

**IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY**

CV 28 of 2016

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02/08/17
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BETWEEN: **'ISILELI SALUNI**

 FIFITA SALUNI

 SIONE SALUNI

 SIONE SALUNI & SONS LIMITED

AND : **SIOSIFA KOLOTI SELUINI**

 YOUNG FARMERS FEDERATION LIMITED

First Plaintiff
Second Plaintiff
Third Plaintiff
Fourth Plaintiff
First Defendant
Second Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: **Mrs. D. Stephenson for the plaintiffs**
 Mr. S. Tu'utafaiva for the defendants

Date of hearing: 28 July 2017
Date of ruling: 2 August 2017

RULING

An assessment of damages

[1] The plaintiffs commenced this action to recover losses for breach of an agreement whereby the defendants were to act as the plaintiffs' agents to plant, farm, harvest and sell their crops. The plaintiffs obtained judgment against the defendants as to liability by way of formal proof on 21 November 2016. This ruling relates to the assessment of their damages.

Recd 02/08/17
Jato

The facts

- [2] In a ruling of 21 November 2016 the Court found that the following had been proved:
- a) The plaintiffs reside overseas and decided to embark on a commercial venture to grow crops in Tonga for export and sale overseas. They intended to grow the crops in Vava'u where land was available.
 - b) In around July 2014 they met the first defendant Siosifa Koloti Seluini. He is a businessman and involved in commercial farming and export. He convinced the plaintiffs to allow him to assist them. On his recommendation the plaintiffs based their venture at Tongatapu.
 - c) The first defendant found the plaintiffs land for the purposes of the venture.
 - d) The plaintiffs engaged the first defendant and the second defendant, which is a company through which the first defendant carries on his own commercial farming and export business, to act as their agents to plant, grow, harvest, export and sell their crops. The defendants were not to be paid a fee for these services but as I note later in this ruling the arrangement provided other benefits to the defendants.
 - e) The plaintiffs have incurred significant expenditure to purchase seeds, pay for labour, equipment and for travel/accommodation costs in respect of the venture.
 - f) The first defendant planted, grew and harvested the plaintiffs' crops. They were subsequently exported through the second defendant and sold in New Zealand on dates unknown to the plaintiffs but during 2014/2015.
 - g) The defendants breached the agency contract as they failed to account to the plaintiffs for any of the proceeds of sale of the plaintiffs' crops.

h) The defendants breached the agency contract as they retained valuable equipment and plant provided by the plaintiffs for the purposes of the venture and did not return it.

[3] As a result of these findings I entered judgment for the plaintiffs and ordered that the defendants were to provide to the plaintiffs' Counsel the following:

a) A sworn statement, in the English language, setting out all financial transactions (including dates, monies paid or received and persons or entities involved) entered into by them as agents for and on behalf of the plaintiffs and pertaining in any way to the planting, harvesting, export and sale of the plaintiffs' crops from 1 July 2014;

b) Originals or certified copies of all documents obtained or created by the defendants and pertaining to the said financial transactions in the statement to be provided pursuant to paragraph (a) above;

c) All emails sent or received by the defendants relevant to the said financial transactions from 1 July 2014;

d) A sworn statement in the English language, as to the whereabouts of certain stated chattels that were the property of the plaintiffs.

[4] The defendants did not comply with any of these orders. In the absence of that information the plaintiffs seek to recover as damages expenditure wasted as a result of the venture.

The evidence

[5] Evidence was given by the third named plaintiff Sione Saluni. He is an accountant by profession. He produced a bundle of documents proving the plaintiffs' expenditure which came under the headings of production and labour costs (funded by the plaintiffs), equipment costs (equipment acquired and provided to the defendants) and travel and communication costs (to negotiate the agency contract, monitor production and recover assets).

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[6] The amounts sought are in Tongan Pa'anga, New Zealand Dollars and Australian Dollars depending upon the currency in which the costs/expenses were incurred. A helpful table was provided which summarises the amounts claimed as follows:

| Summary of costs | Actual cost TOP | Actual cost NZD | Actual cost AUD |
|------------------------------|----------------------------|----------------------------|----------------------------|
| Production and labour | 64,020.11 | 15,263.80 | |
| Equipment | 1,789.00 | 7,250 | |
| Travel and communications | 646.44 | 18,326.90 | 3,263.12 |
| Total | 66,455.55 | 40,840.70 | 3,263.12 |

[7] Sione Saluni gave evidence that following the harvest and export of the plaintiffs' crops by the defendants for sale in New Zealand the plaintiffs received no payments and no reports from the defendants. They contacted the New Zealand importer of the crops who said that there were fewer containers sent to New Zealand than the plaintiffs had been led to believe. They first defendant then made excuses that the produce had arrived in New Zealand late and was rotten but still promised payment.

[8] In April 2015 the first defendant's son, on the first defendant's instructions, emailed Sione Saluni and said that the produce was undersize and had to be spot sold at a loss. The email provided no details of the sales. It promised to pay the plaintiffs back all the money they had invested plus 10% within 3 months. Subsequently more such promises were made but no payments were made.

[9] Sione Saluni said that he and a brother had come to Tonga in February and August 2015 to recover farming equipment that had been sent to Tonga for the defendants use. They were able to recover one tractor and some

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accessories but a second tractor had been disassembled by the first defendant and sold for parts.

