

**BETWEEN: Saby Natonga
First Claimant**

**AND: Group 107 Entertainment
Second Claimant**

**AND: Michel Guyenne
Defendant**

Before: *Justice Aru*

Counsel: *Mr. R. Kapapa for the Claimant
Mr. L. Tevi for the Defendant*

JUDGMENT

1. This is a claim for damages for breach of contract.

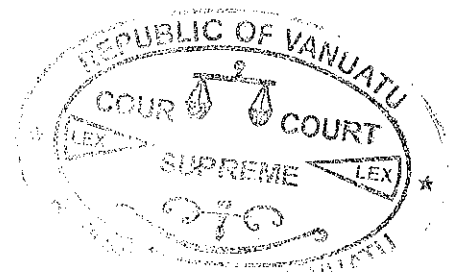
Background

2. In 2014 the parties were in negotiations for the leasing of the defendant's premises in Luganville Santo by the claimants to conduct their business. It is not disputed that Wesley Rasu was engaged by the claimant to conduct negotiations on his behalf with the defendant. The negotiations concluded with the signing of a contract which is dated 27 October 2014. After the signing, the claimants paid the defendant a deposit of VT200, 000.
3. Sometime in March of 2015 the defendant informed the claimant by phone that he did not agree to the establishment of a night club on his premises. Sometime after 24 November 2014 the claimant cancelled the contract.

Claim

4. The claimants now claim damages for breach of contract. The claim as pleaded at paragraphs 5,7, 8 and 9 states:-

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"5. It was part of the Agreement that upon signing of the Agreement the landlord (Defendant) shall give full authorisation to the claimants to do upgrade and renovation works pursuant to clause 4 of the agreement.

7. It was also an essential term of the agreement that provides under clause 6 and 7 which states:

Particulars

Clause 6: NOTICE BY TENANT TO VACATE PREMISES

Spos Planet 107 Santo I wandem aot or muvum locasen blo bisnis blo hem,ba hemi givim 3 manis notis I go lo Landlord

Clause 7: NOTICE TO TERMINATE BY LANDLORD

Spos landlord I wandem Kanselem agrimen ia bifo taem o 5 yiahemi finis , bae hemi responsible blo refunded everi cost blo renovesen mo upgrade mo hemi mas refundem value blo sales blo wan manis kasem end date blo contract.

8. Pursuant to the terms of the Agreement the defendant has cancelled and terminated the contract without any proper justification and notice to the claimants.

9. As a result the of the defendant's actions, the claimants suffer loss and damages

Particulars

a. Loss of VT112, 000, 000 as stated in paragraph 6.

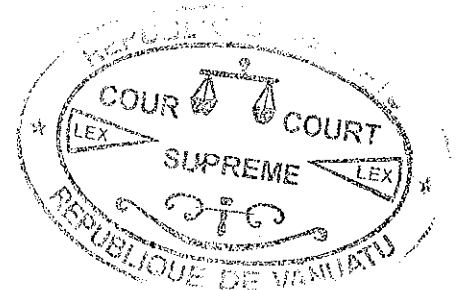
5. The claimants seek the following relief:-

- a) An order that the defendant pay for damages and loss at VT 112,000,000 for breach of contract
- b) An order for general damages
- c) Interest
- d) Other orders deem fit by the Court

Defence

6. The defendant on the other hand denies that he breached the contract. At paragraphs 2, 3 , 6 and 7 of his defence he pleads:-

"2. As to paragraph 3.3 (a) and (b) of the claim the defendant admits however states that as he could not read and write English properly the defendant was misinterpreted as to the content of the agreement as the agreement was presented to him by another person and not the signatories to the agreement and was not explained to him during the signing of the contract;



3. As to paragraph 4 of the claim the defendant admits however states that when the contract was presented to the defendant, the person who presented the contract was not properly communicated.

