

BETWEEN: ELMON MALA and EMMA MALA

Claimants

AND: BYUGMAN MUN AND SANG WOO SEO

trading as **G-TRADING** of PO Box 5115,
Port Vila.

Defendants

Coram: Chief Justice Vincent Lunabek

Counsel: Mr. Jack Kilu for the Claimants
Mr. Edward Nalyal for the Defendants

Date of Hearing: 02 September 2017

Date of Delivery of Judgment: 07 March 2019

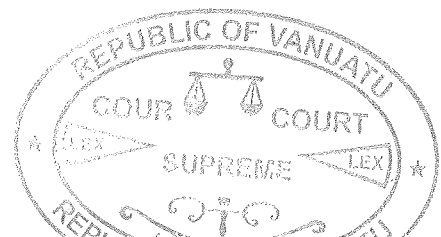
JUDGMENT

Introduction

1. The Defendants seized the Claimant's Hyundai Bus registration No.4826 on 4 December 2013 as a security for an alleged debt of VUV10,000. They drove the bus to the Defendants' garage and kept it there. The Claimants demanded the return of the bus. The Defendants refused or failed to return the bus. As a result the bus suffered serious deteriorations and was completely damaged. The Claimants file this claim seeking set of damages against the Defendants.

Issues.

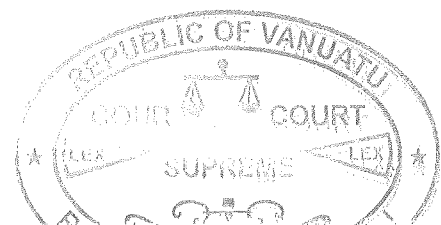
2. The following are the issues to be determined.
 - i. Damages for trespass and unlawful possession of the Claimants' bus;
 - ii. Damages for loss of income;
 - iii. Damages for loss of bus; and



- iv. Common law damages.

Background

3. The Claimants are mother and son. They purchased and operated a bus service in Port Vila. The bus is a Hyundai Mini bus colored green/yellow with red color underneath. It bore the registration number 4826. They purchased it in 2006 for the sum of VT900,000. And it is registered in the name of the son, Elmon Mala.
4. The claim stated that they purchased the bus on January 2011. Despite this anomaly, the relevant date for the purpose of this case is 14 January 2011.
5. The Defendants are two Koreans Nationals. They are investors in Vanuatu. They do business in Vanuatu and they traded as G-Trading. The G-Trading provides automotive repair services and sale of used vehicles.
6. Since December 2013, Defendant Sang Woo Seo is the sole owner of G-Trading.
7. The bus has been placed for repair in the Defendants' garage (G-Trading) on a number of occasions as well as at Woorin Motors Limited. On July 2013, the Claimants took their bus for repair at the G-Trading. They received an invoice for the repair of VUV62,000. The Claimants settled that amount before they took back the bus for service operation on 6 August 2013.
8. Three days after they took back the bus from the G-Trading the bus had problems and they decided not to put their bus again at G-Trading but they took it to Woorin Motors Limited for repair. This was on 9 August 2013. They said the problems faced by the bus which they asked Woorin Motors to redo were some of the same problems G-Trading was supposed to fix on the bus. They also said they have already paid the Defendants for the repair work before they took the bus on 6 August 2013. The attachment "EM8" to the sworn statement of Emma Mala filed on 01 October 2015 showed a copy of Woorin Motors Limited invoice dated 4 October 2013 showing the details of the repair work the Woorin Motors have done on the parts of the bus the Defendants claimed they had repaired and the Claimants had already paid.



