

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

Civil
Case No. 20/848 SC/CIVL

BETWEEN: Madeline Valele
Claimant

AND: Tekon Timothy Tumukon
First Defendant

AND: The Government of the Republic of Vanuatu
Second Defendant

Coram: Justice Dudley Aru
Counsel: Mr. N. Morrison for the Claimant
Mr. S. Kalsakau for the First Defendant
Ms. N. Robert for the Second Defendant

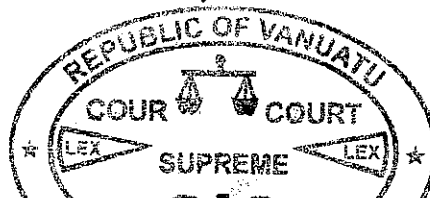
RESERVED JUDGMENT

Introduction

1. The claimant Madeline Valele filed this claim against the defendants Tekon Timothy Tumukon and the Government of the Republic of Vanuatu (the Government) . At the relevant time, Mr Tumukon was the Director of Biosecurity Vanuatu a government department responsible for enforcing the provisions of the Vanuatu Kava Act No 7 of 2002 and the Kava (Amendment) Act No 6 of 2015.
2. The claimant is seeking damages against the defendants for wrongfully suspending her kava export permit.

Background

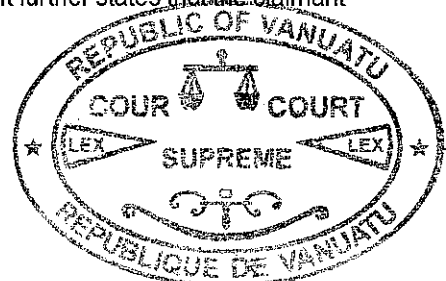
3. The background facts are not so much in dispute . The claimant is involved in the business of kava exports and operates under the name *Valele Trust*. On 29 June 2018 the claimant was issued a kava export permit on certain conditions. The permit was to expire on 31 December 2018 . The expected tonnage for export under the permit was a minimum of 50 tonnes. The kava products include dried kava chips, dried kava roots and dried kava powder.
4. On 9 August 2018 Biosecurity Fiji informed the claimant by letter that upon inspection of a container containing a consignment of the claimant's kava products it was discovered to contain *Kava Kasa* mixed with kava chips. The claimant was promptly informed that *Kasa* was not for human consumption and Fiji did not promote the export of *Kasa* .
5. The claimant was also informed that the Director of Biosecurity Vanuatu was also being notified.



6. On 10 August 2018 the claimant was informed by the first defendant by letter that her kava export permit was suspended for breaching subsections 1(a) (b) (c) and (d) of Part 3A Section 9B of the Kava (Amendment) Act 2015. She was also informed that the suspension was effective from 10 August 2018. (the Suspension)
7. Following the suspension, on 14 August 2018, the first defendant informed the claimant by letter that she has the opportunity to appeal the Suspension and was given seven (7) working days to lodge her appeal with Biosecurity Vanuatu.
8. On 17 August 2018 the claimant by letter informed the first defendant of her appeal on the grounds that it was wrong in fact and law to continue the suspension and requested details of the appeal process that would be applied.
9. On 28 August 2018 the Acting Director of Biosecurity informed the claimant by letter that they will be conducting a visit to her kava facility on 30 August 2018 with the main purpose of inspection.
10. On 14 September 2018 the claimant filed an urgent application for interim relief pending determination of her judicial review claim.
11. On 21 September 2018 the claimant was directed to file a written response and details of her grounds of appeal by 28 September 2018. She was also informed that upon receipt of those documents she will be given three (3) days notice to attend and explain reasons for breaching her export permit.
12. Consent Orders for interim relief were finally signed on 15 October 2018 prohibiting the defendants from continuing to enforce the suspension of the claimant's kava export permit. On the 30 January 2019 the claimant filed her amended claim for Judicial Review. Consent orders were entered on 5 June 2019 discontinuing and striking out the JR proceedings.

Pleadings

13. The claimant filed her claim on 21 April 2020 seeking damages for a period of 66 days when she alleges she was unable to do any exports under her export permit. She alleges she suffered a total amount of VT 22,636,732 in damages. The claimant further alleges that the first defendant failed to comply with s 9B (2) of the Kava Act as he did not issue any directions for compliance following suspension of the claimant's licence. As a result, the lifting of the suspension was delayed for sometime resulting in the claimant suffering the damages claimed.
14. The first defendant in his defence in brief says he was at all material times exercising the functions of the Director of the Government Department of Biosecurity Vanuatu and did so in good faith therefore he cannot be personally held liable. He denies that the Kava Act intended to create a private law right sounding in damages therefore the claimant is not entitled to the relief sought.
15. The second defendant in brief in its defence states that the suspension of the claimant's licence was lawful and relies on s 9A and 9B (1) and (2) of the Kava Act. It further states that the claimant is not entitled to damages and has failed to mitigate its losses.



