

**IN THE MAGISTRATES' COURT
OF THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No.3070 of 2016

BETWEEN: SIMON KAUKARE

Petitioner

Claimant's Lawyer:

Daniel Yawha of YAWHA &
ASSOCIATES
Port Vila, Efate, Republic of
Vanuatu

AND: GILBERT DINH

Defendant

Defendant's Lawyer:

Robin Tom Kapapa of
KAPAPA LAWYERS
Port Vila, Efate
Republic of Vanuatu

JUDGMENT

Introduction

1. This is a claim for breach of contract filed by the claimant against the defendant in respect of a sale and purchase agreement of watermelon.
2. The claimant is an indigenous Ni Vanuatu who engages himself in planting watermelon at Teouma Area on Efate.
3. The defendant is a naturalised citizen of Vanuatu residing in Port Vila and is owner of a commercial tourism business at Rentapao Area.

Background



Claimant's version of facts

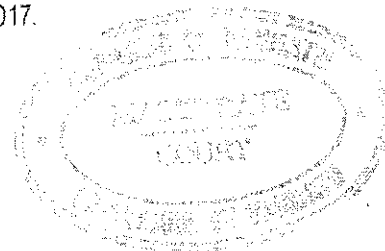
The claimant relied on the following sworn statements:

- Statement of Simon Kaukare (claimant) filed on 9 November 2016.
 - Statement of Selina Kaukare filed on 9 November 2016.
4. The claimant farms water melon at Teouma area and during the harvest season on or about 28 September 2015, the defendant approached him and asks for watermelon to be supplied to him and to which the claimant agreed.
 5. The claimant asserts that the term of the oral agreement is that the claimant will supply thirty water melons to the defendant on each delivery at a discounted rate of VT 1,500 per watermelon and that the defendant will supply the claimant with a second hand bus with its valid licence to be used for bus services transportation.
 6. The claimant held that the defendant at some stage went to him and renegotiate with him to deviate from the actual rate of VT 250 per kilo or VT 150 for smaller sizes.
 7. 13 deliveries of watermelon were made to defendant totalling to 450-water melon weighing 6279 KG.
 8. Using the deducted rate, the claimant should be paid VT 1,569,750 (250 x 6,279). The defendant only paid claimant VT 585,000 leaving the outstanding balance of VT 984,750. Moreover, the defendant failed to deliver the bus to the claimant as agreed.
 9. Sometimes in December 2016 the defendant called claimant through mobile phone and asked him to pay a visit to his garage station at Tagabe. The claimant went to the garage station and was shown the bus by the defendant. The bus model is Hyundai Starex and is orange in colour. The Registration Number is 6144.
 10. The claimant waited nine months but the defendant failed to deliver the bus to him so his lawyer wrote a letter demanding him to make outstanding payment for watermelon and to deliver the bus to the claimant.
 11. Despite the letter of demand, the defendant ignored the outstanding payment and failed to deliver the bus to the claimant.

Defendant's version of facts

The defendant relied on the following sworn statements:

- Statement of Kalwas Waisili filed on 15th May 2017.
- Statement of Kalo Boblang filed on 16th May 2018.
- Statement of Alex Palavi filed on 15th May 2017.
- Statement of Philemon James filed on 15th May 2017.
- Statement of Dick Lava filed on 15th May 2016.



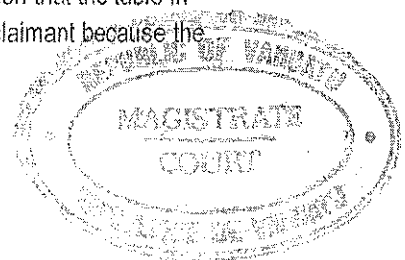
12. The defendant says there was no oral agreement and it was only agreed that the purchase price was VT 150 per kilogram for all watermelons.
13. He denied any outstanding payment and says either he or his staff when approaching the claimant always makes full payment of watermelon collected.
14. He also denied making an oral agreement with the claimant to give him a second hand bus to compensate for the discounted rate of watermelons.
15. He strongly asserts that he has not outstanding payment with the claimant. He also denies that the total quantities being supplied to him are those stated by the claimant.