9. The Claimants took the bus from Woorin Motors Limited back for bus service operation on 4 October 2013. The bus was operating again on that date. Nelson Ngwero, the deceased husband of Emma Mala, was the driver of the bus at that relevant time.
10. Mr. Ngwero drove the bus which was doing bus services when he was stopped by two debt collectors in Port Vila who forced him out of the bus and the bus was driven to G-Trading on 4 December 2013. The bus was kept at the G-Trading as security for an alleged claim that the claimants have an outstanding debt to G-Trading of VUV10,000.
11. The Claimants attempted to take the bus from G-Trading but the Defendants refused to return the bus to the Claimants since 4 December 2013.
12. Because the Defendants refused to return the bus, the Claimants sought legal assistance from Jack Kilu Lawyers. Mr. Jack Kilu on behalf of the Claimants wrote a letter to the Manager of G-Trading demanding the release of the said bus back to the Claimants in his letter dated 6 December 2013. This letter was exhibited "EM9" to the statement of Emma Mala filed on 1 October 2015. In his letter to the Defendants, Mr. Kilu demanded the release of the bus back to the Claimants with a compensation of VUV65,000. Mr. Kilu also pointed out in his letter that the action of seizing the bus without a Court order is unlawful and the Claimants will file a civil claim against the Defendants and their agents unless they released the bus with a payment of compensation of VUV65,000.
13. The Defendants ignored the terms of the Claimants lawyer's letter dated 6 December 2013 and continued to retain the bus.
14. Thereafter, the bus continued to be deteriorated very badly in the custody of the Defendants. The Claimants said the status of the bus was damaged as the Defendants have without the consent of the Claimants removed parts of the bus and used them to repair other bus. Exhibit "EM10" attached to the statement of Emma Mala filed 01 October 2015 showed the pictures of the said bus at the Defendants' garage of yellow/green/red color. It was in a serious state of deterioration. The interior of the bus was seriously and badly damaged. The bus has a Public Vehicle Permits No. 1594 and Certificate of Third Party



Insurance dated 2 May 2013 in the name of Elmon Mala as the owner of the bus. It had further a Public Works Departments Road Worthiness dated 7 March 2013.

15. Exhibit "EM7" is a statement of invoice from the Defendants to the Claimants showing the Claimants paid the repair works done by the Defendants.

Evidence

16. The Claimants filed the following statements in support of the claim:

- Emma Mala filed 7 October 2015 and December 2016.
- Elmon Mala filed 6 April 2016.
- Markson Vira filed 6 April 2016.
- Jackson Tari filed 6 April 2016.
- Nelson Ngwero filed 1 October 2015. However, as he was deceased before the hearing the Claimants' counsel agreed not to be relied upon.

17. The Defendants filed the following statements in support of the defence:

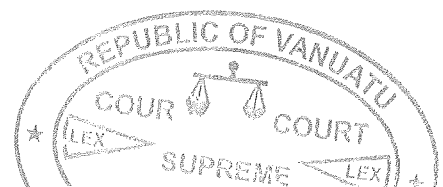
- Sang Woo Seo filed 15 February 2016.
- David Natuman filed 15 February 2016.
- John Nakat filed 11 November 2016.
- Steven Massing Naly filed November 2016.

18. The deponents of the above statements were cross-examined and their oral testimonies were recorded as part of the evidence of this case.

19. The following are the relevant part of evidence on the disputed facts which have a direct bearing or connection with the issues to be determined in this case:

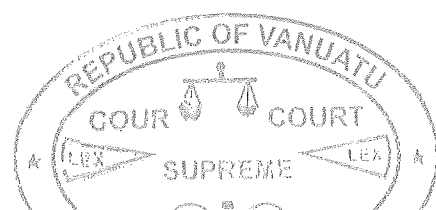
Issue 1: Trespass and unlawful possession of the bus?

20. The evidence established that on 4 December 2016, the driver of the Hyundai Mini Bus colored green/yellow/ red was stopped by two persons acting on



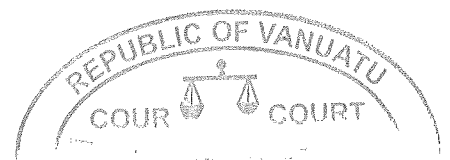
behalf of the Defendants. The bus was driven to the G-Trading garage. This was admitted in the statements filed in support of the Defence. The owner of the said bus is Elmon Mala. Elmon Mala had all required certificates and documents in respect to the bus and the use of the bus as a public transport vehicle including a Third Party insurance and road worthiness certificate for the year 2013.

21. The Defendants asserted the Claimants owed VUV10,000 for the repair work undertaken on the said bus. The Defendants said they tried to contact the Claimants but they were not successful.
22. Defendant Sang Woo Seo deposed in his statement that the Claimants have an outstanding debt of VUV10,000. He could not reach them. He then engaged Mr. David Natuman to help locating the Claimants and to inform them to meet him to discuss the payments of the outstanding debt. He stated his instructions to David Natuman was clear, to find the Claimants and get them to meet him and discuss instalment payments. He said he did not instruct David Natuman to seize the Claimants' bus by force and sell it. He stated that the outstanding amount was very small and it does not make sense for him to seize the Claimants' vehicle for such a small amount. Mr. Sang Woo Seo further stated that the bus was at the G-Trading premises, he waited for the Claimants but nobody came to meet him. Two or three weeks later he engaged David Natuman again to find the Claimants and to tell them to remove their vehicle from G-Trading premises.
23. Mr. Sang Woo Seo was cross-examined. He said he was not in Vanuatu when this issue occurred. The other investor Byugman Mun was here at the relevant time. He said he did not know the date of the seizure of the Claimant's bus. It was pointed out to him that the date was 4 December 2013 and the business name of the Defendants is G-Trading which was registered on 3 December 2013, a day before the seizure of the bus. He was asked and he replied he did not know of any debt owed by the Claimants. He was questioned as to why he sent the agent to stop the Claimants' bus. He answered he did not send them. He said when he came to Port Vila he received this case and he did not know anything about this case. He said he came in as a partner in this G-Trading business.



