IN THE MAGISTRATE'S COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Case No. 17/867 MC/CIVL

BETWEEN: **STEVEN NEMHA RAUSIKAI**
Claimant

AND: **WOORIN MOTORS LTD**
First Defendant

AND: **JONG PHIL SHIN**
Second Defendant

Coram: Fsam

Counsels: Justin_N for Claimant
Roger_T for Defendants

DECISION

Introduction

1. This decision is delivered following the last hearing of this matter, on the 20th of October, 2017, wherefrom Counsels Ngwele and Tevi had consented to and sought leave for an adjournment to file closing submissions for this Court's consideration and determination.

2. Leave was granted and Claimant through his counsel filed their closing submission on the 24th of October, 2017 with the Defendants thereafter, filing theirs on the 24th of November, 2017.

The Claim

3. An amended claim was filed in court on the 1st of August, 2018 pursuant to Rule 3.6 of the Civil Procedure Rules, wherefrom the claimant sought the following reliefs:

> *"i) An order that the agreement dated 9th of June 2016 is void* ***ab initio;***
>
> *ii) An order that the Defendant pay to the Claimant the sum of VT 800,000 compensatory damages for loss of business and loss of opportunity;*
>
> *iii) An order that the Defendant pay to the Claimant damages for pain and suffering*
>
> *iv) Interest at a rate of 5% per annum;*
>
> *v) Costs of VT500,000; and*
>
> *vi) other orders the court deemed fit."*

REPUBLIC OF VANUATU MAGISTRATE COURT REPUBLIQUE DE VANUATU

Undisputed Facts

4. The claimant is the owner of a Hyundai grey bus registration number 6324 and the Second Defendant is the owner of the First Defendant company which is licensed to sell Hyundai vehicles and spare parts.

5. The claimant and defendants had entered into a business relationship, where the claimant purchased vehicle parts from the defendants, after experiencing problems with his bus.

Allegations

6. The claimant alleges that -

a. the business relationship between the parties continued until the claimant fell into arrears and owed the defendant the sum of VT 64,000.

b. The defendants repossessed the claimant's bus, and alleged that the claimant owed it the sum of VT100,000.

c. The claimant and defendant met and verbally agreed that if the defendants sold the bus, then it would be entitled to offset its outstanding from such sale. The balance of the proceeds of sale would then be given to the claimant.

d. On the 9th of June 2016, the second defendant requested the claimant to attend his place of business, where the parties met and the claimant was compelled to execute an agreement.

e. The written agreement was different from what the claimant intended to execute or sign, and of which he is pleading *non est factum* with reasons he is not able to understand the purpose of the agreement because he is illiterate, and he made a fundamental mistake in signing the document which was radically different to the one intended to be signed.

f. The claimant did not read nor understood the terms of the agreement when he signed it.

g. The second defendant having taken advantage of the claimant's inability to understand the written document, and compelled and influenced the claimant to execute the agreement without giving him notice or explaining the terms of agreement to him.

h. The agreement between the claimant and defendant is *void ab initio.*

i. While the bus was in the possession of the defendants, they sold the bus to an individual for the sum of VT650,000, however, the said individual, having made a deposit, did not complete payment, and so the defendants repossessed the bus and sold it to another individual from Malekula island for the sum of VT

800,00, and this individual paid the sum of VT800,000 in cash and retained the vehicle.

j. When the bus was sold, the defendants failed to give the claimant its balance of the purchase price.

k. When the bus was sold the ownership still belonged to the claimant.

l. If the balance of the purchase price had been given to the claimant, the claimant would have purchased a new bus to operate and make money and would not experience the difficulty he is now experiencing to sustain his family's livelihood and pay for the school fees of his children.

m. Claimant is currently experiencing a loss of business and opportunity suffered, suffered from the circumstances earlier mentioned, is also suffering from anxiety, distress and pain. And is constantly worrying about the livelihood of his children.

Defence

7. The defendants mostly deny that the claimant was being compelled to sign the agreement. That the agreement was consensual between the parties as the claimant had found it difficult to pay out his arrears.

8. They further submit that because the agreement was consented to, the claimant is being disqualified from all the reliefs sought in his claim.