Evidence

16. The claimant relies on the following sworn statements which were tendered in support of the claim :
 - Sworn statement of William Colmar filed on 20 November 2020 (Exhibit C1)
 - Sworn statement of Madleine Valele filed on 20 October 2024 (Exhibit C2)
 - Sworn statement of Steve Adams filed on 23 November 2024 (Exhibit C3)
17. The first defendant relied on the sworn statement of Tekon Timothy Tumukon filed 6 June 2023 (Exhibit D1 -1) .The second defendant relied on the sworn statement of Lindon Tari filed on 10 September 2024 (Exhibit D2 – 1).
18. Each deponent was cross examined on their evidence.

Issues

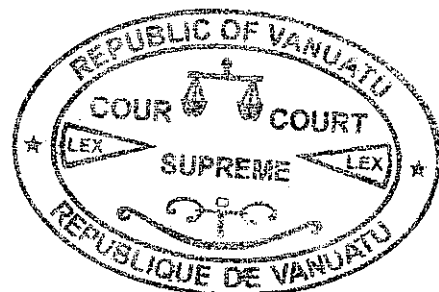
19. There are two main issues in this case namely:
 - whether the defendants breached a statutory duty imposed by s9B (2) of the Kava Amendment Act , and if so
 - Whether the claimant is entitled to damages

Discussions

Issue 1 - whether the defendants breached a statutory duty imposed by s9B (2) of the Kava Amendment Act.

20. The claimant submits the first defendant clearly breached his statutory duty under s 9B (2) of the Act and either he should be held liable personally for the breach or his employer the second defendant as the Government . It was submitted that the claimant was denied natural justice enshrined in s 9B (2).
21. The first defendant submitted that the claimant is estopped from making submissions that there was a breach as the claimant complied with the letter of suspension and responded that they will be appealing the suspension. The second limb of their argument is that the Director had wide ranging powers to require any licence holder to comply with any directions issued by the Director . It was submitted that the direction to appeal the suspension was well within that discretion.
22. The second defendant submitted that the claimant breached the conditions of her licence therefore s9B(2) gave the Director powers to suspend her licence which he did . It was further submitted that the Director had a discretion to determine what directions needed to be carried out to address the reasons for the suspension.It was submitted that the claimant complied with the directions to appeal therefore she could not claim a breach of s 9B (2).
23. Section 9B of the Kava (Amendment) Act states:-

*"9B Suspension or cancellation of license
(1) The Director may suspend a license if:*



- (a) the holder of the license has failed to comply with a term or condition of the license; or
- (b) it is later found that the license holder provided a false or misleading information in order to obtain a license; or
- (c) the license holder has failed to comply with kava quality standards or requirements; or
- (d) the license holder has breached a provision of this Act or Regulations made under this Act; or
- (e) the export facility of a license holder does not meet the prescribed requirements of an export facility; or
- (f) the license holder is trading in narafala kava.

(2) If a license is suspended under subsection (1), the Director is to inform the license holder in writing, of the suspension and is to require the license holder to comply with such directions as may be determined by the Director within a specified period.

(3) If a license holder fails to comply with a direction issued by the Director under subsection (2), the Director is to cancel the license."

(emphasis added)

24. It is not disputed that prior to the suspension, the claimant had a valid licence to export kava. It was issued on 29 June 2018 and was valid until 31 December 2018. Condition 3 of the licence stipulated that:

" 3. The cover products covered by the permit are not to be used to tarnish or bring into disrepute the reputation of the kava industry in Vanuatu in any form or manner."

25. What triggered the suspension was the letter from Fiji Biosecurity that kava kasa (kava stems) was found mixed with kava chips exported by the claimant. The Director's suspension letter of 10 August 2018 said:

"..Further , you have breached other conditions specified on your permit, especially Condition 3.

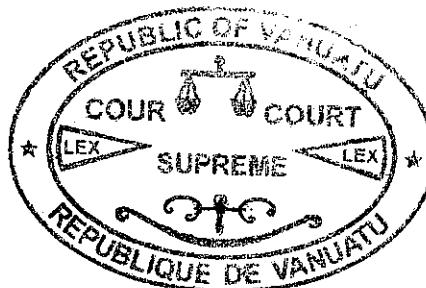
As such, I am suspending your kava export permit because your company has breached subsections 1 (a), (b), (c), of Part 3A section 9B of the Kava (Amendment) Act 2015. The suspension is effective from the date of this notice."

