

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

Civil
Case No. 22/2140 SC/CIVL

BETWEEN: Jean Baptiste Hue representing Drehu
Tapaka Collectif BP 198-988884,
Chepenehe, Lifou Island, New
Caledonia

Claimant

AND: Sylvie Genegeie & Christopher Karie
trading as Belair Farm

First Defendants

AND: Sylvie Genegeie & Leopol (aka Leo)
Genegeie

Second Defendants

AND: Robert Murray Bohn and PITCO

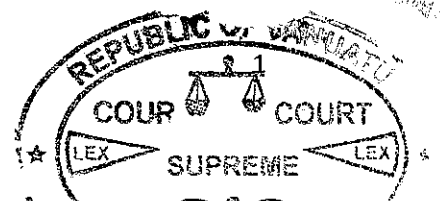
Interested Parties

Date of Hearing: 4 August 2023
Before: Justice V.M. Trief
In Attendance: Claimant – Mr S. Kalsakau
First Defendants – no appearance (in person)
Second Defendants – Mr N. Morrison
Interested Parties – no appearance (in person)
Date of Decision: 18 September 2023

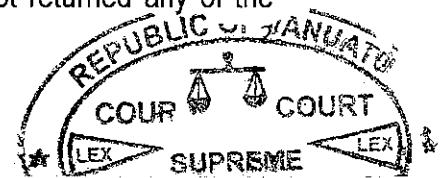
DECISION AS TO CLAIMANT'S SUMMARY JUDGMENT APPLICATION

A. Introduction

1. By the Claim, the Claimant Jean Baptiste Hue representing and on behalf of the farmers' association called Drehu Tapaka Collectif BP 198-988884 of Lifou Island, New Caledonia is suing the Defendants for refund of all monies collected as a result of the sale of the sandalwood belonging to the members of the Collectif, damages, interest and costs.



2. This is the decision as to Mr Hue's application for summary judgment against the Defendants.
- B. The Claim
3. The Drehu Tapaka Collectif (the 'Collectif') is an association of farmers from Lifou Island, New Caledonia.
4. The First Defendants Sylvie Qenegeie and Christopher Karie trade as Belair Farm.
5. The Second Defendants the same Mrs Qenegeie and Leopol (also known as Leo) Qenegeie are wife and husband respectively and operate a business by the name of "Santal Dzy!" in Noumea, New Caledonia.
6. In April 2016, in the last two days of the sandalwood season, Mr and Mrs Qenegeie represented to the then President of the Collectif Wanaxen Kalen that they had a buyer who was ready to buy the Collectif's members' sandalwood at a price of 12,000 Francs per kilo but that the sandalwood had to be immediately shipped to Port Vila for the sale to happen there.
7. In reliance on Mr and Mrs Qenegeie's representation, the Collectif gave their sandalwood to them. This was loaded into six 20-foot containers and shipped to Port Vila.
8. There was no written agreement signed because Mr and Mrs Qenegeie said that there was not enough time as they had to travel to Port Vila immediately to await the arrival of the sandalwood there.
9. On 6 May 2016, the six containers containing the Collectif's members' sandalwood arrived in Vanuatu under the name of the First Defendant.
10. Allegedly in breach of Mr and Mrs Qenegeie representation, the sandalwood was not sold to the buyer or 2 buyers as per the representation, but unknown to the Collectif, the Defendants began selling the sandalwood in small portions to others.
11. Despite selling over 4,000 kg of the sandalwood, no money has been remitted back to the Collectif for distribution to its members.
12. Shortly after the 6 containers landed in Port Vila, the Department of Customs seized them. Court proceedings followed: *Karie v Director of Customs* [2018] VUSC 58 and *Karie v Director of Customs* [2019] VUCA 3.
13. On 22 February 2019, the Court of Appeal ordered the return of the sandalwood (now only 64,464.90 kg remaining) to the possession of the First Defendants.
14. Despite demand and despite revocation of Mrs Qenegeie as their agent, the Defendants continued to deal with the sandalwood, have not returned any of the



sandalwood to the Collectif nor remitted any of the proceeds of the sandalwood to the Collectif.

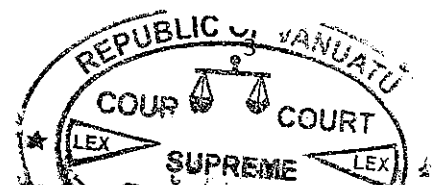
15. On 21 September 2022, Mr Hue on behalf of the Collectif filed the Claim in this matter. The relief sought includes an order directing the Defendants to refund all monies collected as a result of the sale of the sandalwood belonging to the members of the Collectif, damages, interest and costs.

