

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

**Civil
Case No. 15/131 SC/CIVL**

**BETWEEN: HUHU GAITUVWA ASSOCIATION
COMMITTEE INC**
Claimant

AND: ROSEMARY LEONA SPRIGGS
First Defendant

AND: RICHARD WALSH
Second Defendant

AND: DERICK LEONA
Third Defendant

Coram: *Justice Oliver A. Saksak*

Counsel: *Mary Grace Nari for the Claimant
Mark Hurley for the Defendants*

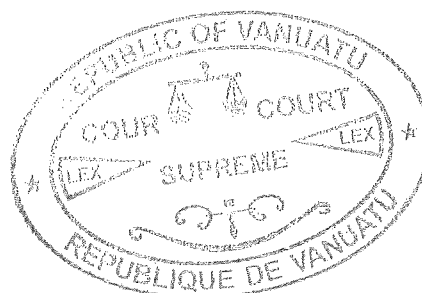
Date of Hearing: *3rd & 4th April and 14th, 15th and 16th May 2019*

Date of Decision: *10th June 2019*

JUDGMENT

Background

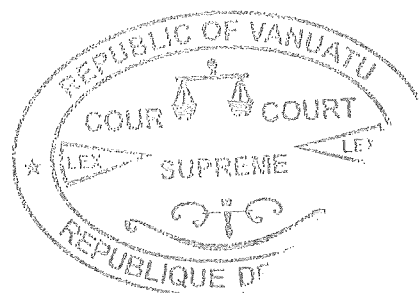
1. The claimant claims damages and losses against the defendants in the total sum of VT273,304,934 made up as follows –
 - (a) Unauthorized expenditures – VT33,186,720
 - (b) Unauthorized withdrawals – VT20,062,882
 - (c) Loss of Cooperative Goods – VT10,500,000
 - (d) Loss of Joint Venture Agreement (Kava) – VT168,750,000
 - (e) Loss of Agreement (Varin Nils) – VT36,150,000
 - (f) Investigators Costs – VT221,000
 - (g) Legal Costs – VT3,472,850
 - (h) Costs of Police Travelling – VT50,000



- (i) Costs of Repairs – VT79,090
 - (j) Costs of Extra-Ordinary Meeting – VT109,404
 - (k) Repairs to Head Office – VT568,820
2. The claimant filed their schedule of damages on 28 February 2019. They filed their initial claims on 18 August 2015 for an amount of VT113,563,035 plus costs, filing fees and interest at 5% per annum. The claimant applied for assessment of damages on 17 July 2018 in the amount of VT273,304,934.
 3. The defendants filed an application on 26 September 2018 seeking orders that paragraphs 7 A, 7 B, 7 C, 8 and 9, A, B, C, D, and E of the claimant’s claims filed on 17 July 2018 be struck out. Alternatively, the defendants suggested the claimants should file an amended claim identifying the exact heads of damages in a schedule detailing each transactions they disputed. Further the defendants stated that the claims in paragraphs 1-6 were not pleaded in the initial claim filed in August 2015.
 4. Following the defendants’ application, the claimant filed their schedule of damages on 28 February 2019.

Discussion

5. Before the Court could make assessments of damages, the claimant bears the onus of proof on the balance of probabilities the liability of the three named defendants namely Rosemary Spriggs, Richard Leona and Derick Leona. The National Bank is no longer a party or a defendant in this proceeding.
6. The claimant produced evidence from only two witnesses namely Rene Titi whose evidence by sworn statements dated 3 March 2016 (Exhibit C1), 1 August 2018 (Exhibit C2) and 9 June 2017 (Exhibit C3) were tendered, and from Joseph Lagoiala whose evidence by sworn statements dated 11 September 2015 (Exhibit C4), 11 September 2015

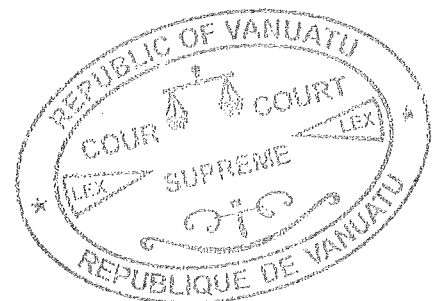


(Exhibit 5) and of 30 March 2016 (Exhibit C6) were tendered in support of the claims of the claimant.

