

BETWEEN: **Ritana Brenda Jeursen**
First Appellant

AND: **Matilda and Dennis Cole**
Second Appellants/First Interested Parties

AND: **Jenver Inc.**
Third Appellant

AND: **National Bank of Vanuatu Limited**
First Respondent

AND: **Republic of Vanuatu**
Second Respondent

Date of Hearing: 5th May 2022

Date of Judgment: 13th May 2022

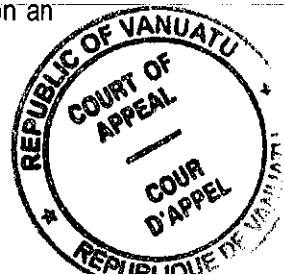
Before: *Chief Justice, Vincent Lunabek*
Justice John Mansfield
Justice Raynor Asher
Justice Oliver A Saksak
Justice Dudley Aru
Justice G.A. Andrée Wiltens
Justice Edwin Goldsbrough

Counsel: *M Fleming – Appellants*
M Hurley – First Respondent
K Tari – Second Respondent

JUDGMENT

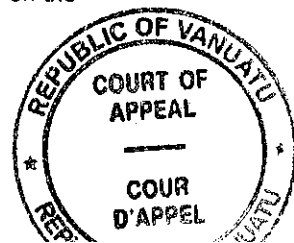
Introduction

1. This is an appeal against a decision of the Supreme Court dated 27 October 2021 striking out the National Bank of Vanuatu's (NBV) claim. The only issue arising in this appeal is the decision by the primary judge to order that costs lie where they fall. The effect of that order is that there was no order for costs in favour of the appellants, even though NBV's claim against them was dismissed. The appellants contend that costs should have been awarded in their favour on an indemnity basis.



Background

2. On 8 August 2019, the NBV as mortgagee of lease title 04/2642/001 (the Lease) filed its claim against the estate of late Colin Pierre Venter (Mr Venter) and Ritana Brenda Jeursen (Ms Jeurson) to enforce its mortgage . There is a considerable history preceding that action.
3. Mr Venter and Ms Jeursen were shareholders of a company Lope. Lope Adventure Lodge Ltd (in Liquidation) (LLA). By a series of loans between 2009 and 2012, NBV lent a considerable sum to LLA in the order of VT 195 million, secured by a mortgage over the LLA assets.
4. Before those loans, Jenver Inc (Jenver), a company with the same shareholders, had acquired particular leased land in its own name the (the Jenver land). In about 2013, in circumstances which may need to be determined by the Supreme Court, the Jenver land appears to have been transferred on the Register to Mr Venter and Ms Jeursen by a Change of Name form provided by NBV to the Lands Department.
5. Sometime later, NBV secured a mortgage from Mr Venter and Ms Jeursen over the Jenver land, securing some of the outstanding liability of LLA. The action then commenced by NBV sought to have the Jenver land sold to reduce the outstanding liability to it.
6. The precise details of the transactions are not in the material before the Court of Appeal.
7. NBV alleges that it loaned substantial sums of money to Mr Venter and Ms Jeursen, which were secured by a third party mortgage over the lease. NBV further alleges that they defaulted in their loan repayments, and as a result, it was seeking power of sale orders to enforce the mortgage by selling the Lease property.
8. Mr Venter died at about that time. His estate submitted a short defence, awaiting the outcome. Ms Jeursen filed a defence on 24 September 2019 disputing the registration as there was no transfer of lease documents signed. She alleged that NBV officers inappropriately used a Change of Name form to record the transfer to them.
9. On 12 November 2019, the second appellants Matilda and Dennis Cole were joined as third and fourth interested parties. They said they had an interest in the Lease as they were invited by Mr Venter to reside on the property and invested their own funds in development of the property aiming towards an eventual purchase of part of the Lease. Ms Jeursen supports that.
10. On 6 November 2019, Ms Jeursen filed an amended defence with a counterclaim. She alleged that NBV staff obtained her signature on the Change of Name form by fraud and forgery. As a consequence, she counterclaimed for stay orders and orders for specific performance in CC826/15, an earlier action. The Court of Appeal does not have the pleadings in the action to fully understand its context or significance. Ms Jeursen claimed that the change of name and then later the mortgage on which the relevant claim is made were procured through fraud or mistake on the part of the NBV by its officers.



