

BETWEEN: JOEL MISAK
Claimant

AND: JACOB JAMES
Defendant

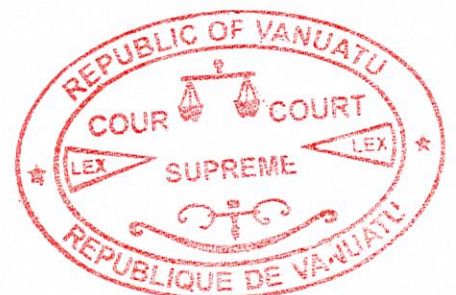
Date: 22th day of May, 2024
Before: Justice W. K. Hastings
Distribution: Mr. R Willie for the Claimant
Defendant- Self-represented

DECISION

1. The Claimant filed a claim for damages for breach of contract. This is an urgent application for an ex parte order to seize a Toyota Hilux Double Cab truck, registration S/10354, which was the subject of the contract. Mr Willie did not specify under which rule of the Civil Procedure Rules 2002 he sought the order.

The claim

2. The facts alleged in the claim are as follows.
3. The Claimant Joel Misak owned a single cab vehicle, registration S/9635, worth VT 3,200,000, and registered in his name. He runs a vehicle repair business and a rental car business.
4. The Defendant Jacob James possessed the double cab vehicle registration S/10354 which was registered under the name of Monica Sapulai. It was worth VT 1,200,000 and needed repairs.
5. According to the claim, in January 2024 they agreed to swap the vehicles. This was an oral agreement. The single cab worth VT 3,200,000 would go to the Defendant, and the Claimant would get in return the double cab worth VT 1,200,000. As the single cab was worth considerably more than the double cab, the Claimant would be out of pocket by approximately VT 2,000,000.
6. The Claimant also paid VT 500,000 as an "upfront payment" to the Defendant at the Defendant's request.



7. According to the claim, they agreed that the Defendant would pay the Claimant the difference, VT 2,000,000. Only when the Defendant finished paying VT 2,000,000 to the Claimant would the registration of the single cab be transferred from the Claimant to the Defendant.
8. The Claimant began repairing the double cab so that he could hire it out at VT 15,000 per day as part of his rental car business. He claims to have spent VT 4,187,280 repairing it. He also claims that the double cab was indeed hired out every day until 18 April 2024.
9. On 18 April 2024, the Defendant allegedly transferred registration of the double cab now in possession of the Claimant from Monica Sapulai to himself. The Defendant arranged for the police to take it away from the Claimant and to deliver it to the Defendant, which they did. The Claimant claims this was in breach of the agreement they made in January 2024.
10. The Claimant claims damages for the cost of repairs to the double cab in the amount of VT 4,187,280; damages for breach of contract in the amount of VT 2,000,000; reimbursement of the "upfront payment" of VT 500,000; and damages for loss of the ability to rent out the double cab at VT 15,000 a day.
11. No defence has been filed.

The application for interlocutory orders

12. As mentioned above, Mr Willie did not specify in the application under which rule he applied for an order authorizing the Police to seize and keep the double cab. He confirmed at the hearing that he was seeking an order under r.7.9.
13. In his sworn statement of urgency, Mr Willie states that the order is sought to safeguard the vehicle so that it can be sold to satisfy any judgment in favour of the claimant. In his sworn statement in support of the application, the Claimant deposes that there is a likelihood that the defendant would sell, transfer or damage the double cab, now registered in the defendant's name, if he becomes aware of the Claimant's claim. No evidence is produced to support this belief. He deposes that "*it would be in the interest of both parties that the defendant's vehicle be seized and held in Police Custody until a determination is made in respect of my claim.*"
14. As the Claimant's stated purpose in seeking an order that the Police seize a vehicle registered in the defendant's name was to preserve the vehicle so that could be sold to satisfy a judgment, I questioned whether r.7.9 was the best rule to use. Rule 7.9 states that a seizing order (otherwise called an Anton Pillar order) may be made "*only if*" the Court is satisfied of every matter listed in subrule 7.9(3). I was not satisfied of the first two.
15. The first is that the Court must be satisfied that the order is required to preserve an object as evidence. The claim is for damages for breach of an oral contract. The physical vehicle is irrelevant as evidence of a breach of contract which will ultimately be determined by the Court finding on the balance of probabilities what the parties agreed, and whether that agreement was breached by the



defendant's alleged conduct. That will be determined largely by credibility findings. The car is irrelevant as evidence to prove a claim of breach of contract.

16. The second is that the Court must be satisfied that there is a "*real possibility*" that unless the order is made, the defendant is likely to destroy, alter or conceal the vehicle, or remove it from Vanuatu. As the vehicle is now registered in the Defendant's name and in his possession, I find it difficult to understand why the Defendant would destroy or alter his own property.
17. Rule 7.8 on the other hand, provides for an order to protect property (otherwise known as a Mareva order). Under subrule 7.8(4), the Court may make the order "*only if*" it is satisfied of three things: that the applicant has a good and arguable case; that a judgment or order, or its enforcement, "*is likely to involve the assets;*" and that dealing with them should be restrained.
18. The case need only be "*good and arguable.*" This is a lower threshold than the "*extremely strong case*" threshold in r.7.9(3)(c), but it is higher than a merely arguable case. I am satisfied that there is a cause of action, that the matter is capable of being tried and that the evidence should be tested. The Claimant's case is therefore "*good and arguable.*"
19. The Claimant has deposed that the vehicle will be used to satisfy any judgment in its favour. This meets the second of the three matters listed in r.7.8(4)(b). It is difficult to gauge at this stage the extent to which a judgment is likely to involve the vehicle as I am unaware of what other assets the defendant has. On the other hand, this vehicle is at the centre of this dispute and it is important that the Court's final remedies are not frustrated or limited at this stage of the proceedings. To preserve the value of the vehicle, I am satisfied that the Claimant should be restrained from any dealing with the vehicle that would reduce its value as a means of satisfying judgment in whole or in part. That satisfies the third matter.
20. Mr Willie has provided draft orders as required under r.7.8(5)(f)(ii).

Result

21. I grant the order to protect property under r.7.8 on the terms sought.
22. The claim is to be served on the Defendant by 29 May 2024.
23. I fix 5 June 2024 as the date by which the claimant is to report back to the Court on what has been done under the order.

DATED at Vila Port this 22nd day of May, 2024

BY THE COURT


Justice W. K. Hastings