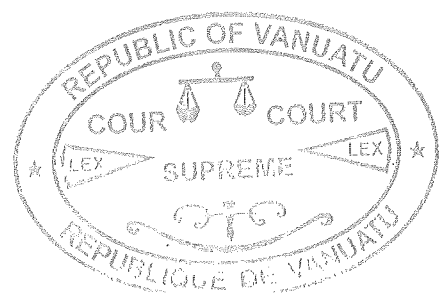
24. Faced with the contradictory evidence of Mr. Sang Woo Seo in what he stated in his statement and his oral testimony, the following findings are accepted as facts:

- The Claimants have no outstanding debt to the Defendants as the evidence of the Claimants show.
- The Claimants' bus was seized and driven to the Defendants' G-Trading garage on 4 December 2013.
- Mr. David Natuman and his men, as debt collectors, acted on the instruction of the Defendants to help them find the Claimants to discuss the installment payments of the alleged debts. It was a fact that the other defendant partner was more involved in this case than Mr Sang Woo Seo.
- The debt collectors acted as agent of the Defendants. They received instruction from Byugman Mun (statements of John Nakat filed 11 November 2016).
- The debt collectors did not know where the Claimants live. They decided on 4 December 2013 to seize the Claimants' bus while it is operating its bus service on that date. They saw the bus at the bus stop near the National Bank of Vanuatu. They forced the driver to get off of the bus at the police station in Port Vila. They drove the bus to the Defendants' garage and kept it on 4 December 2013.
- There was no notice of debt or invoice of the debt owing by the Claimants given to them by the Defendants or their agents.
- There is no Court order issued to stop and seize the bus and drove it to the G-trading garage and kept it there without the consent and authorization of the Claimants.
- Defendant Sang Woo Seo knew of this as he stated that after the bus was in the G-Trading, two or three weeks later he instructed David Natuman to find the Claimants and to tell them to come and remove their bus from the G-Trading premises. If that was what happening, the Claimants did not come and remove the bus from the G-Trading premises. At that point in time, the Claimants' bus was still in the possession of the Defendants. The Defendants did nothing. They did not take steps to return the bus back to the Claimants. The circumstance of



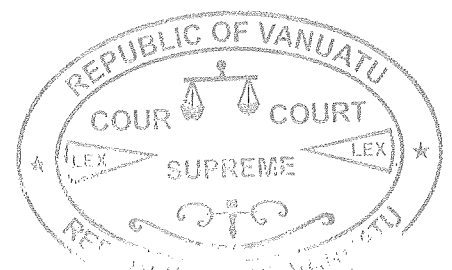
this case is that it was a clear tort of trespass by the Defendants through the action of their agents on the chattel property of the Claimants (the bus). It was unlawful for the Defendants to seize and keep the bus in such a circumstance at the G-Trading premises. The seizure and the possession of the bus at the Defendants' G-Trading, despite the Claimants' demand of its return to them, were unlawful. It had deprived the Claimants from the use and enjoyment of their bus. The Claimants are entitled to damages.

25. The Claimants claim damages in the amount of VUV500,000 and interests of 12% per annum from the date of the seizure of bus (4 December 2013, until all sums are duly settled).
26. Mr. Edward Nalyal in his skeleton submissions on behalf of the Defendants filed 3 March 2017 submitted in essence that the Claimants neglected and abandoned their vehicle at the Defendants' workshop, despite requests by the Defendants to pick it up. Any alleged losses claimed by the Claimants are the Claimants' own making and the Claimants are responsible for those losses.
27. The Court does not accept Mr. Nalyal's submission on behalf of the Defendants as they are contrary to the evidence and the good sense.
28. It is noted that there was no submission or suggestion by Mr. Nalyal on behalf of the Defendants the damages of VUV500,000 for this head of damage, is excessive.
29. In the circumstance, the Court awards the amount of VUV500,000 for the unlawful seizure and possession of the Claimants' bus for its serious deterioration and complete damage.
30. An interest will be considered not independently of this head of damage but together at the end of the assessment of all heads of damages claimed.



