

BETWEEN: E.T.P LIMITED
First Claimant

**AND: SANDY ROSE CLOCHARD & PHILIPPE
CLOCHARD**
Second Claimant

AND: ALEX PALAVI
Defendant

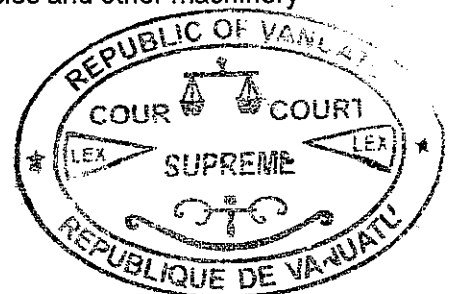
AND: NATIONAL BANK OF VANUATU
Interested Party

Date of Hearing: 17 October 2024
Date of Decision: 21 October 2024
Before: Justice M A MacKenzie
Counsel: Mr. A. Bal for the First and Second Claimant
Mr. T. J. Botleng for the Defendant
Mr. A. Kalmet for the Interested Party
Copy to: Mr R Willie for the Other Interested Party

DECISION

The application

1. The Defendant, Mr Palavi seeks a freezing Order under Rule 7.8 of the Civil Procedure Rules.
2. He seeks four specific Orders: -
 1. That Mr and Mrs Clochard, Mr Palavi and their agents and Servants be restrained from using the name ETP Limited in acquiring any contractual works from any company, Government Departments and any private individuals in Vanuatu.
 2. That Mr and Mrs Clochard, Mr Palavi and their agents and Servants be restrained from using any assets of ETP Limited, including any vehicles and other machinery belonging to ETP Limited.

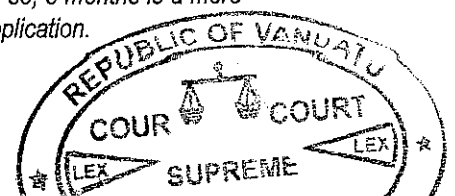


3. That Mr and Mrs Clochard surrender the keys of all machinery of ETP Limited (as listed at paragraph 3 of the application) to the Registrar of the Supreme Court for safekeeping.
4. That Mr and Mrs Clochard, Mr Palavi and their agents and Servants be restrained from collecting any funds or payments or issuing any invoices in the name of ETP Limited.
3. The basis for the application is that Mr Palavi will be seriously disadvantaged and prejudiced if the Order is not granted. The key issue from Mr Palavi's perspective is to ensure that pending the trial of the claim and the counterclaim that both parties are on an equal footing. Mr Botleng describes this as "fairness".
4. Despite a direction made by the Court on 18 July 2024 that written submissions were to be filed by 7 August 2024, Mr Botleng has not done so.¹
5. ETP Limited and Mr and Mrs Clochard oppose the application. Their position is that the ETP Limited and the Clochards, as directors and shareholders of the company are entitled to enter into contracts and use the machinery. As such, there is no basis for a restraining Order.
6. The National Bank is an Interested Party. That is because it has a lien over 5 items of equipment owned by ETP Limited, and ETP Limited also has an overdraft and two loans with the bank. The bank maintains a neutral position in respect of the application. It will abide by the decision of the Court. In his sworn statement filed on 19 July 2024, Mr Dali confirmed that the bank had no objection to the removal and the relocation of an excavator to Port Vila.

Why has the application been made?

7. At the heart of the proceedings is a dispute as to the shareholding and control of ETP Ltd.
8. Mr Palavi, according to his evidence, was appointed as a director and shareholder of ETP Ltd on 26 January 2016. He refers to various company extracts, but in his various sworn statements gives no explanation as to the circumstances of how he became a director and shareholder or what his role in ETP Ltd was.
9. On 16 February 2017 he consented to the National Bank using his title 12/0921/008 as security for borrowings of ETP Ltd. He says he has made various repayments himself under the loan. This does not form part of his counterclaim.
10. On 18 January 2021 Sandy and Phillipe Clochard were appointed as the directors of ETP Ltd. From then on, they are the only directors of ETP Ltd. Mrs Clochard is the only

¹ The Court is mindful of, any has made allowances for Mr Botleng's health issues. Even so, 3 months is a more than sufficient opportunity for Counsel to file submissions in relation to an interlocutory application.



shareholder currently, holding 1000 shares. The circumstances of the Clochards being appointed directors and the transfer of the shares to Mrs Clochard are not clear. The circumstances are not explained in the evidence. The one glimmer is a document annexed to Mrs Clochard's sworn statement filed on 4 July 2024 as SRC 5. The document appears to be a record of a meeting on 18 January 2021, and refers to an agreement of 18 December 2020 between Mrs Clochard, one of the former directors and Mr Palavi. That agreement is not before the Court.

