

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

Judicial Review
Case No. 19/3467 SC/JUDR

BETWEEN: IMPI Limited trading as ENERGY 4 All
Applicant

AND: THE DEPARTMENT OF ENERGY of the
Government of the Republic of Vanuatu
Defendant

Date of Judgment: 28 March 2022

Before: Justice D. Aru

Counsel: Mr E. Nalyal for the Claimant
Ms. A. Bani for the Defendant

RESERVED JUDGMENT

Introduction

1. This is a claim for judicial review filed by the claimant IMPI Limited trading as Energy 4 All against the Department of Energy of the Government of the Republic of Vanuatu. This judgment relates to the rule 17.8 conference/hearing under the Civil Procedure Rules.
2. Rule 17.8 provides as follows:

"Court to be satisfied of claimant's case

17.8 (1) As soon as practicable after the defence has been filed and served, the judge must call a conference.

(2) At the conference, the judge must consider the matters in sub rule (3);

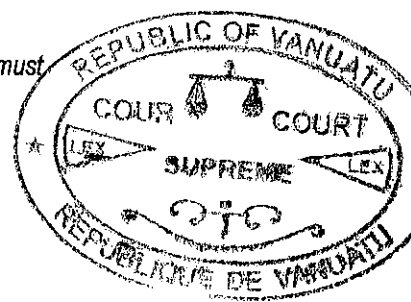
(3) The judge will not hear the claim unless he or she is satisfied that:

- (a) the claimant has an arguable case; and
- (b) the claimant is directly affected by the enactment or decision; and
- (c) there has been no undue delay in making the claim; and
- (d) there is no other remedy that resolves the matter fully and directly.

(4) To be satisfied, the judge may at the conference:

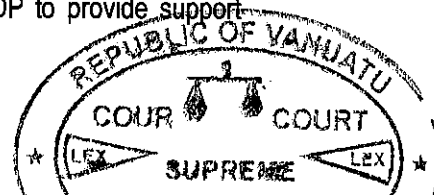
- (a) consider the papers filed in the proceeding; and
- (b) hear argument from the parties.

(5) If the judge is not satisfied about the matters in subrule (3), the judge must decline to hear the claim and strike it out."



Discussion

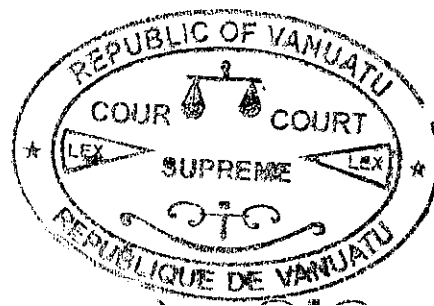
3. Under sub rule (3) above, I will not hear the claim unless I am satisfied of a number of matters namely; that the claimant has an arguable case; the claimant is directly affected by the enactment or decision; there has been no undue delay in making the claim; and there is no other remedy that resolves the matter fully and directly.
4. The matter was initially called for the first conference on 16 March 2020. At that conference Mr Nalyal did not appear. Ms Bani (now deceased) was present and agreed to an adjournment. The hearing was adjourned to 30 April. Both Counsels appeared for the hearing on that date. Before the hearing proceeded, Mr Nalyal applied for a further adjournment on the basis that he needed more time to prepare. He accepted to pay wasted costs of VT5000 and the hearing was again adjourned to 5 June 2020. There was no appearance from Mr Nalyal again on that date. Ms Bani was present and ready to proceed. Given the non appearance of Mr Nalyal she sought wasted costs VT10,000 making a total of VT15,000 to be paid by the claimant before the next hearing which was listed for 23 June 2020 at 10.00am.
5. Mr Nalyal did not appear for the hearing and no reasons were given for his absence. I was also informed by Ms Bani that previous costs ordered against the claimant were also not paid as directed.
6. The hearing proceeded as more than enough time was allowed to Mr Nalyal and he had done nothing to comply with the directions. In this judgment, I have considered the following documents which were filed namely:
 - Urgent claim for judicial review filed on 20 December 2019;
 - Sworn statement of Mr Nicholas Ritsinias also filed on 20 December 2019;
 - Defence filed on 17 January 2020;
 - Written submissions filed on 30 April 2020;
 - Sworn statements of Ms Doreen Leona filed on 17 January and 21 April 2020 respectively;
 - Sworn statement of Mr Joel Caleb filed on 27 January 2020;
 - Sworn statement of Mr Joseph Temakon also filed on 27 January 2020.
7. No written submissions were filed by the claimant to date. No specific directions were issued for the filing of submissions however the State did file submissions. Ms Bani submitted that she relies on her submissions and for the Court to issue a decision on the papers. In line with those submissions she submitted that if the matter is struck out costs should be awarded against the claimant.
8. The background to the dispute is set out in the sworn statement of Ms Leona and is not disputed by the claimant. The Barrier Removal of Achieving the National Target of Vanuatu project (the Project) is funded directly by the Global Environmental Facility and the funds are administered in Suva, Fiji by the office of the United Nations Development Fund (UNDP) based there. The overall purpose of the Project is to enable the National Energy Road Map to achieve its target of 100% rural electrification by 2030.
9. The Project is implemented by the Vanuatu Government through the Project Management Unit (PMU) under the Department of Energy (DoE). And is in accordance with an agreement signed between the DoE and UNDP on 7 November 2018 specifically for UNDP to provide support



services to DoE in the following areas namely identification and recruitment of project and program personnel; identification and facilitation of training activities and procurement of goods and services.

