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

Civil
Case No. 18/2003 SC/CIVL

BETWEEN: FIRST COCONUT MANUFACTURING INCORPORATION (FCMI)
Claimant

AND: SIMEON ARU trading as SIM A CONSTRUCTION & JOINERY and SIM A SHIPPING
Defendant

Before: ***Justice D. V. Fatiaki***

Counsel: *Counsel – Mr. L. Tevi for the Claimant*
Ajesh Chandra for the Defendant

Date of Delivery: ***6th September 2019***

DECISION

Introduction

1. This case concerns a claim for repayment of the value of the "*shortfall*" of copra supplied under various written Copra Export Contract Agreements entered into between the Claimant (**FCMI**) as buyer/shipper and the Defendant as exporter/seller.

2. The initial Agreement set out the general conditions and obligations of the parties as follows:

   - The Defendant's obligations included buying copra from farmers in the outer islands and transporting the copra to Santo domestic wharf, Luganville; obtaining an export licence to export the copra and providing a certificate of origin and moisture from the Vanuatu Coconut Management Board (**VCMB**);

   - The Claimant's obligations included paying transportation costs for the copra from domestic wharf to the main (international) wharf at Luganville, Santo; paying for port charges for berthing an international vessel; wharf and stevedoring charges for loading the copra into the international vessel; VCMB charges; warehouse rent for space at the main wharf and bio-security charges for fumigation of the intentional vessel.

3. Later on 28 September 2016, the Defendant 's obligations were significantly increased to include almost all of the Claimant's obligations and leaving the Claimant with one obligation, namely:

"(the provision of) ***Chartered international vessel to pick copra from Niscol wharf***".

4. In practical terms, the Claimant advanced to the Defendant the agreed purchase price for each Agreement to enable the Defendant to fulfill his "*obligations*" and the Claimant for its part, was obligated to supply an international vessel that would transport the copra from Luganville, Santo to the claimant's business premises located at **Davao City** in the **Philippines**.

5. It appears from the email correspondence exchanged between the parties that from the very first shipment in May 2016 there was a "*shortfall*" in the tonnage of copra supplied by the Defendant. The Defendant had sought in part, to explain the "*shortfall*" as being the result of "*shrinkage*" of the copra due to loss of moisture content as well as the use of inaccurate weighing scales.

6. Be that as it may, relations between the parties continued to sour until finally on 12 March 2018, the claimant's solicitors sent a demand letter seeking the payment of USD$853,503 within 28 days. The Defendant responded by letter dated 24 March 2018 admitting a small fraction of the amount claimed and again iterating its position that all "*shortfalls*" in the tonnage supplied by it "*... was due to shrinkage and moisture content*" because of the copra being "*... stored in bulk*".

7. On 25 July 2018 the Claimant issued a Supreme Court Claim with sworn statement in support seeking judgment in the sum of USD$853,503 and damages of VT100,000 as well as costs. In its claim the Claimant identifies itself as:

"***... a Philippine Company and is able to sue and be sued in its corporate name and style***".

8. In its Defence filed on 11 September 2018 the Defendant "*... strongly challenges the shortfall in tonnage as claimed ...*" and again advances by way of explanation the natural and expected "*shrinkage*" of the supplied copra due to loss of moisture content owing to the copra being for an extended period of time before being shipped, . The Defendant also avers that "***... the Claimant is not a registered company or business in Vanuatu***" (whatever that means).

9. On 15 November 2018 the Defendant filed an Application to Strike Out the Claim on the basis that the operations of the Claimant in Vanuatu was "***... in clear breach of Vanuatu laws of business registration and operation***" and further, the "*... Claimant has ceased operation in Philippines*".

10. In support of the Application the Defendant filed three (3) sworn statements. The first, from Moss Gratiano (VCMB Inspector) who relevantly deposes:

"VCMB issues 5% moisture certificate on all copra export shipments so it is expected that shrinkage of 5% to be allowed on the total tonnage loaded"

And later:

"The certification issued by VCMB on each copra export shipment acts as a legal document for the basis of weight loaded, moisture content and country of origin".

11. The second sworn statement from Simon Jacob (Biosecurity Officer) deposed about the fumigation of the Defendant's copra shipments and the issuance of "***phytosanitary certificates***" for the shipments, as well as, in one instance, the fumigation of the Claimant's supplied vessel in November 2016 on its arrival at Luganville international wharf, at the expense of the Defendant.

12. The last sworn statement is from an Angelo Christopher Gallo a former employee of the Claimant who was based in Luganville at the relevant time and whose duty it was, to verify that copra purchase was done as per contract and provide inventory figures to the Claimant. He relevantly deposed:

"During all copra export shipment, the tonnage on the bill of lading shows true and fair value and it is being verified by me, VCMB, Stevedoring (Niscol) and the representative from the shipping vessel",

And further:

"Copra is a commodity that attracts shrinkage and as per VCMB 5% moisture reduction should be allowed on each shipment and I confirm this was not stated in any of contract made by FCMI".

