

IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU
(CIVIL JURISDICTION)

CIVIL CASE NO. 64 OF 2015

BETWEEN: JEFFREY LAVHA & TOM SAUTE
trading as LAHSAUT of Lenakel
Tanna Island.

Claimants

AND: REPUBLIC OF VANUATU

Defendant

Submissions: 15th March & 21st April 2017

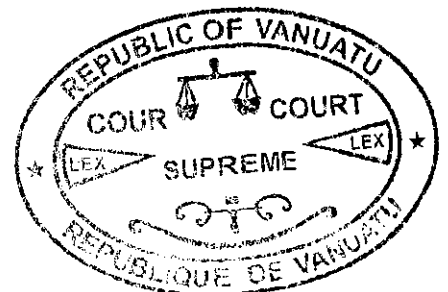
Date of Judgment: 4th May 2017

Before: Justice Mary Sey

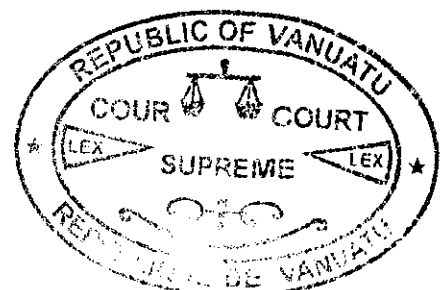
Appearances: Mr. Daniel Yawha & Bruce Kalotiti for the Claimants
Mr. Sammy Aron for the Defendant

RESERVED JUDGMENT

1. Mr. Jeffrey Lavha and Mr. Tom Saute (trading as Lahsaut of Lenakel Tanna Island) have brought this claim for damages and loss suffered as a result of cancellation of the licence issued to their company for sandalwood business. The Claimants also seek specific performance of an agreement relating to proceedings in Judicial Review Case 131 of 2006 between the Defendant and Lahsaut Company.
2. In order to get a clear background of the issues in this case it is timely to set out the **chronology** of events as follows:
 - 24 June 2003: the Council of Ministers endorsed the National Sandal Wood Policy.



- 25 July 2005: the Claimants submitted a proposal to the Department of Forestry to set up an oil industry on the Island of Tanna.
 - 21 September 2005: the Forestry Board of Vanuatu conducted its Sixth Forestry Board Meeting and it considered the Claimants' proposal.
 - 3 October 2005: the secretary of the Board, Mr Hanington Tate, informed the Claimants by way of letter about the Board's resolution.
 - 4 May 2006: Mr. Jeffery Lavha applied to the Department of Forestry for a sandal wood Licence.
 - 13 June 2006: the Defendant through its Department of Forestry issued a sandal wood licence SL/JT/LAHSAUT/05/06 to the Claimants for 10 tonnes for a period of 5 years from 13/6/06 to 13/6/11.
3. In July 2006, Mr. Naupa representing Tropical Rainforests Aromatics Limited filed a claim for judicial review of the decision of the Defendant to grant to the Claimants a licence to harvest sandalwood. The claim which was **Tropical Rainforest Aromatics Ltd v Minister for Agriculture, Quarantine, Forestry & Fisheries** [2006] VUSC 116; Civil Case 131 of 2006 (25 August 2006) named the present Claimants Jeffrey Lahva & Tom Saute (trading as Lahsaut) as Fourth Defendants.
 4. In conjunction with that application for judicial review, Mr. Naupa made an application for urgent injunctive relief to suspend the operation of the licence pending the hearing of the substantive claim. The application was filed together with an undertaking as to damages.
 5. On 25 August 2006, the Supreme Court delivered its judgment and granted an order restraining the Fourth Defendants (the Claimants herein) from conducting sandal wood operations under the Authority of Licence No. SL/JT/LAS005-06 until further order of the Court.
 6. On 21 January 2008, the Court struck out the case on the basis that no step had been taken in the proceeding for 6 months pursuant to Rule 9.10 (2)(d) of the Civil Procedure Rules.
 7. On 19 June 2009, the Claimants' lawyer, Mr. Stephen Joel, wrote to the AG Ishmael Kalsakau demanding VT44,927,145 as compensation for damages



suffered by the Claimants as a result of the licence which was issued by the Defendant. The salient part of the letter reads:

"The Supreme Court proceedings were struck off on 21 January, 2008 under Rule 9.10 (2)(d) of the Civil Procedure Rules due to the claimants not taking steps for more than 6 months. The other reason as we now know was because the State has voluntarily revoked our client's first licence and issued them with another. Nevertheless, my clients are entitled to the damages suffered as a consequence of the mistakes and or negligence of its institutions. The Forestry Department and Ministry is (sic) wrongfully issuing its first licence the subject of Supreme Court Civil Case No.131 of 2006, the Court's interim orders, revocation of said licence and issuance of another."

