

Box file

IN THE HIGH COURT OF KIRIBATI 2014

CIVIL CASE NO. 192 OF 2010

	[TEIO TEBETANGA	PLAINTIFF
	[
BETWEEN	[AND	
	[
	[BETIO TOWN COUNCIL	DEFENDANT

Before: Hon Chief Justice Sir John Muria

28 July 2014

Ms Elsie Karakaua for Plaintiff

Ms Taoing Taoaba for Defendant

JUDGMENT

Muria CJ: The plaintiff's claim is for the detentions of his Bus registered as BA 1001 by the defendant. The two periods of the detentions of the plaintiff's Bus were from 27 September to 15 October 2010 for which the plaintiff claims \$4,180.00 as a loss in his business for the period and from 16 October 2010 to end of June 2011 for which he claims \$25,800.00 as a loss in his business takings. His total special damages claim is therefore \$29,980.00. In addition, the plaintiff also claims general damages in the sum of \$5,000.00

Brief background

The plaintiff operated a Bus Service business since 1998. On 27 September 2010 the defendant detained the plaintiff's bus Registered BA1001 at its

compound at Takoronga, Betio. The reason for detaining the bus was that the bus driver failed to stop pick up a school child who was waiting for a bus at one of the bus stops early in the morning on that day. The plaintiff's bus driver and bus conductor (fare collector) were ordered by the defendant's Warden to pay \$100.00 fine for failing to pick up the school child at the bus stop. The plaintiff refused to pay the \$100.00 and so the bus was restrained. With the help of his then lawyer, on 13 October 2010 the plaintiff was allowed to take his bus from defendant's compound on the condition that he paid the \$100.00 fine. The plaintiff took his bus but still refused to pay the \$100.00 fine.

On 20 October 2010, following the release of his bus BA1001, the defendant wrote to the plaintiff about the non-payment of the \$100 fine. In the same letter, the defendant informed the plaintiff that his bus was again being restrained and that his licence to operate his bus in Betio was revoked. The plaintiff was not informed in advance that his licence would be revoked. Consequently, the plaintiff had to operate his bus BA 1001 only in TUC from 16 October 2010 to the end of June 2011.

As his bus BA1001 was not earning as much as it used to be when he operated it in Betio, the plaintiff visited the defendant's office in June 2011 and asked if he would be allowed to renew his bus operating licence for Betio as well. His request was granted. His licence to operate in Betio as well, was renewed without having to pay the \$100 fine. It is said that the fine of \$100 insisted upon by the defendant previously was foregone.

The plaintiff claims that he incurred losses during the detention of his bus BA 1001, as well as during the revocation of his licence.

Detention of plaintiff's bus from 27 September to 15 October 2010 conceded.

At the beginning of the hearing, Ms Taoaba of Counsel for defendant informed the Court that defendant conceded to the plaintiff's claim in respect of the period from 27 September 2010 to 15 October 2010. That concession being made, I find that the defendant had unlawfully restrained the plaintiff's bus BA1001 for the said period.

Judgment is therefore entered for the plaintiff in the sum of \$4,180-00 for losses incurred by the plaintiff arising out of the seizure and detention of his bus BA1001 for the period 27 September to 15 October 2010.

Claim for detention of plaintiff's bus for period 16 October 2010 to 30 June 2011

The defendant denied the plaintiff's claim of losses in his bus services for period 16 October 2010 to 30 June 2011. The defendant's case is that the plaintiff's operating licence was revoked because the plaintiff failed to pay the fine imposed on his driver for breaching the conditions governing the bus service imposed on buses.

The plaintiff's case is that the defendant's action in revoking the plaintiff's bus operating licence was unlawful. Counsel for the plaintiff submitted that the defendant failed to comply with the mandatory requirements of the Business Bye-Laws (I take that to mean the *Betio Town Council (Business*

Licence) Bye-Laws 2009). The plaintiff's argument is that the defendant had to consult the Mayor of the Council first, then give written to the plaintiff before revoking his licence (S11(1)). Secondly the plaintiff also argues that the defendant failed to give reasonable time for the plaintiff to respond before revoking his licence. The plaintiff refer on S.11(3) of the said Bye-laws.

Section 11(1) and (3) of Betio Town Council (Business Licence) Bye-Laws 2009.

As the plaintiff's case is based on the alleged breaches of section 11(1) and (3) of the abovementioned Bye-Laws, I set them out here. The provisions of Section 11 are as follows:

“(1) The Clerk of the Council, may in its discretion, suspend or revoke or reject a business license after consultation with the Mayor.

(2) Prior to any suspension or revocation or rejection, the Clerk of the Council acting upon the recommendation of the Mayor shall advise the licensee in writing that it is considering taking action to suspend or revoke or reject the license, and the reasons why such action is being considered.

(3) The licensee shall be given a reasonable period of time to respond, after which time the Full Council Meeting OR any authorized Committee may proceed to consider the matter.