11. In the meantime, on 2 July 2021, formal orders were issued on application by the appellants to add Jenver as second interested party and the Republic of Vanuatu as third defendant. The Republic of Vanuatu was joined simply to properly secure the capacity to rectify the Register, if it was found that Jenver still should be the registered lessee. The Coles became the first interested party. It was also ordered that Ms Jeursen and Jenver file their cross-claim against the Republic of Vanuatu. This was filed on 8 July 2021. The cross-claim alleged that the Director of Lands breached the Land Leases Act by registering a transfer of the Lease from Jenver to Mr Venter and Ms Jeursen by way of a Change of Name form. The orders sought were to cancel registration of the Change of Name form and retain Jenver as lessee. Furthermore they sought orders to cancel the mortgage.
12. The Republic of Vanuatu, in its defence filed on 16 July 2021, pleaded that the Lease was never transferred from Jenver to Mr Venter and Ms Jeursen, as no application was made to transfer the Lease. Further, the Change of Name form was not a registrable instrument capable of recording registration of a transfer of lease. It was further pleaded that the alleged registration was made based on information supplied to the Director of Lands, but should not have been made. The Republic, for the Director of Lands, filed a response which accepted that Jenver was still, and still should be shown as, the registered lessee. The balance of its response is difficult to comprehend. It is said by the appellants that it is contradictory to the primary position taken by the Director.
13. On 17 August 2021 Ms Jeursen and Jenver filed their application to strike out NBV's claim. It was acknowledged by counsel for NBV that its claim should be struck out, as it was apparent that the Director intended to rectify the Register to show Jenver as the lessee. The application was granted and the claim was struck out on 27 October 2021. The appellants sought costs of the action on an indemnity basis. The Judge then declined to make an order for costs of the action in favour of the appellants. That order is now the subject of this appeal.

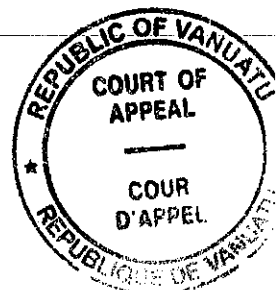
Judgment under Appeal

14. At the hearing of the strike out application, Mr Hurley as counsel for the NBV concluded his submissions and conceded that " *he is instructed that the NBV does not oppose the Court granting Order 1 sought in the Application (claim of the claimant filed 8 August 2019 be struck out)*". The primary judge noting the submission said at paragraph 4 of her decision that:

"4. The first order sought in the Application not being opposed, I ordered that the NBV's claim filed on 8 August 2019 is struck out."

15. On the issue of costs, Mr Fleming, as counsel for the appellants, sought indemnity costs against the NBV on the basis that its officers were involved in registration of the change of name form and these had put his clients to great expense defending proceedings against them. Furthermore that they made five offers to NBV to settle the matter which were all rejected. The primary judge at paragraphs 21 to 23 said:

"21. Again, I have not conducted a trial in this matter nor made any factual findings. Whether or not NBV officers were involved in the 2013 registration of the



Change of Name Form and whether or not the registration of that Form was obtained by mistake are matters of disputed fact. Further, not having made any factual findings, I fail to see how I can determine that the NBV without good cause prolonged the proceeding or brought the proceeding in circumstances that amounted to a misuse of the litigation process or otherwise engaged in conduct that resulted in increased costs (rule 9.5(5)(a)-(c), Civil Procedure Rules).

22. *As to the 5 offers to settle that were made and rejected, Mr Fleming's clients have effectively succeeded not after a trial but as a result of the Director of Lands giving notice of his own motion to exercise his power under s. 99 of the Act. In those circumstances, I do not see why the NBV's rejection of the offers should result in indemnity costs being ordered against it.*
23. *As to the submission that the State indemnify the NBV, I note that the State was added as a party on the filing of the Cross Claim on 8 July 2021. Within a month, the Director of Lands on his own motion gave his 23 July 2021 notice. The State has acted quickly to address the matter within the control and responsibility of the Director of Lands. Accordingly, I am not persuaded that the State should indemnify any party in this matter nor have costs ordered against it."*

16. And at paragraph 24 concluded:

"In the circumstances, costs should lie where they fall, I so order."

Appeal

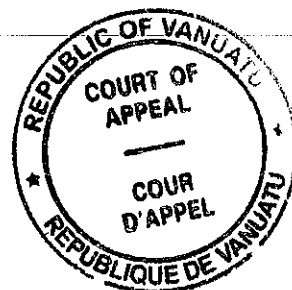
17. The only remaining issue in the notice and grounds of appeal is ground 1, whether costs should have been awarded by the primary judge, and if so, on what basis.
18. The appellants submit that the primary judge was wrong in not awarding costs against NBV. NBV on the other hand submits there was no error by the primary judge and that the appeal should be dismissed. We assess from the material and the Judgment that NBV indicated to the primary judge that, as was put in this appeal, NBV will be able to bring a further proceeding in much the same terms as the present one, and in which the same issues will need to be decided.

