

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

Civil Appeal
Case No. 22/54 SC/Civil

BETWEEN: Solomon Asang
Appellant

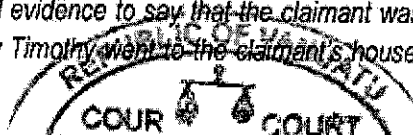
AND: Lyah Mawa trading as Santa
Trading Company
Respondent

Before: Justice Oliver A. Saksak
Counsel: Mr Rollanson Willie for the appellant
Mr Lent Tevi for the respondent
Date of Hearing: 17th July 2023
Date of Judgment: 20th July 2023

JUDGMENT

1. This appeal is against the findings of the Senior Magistrate dated 4th November 2022 whereby the claim of the appellant was dismissed.
2. Two grounds were raised (a) that the Magistrate did not consider the claimant's two sworn statements and the other evidence filed in support of his claim, and (b) that the Magistrate had relied on hearsay evidence based on assumptions.
3. The Magistrate had to decide on 2 issues (a) whether the claimant was drinking and driving and (b) whether the respondent terminated the contract when retrieving the key of the vehicle.
4. In determining those two issues the Magistrate considered 6 sworn statements, 2 statements by the claimant, one for his wife Jane, one for Emilie Wanemay, one for Jean Yves Fabiano and one from Magali Laicha.
5. The Magistrate also considered the evidence by sworn statements from the 6 defence witnesses who were Philip Banga, Ricky Jack, Solomon Livo, Jonas Alick, Jack Alick and Bradley Timothy.
6. The Magistrate said:

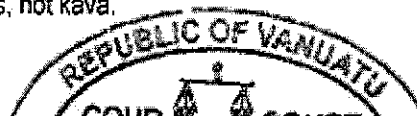
"Against this, all 6 witnesses for the defendant filed evidence to say that the claimant was at the time drinking alcohol was driving. Jack Alick and Bradley Timothy went to the claimant's house to fetch his



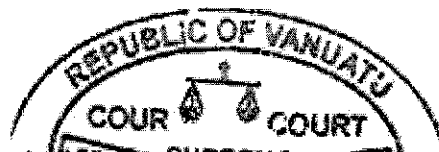
stuff that he forgot in the taxi that the claimant was driving. Upon arrival at his house he was not home and the claimant's brother told them that the claimant was out again drinking with his friends in the car. The claimant disputes this evidence saying it is a hearsay evidence."

7. The Magistrate however stated that defence witnesses Philip Banga, Ricky Jack, Solomon Livo and Alick Jonas all said they were eye witnesses who saw the claimant drinking at La Place and dancing with a bottle of wine in his hand, the music in the car being loud. He was seen at the Pump Station still with the bottle of wine in his hand while stopping a fight between Clovis and his wife.
8. After all that evidence the Magistrate said:

" I consider the above evidence as first hand evidence being eye witnesses even though the claimant's counsel dispute that they mistaken the bottle of kava with a bottle of wine, there are at least 5 witnesses who saw him dancing with the bottle and one of them saw him again with a bottle of wine at Pumps Station when he was rescuing officer Clovis from a fight."
9. With those evidence the Magistrate was satisfied that the evidence of the defendant's witnesses corroborated each other and made the conclusion:
" with the above evidence am satisfied that the first issue that claimant being drunk when he was driving was made out."
10. Mr Willie submitted the Magistrate was wrong to reach that conclusion because she had not considered the claimant's two statements and the other witnesses, and that she had merely based on assumptions.
11. That submission is rejected. The Magistrate considered all 6 witnesses' evidence including the claimant's two statements against the evidence of the 6 defendant's statements. She concluded the statements and evidence of these witnesses corroborated each other. In other words the Magistrate preferred the evidence of the witnesses for the defendant as having more weight than the evidence of the claimant.
12. The evidence of the claimant lacked support and corroboration. He could have produced evidence from his driver, Dalesa, Abel and/or Randel and Sakias to rebut the evidence of the witnesses for the defendant about the bottle of wine and the drinking in the taxi car.
13. There was clearly evidence available from the claimant's wife, Jane that a bottle of wine was in the car and it was half full. And it was the claimant himself who took the half bottle of wine into the car. (see paragraph 5 of Jane Enock's statement). The question to ask is why take a half full bottle of wine in a car, but for the purpose of drinking it.
14. It was also the evidence of the claimant's witnesses Emilie Wanemay that they were drinking beer with Sakias while the claimant was drinking kava. As I know it, Kava is usually drank from a coconut shell or a plastic cup but the evidence of the claimant was that:
" Mifala I go stop long laplas, Emilie wetem Saki I stap drink beer blong tufala while mi leftemap plastic kava...." (see paragraph 12 of sworn statement). This is contradictory to what is said in paragraph 4 of the letter dated 6th April 2021 by the Public Solicitor that he had a few shells of Kava. Then subsequently there was the dancing to the loud music coming from the taxi car. Those are obvious actions of people consuming alcoholic drinks, not kava.