(4) Any person aggrieved by the decision of the Committee or Council to either suspend or revoke or reject a Business license shall have the right to appeal to the Full Council Meeting, who shall have the power to reverse such decision, on such terms as may be reasonable. The decisions of the Full Council Meeting shall be final. "

The 2009 Bye-Laws, referred to, cover the many and various business undertakings within the Betio Town Council local government area of authority. Bus Service is one of the businesses included in the schedule to the Bye-laws. Under the Bye-Laws a Bus Operator is to pay \$400.00 per year for his licence to operate a Bus Service.

It is also important to note that under section 4(3) and (4), the defendant has power to attach conditions to any business licence. In this regard, the defendant made provisions setting out conditions attached to the licence to operate bus service. Section 4(3) and (4) provide as follows:

"(3) The Council may attach such conditions to any business license as are reasonable in the circumstances.

(4) Any licensee who acts otherwise than in accordance with the conditions attached to his license shall be liable under this Bye Law"

Both TUC and BTC laid down conditions for operating the Bus services in both of their council jurisdictions. One of the conditions laid down in clause 4 is that-

" A bus driver shall comply with the following conditions:

- (1) He shall not bypass pupils, especially children, old people or handicapped who waited for the bus beside the road, when the bus has available seats”

The penalty for not complying with clauses 4(1) - (11) is set out in clause 5 which imposes a fine of \$100.00 on the driver. However under Clause 2(5) of the Bus Conditions the owner is obliged to pay to the council fines if the owner or his employee fails to comply with the conditions imposed. Clause 2 (16) obliges the bus owners to inform and ensure that their employees adhere to the rules set out in Bus Conditions.

Clause 3 of the Bus Conditions then sets out the penalties for not complying with the Condition. These include payment of a fine of \$300.00, suspension and revocation of licence.

There is no doubt that the defendant has power to penalize bus owners or bus drivers if they fail to comply with the conditions attached to their licenses to operate bus service. However, the reason generating the dispute between the plaintiff and defendant was the imposition of the fine of \$100.00 for failing to pick up a school child at a bus stop on 27 September 2010. The plaintiff refused to pay the fine throughout the dispute. Even after his bus was released and his operating licence was renewed, the plaintiff still had not paid the fine of \$100.00. In the Court's view the plaintiff was entitled to insist that the fine was justified before he could pay.

Was the fine of \$100 justified?

It is true that the defendant had the power to impose the penalty of \$100 fine for failing to comply with the provisions of the Bus Conditions. But there must be basis for imposing the fine on the plaintiff's driver. The allegation was that the plaintiff's bus driver failed to stop to pick up a school child on the morning of 27 September 2010. The bus driver and bus conductor (fare collector) denied the claim that they failed to stop to pick up school children.

The allegation of breaching the Bus Conditions, having been denied, it was incumbent on the defendant to establish by evidence, that the breach had actually occurred and that there was basis for imposing the fine. None of that happened. Instead the plaintiff was required to pay the \$100 fine before the bus was to be released.

There was no evidence to substantiate the alleged failure on the part of the plaintiff's driver to stop to pick up a school child. So there was nothing before the defendant to justify the imposition of the fine of \$100.00 against the plaintiff in the first place. It follows that there was no basis to detain his bus BA 1001 from 27 September to 15 October 2010.

Was the revocation of licence from 16 October 2010 to 30 June 2011 justified?

That's not the end of the issue of the \$100.00 fine. Subsequently the defendant continued to insist that the plaintiff paid the \$100.00 fine for the same reason that the plaintiff refused to pay until his bus was released. He maintained his stand that he was not going to pay the \$100 fine. He

subsequently suffered the second punishment for not paying the said fine. His operating licence was revoked. His bus could not operate in Betio because his licence to operate in Betio Town Council area had been revoked from 16 October 2010 to 30 June 2011.

In the Court's view the basis of imposing the \$100 fine had not been established. It was a fine imposed without justification and so it was unreasonable for the defendant to use its non-payment as a means to revoke the plaintiff's licence to operate with Betio Town Council area. The revocation of the plaintiff's licence was not justified in law.

It is one thing to have the power to impose the fine of \$100.00. It is quite another thing altogether to justify the exercise of the power to impose the fine on an alleged lawbreaker. The latter requires proof.

A further feature of the defendant's position in this case is that, despite the defendant's insistence upon the plaintiff to pay the \$100 fine, it did not make any counter-claim for the amount in its defense. The non-payment of the \$100 is the genesis of the dispute between the plaintiff and defendant in this case. Had the defendant made the counter-claim it would be required to furnish evidence to ground the basis for claiming the payment of the \$100.00 as a debt owing to the defendant. As it turns out, there is nothing before the Court to justify the imposition of the \$100.00 fine.

Was the plaintiff entitled to specific damages?

