

BETWEEN: Joshua Kalsakau
Claimant

AND: Ifira Trustees Limited
Defendant

Date of Hearing: 25th March 2021
Date of Decision: 30th March 2021
Before: Justice Oliver.A.Saksak
In Attendance: Mr Nigel Morrison for the Claimant
Mr Mark Hurley for the Defendant/
Counter-Claimant

JUDGMENT

Introduction

1. This is an employment claim based on a contract of employment entered into between the parties on 19th October 2017.

Facts

2. The claimant's employment was terminated by the defendant by issuing a termination notice dated 5th November 2018. The purported termination was made pursuant to the Resolution 4 of the Board of Directors of the Defendant Company (ITL) dated 31st October 2018.
3. Resolution 4 states-
" That Director Kalfabun Allan refuses Director Kalsakau as new Executive Director for Ifira Ports and Development Services and Ifira Wharf and Shipping Limited effective 31st October 2018."

Claim

4. The claimant claims that this purported termination was a denial of his rights under the Employment Act [CAP 160] and that his purported termination was unlawful and/or unjustified.
5. His claims are for unpaid salaries for the duration of his contract, severance allowances, holiday and leave entitlements, and contributions to the National Provident Fund.

Defence and Counter-Claim

6. The defendant ITL filed a defence and counter-claim on 8th August 2019. Basically and in essence ITL admitted (a) there was a contract, (b) the contract was terminated pursuant to the Board's Resolution 4, (c) the notice of termination was issued without notice or discussion with the claimant, (d) the claimant's rights were denied, (e) that the termination was unlawful, and

(f) that ITL has not paid the claimant's salaries pursuant to the contract since termination notice on 31st October 2018.

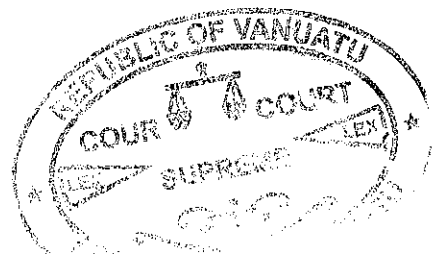
7. The defendant has counter-claimed for the sum of VT 1,325,000 being monies advanced to the claimant which are being recovered, and remain outstanding.
8. ITL seeks an order to set off the amount claimed from the amount awarded to the claimant, with interest at the rate of 5% per annum from 28 May 2019.

Agreed claim

9. At the outset of the hearing Mr Morrison informed the Court that the claimant's claims had, subject to discussions between counsel for the parties, been agreed, exclusive of costs. The head claim as agreed was for the sum of VT 4,294,574.
10. Accordingly the Court awards judgment in favour of the claimant in the sum of VT 4,294,574.

The Defendant's Counter-Claim

11. The claimant denied the counter-claim of the defendant. He was cross-examined by Mr Hurley.
12. In his evidence in cross, Mr Kalsakau denied categorically any advance in June 2004 in the sum of VT 350.000 to SMET. He categorically denied receiving VT 200.000 as an advance made on 31st August 2012 on the basis there is no signature as proof he was paid that amount as an advance.
13. In regard to travelling expenses in the sum of VT 350.000 entered on 9th December 2016, the claimant acknowledged in cross that the Bank Statement (page 8) does show a cheque (No. 0014835) was drawn on 09/12/2016 and the Reconciliation Report (page 7) does show it is an entry made against his name, he was unable to answer further stating he needed to see more evidence.
14. In regard to an advance entry of VT 400.000 mad on 14/03/18 for medical expenses the claimant accepted he received the money when he was bedridden with an illness and authorized another person to sign off for it, but said it was not an advance.
15. Thirdly for the VT 100.000 received on 18/06/19 towards a trip to Tahiti the claimant accepted receiving the money but said again that it was not an advance.
16. The claimant was cross-examined in relation to the General Ledger (Details) at page 15 showing deductions from his VT 30.000 sitting allowances at the rate of VT 10.000 from 26th August 2020 through 25th February 2021. From



those deductions his debts have been reduced to VT 1,095,000. The claimant accepted he had requested those deductions to be made.

Evidence by ITL

17. ITL relied on the sworn statement and the attachments of Josina Robert in support of their counter-claim. In cross Ms Robert was unable to produce any other documents in support of the SMET advance in 2004 and the advances claimed in paragraph 6 of her sworn statement.

The Issue

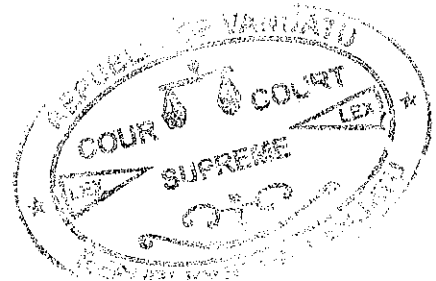
18. The only simple issue for the Court is whether or not the purported advances recorded by ITL at paragraph 6 of Ms Robert's sworn statement are repayable.
19. Mr Hurley submitted orally that on the evidence presented the Court should be satisfied on the balance of probabilities that they are proved and are payable, and are to be set off against the award made to the claimant.
20. Mr Morrison submitted orally that the counter-claimant has the onus of proof and that they lacked documents to prove their counter-claims.

Discussion

21. For the counter-claimant to succeed on its claims for monies paid to the claimant as advances ITL had to show documents as attachments (page 9) and page 13. These relate to advances made to the claimant for medical expenses in the sum of VT 400.000 and VT 100.000 made towards the Tahiti trip. These were clearly advances and which were clearly signed off on as such.
22. The claims in relation to VT 350.000 to SMET on 1/06/04 or VT200.000 made on 31/08/2012 and VT 350,000 made on 9/12/16 do not have those documents to reinforce those claims.

Findings

23. I find therefore that the payment made on 14/03/18 in the sum of VT 400.000 and VT 100.000 made on 18/06/19 to the claimant by ITL were advances which are payable by the claimant.
24. I find that the payments made on 1/6/104 in the sum of VT 350.000, on 31/08/12 in the sum of VT 200.000 and on 9/12/16 in the sum of VT 350.000 were not advances and are not repayable by the claimant.



The Result

25. ITL the counter-claimant has judgment on their counter-claim but at a reduced sum of VT 500.000 instead of VT 1.400.000 as initially claimed.
26. The claimant has repaid through direct deductions at VT 10.000 the sum of VT 305,000. The balance owing by the claimant is therefore VT 195.000.

Orders

27. I order that the sum of VT 195.000 be set off against the sum of VT 4,294,574 due and owing to the claimant by ITL. The balance payable by ITL to the claimant shall be VT 4,099,574.
28. The claimant is entitled to interest on VT 4,099,574 at 5% per annum from 31st October 2018 to the date of payment.
29. In the circumstances of the case there will be no order as to costs. Each party bears their own costs.

DATED at Port Vila this 30th day of March 2021

BY THE COURT


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Oliver.A.Saksak

Judge