10. The Project developed an annual work plan for 2019 divided into four (4) quarters to implement its activities. The funds were requested by the PMU from UNDP in Fiji also on a quarterly basis. In the 4th quarter of 2019 (October to December 2019), the UNDP retained all the funds and decided to facilitate all the payments to service providers/contractors from Fiji. It was during this time that there were 5 PV (Photovoltaic) solar systems to be installed in five (5) demonstration sites namely: Utanlangi on the island of Nguna; Pele Village on the Island of Tonga; Saufeli Community on the Island of Malo,(Santo) and Angoro and Abwatuntora villages on North Pentecost.
11. Implementation of the 4th quarter would complete Outcome 5B of the Project document called *"Enhance confidence in the economic and technical viability and long term sustainability of sustainable energy and low carbon energy projects"*. Outputs and activities to be implemented to achieve this outcome were the demonstration of several types of PV solar systems of different capacities based on load assessment. Each would be different as there was no standardised size that would fit all four sites. The Project aimed to demonstrate various types of systems of differing capacities which meant that each system will be unique.
12. To implement the 4th quarter, the Project used the Vanuatu Rural Electrification Project (VREP) approved vendor/suppliers namely:
 - Power and Communications Solutions;
 - Savvy Solar;
 - Etech Vanuatu; and
 - The claimant, Energy 4 All.
13. These vendor/suppliers were to supply the PV Solar systems through a Request for Quotation process .Energy 4All was approved by DoE as an approved VREP vendor/supplier by letter date 9 May 2019. Following this approval, Energy 4All was also informed in its approval letter that *"the next steps would be for Energy 4All to sign the Subsidy Implementation Agreement (SIA) then proceed to submit product applications for approval..."* .
14. The SIA agreement was signed by Energy 4All on 1 July 2019 with the Government in relation to VREP.
15. On signing SIA, Energy 4All agreed to carry out its obligations in accordance with VREP guidelines which are incorporated into the Subsidy Implementation Manual (SIM). The manual sets out the operation of the subsidy program whereby a vendor supplies solar home systems for VREP.
16. Around 2018 – 2019 three (3) employees of Energy 4All attended the Sustainable Energy Industry Association of the Pacific Islands training on Design and installation of off grid power systems funded by VREP. The three employees were successful and were awarded with Provisional Accreditation for Design and Installation of Off Grid level 1 and level 2.
17. The claimant does not dispute the application of the SIA agreement nor the VREP guidelines incorporated into SIM.

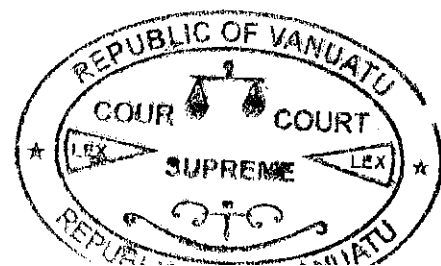
Arguable Case



18. The first and main issue is whether the claimant has an arguable case.
19. First the claimant alleges that they were not informed of the technical standards they had to meet before submitting their quotations and second that no reasons were given as to why their quotes only met the technical standards of one site but not the remaining three (3) sites .
20. The whole issue arose after Mr Joel Galeb of DoE approached Mr Nicholas Ritsinias of Energy 4All to provide quotes for the 4 different sites. Mr Ritsinias was informed the sites were all in different rural areas. The load analysis of the sites were provided to Mr Ritsinias by Joel Galeb who also dealt with his queries about the AC side of the systems .Regarding the system design specifications, Mr Ritsinias was told that they were to be in line with VREP guide lines.
21. Being an approved VREP vendor/supplier with three of its employees trained in designing and installing off grid power systems, the claimant was familiar with the VREP guidelines and requirements on design and installation of solar systems.
22. Quotes were sought from 4 different suppliers including the claimant to be able to assess and evaluate what system was best suited for each of the sites .The fact that only one quote was accepted is a simple fact of everyday business which the claimant would be familiar with. The defendant is not legally obliged to explain why the claimant's other quotes were not accepted. The solar systems were for four demonstration sites. Each unique to its site location as there was no standardised system that would fit all four sites as deposed by Mr Caleb and Ms Leona .
23. Thirdly the claimant claims that the defendant breached the provisions of the Government Contracts and Tenders Act [CAP 245] as amended on two aspects. Firstly that the process was not transparent, and second, that the contracts were split to avoid the VT 5million threshold so that a tender process would not be required.
24. Section 3 of the Act as amended provides for Government Contracts with a value of less than VT5million and subsection (5) states:

