

09/01/18

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BETWEEN: 1. **VILIAMI UASIKE LATU**
 2. **SILIVENUSI TO'A**

Plaintiffs

AND: 'ETUATE LAVULAVU

Defendant

BEFORE THE LORD CHIEF JUSTICE PAULSEN

Counsel: **Mr. W C Edwards Snr SC for the plaintiff Viliami Latu**

Mr 'E Lavulavu in person

Date of hearing **21 December 2017**

Date of Ruling: **8 January 2018**

**RULING ON APPLICATION TO VARY CONSENT ORDERS
AS TO COSTS**

The application

[1] The plaintiff (Mr. Latu) successfully obtained a declaration in this proceeding that the election of the defendant (Mr. Lavulavu) on 27 November 2014 as the Peoples Representative for the Vava'u No.16 Electoral District was void. On 17 June 2016 costs were fixed in favour of Mr. Latu in the sum of \$69,319.90. The order of 17 June 2016 was varied by consent on 11 October 2016 and again on 11 August 2017. This ruling is concerned with an application by Mr.

Rec'd 09/01/18
Jto:

Lavulavu to vary the terms of the consent order of 11 August 2017 to give him more time to pay. The application is opposed by Mr. Latu.

The consent orders

[2] The consent order of 11 October 2016 (in so far as relevant) reads:

- 1 The Order for payment of costs by... [*Mr. Lavulavu*] to... [*Mr. Latu*] fixed in the sum of \$69,316.90 on the 17 June 2016 is varied and shall be paid by instalments as follows-
 - (a) The sum of \$10,000 shall be paid on or before the 10th November 2016.
 - (b) The sum of \$30,000 shall be paid on or before the 30th July 2017.
 - (c) The sum of \$10,000 shall be paid on or before the 10th December 2017.
 - (d) The sum of \$10,000 shall be paid on or before the 30th July 2018.
2. In the event of... [*Mr. Lavulavu*] making all the instalment payments referred to in Order 1 on the due dates thereof, it shall constitute full payment of costs and the balance of \$9,316.90 and interest owing shall be discounted.
- 3 In the event of any failure or default by... [*Mr. Lavulavu*] to make the payment of any instalment payment within 14 days of the date fixed for payment the full amount of \$69,316.90 plus interest thereon from the 17th June 2016 less the amount or amounts of any payment made shall become due and payable forthwith.

[3] The consent order of 11 August 2017 varied the consent order of 11 October 2016. It had the effect of changing the amounts payable by Mr. Lavulavu on 30 July 2017 and 10 December 2017 only and read:

1. That Order 1(b) and (c) of the Orders for payment of costs dated 11th October 2016 are hereby varied with the amounts fixed for payment on the 30th July 2017 reduced from \$30,000.00 to \$10,000.00 and the payment for the 10th December 2017 increased from \$10,000.00 to \$30,000.00 as follows-

1(b) The sum of \$10,000.00 shall be paid on or before the 30th July 2017.

1(c) The sum of \$30,000.00 shall be paid on or before the 10th December 2017.

2. The Orders dated the 11th October 2016 shall remain in full force and effect and are hereby reconfirmed in every respect.

This application and the parties' positions

[4] In his application Mr. Lavulavu applies to vary paragraph 1(c) of the consent order of 11 August 2017 by reducing the amount payable on 10 December 2017 to \$10,000 with the balance of \$20,000 to be paid on 30 July 2018.

[5] The ground which Mr. Lavulavu advances in support of his application is that he is indigent. He has only \$10,000 on hand to pay to Mr. Latu. He says that he has no source of income other than farming activities and that he has not been paid for a container of food crops sent to New Zealand in February 2017. He also says that the Government has failed to honour election promises made to

growers to sell and export their crops. The lack of any payment for his container and the Government's failure to honour its promises, he says, have put him in the position where he cannot pay Mr. Latu as agreed. He expects that he will be able to harvest crops in the first half of 2018 and is 'certain' that by 30 July 2018 he will be able to clear his indebtedness. Mr. Lavulavu submits that all he wants is 'justice' and more time to pay his debt.

