

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Civil Jurisdiction)

Civil

Case No. 21/448 SC/CIVL

BETWEEN: Arlette Malapa

Claimant

AND: George Kalkaua Taleo

Defendant

Date of Trial: 19 May 2022
Before: Justice V.M. Trief
In Attendance: Claimant – Mr P.J. Boe
Defendant – Mr S. Kalsakau
Date of Decision: 18 January 2023

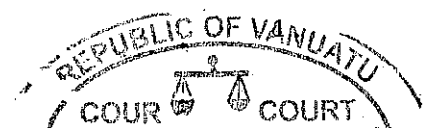
JUDGMENT

A. Introduction

1. The Claimant Arlette Malapa owned a yellow Hyundai Grace bus registration number B15544 (the 'bus'). She operated the bus offering public transport in Port Vila.
2. On 7 December 2017 the bus was damaged in a vehicle collision alleged to have been caused by the Defendant George Kalkaua Taleo who was driving Government vehicle G1079. A third vehicle H16355 was also involved in the accident. Mr Taleo is being sued for loss of business profits, exemplary damages and costs.
3. The parties filed closing submissions. I now set out the judgment.

B. Pleadings and Issues

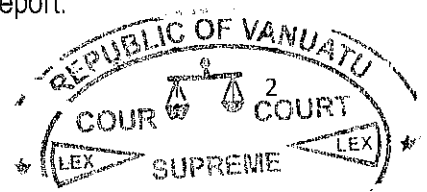
4. The Claimant alleges that Mr Taleo was driving under the influence of alcohol and recklessly and carelessly caused the accident which resulted in damage to the bus. The relief sought includes loss of business profits, exemplary damages and costs.
5. It is accepted that Mr Taleo and the bus were involved in an accident on 7 December 2017 (the 'accident').
6. Mr Taleo offered to pay for and did pay for repairs of the bus, however denies that such payment was an acceptance of any liability for the accident or loss of business.



7. Mr Taleo further alleged in his Defence that the Claim is misconceived, that he did not owe a duty of care for the alleged loss of business, that Ms Malapa has failed to mitigate her losses and in the alternative, that he was not the direct cause of the delay in having Ms Malapa's vehicle up and running and that any damages for loss of business are too remote and ought not to be granted.
8. The issues arising include whether or not Mr Taleo negligently caused the accident, whether the loss of business profits claimed were caused directly or indirectly (and reasonably foreseeably) as a result of the damage incurred by the bus in the accident, the extent of the losses and whether or not Ms Malapa mitigated her losses.
9. If it is proved that Mr Taleo negligently caused the accident, then he will be liable for damages and I need consider the other issues arising. If not proved, the Claim will be dismissed.

C. Objections to admissibility of Claimant's evidence

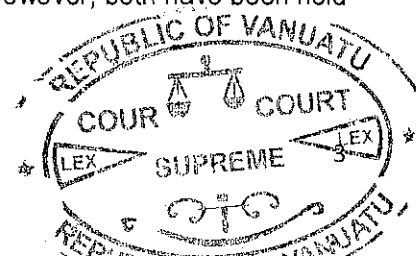
10. As soon as Ms Malapa tendered her sworn statements [**Exhibits C1 and C2**], Mr Kalsakau commenced with objections to the admissibility of the evidence. Counsel had a short discussion and then informed the Court that they were agreed that the Defendant would set out the objections in the Claimant's closing submissions and Mr Boe would respond in the Claimant's submissions in reply. This is recorded in the Judge's notes. I accepted this course and the parties went on to present their case.
11. Mr Kalsakau duly set out objections to parts of Ms Malapa's sworn statements in the Defendant's closing submissions and Mr Boe responded to them in the Claimant's reply submissions.
12. Mr Boe submitted that objections could only be made before a sworn statement was relied on and that to raise objections after completion of the trial was tantamount to an ambush and was discourteous to the Court and counsel.
13. With respect, Mr Boe's submissions run counter to the course counsel agreed at trial. Accordingly, there is no merit to his submissions in response.
14. I now deal with each objection in turn.
15. Ms Malapa stated in para. 6 of her sworn statement filed on 19 February 2021 [**Exhibit C1**] that at on 7 December 2017, Mr Taleo was driving G1079 at Teouma Bridge Road under the influence of alcohol and therefore recklessly and carelessly caused an accident which resulted in the damages to the bus. She attached as **Annexure "AM2"** a Police Report into the accident dated 7 December 2017 by Sgt Edward Kalura of the Vila Police Station Traffic Section who stated that Mr Taleo was under the influence of alcohol and caused the accident by driving on the wrong side of the road.
16. Mr Kalsakau objected to Ms Malapa's para. 6 for being opinion evidence and to **Annexure "AM2"** as hearsay, opinion evidence and that that the maker of the Police Report could not be cross-examined to test the veracity of the report.



