

BETWEEN: MANUELA ALGUET LEROUX
Applicant

AND: EDNA LEW RATONEL
Respondent

Date of hearing: 7th November, 2019
Delivered: 27th November, 2019
Before: The Master Cybelle Cenac-Dantes
In Attendance: Marie Noelle Patterson counsel for the
Applicant, Andrew Bal counsel for the
Respondent

JUDGMENT

Headnote

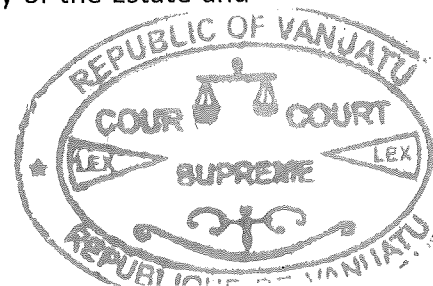
Shifting of evidential burden - damages - speculative loss - nominal damages

INTRODUCTION

1. The Applicant in this case seeks a judgment that certain machinery contained on the business premises of Henri Leroux (hereinafter called "the deceased") was converted to the use and benefit of the Respondent, both before she became Administratrix of the deceased's Estate and after.

BACKGROUND

2. The matter of the administration of the Estate of the deceased was re-opened on the filing of an Application by the Applicant to revoke the Respondent as Administratrix and appoint the Applicant and sole beneficiary in her stead. This court found that the Respondent was in breach of her fiduciary duty to the beneficiary of the Estate and consequently called her to account for all its assets.



3. The said judgment was appealed by the Respondent and a cross-appeal was filed by the Applicant, asserting that my judgment failed to address the issue of the loss of machinery although evidence was submitted. The appeal judge found in favour of the applicant and directed that the matter be returned to my court for hearing on the allegations for loss of machinery and loss of rent. An award was made for loss of rent in the amount of VT5,440,000 on the 7th November, 2019. Arguments for loss of machinery were heard and judgment on quantum reserved.

APPLICANT'S CASE

4. The Applicant submits that the Respondent was running her father's business before he died and continued to do so after his death as Administratrix. She submits that when the Respondent gave an account of the assets she omitted to include all the machinery and parts that made up the movable assets of the Estate because she had sold them and not accounted for the funds. She asserts that the Respondent continued to apply for a business license in both her name and that of the deceased.
5. The Applicant submits an inventory of these lost goods and ask the court to compensate her accordingly.

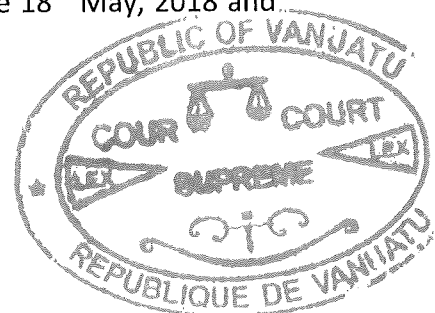
RESPONDENT'S CASE

6. The Respondent argues that she never touched "those machinery"¹ in the store room, and that she in fact only has, currently, a brand new out-board motor which is in the building, untouched, and a hydraulic press which she is presently using.

DISCUSSION

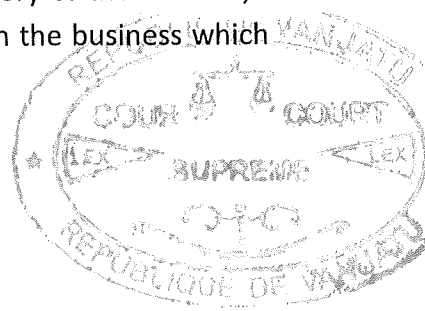
7. As neither counsel chose to subject the witnesses to cross-examination I was left to determine the veracity of the evidence from sworn statements filed in anticipation of this particular hearing, and all other antecedent statements filed throughout the breadth of this matter.
8. The Respondent filed, for the purposes of this hearing, her sworn statement of the 26th September, 2019 and relied on its contents solely. The Applicant relied on her sworn statement of the 29th April, 2016, her submissions of the 18th May, 2018 and

¹ Para. 11, sworn statement of the respondent filed 26th September, 2019



7th November, 2019, along with previous statements of her witness Albertine Hakwa of the 10th October 2017.

