IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

Civil Appeal Case No. 24 of 2014

BETWEEN: REPUBLIC OF VANUATU
Appellant

AND: BOETARA FAMILY
First Respondent

AND: ZEBEDEE TARVUI MOLVATOL
Second Respondent

AND: RACHEL MOLSAKEL AND MATHIAS MOLSAKE
Interest Party

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon.Justice Mary Sey

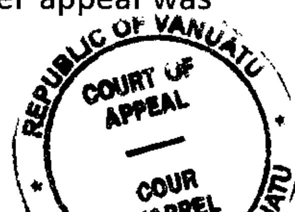
Counsel: *Mr. F. Gilu for the Appellant*
Mr. F. Laumae for the First Respondent
Mr. G. Nakou for the Second Respondent
Mrs. Marie Noelle F. Patterson for the Interested Parties Rachel Molsakel and Mathias Molsakel

Date of Hearing: *23 July, 2014*

Judgment Date: *25 July 2014*

JUDGMENT

1. This is an appeal against the judgment of the Supreme Court in Civil Case No. 40 of 2011 which ordered the appellant to pay VT49,865,000 to the first and second respondents as custom owners of the Belbarav land, being their share of compensation payable under a compulsory acquisition. The parties in the Supreme Court in Civil Case 40 of 2011 were the first and second respondents as claimants and the appellant as respondent. Rachel Molsakel and Mathias Molsakel (the Molsakels) were not parties to the proceedings and were not before the Supreme Court when the order under appeal was



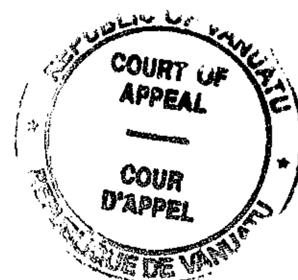
made. At a review hearing after the appeal was filed, the Court of Appeal directed that the notice of appeal be served on the Molsakels as they are parties potentially affected by the orders under appeal. A written submission on their behalf was filed in this Court which in substance complains about the judgment under appeal for precisely the same reasons advanced by the appellant.

2. When the appeal was called, Mrs. Marie Noelle Patterson appeared as a matter of courtesy to inform the Court that the Molsakels relied on the written submissions which had been filed. Mr. Nakou appeared for the second respondent, and indicated that the second respondent supported the arguments to be presented on behalf of the first respondent.

3. At trial in the Supreme Court the appellant did not dispute that the first and second respondents are custom owners of Belbarav, or that compensation is due for the compulsory acquisition of the land. However the appellant contended that the Supreme Court should not order payment at this time as there is in place an injunction in other proceedings that were not before the Court restraining payment of the compensation.

4. There has been a long running dispute over custom ownership of Belbarav which has delayed the payment of compensation by the appellant. For the purpose of this appeal it is necessary only to refer to two of the competing claims to custom ownership.

5. The first and second respondents base the recognition of their status as custom owners on decisions of the Veriondali Village Land Tribunal dated 30th May 2005 and 16th April 2012. Those decisions came under challenge by Mr. Thompson Wells and by the Molsakels each of whom were long standing claimants to custom ownership. In Civil Case 18 of 2012 Mr. Wells sought an order declaring him to be a custom owner. On 2nd April 2012 and 6th July 2012 interlocutory orders were made in Civil Case 18 of 2012 restraining payments of compensation by the appellant pending the resolution of those proceedings.

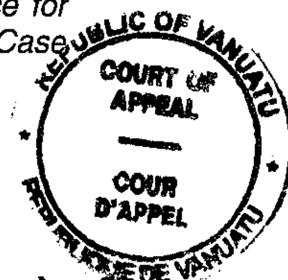


6. The long running litigation pursued by Mr. Wells to establish his custom ownership was finally determined against him by the Court of Appeal in Molbarav and others v. Wells and the Republic of Vanuatu [2014] VUCA 12 Judgment in that matter was delivered on 4th April 2014. The Court of Appeal declared that Mr. Wells has no continuing claim at law either actual or potential as custom owner to any parts of the proceeds due to the custom owners of Belbarav. Consistent with that conclusion, the Court of Appeal set aside the injunctions made on 2nd April 2012 and 6th July 2012 in so far as they protected Mr. Wells. However for reasons given in the judgment, the Court of Appeal ordered that the injunctions remain in place for the benefit of the Molsakels.