8. In a letter dated 6 October 2009 and addressed to the DG (Mr Jeffrey Wilfred), the AG stated as follows:

"Dear Sir

Re: LAHSAUT LOCAL PRODUCTS COMPANY

On the 30th July, 2009 I wrote to the Director of Forestry Department attaching a letter I received from Messrs Stephen Tari Joel & Associates claiming damages for a revocation of a licence and re-issuance thereof thereby reducing the quota the Company could extract sandalwood.

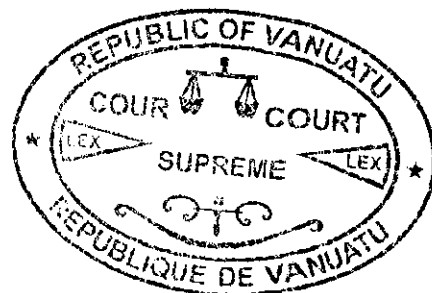
It appears by letter dated January 11, 2009 that (sic) then Acting Director of Forestry conditioned the grant of a licence to the Company to the (sic) purchase of a distillery.

The letter also alleges the Government issued a licence that was contrary to legal quote requirements which was relied upon by Lahsaut Company.

The claim is for the Sum of VT44,927,145. They are threatening legal action of (sic) the Government does not address their claim.

I have considered the materials they have submitted and the file on this matter. I consider, unless there are telling reasons why the Government should not do so, serious effort must be spent on negotiating an outcome that is mutually beneficial to both parties.

I await your instructions



Yours Sincerely

Alatoi Ishmael KALSAKAU

9. On 13 June 2012, the Minister of Agriculture, Forestry and Fisheries (Minister Ngwango) made an offer to the Claimants of an out of Court settlement of VT60,000,000 to be paid by three instalments in August, September and October 2012.
10. By letter dated 22 August 2012, the Minister advised the AG to prepare a deed of settlement accordingly.
11. On 17 September 2012, the Attorney General advised the Minister that the Deed of Release had been prepared and that it was to be tabled before the Council of Ministers (COM) for approval. However, the Deed was not executed because the COM never met as the Ministers were contesting elections at the time.

The Evidence

12. The Claimants' evidence was essentially contained in the following documents:

Exhibit C1 – sworn statement of James Ngwango dated 26 May 2016 with annexure “JN1 – JN5”.

Exhibit C2 – sworn statement of Jeffrey Lahva in support of claim dated 18 May 2015 with annexure “JLD1” – “JLD24”.

Exhibit C3 - Further sworn statement of Jeffrey Lahva in support of claim dated 3 November 2015.

Exhibit C4 - sworn statement of Jeffrey Lahva dated 2 October 2015 in response to sworn statement of Hannington Tate

Exhibit C5 - Sworn statement of Anniva Tarilongi dated 22 December in support of the claim

Exhibit C6 – Audit Report prepared by Namba 1 General Consultancy Services (NIGCS)

The evidence adduced by the Defendant was contained in the following documents:

Exhibit D1 – sworn statement of Nadine Alatoa dated 11 December 2015.

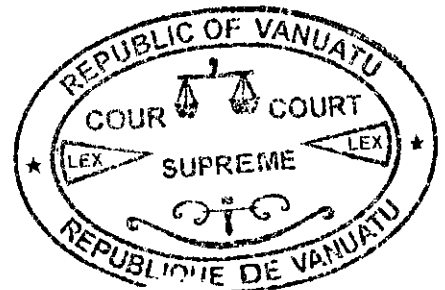


Exhibit D2 – sworn statement of Hannington Tate dated 7 August 2015 with “HT1” – “HT3”.