- [6] Mr. Latu opposes Mr. Lavulavu's application. Mr. Edwards argues that the Court has no power to vary a consent order. He also submits that the Court should not vary the consent order (assuming power exists) as the reasons Mr. Lavulavu now advances are the same ones he relied upon when negotiating the consent order of 11 August 2017. In addition, Mr. Latu does not accept that Mr. Lavulavu's only source of income is his farming activities. Mr. Edwards referred me to the fact that Mr. Lavulavu owns a quarry (of which there was evidence given in the substantive action) and he asserts that Mr. Lavulavu has been paid significant sums for consultancy work in relation to a development at Popua (which is denied by Mr. Lavulavu).

Discussion

- [7] For the purposes of this application I am prepared to accept that Mr. Lavulavu does not have money presently available to pay Mr. Latu. Nevertheless, his application must be dismissed for the reasons that follow.
- [8] A consent judgment or order is final subject to any right of appeal. Except in special circumstances the Court has no power to set aside or vary a consent order previously made by it. Where one party is in breach of a consent order (as Mr. Lavulavu is in this case) the Court

will enforce the consent order and will not vary it by giving extra time for performance (White Book 1988 Vol 2 Part 14 4606 at page 1269 and the cases referred to). No appeal has been filed by Mr. Lavulavu in respect of the consent order of 11 August 2017 and there are no grounds upon which he could do so.

[9] In addition, as in this case a consent order may embody an agreement made between the parties. Here Mr. Lavulavu and Mr. Latu made an agreement the effect of which was to compromise some of Mr. Latu's rights in relation to the payment of costs. A party to such an agreement may seek to set aside or vary a consent order in an action commenced for that purpose. The Court will only interfere on the same grounds as it would with any other contract, for example if fraud, mistake or misrepresentation was established. Mr. Lavulavu has not commenced such an action and there is no suggestion of any ground existing to challenge the consent order on this basis either.

[10] What I have said is enough to deal with this application. For completeness, I would add that even if the Court had the power to vary the consent order I would not have done so.

[11] Whilst I have been prepared to accept that Mr. Lavulavu does not have cash on hand to pay Mr. Latu he clearly has assets to which Mr. Latu may seek recourse for payment of what is owed. Mr. Latu was awarded costs because he was successful in this proceeding. The case was an important one and his costs were reasonably incurred. Mr. Latu's costs were high only because of the manner in which Mr. Lavulavu chose to run his defense. Having been successful Mr. Latu is entitled to immediate payment of his costs. He should not be expected to wait until such time as it suits Mr. Lavulavu to pay him.

Notwithstanding that, Mr. Latu has already agreed on two occasions to vary the terms of payment of his costs to accommodate Mr. Lavulavu's circumstances. Mr. Latu is entitled to say 'enough is enough'. I note also that it is not the case that the only effect of the variation sought is to give Mr. Lavulavu more time to pay. Should the Court vary the consent order in the manner that Mr. Lavulavu seeks it would deprive Mr. Latu of his right (which presently exists by reason of Mr. Lavulavu's default) to immediate payment of both the full \$69,316.90 that he was initially awarded as costs and interest.

- [12] Mr. Lavulavu submitted that he was asking for 'justice' but in my view if the Court was to accede to his application it would not be acting justly. To the contrary, it would be acting arbitrarily and inflicting injustice upon Mr. Latu.

Result

- [13] Mr. Lavulavu's application to vary the consent order of 11 August 2017 is dismissed.
- [14] Mr. Latu is awarded costs on this application to be fixed by the Registrar if not agreed.




O.G. Paulsen
LORD CHIEF JUSTICE

NUKU'ALOFA: 8 January 2017