13. In written submissions filed by the Defendant on 03 June 2019 the Defendant writes inter alia:

"FCMI is an International Company and the company documents have been submitted and served proving that it is an International Company to Vanuatu ...".

It is also submitted that the claimant's Vanuatu operations such as they were, was in breach of Section 10(1)(a) and 10(1)(f) of the International Companies Act [CAP. 222]. In addition, in his oral submissions the Defendant's representative forcefully submitted that the claimant:

"... has no legal status or existence in Vanuatu. Not registered with VFSC or have a VIPA Certificate or business address or licence to trade in Vanuatu. They have nothing at all. Not even a bank account".

14. Section 10 of the International Companies Act [CAP. 222] ("**IC Act**")provides:

10. Restrictions on international companies

(1) *An international company shall not –*

a. carry on business in Vanuatu;

[paras. (b) to (i) omitted as irrelevant]

(2) *For the purposes of subsection (1)(a) an international company* ***shall not be treated as carrying on business in Vanuatu by reason only that it –***

(a) carries on business *with another company incorporated under this Act or* ***in furtherance of the business of the company carried on outside Vanuatu;***

(my highlighting)

15. In the absence of a definition in the **IC Act** of what is an: "*international company*" and mindful of the long title of the **IC Act** and the definition of a "***company***" as meaning an international company incorporated or continued under the Act, I am satisfied and it appears to be conceded, that the Claimant is an "*international company*" for the purposes of the **IC Act** and is therefore prohibited ("***shall not***") from doing business in Vanuatu.

16. In this latter regard I am also satisfied that the Claimant is, to use the words of the exception set out in Section 10(2)(*above*), merely doing business with the Defendant "*... in furtherance of* (**FCMI**'s) *business ... carried on outside Vanuatu*", namely, at its principal registered business address at **Davao City** in the **Philippines**. Accordingly, the Claimant is not in breach of the **IC Act**. This ground for striking out is without merit and is dismissed.

17. In his written response to the Application counsel for the Claimant writes:

"*... The Claimant says that it is a foreign Registered Company that operates overseas and that it ... legally does not need to be registered with the Financial Services Commissioner as it does not exists* (sic) *its operations in Vanuatu but only send money through to* (the Defendant). ...

T*he Claimant are not residents of Vanuatu and had not invested in Vanuatu but it had entered a contract for the supply of copra from the Defendant therefore under the (VFSC Act) it cannot be registered ... and even* (under the VIPA Act) *it is excludes* (sic) *from being an investment in Vanuatu under Sections 5 & 6 of the VIPA Act* (whatever that means)".

And later:

"*The entry into and performance of the Agreements by the Claimant and the Defendant was not an 'investment' which required approval certificate as stated in the VIPA Act definition*".

18. Section 5 of the Vanuatu Investment Promotion Authority Act ("**the VIPA Act**") provides:

5. Foreign investment without approval certificate prohibited

(1) *A foreign investor must not invest* ***in Vanuatu*** *without first obtaining an approval certificate.*

(2) ***Where a foreign investor invests <u>in Vanuatu</u> without an approval certificate*** *or engages in an investment not authorised by an approval certificate then,* ***every contract and every, agreement entered in to by that foreign investor and relating to that investment will be void and of no effect.***

(my highlight & underlining)

19. The following definitions in the VIPA Act referred to in counsels' submissions will also assist in resolving the Defendant's application:

*"**approval certificate**" means a certificate issued by the Board under section 8;*

*"**foreign investor**" means:*

(a) (irrelevant) ...;

(b) A body corporate:
(i) That is not wholly controlled by persons who are citizens of Vanuatu; or

(ii) that has any of its shares (voting or otherwise) beneficially owned or controlled by persons who are not citizens of Vanuatu; ...

*"**invest**" and "**investment**" means to be engaged in an activity for the principal purpose of gain (pecuniary or otherwise) in conjunction with a business licence **<u>but does not include:</u>***

(a) ...

(ab) ...

*(b) **an isolated transaction**, not being one of a number of similar transactions repeated from time to time or from which there will be derived a re-occurring or continuing benefits;*

(c) ...
(d) ...
(e) ...
*(f) **entry into and performance of a contract for the supply of goods or services by a supplier who is not a resident of Vanuatu;***

20. For completeness, Section 26 of the VIPA Act states:

"(1) A person who contravenes a provision of this Act is guilty of an offence and is liable on conviction to a fine:

(a) in the case of an individual- not exceeding VT1, 000,000; or

(b) in the case of a body corporate-not exceeding VT5, 000,000."

