

(Civil Jurisdiction)

BETWEEN: OBED SAMUEL

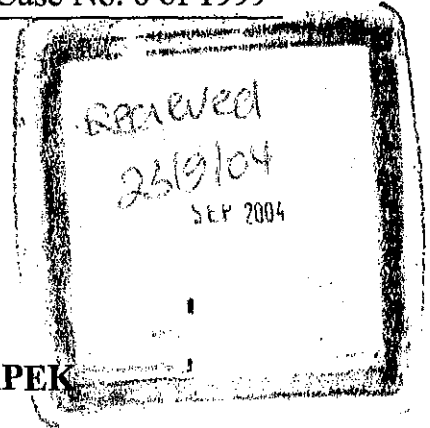
Judgment Creditor

AND: JEFFERY LUNAPEK

First Defendant

**AND: PUBLIC WORKS DEPARTMENT
(PWD)**

Judgment Debtor



**Coram: Mr Justice Oliver A. Saksak
Mrs Cynthia Csiba – Clerk**

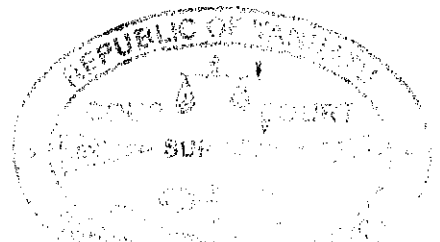
**Counsel: Mr Frederick Loughman of State Law Office for the Judgment Debtor and
Applicant.
Mr Jack I. Kilu for the Judgment Creditor and Respondent.**

Date: 22nd September, 2004

JUDGMENT

This is an Application by the State Law Office on behalf of the Judgment Debtor to set aside the judgment of the Court dated 25th November, 2002 on the grounds that the judgment was improperly entered against the PWD when they were not served with the statement of claim. The Application is supported by Mr Loughman's sworn statement which is taken as read. Mr Kilu does not wish to cross-examine Mr Loughman on his affidavit.

Mr Loughman submits that under Rule 9.5 of the Civil Procedure Rules the Application is properly made. Mr Kilu argues that the judgment was



delivered after a full trial and that it was not a default judgment. I agree with Mr Kilu. The judgment was a final judgment after a trial. Rule 9.5 can only be used when a defendant has not complied with Rule 9.1. In any event this matter was dealt with under the old Rules. The new Rules only commenced on 31st January 2003.

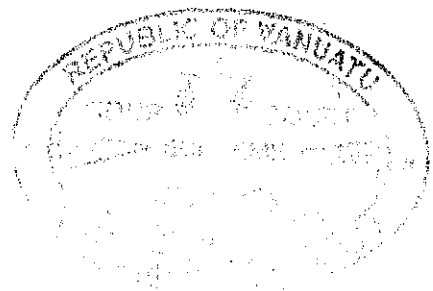
Mr Loughman argues that the PWD were not served with a copy of the statement of claim. Further that the statement of claim was not filed. Mr Kilu in response relies on the affidavits of the Respondent and of Pascal Tavsaï. The Respondent says that he witnessed service on Jenny Ulnaim on 27th November 2001. Pascal Tavsaï confirms that. Mr Loughman tells the Court that Jenny Ulnaim denies service. She has not deposed to any sworn statement and neither has the Senior Foreman. Paragraph 14 of Mr Loughman's statement is hearsay evidence and is inadmissible. The rest of it do not help his arguments and submissions.

There is a proper writ of summons signed by the claimant dated 19th April 1993. At the end of that Writ someone has deposed to its service on PWD and on Jeffrey Lunabek at Lakatoro on 19th April 1993. The server has signed his signature. That is the third person who says he served PWD. If then three persons say they had served PWD, then there can be no denial by them in the absence of properly sworn statements.

The Writ of Summons is not stamped. It is common knowledge that there is no Supreme Court registry at Lakatoro. On 16th November 2000 Obed Samuel informed the Court at Lakatoro in person that he had paid a filing fee of VT8,000. He was issued with a receipt No.600499 showing a payment of VT8,000. That is sufficient to make his claim deemed to have been registered.

Mr Loughman raises the issue of time limitation. That matter is no longer in issue. The Court decided that issue when the First Defendant raised it as a preliminary matter. There is a judgment to that effect dated 13th June 2001.

Mr Loughman raises the issue of leave to appeal out of time. Mr Kilu argues that time for appeal has long lapsed. There is no proper application before me in that regard. I prefer to leave that issue aside for the moment. In the event that there is an application, the Court would consider it as a separate matter.



Mr Kilu makes submissions in relation to costs to be made on an indemnity basis. He outlines the reasons. I have read those submissions and agree with them.

In the course of his reply, I interject Mr Loughman indicating that the application before me was in my view baseless and that I would dismiss it. However I indicate that I would hear him further in relation to costs and ask him whether he would need a short adjournment to discuss the matter with Mr Tom Joe. Mr Loughman agrees to an adjournment. The Court allows 15 minutes.

I allude Mr Loughman to the cases of Solzer v. Pierrot Garae and The Government (1992) 2VLR 528 and of Lansanneur v. Pierre Barge & Lawndes Pacific Ltd (1984) 1VLR 125. These are personal injury cases based on negligence where in the former, the Court awarded over VT6 million, and in the latter the Court awarded in excess of VT 2 million. Comparing these figures with VT800.000 claimed by the claimant in this case, his claim appears to be on the lower side. The Judgment debtor faces risks of firstly that even if the Court of Appeal were to grant the leave and the case appealed, they would refer the case back for a rehearing. As such they would be risking the possibility that the award of damages based on the findings of negligence might be increased.

The Court resumes at 10:15 a.m. Mr Loughman informs me that on his instructions, the Judgment debtor now accepts liability for the payment of damages to the judgment creditor. Further he informs me that they also accept to pay costs on an indemnity basis. The total sum being claim is the amount of VT530,861. This includes the sum of VT68,500 submitted by Mr Obed Samuel himself through Mr Kilu. Mr Loughman agrees that the costs be paid within 28 days from the date of judgment.

As to the payment of the judgment sum of a total of VT1,898.000 Mr Loughman informs the Court that it will be subject to further instructions from responsible authorities in Port Vila.

Under those circumstances I now make the following orders –

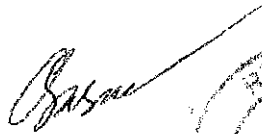
- (1) The Judgment Debtor be required to pay costs on an indemnity basis in the sum of VT530,861 to the Judgement Creditor within 28 days from today.



- (2) The Judgment Debtor be required to inform Counsel for the Judgment Creditor and the Court Registry as to the manner of payment of the judgment sum within 28 days from today.

DATED at Luganville this 22nd day of September, 2004.

BY THE COURT



OLIVER A. SAKSAK
Judge

