

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

Civil
Case No. 17/165 SC/CIVL

BETWEEN: SELINA SIMBOLO
First Claimant

AND: PATRICE RIVIERE
Second Claimant

**AND: THE GOVERNMENT OF THE REPUBLIC
OF VANUATU**
Defendant

Before: *Justice Aru*

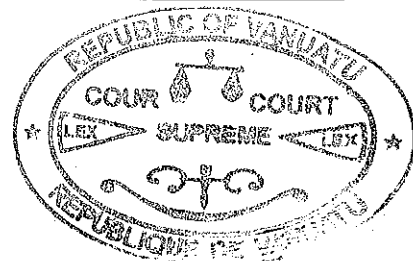
In Attendance: *Mr. J. Kilu for the Claimant*
Mr. S. Kalsakau for the Defendant

JUDGMENT

1. This is a claim in damages for negligence and breach of duty .The relief sought by the claimants are as follows:-

A. First claimant

1).	Common law damages for stress and anxiety	VT 5,000,000
2).	Damages for negligence and breach of duty	VT 5,000,000
3).	Interest @12% per annum to commence from the date of the Enforcement Warrant (1 March 2009) until all sums due are fully settled	
4).	Costs on indemnity basis	



B. Second claimant

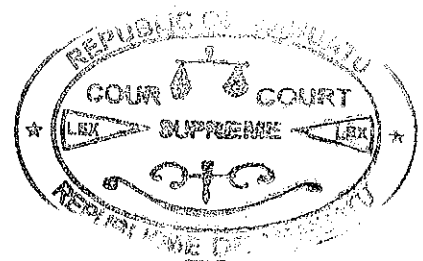
1).	Specific damages: a) lease transfer and Minister's consent b) stamp duties c) Architect fees for warehouse Total	VT14,625 VT80,000 VT250,000 VT344,625
2).	Damages for negligence And breach of duty	VT5,000,000
3).	Common law damages for stress and anxiety	VT5,000,000
4).	Interest @ 12 % per annum to commence from the date of the enforcement warrant (1 March 2009) until all sums due are fully settled	
5).	Costs on an indemnity basis	
6).	Any other order the court deems proper	

2. On 4 May 2018 the claim was struck out pursuant to an application to strike out filed by the defendant. The claimants were then ordered to pay the defendant's costs in the sum of VT 75,000 within 14 days.

3. These are the reasons for making those orders.

Background

4. In 1996 the first claimant's husband, Mr Kalo Simbolo was the registered proprietor over lease property title No 11/0G31/004 (the Property). Mr. Simbolo apparently had some debts with Westpac Bank. To offset the debt he entered into an oral agreement with a Mr Api Toara to use the Property and repay the debt to Westpac Bank. The parties also agreed that once the debt is repaid the Property would be transferred to Mr Toara. Following repayment of the loan, Mr. Simbolo refused to transfer the Property to Mr Toara.



5. Mr Toara then filed proceedings for the transfer of the Property to him or in the alternative payment of VT 12,085,751 being for improvements made on the Property. On 1 October 1998 Saksak J dismissed the proceedings in **Toara v Simbolo** [1998] VUSC 62. On appeal by Mr Toara, the Court of Appeal in its decision around September 2009 encouraged the parties to settle the matter rather than proceed with a hearing which would only increase their lawyers costs. That seemed to be the end of the matter.
6. Mr. Simbolo however issued fresh proceedings in Civil Case No. 14 of 1999 **Kalo Simbolo v Api Toara (CC 14/99)**. A default judgment was issued in favour of Mr. Simbolo in the sum of VT 24, 825, 298 on 30 October 2000. Sadly, Mr. Simbolo died on 26 August 2005.
7. On 17 November 2005 the first claimant obtained letters of administration over her husband's estate which was estimated to be VT26, 225, 298. She obtained an enforcement warrant to sell the Property on 20 March 2009 to recover the sum of VT 27,804,333.
8. By then the Property had been transferred and registered to a Gene Wong and Giovanna Soldateschi as lease title No 11/0B24/062. On 29 April 2009 the Sheriff in executing the enforcement warrant informed Mr Wong to vacate the Property and also advertised the sale of the Property.
9. The second claimant responded to the advertisement and paid VT 4,000,000 into Court for the Property. It was then transferred and registered to his name on 8 May 2009.
10. Mr Wong then issued proceedings against the second claimant in Civil Case No. 25 of 2010 **Wong v Daniel & Ors (CC25/10)** to restrain the second claimant from remaining and occupying the Property. On an application for summary judgment, Lunabek CJ granted the orders sought by Mr Wong and ordered the second claimant to vacate the Property. It was also ordered that the sum of VT 4, 000, 000 paid into Court for the Property by the second claimant be refunded to him .The final order , order 7 directed that:-