7. The Molsakels had two civil cases on foot at that time, each of which sought orders in support of their claim to custom ownership. In Civil Case 124 of 2011 the Molsakels sought to challenge the decision of the Veriondali Village Land Tribunal dated 30th May 2005 on the basis that members of the tribunal were not qualified and that they had a conflict of interest. In Judicial Review Application 8 of 2013 the Molsakels sought two orders, the first quashing the decision of the Veriondali Village Land Tribunal dated 16th April 2014, and the second for a mandatory order requiring the South East Area Land Tribunal to hear and determine an appeal brought by the Molsakels against the decision of the Veriondali Land Tribunal dated 30th May 2005.

8. Although the Molsakels were not party to Civil Case 18 of 2012 in which Mr. Wells was claimant, the Molsakels two civil cases had been listed at the same time as Mr. Wells' claim before the judge who on 6th July 2012 continued the restraining orders against the appellant that had been made on 2nd April 2012. The Court of Appeal was satisfied that the injunctions were intended to benefit the Molsakels as well as Mr. Wells. Accordingly, in disposing of the appeal on 4th April 2014 the Court of Appeal ordered:

> *"The injunctions made on 2nd April 2012 and 6th July 2012 are set aside in so far as they protect the first respondent (Mr. Wells). For the removal of doubt the injunction however will remain in place for the benefit of Rachel Molsakel and Mathias Molsakel until Civil Case*



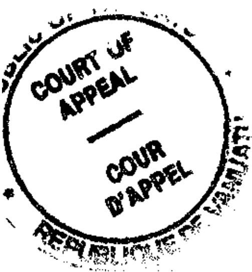
No. 124 of 2011 and Judicial Review Application No. 8 of 2013 are determined or a judge of the Supreme Court otherwise orders".

9. The order now under appeal directed immediate payment of compensation money still held by the appellant. The trial judge referred to the orders of the Court of Appeal, but concluded on evidence led on behalf of the first and second respondents that the Molsakels had not validly instituted an appeal to the South East Area Land Tribunal against the Veriondali Village Land Tribunal decision of 30th May 2005, and that it was an injustice to keep the respondents out of their money. The judge noted that Civil Case 124 of 2011 and Judicial Review Application No. 8 of 2012 were still on foot. He said:

   "Those cases should be determined and disposed of quickly in light of the Court of Appeal decision of 4th April 2014. In the meantime before those cases are heard and decided, I have seen the evidence that clarifies the uncertainties surrounding the Molsakels' appeal and having done so, I am satisfied the Molsakels do not have any appeal on foot to be a bar to the Claimants being paid what is their legal and constitutional entitlement".

10. The respondents seek to uphold this decision on the ground that earlier judgments of the Supreme Court in other proceedings in which the Molsakels have been parties have already dismissed a judicial review application challenging the Veriondali Land Tribunal decision, and have held that the Molsakels have not instituted a valid appeal from that decision. They submit that these earlier decisions decided against the Molsakels the very issues they seek to re-litigate in Civil Case No. 124 of 2011 and Judicial Review Application 8 of 2013. Accordingly, there was no need to hear the Molsakels again in the Supreme Court, and that the trial judge was correct to order as he did even though the Molsakels were not parties in the case before him.

11. In our opinion Mr. Laumae's argument presented on behalf of the respondents overlooks one important fundamental rule of law and procedure: a person must be given the opportunity to be heard in opposition



to the making of an order that will adversely affect that person's legal rights. The Molsakels were not parties before the trial judge.

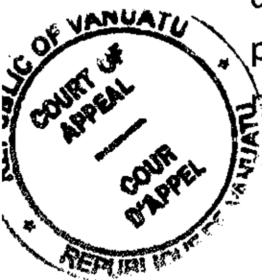
12. Mr. Laumae in detailed written submissions and oral argument has taken the Court to papers and to the earlier court decisions on which he relies. However that material goes to the merits of issues to be decided in Civil Case 124 of 2011 and Judicial Review Application 8 of 2013, and on the trial of those proceedings the material relied upon may well lead to the dismissal of those cases. However in that event the Molsakels will first have had an opportunity to be heard and to raise matters (if any) that they wish to put forward to counter the apparent finality of the earlier decisions.

13. The Supreme Court in proceedings other than Civil Case 124 of 2011 and Judicial Review Application 8 of 2013 cannot validly make orders which determined the rights of the Molsakels claimed in those cases without first giving the Molsakels notice in those other proceedings and an opportunity to be heard.

14. This Court has at length in many earlier decisions stressed the fundamental need for courts to give parties the opportunity to be heard in answer to allegations made against them before the Court makes an order affecting their legal rights. Regrettably, that did not occur in the present instance.

