

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

Civil
Case No. 18/2941 SC/CIVL

BETWEEN: JENECK SAMUEL PATUNVANU
Claimant

AND: THE REPUBLIC OF VANUATU
Defendant

Before: Justice D. V. Fatiaki

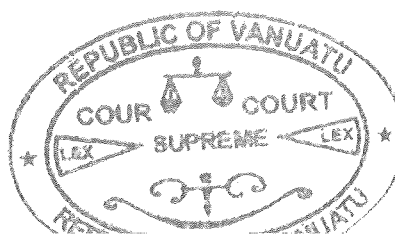
Counsel: Mr. G. Boar for the Claimant
Mr. H. Tabi for the Defendant

Date of Delivery: 6th September 2019

DECISION

Introduction

1. On 24 October 2018 the claimant issued Supreme Court proceedings claiming “*loss of business income*” in the total sum of VT16 million for two aborted business ventures in March and April 2011 that the claimant claims he had been contracted to undertake to “**Indonesia**” and “**Korea**”.
2. The claimant pleads that he was unable “... *to travel to Indonesia and Korea because he was prevented from doing so*” by a decision of the Director of Ports & Harbours that the claimant had unresolved, unexplained issues facing two ships “**M.V. Koana**” and “**M.V. Christie Leigh**” that he had allegedly brought into Vanuatu waters.
3. On 31 October 2018 without a response or defence, the defendant filed an application to strike out the claim in its entirety on the grounds that the claim was “... *a total abuse of process*” in so far as the causes of action in the present claim and relevant facts had already been determined by the Supreme Court and in the Court of Appeal (“**res judicata**”) and, although a different relief or remedy was being sought in the present claim, the causes of action and facts remained the same. Reference was also made to Port Melbourne Authority v Anshun Pty [1981] HCA 45 and Claire Dornic v VCMB Civil Case No. 15 of 2009 where the case of Henderson v Henderson (1843) 3 Hare 100 was referred to.



The Earlier Proceedings

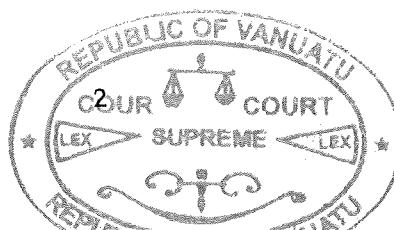
4. In March 2014 the claimant issued proceedings against the Defendant in the Supreme Court in **Civil Case No. 53 of 2014** claiming damages for “*false imprisonment*” and “*malicious prosecution*”. Included in the claim was a section entitled: “Claim for business loss” which is in substantially identical terms to the present claim.
5. In September 2014 for reasons which are not entirely clear, an Amended Claim was filed in which the entire “Claim for business loss” was removed. In other words, the Claim in Civil Case No. 53 of 2014 was now limited and confined to one seeking damages for “*false imprisonment*” and “*malicious prosecutions*” only in respect of the claimant’s arrest and aborted prosecutions in two (2) criminal cases: 72 of 2011 and 172 of 2011, respectively.
6. On 13 February 2015 the Supreme Court delivered its judgment in Civil Case 53 of 2014 (as amended) awarding the claimant damages in the total sum of VT6,900,000. The defendant appealed against the entire judgment (see: Patunvanu v Republic of Vanuatu [2014] VUSC 99).
7. On 8 May 2015 the Court of Appeal in Republic of Vanuatu v Patunvanu [2015] VUCA 9 allowed the Defendant’s appeal against the Supreme Court’s finding of liability for “*malicious prosecution*” and the damages awarded was drastically reduced from VT6.9 million to VT500,000 without any interest or costs.
8. Three (3) years later on 18 September 2018 claimant’s counsel in an exchange of correspondence with State Law Office wrote in the following terms after referring to the claimant’s earlier partly successful civil proceedings:

“We have perused these judgments and consider whether Economic loss was also litigated in these court proceedings but it appears Economic loss was never an issue and thus not res judicata and issue estoppel”.
9. On 2 October 2018 the Solicitor General responded to claimant’s counsel in the following terms:

“... we will strongly defend the State based on the principle of res judicata and will seek costs against you and your client should we succeed in defending any claim against us by your client”.

The Issues

10. From the defendant’s application and the claimant’s response and the submissions filed by both parties it is possible to extract two (2) issues:
 - (1) The pleading issue; and



(2) “*res judicata*”.

11. As to (1) after referring to Rules 4.1 and 4.2 of the Civil Procedure Rules, defence counsel writes:

“... there are no facts which could set out what happened between the parties ... The only pleadings which the claimant relies on as their facts are the (sic) mentioned of the two cases that had already been decided by the Court. There are no substantial pleading which could set out the facts as required by the Rules”.