ISSUES

13. The issues posed for the Court’s determination are threefold:
- (i) Whether the Claimants have suffered damages and loss?
 - (ii) If so, whether the Defendant is liable for the damages and loss suffered by the Claimants?
 - (iii) Whether there was an agreement by the Defendant to pay damages to the Claimants?

Discussion and Decision

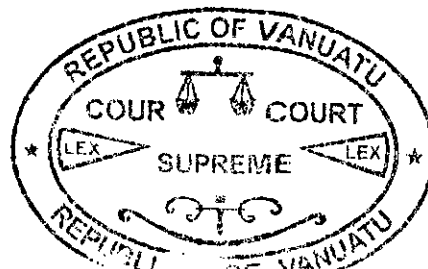
14. The reliefs sought by the Claimants as they appear in the Supreme Court claim filed on 13 April 2015 read as follows:

“WHEREFORE CLAIMANTS CLAIM

1. *Judgment sum of VT60,000,000.*
2. *10% interest of the Judgement amount since September 2012 to the date of settlement.*
3. *Cost*
4. *Any other orders deem just.*

AS A FURTHER AND/ OR ALTERNATIVE CLAIM

18. *By reason of government granting the license upon relying the term of license, Lahsaut Company now the Claimant has been operating in accordance with the terms of license issued from 2006 to 2011. Based on the term of this license, Lahsaut has been operating as sandalwood company.....*
19. *And or about 13th June 2006, the tropical Rainforest filed the judicial review to restraint ((sic) and also filing the restraining order against Government. The Supreme court granted injunction against the defendant*



(Lahsaut Local Product company) and granted interim injunction on the 25th August 2006 preventing Lahsaut company to operate under the license issued.

20. *The Claimant has lost the opportunity to operate its business successfully as a result of (sic)*

21. *As result of the government action Lahsaut Local Product has suffered lost (sic) and claimant (sic) for damages as particularized as follows:*

- a) Loan Agreement (for buildings, plant and machinery purchased)
VUV 6,800,000*
- b) Salary and wages loss (Staff, work contract and casual Labours)
VUV 5,820,000*
- c) VNPF Contribution VUV 468,000*
- d) Farmers royalties VUV 1,892,000*
- e) Outstanding lease VUV 3,000,000*
- f) Legal loss VUV 9,500,000*
- g) Projected Net Profit Loss for 2006 -2010 VUV105,243,100*

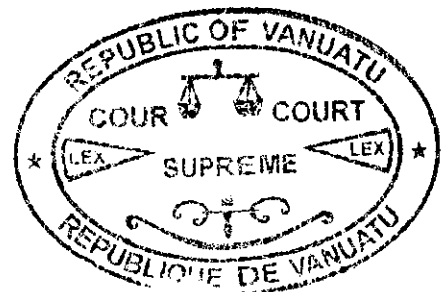
*Total Direct loss suffered in the sum of: VUV132,723,100
The above benefits are the direct cost of the injunction granted by the court."*

15. The Claimants allege that they suffered loss and damages arising from these factors:

- (a) Relying upon the Defendant's representation to them to purchase a distillery plant from their associates in Australia before the licence was approved;
- (b) The injunctive relief granted in favour of Mr. Jonathan Naupa in Civil Case No. 131 of 2006 restraining them from conducting sandal wood operations under the Authority of Licence No. SL/JT/LAS005-06 until further order of the Court; and
- (c) The cancellation of the licence issued to them by the Defendant.

16. The Claimants further allege that the Defendant has admitted its liability for such loss through correspondences exchanged between them as well as at various meetings held by them.

17. For its part, the Defendant submits that there was no representation made from the Government to the Claimants for them to purchase the distillery machine in order to carry out sandal wood operation in Tanna. The Defendant further



contends that the government is not liable for the losses suffered by the Claimant and alleges that Tropical Rainforest Aromatics Ltd is liable pursuant to its undertaking as to damages given in Civil Case No.131 of 2006.

