

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

Civil Case No. 237 of 2014

**BETWEEN: MICHELLINE VIRELALA
JEAN MARIE VIRELALA &
RODOLPHE PIPITE**
Claimants

AND: THE REPUBLIC OF VANUATU
First Defendant

AND: THE LUGANVILLE MUNICIPALITY
Second Defendant

Coram: *Mr. Justice Oliver A. Saksak*

Counsel: *Robin Tom Kapapa for the Claimants
Lennon Huri for the Defendants*

Date of Hearing: *24th February 2017*

Date of Judgment: *8th June 2017*

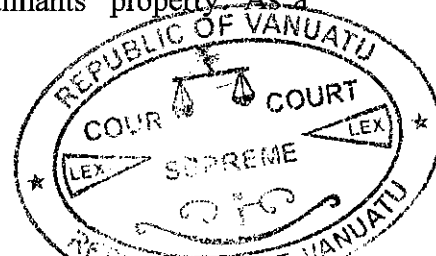
JUDGMENT

Introduction

1. This is a claim for compensation in the sum of VT 200 million for negligence and damages.

Facts

2. The Claimants are registered proprietors of Leasehold title 03/0..92/047 (the property) situate near Chapius Stadium in Luganville, Santo. The property is adjacent to land reserved as green space owned by the First and second Defendants (the Defendants). In 2008 the Claimants borrowed moneys from ANZ Bank in the form of Loans to build a house on the property. The residential house was built to almost completion. However the defendants allowed the land to be leased by Site Acquisition Services Ltd (SASL) to erect and install a telecommunication tower. The lease was registered on 4th February 2008 as lease title No. 03/0J92/077 (lease 077). SASL erected and installed their tower some 10-15 meters away from the Claimants' property. As a

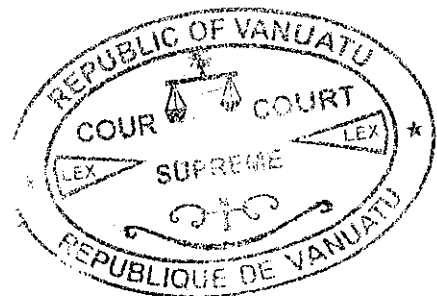


result of heavy rains and thunder storms one night in 2008 lightning caused electric shock and damaged the house. In fear the claimants have abandoned the house and property.

Claims

3. The Claimants claim-

- (a) As a result of the tower and the fear of electrical shocks and other health hazards no one is desirous of residing in the house and on the property.
- (b) The defendants were negligent in not making awareness to the nearby residents of the danger and implications of the installation of the tower.
- (c) The defendants failed to advise the claimants or the nearby residents about the dangers of living close to the tower.
- (d) The defendants failed to explain and disclose to the claimants and the public the nuisance the tower would cause to them.
- (e) The claimants and the defendants have had numerous organized meetings with the Telecommunication and Radio Communication Regulator (TRR) who has resolved the claimants be compensated by the defendants.
- (f) The TRR has written to the defendants advising them to compensate the claimants.
- (g) The First Defendant made representation accepting to compensate the claimants and that the amount instructed for payment was VT 60 million.
- (h) The defendants have not paid the amount made in the representation. As a result the claimants filed this proceeding.



The Defence

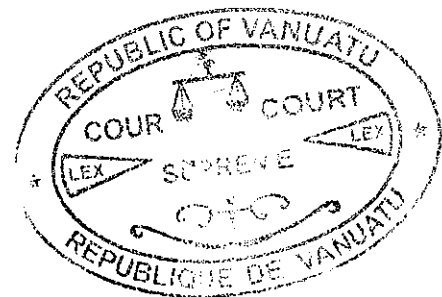
4. The defendants say-

- (a) SASL inspected the site prior to erecting their tower.
- (b) The tower is built 25 meters away from the claimants' property.
- (c) The claimants' building was never completed due to their default in repayment of their loan facility.
- (d) They do not owe any duty of care to the claimants.
- (e) They are not guilty of any breach of duty of care.
- (f) The claimants have not suffered any damages.
- (g) The representation made as to the compensation of VT 60 million was made without authority.
- (h) The letter relied on by the claimants does not constitute a legal cause of action.
- (i) The claimants have failed to mitigate their loss.
- (j) The defendants did not comply with section 6 of the State Proceedings Act in instituting this proceeding.
- (k) The claimants are not entitled to any reliefs sought.

The Issues

5. The Claimants raised the following issues-

- (a) Whether or not the Republic of Vanuatu (Government) has made representation to the claimants for compensation of leasehold title No. 03/0J92/047?
- (b) Whether or not the Republic of Vanuatu is bound by the representation made by its duly authorized representative, the Minister of Lands to compensate the Claimants at Sixty Million Vatu (VT 60.000.000)?
- (c) Whether or not the Defendants were negligent and had breached their duty of care by consenting to the erection of the tower near the claimants' residence?