12. In response, claimant’s counsel writes:

“The pleading in this matter does not arise in false imprisonment and malicious prosecution. In this action, the cause of action arises in contract and economic loss suffered as a result of the defendant’s actions.

In this case the claimant seeks VT16 million being the loss of the contract price he would have earned if the contracts for delivery of the vessels from Indonesia and Korea to Vanuatu were fulfilled”.

13. Despite the above submissions, claimant’s counsel includes under the heading: PLEADINGS, the following relevant summary:

“The claimant claims for economic loss arising from the (undisclosed) actions of the defendant and as determined and found in Supreme Court Civil Case No. 53 of 2014”;

and

About March 2011, the Director of Ports and Harbour and Principal Licencing officer ... determined that the claimant would be prevented from fulfilling the contracts (whatever that means)”;

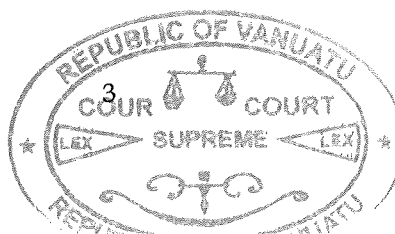
Lastly and somewhat inconsistently counsel writes:

“The claimant’s arrest and imprisonment resulted in the claimant losing out on the VT16 million that he would earn if he had fulfilled the contracts for Indonesia and Korea ...”.

14. In light of the apparent inconsistency in the reason(s) attributed for the economic loss he allegedly suffered, I turn to the claimant’s actual pleadings in the present Claim where, after referring to the earlier partly successful proceeding in Civil Case No. 53 of 2014, the “Statement of the Case” clearly and unequivocally pleads:

“6. As a consequence of the false imprisonment as found in Civil Case No. 53 of 2014 the claimant suffered economic loss as follows:

15. Later in the present Claim, a different reason is pleaded as follows:

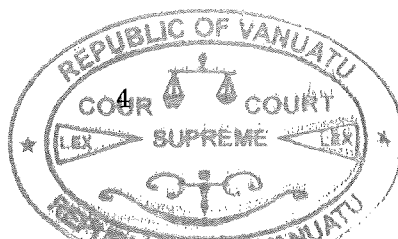


"19. As a result of the decision of the Director of Ports & Harbour the claimant did not travel to Indonesia and Korea".

16. Unfortunately, the relevant particulars supplied in **para. 18** does **not** clearly demonstrate or explain *how?* an oral statement or unwritten decision of the Director of Ports & Harbour could or did prevent the claimant from fulfilling the contracts nor, *why?* The claimant says he "... *could not do anything about the (Director's) decision ...*". There is no suggestion that the claimant disagreed or challenged the Director's decision or sought to judicially review it as illegal and/or ultra vires.
17. In the above averments, the Claimant identifies two (2) quite separate and distinct "events" as causative of the economic loss he claims he suffered, namely:
- (a) proven "*false imprisonment*" (**para. 6**); and
- (b) "*the (bare) decision of the Director of Ports & Harbour*" made at an undated meeting held at the offices of the Ministry of Ni-Vanuatu Business Development (**paras. 18/19**).

Discussion and Conclusion

18. As to (a): it is common ground that the proven "*false imprisonment*" occurred on 21 April 2011 and lasted for **3 ½ hours** before the claimant was eventually released from police custody. Given the duration, it is difficult to understand *how?* the economic loss allegedly suffered could possibly have arisen or been caused by the claimant's brief albeit unlawful detention by the Defendant's servants. Certainly there are no pleadings or particulars that clearly and directly co-relates the claimed economic loss with the Claimant's false imprisonment.
19. As to event (b): which allegedly occurred in "*March 2011*", it is again difficult to understand how an (unexplained) utterance or (unwritten) "*decision of the Director of Ports & Harbour*" without more, could possibly be causative of the economic losses incurred as a result of the claimant being unable to travel or being prevented from performing the "*Indonesia*" and "*Korea*" contracts.
20. Be that as it may, the "*Indonesia*" contract is evidenced in a letter written by the Minister of Ni-Vanuatu Business Development on 24 March 2011 and the "*Korea*" contract was entered into on 11 April 2011 the month following the Director's so-called decision or oral statement.
21. The "*Indonesia*" contract is clearly expressed as a commitment by the Ministry to assist two Ni-Vanuatu co-operative associations:



“... through meeting the travel expenses of the shipping expert (the Claimant) and our representatives on behalf of government, Second Political Advisor Mr Chancel Nathaniel ... to travel (to Indonesia) ... including their 8 days per diem, accommodation and other incidentals”.