7. The defendants on the other hand called evidence from 4 witnesses namely Derick Leona, Rosemary Spriggs, Richard Leona and Charlot Gihala. Bob Aru, an NBV Officer was summoned by the Court to produce documents which he did under oath on 3rd April 2019. He produced documents exhibited as D1, D2, D3, D4, D5, and D6. Derick Leona's sworn statements were tendered into evidence as exhibits. These were statements dated 3 August 2017 (Exhibit D7), 2nd November 2018 (Exhibit D8) and of 1 April 2019 (Exhibit D9). Rosemary Spriggs' statements dated 3rd August 2018 (Exhibit D10) and of 2 November 2018 (Exhibit D11) were tendered into evidence. Richard Leona's sworn statements of 12 April 2016 (Exhibit D 12) of 14 July 2016 (Exhibit D 13) and of 18 February 2018 (Exhibit D 14) were also tendered into evidence in support of the defence. Finally Charlot Giala's sworn statements of 3 August 2017 (Exhibit D 15) and of 2 November 2018 (Exhibit D 16) were also tendered into evidence in support of the defendants.
8. Based on those evidence Mrs Nari filed written submissions initially on 27 September 2018 and an amended one on 16 May 2019 at 9.45am. Mr Hurley filed written submissions at 10 am on 16 May 2019. I heard counsel orally in respect of those submissions.
9. Mrs Nari raised two issues: (a) Are the defendants liable for the losses claimed by the claimant? (b) What losses are payable to them?
10. Mrs Nari submitted the relevant law to be the Charitable Associations (Incorporation) Act CAP 140. Therefore this legislation has to be the starting point in deciding this matter and the issues raised. Section 1 defines –

“association” means any association or body or persons;

“charitable purposes” includes objects of a religious, educational, cultural, scientific or sporting nature or for general social welfare and any other object the main purpose of



which is not financial profit which the Minister declares to be charitable for the purposes of this Act.”

11. Section 2 provides for the incorporation of committee of a charitable association –

“1. The Committee, having not less than six members, of any association established for charitable purposes may apply to the Registrar for a certificate of incorporation of the Committee as a corporate body.

2. The Registrar shall either refuse to grant a certificate or if he is satisfied that the application complies with the requirements of this Act and the association is established for charitable purposes grant a certificate.

3. When granting a certificate the Registrar may attach such conditions in addition to any that may be attached under section 3(c) as he may consider necessary for the proper functioning and welfare of the association.

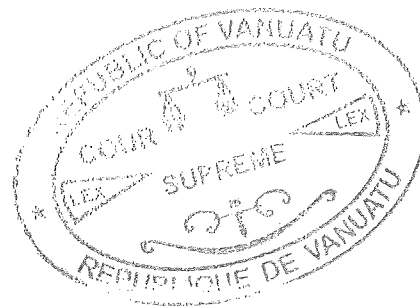
4. On the date set out in the certificate of incorporation a committee shall be a body corporate and may sue and be sued and do and suffer to be done all that corporate bodies may do and suffer to be done.” (My underlining for emphases).

5. The Constitution of Huhu Gaituvwa Association.

The following provisions of the Constitution are relevant:

(a) Preamble

“We the Generations of Atenmwalau and Atentagaro of Huhu Gaituvwa Community, united we stand vowing to uphold the spirit of one ness, acknowledging that the transfer of authority and mandate for the decision making is vested in the Togotogon Vanua, reminding ourselves of the homegrown believe (sic), the basis upon which we work hand in hand demanding our prosperity through the development of the [declared Public Land], and for its purposes we commit ourselves and proclaiming the



establishment of Huhu Gaituvwa Association by adopting each and all the Articles of this Constitution.”

