

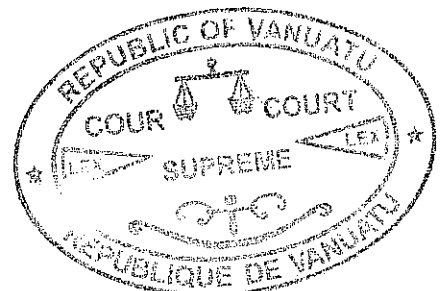
BETWEEN: ANZ BANK (VANUATU) LIMITED
Judgment Creditor

AND: ELIZABETH THIAL and TONY CHARLES HARRIS
Judgment Debtors

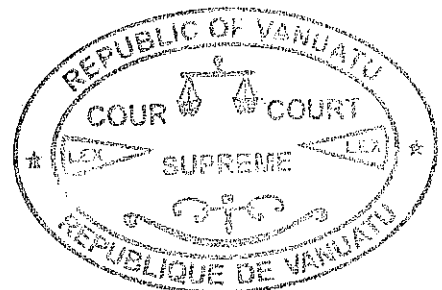
Date of Hearing: 15th day of March 2024
Before: Justice W. K. Hastings
Distribution: Mr. A. Kalmet for the Judgment Creditor
Mr. J. Mesao for the Judgment Debtors

DECISION ON APPLICATION TO STAY EXECUTION OF ENFORCEMENT WARRANT

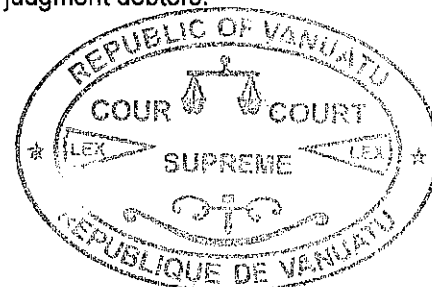
1. The applicants (the applicant judgment debtors) applied on 19 December 2023 to further stay for 6 months the execution of the enforcement warrants (non-money order) issued in favour of the ANZ Bank (the respondent judgment creditor) dated 12 September 2023 and 30 November 2023.
2. When the order of 12 September 2023 was issued, execution of the enforcement warrant was stayed until further order of the Court on the strength of assurances from the judgment debtors that BRED Bank would consider their representations to refinance the debt, and to allow the judgment debtors time to gather together materials that would explain to the Court their financial capacity. That conference was set down for 28 November 2024 at 9am. Although the judgment debtors did not attend at 9am, they were represented by their then lawyer Mr Tari. Having heard from both Mr Tari and Mr Kalmet, the stay was lifted and fresh warrant on the same terms dated 30 November 2023 was signed.
3. Mr Kalmet provided evidence today showing the debt to the judgment creditor is now in the region of VT42,000,000 and has steadily increased as a result of no payments having been made to reduce it. The judgment debtors disputed this amount. The property the judgment creditor seeks to sell is where the judgment debtors live. There is a person willing to purchase the property from the judgment debtors for VT16,000,000 as soon as it can be sold with vacant possession. The judgment debtors say the property is worth VT18,000,000 and that a neighbour has told them it would buy the property. Either way, the sale of the property would be unlikely to eliminate the debt.
4. Filed with the application for another stay of execution of the enforcement warrant are:



- a. a sworn statement of urgency filed 19 December 2023 from the judgment debtors' new lawyer Mr Mesao, deposing that 6 months "*will be sufficient for them to pay the Judgment Creditor;*"
- b. a sworn statement of Tony Charles in support of the application for another stay filed 19 December 2023, deposing that the reason he seeks another stay is his "*soon-to-begin, reliable, robust, well-paid employment*" (Mr Charles's underlining) with an Australian NGO called "*Respond Global*" which will involve working on the IT systems aboard the NGO's boat HELPR-1. Annexed to the sworn statement is a "*Financial Synopsis for Elizabeth & Tony Harris*" showing proposed income of VT 6,474,864 and assets of VT 20,287,256 which includes an AUD 15,000 investment in Citigold that is waiting for "*goldmania*" to increase its value;
- c. a sworn statement of Elizabeth Thial in support of the application for another stay filed 19 December 2023, deposing that the judgment debtors intend to renovate a 2-bedroom flat on the property and make it "*available to rent immediately after refinancing of the property.*" She also refers to their ability to refinance "*after my husband starts his new job with Respond Global first thing in the new year, next month*" and to "*the VNPF/Super/Severance becoming available 'in due course'*" beginning in January 2024;
- d. a "*memorandum outlining evidences of the judgment debtors*" filed 19 December 2023 summarising emails from Respond Global, the last dated 15 December 2023, that refer to the contract of IT support "*which had been definitively offered just the day before*" 17 October 2023, which was followed by emails referring to the "*drafting*" of the service agreement on 27 November 2023, modifying the draft on 5 December 2023, and that another week was required to finalise the draft contract due to people in authority being on leave, on 15 December 2023;
- e. a sworn statement of Tony Charles filed 15 March 2024, updating the judgment debtors' financial position. This document refers to an increase in Ms Thial's salary "*in just under two-and-a-half months' time*" having received an offer of employment as Business Manager for Paradise Petroleum; the vessel HELPR-1 having been in dry dock but now functioning under a new captain who has employed Mr Harris casually on two occasions when the ship was in Port Vila; Mr Harris "*already beginning the process of retrieving his superannuation funds from Australia*" which will make available VT 7,000,000 to "*go towards the refinancing schedule;*" the severance pay of VT 3,000,000 Ms Thial will receive from ceasing her employment at the Australian High Commission; and rent of VT 3,600,000 per annum expected to be received after the 2-bedroom flat is renovated after refinancing.



