant on the other hand filed their written submissions with a sworn statement deposed by Mr Samuel Namuri. It also relies on the first sworn statement filed by Mr. Namuri on 28 January 2014.



5. The claimants in their memorandum provide a breakdown of what they say their damages and costs should be as follows:

i) 16 days worked

For the 16 days, the grader worked 108.5 hours @ the rate of VT 10,000 - VT1,085,000;

ii) 44 days' work suspended

1 machine 7 hours per day

4 machines 28 hours per day @ 10,000VT per hour per machine – VT 280,000 per day for 4 machines for the 44 days – VT 12,320,000;

iii) Other damages

Credit Corporation Loan as @ 23 March 2016 - VT4,117,679

Term deposit used by Credit Corporation - VT577,753

Damage to Machines and total cost to replace all the machines - VT 21,300,000;

iv) Personal damages

Damage to name and business reputation - VT 6,000,000

Loss of business profit over 5 years - VT 54 ,250,000

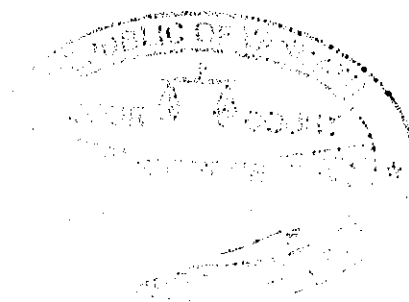
Subtotal - VT 98,565,432;

v) interest @ 20% (VT19,7133,086.4);

subtotal – VT 118,278,518.4;

vi) VAT @ 12.5% (VT 14, 784, 814.8)

Grand Total – VT 133,063,333.2



6. It was submitted by the claimants that the suspension of the contract by the defendant placed them in a very difficult situation because the contract was not terminated but suspended.
7. The defendant submits that the contract is a fixed term contract with specific terms and conditions. Although it was executed on 25 January 2011 work on that specific contract only started on 23 December 2011 for 16 days before the contract was suspended. It was submitted that those 16 were paid.

16 days

8. Although the claimants still claim for the 16 days worked, the Court of Appeal at paragraph 20 of its judgment accepted that the 16 days worked has been paid.

Loss of profit for the 44 days

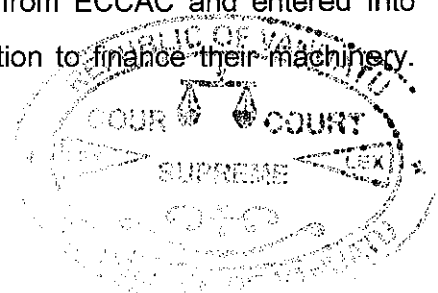
9. No calculation or evidence is provided by the claimants on the cost of operating the machines ie diesel, maintenance and drivers wages .Given the nature of the work, I accept that not all machines would be operating at the same time. In calculating the loss of profit for the 44 days I take into account the fact that the claimants hired dump trucks from Eratap Chiefs and Community Area Council (ECCAC) under a separate contract at the rate of VT 6,750 per hour. The difference in the hourly rate under both the Government and ECCAC contracts is VT 3,250 per hour. A reasonable assessment to calculate the claimants' loss of profit if a single machine was used for the 44 days would be to use the difference in hourly rate as that would give an approximate figure of the actual profit made after paying ECCAC:

44 days x 8 hours per day = 352 hours

352 hours x VT3250 = VT 1,144,000

Other damages

10. It is quite obvious from the second claimant's sworn statement filed on 6 September 2017 that at the time of signing their roadworks contract with the Government, the claimants did not have the machinery to carry out the road works they contracted to do .On their own initiative they hired dump trucks from ECCAC and entered into subsequent loan arrangements with Credit Corporation to finance their machinery.



Their contractual obligations with the defendant is totally independent of any subsequent arrangements they entered into with third parties. Therefore when the contract was suspended, the claimants were obliged under their arrangements with third parties to ensure that the machinery were always in a safe working condition. With ECCAC the claimants were obliged to service the dump trucks. There is no evidence that during the suspension of contract the claimants tried finding other job opportunities where the machinery could be utilised and maintained in good working order. As for personal damages there is also no evidence that the second claimant has been blacklisted by the banks or that the company has been bankrupted. Similarly there is no evidence that the second claimant's name and reputation has been damaged. What was reported in the Daily Post Newspaper is the judgment on the claimants' claim.

Conclusion

11. Having made the above observations, I am of the view that the claimants are only entitled to a sum of VT1, 144, 000 for the loss of profit for the remaining 44 days of the contract. In addition the Claimants are entitled to costs to be agreed or taxed.

DATED at Port Vila this 24th day of May 2017

BY THE COURT

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D. Aru
Judge