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6. As to paragraph 7 and 8 of the claim the defendant does not know and does not admit as it was not explained to him in a language that the defendant understood

EVIDENCE

7. The evidence presented by each party is as follows. For the claimant:-

- Sworn statement of Saby Natonga filed on 6 May 2016 and tendered as **Exhibit 'C1'**
- Sworn statement of Sharwan Kumar filed on 6 May 2016 and tendered as **Exhibit 'C2'**.

8. The defendant also filed two sworn statements:-

- Sworn statement of Michel Guyanne filed on 25 February 2016 tendered as **Exhibit 'D1'**
- Further sworn statement of Michel Guyanne filed on 17 November 2016 tendered as **Exhibit 'D2'**

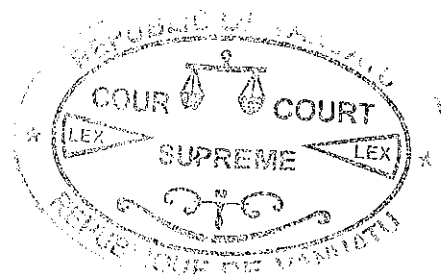
ISSUES

9. Three issues identified by the claimant for determination by the Court are:-

- (i) whether or not the claimant and the defendant have a binding contract?
- (ii) whether or not the defendant has complied with clause 6 and 7 of the contract ?
- (iii) whether or not the claimant is entitled to damages if the contract was breached ?

SUBMISSIONS

10. The claimant submits that following negotiations with the defendant the parties entered into a simple contractual relationship. That there was an offer and acceptance before the contract was signed. And consideration of VT200, 000 was paid by the claimants to the defendant's account. Secondly it was submitted that the cost of the material for the business was properly incurred as it was made pursuant to the contract. It was submitted that as the defendant cancelled the contract before its 5 year term lapsed, the claimants were entitled to a refund for the cost of renovation and upgrade as provided under clause 7 of the contract.



11. The defendant on the other hand denies that he is bound by the contract and submits and relies on the principle of non est factum.

DISCUSSION

12. It is not disputed that the parties signed a contract purportedly for the claimant to lease the defendant's premises in Luganville Santo and pursuant to that the claimant paid a bond of VT 200,000. The defendant however asserts that he is not bound by the contract and relies on the principle of non est factum.

13. Two key provisions of the contract stand out for the purposes of consideration whether the defendant could be held to be bound. First the preamble. It states:-

"Preamble

- A. Group 107 we hemi wan media mo entertainment group – FM107, Vanuatu Times and Planet 107 Entertainment Centre (inc. Cinema 107, 107 Entertainment Garden, 107 Kava Galaxy, 107 Rock Café, Planet VIP, amongst other businesses), we hemi base lo Laguna building, Port Vila, Vanuatu (Tenant);
- B. Michel Guyenne hemi Landlord blo building wea bae I hostem Planet 107 Entertainment Centre, Santo;
- C. Whereby tufala parti Planet 107 Santo Management mo Michel Guyenne oli wandem enterem agrimen"

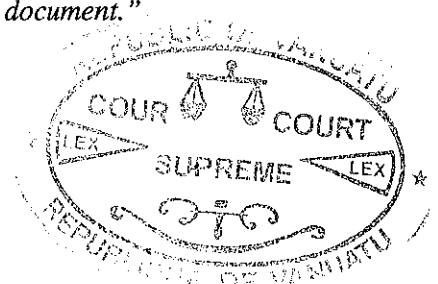
14. Secondly clause 4 of the contract which provides for the tenant's rights. It states:-

"Landlord hemi givim full raet long Tenant blo ol renovations mo update. Stat lo date blo signing blo rental agreement ia, Planet 107 Santo mo Management blo hem I save operate, manage, renovate, build mo adjust folem ol requirements blo business mo ol nid blo operesen."