Burden and Standard of Proof

9. It is for the Claimant in this case who has the duty to proof his claim on the balance of probabilities.

Evidence

Evidence by Claimant

10. The Claimant adduced evidence under oath and by referring to his sworn statement filed 6th of April, 2017.

11. Mr Rausikai's evidence on oath was that he agreed to and confirms there was a written agreement dated the 9th of June 2016, between the parties as is annexed to his sworn statement and marked **"SMR 1".**

12. Under cross-examination, Mr Rausikai further stated that there was an earlier agreement of him owing the defendant company a total sum of VT64,000, although there is no evidence produced in court to support this alleged figure. That the agreement he signed (9th of June 2016 agreement) in relation to the debt of VT100,000 is for vehicle parts.

13. He further stated on cross that he signed the 9th June, 2016, agreement in the presence of a company workman (John), and the second defendant wherefrom he stated he will be paid VT30, 000 by the Defendant company, and a later payment of VT100, 000, will be made to him. However, while he was being driven home by the company's workman (John) and was told by John about the transfer of ownership of his bus, he decided not to accept the later payment of VT100, 000.

14. Mr Rausikai further stated under cross that the agreement he signed was for the defendant company to sell his bus at a total of VT230,000, from which VT100,000 will be paid to the defendant company to offset the amount owing to them by the claimant, and remaining balance of VT130,000 will return to the claimant.

Evidence by Jong Phil Shin (Second Defendant)

15. The Defendant testified under oath and relied on his sworn statement filed 24th of August 2017, to which he confirmed as his statement when referred to during questioning by his counsel.

16. Mr Shin stated in court in relation to the agreement of 9th June 2016, that his office secretary prepared the written agreement after discussion between parties with assistance of a workman, because like the claimant, he also does not know how to write in bislama or English.

17. He further denied the claimant not understanding the agreement, because it was first explained to the claimant (in bislama) by a workman of the company before he (Claimant) signed the document.

18. And in response to where the agreement was executed, he stated that the parties signed the agreement around a table together in his office at Korman area, contrary to what the claimant stated.

19. Mr Shin further stated under oath that although he does not understand what is in the written agreement, he knows that what they discussed to be in the agreement was that he sells the claimant's bus, and from the proceed he gives VT 100, 000 to the claimant, (having given VT30,000 as deposit to the claimant to fix the bus), and transfers the bus to the defendant company.

20. Under cross examination, Mr Shin further stated that the Claimant had approached the defendant company to help him sell his bus. At that time, the bus was not in a good condition. And the parties had agreed to a value for it of VT 230, 000 , as the selling price, wherefrom VT 100,000 will offset moneys owing to the defendant company by the claimant for parts supplied on credit by Defendant Company and VT 130,000 will go to the claimant.

Evidence by John Yasul

21. Mr Yasul, is a sales person for the defendant company, and he was the workman present during discussions and signing of the agreement between the claimant and second defendant in this matter.

22. He confirmed the bad condition of the bus when it reached the defendant company, where in response to 'how he knew the bus was in a bad condition,' he stated that he had to tow the bus from namba 2 lagoon to the Defendant Company's premises.

23. Again Mr Yasul confirmed the second defendant's evidence, that the agreement was executed at the first defendant's office at Korman, that he was the one who read the agreement to the claimant and the claimant seemed and even said he was happy with it before he signed it.

Issue

24. The main issue, for the court to decide in this case, and as is raised by the defendants, in their submission is whether or not the claimant understood the content of the agreement before signing it?

Discussion

25. Mr Steven Rausikai was an elderly man from Tanna who had no good educational background, and not able to read and write bislama or English properly. The agreement of 9th June 2016 which is the main subject in issue in this matter, was written in bislama language.

26. It is a fact that the claimant's bus had already been experiencing problem before the 9th June agreement.

27. While both parties are alleging different figures owing to the first defendant, (VT64,000 by the claimant and VT100,000 by the defendant company), it is also a fact that the claimant did owe Woorin Motors an outstanding amount of money for vehicle parts.

28. Although the claimant did not prove his allegation of VT64,000, the second defendant, Mr Shin did have attached to their sworn statement and annexed as : "JPS1" an invoice dated 13th of April, 2015, of outstanding payments of vehicle parts, as well as an agreement dated 14th April 2015, between claimant and defendants, towards settling of debt owing the company by the claimant.

29. It is from this outstanding due that the defendant company and claimant had entered into the agreement of 14th April 2015, of which although I find a lot of grammatical issues in the way the terms were being worded, it can be understood that claimant had signed this agreement where he was to pay VT15,000 every week as installment, and wherefrom, default on the part of claimant within given time frame ('two [2] Mondays") may result in the seizure of his bus and ownership by the defendant company, and extra charges added to the outstanding balance owing.