Issue 2: Damages for loss of income.

31. The Claimants, firstly, claimed for the loss of income, commencing from 4th December 2013 (date of the unlawful seizure) up to date of the completion of trial (2nd September 2017).
32. The Claimants say and give evidence that they make a gross income of VUV9,000 to VUV15,000 per day. They provided a list of income from 2011 to 2012 of VUV9,000 to VUV15,000 (statement of Emma Mala filed 7 October 2015). However, Mr. Kilu submitted that the Claimants will only pursue with a gross profit of 12,000 per day minus VUV5,000 for expenses per day such as fuel and driver's wage.
33. The Defendants denied that the Claimants' bus made a gross income of VUV9,000 to VUV15,000 per day. The Defendants said the said gross income per day was excessive and unsubstantiated. The Defendants argued that there are too many buses in Port Vila and it is not possible for the Claimants' bus to make the gross income of VUV9,000 to VUV15,000 per day. The Defendants provided no better evidence on this aspect of the claim than what the Claimants testified to be the position for their bus. There was no evidence of the total number of buses in operation in Port Vila town in 2013 and the average gross income per bus per day in that relevant year. The best evidence on this aspect of the claim was that provided by the Claimants.
34. The assessment of the damages under this head of claim will be made on the evidence of the Claimants of a gross income of VUV12,000 per day minus VUV5,000 for expenses per day.
35. Based on the Claimants' submission:
- a) From 4 December 2013 to 2nd September 2017, makes a total of 1,680 days. The gross income per day for 1,680 days is $1,680 \times \text{VUV } 12,000 = \text{VUV}20,160,000$;
 - b) The total expenses per day for 1,680 days at VUV5,000 per day $1,680 \times \text{VUV}5,000 = \text{VUV}8,700,000$; and

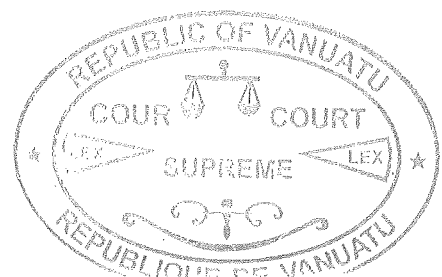


c) The Claimants claim total Net income (after expenses) for 1,680 days
 $VUV20,160,000 - VUV8,400,000 = VUV11,760,000$.

36. The Claimants claimed and submitted they are entitled to VUV11,760,000 compensation (damages) for loss of income for the period 4 December 2013 to 2 September 2017 with interests of 12% per annum on the principal sum to commence from 4 December 2013 until all sums due are fully settled.
37. The assessment is made on pure mathematical calculation logic and considerations have to be made to uncertain situations and circumstances that may arise, the fact that the bus was a second hand bus (evidence of Emma Mala that the bus after its purchase in 2011 (relevant period) went to the Defendants' garage after just 1 month of operation), any other circumstance of the bus stopping operation for some time (accident or any other) or the expenses may be increased. The uncertainty is assessed as high to 10% which represents an amount of VUV1,760,000. That amount has to be taken off from the total amount of VUV 11,760,000.
38. The Claimants are awarded damages for loss of income of their bus for the amount of VUV10,584,000. Any interest on this amount will be calculated on the overall amount of the damages but not independently on this amount.

Issue 3: Damages for the loss of the bus

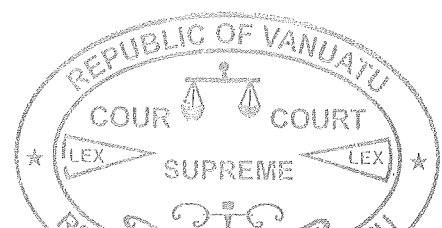
39. The Claimants' Third Claim is for the reimbursement of the costs of the bus. The bus was purchased in 2006 and started to do bus service operation that year. It was unlawfully seized and kept under the custody of the Defendants from 4 December 2013 to the filing of this claim which was completely deteriorated and damaged. The purchase price of the bus was VUV900,000. The Court accepts the submissions that a certain percentage of the depreciation had to be given in the value of the bus. It is accepted that a proper depreciation would be at 10% depreciation for each year of service. It was purchased in 2006 and unlawfully seized in 2013, which makes a total of 7 years in the service of the Claimants.



