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

Civil Case
No. 22/780 SC/CIVL

BETWEEN: Albea David representing Mele Maat Community
Claimant

AND: Ponatoka Development Company Limited
Defendant

Date: 5 June 2023

Before: Justice V.M. Trief

Counsel: Claimant – Mr J. Harold, for Mr D. Yawha

Defendant – Ms V. Muluane, for Mrs M.N. Ferrieux Patterson

DECISION AS TO COSTS

A. Introduction

1. By Decision as to Application to Strike Out Claim and as to the Claimant Albea David representing Mele Maat Community's ('Mr David') Urgent *Ex Parte* Application for Restraining Orders dated 28 April 2022, I declined the Application for Restraining Orders and granted the Application to Strike Out Claim (the 'Decision').

2. I considered that the Application for Restraining Orders was doomed to failure and that the Claim was hopeless as it did not disclose a cause of action therefore invited the Claimant's written response as to why the Defendant Ponatoka Development Company Limited's ('Ponatoka') costs of the proceeding should not be paid on an indemnity basis, and Mr Harold and Mr Yawha's response as to why those costs should not be personally paid by them.

3. By Response to Indemnity Cost pursuant to the Supreme Court Decision dated 28 April 2023 filed on 15 May 2023, Mr Harold provided his response and submissions as to costs. No submissions were filed by Mr Yawha however as Mr Harold works in Mr Yawha's firm and under his supervision, I assume the decision was taken for submissions to be made by Mr Harold only.

4. In reply, on 23 May 2023, Ponatoka filed Defendant's Reply to the Response to Indemnity Costs pursuant to the Supreme Court Decision dated 28.04.23 filed on 15.05.23.

5. This is the decision as to costs.

B. Late filing of Claimant's submissions

6. I stated as follows in para. 2 of the Decision:

> *No submissions have been filed by that time or since.*

7. What I stated in para. 2 of the Decision was incorrect as the following had been filed but I was unaware when I issued the Decision that they had been filed:

   a) Response to Strike Out Claim filed on 21 April 2023;

   b) Sworn statement of Albea David in support to Oppose the Strike Out Claim filed on 28 April 2023; and

   c) Legal Submission for the Claimant filed on 28 April 2023.

8. However, all three documents were filed late as they were filed after the time required in the Orders dated 13 April 2023, that is, by 4pm on 20 April 2023.

9. The Legal Submission filed on 28 April 2023 was filed on the same day as the Decision issued. It was filed too late for any consideration by the Court.

10. The Response to Strike out Claim filed on 21 April 2023 and the supporting sworn statement do not raise any matter to show that the Claim disclosed a cause of action or that the Claimant had standing to bring the Claim.

C. Submissions

11. In opposition to indemnity costs being ordered, Mr Harold submitted as follows:

   a) That the Claimant believed it had reasonable grounds to forward the matter to Court for argument however counsel failed to attend the hearing;

   b) He accepted his fault and apologized on this matter;

   c) He was not fully clairvoyant or could not predict the outcome therefore he should not be held liable for the cost;

   d) That the hearing was held on the date listed and decision made therefore there was no further prolonging of the proceeding. Despite his non-attendance at the hearing and filing the submissions late, the Court gave its decision without delay; and

   e) That he did not deliberately or without good cause engage in conduct that resulted in increased costs.

12. In opposition to counsel personally bearing costs, Mr Harold submitted as follows:

    a) That it was the Claimant's intention to pursue their case because they were actual occupants of the land since 1963; and

    b) Claimant's counsel was responsible for filing the submissions and sworn statements late and for failing to inform the Court.

13. In the Reply submissions filed on 23 May 2023, Ms Muluane submitted as follows in support of indemnity costs being ordered and to be personally borne by counsel:

    a) That Claimant's counsel as reasonably competent lawyers should have advised Mr David not to bring the proceeding as they owe a duty to their client and as officers of the Court to analyse the case and weigh its prospects of success and advise the client accordingly;

    b) That Claimant's counsel should have concluded that because the lease does not exist anymore and as alleged pre-Independence "occupiers", the Claimant does not have any legal right on the lease therefore he has no standing nor cause of action;

    c) That on 23 February 2023, Defendant's counsel gave Claimant's counsel notice that if the Application for Restraining Orders was not withdrawn and the Strike-out Application conceded to, that indemnity costs would be sought. No reply was received from either Mr Yawha or Mr Harold;

    d) That the Claimant had prolonged the proceeding without any good cause which resulted in increased costs due to the following:

        i. On 17 November 2022, the Court ordered that the Claimant serve the Urgent *Ex Parte* Application and the supporting documents by 1 December 2022. The Claimant did not comply with this Order;

        ii. On 16 December 2022, the Court noticed that the documents were served on 12 December 2022 and remarked that, "*the Claimant's failure to comply with the Orders has likely resulted in the Defendant not having had enough time to retain counsel or respond to the Application. Certainly there was no appearance today for the Defendant.*" Consequently, the hearing of the Urgent *Ex Parte* Application was postponed again;

        iii. The Court requested three times on 20 February 2023, on 20 March 2023 and on 13 April 2023 for the Claimant's counsel to state which document would have to be declared ineffectual as he had filed the Claim twice in identical terms (on 7 December 2022 and on 22 December 2022). I noted that the inefficiency on the part of Claimant's counsel was unhelpful. No response was ever received from counsel; and

        iv. No submissions for the Claimant were filed by 4pm on 20 April 2023 as ordered on 13 April 2023.