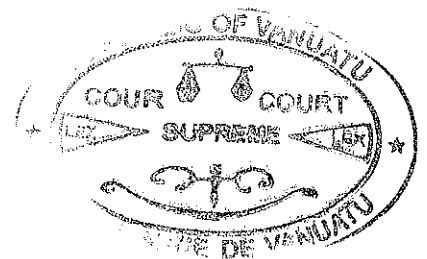


"7. Any application for damages is still stood over to a conference to be held between the parties on Wednesday 18 August 2010 at 8.30 am o'clock."

11. On 25 June 2013 the second claimant instituted proceedings in Civil Case No.142 of 2013 **Patrice Riviere & Ors v Peter Bata & Ors (CC142/13)**. This proceedings were brought by the second claimant and Mr. Gilles Daniel against the Director of Lands and the Republic of Vanuatu alleging that they suffered loss and damages as a result of the cancellation of the transfer of the Property to them and reinstating Mr Wong as the lessee.
12. On 11 June 2014, this case was struck out by Fatiaki J and costs were ordered against Mr. Riviere and Mr. Daniel in the sum of VT50, 000.
13. On the 1 February 2017 the current claim was filed.

Application to strike out

14. The defendant's application to strike out was filed on 15 June 2017 with a sworn statement of Mr Kalsakau filed in support. The main ground advanced by the defendant is that the cause of action in negligence raised by the claimants accrued sometime in August 2010, some 7 years ago. As such it was submitted that the claim was statute barred by section 3 (1) (a) of Limitation Act [CAP 212] (the Act) which provides that no cause of action in tort can be brought after expiration of 6 years from the date when the cause of action accrued.
15. It was submitted that on 25 June 2013 the second claimant had instituted proceedings in **CC142/13** for loss and damages against the director of Lands and the Republic of Vanuatu but the case was struck out on 11 June 2014.
16. The claimants on the other hand do not dispute that the case was struck out on 11 June 2014. The gist of their submissions is that for the purposes of s 3 (1) a) of the Act, the 6 year limitation period begun to run from 11 June 2014 and is still within time.



17. It was submitted that the limitation period could not begin to run from 5 August 2010 given that the same claim, CC142/13 had been previously filed within the 6 year limitation period and was struck out on 11 June 2014.
18. The issue before the Court is when did the cause of action in tort accrue. Section 3 (1) a) of the Act states:-

“3. Limitation of actions of contract and tort and certain actions

(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –

(a) actions founded on simple contract or on tort;
...”

(emphasis added)

Discussion

19. Mrs Simbolo was not a party to the proceedings in CC142/13. The relief sought by Mr. Riviere and Mr. Daniel in that case was for a declaration that the transfer of their title (to Mr Wong) was illegal. The second order sought was for damages in the sum of VT22, 914, 625 with interest at 10%.
20. The claim was pleaded at paragraphs 2 to 9 as follows:-

“2. The claimants are partners in a land acquisition at Nambatu area under the lease title 11/0B24/062 ;

3. The land was advertised in or around April 2009 for tender by the Supreme Court ;

4. The claimants won the tender on 6 May 2009;

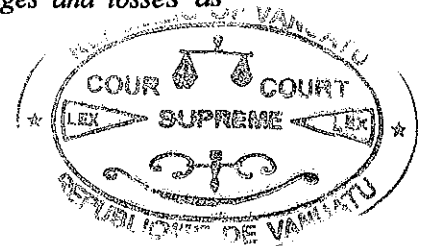
5. They had a meeting at the Land Records on 7 May 2009 with the Sheriff and the registration officer. The registration officer confirmed that it was in order for the registration and the claimants paid the land the said land and the registration fees on that date ;