26. On the 14 August 2018 after her licence was suspended, the Director addressed the following letter to Mrs Valele:-

"Our Reference: BV/100.5.0/89/7600/tt

14 August 2018

Mrs. Madeline VALELE
Valele Trust
P O Box 171 Luganville
Santo



Dear Mrs VALELE,

Re: Right to Appeal (Suspension of your Kava Export Permit)

This office took the decision to suspend Valele Trust's Kava Export Permit on Friday 10 August 2018. A formal notice of this suspension was communicated to your company on the same day. You are now given the opportunity to appeal this decision; provide information and any other form of evidence to support your appeal.

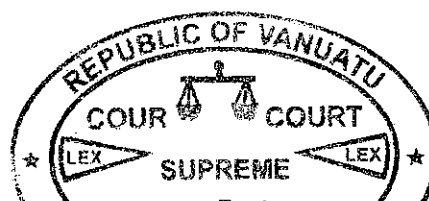
You are given seven (7) working days to launch your appeal to this office.

Thank you for your understanding

Tekon Timothy Tumukon
Director

CC: Hon Matai Seremaih NAWALU, Minister, Ministry of Agriculture,
Livestock, Forestry,
Fisheries & Biosecurity (MALFFB)
Benjamin Shing, ADG, MALFFB
Richard Kalses, Compliance Officer, MALFFB
Nigel Morrison, Ridgeway Blake Lawyers
Biosecurity Vanuatu"

27. In their evidence when cross examined, both Madleine Valele and William Colmar accepted that the claimant's licence was suspended as a result of of the letter by Fiji Biosecurity. The dispute arises as to how the Director exercised his powers under s 9B. There is no ambiguity in the reading of the section. Parliament clearly intended when a suspension is issued, the Director is to inform the licence holder in writing and require the licence holder to comply with such directions as he may determine within a specified period. Where the directions are complied with the suspension would be lifted and exports should resume.
 28. Section 9B cannot be read in isolation but must be read in conjunction with s9B (1) and the intention of the Act one of which is to promote the export of Vanuatu kava to overseas markets hence any directions issued must address remedial steps to be taken to deal with the breach or further breaches within a specified period . Where such directions are not complied with, then the Director may cancel the licence under s9B (3).
 29. There is no appeal process provided under the Kava Act nor the Kava (Amendment) Act. There fore by advising the claimant to lodge an appeal against the suspension is misleading and contrary to the clear wording of s9B (2). In that sense the Director breached his statutory duty to apply the law.
- Issue 2 - Whether the claimant is entitled to damages
30. As a result of that breach the claimant says that she is entitled to damages. It was further submitted that evidence of the extent of the damage suffered was provided by Steve Adams, an expert accountant. It was submitted that Mr Adam's evidence was not challenged therefore it



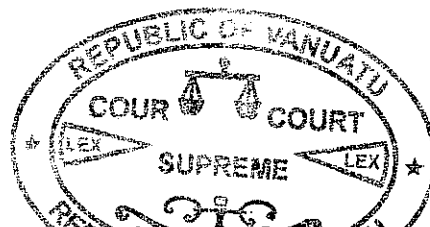
should be accepted. It was finally submitted that the claimant should be awarded damages in the sum of VT 22,636,751 against the first and second defendants together.

31. The first defendant submitted that for the claimant to be entitled to damages, she must show that Parliament intended for the Act to create a private law right sounding in damages. He relied on **Pierre v Republic of Vanuatu** [2014] VUSC 62 to submit that Parliament never intended that s9B (2) should confer on the claimant a private law right of action sounding in damages.
32. It was also submitted that there was no evidence to show that the claimant suffered damages during the period of the suspension as the only attempt to show loss suffered was contained in the report of Mr Adams who in cross examination admitted he did not go to Santo to inspect any kava products that were not sold. He relied on projections he made for past sales. It was finally submitted that if the Court were to find that the defendant is liable, the second defendant should bear the liability as he was merely performing a function as a public official pursuant to his functions under the Kava Act.
33. The second defendant submitted that the claimant is not entitled to damages and makes the same submissions as the first defendant regarding Mr Adam's evidence. It was submitted that the assessment of damages was based on an opinion and there was no concrete evidence that was relied upon to make the calculations. It was further submitted that without consideration of the physical quality and weight of the kava product during the suspension period, the claimant's calculation of the damages was flawed. It was finally submitted that suspension of the claimant's licence was a result of the claimant's own actions when she exported prohibited kava products to Fiji and breached the terms of her kava permit. It was submitted that the claim for damages should be dismissed.
34. In addition, the second defendant made similar submissions as the first defendant that s9B (2) did not give the claimant a private law right of action for damages against the Director if there is a breach. It relied on *Pierre's* case referred to by the first defendant above and **Sambo v Principal Electoral Officer** Civil Case No 139 of 2009.
35. In *Pierre's* case the claimant was removed as Director of a Government Department and he sought damages against the defendant for breaches of a statutory provision. Justice Sey made the following observations:-

