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

CIVIL APPEAL CASE No. 12 OF 2015

BETWEEN: ZEBEDEE MOLVATOL

Appellant

AND: RACHEL MOLSAKEL AND MATHIAS MOLSAKEL
First Respondents

AND: THE REPUBLIC OF VANUATU
Second Respondent

AND: TIMOTHY MOLBARAV, AMALI SOLOMON, PETER NATU, JAMES TAMATA AND SINGO MOLVATOL
Third Respondent

AND: BOETARA FAMILY
Fourth Respondent

Coram: *Hon. Chief Justice Lunabek*
Hon. Justice Bruce Robertson
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice Mary Sey
Hon. Justice Richard David Chetwynd

Counsel: *Mr. Robin Kapapa for the Appellant/Applicant*
Mrs. Evelyn Blake for the First Respondents
Ms. Christine Lahua for the Second Respondent
Mr. Felix Laumae for the Third & Fourth Respondent

Date of Hearing: *16 and 22 July 2015*

Date of Judgment: *23 July 2015*

JUDGMENT

INTRODUCTION

1. The original Judicial Review No. 8 of 2013 (the JR claim) was filed on 20 May 2013 and seeks a quashing order of the Veriondali Village Land

Tribunal decision of 16 April 2012. It also seeks a mandatory order requiring the South East Area Land Tribunal to hear and determine an appeal against the decision of the Veriondali Land Tribunal dated 30 May 2005 in which it declared Zebedee Molvatol and the Boetara Family as custom owners of Belbarav Land.

2. As the JR claim was out of time, on 2 December 2014, a Judge of the Supreme Court gave leave to Rachel and Mathias Molsakel (the First Respondents) extending time to bring that claim in the Supreme Court. The primary Judge said the claims were clearly arguable, and the reasons for the delay satisfactorily explained.

3. The JR claim was amended by leave given on 3 December 2014.

4. The JR claim which is relevant now is the amended version. It seeks:

   (1) An order quashing the order of the Santo/Malo Island Court in 2004 (precise date unknown) so that Land Case No.5 of 1992 in the Island Court ceased, and the custom ownership of the land issue came to be considered and decided by the Veriondali Land Tribunal leading to its decision on 30 May 2005;

   (2) An order quashing the Verondali Land Tribunal decision;

   (3) An order prohibiting any Customary Land Tribunal from deciding the custom ownership of the Land;

   (4) An order directing the Island Court to hear and decide the custom ownership of the land in Land Case 5 of 1992.

5. The basis for those claims is that Section 5 (1) of the Customary Land Tribunal Act [Cap] (CLT Act) allows an Island Court to "withdraw" a claim so that it could be dealt with under the CLT Act. However, it is said the "withdrawal" decision was beyond power, because the Molsakels and 3 other Claimants wanted their claims to continue in the Island Court.

Consequently, section 5 (3) of the CLT Act did not permit the "withdrawal" of the Island Court case and so it did not give jurisdiction to the Verondali Land Tribunal to hear the claim. The decision of the Verondali Land Tribunal is therefore a nullity.

6. There is an alternative claim, for an order:

(5) To quash the decision of the Verondali Land Tribunal made on 30 May 2005 naming the Third Respondents as custom owners of Belbarav Land in equal shares; and

(6) An order requiring the South East Area Land Tribunal (SEALT) to hear and decide the appeal of the First Respondents against the decision of the Verondali Land Tribunal of 30 May 2005.

7. The grounds for the alternative orders (5) and (6) are that the Molsakels took part in the process leading to the Verondali Land Tribunal decision of 30 May 2005, when they were unaware of their rights under Section 5 of the CLT Act, and they have appealed to the SEALT from that decision in any event. They say an appeal hearing started on 9 August 2009, but was aborted.

8. On 30 May 2005 the Verondali Village Land Tribunal declared Zebedee Molvatol and Boetara Family the custom owners of Belbarav land situated in Santo. The eleven (11) losing counter-claimants included: **Mathias Molsakel** of Sarakata Area, Luganville; **Family Livo** of Tutuba Island; **Ben Tunala** of Sakele Nakamal, Chapuis Area; and **Joseph Johnny** of Natawa Village, Shark Bay, East Santo.