6. The defendants raised four issues three of which were the same issues raised by the claimants as stated in paragraph 5. The Fourth issue is whether or not the erection of the Digicel tower poses a threat to the buildings and lives of the nearby residents?

The Evidence

7. The Claimants evidence in support of their claims were given through 2 witnesses namely Rodolphe Pipite (RP) and Michelline Virelala. (MV). RP confirmed in examination in chief his sworn statement dated 23rd September 2014 tendered as Exhibit C1 and his sworn statement dated 29th February 2016 tendered in Exhibit C2. He was cross-examined by defence counsel in relation to these two statements and re-examined. Mr Huri raised objections at the outset to paragraphs 8, 11, 16, 20 and 22 of the statement dated 23rd September 2013 and to paragraphs 3 and 4 of the statement dated 29th February 2016. The Court however overruled all objections and admitted all statements and their annexures into evidence in support of the claimants claims. The sworn statement of MV was not challenged and was admitted into evidence without objections by defence counsel.

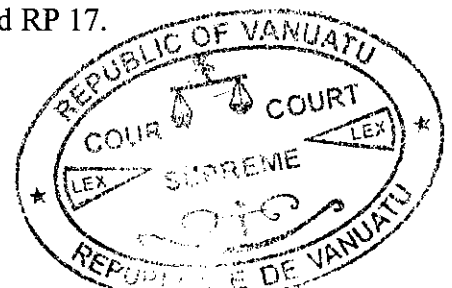
The Court will refer to relevant evidence in its discussions of the issues later in the Judgment.

8. For the defence, Jay Hinge gave evidence confirming her statements in her sworn statement dated 23rd June 2015. She was cross-examined by Mr Kapapa after which her statement and its annexure was tendered into evidence as Exhibit D1.

Considerations

9. Issue (a), whether or not the Government has made representation to the claimants for compensation?

- 9.1. The evidence of Rodolphe Pipite (RP) Exhibit D1 annexes the Attorney General's letter dated 9th April 2014 and of 24th April 2014 as RP 16 and RP 17.



9.2.The advice by the Attorney General on 9th April 2014 was given following a meeting held on 28th March 2014 was that the claimant be compensated. The Attorney General had earlier advised on 11th November 2013 that “ *the Family Virelala be compensated, this is due to the representations that were made to him during the meeting of 7th June 2012.....*”

9.3.In the Attorney General’s letter dated 24th April 2014 the Attorney General said this in the fourth paragraph “..... Note that in the event that the matter goes to Court we cannot deny the fact that the Government did make representations to Family Virelala”
(my emphasis)

9.4.It is therefore clear from this evidence that representations have been made and the defendants are stuck with that. This issue is therefore answered in the affirmative.

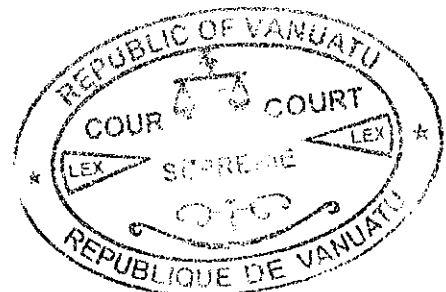
10. Issue (b), whether or not the Republic is bound by the representations made by its (then) Minister of Lands to compensate the claimants in the sums of VT 60 million?

10.1 This is both a legal and factual issue and the answer is both “ yes” and “no”. It is “yes” because factually it has been clearly established the representations exist, and “ no” because the amount was not formally approved by the Council of Ministers.

10.2.I accept the Attorney General’s submission that section 42 A of the Public Finance and Economic Management (Amendment) Act No. 3 of 2011 is clear legal basis that any request made for release for an amount of VT 10.000.000 or more must have the approval of the Council of Ministers.

10.3.That being the legal position, the only issue is as to the amount of compensation.

11. Issue (c), whether or not the defendants were negligent and had breached their duty of care by consenting to the tower being erected near the claimants’ land and residence (property).



11.1. The evidence of RP (Exhibit C1) annexes as RP 11 the Minutes of Meeting held on 7th June 2012. Present at that meeting were: the Luganville Municipal Council, Lands Department, TRR and Family representative of the Family Virelala. It is recorded under the subhead “ *Issues*” that no public consultation had been made and that the Luganville Municipal Council had no knowledge of the grant of lease to SASL and that approval had been granted to SASL to erect their tower on the leased property.

11.2. It is conceded in the defendants submissions that there was no Environmental Impact Assessment Report (EIA) made prior to the grant of the lease or license.