- [10] The first defendant gave evidence. His evidence was curt and unsupported by any contemporaneous documents. He did not dispute the evidence of Sione Saluni as to the costs the plaintiff had incurred. He did not accept however that the plaintiffs were entitled to recover all of their travel, accommodation and sustenance costs.
- [11] The first defendant said that the plaintiffs' crops had not been good due to drought and that only four containers of exportable fruits had been harvested for the plaintiffs. There was no corroborative evidence of a drought in Tonga in 2014 and there was no production records to show the quantity of the harvest. There were no supporting documentary evidence, such as shipping documents, of the number of containers sent by the defendants to New Zealand either.
- [12] The first defendant said that the income from the sales of the plaintiffs' crops did not cover costs and that he had incurred huge losses because his own crops had also been poor that year. He produced no supporting documentary evidence of the sales, who they were made to, when they were made and how much was received.
- [13] The first defendant presented what he said was a financial report showing the revenue earned and costs of the plaintiffs' venture which showed a loss of TOP\$93,544. He accepted that this did not include any of the substantial sums that the defendants had received from the plaintiffs nor the proceeds of sale of the disassembled tractor.
- [14] I reject the defendants' financial report. The report was not provided to the plaintiffs following the sale of their crops but only after the issue of this action. The defendants failed to comply with the Court's order requiring them to produce any and all documents relevant to financial transactions pertaining

in any way to the planting, harvesting, export and sale of the plaintiffs' crops so the plaintiffs have had no opportunity to confirm or challenge the contents of the report. The report was not prepared independently but by the first defendant in person. The first defendant did not produce a single document to corroborate any of the figures in the document. Even if the costs shown were incurred by the defendants there is no way of knowing if they were incurred in the performance of the agency contract or in the production and sale of the defendants' own crops. The report has little, if any, evidential value.

Assessment of loss

- [15] Whilst a plaintiff claiming damages will usually seek to recover losses based on his expectation of the performance promised but unfulfilled he may instead claim expenditure wasted as a result of the defendants' breach of contract. Such wasted expenditure may fall into various categories including expenditure incurred by the plaintiff before making the contract, expenditure incurred in or towards performing the plaintiffs' obligations under the contract and necessary expenditure arising directly from the defendants' breach (see Harris, Campbell and Halson *Remedies in Contract and Tort* 2nd ed at 121-122). Different principles may restrict recovery of damages in each case.
- [16] The first defendant has accepted as accurate the production and labour costs (Tab 1) and equipment costs (Tab 2) claimed by the plaintiffs. These sums are expenses incurred by the plaintiffs towards performing their obligations under the agency contract and are clearly recoverable as damages to the extent that they have been wasted by the defendants' breach. In this case some of the expenses were recovered as the plaintiffs were able to salvage some of their equipment from the defendants. They have given the defendants full credit for equipment that was recovered. I allow these amounts.

- [17] The only amounts which the defendants dispute fall under the heading travel and communication costs (Tab 3 of the bundle). The plaintiffs have divided these into four categories.
- [18] Category 1 relates to costs incurred to travel and meet with the first defendant in Auckland. The amount claimed is NZ\$6,823.31. This is expenditure incurred by the plaintiffs before making the agency contract. As a matter of principle such expenditure will only be recoverable if at the time of the making of the contract it was within the reasonable contemplation of the parties that the plaintiffs would recoup these costs under its contract with the defendants. The arrangement between the parties was that the defendants would provide their agency services without payment of a fee. That is not to say that they got no benefit out of the agency contract as they obtained some advances from the plaintiffs and used the plaintiffs' equipment for their own farming operation. However, it could not have been contemplated that these initial expenses would ever be recouped from the defendants. In short these costs are too remote to be recoverable and are not allowed.
- [19] Category 2 relates to the costs of travel and accommodation of the first three plaintiffs to inspect the crops in December 2017. These costs are not recoverable from the defendants either. Whilst the costs were expenditure incurred in reliance upon the agency contract the evidence did not satisfy me that it was expenditure that the parties contemplated would be incurred. Furthermore, I can see no justification for three plaintiffs coming to inspect the crops, for the length of time spent here nor do I consider the defendants could ever be responsible for some of the quite substantial sums claimed for food and drink. I disallow this claim.
- [20] Category 3 is in a different category. I understand these costs (with the exception of an airfare for NZ\$709 which should be in category 4) are costs for two plaintiffs to travel to Tonga in an effort to locate and recover

equipment provided to the defendants. Equipment was recovered in mitigation of the plaintiffs' losses. Such costs are recoverable provided they are reasonably incurred and there is nothing to indicate that they were not. I allow them.

[21] Category 4 are costs of this action and should be claimed as such.

Result

[22] Referring to the three heads of loss claimed I enter judgment for the plaintiffs against the defendants in the following sums:

- a) In respect of production and labour costs the sums of TOP\$64,020.11 and the sum of NZD\$15,263.80.
- b) In respect of equipment costs the sum of TOP\$1,789 and the sum of NZ\$7,250.
- c) In respect of travel and communication costs the sum of TOP\$646.44 and NZ\$755 and AUD \$3,263.12 in respect of the category 3 expenses only.

[23] The plaintiffs are entitled to costs and reasonable disbursements as fixed by the Registrar.

NUKU'ALOFA: 2 August 2017



A handwritten signature in black ink, appearing to read "O.G. Paulsen".

**O.G. Paulsen
LORD CHIEF JUSTICE**