Discussions

19. Rules 15.1 of the Civil Procedure Rules provides:

" 15.1 General provisions about costs

(1) *The court has discretion in deciding whether and how to award costs.*



- (2) *As a general rule, the costs of a proceeding are payable by the party who is not successful in the proceeding.*
- (3) *However, nothing in this Part prevents the parties to a proceeding from agreeing to pay their own costs.*
- (4) *The court may order that each party is to pay his or her own costs."*

20. The Court has a discretion whether to award costs and how to award costs. The primary judge ordered that "*costs lie where they fall*". The stated reasons for doing so were:

- There was no trial and there were no factual findings;
- Whether NBV officers were involved in the registration of the change of name form and whether registration of that Form was obtained by mistake were disputed facts;
- Without these factual findings she could not determine that NBV without good cause prolonged the proceedings or misused the litigation process or engaged in conduct that increased costs; and
- The appellants succeeded not after a trial but as a result of the Director of Lands giving notice of the intention to correct the error in registration.

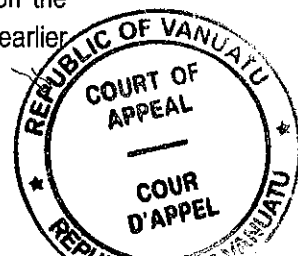
21. The appellants submit that they are entitled to costs and rely on what this Court said in Inter Pacific Investment Ltd v Sulis [2007] VUCA 26 that:

*"It is of the essence of **costs** awards that they reflect the reality of what has occurred in a particular piece of litigation.*

*As acknowledged by all counsels **costs** are a discretionary matter and therefore an Appeal Court would have to be satisfied that the exercise of **discretion** was such as not to be available to a judge reasonably assessing all the circumstances."*

22. The appellants in support of their submissions, for an order for indemnity costs, rely on matters on which no factual findings were made by the primary judge as there was no trial. These included reciting the history of how events occurred. The thrust of NBV's submissions was that it was inappropriate for the appellants to make submissions relying on the history of the proceedings as most of the facts were disputed and yet to be determined in a proper trial.

23. In our view, the primary judge did not fall into an error of a character which would permit this Court to substitute any view that indemnity costs should not be awarded. The decision not to do so is entirely understandable. It would be inappropriate to assume any form of improper conduct or fraud on the part of the NBV without having heard the evidence, particularly where there is on the pleadings an issue about the topic, and in addition an issue about the significance of earlier proceedings which might give rise to an estoppel adverse to the appellants' allegations.



24. However, in our view the decision of the primary judge not to award costs at all is not within the range of a proper exercise of the decision making power on costs. The dismissal of the claim would in the normal course be followed by an order for costs. The fact that one party has made allegations against another party which have not been tested and determined does not routinely preclude that party from the normal costs benefit. There is no allowance for the possibility of the NBV deciding not to pursue its claim in the future. If that occurred, the appellants would have been deprived of their costs absolutely when they should not have been. It is not immediately clear, if Jenver is restored as the lessee, whether NBV will be able to exercise a power of sale of the Lease under its mortgage. There are other circumstances which might influence the NBV not to further litigate.
25. On reflection, NBV may prefer not be exposed to the risk of the claims of improper conduct or fraud from being made out. It may re-assess its dealing with Ms Jeursen, having regard to her claim that she was but a follower of what Mr Venter told her to do, and did not form independent judgments about the actions she appears to have taken. Even if the NBV brings a further claim and similar issues are ventilated, the costs of running that case will be incurred by the appellants in any event, so there would be both the costs of this action and the costs of the second action to be paid. That is somewhat speculative, but no more so than the speculation of the NBV inevitably bringing its claim in much the same form, and inviting much the same issues, as are presently pleaded.
26. Given the circumstances, we are of the view that the proper order for costs is that the appellants should recover their costs of the action on a standard basis. We have treated Ms Jeursen and the Coles together, as that seems to have been assumed in the submissions.

Result

27. The appeal is therefore allowed and the first respondent, NBV is ordered to pay the first, second and third appellants costs of the action in the Supreme Court on a standard basis to be agreed or taxed by the Master.
28. They should also recover the costs of the appeal. As the appellants were represented by the one counsel, one set of Costs is appropriate. We fix the costs of the appeal at VT 60,000 having regard to the agreement that the appeal should be heard on the papers.

Dated at Port Vila this 13th day of May 2022

BY THE COURT


Hon Vincent Lunabek
Chief Justice