C. The Claim

16. The First Defendants have not filed a Defence.
17. The Second Defendants' Defence was filed on 28 October 2022. They alleged that they were independent of the Collectif and are not bound to them by agency or otherwise. They deny any reliance on any purported representation and any negligence, dishonesty or deceit on their part as alleged. They allege that they never had any obligation to pay money to the Collectif after their commercial operation; they admit that they have refused request to pay money to the Collectif as they say that the Collectif is not the rightful recipient of any money. Further, that Mr Hue and/or the Collectif has no right in law to demand all monies collected as a result of the sale of the sandalwood.

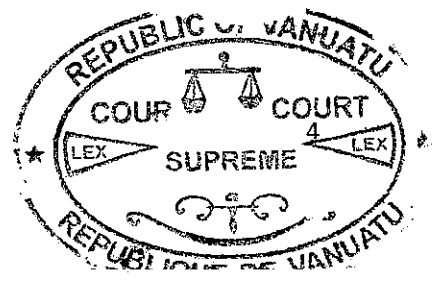
D. The Application and Submissions

18. On 1 June 2023, Mr Hue filed Summary Judgment Application against the Defendants in reliance on rule 9.6 of the *Civil Procedure Rules* (the 'CPR'), that is, that the Defendants have no real prospect of defending the Claim and there is no need for a trial of the Claim (the 'Application').
19. The Sworn statements relied on in support include those of:
 - a. Jean Baptiste Hue filed on 1 June 2023;
 - b. Zongo Dominique filed on 1 June 2023;
 - c. Rene Kalen Wanakaen filed on 1 June 2023 and 21 September 2022; and
 - d. Philippe Leanga filed on 1 June 2023 at 3.30pm and (earlier one) filed at 1.45pm.
20. Mr Kalsakau submitted that the Second Defendant's Defence raises an issue as to the ownership of the sandalwood but it was only after a request for particulars that the Second Defendants partly disclosed the persons they dealt with as representing the association whose members owned the sandalwood namely Dominique Zongo, Secretary and Rene Wanakaen, President. Both of them have filed sworn statements in support of the Claimant. Therefore, in his submission, it would be a waste of time and resources of all parties to go to trial as to the standing of the Claimant to sue on behalf of the owners of the sandalwood. He submitted that the issue as to the



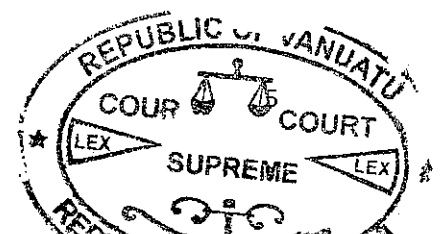
ownership of the sandalwood is fanciful rather than realistic such that the Defendants simply have no real prospect of defending the Claim.

21. The Second Defendants opposed the Application. They filed the Sworn statement and Further Sworn statement of Leo Qenegeie on 21 July 2023 and 3 August 2023 respectively in support of their opposition.
22. In the earlier sworn statement, Mr Qenegeie deposed that they have never dealt with the Claimant nor had a contractual relationship with the named-Claimant. He enclosed the Constitution of Drehu Tapaka which is a completely different entity from the 'Drehu Tapaka Collectif' that the Claimant appears to claim. He deposed that the 'collective' was created while the 'association' was still active. There are no administrative and official documents showing that the containers belong to the association. Further, that the Collectif wants to have all the frozen funds without regard to their reasonable fees and costs which they have incurred in putting the sandalwood on the market and selling it.
23. In his second sworn statement, Mr Qenegeie deposed that the company Santal D'Zyl exported the sandalwood from New Caledonia to Vanuatu however it has not been named as a defendant in this matter. There was never a written contract between the parties for the sandalwood as there was not enough time to create one. He himself has put more than VT15 million into the export and sale of the sandalwood therefore the suggestion that he should not be paid and reimbursed is ridiculous. With respect to the Vanuatu Courts, this dispute should be determined in the New Caledonia courts. He maintains that the Collectif is not the rightful legal recipient of sale proceeds. He stated that it concerned him that the Collectif is essentially made up of one family – the Issamatro family – which includes Mr Hue.
24. Mr Morrison submitted that this is a classic case not amenable to summary judgment as there are significant disputes of fact including whether or not the entirety of the proceeds of sale should go to the Claimant and what were the terms of the agreement with Mr and Mrs Qenegeie. He submitted that with the conflicting accounts from the Claimant and Defendants, a trial must be had then the Court make its decision. He stated that Santal had not been named as a party. He suggested that it may be that the issue of the ownership of the sandalwood is best determined in New Caledonia rather than the Vanuatu courts and that the present matter could be stayed until that issue is resolved in the New Caledonia courts.
25. In reply, Mr Kalsakau submitted that his clients revoked Santal's authority to deal with the sandalwood. Further, that it is an internal matter for the association or the Collectif whether Mr Hue has authority to bring the Claim on their behalf but not Santal's business; this is the equivalent of an agent trying to tell the principal how to run its business. He submitted that if Santal thinks it is owed money, it should sue in New Caledonia for that – no Counter Claim has been filed in the present matter.