(b) Goals

“Huhu Gaituvwa to hold in trust and develop all existing assets, including land and Marine resources in the area of the land declared as Lolong Public Land for the benefit of its members.”

(c) Objectives

“To unite, manage and develop the public land in the best interest of the community.”

(d) Guiding Principles

“To teach, encourage and promote the following principles to achieve its goals and objectives:

Respect, Honesty, Unity, Cooperation, Transparency, Accountability, Submission, good leadership.”

(e) Name

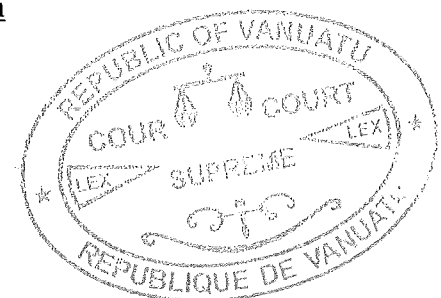
“1.1. There exists an Association on Pentecost, in Vanuatu known as “Huhu Gaituvwa Association” (hereinafter referred to a HGA)....

1.4. HGA is a Non-Profitable Association.”

(f) Registration

“2.1. HGA is registered by virtue of this Constitution as a Non-Profitable Association, to be able to be sued and be sued under its own name.”

(g) Claims by and against the Association



“3.1. A person or an organization wishing to claim against HGA in contract or tort may bring a suit against the Association in respect of the claim, in any courts of the competent jurisdiction in which a suit may be brought.

3.2. Suits on behalf of HGA may be brought in the name of the Association by:

- (a) the chairman of the Executive Council
- (b) the legal officer; or
- (c) any person appointed by the Executive Council in consultation with the Board.....”

(h) Administration

“5.1. The Administration of HGA is created by member representative known as the Executive Council.

5.2. The Executive Council of HGA is Lolong Area Council.

5.3. The Advisory Committee is composed of educated and certain people appointed with standings.”

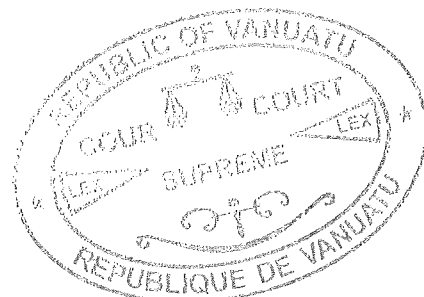
(i) Finance Provisions

“14.0. Huhu Gaituvwa will establish bank accounts for the smooth financial operation of the Association.

14.1. The signatories to the accounts to be decided by the Executive Council according to the position held.”

(j) Audit

“15.1. There is to be an assessment to the Huhu Gaituvwa bank account and assets.



15.2. The assessment is to be done by an independent auditor once a year prior to the annual General Meeting.”

(My underlining for emphasis)

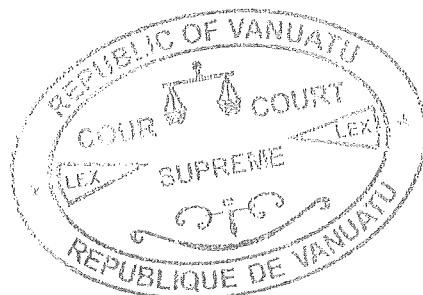
12. The Constitution of HGA has an Annexure of Interpretation. The following definitions are relevant:

- (a) “Executive Council means Vateveve Kaea.
- (b) “Committee” means Advisory Committee
- (c) “Council” means Executive Council of HGA
- (d) “Public Land” means area of land in Loltong Bay, North Pentecost comprising of 117 ha. 60 a. 00 ca as specified in the Declaration Order No. 70 of 1983 made by S. J Regenvanu on 16th day of September 1983.
- (e) “Advisory Committee” means members of atinmwala and atintagaro who are of standing.
- (f) “Non-profitable Association” means HGA is not intending to make profits, but rather, to organize the communities to manage the affairs within the Loltong Declared Public Land.”