9. In my order of the 7th August, 2017 I had found the Respondent sufficiently blameworthy in her conduct towards the Estate, and that she had, as a result, inflicted loss on the beneficiary which had to be recouped. Flowing from that judgment the Respondent, now no longer Administratrix was asked to account for all the assets of the deceased. She did this most inadequately as she was unable to provide any detailed records of all transactions. Even the accountant Eben Lewis (her witness) collated his evidence for the court from her defective records. On account of this defect the Applicant, as new Administratrix and beneficiary submitted that there was more than what the Respondent was alleging, and stated that there were other unaccounted for items. These items the Applicant submitted in an inventory attached to a sworn statement.
10. It would be helpful at this point to remind ourselves of the burden which is required to be lifted. In a civil matter the onus of proof rest with the one making the assertion of fact. The standard of proof for that fact is always on a balance of probabilities. In other words, is the fact being asserted more likely true than not.
11. For the purposes of determining upon whom the onus of proof rests, we must return to the genesis of this case. I earlier stated that the case started with an application for revocation. The onus to prove the negligence of the Respondent was of course on the Applicant. Consequent upon her discharging that burden an order was given calling the Respondent to account. Following the account of the Respondent the Applicant made certain allegations that they were inaccurate based on information she had collected; her own inventory taken in 2016, the evidence of Albertine Hakwa and her own recollection. At that point I believe the evidential burden on the respondent extended to more than a bare denial of the allegation. The onus was now on her to prove that the accounts presented by her were in fact accurate.
12. In civil cases the evidential burden may shift depending on the circumstance. I believe this to be one of those circumstances, that is, that the concealment or disposal of assets to the disadvantage of the beneficiary could have been done and would only be known to the Respondent.
13. While I am not wholly convinced that the inventory of the Applicant is accurate, as I would not expect it to be, considering she was not the repository of those items, I am willing to accept that there was machinery contained within the business which



has been unaccounted for by the former Administratrix. I believe this for two reasons:

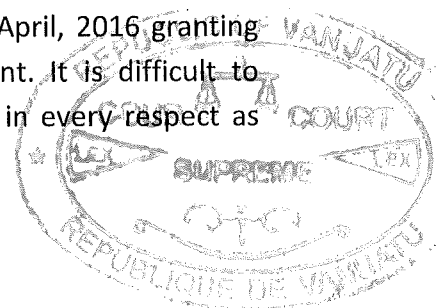
- (1) It is a fact that the deceased ran a parts business and at the time he took sick and was removed to New Caledonia the business continued to run. The Respondent never represented otherwise. In her statement of the 5th November, 2019 the Respondent stated that she was sending money to the deceased every month from the sale of parts, etc., a clear indication that the business was viable and continued to operate.

Further, in her sworn statement of the 26th April, 2016 the Respondent said that after she obtained Letters of Administration she continued to run "my business". Of course, she could have only meant the business of the deceased as she was acting as Administratrix and at no time before or after the death of the deceased was the business transferred to her.

Further still, the evidence of Albertine Hakwa who worked with the deceased up till 2003 attested to the fact, that at the time of her departure the business premises had, present, very many items, including office equipment and spare parts. She went on further to state that she only left because the Respondent had not been paying her VNPF. I infer from her evidence, which I accept, that there were numerous saleable items still in the business which would have been an asset of the Estate, and that after the deceased took ill in 2000 the Respondent continued to run the business. It is more than likely therefore, that as the business continued to operate as the same business, it continued to buy and trade in parts.

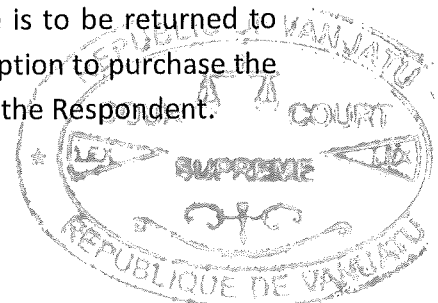
- (2) That the Respondent, as Administratrix continued, even after the death of the deceased to obtain the same type of business license in both her name and that of the deceased. This was contained in the statement of Eben Lewis of the 15th July, 2016. I am therefore prepared to accept that it was more than likely that there were parts and machinery on the business premises.

14. The question which remains for the court is exactly what items formed part of the inventory which were converted to the use of the Respondent and which are to be reimbursed. The Applicant presented in evidence her sworn statement with inventory attached and the sworn statement of Albertine Hakwa. I believe this inventory was taken on the same day as my order of the 29th April, 2016 granting permission for the said inventory to be done by the Applicant. It is difficult to conclude that this inventory is good evidence and irrefragable in every respect as



there is no indication that it was taken in the presence of the Respondent or other witnesses. It is difficult therefore to make a finding that this inventory is an accurate account of the items contained in the premises as of the 29th April, 2016. An inventory, witnessed would have been more useful to me than what appears to be a collation of items estimated to have been in the premises.