" 24. The Courts have invariably held that it is not enough to give rise to an action for breach of statutory duty that the plaintiff show that the relevant provision was designed in general terms to protect a class of individuals to which he belongs. He must establish that Parliament intended that that provision should confer a private law right of action "sounding in damages." In M. v Newham L.B.C. [1991] ALL ER 602 at 625 the Court held that:

"The fact that a particular provision was intended to protect certain individuals is not of itself sufficient to create a private law right of action upon them, something more is required to show that the legislature intended such conferment."

25. In R v Deputy Governor of Parkhurst Prison, ex p. Hague, [1990] UKHL 8; [1991] 3 ALL ER 733, the House of Lords reiterated that the primary question in relation to



an action for breach of statutory duty is always whether the legislation intended to create a civil remedy for aggrieved individuals.

26. In this case, whether the breach does or does not give such right of action must depend upon the object and language of the Act. When one reads the provisions of sections 19A and 19B, it can be inferred that neither the Act nor any evidence available before this Court shows that Parliament intended that the provisions should confer on the Claimant a private law right of action sounding in damages. Furthermore, that inference is reinforced by the availability of other remedies, including judicial review under Rule 17 (Civil Procedure Rules), to the Claimant."

36. At the end the Court found that:

"... the mere fact that there was a breach of the provisions of sections 19A and 19B of the Act does not vest a right of action in the Claimant against the Defendants. In the circumstances, I would make no award for damages for breach of employment condition and for distress and humiliation as claimed by the Claimant."

37. In *Sambo's* case, Justice Fatiaki at paragraph 36 of his judgment remarked:

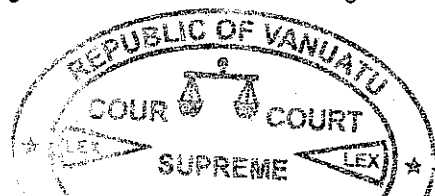
" In X (minors) v. Bedfordshire CC (1995) 3 ALL ER353 Lord Browne-Wilkinson says (at p. 364):

"The principles applicable in determining whether such statutory cause of action exists are now well established ... The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private cause of action If the statute provides no other remedy for its breach and the parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action".

38. And at paragraph 38 he states:-

"In my view, the failures and breaches of the election officials gives rise specifically to the offences detailed in Section 52 of the Representation of the People Act headed: Offences by Election Officers which provides the exclusive means of addressing those failures and breaches ie. by prosecution for a criminal offence which is subject to heavy penalties including imprisonment. This means of enforcement militates against a private right to claim damages for such breaches."

39. Having considered the cases referred to me, Section 9B (2) and the Kava Act as a whole are silent on the right to recover damages against the Director for any breaches of the Act. The absence of such a provision is clear indication that Parliament did not intend to create a private law right sounding in damages for any breaches of the Act. I find that the mere breach of s9B(2) does not vest a right of action in the claimant against the defendants for damages. The available



remedy under the Civil Procedure Rules is Judicial Review under Rule 17 which the claimant pursued and later discontinued by consent.

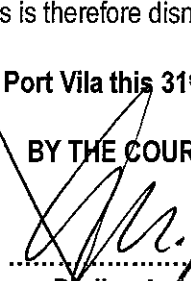
40. Even if a private right existed, the only evidence relied on by the claimant in support of the damages suffered is the evidence of Steve Adams. Under cross examination, Mr Adams admitted that his assessment of the damages was not based on the unsold kava retained by the claimant but on his own opinion based on previous sales. He also admitted that he did not go to Santo to do any assessment of the loss alleged.
41. I am satisfied that the claimant has not proved on the balance of probabilities that he is entitled to damages.

Result

42. The claimant's claim for damages is therefore dismissed. No order as to costs.

DATED at Port Vila this 31st day of October, 2025

BY THE COURT



Dudley Arpa
Judge