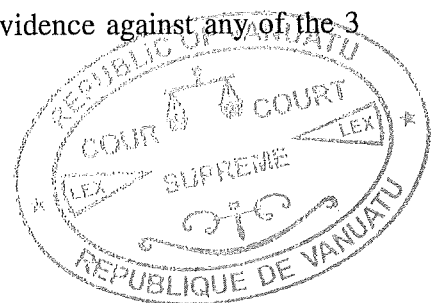
(My underlining for emphasis).

13. The defendants have not raised the issue of standing about who is the appropriate person(s) to bring this action on behalf of HGA. But in my view this goes to the heart of this case.

14. By section 2(1) of the Charitable Association Act CAP 140, for HGA to be a charitable association, it should have a committee of 6 members registered and a certificate issued as evidence. The Constitution of HGA makes no provision for such a committee. It does provide for an Executive Council and an Advisory Committee among others, but no Committee registered as “HGA Committee Incorporated.” If a committee has infact been registered, there is no evidence of it and who its 6 members are. This is my first observation.



15. Secondly are Rene Titi or Joseph Lagoiala members of the HGA Committee Incorporated? There is no evidence before me showing they are, to qualify them to bring this claim for damages. Article 3.2 of the Constitution of HGA clearly states that only the chairman of the Executive Council, a legal officer or any person appointed by the Executive Council in consultation with the Board can bring suits on behalf of the Association. There is no evidence Mr Titi or Mr Lagoiala are chairman of the Executive Committee.
16. Thirdly as to representation by Mrs Nari. One of the claim relates to the sum of VT736,850 paid to Nari & Co. It could be that Mrs Nari is acting in a conflict of interest in this matter.
17. Fourthly if HGA is in fact registered as a Charitable Association, could it be that HGA has overstepped its Constitution by doing business for profit? Both the Charitable Associations Act and the HGA Constitution are very clear that HGA is not a profit-making body. But they set up 3 cooperatives and have done kava exports for which they now claim liability against the defendants for their losses. Was HGA entitled or allowed to do all those business transactions under their own Constitution? My view is that they are not entitled or even allowed to do that. Their goals and objectives as set out in their Constitution are very clear. HGA have acted ultra vires the Charitable Associations Act and ultra vires their own Constitution and its goals and objectives.
18. For those reasons the claimants claims for loss of kava under agreements with Alexandre Nguyen and Varin Nils of VT168,904,532 and VT36,150000 are declined and dismissed. These claims are unfounded and without foundations.
19. In the same vein the claims for cooperative goods for 3 cooperatives at VT10,500,000, VT12,241,640 (producers) VT4,044,176 (wholesale) and VT5,000,000 (loss of profit) are also dismissed as having no legal basis.
20. For unauthorized withdrawals of VT20,062,882 I find no evidence against any of the 3 defendants. Accordingly these are also dismissed.



21. For claims in relation to investigation costs, (VT221,000) legal costs (VT3,472,850), costs of Police travelling (VT50,000), costs of repairs (VT79,090), costs of repairs (VT565,820), and costs of extra-ordinary meeting (VT109,040), I find the claimants expended these as part of their administrative functions for the good and proper operation of the Association. Therefore these are not claimable. And accordingly they are dismissed.

Submissions of Defendants

22. I have read the written submissions filed by Mr Hurley on 16 May 2019. I agree with those submissions totally and adopt them as the basis of my conclusions.

Conclusion

23. The claim against the defendants in relation to liability for losses and damages fail in their entirety. As such the second issue of assessment as to amount of damages and losses is irrelevant for consideration. The claims of the claimant are therefore dismissed in their entirety.

24. In the peculiar circumstances of this case as per the HGA, Constitution, its preamble, goals, objectives and guiding principles, I will make no order as to costs. Each party must bear their own costs.

DATED at Port Vila this 10th day of June, 2019.

BY THE COURT

OLIVER A. SAKSAK

Judge