D. Discussion

14. I stated as follows in paras 21-24 of the Decision:

> *21. There was no attempt by the Claimant to comply with rule 7.5 of the CPR in the manner in which it made its Application hence the Application was doomed to failure. Further, it prolonged the proceeding without good cause. The Claim also was hopeless as it does not disclose a reasonable cause of action nor does the Claimant have standing to bring it. I am minded therefore to order that the Defendant's costs of the proceeding be paid on an indemnity basis.*
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> *22. I consider that a reasonably competent lawyer would not have drawn the Claimant's Application and the Claim as they did with each having no prospect of success. In the circumstances, I consider that Mr Harold and Mr Yawha have without good cause engaged in conduct that resulted in increased costs – see r. 15.5 of the CPR.*
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> *23. For the same reason, the costs of the proceeding are an unnecessary expense for the Defendant incurred by Mr Harold and Mr Yawha – see r. 15.26(2)(c) of the CPR. Accordingly, it is not fair that the Claimant pay those costs. I am minded therefore to order that Harold and Mr Yawha personally pay the Defendant's costs of the proceeding.*
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> *24. Therefore in accordance with r. 15.26(3) of the CPR, I hereby require Mr Harold and Mr Yawha's written response **by 4pm on 16 May 2023** as to why the Defendant's costs of the proceeding should not be paid on an indemnity basis, and why those costs should not be personally paid by Mr Harold and Mr Yawha.*

15. Having considered counsel's submissions, I maintain my view that the Urgent *Ex Parte* Application for Restraining Orders was doomed to failure for the reasons given. I also maintain my view that the Claim was hopeless as it did not disclose a cause of action and that the Claimant did not have standing to bring the Claim.

16. In *Kramer Auscenco (Vanuatu) Ltd v Supercool Vila Ltd* [2018] VUCA 29 at [13], the Court of Appeal ordered costs on an indemnity basis, referencing that "*the appeal was a hopeless case, with absolutely no prospects of success*". The Court of Appeal also ordered indemnity costs in *Siri v National Bank of Vanuatu Limited* [2023] VUCA 12 at [33] stating that, "*This was a hopeless claim.*"

17. The facts in *Kramer* and *Siri* are different from the present matter however they are both matters in which the Court held that the appeal advanced was a hopeless case and ordered that costs be paid on an indemnity basis. I consider they are precedent for this Court similarly to order that costs be paid on an indemnity basis in the circumstances of a hopeless case.

18. Accordingly, costs will be ordered on an indemnity basis.

19. Contrary to Mr Harold's submissions, I consider that reasonably competent lawyers would not have drawn the Urgent *Ex Parte* Application and the Claim as they did with no prospect of success. It is no excuse to say that their client intended for the matter to be brought to Court. Counsel's duty was to analyse the case and to provide legal advice including as to the prospects of success. With respect, it should have been patently obvious that neither had any prospect of success. In those circumstances, I consider

that Claimant's counsel without good cause engaged in conduct that resulted in increased costs and the costs of the proceeding were an unnecessary expense for the Defendant therefore will order that Claimant's counsel personally pay the Defendant's costs of the proceeding.

20. I am not aware that Mr Harold is a lawyer who may practise on his own account. He works in Mr Yawha's firm and is subject to Mr Yawha's supervision. In the circumstances, I consider that the costs should be personally borne jointly and severally by both Mr Yawha and Mr Harold.

E. Result and Decision

21. By Decision as to Application to Strike Out Claim and as to the Claimant's Urgent *Ex Parte* Application for Restraining Orders dated 28 April 2022, I declined the Claimant's Application for Restraining Orders and granted the Defendant's Application to Strike Out Claim.

22. Costs must follow the event.

23. For the reasons given, Claimant's counsel Mr Yawha and Mr Harold are to personally pay, jointly and severally, the Defendant's costs of the proceeding on an indemnity basis as agreed or taxed by the Master. Once settled, the costs are to be paid within 28 days.

24. The listing on 21 November 2023 is **vacated.**

DATED at Port Vila this 5th day of June 2023
BY THE COURT

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Justice Viran Molisa Trief

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