

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**

*(Civil Jurisdiction)*

Civil Case No.38 of 2007

**BETWEEN:** **GUY BERNARD**  
Claimant

**AND:** **THE REPUBLIC OF VANUATU**  
Defendant

**Coram:** *Justice D. V. Fatiaki*

**Counsels:** *Mr. G. Benard in person*  
*Mr. J. Ngwele for the Defendant*

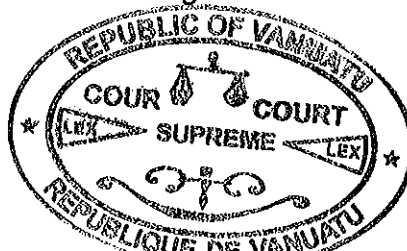
**Date of Decision:** *5 April 2012*

**JUDGMENT**

1. This is an application for summary judgment filed on **1<sup>st</sup> December 2010** supported by a sworn statement. It follows on from the courts ruling of **10 June 2010** dismissing the Republic's application to strike out the claim. In its written reasons provided on **26 October 2010** the Court set out the chronology of the case as follows:

*"The action has a long and chequered history which may be briefly outlined as follows:*

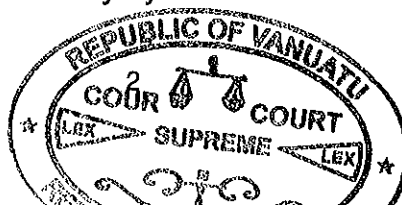
- On **24 March 2000** the Claimant's home was searched and numerous personal items were seized by the Police including antique arms and a large quantity of elephant tusks (the seized items). A record of search listing the seized items was provided at the time;
- On **27 June 2000** the Claimant was charged with several offences before the Magistrates Court including a charge of Illegal Importation of Elephant Tusks contrary to section 9 of the ***International Trade Flora and Fauna Act No. 36 of 1989***;
- On **8 March 2001** the Claimant was acquitted by the Magistrate's Court and the prosecution were given the usual 14 days to appeal the decision. No appeal was filed in the matter.
- On **18 April 2007** the Claimant filed a claim in the Supreme Court seeking compensation and damages for the missing items;



- On 10 July 2007 a defence was filed and on 12 July 2007 an application to strike out the claim was filed with a supporting sworn statement;
- Since then the Claimant has tried to retrieve his personal effects seized by the Police with little success and culminating in a formal letter of complaint to the Police Commissioner dated 23 October 2007;
- On 6 November 2007 the Police replied to the Claimant advising him that they have managed to locate 5 antique swords which had "suffered corrosion" and confirming that "all other items mentioned in the search warrant are missing."
- The matter then effectively went to sleep for 2 years including the Defendant's strike-out application, until a conference notice was issued by the Court listing the matter on 24 November 2009 for the purpose of reconstructing the file which presumably had been burnt in the Supreme Court building fire.
- A second conference notice unusually listed for the same date required the parties "to advise as to the current status of the matter and to show cause why the proceeding should not be struck out pursuant to **Rule 9.10 (3) (a)**";
- On 26 November 2009 the Acting Master struck out the action pursuant to Rule 9.10 (2) (a) because no step had been taken in the proceeding for 6 months. The Claimant was personally notified on 6 January 2010;
- On 8 January 2010 the Claimant filed an urgent application to set aside the Master's order striking out the proceedings. The application was vigorously opposed;
- On 22 January 2010 the Claimant filed a sworn statement in support of his urgent application and a brief written submission;
- On 5 May 2010 the Master's order was set aside at a conference hearing and the Defendant's 2007 application to strike out the claim was fixed for argument on 10 June 2010 submissions were ordered from both parties and these were provided to the Court;"

2. Since the Court's ruling the following is the continuation of the chronology:

- 29 October 2010 – State counsel indicated it would not pursue its application for leave to appeal the Court's ruling and the Republic was ordered to file sworn statements in support of its defence as well as provide discovery by 12 November 2010;

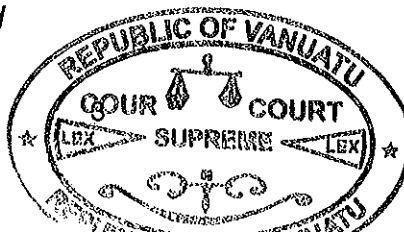


- **1 December 2010** – Claimant filed an application for summary judgment with a sworn statement in support;
- **3 January 2011** – Claimant filed written submissions in support of the application;
- **25 February 2011** – The Republic filed a sworn statement;
- **28 February 2011** – Both parties filed written submissions on the application for summary judgment;
- **1 March 2011** – Claimant filed a response to the Republic's submissions opposing the application;