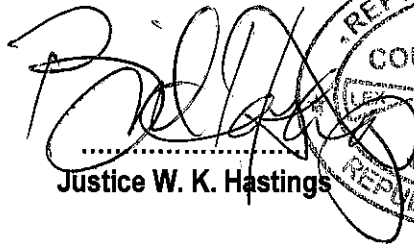
5. On 15 March 2024, the judgment creditor filed a sworn statement from Kethy Matariki, the Asset Management Officer at ANZ. Kethy Matariki deposes that after obtaining power of sale orders on 17 September 2020, the bank undertook all appropriate steps for the mortgagee sale of the property and secured a purchaser. The bank is concerned that the purchaser will cancel the sale contract because it is a condition of the sale and purchase agreement that the purchaser is to have vacant possession of the property and the continued occupation of the property by the judgment debtors prevents this. Ms Matariki also deposes that having reviewed the documents provided to support the application for another stay, the bank *"is not satisfied by the documents provided to support or indicate the financial capability and independent verification of the Judgment Debtors ability to pay off their outstanding [debt] with the Bank."*
6. Annexed to the sworn statement of Kethy Matariki is a bank statement showing the balance of the debt owing has risen from VT 38,219,295 on 18 January 2024 to VT 42,329,027 on 29 February 2024.
7. This matter has an extensive history. On 17 September 2020, the Deputy Master issued power of sale orders in favour of the bank which empowered the bank to sell the property, ordered the mortgagors to give the bank vacant possession, and gave leave to the bank to seek an enforcement warrant (non-money order) in respect of the property. These orders were incorrectly appealed to the Court of Appeal and the appeal was withdrawn. On 16 November 2022, the mortgagors applied to stay the enforcement orders of 17 September 2020. On 30 November 2022, the bank applied for an enforcement warrant for eviction orders having found a purchaser of the property. On 24 May 2023, the judgment debtors were given more time to demonstrate their financial position to the Court. On 11 July 2023, the matter was adjourned again because the judgment debtors said BRED Bank needed 8 weeks to consider their application for refinancing. On 24 September 2023, having heard that little progress had been made with respect to refinancing, the application for an enforcement warrant (non-money order) was granted but stayed until 28 November 2023. The stay was lifted on 28 November 2023 and a new warrant issued on 30 November 2023. The warrant could then be executed a year after the application was made and over 3 years after the power of sale orders were issued.
8. The evidence presented today was the evidence that would have been presented on 28 November 2023 but that was not presented either by Mr Tari or by the judgment debtors who did not attend the conference. It has been updated in the four months since and was presented at today's hearing.
9. As a result of the delay in hearing this application for another stay of execution of 6 months, 3 of the 6 months requested in the stay application have passed. In that time, the contract with Respond Global has not materialized, there is no evidence the BRED Bank refinancing has progressed, the flat renovation depends on the refinancing, and the superannuation, severance and new salary as a result of employment yet to be commenced all remain in the future. In the meantime, the bank has a purchaser who has been waiting for 18 months for vacant possession of the property, the sale of which will reduce, but not eliminate, the debt owed to the bank by the judgment debtors.



10. In *ANZ Bank (Vanuatu) Ltd v Lulum* [2000] VUCA 7, the Court of Appeal said the Supreme Court is not entitled to refuse the grant of an order for the enforcement of a mortgage under s 59(2) of the Land Leases Act [Cap. 163] simply because a judgment debtor contests the amount owed or the Court sees something unfair in the nature and circumstances of the mortgagor's default. In this case, there is no dispute that the judgment debtor is indebted to the judgment creditor, although the *amount* of the indebtedness may be disputed. An amount equivalent to the debt owing has not been paid to the judgment creditor or into Court. It is nearly 4 years since the Deputy Master issued the power of sale orders. The judgment debtors have benefited from a great deal of leniency over the years, but this has been to the detriment of the judgment creditor to whom the debt is owed. On my assessment of the evidence presented today, there is no longer any reason to restrain the judgment creditor from exercising its power of sale.
11. For these reasons, the application to stay the enforcement warrant issued on 30 November 2023 is declined. The warrant may be executed.
12. Costs are awarded to the judgment creditor and are to be taxed if not agreed.

DATED at Port Vila this 18th day of March, 2024

BY THE COURT


Justice W. K. Hastings