6. The claimants went into occupation and on the 14 October 2009 , the first defendant acting as second defendant cancelled the registration of the said land title and registered it to a certain “Gene Wong and Giovana Soldateschi”;

7. There was no chance given. There was no opportunity to represent the claimants arguments;

8. The Director General of the Ministry of Lands ordered the reinstatement of the title back to the claimants but the first and second defendants never did so;

9. By reason of the above, the claimants have suffered damages and losses as follows:



Particulars

- i). the claimants have lost money invested in the repair , maintenance and care of the land and building being , 2,700,000 vatu*
- ii). the claimants have lost the land registration fees and all taxes paid in the amount 214,625 vatu*
- iii). The claimants have lost the opportunity of their business that is 20,000,000 vatu*
- iv). Costs and damages as may be awarded by the court."*

(emphasis added)

21. The above pleadings show that the cause of action pleaded accrued on 14 October 2009. That is when the lease registered to Mr Riviere and Mr Daniel was cancelled. The 6 year limitation begun to run from 14 October 2009. Therefore that case was filed within time. The fact that it was struck out on 11 June 2014 does not create a new cause of action. There is no evidence that the decision to strike out the claim was set aside or appealed. No cause of action arose in 2014.

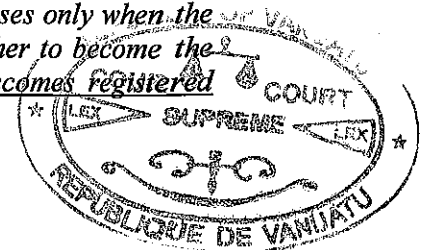
22. The current proceeding is a fresh claim filed by the claimants on 1 February 2017. The claimants plead their claim at paragraph 4 as follows:

"4. This action is brought against the defendant on the basis of negligent actions of the Sheriff's office and the Department of Lands."

23. In **Presbyterian Church Trust Association v Moore** [2013] VUCA 2 the Court of Appeal considered the limitation point in respect of two competing claims over a registered lease. The brief facts were that the respondent had purchased the disputed lease but was given a wrong title which was registered in her name. Upon discovering the error she surrendered the title but failed to get registration over the disputed title in her name. Subsequently the appellant bought the disputed lease and successfully obtained registration in its name. Mrs Moore then challenged the registration and sought damages as an alternative .The disputed lease was however rectified to her name. On appeal by the Presbyterian Church Trust Association the appeal was allowed. Rectification of the title was quashed and it was determined that Mrs Moore was entitled to damages as her claim was within time and not prohibited by limitation.

24. The Court at paragraph 25 said:-

"25. As to the limitation point, Mrs Moore's cause of action arises only when the PCTA's registration occurs. Until that time it was possible for her to become the registered lessee. No cause of action accrues until another becomes registered

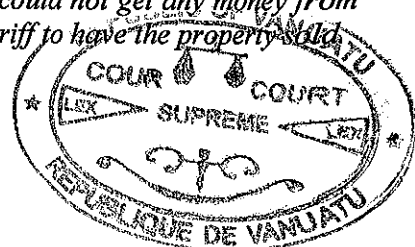


lessee of the land preventing her registration. Registration of the PCTA's interest occurred on 30 March 2007. These proceedings were commenced on 29 June 2011. Section 3 (1) (a) of the Limitation Act [CAP212] provides for a 6 year time limit for such an action. These proceedings were therefore within that time limit."
(emphasis added)

25. In the second claimant's sworn statement filed on 8 February 2017 at **Annexure "PR8"**, the Advice of Registration of a dealing in land in respect of lease title 11/0B24/062 shows that on 8 May 2009 a transfer of lease was made from the Sheriff to the second claimant for a consideration of VT 4,000,000. That transfer of lease was registered on 29 June 2009.
26. A second Advice of Registration of a dealing in land in respect of the same title shows that the lease was rectified on 14 October 2009 by cancelling the second claimant's name and re instating Gene Wong and Giovanna Soldateschi as the registered proprietors.
27. That rectification was registered also on 14 October 2009.
28. The second claimant's cause of action therefore accrued on 14 October 2009 when the lease was rectified and Gene Wong and Giovanna Soldateschi became the registered proprietors of the lease. In my view, the second claimant is now statute barred by s 3 (1) a) of the Act as more than 6 years have now lapsed.
29. Even if it could be argued that the cause of action accrued on 5 August 2010 when Lunabek CJ gave judgement in **CC25/10**, the second claimant is still statute barred as more than 6 years has lapsed.
30. For the first claimant, she was neither a party to **CC142/13** nor **CC25/10**. Her claim for damages relates to the negligent actions of the sheriff as alleged at paragraph 4 of the claim. In her sworn statement filed on 23 February 2017 she says that:-

"16. The underlying dispute by my late husband dates back to 1996 and I had hoped to get some money out of the dispute when the sheriff was undertaking enforcement proceedings to seize Api Toara's property for sale in 2009.

