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

Civil Case No.103 of 1998

State Law Office

MAY 2001

BETWEEN: FRASER SINE
Plaintiff

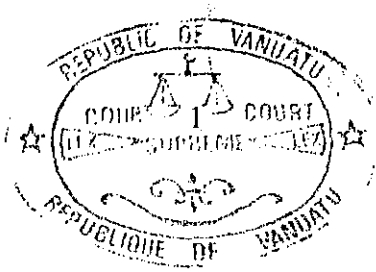
AND: MINISTRY OF AGRICULTURE FORESTRY, LIVESTOCK AND FISHERIES
Defendant

Coram: ***R. Marum J. MBE***

Mr. Robert Sugden for the plaintiff
Mr. George Nako for the defendant

JUDGMENT

This was an action by way of Writ of Summons of the 16th September 1998. The purpose of this action is to set aside the deed of release signed between the plaintiff and the defendant on the 4th of September 1997. In brief, the plaintiff took action against the defendant in case 116/94. While this case was pending before the court, the defendant and the plaintiff entered into a deed, whereby releasing the defendant from any further liability in the action, meaning the end of the matter, and only for the plaintiff to withdrawn the case. When the matter came before the judge for hearing on the 7th of September 1998 he could not proceed with the substantive matter due to the deed of release, and treating the deed of release as ending the matter there. However, the judge said in his judgement that to make live again the action, the plaintiff can challenge the validity first of the deed of release in opening up the case, if the court finds for the plaintiff, then the deed of release can be set aside making live the case 116/1994 to proceed on. The view of the judge in case 116/1994 is as follows: -



"This action can not continue for as long as the deed remains an effective document of the plaintiff. The proper cause is to stay the plaintiff's action. The plaintiff will be free to bring a separate action seeking to have the deed set aside ... If the action is successful and the deed is set aside, the stay of the proceeding will, without any further steps by any party, cease to take effect. The plaintiff will then be free to prosecute his action."

For these reasons, this matter now came before this court seeking for the deed of release to de set aside, and if it is set aside than the substantive matter in case 116/94 comes to live for continuation.

Relief

The relief sought by the plaintiff in his summons are as follows: -

1. *A declaration that the agreement between the defendant and the plaintiff whereby the plaintiff released the defendant for all claim in respect of the Civil Case No. 116 of 1994 is unconscionable as regard to the defendant and;*

2. *An order setting aside agreement and allowing the Civil Case No. 116 of 1994 to continue as against both defendants.*

Issues:

1. Whether the agreement entered to was unconscionable and;
2. Whether there was unethical conduct and
3. Whether the Attorney General has a duty to see the plaintiff's lawyer.

On the basis of these issues the defendant maintain that:

1. The settlement agreement was valid and,
2. The agreement puts an end to such proceeding in the Case 116 of 1994.

Witness

Only the plaintiff gave evidence while Kilu gave evidence for the defendant.

Sugden advances that unconscionable relief is one of equitable remedy available in setting aside a deed. Unconscionable action can arise whenever one of the parties in negotiation is place in a disadvantage position in relation to the stronger party. And the stronger party uses his advantages to obtain an agreement. If this occur then, that alone is sufficient to set aside the deed of release of the 4th of September 1997. He advances, too that in the plaintiff signing the deed of release he was place in disadvantage situation, did not seek legal advice, when Mr. Sine approached the defendant he was in great financial need, the defendant being represented by a legal counsel had quite stronger advantage over the plaintiff, and he was wrong to communicate directly with his client.

The defendant advances that, whether the defendant knew of the inability or disability (need of money) of the plaintiff in seeing the defendant, he at that time was a highly educated person with university advance level of education, not poor, neither ignorant and was in a position of power of negotiation, he was not place in a disadvantage situation, he knew what he was asking for as he was the one who approached them first, the negotiation was before Kilu as counsel for the defendant, the Attorney General and Willie Fred, not only that he was paid at VT679.500, and he knew very well that he was to receive VT 679,500, and the plaintiff at that time discharge a worth while judgment to obtain money, and the plaintiff was quite aware that he was entitle only to be paid VT679.500.

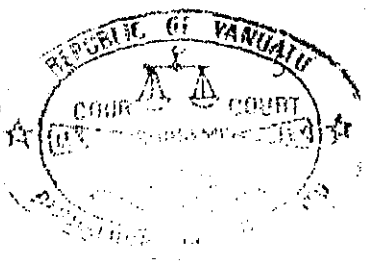
The deed of release was written in simple English words and mainly the first part reads: -

> "*I, Fraser Sine, in consideration of the sum of... (VT497.500) Being the full and final settlement of all the claims whatsoever in relation to the Civil Case Fraser Sine –v- The Minister of Agriculture... paid to me by the Government of the Republic of Vanuatu, the receipt of which I hereby acknowledge.*"

This was simple English and the plaintiff with university education in all circumstances was able to read and speak English and was totally able to understand and accept the meaning of the deed. Further, he was also the managing director of Port Vila Fisheries Ltd Co. and will quite extensively write correspondences in English language. I did not find any language difficulties at all to say that the plaintiff, in signing the deed did not understand what he was signing for.