"(5) Prior to entering into a Government Contract with a value of less than VT 5,000,000 a Director General must:

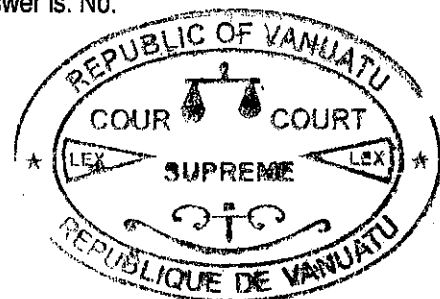
- (a) ensure the contract is consistent with Government policy; and*
- (b) ensure the contract is fiscally responsible, prudent, cost effective, and is a necessary obligation for Government to assume; and*
- (c) consult with the Director of the Department of Finance and satisfy himself on reasonable grounds that the Government has or is likely to have the financial ability and resources to meet all of the obligations under the contract including future obligations; and*
- (d) ensure that no conflict of interest exists between a Director General and the other party; and*
- (e) use a competitive and transparent process when deciding who to award the contract to including where applicable, a request for quotations process as may be prescribed by this or any other Act or regulation; and*



(f) *obtain the concurrence of the Director of the Department of Finance that the procedures in accordance with this or any other applicable Act have been followed.*

(6) *A Government Contract must not be awarded to a Public Servant, a Minister or a Member of Parliament or a leader as defined in the Leadership Code Act [CAP 240]."*

25. The claimant alleges that the defendant breached s3 (5) e) above as the process of requesting quotes was not transparent. Mr Caleb's evidence is that he obtained quotes from all four VREP approved suppliers including the claimant. On 14 November 2019 he informed Mr Ritsinias that the quotes would be evaluated to approve the suppliers of the solar systems for each site. On 25 November 2019 Mr Ritsinias enquired by email to Mr Caleb on updates on the evaluation to which Mr Caleb responded the next day that evaluations will be finalised the following week.
26. This exchange of emails was later followed by a number of emails accusing and threatening legal action against the Director of DoE and their staff.
27. The evaluation report was completed on 5 December 2019. (Annexed as DL7 to the sworn statement of Ms Leona filed on 17 January 2020) .Energy 4All was informed of the outcome through Mr Ritsinias the same day by Mr Caleb. Mr Ritsinias was not happy upon being informed he had been awarded one of the sites and argued as to why he was not awarded all the sites. This was followed up with email after email accusing DoE and their staff until the claim was filed.
28. Eventually on 13 January 2020 Ms Leona informed Mr Ritsinias that the award to Energy 4All to supply PV Solar systems for Pele on Tongoa Island had been cancelled for the following reasons:
- Non-cooperation after DoE/PMU informed him of its interest in one of his systems for Pele Village;
 - Continuous correspondence intimidating, harassing ,and threatening staff of DoE/PMU up to the date the JR claim was filed;
 - Non submission of pro forma invoices as requested on 5 December 2019; and
 - Finally that the work plan for phase 4 could be delayed further by Energy 4All as it could affect the whole Project and its donor partners.
29. The second aspect of the claimant's complaint about breaches of the Act relates to contract splitting. The claimant says that the contracts were split so that they fall under the threshold amount of VT5million and the defendant had to use a request for quotations instead of calling for tenders. The defendant submits that this is without basis and I agree. The project was for 4 demonstration sites. There were four different arrangements for each site and not one of which the defendant could split into four. Furthermore the total cost for each system to be installed on each site was less than VT5million.
30. In answer to the question whether the claimant has an arguable case the answer is: No.



Was the claimant directly affected?

31. The claimant is a VREP approved vendor/supplier of goods and services including three others as mentioned above. The reason they were approached to provide quotes was that the total cost of each system was under VT 5million. All the quotes submitted were evaluated as shown in the evaluation report before projects were awarded. The claimant was successful in being awarded the Pele project but refused to provide their invoices when requested to progress the work. Given the circumstances, they are not directly affected.

Undue delay

32. Mr Ritsinias was informed of the results of the evaluation on 5 December 2019. The proceedings were filed on 20 December 2019. There was no undue delay as the claim was filed some two weeks after the claimant was informed of the decision.

Any other remedy that resolves the matter fully

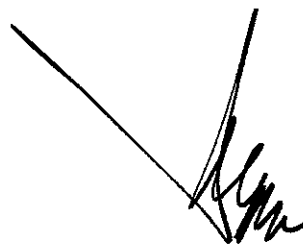
33. The defendant submits that there is no other remedy that resolves the matter fully. I agree. The claimant intends to challenge the decision of the defendant. The only way to do that is by judicial review but I cannot hear the claim unless I am satisfied the claimant has an arguable case. He does not as I have said above.

Result

34. Despite there being no undue delay in making the claim, I am satisfied the claimant has no arguable case that could sustain the claim. Therefore the urgent judicial review claim is hereby struck out and the defendant is entitled to costs fixed at VT85,000 to be paid within 28 days .

DATED at Port Vila, this 28th day of March, 2022

BY THE COURT



D. ARU
Judge.