15. From those actions of the claimant, the Magistrate was entitled to draw the conclusion that the claimant was drinking that night and was driving. The Magistrate had come to the right conclusion and did not do so on hearsay evidence.
16. The appeal is therefore dismissed on this first ground.
17. Secondly, it was argued and submitted that the defendant had breached their contract with the claimant by removing the car key from him and that there was no warning given prior to termination of the contract.
18. The relevant condition in dispute was:
"no drinking alcoholic liquor while driving the company asset as after several warnings, the company will surely terminate your contract."
19. The Magistrate considered the issue and said:
"in this case the defendant stated in his sworn statement that they confiscated the car and told the claimant to come into office the next day to get his warning and assumingly to take back the car. But the claimant failed to attend to the office, instead and went the Public Solicitor and have them wrote a letter to her to release the vehicle to which the defendant replied explaining that she wanted to formally give a warning letter to him but the claimant refused. Additionally, the defendant never terminated the Agreement as required by the Agreement, it is the claimant who elected to terminate the claim by not complying with the Agreement to accept discipline by electing not to go back to the office to collect the car keys and warning letter."
20. The Santa Trading Company had a real and legitimate concern about the safety of their asset which at 25th March 2021 had an outstanding debt of VT 2,347,200.
21. With that amount of debt on hand and only after 7 days from the date of signing the Agreement, the claimant was already abusing the car by allowing persons who drank kava, beer and wine to drink in it or with it.
22. The conditions prohibiting drinking of alcohol in the car and whilst driving implies some disciplinary measures by the use of the terms *"after several warnings..."*
23. The evidence show a few telephone calls were made to him by Bredley Timothy in the night of 1st April 2021 but the claimant did not respond. It was only in the morning of 2nd April 2021 that he was stopped at the Cinema Hickson and asked to come into office. He did and smelt alcohol and was arguing. He had drank all night and then drove the car. He was asked to leave the key in office which he did. And he was told specifically to return to office on Tuesday to receive his warning letter. That action was to be in compliance with the condition. However the claimant did not do so. He only went to office in the afternoon instead and with his letter of demand dated 6th April 2021.
24. Had the claimant returned to the office on Tuesday morning and without any letter from his solicitor, he would have been given a warning letter and the car keys and he would still be enjoying the use of the car today. And there would not have been any proceeding filed by him.



25. The end result is that the claimant walked away from the opportunity of being given any warning when the opportunity existed and was given. There was therefore hardly any reason to complain that the company had terminated his contract and that as a result, he suffered damages.
26. The Magistrate was correct in reaching the conclusion that she made. Therefore the appeal fails also on the second ground.
27. The appeal is dismissed and the summary judgment of the Magistrates Court dated 4th November 2022 is upheld.
28. The appellant will pay the costs of the respondent which I fix at VT 50,000 within 28 days from the date of judgment.

DATED at Luganville this 20th day of July 2023

BY THE COURT


OLIVER A SAKSAK
Judge