11.3. Section 11 of the Environmental Management and Conservation Act [CAP. 283] states:

“ All projects, proposals or development activities that

(a) Impact or are likely to impact on the environment of Vanuatu, and

(b) Require any licence, permit or approval under any law, must comply with the Provisions of this Act.”

11.4. Section 12 of the Act states:

“

1. All projects, proposals or development activities that:

a) Cause or are likely to cause significant environmental, social and/or custom impacts, or

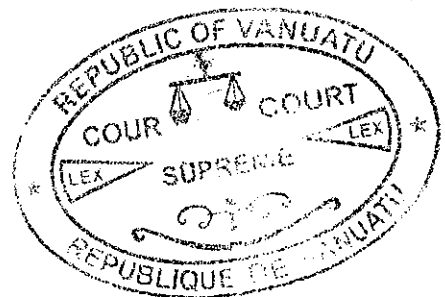
b) Cause impacts relating to the matters listed in subsection (2),

Are subject to the EIA provisions of this part.

2. Without limiting, subsection (1) all projects, proposals or development activities that will do or are likely to do all or any of the following are subject to the EIA provisions of this part:

a)

b)



- c)
- d) *result in contamination of land,*
- e) *endanger public health,*
- f)
- g)
- h) *Affect air quality,*
- i)
- j)
- k) *Result in any other activity prescribed by regulation."*

11.5. Section 14 of the Act States:

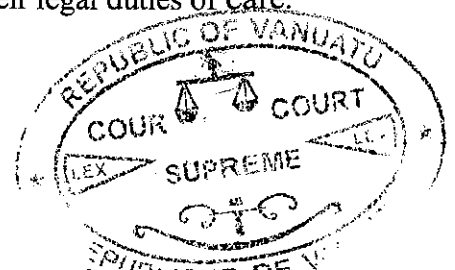
1. Subject to subsection (2), any Ministry, Department, Government Agency, local Government or municipal Council that receives an application for any project proposal or development activity not exempted by section 13 must undertake, or have undertaken on its behalf, a preliminary EIA of that application to determine:

- a) *Whether the project, proposal or development activity is likely to cause environmental, social or custom impact, and*
- b)
- c)"

(My emphasis)

11.6. Applying the law to the facts and from the evidence I find-

- a) There was no application made or submitted by SASL. If there was, there is no evidence of it.
- b) Sections 11 and 12 of the Act were therefore not complied with by SASL.
- c) Section 24 places a mandatory requirement on the Government and its agencies, departments and the Luganville Municipal Council (the defendants herein) to undertake a preliminary EIA of the application. This was not done. The end result is that the Government and the Luganville Municipal were negligent in their legal duties of care.



The consequential effect of that failure is that the Government and the Luganville Municipal Council breached their duty of care to the claimants and the public.

11.7. The issue in (c) therefore is answered in the affirmative.

12. The issue in (d) is whether or not the erection of Digicel tower poses a threat to the buildings and live to nearby resident?

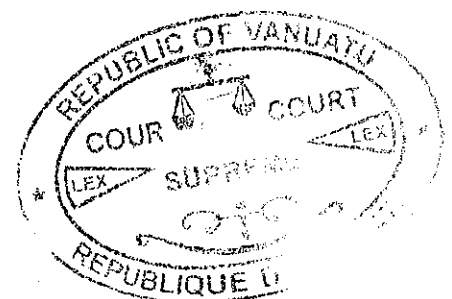
12.1. To answer this issue adequately the Court needs expert evidence. And neither the claimant nor the defendants called any such expert to give evidence to this effect.

12.3. RP did give evidence annexing TRR's letter of 20th April 2012. ("RP9", Exhibit C1) which show TRR stating that "the environmental and safety concerns of people who live near a radio mast have been taken into serious consideration by Governments, Operators, and International Standards Authorities....."
(emphasis added)

12.4. This is a presumption that has no legal or factual basis in the absence of an EIA Report.

12.5. The evidence of RP also discloses a letter of 15th June 2014 written by Donatian Batsari annexed as "RP 2" to Exhibit C1. This is the letter confirming that in December 2008 there was lightning strike which blew up every electrical light pulps in the building. That was a one time incident which gave right to this claim. As a result of this one-time incident no one is prepared to occupy the building of the claimants. It is on the basis of this incident that the Government made representations to compensate the claimants. Having made those representations the Government as it were, is acknowledging that this tower erected by SASL is a threat to the nearby residents and the claimants.

12.6. For those reasons this last issue is answered in the affirmative.



The Result

13. The Claimants are successful and judgment is entered in their favour as to liability against the defendants. The remaining and final issue is therefore quantum.

Quantum

14. The Claimants have reduced their initial claims or damages of VT 200.000.000 down to VT 60.000.000. This is the amount that the then Minister of Lands, Paul Telukluk by letter dated 1st October 2015 instructed the Solicitor General to prepare a Deed of Release for payment. This is disclosed to the Court in the evidence of RP as Annexure "RP A" to his sworn statement dated 29th February 2016 (Exhibit C2).