17. In her para. 6, Ms Malapa drew conclusions of law which are for the Court to draw in determining this matter. Accordingly, the objection is upheld and para. 6 is struck out.
18. The maker of **Annexure "AM2"** has not been called as a witness. It is hearsay and inadmissible as the object of the evidence is to establish the truth of what is contained in it (in the Police report), that is, that Mr Taleo caused the accident. Accordingly, the objection is upheld and the Annexure is struck out.
19. In para. 11 of **Exhibit C1**, Ms Malapa deposed that the total owed by Mr Taleo is to be calculated at the rate of VT10,000 per day, totalling VT9,890,000. Mr Kalsakau objected to the whole of para. 11 as hearsay and opinion evidence.
20. The exercise undertaken by Ms Malapa in her para. 11 is a conclusion for the Court to draw in determining this matter. Accordingly, the objection is upheld and para. 11 struck out.
21. In para. 12 of **Exhibit C1**, Ms Malapa set out submissions as to what Mr Taleo's options were to settle her claims. The whole paragraph was objected to as irrelevant opinion. I agree. That paragraph is struck out.
22. In para. 3 of her sworn statement filed on 21 June 2021 [**Exhibit C2**], Ms Malapa attached as **Annexure "AM1"** a copy of the Notice dated 3 October 2019 from the Shefa Port Vila Land Transport Association. In para. 4 of **Exhibit C2**, in the part beginning at "*loss of my business... at VT10,000 per day in accordance to the Port Vila Land Transport Association*", Ms Malapa set out what her loss of business profits were in accordance with the rate in **Annexure "AM1"**. In para. 6 of **Exhibit C2**, Ms Malapa set out the total balance for Mr Taleo to pay.
23. Paragraph 3 and **Annexure "AM1"** of **Exhibit C2** were objected to for hearsay and opinion and that the maker of the notice could not be cross-examined as to the veracity of the notice's contents. The part of para. 4 referred to and para. 6 of **Exhibit C2** were objected to as hearsay and opinion.
24. I note that **Annexure "AM1"** had already been adduced into evidence as **Annexure "AM4"** in para. 8 of **Exhibit C1**. It was not hearsay there as it was adduced to establish by the evidence, not the truth of the statement (the notice), but the fact that it was made. However, as **Annexure "AM1"** in **Exhibit C2**, it is hearsay and inadmissible as the object of the evidence is to establish the truth of what is contained in the statement, that is, that VT10,000 per day is the applicable rate for calculating Ms Malapa's lost business profits. Accordingly, the objections are upheld and para. 3, **Annexure "AM1"**, the relevant part of para. 4 and para. 6 of **Exhibit C2** are struck out.

D. Discussion

25. The only evidence adduced by Ms Malapa as to Mr Taleo driving G1079 on 7 December 2017 under the influence of alcohol and that he caused the accident was in para. 6 of **Exhibit C1** and in the Police Report **Annexure "AM2"**. However, both have been held inadmissible and struck out.



26. There is no other evidence that Mr Taleo was driving under the influence of alcohol and caused the accident.
27. Even if the Police Report in **Annexure "AM2"** was admissible, Ms Malapa accepted in cross-examination that the Police were not eye-witnesses to the accident. She also accepted that Mr Taleo had never been prosecuted in relation to the accident. It does not follow then that the Court would have necessarily accepted the Police Report as conclusive that Mr Taleo caused the accident. Other evidence would have been needed to prove that he caused the accident.
28. Ms Malapa also gave evidence about her conversation with her bus driver about the cause of the accident. The bus driver too was not called as a witness. Ms Malapa explained that it was difficult to locate him, even though she knew he lived at Ohlen area. Accordingly, the conversation that Ms Malapa had with her bus driver about the cause of the accident is also hearsay evidence and inadmissible.
29. I note for completeness that Mr Taleo gave evidence [**Exhibit D1**] denying that he caused the accident. He admitted in cross-examination that he had some glasses of wine and kava at an official ceremony that afternoon before he left for Teouma where the accident occurred. He remained firm in cross-examination that he did not buy or consume beers on his way to Teouma, and that he did not cause the accident. No evidence was adduced to show that beer cans were bought and how many were consumed (if any).
30. Colin Natonga was also called as a Defence witness. He regards Mr Taleo as his friend and they are related by marriage. Mr Natonga gave evidence about witnessing the accident [**Exhibit D2**] but in answer to my question, stated that he arrived after the accident happened but when it was just "fresh". He said that he did not observe that Mr Taleo was drunk. He was not cross-examined about what he heard from the bus driver stating words to the effect that it was the third vehicle that caused the accident. I found Mr Natonga's evidence to be of limited assistance.
31. On consideration of the evidence, it has not been proved that Mr Taleo negligently caused the accident. No liability having been established, the Claim must be dismissed.

E. Result and Decision

32. The Claim is **dismissed**.
33. Costs must follow the event. The Claimant is to pay the Defendant's costs on the standard basis as agreed or taxed by the Master. Once set, the costs are to be paid within 21 days.

DATED at Port Vila this 18th day of January 2023
BY THE COURT


Justice Viran Molisa Trief