3. **Rule 9.6 of the Civil Procedure Rules Provides:**

**“9.6 Summary judgment**

- (1) *This rule applies where the defendant has filed a defence but the claimant believes that the defendant does not have any real prospect of defending the claimant's claim.*
  - (2) *The claimant may apply to the court for a summary judgment.*
  - (3) *An application for judgment must:*
    - (a) *be in Form 15; and*
    - (b) *have with it a sworn statement that:*
      - (i) *the facts in the claimant's claim are true; and*
      - (ii) *the claimant believes there is no defence to the claim, and the reasons for this belief.*
- .....
- (7) *If the court is satisfied that:*
    - (a) *the defendant has no real prospect of defending the claimant's claim or part of the claim; and*
    - (b) *there is no need for a trial of the claim or that part of the claim, the court may:*
    - (c) *give judgment for the claimant for the claim or part of the claim; and*



(d) *make any other orders the court thinks appropriate.*"

The objective and purpose of the above Rules is plain. It enables the Court to dispose of a filed defence which has no real prospect of success and where there is no need for a trial. When properly exercised the Rule achieves expedition and saves unnecessary expenses in terms of cost and the proper allocation of the courts resources consistent with the overriding objectives of the **Civil Procedure Rules**.

4. As mentioned earlier in the courts' written decision of **26 October 2010** the substantive claim seeks damages and compensation for missing personal items seized from the claimant's home by police acting under a search warrant on **24 March 2000** and which has never been fully restored to the claimant despite his acquittal of criminal charges by the Magistrate Court on **8 March 2001**, and, despite several attempts by the claimant to recover his possessions over a period of six (6) years between **2001 and 2007**.
5. The claim comprises **14 paragraphs** half of which have particulars provided, and relevantly traces events from the seizure of the claimant's personal possessions on **24 March 2000** through various unsuccessful attempts to retrieve the items until the date of the claim on **18 April 2007**. The claimant accepts that of the items seized sixty one (61) elephant tusks were returned on **10 December 2004** and nothing else.
6. The seized items are particularized in **paragraph 7** of the amended claim as follows:
  - (i) *66 elephant tusks;*
  - (ii) *6 antic swords(1789) and hatchet (1810)*
  - (iii) *A telescope*
  - (iv) *Various ship safety equipments*
  - (v) *2 antic arms (1760)*
  - (vi) *Court files/documents"*
7. The defence of the Republic which was filed on **24 April 2007** other than making minor partial admissions and two denials of knowledge, "*denies each and every allegation contained in*" enumerated paragraphs of the claim including **paragraph 7** (above).
8. Such a bald defence without condescending to particulars or addressing the pleaded facts offends several subrules of **Rule 4.5 of the Civil Procedure Rules** including **subrules (3) and (4)**. Accepting that the claimant is a lay-person and used the word "*confiscate*" when referring to the personal items taken during the search of his house, it is disingenuous to deny that a search of the claimant's home took place pursuant to a lawfully issued search warrant or that the listed items were seized. Likewise a failure to positively admit or plead in defence that some items were returned to the claimant is unhelpful and unnecessarily evasive.

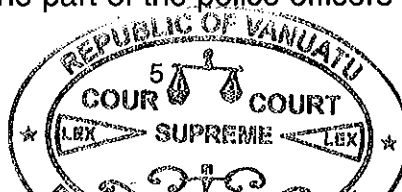


9. As the Court of Appeal said in **ANZ Bank (Vanuatu) Ltd. v. Dinh [2005] VUCA 3** in rejecting an appeal against the entry of default judgment said:

"Where a Defendant seeks to establish an arguable question to avoid a summary judgment, or to demonstrate an arguable defence for the purpose of setting aside a default judgment, it is not sufficient for the Defendant merely to raise a general assertion that the claim might not be correct. The Defendant must give particulars sufficient to show that there is real substance to the argument. In a case like this, where the argument, if it had substance, would go only to a small part of the claim, the particulars given must also indicate which parts of the claim are open to possible question, and which parts are not affected. This is necessary so that judgment can be entered for that part of the claim which is not the subject of dispute."