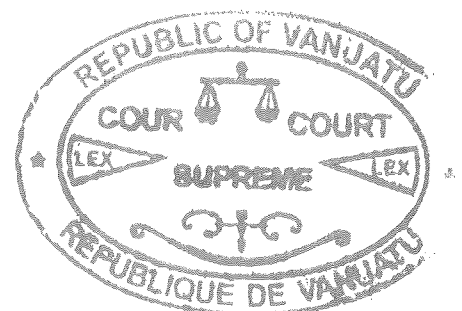
15. The inventory itself is quite non-specific: it mentions a “fully equipped workshop with tools machinery” but does not detail what these are: it mentions “various (projectors and tyres for cars)” but gives no further details. The inventory goes on in this vein. While I can appreciate that this is the inventory of an amateur, the Applicant being unrepresented by counsel at the time, I cannot make an allowance for this defect to the disadvantage of the Respondent. Counsel for the Applicant would wish the court to accept this inventory, without more, simply because the Respondent has failed to put any evidence to refute its contents before the court. But, in spite of the lack of representation by the Respondent’s counsel it is still incumbent on the court to weigh and measure the reliability of all the evidence presented.
16. Albertine Hakwa’s statement does no better to assist the court to arrive at some definite point of assessment. Her statement is sworn 14 years after she ceased working for the deceased. The intervening years would most certainly have had an impact on the inventory of the business, either by way of an increase or decrease.
17. Notwithstanding, I take note of the Respondent’s admission in relation to the inventory of the Applicant that she “never touched **those** machines.” I take that to be an admission that there were items belonging to the Estate remaining on the business premises. She went on to admit the existence of a new out boat motor engine in the storeroom and a hydraulic machine being used by her.
18. While I can be certain about the existence of machinery from the business, I find that the claimed loss is merely speculative. That is, the patent lack of evidence prevents me from ascertaining the exact items lost. This inevitably affects my ability to make an award remotely close to what has been requested by the Applicant.
19. Without the necessary evidence to make an accurate assessment on which to peg an award, I am left with no choice but to make an award for nominal damages only, in the amount of VT4 million. I also make an additional nominal award of VT250,000 representing rental payments to the Estate of the deceased for the use of the hydraulic machine by the Respondent. The motor boat engine is to be returned to the Applicant for sale as well as the hydraulic machine. A first option to purchase the latter, at a price agreed between the parties, is to be offered to the Respondent.



20. In conclusion, I wish to admonish counsel for the Respondent. He has been largely responsible, since assuming conduct, for delaying this matter. At none of the hearings can I say that he made even the mildest effort to represent his client to the standard expected, and at this final hearing his efforts can only be described as lukewarm and non-existent. The documents filed on behalf of his client were of little assistance to the court for the quagmire of confusion it brought. Exhibits were not identified, copies were faded, there was no proper correlation made between the facts in the sworn statement and the exhibits appended. Nothing counsel offered was of any assistance to this court. But for the herculean effort of this court to make sense of the nonsense presented, his client might have quite likely been lumbered with a judgment in excess of vt20 million. It was an abysmal display of ineptitude and negligence on the part of Mr. Bal. I have never before used the occasion of one of my judgments to reprove counsel but the lack of representation was too glaring and offensive not to be highlighted. I would hope to never see it repeated again.

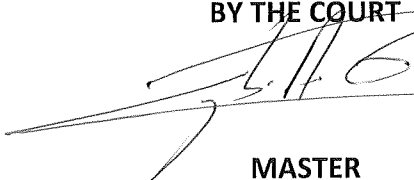
21. My orders are as follows:

1. That nominal damages are awarded to the Applicant in the amount of VT4,250,000.
2. That motor boat engine is to be returned to the Applicant with immediate effect.
3. That the Respondent is to be given first option to purchase the hydraulic machine, at a price to be agreed between the parties. If no agreement is reached then the machine is to be returned to the Applicant with immediate effect.
4. That costs are awarded to the applicant which decision on amount is deferred to the next hearing.
5. That Mr. Bal is to show cause why an indemnity costs order should not be made against him personally.
6. That the amount of Vt4 million, VT5,440,000 for unpaid rents under my order of the 7th instant, together with costs are to be paid by the respondent no later than the 13th December, 2019.

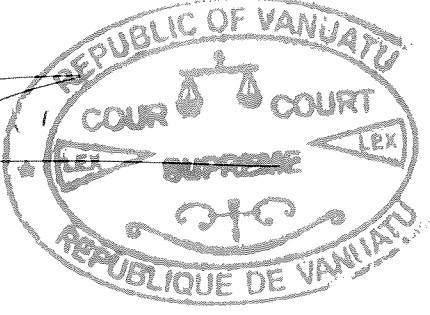


7. That the matter is listed for status update on the 16th December, 2019 at 9 a.m. If payment has not been made prior to then a date for enforcement conference will be given.

BY THE COURT



MASTER



The seal of the Supreme Court of Vanuatu is circular. The outer ring contains the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom. Inside the ring, the words "COUR" and "COURT" are positioned on either side of a central emblem featuring a scale of justice. Below the scale, the word "SUPREME" is written in a stylized font. On the left and right sides of the seal, the word "LEX" is written in a small box.