

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

Civil
Case No. 19/1331 SC/CIVL

BETWEEN: Switi Limited
Claimant

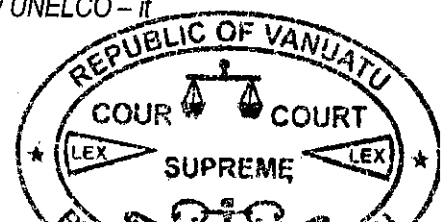
AND: Erma Electronique
Defendant

Coram: Justice Aru
Counsel: Ms. L. Raikatalau for the Claimant
Defendant-no appearance

JUDGMENT
(Assessment of Damages)

Background

1. This is a matter remitted by the Court of Appeal (COA) in *Switi Limited v ERMA Electronique* [2022] VUCA 22 for re assessment of damages specifically in relation to future economic loss for the balance of the agreed 20-year period in which the ERMA system would have supplied Switi with its electricity needs.
2. The assessment hearing did not proceed immediately following the COA decision as most of the documents from the Court file could not be located. After some time, the file had to be reconstituted with documents supplied by Switi.
3. The COA in remitting the matter remarked at paragraphs 33,34 and 35 of its decision that:
 33. *"We have no real doubt that the primary judge would therefore assess the damages for the future (from 20 August 2022) to the completion of the 20-year period, that is now a period of 15 years or 180 months, on the same basis as he has assessed past losses. That is, subject to allowance for contingencies, it is appropriate to determine the present value of a monthly loss of (say) VT1,300,000 for that further period. That is a matter of calculation allowing for the benefit to Switi of having the use of that money at the present time, rather than progressively over the next 15 years. There must also be an allowance for contingencies. Such contingencies may include a possible detriment in the market or external events affecting the market for ice-cream or of the extent of Switi's share of that market, personal exigencies which may affect the operations of Switi, some further variation in the cost of electricity provided by UNELCO – it*



is not realistic to expect a reduction in its current prices – and the prospect of further technology developments which may affect the manner of power generation in the future. They are necessarily uncertain, but in our view overall should result in a reduction of about 10 -15% of the present value of the monthly loss of VT1,400,000 being suffered by Switi until 2037.

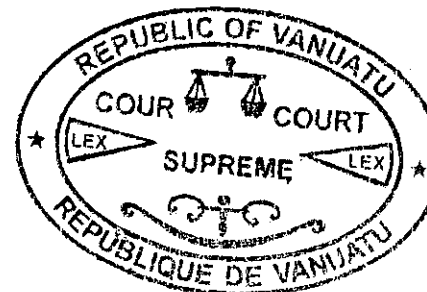
34. *There is no evidence of the present capital value of that monthly loss. It will depend upon the anticipated earnings rate of the capital sum if it is received in a lump sum, rather than paying monthly, and upon the assumption that the earned interest on the capital sum is compounded (as is generally assumed) until it is notionally withdrawn to represent the monthly future payments. At present, the assumed earnings rate would be quite low. That is a matter which Switi might secure further evidence about, and to then adduce to the primary judge.*
35. *In our view, it is appropriate in the circumstances to give Switi the opportunity to adduce that evidence. There is no reason why the matter should not be sent back to the primary judge for the final fixing of the damages. That will involve the two stage process of determining the losses to the date of the judgment in the manner adopted by the primary judge, but brought up to date, and secondly of fixing the future losses to be paid as a lump sum also in the manner referred to. As to the first step, Switi may adduce further evidence of the same character as we received, but to the time of the further hearing. As to the second, no doubt Switi will secure evidence from an appropriate expert (in the course of the submissions it was noted that may be a bank source or an actuary) as to the net present value of the future monthly losses for the balance of the 20 year term, and the primary judge may allow some further reduction in that amount to cater for the sort of contingencies we have referred.*

.....”

(emphasis added)

Discussion

4. The matter now before me as identified by the COA is to determine losses up to the date of judgment to be brought up to date and secondly , to fix future losses to be paid as a lump sum.
5. Switi relies on the following documents for the purposes of the assessment:
 - Application for the assessment of damages filed 29 June 2023;
 - Sworn statement of Marie Helen Omry filed 14 September 2022;
 - Sworn statement of Marie Eve Chabot filed 1 June 2023;
 - Sworn statement of Nicole Dufus filed 29 June 2023;
 - Sworn statement of Marie Helen Omry filed 11 October 2023;



Actual Losses up to the date of judgment

6. Counsel submits that the COA accepted that from the date of instalment of the ERMA system, to the date of judgment, the claimant was entitled to VT 52,579,923 for the period of 4 years. It was further submitted that in line with the COA decision, the claimant is also entitled to adjustments for the period May 2021 to March 2022, a period of 11 months totalling VT 14,949,878 at an average monthly rate paid by Switi at VT 1,359,080.
7. From 2017 to 19 August 2022 (date of COA judgment), it was submitted that the claimant was entitled to VT 73,842,112 (inclusive of 3 weeks in August 2022).
8. For the period August 2022 to May 2023 Switi continued to incur high costs for its electricity needs as evidenced by Nicole Dufus in her sworn statement. She provided copies of ten (10) months of paid Unelco invoices annexed as "ND1" revealing the amounts paid as follows:-