40. A 10% depreciation per year is VUV 90,000 per year and for a total of 7 year is VUV90,000 x 7 years = VUV630,000.
41. The Claimants submits and the Court accepts that the total reimbursement cost would be VUV900,000 - VUV630,000 = VUV270,000. The Claimants are entitled to the sum of VUV270,000 to compensate for the loss of their bus.

Issue 4: Common Law Damages

42. The Claimants finally claimed for common law damages.
43. The Claimants refer to the case of **Melcoffee Sawmill Ltd –v- George (2003) VUCA** where the Court of Appeal awarded this type of claim to the Respondent. There the Court sets out the position in that common law damages are usually awarded to reflect the seriousness or the aggravating circumstances in a case, or the high handed attitude of the Defendant's treatment towards the Claimants. It is awarded to compensate a person for emotional stress and pain a person had to suffer as a result of the Defendants' unlawful actions. In the Melcoffe Sawmill case, the Court of Appeal awarded common law damages in the sum of VUV30,000 despite lack of specific evidence. The amount to be awarded depends on the seriousness or the aggravating circumstances of each case.
44. Mr. Nalyal submitted on behalf of the Defendants that the Claimants are not entitled to this damage as the circumstances of this case do not justify that common law damages be awarded to the Claimants.
45. Mr. Kilu submitted on behalf of the Claimants that the aggravating circumstances of this case justify an award of common law damages to be assessed and awarded to the Claimants. Mr. Kilu sets out the following aggravating circumstances in his submissions:
- a) despite the Claimants denying that they owe the Defendants the alleged sum of VUV10,000, yet the Defendants through their agents, seized the Claimant's bus;
 - b) the seizure is unlawful without any proper Court orders authorizing the seizure;



- c) the Defendants do not even have a copy of any invoice for the alleged VUV10,000 debt against the Claimants;
- d) the driver of the bus was told to get off the bus at the police station, while the Defendants agents take the bus to the Defendants' garage on 4 December 2013.
- e) the Claimants continuously requested the return of the bus but although the agents of the Defendants (David Natuman and John Nakat) knew where the Claimant Emma lives, they continue to refuse or fail to return the bus to the Claimants;
- f) even the Claimants' lawyer, Jack Kilu lawyers, wrote only 3 days after they had seized the bus, requesting the immediate release of the bus, because it had been seized unlawfully, yet the Defendants refused or failed to return the bus;
- g) the Defendants appear to have taken the law in their own hands by seizing the bus without any proper Court orders to do so;
- h) the Defendants then used parts of the Claimant's bus to make money for themselves, by using parts of the Claimants' bus to repair other vehicles. This is not disputed by the Defendants and is accepted as a fact;
- i) although the bus has been in the Defendants' premises since 4 December 2013, the Defendants now comes to Court testifying that he knows nothing about the seizure of the Claimants' bus, although they had been using its parts.

46. The Claimants say that these actions of the Defendants toward them amount to seriousness and aggravating circumstances which had caused them a lot of emotional stress, pain and suffering and they sought an award of VUV 500,000 to be compensated for their emotional stress, pain and suffering.

47. The circumstances described in (a) to (j) above show the seriousness and aggravating circumstances of the treatments of the Claimants by the Defendants (and agents) which are contained in the material evidence provided by the Claimants and the Defendants do not really dispute them apart from just generally deny them. These circumstances create emotional stress, pain and suffering on the part of the Claimants. They justify an award of damage to compensate the Claimants as common law damages. The next question is



whether VUV500,000 as claimed by the Claimants is the appropriate award in these circumstances. The Court declines to award an amount of VUV 500,000 claimed as excessive but instead the Court assesses that an award of VUV100,000 is appropriate.

48. In summary, the Claimants are entitled to the following damages:

1. Trespass and unlawful possession of the bus of VUV 500,000.
2. Damages for loss of income for the bus of VUV 10,584,000.
3. Damage for the loss of the bus of VUV 270,000.
4. Common law damage of VUV 100,000.
5. The grand total is of VUV 11,454,000.

49. The Claimants are entitled to interest of 12% on the principal amount of VUV 11,454,000 per annum from 4 December 2013 until the full amount due is fully settled.

50. The Claimants are also entitled to costs on common basis against the Defendants and such costs shall be agreed or determined.

**Dated at Port-Vila, this 07th March 2019
BY THE COURT**



**Vincent LUNABEK
Chief Justice**