11. There is no evidence from any party as to Mr Palavi's role in ETP Ltd, both before and after 18 January 2021. What the evidence confirms is that whatever his role was, Mr Palavi's role in ETP Ltd was terminated by ETP Ltd via a company resolution dated 27 September 2022. The written Minutes of the meeting are annexed to Mrs Clochard's sworn statement of 4 July 2024 as SRC 4. The Minutes record that Mr Palavi refused to follow Mrs Clochard's instructions and performed work without consulting or obtaining Mrs Clochard's approval. Therefore, he breached the contractual arrangement and is "*automatically terminated from his employment.*"
12. Mrs Clochard believed that Mr Palavi was undertaking contracts in the name of ETP, using its machinery and not accounting for the contract funds received. Proceedings followed. Mr Palavi counterclaimed alleging employment and company related issues. In particular, Mr Palavi's counterclaim includes a claim to be paid the value of his shares, damages for loss of revenue and to be restored as a director and shareholder.

The claim

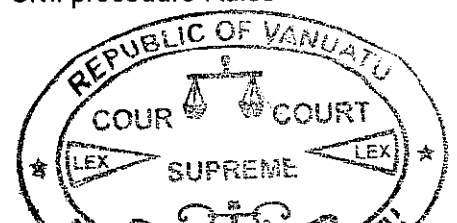
13. Before the claim was filed on 19 May 2023, ETP Ltd, sought and was granted an interim restraining order on 13 April 2023 against Mr Palavi on a without notice basis.
14. The claim is that Mr Palavi obtained contracts in the name of ETP Ltd, retained the proceeds of such contracts, and used machinery belonging to ETP Ltd. The relief sought is for a sum of money for tractor rental, general damages and special damages, on the basis that ETP Ltd suffered substantial loss and damage

The defence and counterclaim

15. Mr Palavi denies that ETP Ltd is entitled to the relief sought and filed a counterclaim. In the counterclaim, Mr Palavi claims under the Employment Act for various employee entitlements. He also seeks payment for his shares in ETP Ltd, damages for loss of revenue from ETP Ltd and a number of declarations which would see him restored as a director and shareholder of ETP Ltd.

The Law

16. The application is for a freezing order pursuant to rule 7.8 of the Civil procedure Rules ("CPR"), which says;



Order to protect property (freezing order, formerly called a Mareva order)

7.8

(1) *In this rule:*

“owner”, for assets, includes the person entitled to possession and control of the assets.

(3) *The court may make a freezing order whether or not the owner of the assets is a party to an existing proceeding.*

(4) *The court may make the order only if:*

(a) *the court has already given judgment in favour of the applicant and the freezing order is ancillary to it; or*

(b) *the court is satisfied that:*

- (i) *the applicant has a good and arguable case; and*
- (ii) *a judgement or order in the matter, or its enforcement, is likely to involve the assets; and*
- (iii) *the assets are likely to be removed from Vanuatu, or dealing with them should be restrained.*

(5) *The application must:*

(a) *describe the assets and their value and location; and*

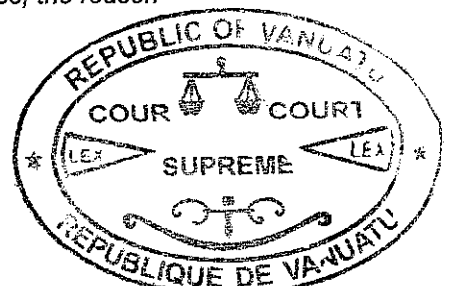
(b) *include the name and address of the owner of the assets, if known, and the identity of anyone else who may be affected by the order and how they may be affected; and*

(c) *if a proceeding has not been started, set out:*

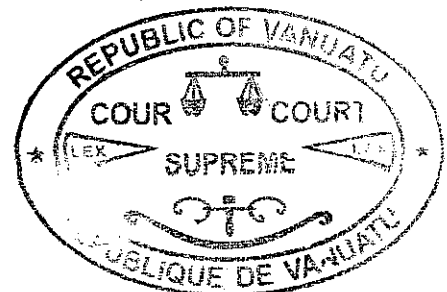
- (i) *the name and address of anyone else likely to be a defendant; and*
- (ii) *the basis of the applicant's claim; and*
- (iii) *the amount or nature of the claim; and*
- (iv) *what has been done to recover the amount of the claim, or to get the relief claimed; and*
- (v) *any possible defences to the claim; and*

(d) *in any case, set out:*

- (i) *how the assets to be subject to the order will form part of any judgment or its enforcement; and*
- (ii) *what will be done to preserve the assets; and*
- (iii) *if the application has not been made on notice, the reason for this; and*