21. It is clear from Section 5 (*above*) that a "***foreign investor***" must <u>not</u> invest "*in Vanuatu*" without first obtaining an "*approval certificate*" from the VIPA Board under Section 8. However, the questions, that need to be asked and answered are:

(a) Is FCMI a "***foreign investor***"? <u>and</u>

(b) If it is, then does its business activity or contractual arrangements with the Defendant constitute an investment "*in Vanuatu*"?

If the answer to both questions is "*Yes*" then the Claimant has breached Section 5(1) with the consequences that follow in subsection (2).

22. **As to (a)** there can be no doubting from the Claimant's own registration papers filed, that it is a foreign company incorporated in the Philippines which is wholly controlled by non-citizens of Vanuatu who beneficially own and control all of its issued shares. Therefore by definition, the Claimant is a "***foreign investor***" for the purposes of the VIPA Act. This first question is answered in the affirmative: "*Yes*".

23. **As for question (b)** it is common ground that the activity and contractual relations between the parties was entered into "... *for the principal purpose of gain* (*pecuniary or otherwise*)" albeit in the absence of any *'business licence'* being held by the Claimant.

24. Furthermore given the nature and number of Agreements entered into by the parties, it cannot be said that they are excluded from being an "*investment*" in so far as they are neither "*isolated transaction(s)*" nor do they involve the "*supply of goods by a supplier who is not a resident of Vanuatu*".

25. It is clear also from the introductory words of the "***invest***" definition, that the act of investing for the purposes of the VIPA Act involves a non-citizen or a foreign corporate entity being engaged in a profit-making activity for which a "*business licence*" is required. In similar vein, the Business Licence Act [CAP. 249] ("***BL Act***") defines "***business***" as any: "*lawful form of trade, commerce ... or other activity carried on for the purpose of gain ...*".

26. There can be no doubting that the Copra Export Contract Agreements between FCMI (as "*buyer*") and the Defendant (as "*seller*") were entered into as trade or commercial ventures "*carried on for the purpose of gain*" and, as such, each party is required to have a "*business licence*" unless exempted under the BL Act (*see:* ***Section (2)(1)***].

27. In this latter regard amongst the activities exempted from a business licence and listed in Schedule 2 of the BL Act are:

"Exporters of any products from Vanuatu".

Accordingly, the Defendant as an "*exporter*" of copra "*from Vanuatu*" to the Philippines, is exempted from the requirements of the BL Act. Such an exemption however, necessarily implies that exporting copra is a "*business*" which requires a "*business licence*".

28. Although the isolated analysis of the definitions in the VIPA Act leads to a tentative conclusion that what "**FCMI**" is involved in with the Defendant is an "*activity*" that requires VIPA approval, I recognize that the interpretation provision of the VIPA Act namely, Section 2 ends with the cautionary phrase: "... ***unless the context otherwise requires***". In this regard it is noteworthy that the definition

of an "***investor***" expressly excludes a citizen of Vanuatu or an enterprise wholly owned and controlled by a citizen of Vanuatu.

29. The Defendant is clearly **not** an "*investor*" for the purposes of the VIPA Act which also makes it clear in Section 1(a) and in the long title, that its principal concern and purpose is : "... (to) *expeditiously facilitate, promote and foster foreign investment in Vanuatu*" (my underlining).

30. In similar vein and more particularly, Section 4 in Part 2 of the VIPA Act (where the offence Section 5 is to be found), clearly states that the purpose of this Part is: "*... to establish and regulate a system for appraising investment proposals and* (for) *granting approval to foreign investors to invest in Vanuatu*" (again my underlining).

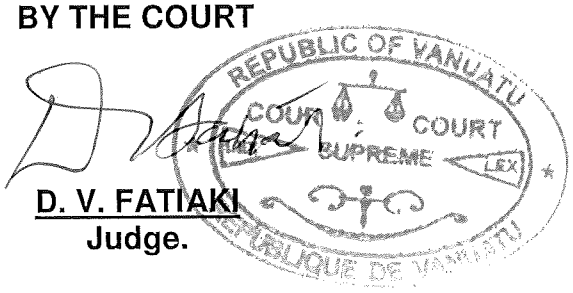
31. Viewed in the light of the foregoing, I am satisfied that although FCMI is by definition, a "*foreign investor*", nevertheless, it is not involved in investing "***in Vanuatu***" for which it requires either a "*business licence*" and/or a VIPA "*approval certificate*". The second question is answered: "*No*".

32. Accordingly this last and final ground advanced for striking out the claim is also without merit and the Application is dismissed. I leave costs of this Application to be determined at the end of the case.

33. The claim must be tried on its merits, in accordance with a timetable agreed by the parties and the Court.

DATED at Port Vila, this 6th day of September, 2019.

BY THE COURT



D. V. FATIAKI
Judge.