15. Dealing first with the notion of non est factum. The requirements and how the principle applies was stated by the Court of Appeal in **Colmar v Rose Vanuatu Limited [2007] VUCA 18** in the following terms:-

"(for) the defendant to establish a claim of non est factum three elements must be present and proven:-

- a) *the signor must be under a disability; and*
- b) *there must be a sufficiently significant difference between the document as signed and what the signor believed it provided; and*
- c) *the signor should not have been careless when he signed the document."*



16. It was submitted that the defendant does not read English but understands and reads Bislama. Secondly he said under cross examination that Athanas Rasu gave him the contract to sign at night and told him that the agreement was for the claimant to set up a children's playground and snack bar but never told him about the establishment of any nightclub. That was not disputed by the claimants as Athanas Rasu was not called as a witness . Following that discussion the defendant signed the contract.

17. At paragraph 9, 10 and 11 of his sworn statement Exhibit 'D1' he says:-

"9. Afta we mi signem contract ia, 5 manis afta long March 2015 , mi lukim wan time nomo we Athnas Rasu wetem wan man we hemi hemi wan electrician I kam long ples blong mi blong measurem ol ples blong hemi save putum ol rope blong electric mo long taem ia oli no mekem wan wok nating .

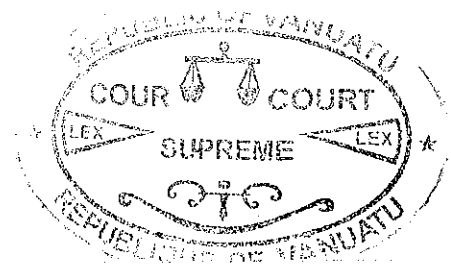
10. long taem ia mi askem long electrician ia se hemi markem olsem we hemi mekem ia blong wanem , mo hemi talem long mi se hemi markem blo oli mekem wan naet club long ples ia .

11. Sem taem tu mi askem blong mi tok tok long Saby Natonga , mo mi talem long hem se mi no wandem naet club I stap long ples blong mi, mo Saby hemi talem long mi se mi signem contract finis mom o ilet nao blo mekem se mi no kat mani blong pem bak ol mani we I spendem finis."

18. The defendant said in his oral evidence in Court that Mr Natonga never told him about wanting to operate a night club from his premises.

19. For the claimants, Mr Natonga says that he made a contract with the defendant and under clause 4 of the contract the defendant gave the claimants full right to operate , renovate and adjust the premises according to the needs of the business. Mr Kumar's evidence although he was not party to the contract confirms what Mr Natonga said. Mr Kumar says that following the signing of the contract, the claimants incurred costs in establishing the business.

20. Considering the totality of the evidence, it is quite apparent that at no time prior to the signing of the contract was the defendant informed that the claimants wanted to operate a nightclub from his premises. No evidence was provided by the claimants to that effect. Mr Rasu told him when he handed the defendant the contract that it was for a children's playground and snack bar. From the list of Group 107 businesses mentioned in paragraph A of the preamble nightclub is not mentioned. This is however the main intended purposes for using the claimant's premises as sometime after the contract was terminated the claimants opened the night club in another place. Similarly clause 4 of the contract is silent on the intentions of the claimants to do renovations to the building and to adjust it according to the requirements of the business.



21. It is questionable that if the primary business was to set up a night club why was it not disclosed to the defendant before the signing.

22. The defendant was led to believe that the business was a children playground with a snack bar. I accept the defendant's plea of non est factum and must set aside the contract. As he received a sum of VT 200,000 as bond from the claimant that will have to be refunded.

Conclusion

23. The claim is therefore dismissed and I make the following orders accordingly:-

- (i) The contract is set aside and the claim is dismissed;
- (ii) The defendant must refund the claimant the sum of VT 200,000 within 21 days;
- (iii) The defendant is entitled to costs to be agreed or taxed by the Master.

DATED at Port Vila this 4th day of May, 2018

BY THE COURT



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D. Aru
Judge