22. According to the Ministry's Terms of Reference (“**TOR**”) for the “*Indonesia*” contract:

“A total Budget of **VT887,020** is allocated out from the Ministry of Ni-Vanuatu Business Development towards the Official Travel Mission to Indonesia”.

23. Of particular relevance to the claim for economic loss is the following self-explanatory item in the “**TOR**” under the heading:

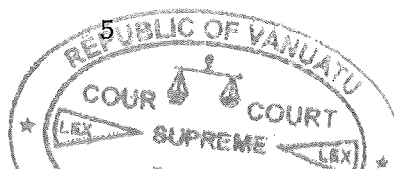
Outcome of the Mission:

*On completing the mission to Indonesia with the full outcome report, the **first stage** of this strategic program will be achieved reflecting the Government Support to Ni-Vanuatu Business Development and participation.*

*The **Second stage** would be for **the two cooperative associations to invest in any terms of Payment and the Delivery of the Vessels to Vanuatu**”.*

(my highlighting)

24. Plainly the “*Indonesia*” contract as set out in the Minister's letter and “**TOR**” does **not** include any commitment by the Defendant to purchase and/or fund the delivery of (the yet-to-be identified) vessels to Vanuatu which constitutes the so-called economic loss that the claimant says he has suffered.
25. If I may say so, even if the claimant succeeds in establishing the liability of the Defendant on the “*Indonesia*” contract (upon which I have grave doubts) the Claimant's loss would necessarily be limited to one half of the allocated budget figure in the “**TOR**”, namely, $VT(887,020 \div 2) = \mathbf{VT443,510}$ which is significantly less than the VT8 million claimed. The Claimant's loss is **not** the loss of an unperformed vessel delivery contract, rather, his loss, if any, is the share he would have received from the allocated budget for the aborted “*scoping*” trip to Indonesia. In brief, there never was a concluded vessel delivery component in the “*Indonesia*” contract.
26. The “*Korea*” contract although more straight-forward is an open “*vessel delivery contract*” entered between the claimant and a Korean individual “*Seokbae Ko*” on 11 April 2011 after the Director's decision that the Claimant says prevented him from undertaking the “*Korea*” contract.
27. I also say “*open*” advisedly, because the “*Korea*” contract has no duration or a specified date by when delivery of the vessel to Vanuatu should be completed. As such, the contract remained in existence until it was unilaterally terminated in writing by “*Seokbae Ko*” on 24 June 2011. In other words, the “*Korea*” contract




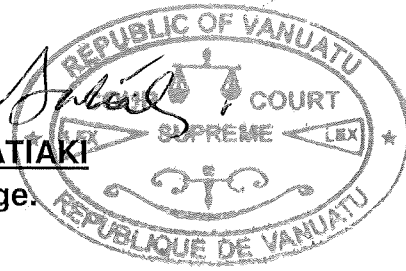
fell through not because of anything the Claimant did or for failure to perform on his part. How then could the Defendant (which is not a party to the contract) possibly be liable for such a termination? The Claimant's pleadings don't say why and in my view, gives rise to no cause(s) of action against the Defendant.

28. In the above circumstances, Claimant's counsel accepts that the Claim (as pleaded) needs to be extensively changed and amended to remove irrelevant causes of action presently pleaded, and, to clearly identify and plead new and appropriate cause(s) of action against the Defendant with proper particulars showing *how?* it is said the Defendant is liable for the economic losses that the Claimant says he suffered under the "*Indonesia*" scoping contract and the "*Korea*" vessel delivery contract.
29. Defence counsel also opposes any leave being granted to the Claimant to amend its Claim to include a completely new tortious claim for "*wrongful interference with contractual relations*" which could well involve new and extra parties.
30. As well the Claimant may wish or need to challenge and overturn the Director's decision which allegedly prevented him from leaving the country and pursuing the "*Indonesia*" and "*Korea*" contracts and there is also the possibility of a limitation defence being raised barring not only the present but also any new claims that the Claimant may consider filing.
31. Although I reject "*res judicata*" as a valid basis for striking out the Claim, I accept defence counsel's complaint that the Claim (as pleaded) is quite unhelpful, internally inconsistent, misleadingly incomplete and non-compliant with the pleading Rules and is an "*abuse of process*".
32. The Application is granted and the Claim is struck out with costs of VT30,000 summarily assessed to be paid by the Claimant within 21 days.

DATED at Port Vila, this 6th day of September, 2019.

BY THE COURT


D. V. FATIAKI
Judge.



The seal of the Supreme Court of Vanuatu is circular. It features a central emblem with a scale of justice and a book. The text "REPUBLIC OF VANUATU" is written along the top inner edge, and "REPUBLIQUE DE VANUATU" along the bottom inner edge. In the center, the words "SUPREME COURT" and "LEX" are visible, along with a star on the right side.