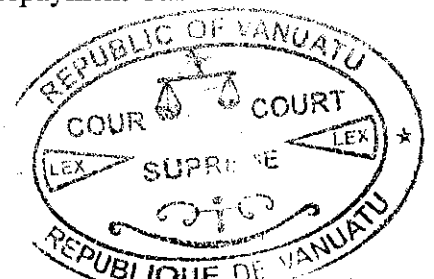
15. It is obvious from the submissions by the defendants that this sum is not accepted as the letter does not specify how the amount of VT 60 million was arrived at.

16. In assessing the amount of compensation to be paid to the Claimants by the defendants, I am assisted by the evidence of Michelline Virelala, (Exhibit C3) and of Jay Hinge (Exhibit D1). Annexure "MV 19" shows Compensation Summary Tables-

Table A- Loans-

(a)	Amount Loaned	VT 12.000.000
(b)	Fortnightly and Yearly Payments form 2008-2014	VT 6.006.000
(c)	Repayment Base and Interest for 2008-2014	VT 10.940.304
	TOTAL	VT 16.946.304

17. Ms Hinge's evidence by sworn statement discloses documents relating to the claimant's loans. The amount is VT 8.100.000. I accept this as the correct amount and reject the amount of VT 12 million. I also reject the fortnightly and yearly amount of VT 6.006.000. These were paid by the claimants under the terms of the loan and should not have to be compensated for or repaid. But I accept that with the repayment base and



interest rate the amount would be VT 10.940.304 as claimed. The total compensation therefore is VT 10.940.304 for this Table.

18. Table B- Expenditures. The claimants have not proved these claims by any evidence, documentary or otherwise. The sums claimed at VT 4.336.000 are therefore rejected.
19. Table C – Expenditures for Mr and Mrs Rodolphe Pipite. The sums of VT 5.938.600. The claimants have not produced any evidence, documentary or otherwise substantiating those claims. And therefore these claims are rejected. However I am inclined to accept the lower sum of VT 1.331.260 calculated by Mr Pipite in Annexure “ RP 13” to his sworn statement (Exhibit C1).

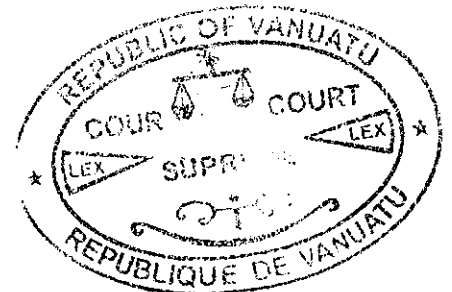
The total sum awarded under this Head shall be VT 1.331.260.

20. Table D – Interests. This claim is for VT 75.000.000. There is no evidentiary basis for this claim and it is rejected.
21. Table E- Property Valuation. The total sum of VT 30.000.000 are claimed for these as follows-

(a) Value of Vacant Land	VT 3.207.789
(b) Value of residential building	VT 10.627.000
(c) Value of improvement	VT 2.000.000
(d) Margins	VT 14.165.211

I do not understand what the claimants mean by “margin” so this claim is rejected. And I also reject the VT 2.000.000 claimed separately as improvement. My understanding of improvement is the land value plus the building costs. I therefore allow only VT 3.207.789 and VT 10.627.000. The total allowed shall be VT 13.834.789.

22. Table F. Lawyers Payments. An amount of VT 2.000.0000 is claimed. This is a fair amount and it is accepted.



23. In summary the following sums are allowed:

Table A VT 16.946.304
Table B NIL
Table C VT 1.331.260
Table D NIL
Table E VT 13.834.789
Table F VT 2.000.000
TOTAL VT 34.112.353

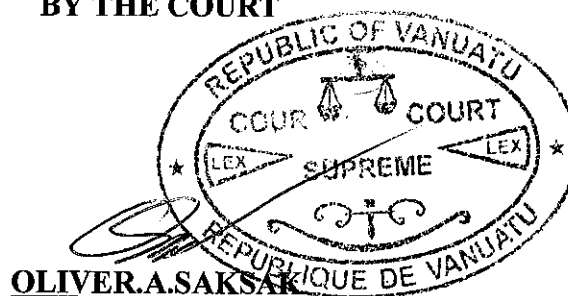
24. The total amount of compensation awarded to the claimants against the defendants are the sums of **VT 34.112.353**.

The Result

25. The Claimants therefore have judgment for the total sums of VT 34.112.353 against the defendants. There will be no separate order of costs as the VT 2 million awarded in Table F will cover the costs of the claimants.

DATED at Port Vila this 8th day of June 2017

BY THE COURT



Judge