18. I note from paragraphs 23 – 26 of the said judgment that the Court remarked as follows:

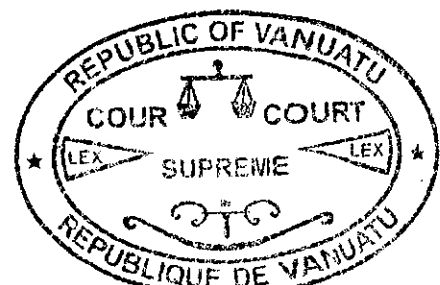
“23. Applying these principles relating to injunctive remedies, the balance comes down in favour of granting an injunction because, to summarise: there is a serious question to be tried. Indeed on the material before the Court at this stage it could be said that the Claimants have a strong case on one or both of the grounds that I have referred to.

24. It is particularly so when it seems at least possible that the Second Defendant might lack any strong backing from his own superior in relation to this decision, although again that is something which not clear at this early stage.

25. Secondly because damages are not available and not capable of remedying any potential damage to the Claimant's interest if an injunction is not made. While on the other hand any damage to the Fourth Defendants can be remedied by damages and the undertaking which has been given.

26. In this regard it would be obvious the Fourth Defendants should quantify any damages which they might suffer by virtue of the injunction I am about to make so in the event that the Claimant does not succeed at full trial, the Fourth Defendants are in a position to ask for the undertaking to be given practical effect. I simply mention that. Further as I have said the status quo favours the Claimant in this case.”

19. Mr. Lahva testified that the Claimants' licence had been given to them in good faith so they thought they should pursue their claim for damages against the Government. During cross examination, Mr. Lahva was referred to the Undertaking given in Civil Case 131/2016. This document was exhibited to Mr. Hannington Tate's sworn statement as "HT2". Mr. Lahva said that it was Government that had issued the licence and since Government was wrong to have exceeded the 80 tonnes then the Claimants were entitled to be compensated by the Defendant. He said the Claimants did not apply for the restraining order to be set aside.



20. The Claimants seem to place reliance on Mr Nwango's letter dated 13 June 2012 to their lawyer Mr. Stephen Tari Joel (See annexure "JLD20" of the sworn statement of Jeffrey Lahva) as an agreement on behalf of the Defendant to settle the Claimants claim out of court. The letter states:

"Re Claim for compensation and damages by Lahsaut Against the Republic..

...I need time to seek advice and received (sic) further information in regards to Supreme Court Case No. 131 of 2006.....

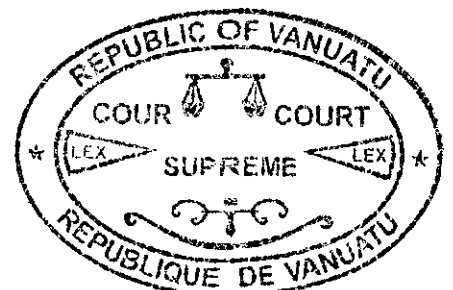
However, I feel that a fair compensation from the loss, damages and suffering caused by the Government to Lahsaut should be VT 60,000,000...

My Ministry will do all things necessary to ensure this claim is resolved outside court....."

21. However, the Defendant says that the Claimants have failed to establish that they have suffered damages and that, even if they have, the Claimants should seek compensation under the Undertaking given by Tropical Rainforest Aromatics Limited as directed by the Supreme Court. Mr. Aron submits that nowhere under the Forestry Act [CAP 276] is the Minister clothed with power to offer settlement on behalf of the Defendant. To buttress his submission, counsel relies on the principle outlined in **Birkdale District Electric Supply Co v Southport Corporation** [1926] A.C 355 as stated in Chitty on Contract (6th ed) at paragraph 725, page 468 that:

"If a person or public body is entrusted by legislature with certain powers and duties expressly or impliedly for the purposes, those persons or bodies cannot divest themselves of those powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise."

22. In **Barnard v National Dock Labour Board** [1953] 2 QB 18, the Court of Appeal held that, the delegation by the London Dock Labour Board, a statutory body, of its disciplinary functions to a port manager, was unlawful. The



manager's purported suspension of workers was therefore a nullity. Denning L.J. said -

" we are not asked to interfere with the decision of a statutory tribunal; we are asked to interfere with the position of a usurper These courts have always had a jurisdiction to deal with such a case.

.....the courts of equity have always had power to declare the orders of a usurper to be invalid and to set them aside. So at the present day we can do likewise."