17. All my hope had gone when I was advised that I could not get any money from the sale. I had relied so much on the efforts of the sheriff to have the property sold.



18. When I learnt that I could not get the money from the sale by the sheriff, I felt very disappointed and very depressed. After all, I trusted the sheriff and the Department of Lands that they were doing the right thing. What happened has caused me a lot of stress."

31. The first claimant obtained an enforcement warrant for the sum of VT 27,804,333 against Api Toara in CC14/99 on 20 March 2009. One of Mr Toara's properties identified in the warrant for seizure and sale by the sheriff to satisfy the debt was lease title 11/0B24/062. The following facts which are undisputed as set out by Lunabek CJ in CC25/10 are helpful for the purposes of the current proceedings :

"a). Leasehold property title 11/0B24/062 (the Property) was initially registered in the name of Mr Api Toara . Mr Api Toara was the former owner of the Property .

b). In or about 29 July 2008, Mr Gene Wong negotiated with Api Toara , the former owner of the Property to acquire the property from him . On 13 August 2008 , he and his wife Giovanna Soldateschi , compelled the acquisition of the title for Vatu 11,500,000 and Mr Toara delivered up to them the signed transfer of lease in respect to the property together with the consent from the Minister of Lands to that transfer. Mr Gene Wong then attended to the stamping and registration of transfer.

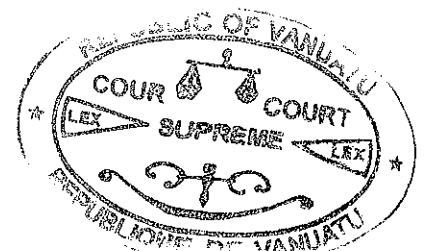
c). On 27 November 2008 , the transfer from Api Toara to Gene Wong and Giovanna Soldateschi was registered with the Lands Records Office .

d). An Enforcement Warrant was granted by order of the Supreme Court on 20 March 2009 in Civil Case 14 of 1999 in relation to an action against Mr Api Toara. On 20 March 2009 an Enforcement Warrant issued by the Supreme Court in relation to the recovery of a judgment debt of Vatu 27,804,333 and authorising the sheriff to use necessary means to enter and take legal possession of among others title 11/0B24/062 said to belong to the defendant (Api Toara) and to advertise it by tender for sale to recover the above mentioned costs.

..."

(emphasis added)

32. On 27 November 2008 the transfer of lease from Api Toara to Gene Wong and Giovanna Soldateschi was registered. This meant that as of that date, the first claimant could no longer enforce her judgement over the Property. That in my view is when her cause of action accrued. Even if it could be argued that the first claimant has a cause of action in tort against the Sheriff and the state, that cause of action accrued on 14 October 2009 when the lease was rectified by cancelling the second claimant and reinstating Gene Wong and Giovanna Soldaterchi as lessees. At that time the first claimant lost the opportunity to be paid VT4, 000, 000 paid into Court by the second claimant under the enforcement warrant.



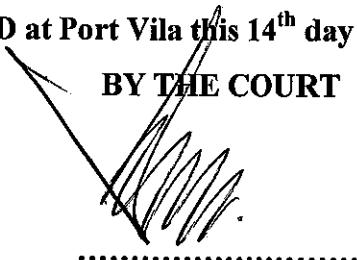
33. The first claimant sat on her rights and did nothing when the lease was transferred to Gene Wong and Govanna Soldaterchi. She is now time barred by s 3 (i) a) of the Act to bring the current proceedings as more than 6 years have lapsed.

Conclusion

34. The claim could not be sustained and for these reasons it was struck out.

DATED at Port Vila this 14th day of May, 2018

BY THE COURT



.....
D. Aru
Judge

