

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

**Civil**  
**Case No. 23/2251 SC/CIVL**

**BETWEEN: ERICK JOHN TABIR**  
Claimant

**AND: TOYOTA TSUSHO ( VANUATU )**  
**TRADING AS ASCO MOTORS**  
Defendant

Date of Trial: 31 October 2024  
Date of Decision: 1 November 2024  
Before: Justice M A MacKenzie  
Counsel: Claimants – Mr J Kaukare  
Defendant – Mr A Kalmet

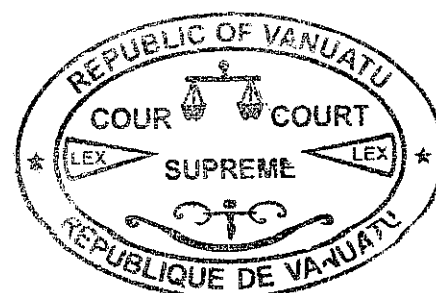
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## **DECISION**

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### **The issue**

1. On 25 October 2024, the Defendant filed two sworn statements in support of their defence and counter claim. They are the only sworn statements filed by the Defendant.
2. The sworn statements were filed outside of the timetabling directions made by the Court on 23 July 2024. The sworn statements were to be filed and served by 2 August 2024. So, it is unarguable that the Defendant did not comply with the directions made.
3. This is an issue because the matter was listed for trial on 31 October 2024. At the outset of the trial, Ms Kaukare objected to the sworn statements being filed, having regard to rule 11.6 of the Civil Procedure Rules. I heard argument from both counsel, and then advised counsel of the result. I said I would give written reasons. These are my reasons.



## **The result**

4. I declined to uphold the Claimant's objection to the filing of the Defendant's sworn statements. The sworn statements are admissible and will be taken into account. The primary reason is that the evidence is relevant to the issues for determination by the Court.
5. The prejudice to the Claimant can be met by:
  - a. An order for wasted costs. Counsel agreed that VT 10,000 was appropriate.
  - b. The trial being adjourned for the Claimant to have an opportunity to file a sworn statement in reply, particularly as the Defendant had not filed any other evidence, so that the Court has all relevant evidence from both the Claimant and Defendant. I will discuss this in more detail, as initially the Claimant's position was that he wanted the trial to proceed.

## **Relevant law**

6. Ms Kaukare relies on rule 11.6 of the Civil Procedure Rules ( CPR ) in advancing the submission that the sworn statements should not be accepted. Rule 11.6 says:

### **11.6 Service of sworn statement**

*A sworn statement must be filed and served on all other parties to the proceeding:*

*if the court has fixed a time, within that time; or*

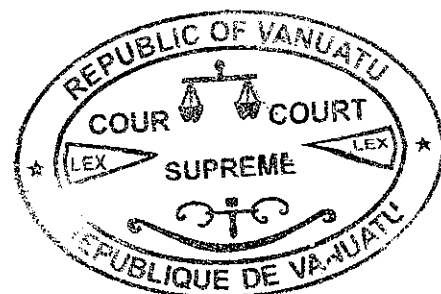
*for a sworn statement to be used during a trial, at least 21 days before the trial; or*

*for a sworn statement that relates to an application, at least 3 days before the court deals with the application.*

7. However, rule 11.7 of the CPR is also relevant and says:

### **11.7 Use of sworn statement in proceedings**

*(1) A sworn statement that is filed and served becomes evidence in the proceeding unless the court has ruled it inadmissible.*



(2) *The sworn statement need not be read aloud during the trial unless the court orders.*

(3) *A witness may be cross-examined and re-examined on the contents of the witness's sworn statement.*

(4) *A party who wishes to cross-examine a witness must give the other party notice of this:*

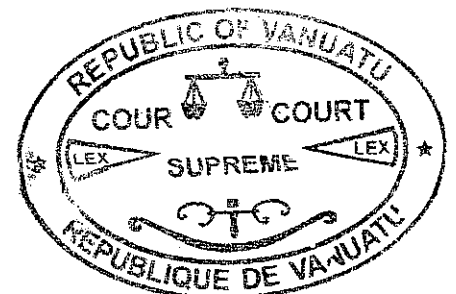
*at least 14 days before the trial; or*

*within another period ordered by the court.*

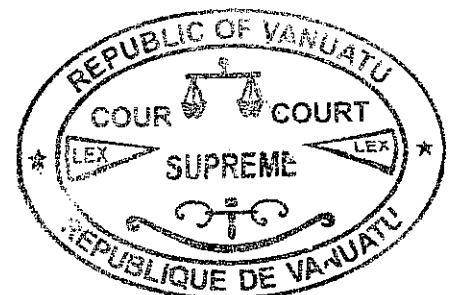
8. What rule 11.7 confirms is that once a sworn statement is filed and served, it becomes evidence in the proceeding unless the Court rules it inadmissible.
9. I must also take account the overriding objective of the CPR as set out in rule 1.2, which is to enable the Courts to deal with cases justly.