30. The defendant further attached and marked as "JPS2" the same copy of agreement dated 9th June 2016, which was also attached by the claimant to his sworn statement.

31. From the circumstances of the case, and from what I gather from the evidence presented, the agreement of 9th June 2016, came about because of default by claimant in paying out his outstanding with the company. And as the claimant clearly stated in his oral evidence under re-examination, where he made reference to entering into an *original agreement* (which I believe is the 14th of April 2015 agreement aforementioned). However so, and be this the intention of the defendants, they had failed to properly explain this in light of the 9th June 2016 agreement to the claimant.

32. I also take note of the closing submissions filed by both counsels while considering the main issue aforementioned.

33. The claimant particularly raised a plea of **Non est factum**, wherefrom he made reference to a supreme court case **Alfred Hinge v Enterprise Roger Brand [2005] VUSC 71,** where Judge in this case made further reference to decision by the House of Lords in **Sanders v Anglia Building Society (1971) AC 1004,** that three elements needed be satisfied for a plea of non est factum to be successful, that is;

> 1) that the signer be under disability;
>
> 2) that there be a sufficient different between the document as it is and as the signer believed it to be; and
>
> 3) That the signer should not have been careless… .'

34. As regards the first element, in the present case, the claimant clearly stated in evidence and as in paragraph 12 of his sworn statement that he did not read the agreement because he did not have a good education, and does not know how to read in English (although the agreement was written in bislama). So I concur with the statement by His Lordship on the above case that the claimant does belong to a class of persons who have to rely on others for advice as to what they were signing in order to understand the content of the document. And so the first element is satisfied.

35. Second, the claimant must prove that he signed the document in the belief that it was radically different from what it actually was. The claimant in this case, Mr Rausikai provided in his evidence particularly referring to paragraph 9 of his sworn statement, where he stated that he had believed the company was going to sell his bus and provide him the balance of the proceeds after offsetting his debt with the company. This is confirmed in his evidence under oath during cross examination.

36. However in the agreement of 9th June 2016, which he signed, the contents stated that the claimant had agreed to sell his bus to the first defendant for the sum of VT 230,000, and of which the claimant is strongly disputing as radically different in nature and content to what he had believed it to be.

37. I therefore find this second element also satisfied.

38. And as with the last element, where the failure of the signer to read and understand the document must not have been due to his own carelessness. Again, the claimant could not read nor write English or bislama, but was told by the second defendant that he will be signing an agreement regarding the sale of his bus and of

REPUBLIC OF VANUATU MAGISTRATE COURT REPUBLIQUE DE VANUATU

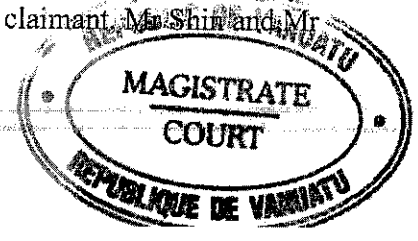
which agreement was executed in the presence of both the second defendant and Mr Yasul. He was also told to be given VT30,000 after he signed the agreement, as was also confirmed in his evidence under oath. Although there is much contradiction in evidences by all witnesses regarding the purpose of payment of VT30,000 to the claimant by the defendant company, what is clear is that the claimant did expect some payment to be made to him if the bus were put up for sale, and after proceeds were put towards offsetting his due with the company, so given his situation, I find the claimant not having signed the document out of his own carelessness, and so the third element is also satisfied.

39. The claimant further stated there was a breach of verbal agreement regarding sale of Hyundai bus. Although defence in their closing submission stated that claimant failed to produce evidence to prove this allegation, I disagree with the defence in this situation. According to the second defendant's evidence under cross examination, he did confirm this transaction made by the defendant company, wherefrom he confirmed the first sale of claimant's bus for VT650,000 did not eventuate due to non-payment of the first buyer, and his re-possession of the bus and sale to another buyer for the sum of VT800,000. Clearly, the second buyer paid cash and retained the bus vehicle, and accordingly, the defendant had not given any balance from the purchase price to the claimant. The court also takes note that while the bus was being sold to the second buyer, it was still under the ownership of the claimant. Clearly this shows a breach of the verbal agreement (of which agreement was neither disputed nor challenged by the defendants).