1) 31.8.22	- VT 1,635,977
2) 30.9.22	- VT 1,719,699
3) 31.10.22	- VT 1,823,378
4) 30.11.22	- VT 1,691,573
5) 31.12.22	- VT 1,636,491
6) 31.1.23	- VT 1,542,578
7) 28.2.23	- VT 1,317,922
8) 24.3.23	- VT 760,460
9) 30.4.23	- VT 1,482,552
10) 31.5.23	- VT 1,482,462

9. It was submitted that the total paid for this period which the claimant is entitled to claim is VT 15,093,491 less adjustments for the period before 20 August 2022 being VT1,226,983 reducing the total to VT13,866,508 at an average per month for the 10 months period being VT1,509,309.
10. It was further submitted that the total costs of electricity incurred between 20 August 2022 and 31 May 2023 was VT 13,866,508. That this should adjusted for the average monthly costs promised by ERMA of VT 337,491.
11. For the total past losses plus 3 weeks up to 19 August 2022 it was submitted that the figure should be:-

VT 73,842,112 (2017 to 19 August 2022 (date of COA judgment), + VT889,492
(being ~~VT1,226,983 less VT 337,491~~) =

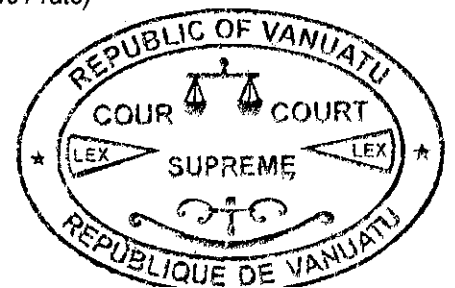
VT 74,731,604

PLUS

Actual losses from 20 August 2022 to May 2023 (Amounts paid to
Unelco less VT337,491 per month for 10 months period (average electricity costs
Promised by ERMA – VT 13,866,508 – VT 3,037,419VT (337,491 rate) =

VT10,829,089

12. I accept that the total Actual losses as at 31 May 2023 is **VT85,560,693**



Present day Capital Value

13. As for present day capital value, the claimant submitted that it relies on the expert evidence filed by Marie Eve Chabot. She is a qualified Chartered Professional Accountant and Managing Director of AJC chartered accountants and professional business advisors. She deposes in her sworn statement that following the Court of Appeal decision, the claimant sought their services to ascertain the present capital value of monthly loss referred to by the Court at paragraphs 33 to 35 of the judgment.

14. At paragraph 5, she states:-

"5. We have determined the present capital value of the monthly loss suffered by Switi as VT 203,500,000 (from the date of the decision) which can then be averaged at a monthly loss of VT 1,130,555.55. "

15. And at paragraph 9 and 10 she concludes that:-

"9. It is to be expected that the period between August 2022 and the date this Court assesses damages, will also fall within the period of recorded "past losses".

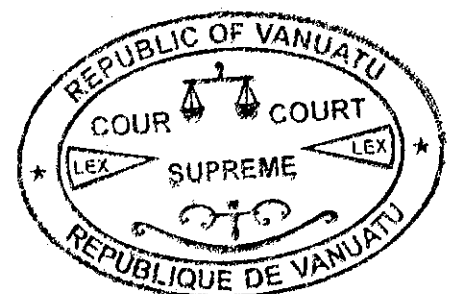
10. In that event that past losses as actual losses can be updated up to the time of Court's assessment, and the remaining period can be calculated at the rate, after mitigation, of VT 1,130,555.55 per month to the end of the 180 month period until 2037... "

16. A report of the AJC assessment is attached as Annexure MEC 2 to Ms Chabot's sworn statement.

Future losses

17. The claimant finally submits that the total **actual losses of VT 85,560,693** should be added to projected losses to the end of the 20 year period of contract being 2037 to arrive at the total damages claimed. Three options were submitted for consideration in arriving at a base figure namely:

- *projected losses based on the average per month at the AJC calculated present day value multiply by remaining number of months; or*
- *projected losses based on the average suggested by the COA multiply by remaining number of months; or*
- *projected losses based on an average (between average monthly loss incurred in the 70-month period, the AJC monthly rate and the COA suggested rate to be divided by 3*



18. I adopt the third option being actual average monthly loss incurred in 70 months (VT1,860,015) plus AJC monthly rate (VT1,130,555) plus COA suggested rate (VT1,400,000) divided by 3 = **VT1,463,524**.

19. From this figure I deduct the ERMA guaranteed monthly minimum cost had their system been fully functional to arrive at a baseline average from which to assess projected loss to the end of the 20-year period as follows:-

$$\text{VT1,463,524} - \text{VT 337,491 (ERMA monthly rate)} = \text{VT 1,126,033} \times 170 \text{ (remaining months)} = \text{VT 191,425,610}$$

20. The total damages award arrived at is therefore (Actual loss from August 2017 to May 2023) **VT 85,560,693 + VT 191,425,610** average projected loss for 170 months remaining balance of 20 year period) = **VT 276,986,303**.

Result

21. There being no response or objections filed from the defendant, despite being served with the application for assessment and all supporting documents referred to in paragraph 4 above evidenced by the proof of service filed on 11 October 2023, I enter judgment in favour of Switi as follows:-

- a) Total damages VT 276,986,303
- b) Interest @ 5%
- c) Costs to be agreed or taxed.

DATED at Port Vila, this 22nd day of November, 2023

BY THE COURT



Dudley ARU
Judge.