The plaintiff instigated the out of court settlement by approaching the defendant. As a follow, up he wrote the letter dated 16th July 1997 and set his claim in the case No. 116/1994 totaling VT7.285.070 as the amount claimed in the substantive action, however, he was ready to settle for Vt 1.936.225 as the proposed settlement, which was far below his claim in the Writ of Summons. At least the plaintiff had tried to have an out of Court settlement as far as 1996. The purpose of writing the letter of 16th July 1997 to the Attorney General has some contravening factors; the plaintiff is saying that the Attorney General and Kilu told him to write that letter; while the defendant maintains that, it was Fraser's own writing and proposal. I find that in such situation, the writer was solely responsible for his written words and no others. He had all the time to master what he was writing for. He was highly educated to university level, and being the writer it was his wants that he was putting it down in black and white in transferring his wants to the other party. If there is any truth in saying that he only wrote what he was told to write than, it could have been easier for the plaintiff to write quoting what the Attorney General and Kilu informed him to write. I can only draw a prima facie inference that upon their discussion, the plaintiff was to write to the Attorney General his proposal he agreed to for the defendant to settle. And that was confirmed by his letter of 16th July 1997 for a reduction to VT1.936.225 from VT 7.275.070. This proposal did not go down well with the Attorney General as the government stand, as from 1996 was to pay the plaintiff VT697.500 and be given a job. At the time of writing the letter of the 16th July 1996, he was still unemployed. So in other way the proposal claim by the plaintiff and the government of VT697.500 were all in a stand still.

On the 25th July 1996, after the plaintiff writing that letter attended to Kilu's office. In my view, this was to follow up his letter of 16th July 1996. On his attendance to Kilu's office he expresses his financial difficulties, as stated in his letter of 16th July 1996 that is for school fees and not employed. Further in Kilu's evidence the wife left him, private lawyer too expensive, and the case has been dragging on for too long. When this discussion took place, there were still no agreement between the defendant and the plaintiff as to their different amounts as out of Court settlement. On 25th July 1996 he tabled his reasons, in negotiating for settlement. The Government did not accept the VT1.936,225 as proposed by the plaintiff and remain firm on Vt697.500. On his proposal, the position of the Government was clear, that he was only entitled to VT697.00 and not more. Consequence to his letter of 16th July 1997 he was paid VT200.000 prior to signing of the deed of release, and remaining to be paid was VT497.500, giving the total of VT697.500 as maintained by the defendant. By 2nd September 1997 the plaintiff approached the Attorney General for the payment of VT497.500. This time the deed of release was prepared for signing by the parties as settlement of the amount of VT697.500. Before signing of the deed of release the plaintiff had the opportunity of discussion with Attorney General and knew the Government offer to pay him VT697.500 as full settlement of the relief in case 116/94, and the collection of VT200.000 will confirmed that the amount of VT697.500 was the amount the parties were working towards as full settlement of the Civil Case No. 116/1994. I will not accept any misunderstanding of the purpose of the deed of release and accept that the plaintiff signed the deed of release with the knowledge of what he was signing for. However, at that very time of his negotiation he was in desperate financial needs due to his financial needs, he saw this opportunity by negotiating settlement of his case to give answer to his crisis. He was at the crossroad, torn between two worlds, either to accept the offer or stuck with his financial problems. He became the weaker person of the two to bargain. And that's why, it would have been proper for the defendant and his counsels to leave the matter aside and the plaintiff counsel should have been contacted for any round table discussion, as his counsel was still on foot in the case he was negotiating settlement. This may be additional expense to him, as mention in his letter of the 16th July 1997, which lead the defendant to negotiate directly with the plaintiff, as he has to pay for that. However, that opportunity should have been offered to him at that very time to seek legal assistance from his counsel as to the extent of signing out his rights in his case. I find his case falls under the categories of unconscionable bargaining power, and to get justice in his case in a more unfavorable



approach, but yet took it due to his desperate needs. He was also to be partly blamed for the situation he was in. He knew very well that he still had a lawyer on foot in his case and ignored that and took a short cut for ending the Case 116/1994 in this manner.

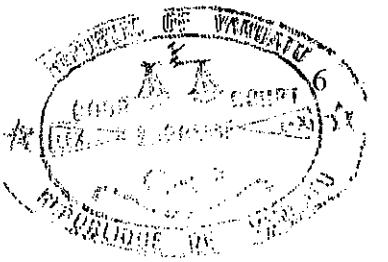
Legal representation in civil suite is a personal right at the expense of the user and remains for a party to exercise that personal right. If there is an engagement of a counsel by a party then there is a client counsel relationship is established, meaning that in any matter before the Court of law the counsel be the guardian of the interest of his client rights until final decision is made or until the counsel withdraw or fired by his/her client. In this case no evidence that the plaintiff's counsel has cease as counsel in the case. This means that for any dealing with his client he must be informed of the approach his client took, and also to find out from his counsel whether he is still representing his client or not, to avoid conflict of interest in achieving justice in his case. At least the defendant counsel could easily telephone the plaintiff's counsel and inform him. In addition, the view of the judge in the same case dated the 7th of September 1998 at page 9 and I quote: - "*to record my view that in dealing with plaintiff directly, as result of which the plaintiff signed the deed of release and discharge, Mr. Kilu acted in a manner contrary to the ethics of legal profession*", demonstrated the unaccepted ethical approach by counsel in dealing with other counsel client, and this is also sufficient to set aside the deed of release. The defendant counsel advances that the deed of release was valid and the agreement puts an end to the case. This advancement cannot stand for reasons already given over the signing of the deed of release. For these reasons, the deed of release should be set aside to make way for the court to deal with the real issues between the parties.

For these reasons, I find for the plaintiff, and grant the following orders sought by the plaintiff: -

1. I declare that the agreement the defendant and the plaintiff, where the plaintiff released the defendant from all claims in respect of civil case No. 116/1994, is unconscionable as regards to the defendant.

2. This agreement is now set aside and;

3. Civil case No. 116/1994 to continue as against the defendants.



The practical reality of this finding is that, the plaintiff no longer now entitle to those money he received from the defendant and remains a debt as of today he owes to the defendant, and the only cause open to him is to refund it back to the defendant.

Dated at Port Vila, this 27th day of September 2001

R. MARUM MBE
JUDGE.