40. The Claimant also stated that the bus was in proper working condition, when repossessed by the defendant company, I find this hard to believe given the witness John's evidence, during examination in chief where, when asked how he knew the bus was not in a good condition, or the engine not working, he stated that he towed the truck from namba 2 lagoon to the defendant's company office at Korman area. This was not challenged nor disputed by the claimant. I therefore accept this witness's evidence as the truth and refuse to accept the claimant's submission regarding condition of the bus when possessed by the defendant company.

41. The claimant also raised contradicting evidence between Defendant Jong Phil Shin and witness John Yasul, as set out in paras 32 and 33 particularly sub paras (b) and (c) of his closing submission. And I do take note of these contradictions. However, I must not deviate from the main issue at hand, and that is with regards to the claimant's understanding of the content of the agreement. Clearly, both Mr Shin and Mr Yasul gave evidence for the defence that the agreement was explained to the claimant, before he signed it, however this was disputed by the claimant. As he stated that he was only told to sign an agreement and be given the VT30,000. So I find that the actual content of the agreement was not explained to the claimant, as I stated earlier, and therefore refuse to accept the evidence of both Second defendant and Defence witness Mr Yasul.

42. Mr Rausikai also submitted for the court to draw an adverse inference following absence of a key witness, the Accountant. I don't see any reason for the accountant to be considered a key witness in this case, as I find the main key witnesses are the ones present during the signing of the agreement, and as clearly stated in the evidences above, the people present are the claimant, Mr Shin and Mr



Yasul. I therefore refuse to accept this submission by the claimant and refuse to draw inference accordingly.

43. The defendant in his closing submission stated that what matters is not who prepared the agreement of 9th June 2016, but whether or not the claimant understood the content of the agreement before putting down his signature on paper, and this I agree with defence, because the only answers to the main issue at hand can be drawn from evidences of the persons who were *present* on the 9th of June 2016, the date the agreement was signed.

44. I can also gather from the evidence of both the claimant and the second defendant that the *workman* they are both referring to in their evidence as being present during the signing of the agreement was the defence witness Mr John Yasul himself, despite the minor contradictions in the second defendant's evidence.

45. The defendant further submitted that the claimant is not trustworthy in his evidence, as he claimed he signed the agreement at Customs Department Office in Port Vila, where in fact the agreement was signed at Korman in the defendant's office. And I believe both the second defendant and defence witness Mr Yasul as to the true location where the agreement was executed, was at the defendant's company office at Korman area.

46. I also concede with defence to the extent it was clear the Claimant expressed some doubt or confusion throughout questioning, and seemed uncertain as to his own answers when testifying, and I also take note that this could be a ground of his disability to understand English or bislama well during questioning and answering, as I find so likewise with the second defendant, Mr. Shin.

Findings

47. Having considered all evidence and submissions before me, and all relevant authorities and principles cited relating to this matter, I find from the evidence that:

a. there was an initial verbal agreement between parties that the claimant's bus will be sold at VT230,000 wherefrom VT100,000 will be paid to the company to offset his outstanding due to the company, and the remaining balance will return to the claimant.

b. there was a latter written agreement dated 9th of June 2016 made between the parties.

c. the latter agreement (above-mentioned) was different from what the claimant intended to sign or execute.

d. at the time the claimant signed the agreement, he did not read nor did he understand the content of the agreement, due to his inability to understand English and Bislama properly.

e. On the 9th of June 2016, the claimant was told to sign an agreement and be given VT30,000 and which I find is compelling, on the part of the defendants in getting the claimant's signature on paper.

48. I also find that the defendants' action in having had possession of the claimant's bus and having sold it to a buyer at VT800,000 without giving the claimant its balance of the purchase price, and while the bus was still under ownership of the claimant, is a clear breach of the verbal agreement.

49. I am also satisfied with the case of **Alfred Hinge v Enterprise Roger Brand (2005) VUSC 71** as it does assist the claimant in this case particularly in relation to the claimant's plea of *Non est factum.*

Conclusion

50. The claimant is successful in his claims with the following orders:

1. That the agreement dated 9th of June 2016 is void *ab initio.*

2. That the defendant pays to the claimant the sum of VT 800,000 for general damages for loss of business and loss of opportunity. .

3. That the defendant pays interest at a rate of 5% per annum as of date of Judgment.

4. That costs of VT500,000 is awarded in favor of the claimant.

Dated at Port Vila this 21st day of December, 2017.

BY THE COURT

REPUBLIC OF VANUATU MAGISTRATE COURT REPUBLIQUE DE VANUATU

.....

MAGISTRATE