E. Consideration

26. The Court may enter summary judgment where it is satisfied that the Defendants have no real prospect of defending the Claim or part of the claim, and there is no need for a trial of the claim or that part of the claim: rule 9.6(7) of the CPR.
27. The Court must not enter summary judgment if it is satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law: rule 9.6(9) of the CPR.
28. Justice Tuohy stated as follows in *Sugden v Rolland* [2022] VUSC 145 at [22]-[23]:
22. *The onus is on the claimant to establish the grounds set out in rule 9.6(7)(a) and (b). A real prospect means one which is realistic not fanciful: Swain v Hillman [2001] 1 All ER approved by the Court of Appeal in Bokissa Investments v RACE Services [2003] VUCA 22. In regard to Rule 9.6(9), while the Court will not normally attempt to resolve material conflicts of evidence or assess the credibility of witnesses on a summary judgment application, it need not accept uncritically, as evidence raising a dispute of fact which calls for further investigation, every statement in a sworn statement however equivocal, lacking in precision, improbable in itself: Eng Mee Yong v Letchumanan [1980] ACT 331. In other words, any dispute between the parties on a substantial question of fact must also be a real not a fanciful one.*
23. *In summary, while caution should be exercised in deciding applications for summary judgment, a realistic approach needs to be taken. If there is no realistic prospect of defending a claim, a grant of summary judgment gives effect to the overriding objective of the Rules; it saves time an expense for both parties, it avoids the use of the Court's resources for no purpose and is generally in the interests of justice: Swain v Hillman (supra at p. 94).*
29. The issues between the parties arising from the Claim and the Second Defendants' Defence include:
- Does the Collectif (or some other body or persons) own the sandalwood handed over to Mr and Mrs Qenegeie? (question of fact)
 - Did Mr and Mrs Qenegeie make a representation to the Collectif? (question of fact)
 - If yes, did the Collectif hand over its sandalwood to Mr and Mrs Qenegeie in reliance on that representation? (question of fact)
 - Were Mr and Mrs Qenegeie negligent, dishonest and/or deceitful in their representation? (question of law)
 - Was Mr and Mrs Qenegeie's authority to deal with the sandalwood revoked? (question of fact and law)
 - Is the Collectif the rightful recipient of the monies collected as a result of the sale of the sandalwood? (question of fact)



- g) Does Mr Hue and the Collectif have a right in law to demand all monies collected as a result of the sale of the sandalwood? (question of law)
30. I consider that the questions of fact identified as issues between the parties are substantial questions of fact. Those can only be determined after trial.
31. It was Mr Kalsakau's submission that that the issue as to the ownership of the sandalwood is fanciful rather than realistic such that the Defendants simply have no real prospect of defending the Claim. It is now asserted that at the time the sandalwood was handed over to Mr and Mrs Qenegeie, the farmers were members of the Drehu Tapaka association which is exactly the same body as the Collectif. Whether or not the Collectif (or some other person) owns the sandalwood is a question of fact as is whether or not the Collectif is the rightful recipient of the monies collected as a result of its sale. These questions of fact are triable issues which must be decided after trial.
32. The questions of law identified as issues between the parties are difficult questions of law.
33. In the circumstances, rule 9.6(9) of the CPR dictates that the Court must not enter summary judgment. That answers the Application.

F. Result and Decision

34. For the reasons given, the Claimant's Summary Judgment Application filed on 1 June 2023 is **declined and dismissed**.
35. The costs of the Application are reserved.
36. This matter is listed for Conference at **1.25pm on 24 October 2023**. Counsel are to forward consent orders as to giving of account (item 1 of the Claim prayer for relief) before then.

**DATED at Port Vila this 18th day of September 2023
BY THE COURT**

VM Trief
Justice Viran Molisa Trief