- (d) *include an undertaking as to damages that may be caused to the defendant or potential defendant, or anyone else who may be adversely affected, if the order is made; and*
- (e) *have with it:*
- (i) *a sworn statement in support of the application; and*
(ii) *a draft freezing order.*
- (6) *The sworn statement must include the following:*
- (a) *why the applicant believes:*
- (i) *the assets may be removed from Vanuatu; or*
(ii) *dealing with the assets should be restrained; and*
- (c) *if the court has already made a judgment or order, why the applicant believes the judgment or order already made may not be able to be satisfied, or may be thwarted, if the freezing order is not made; and*
- (d) *if a proceeding has not been started and the name and address of the owner of the assets, and anyone else likely to be a defendant, are not known, what has been done to find out those names and addresses; and*
- (e) *in any case:*
- (i) *how the assets to be subject to the order will form part of any judgment or its enforcement; and*
(ii) *what will be done to preserve the assets; and*
(iii) *if the application has not been made on notice, the reason for this.*
- (7) *If the name and address of the owner of the assets is not known, the application may be served as follows:*
- (a) *for service on a ship, by attaching it to the mast; or*
- (b) *for service on an aircraft, by attaching it to the pilot controls; or*
- (c) *in any case, as the court directs.*
- (8) *When making the freezing order, the court must also:*
- (a) *fix a date on which the person to whom the order is granted is to report back to the court on what has been done under the order; and*
- (b) *if a proceeding has not been started, order that:*

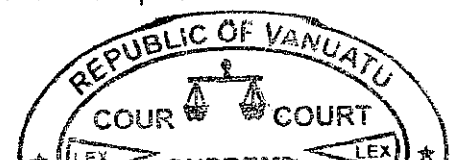


- (i) the applicant file a claim by the time stated in the order; and
- (ii) if the defendant is not known, the defendant be described in the claim as "person unknown"; and
- (iii) if the name and address of the defendant or potential defendant is known, fix a time for serving the claim on him or her.

(9) The court may set aside or vary a freezing order.

Discussion

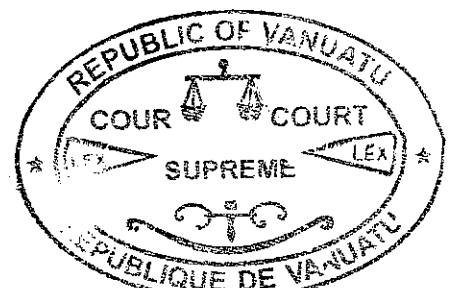
17. Mr Palavi seeks that both he and Mr and Mrs Clochard be restrained from dealing with the assets of ETP Ltd. Notably, Mr Palavi does not seek freezing orders in relation to ETP Ltd.
18. The making of a freezing order is discretionary. In considering whether to exercise the Court's discretion and make a freezing order, I assess that the following factors are relevant:
 1. Mr Palavi seeks to restrain himself and the Clochards, but not ETP Ltd. It is a general principle of law that a company is a person of its own: *Goiset v Blue Wave Limited* [2001] VUSC 24, followed in *Estate of Stephen Quinto v Giltrap* [2023] VUSC 285. It is ETP Ltd who is entering into contracts and on the face of it, owns the machinery, and not the Clochards personally. Even if a freezing order is granted, ETP Ltd, an entity in its own right, can continue to enter into contracts and use the machinery it owns.
 2. The purpose of a freezing order is not to put parties to proceedings on an equal footing, which is the basis for the application. The purpose of a freezing order is to prevent the disposal or dissipation of assets and defeat a judgment. There is no evidence whatsoever that ETP Ltd or the Clochards have disposed of, or will dispose of or dissipate assets of ETP Ltd. Mr Palavi's sworn statement filed on 27 June 2024 in support of the freezing order application does not contain any information or assertion that ETP Ltd (or indeed the Clochard's) have or will dispose of any of ETP Ltd's assets.
 3. Under rule 7.8(4)(b), the criteria for the making of a freezing order is;
 - (i) Mr Palavi has a good and arguable case.
 - (ii) A judgment or order in the matter, or its enforcement, is likely to involve the assets; and
 - (iii) The assets are likely to be removed from Vanuatu, or dealing with them should be restrained.
 4. It is difficult to make any assessment as to whether Mr Palavi has a good and arguable case. The counterclaim is, with respect, confusing. He claims employee entitlements, seeks a payout for the value of his shares but at the same time seeks to be reinstated as a director and shareholder. The main problem at this point is that the evidential position from all parties is incomplete and inadequate. For



example, there is no evidence at all that Mr Palavi was an employee of ETP Ltd or how his shareholding in ETP Ltd was acquired, and whether it was for valuable consideration or not. There is also no quantification of the value of the shares.