### **Discussion**

10. Ms Kaukare objects to the sworn statements being filed, given the breach of the timetabling directions made on 23 July 2024, and given that rule 11.6 provides that for a sworn statement to be used during a trial, it must be filed and served on all other parties at least 21 days before the trial. The filing of the sworn statements breached both the timetabling directions and rule 11.6.
11. Ms Kaukare advises that she put Mr Kalmet on notice by writing to him on 23 October 2024 advising that she would not accept any further sworn statements. As a consequence of the late filing, she was unable to discuss the defence position with the Claimant and had already prepared for trial.
12. Mr Kalmet accepts that the statements were filed well outside the time required, and rule 11.6. He submits:
  - a. The tardiness lies with counsel and not the Defendant.
  - b. The overriding objective of the CPR should be taken into account. As such, the Court should apply substantial justice. As per *Dinh v Polar Holdings Ltd* [2006] VUCA 24, substance must have priority over form.



- c. The concern could be addressed by a wasted costs order.
  - d. The evidence in the sworn statements is relevant to the issues for the Court to determine.
  - e. There is no prejudice to the Claimant because he can be given an opportunity to comment.
13. In order to determine this issue, it is unnecessary to delve extensively into the claim, and the defence. In brief, the Claimant asserts that he entered into a partly written and partly oral contract for the Defendant company to repair his vehicle following an accident. The Claimant accepted a quote given by the Defendant for the repairs. He paid a deposit. The Claimant alleges that the contract was breached because the vehicle was not repaired in the timeframe agreed by the parties. He seeks as relief, refund of the deposit, and general and exemplary damages.
  14. The Defendant agrees that they gave the Claimant a quote and said that various parts items were not in stock and had to be back ordered which would take 2-3 months. The Defendant accepts that the Claimant paid a 50% deposit. The Defendant counter claims for the balance of the quoted repair cost on the basis that the work was completed.
  15. The two sworn statements filed by the Defendant on 25 October 2024 address the circumstances of the repair from the Defendant's point of view and provide evidence relating to the counter claim. Therefore, they are relevant. If evidence is relevant, it is admissible, other than if another exclusionary rule applies. Pursuant to rule 11.7 of the CPR, a sworn statement that is filed and served becomes evidence in the proceeding unless the Court has ruled inadmissible. As was held in *Dinh v Polar Holdings Ltd*, immediately upon filing and service the sworn statement "becomes" evidence, regardless of subsequent events.
  16. The Court does not condone noncompliance with directions. However, there are a number of factors which mean that the sworn statements are admissible evidence and will be taken into account in determining the issues before the Court:
    1. As rule 1.2 of the CPR says, the overriding objective of the rules is to enable the courts to deal with cases justly. In *Dinh v Polar Holdings Ltd* [2006] VUCA 24, the Court of Appeal affirmed observations previously made in *Fujitsu (NZ) v International Business Solutions Limited and others* [1998] VUCA 13 that "...the Rules of Court are intended to further the interest of fairness and justice, and



*they must be applied with common sense in a realistic way to ensure that the purpose, not just the letter, of the Rules is achieved”*

2. The delay is not the Defendant’s fault. Mr Kalmet acknowledges that counsel takes responsibility for the tardiness.
3. The sworn statements are relevant to the claim, defence and the counterclaim.
4. While there is prejudice to the Claimant in the sense of delay, such concerns can be allayed by a wasted costs order and providing the Defendant an opportunity to respond to the sworn statements. I made it clear that the Court would grant an adjournment to ensure that the Claimant was not embarrassed or prejudiced by the late filing, and to ensure procedural fairness. Initially the Claimant wished to proceed with the trial. I was unwilling to do so unless counsel confirmed that the Claimant wished to proceed without having the opportunity to file a sworn statement in reply. That is because the Defendant’s sworn statements potentially cast doubt on the Claimant’s position that the Defendant agreed (expressly or impliedly) to have the repairs completed by the time school started again. Mr Toara’s sworn statement also provides evidence in support of the counter claim that it is likely the Claimant would wish to address.
5. In accordance with the overriding objective, this is a situation where substance should have priority over form.

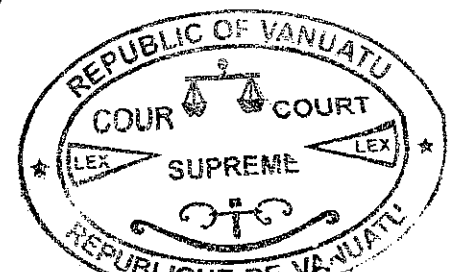
## **Orders and Directions**

### **Orders**

17. The sworn statements filed by the Defendant on 25 October 2024 are admissible and will be taken into account.
18. There is a wasted costs order in the sum of Vt 10,000 in favour of the Claimant, to be paid by 14 November 2024.
19. The trial is adjourned to enable the Claimant to file and serve a sworn statement in reply.

### **Directions**

20. The Claimant is to file and serve a sworn statement in reply by 7 November 2024.



- 21. The proceeding is listed for trial at **9.30am on 28 January 2025.**
  
- 22. The Claimant is to file and serve a statement of agreed and disputed facts and issues by 1pm 27 January 2025.

**DATED at Port Vila this 1st day of November 2024.  
BY THE COURT**