15. As the orders made in the Supreme Court had the effect of removing the protection of the injunction supported by the unresolved Molsakel claims without a trial of those matters and without the Molsakels being given the opportunity to be first heard, this appeal must succeed.

16. In our opinion the appeal must succeed on a further ground as well based on the issues raised in the Judicial Review Application 8 of 2013. Those proceedings seek also to attack the decision of the Veriondali Village Land Tribunal dated 16th April 2012. In the overall picture the challenge to that decision may not be of much importance (and the respondents contend that properly understood that the decision is of no importance). Nevertheless it remains a live issue until Judicial Review Application 8 of 2013 is heard and

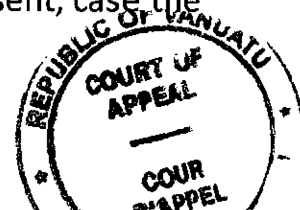


determined by the Court. That issue was not determined by the reasons given by the trial judge to support the order now under appeal.

17. The order of the Court of Appeal made on 4th April 2014 is clear. The injunction restraining the appellant from paying out proceeds of the acquisition is to continue in force pending the outcome of Civil Case 124 of 2011 and Judicial Review Application 8 of 2013. If that injunction is to be lifted or varied, that must be done by order made <u>in</u> Civil Cases 124 of 2011 and Judicial Review Application 8 of 2013.

18. We do not think it is necessary to spend time discussing the minute of a conference hearing that took place in Civil Case 124 of 2011 and Judicial Review Application 8 of 2013 on 9th May 2014 before another judge in the Supreme Court. We simply note that the minute identifies difficulties for the Molsakels in those cases which may arise from the material relied on in this Court by Mr. Laumae, but it is clear from the minute that claims in both those cases remain alive and are still to be determined at trial. In the meantime the restraining order continued in force by the Court of Appeal on 4th April 2014 remains in force.

19. The respondents seek also to uphold the decision of the trial judge on an additional and distinct ground. They contend that as they were accepted by the Minister as the custom owners of Belbarav entitled to the proceeds of the acquisition under the Land Acquisitions Act [CAP. 135] ("the LA Act"), the Minister's decision is final and binding, and has the consequence that the Molsakels can have no entitlement to the proceeds of the acquisition. Under the LA Act where the Minister decides that a particular piece of land is likely to be needed for public purposes he may direct the acquiring officer to cause notice to be given to the custom owners under s.2 of the LA Act, and that sets in train a process that can lead to the Minister making a public declaration under s.6 that the land is so required. Notice of the declaration is then to be given to the custom owners who may claim compensation which, upon assessment, will be apportioned amongst them. By s1 of the LA Act *"custom owner"* means *"the person who in the absence of a dispute, the Minister is satisfied is the custom owner of the land"*. In the present, case the



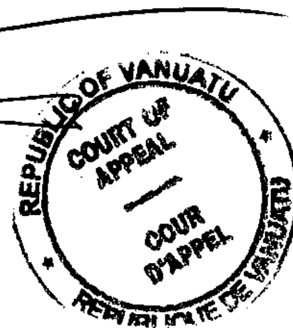
respondents' argument assumes that notice was not given to the Molsakels under ss. 2 and 6, nor were they later involved as custom owners in the procedures that followed leading up to the completion of the acquisition process. Plainly there is now *"a dispute"* as to custom ownership, but the respondents argue that there was no dispute at the time of the notice given under ss. 2 and 6.

20. The facts assumed by this argument are open to doubt. The declaration under s.6 was made on 20th May 2010: see Republic of Vanuatu v. Boetara Family [2011] VUCA 6 at [4]. The material filed in Civil Case 124 of 2011 and Judicial Review Application 8 of 2013 show that the Molsakels were pressing their claims back in 2005. But even if the factual basis of the respondents' submissions were correct, we consider a decision of the Minister as to the identity of custom owners for the purposes of giving notice under LA Act does not determine, as a matter of law, who are the custom owners, and cannot operate to exclude others from sharing in the proceeds of the acquisition if they later establish that they have custom ownership rights.

21. Under the laws of Vanuatu the Minister has no power to finally determine custom ownership. At relevant times that power lay with the Land Tribunals and the Courts. The respondents' additional argument cannot justify the judgment under appeal.

22. The appeal is allowed. The judgment in the Supreme Court is set aside. The respondents must pay the appellant's costs of the appeal fixed at VT60,000 including disbursements.

FOR THE COURT



Hon. Vincent Lunabek
Chief Justice.