5. The claim as currently pleaded, does not involve the machinery assets of ETP Ltd. The claim is either for liquidated sums, damages or declarations.
6. The key issue though is whether dealing with the assets should be restrained. As was held in *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 ALL ER 213, if there is a danger that the debtor may dispose of his assets so as to defeat a claim before judgment, the Court has jurisdiction in a proper case to grant an interlocutory judgment to prevent disposal of assets. This was affirmed in Vanuatu in *Best v Owner of the Ship "Glenelg"* (No1) [1982] VUSC 9, in considering caselaw in relation to Mareva injunctions (now freezing orders).
7. As noted, there is no evidence at all that the Clochards or ETP Ltd have disposed of or will dispose of or dissipate ETP Ltd's assets or put them out of Mr Palavi's reach, in the event that judgment is entered in his favour. Some of the machinery is subject to a lien to the National Bank so there is no prospect of those machinery items being disposed of.
8. Rule 7.8 of the CPR detail what an application and sworn statement should address. Mr Palavi's application and sworn statement filed in support of the application fall short of what is required in terms of the rules. They do not:
 - a. Describe the value of the assets in question; rule 7.8(5)(a).
 - b. Set out how the assets to be subject of the order will form part of any judgment or its enforcement; rules 7.8(5)(d)(i) and (6)(d)(i).
 - c. Detail what will be done to preserve the assets; rule 7.8(5)(d)(ii) and (6)(d)(ii).
 - d. Address Mr Palavi's ability to satisfy the undertaking he has given. Mr Palavi has given the undertaking required by rule 7.8(e). However, the sworn statement should address his ability to satisfy the undertaking; *Intercontext v Schmidt* [1988] FSR 575. Mr Palavi has failed to address his ability to satisfy the undertaking.
 - e. Address why Mr Palavi believes dealing with the assets should be restrained; rule 7.8(6)(a)(ii). Mr Palavi affirms that various matters detailed in his sworn statement demonstrate the prejudice suffered by him while awaiting the trial of the substantive claim and counter claim.² Those matters are irrelevant to whether there is a risk ETP Ltd or the Clochards will dispose of assets so as to defeat any judgment in Mr Palavi's favour.

² At paragraphs 5-8(a)-(f).



19. I reiterate that the purpose of a freezing order is not to put parties to a proceeding on an equal footing or to be "fair". It is to address risk of assets being disposed of or dissipated to defeat a judgment.
20. The application for a freezing order under rule 7.8 in the terms sought cannot be granted and is declined, having regard to the factors set out at paragraph 18 above. In summary, that is because Mr Palavi has not put evidence before the Court as required by rule 7.8 as detailed above, but more significantly has not put any evidence at all before the Court to suggest that there is a risk or danger that the Clochards or ETP Ltd may dispose of ETP Ltd's assets so as to defeat Mr Palavi's claim before judgment. In such circumstances, I do not consider that the Clochards (or ETP Ltd) dealing with the assets should be restrained. Further, as ETP Ltd is an entity in its own right, the company could continue to trade and use its machinery. So, any freezing order would be of no practical effect.
21. The difference between the current application and the interim restraining order made by Justice Geoghegan on 13 April 2023 is that the Clochards are currently the directors of ETP Ltd, and Mrs Clochard is the sole shareholder. When the interim restraining order was made against Mr Palavi, he was neither of those things.

Result

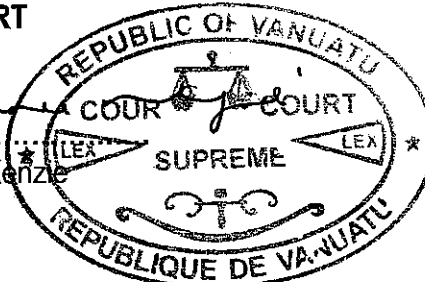
22. The application for freezing orders is declined and dismissed.
23. There is to be an order for costs in favour of the Claimants as either agreed or taxed.

Directions

24. The Court is concerned about the state of the pleadings and the evidence. This relates to all parties. There is a lack of focus on what the issues are.
25. There is to be a **conference at 1.30 pm 1 November 2024** to make further directions to ensure that the proceeding is ready for trial.

**DATED at Port Vila this 21th day of October 2024
BY THE COURT**

.....
Justice M A Mackenzie

The seal of the Supreme Court of Vanuatu is circular. It features a central emblem with a scale of justice and a book. The text "REPUBLIC OF VANUATU" is written along the top inner edge, and "REPUBLIQUE DE VANUATU" along the bottom inner edge. In the center, the words "COUR" and "COURT" are written on either side of the emblem, with "SUPREME" below it. Two small triangles containing the word "LEX" are positioned on either side of "SUPREME".