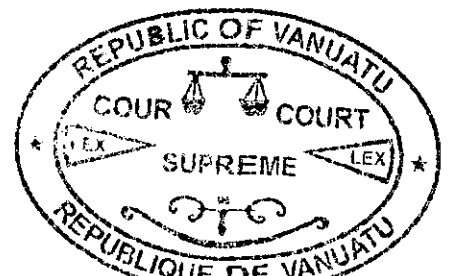
23. It seems clear from these authorities cited that if a person who, or body which, takes action is not designated as the person or body authorised to take that action, the Courts will hold that the action is unauthorised, ultra vires and unlawful.
24. Judging from the totality of the evidence adduced by the parties, I find that an agreement was never reached between the Defendant and the Claimants. It seems clear to me, on the balance of probabilities, that Minister Nwango's negotiations to have the matter settled out of Court in the sum of VT60 Million was ultra vires. Under cross-examination, Mr. Nwango was asked whether he had received advice from the State Law Office as to whether or not to negotiate settlement and his response was "No mi nor seekem advice." He said that he believed he had power as the Minister at the time to negotiate a settlement. It is interesting to note that even though the amount claimed by Mr. Stephen Joel on behalf of the Claimants was for the sum of **VT44,927,145**, Minister Nwango made an offer to the Claimants of **VT60,000,000** which meant an excess of over VT15,000,000.
25. Moreover, section 42A of the *Public Finance and Management Act No.3 of 2011* as amended, provides that:

"(1) A Minister, Director General, Director or an officer of an agency must seek:

- (a) legal advice from the State Law Office; and*
- (b) advice from the Director General as to the availability of funds, for the preparation of a Release.*

(2) A Release may be approved in the following manner:

- (a) for an amount less than VT 10,000,000 - approval by the Minister after consultation with the Director General; and*



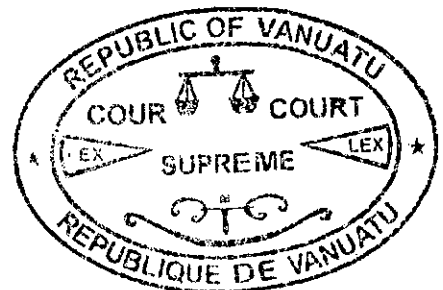
(b) for an amount of VT 10, 000, 000 or more - approval by the Council of Ministers.

(3) To avoid doubt the process in subsection (1) must be complied with before an approval can be made under subsection (2)."

26. Section 42B further provides that in the event that a release is made without due compliance with section 42A, such release has no effect. I note from the evidence of Nadine Alatoa that there was never any compliance with section 42A(2)(b) of the PFEM Act as amended. As such it is the submission of Mr. Aron there is no existing agreement between the Claimant and the Defendant that would warrant specific performance against the Defendant. The Defendant further submits that the fact that it refuses to compensate the Claimants as proposed by Mr. Nwango cannot be considered as a breach of contract because there is no agreement for settlement and neither can it give rise to a cause of action for specific performance. I agree.
27. As a further or alternative claim, the Claimants claim the sum of VT132,723,100 as quantified in paragraph 15 of this judgment. However, I note that most of the items claimed are pecuniary damages which need to be specifically pleaded and specifically proven. In **Bonham-Carter v Hyde Park Hotel Ltd, (1948) 64 T.L.R 177** Lord Goddard C.J stated as follows:

"On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages, it is not enough to write down the particulars and, so to speak, throw them at the head of the Court saying this is what I have lost I ask you to give me these damages. They have to prove it."

28. Regrettably, the Claimants in this present case have failed to specifically prove their damages. Consequently, no award would be made under these heads of damages as quantified.
29. Judging from the totality of the evidence adduced, I find on the balance of probabilities that the Claimants have failed to prove their claim against the Defendant for damages and loss as alleged. The Claimants are also not entitled to an order for specific performance. Nonetheless, however, I find that the Claimants are in a position to ask for the undertaking in damages filed by Tropical Rainforest Aromatics Limited in Civil Case 131 of 2006 to be given practical effect.



30. Costs are awarded to the Claimants on a standard basis to be agreed between the parties failing which they are to be taxed.

DATED at Port Vila, this 4th day of May, 2017.

BY THE COURT



M. M. SEY
Judge