(my underlining)

10. Be that as it may the claimant deposes in his sworn statement in support that *"the facts stated in my claim are true and the defence filed by the defendant in this proceeding has no prospect of success"*.
11. The defendant's evasiveness in opposing the application for summary judgment, is highlighted by the singular sworn statement filed in opposition and which clearly deposes that the claimant's home was searched in June 2000 and *"elephant tusks, antique swords, firearms, antique riffles, a telescope, ship safety equipments, court files and documents and a hatchet"* were seized. The sworn statement further deposes that *"on 10 December 2004 at around 11:06am we returned the elephant tusks to the claimant"* without stating the quantity. **No** mention is made of the return of the claimant's other seized items other than, an unhelpful claim by the deponent of his *"understanding"* that they were also returned to the claimant and the naming of **Senior Sergeant Jean Paul Ture** in that regard.
12. The sworn statement also annexed a copy of the relevant search warrant dated **23 June 2000**; a record of search which enumerated the items seized from the claimant's home, including, **(59 + 4)** *"elephant tusks"*; and a signed receipt for the return of *"61 (sixty one)"* elephant tusks dated **10 December 2004**. The absence of a sworn statement from **Senior Sergeant Jean Paul Ture** is significant and, in my view, telling against the defendant.
13. Even on the defendant's evidence there remains an unexplained shortfall of two **(2)** elephant tusks. Furthermore, given the existence of the above supporting documents, the absence of a similar documentary record in relation to the return of the claimant's antique items is explicable on the basis that the deponent's understanding is faulty and wrong. At best it demonstrates a culpable lack of proper record-keeping and secure storage of exhibits on the part of the police officers concerned.

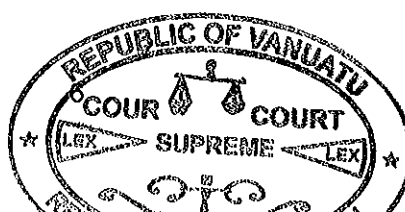


14. In light of the foregoing this Court does **not** accept defence counsel's submission which seeks to challenge the uncertainty of the claim as to the exact number of elephant tusks that were seized or not returned. Similarly, the submission that elephant tusks can have no value "*on the white market*" in light of Vanuatu's ratification of the **CITES convention** is misguided and fails to address the claimant's undisputed sworn evidence of acquisition and purchase of the seized items from **Gabon** (Central Africa) and **France**. Whatsmore the fact that most of the claimant's other seized items are described as "*antics*" or "*objects d'art*", including, a boxed pair of Russian duelling pistols passed down from the claimant's grandfather which had been in the claimant's possession for **30 years**, gives some indication of the real "*sentimental value*" of the items.
15. Needless to say not only has the claimant been acquitted by a court of law for an offence of unlawfully importing **63** elephant tusks into Vanuatu (see: the judgment in **Magistrate Court Criminal Case No.351 of 2000**), but, there is also **not** a shred of evidence that the claimant ever intended to illegally export or trade the elephant tusks.
16. I am satisfied after considering the competing submissions and sworn statements and annexures, that the defendant's defence has no real prospect of success as to the missing two (**2**) elephant tusks and the claimant's other valuable antique items seized in the execution of the search warrant. Similarly, I accept the claimant's undisputed evidence in support of the valuation of the missing items and I reject the defendant's complete avoidance of the claimant's sworn evidence of valuation, as raising a seriously arguable issue as to the valuation of the missing items.
17. Accordingly, I enter judgment for the claimant in the following sums by way of "*general damages*":

		<u>VT</u>
1	Two (2) elephant tusks valued @ <b>VT300,000</b> each	- <b>600,000</b>
2	Various antique items valued @ a total of <b>FF168,500</b> ( <i>using a conversion factor of FF6.55 for 1Euro and VT130 for 1Euro</i> )	- <b>3,344,275</b>
<b>Total VT</b>		<u><b>3,944,275</b></u>

18. Finally I award the claimant "*exemplary damages*" in the sum of **VT500,000** based upon the court's satisfaction of the following factors:

- (i) The timing and circumstances in which the search of the claimant's house was carried out in the early hours of the morning and in the absence of both the claimant and his wife who had been arrested and were held in police custody to the knowledge of the responsible officers conducting the search;



- (ii) The failure of the government authorities, including the police to properly and effectively address the claimant's numerous complaints about his missing items;
  - (iii) The length of time it took for the defendant to admit that the claimant's seized items were "*missing*" i.e. after 6 years from his acquittal;
  - (iv) The unreasonable refusal of the defendant to seriously consider the claimant's offers to settle his claim; **and**
  - (v) The absence of a meritorious or arguable defence to both the liability for and quantum of the claim.
19. Although not specifically sought, the claimant is also awarded "*interest*" at **5% per annum** on the above awards. In the case of "*exemplary damages*" until final payment, and, for "*general damages*", calculated from **18 April 2007** until final payment.
20. **All** disbursements incurred by the claimant in instituting and prosecuting the claim are also ordered to be reimbursed. In making these latter orders, I am mindful that the claimant has personally conducted his case throughout; that the value of antiques appreciates over time and, that the right of a judgment creditor to recover interest is a statutory right (see: **Naylor v. Foundas [2004] VUCA 26**).

**DATED at Port Vila, this 5<sup>th</sup> day of April, 2012.**

**BY THE COURT**

  
**D. FATIAKI**  
Judge.