Issue

1. *Whether there was an oral contract entered into for claimant to supply watermelons to defendant at VT 1,500 per melon and a second hand bus with valid transport permit?*
2. *Whether or not the court can award specific damages without any substantive evidence?*
3. *Whether contracts entered into with market vendors operating without a licence constitute a valid contract?*

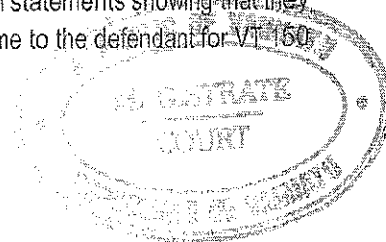
Discussion

16. It is the submission for the claimant that the defendant had initially entered into an oral agreement with him to supply him with watermelons each delivery of 30 watermelons at 1,500 VT and not VT 250 per kilo but that the difference will be accounted for a service bus which will be given to claimant with a valid permit to operate bus service business.
17. At what stage of the contract did the claimant become aware of the offer by the defendant to give him a bus. The claimant's version of the agreement fail to disclose the date when that offer was made by the defendant for his bus to be given to the claimant. There is no clarity as to the selling price of the bus so that a difference of the sales of the watermelon will clearly reflect that price. It is apparent that the subject of the bus came at a later date because Ms. Selina Kaukare said in cross examination that she heard the claimant and the defendant communicating that transaction at one time through the phone. Mr Gilbert Dinh in cross examination says a month had passed after he was paying claimant's watermelon at 150 VT when claimant raised his need for a bus.
18. What would be the subsequent price for the watermelon after the defendant had offered to sell his bus to the claimant. The claimant's sworn statement at Paragraph 4 (c) said there was an approach by defendant sometime later to deviate from selling watermelon at actual rate of 250 VT or 150 VT for smaller sizes. It does not say the reason for the deflection is to represent the difference in the selling price of the bus. So according to claimant in annexure SKA it could be obvious that the selling price of VT 1,500 began before the negotiation of the service bus began.
19. Third witness for claimant namely Juliette Kaukare said in re-examination that the table in annexure SKA is being drawn purposely to find the balance owing by claimant because the



bus had not been delivered to claimant. The table does not make a sense because the on the 26th of November 2015 there were 90 watermelons delivered but the claimant only paid the claimant 45,000 VT. If he earns 45,000 VT from each delivery of 30 watermelons, then he should earn 90,000 VT extra on the 26th of November 2015 and the total amount received by defendant would be VT 675,000.

20. The claimant says in cross-examination he would usually weigh the watermelons a day before the defendant goes and buy them and collect them. He also says there are no proper recording of all sales of watermelon. I agree. Had he kept record of all transactions, it would be disclosed in evidence. It is unfortunate that such documentary evidences were not disclosed to make the claimant's case easier.
21. I hold the view by counsel for the defendant that the agreement is obviously not complete or is somehow vague or ambiguous in the terms thereof. As a matter of principle in contract law, contracts that are incomplete or are ambiguous cannot be enforced. The claimant does not show sufficient evidence to substantiate his case. The record of payment as shown in annexure SKA is drawn by counsels in absence of an original docket showing payments effected by defendant at each delivery.
22. It will be dangerous for the court to rely on such assertions by counsel as it would resort to miscarriage of justice. It is always the notion that a person bringing a civil action against another person must prove his or her case with evidence.
23. I accept the defendant's evidence in cross examination that the claimant was called to his garage to test drive the bus. It was not an act of delivery of the bus to the claimant on the terms of their agreement. Had it been so, it would be reasonable that the transfer of ownership be effect to the claimant before a delivery could be executed.
24. The claimant's counsel submitted the case authority of *Goiset v Blue Wave Ltd* [2001] VUSC 124, where the court held that conduct of the parties infers a binding agreement between them even though there was no written or oral agreement.
25. While the court made reference to that principle in contract law, it is apparent that it refuses to award relief to claimant for her services cost in that she had no licence to effect that service. She was awarded relief for monies being spent on the defendant with invoices disclosing such spending.
26. The nature of the contract in this present case is one where while the parties are involving themselves in the transaction of sale and purchase of watermelon, their understanding as to the terms of the agreement as regards to price and giving of a service bus as consideration for a discounted price of watermelon remains a contention. The defendant denied having any outstanding payment with the claimant.
27. I find the defendant's evidence consistent throughout in that he bargained for 150 VT per kilo for the VT 250 or else he will not pay the watermelon. A witness namely Philemon James who said in cross examination that he was selling similar watermelon to the defendant at VT 150. Other witnesses who are watermelon farmers also filed sworn statements showing that they have engaged in watermelon farming and are also selling same to the defendant for VT 150 per kilo.



28. The defendant was extremely shocked by the claimant and regretted not keeping any records of the transactions with the claimant.

Conclusion

29. The court hereby orders that:

1. I find for the defendant.
2. The claimant's claim is dismissed.
3. Cost for the defendant to be taxed failing agreement.

Dated at Port Vila this 23rd day of July 2018

BY THE COURT

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MOSES PETER
Senior Magistrate