For the period 16 October 2010 to the end of June 2011, the plaintiff could not operate his bus BA 1001 in Betio area. The plaintiff had to run his bus

service only in TUC area for which he earned only about \$300 gross per day. After expenses of \$180 were deducted he was left with a profit of \$120. He rounded out his loss to only \$100 per day. No doubt had his licence not been revoked, he would operate both in TUC and BTC and his profit would likely to be about the same as that earned from his other bus BA1038 which profited him \$220 per day net.

The defendant argued that if the plaintiff is entitled to damages, he ought to mitigate his loss. I am satisfied that the plaintiff had mitigated his loss in this case. In fact the plaintiff had been more generous to the defendant than he would have been. The plaintiff only claims \$100 per day as loss of profit for the period 16 October 2010 to the end of June 2011 based on his earnings for operating in TUC area only. Had his operating licence not been revoked he would have operated both in BTC and TUC and his profit would have been higher than \$100 per day. Had the plaintiff chosen to base his claim on loss of profit for operating in TUC and BTC together, his claim would have been much higher than \$25,800 that he now claims for his loss of profit for period 16 October 2010 to the end of June 2011.

I accept, as I must, that the power to award damages must be exercised subject to the rules of pleadings and procedure. It is for the plaintiff to establish his claim as to damages and quantum.

There was no evidence to counter the figure claimed by plaintiff as his loss of profit in this case. In the circumstances, the plaintiff is entitled to specific damages in the sum of \$25,800.00 to cover his loss of profit for the period 16 October 2010 to 30 June 2011 and it is so granted.

The total award for specific damages is therefore \$29,980.00.

General Damages

The plaintiff in this case also claim general damages. In his statement of claim he claims "pecuniary loss and damages" which I take it to mean specific financial loss and general damages. As to the plaintiff's claim for specific damages in terms of financial loss, the Court has accepted his claim and granted him a total sum of \$29,980.00.

It is not pleaded in the statement of claim what the general damages are for. The plaintiff simply pleads "damages". I think it is true to say that very often parties assume that they can claim general damages as a result of the actions or conduct of the defendant. This, I think, is because general damages are those which will be presumed to be the natural or probable consequence of the wrong complained of, with the result that the plaintiff is required only to assert that such damage has been suffered. However, to my mind, it is a mistake to think that, as long as the defendant's actions create a situation where the plaintiff finds himself or herself in distress, general damages will follow. Some form of proof is still required that the plaintiff has suffered some type of loss before general damages can be awarded.

In the present case, the plaintiff only pleads "damages" in his statement of claim. The details of the factors giving rise to his claim of general damages are set out in affidavit of June 2013. The generally accepted rules of

pleadings provide that the parties must plead their cases for specific or general damages.

We have now adopted the practice in this Court that unless otherwise directed, evidence at the trial is to be by affidavit or sworn statement and the deponent or the maker of the affidavit or sworn statement should be present at the trial for cross-examination if required. So at the Direction Hearings, parties are usually ordered to file and serve their affidavit evidence or sworn statements on the other party. It is intended by such practice that details of the facts or evidence of the parties' case are to be set out in those affidavits or sworn statements.

In the present case, although the plaintiffs only pleads "damages" in his statement of claim, the Court accepts the details of his case for claiming general damages as contained in his affidavit. He states in his affidavit as follows:

- "3. I was filled with great anxiety when our bus was at first restrained and again that my operational licence was revoked. In addition to that I had to undergo mental distress for such a long time until June 2011 when the Defendant ended the revocation of our operational licence.
4. During that period of time (suspension and revocation) I had undergone sleepless nights and also suffered emotional stress. As a result of this, I suffered a stroke around January 2011.

5. At the time my wife was diabetic and she was also affected by such decision. Because it was both our business, this issue affected us greatly as it became the topic of our worry every day. A few months after I suffered stroke, my wife passed away.

6. It was the end of June 2011 that the Defendant finally ended our problems. However the distress we had encountered during the period of suspension/revocation was extreme.”

There was no evidence from the defendant to rebut what the plaintiff has deposed to in his affidavit. As I indicated above, the Court accepts the details of the general damages suffered by the plaintiff as contained in his affidavit. They satisfy the test of “some proof” of the type of loss suffered by the plaintiff for his claim for general damages.

I make it clear that my conclusion that the unchallenged details in the plaintiff’s affidavit of his claim for general damages are sufficient proof of his claim in the present case, is not to be taken as sanctioning general departure from the requirements that damages, specific or general, but especially specific damages, must be pleaded as required by the rules. As Lord Woolf MR pointed out in *McPhileney v Times Newspapers Ltd and Others* [1999] 3 All E R 775 at 793 that pleadings –

“are still required to mark out the parameters of the case that is being advanced by each party.”

In the present case, I accept the plaintiff's claim for general damages and I feel the amount of \$3,000 would be appropriate in the circumstances of this case.

Conclusion

There will be judgment for the plaintiff in the sum of \$29,980.00 for specific damages and \$3,000.00 for general damages. I order accordingly.

Costs to the plaintiff, to be taxed if not agreed.

Dated 17 October 2014