9. The other step in support of the alternative orders (5) and (6) is based on the Minute of the Court of Appeal of 30 April 2008 (in **Civil Appeal Case 42 of 2007**). Prompted by that Minute, the Verondali Land Tribunal on 16 April 2012 (it is said) made a fresh decision replacing its earlier decision of 30 May 2005, when it was only to clarify how the Belbarav Land is held between the Boetara Family and Zebedee Molbarav.

10. It should be noted that the defence of the Third and Fourth Respondents in the JR claim raised an important factual dispute which is illustrated by the assertion that there was and is no Land Case No.5 of 1992 in the Island Court, nor is there any "withdrawal" decision in 2004 as asserted. A further important factual dispute is shown by the assertion that there was and is no appeal to the SEALT from the decision of the Verondali Land Tribunal of 30 May 2005 in respect of Belbarav Land.

11. Their defences also claim that the Molsakels are estopped from pursuing the JR claim because of prior decisions of the Supreme Court Civil in **Case No. 8 of 2010**, and **Civil Case No. 25 of 2012** [*see:* Section 39 (4) (a) and (b) of the CLT Act] and by taking part in the Verondali Land Tribunal decision.

12. In preparation for a hearing of the JR claim, extensive evidence by sworn statements has been filed in accordance with directions given on 2 December 2014, after the leave (now the subject of this appeal) was given. That is not the end of the procedural battle.

13. The Appellant applied orally to the primary Judge for leave to appeal out of time from the orders of 2 December 2014 as required by Civil Procedure Rules, Rule 17.5 (2). His primary basis for seeking leave to do so is because he was not given the opportunity to be heard on 2 December 2014.

14. On 23 April 2015, the application was refused by the primary judge as the JR claim was then set down for hearing on 15 June 2015, and the evidence statements substantially filed. The primary Judge refused that leave, because, in the circumstances, the Appellant would not be materially prejudiced by the order of 2 December 2014 because of the imminent trial where he could raise and have resolved, the matters which the Appellant said would lead to the judicial review claim necessarily failing.

15. The Appellant on 24 April 2015 then instituted the present application for leave to appeal. It first came before the Court of Appeal on 6 May 2015, but it was not then ready to be argued.

16. The grounds on which it was argued that leave to appeal out of time should be given, and the Appeal allowed, are that the order of 2 December 2014 was made in the Appellants' absence and without notice to him even though he was named as a Defendant on the JR review claim, and, secondly, because (it is said) the appellant had previously applied for, and been refused, an extension of time to institute the JR claim, so the decision of the primary Judge of 2 December 2014 contravened section 39 of the Customary Land Tribunal Act.

17. This appeal was stood over from the May 2015 sitting of the Court of Appeal to allow the parties time to file further documents in the appeal and for the Molsakels to engage new counsel.

18. As noted in the Court of Appeal's Minute of 8 May 2015 the appellant seeks leave from the Court of Appeal to appeal against an order of the Supreme Court on 2 December 2014 giving the Molsakels leave to file the JR claim out of time.

19. During the hearing of the appeal Mr. Laumae asserted that the present claim in Judicial Review 08 of 2013 is exactly the same as in the discontinued claim in Civil Case No. 08 of 2010 and was therefore "*res judicata*" in terms of Rule 9.9 of the CPR. To the suggestion that the parties were different, Mr. Laumae explained that the two additional names in the First Defendants in the present review namely '*Timothy Molbarav*' and '*Singo Molvatol*' are brothers of the already named First Defendants in the Civil Case and therefore added nothing. Likewise the absence of any mention of the "*Boetara Family*" as the third Defendant in the review case was immaterial or added nothing as the First named Defendant's bothers are representatives of the Boetara Family as noted in the intituling of the earlier Civil Claim. After considering the papers and counsels' submissions, we are satisfied that for present purposes the parties in Civil Case No.08 of 2010 are the same as in Judicial Review Case No.08 of 2013.

20. We turn to consider next whether the grounds of challenge are also the same and we find that the dual basis asserted in Civil Case No.8 of 2010 for challenging the Tribunal decision of 30 May 2005 are: *"bias and/or conflict of interest"* (see: paragraph 12 of the claim).

21. The original claim in Judicial Review No.08 of 2013 does not expressly mention bias or conflict of interest on the part of the Tribunal members as a ground for challenging its decision, instead, the grounds refer to an aborted hearing of the Molsakels' appeal before the South East Santo Area Land Tribunal and to a subsequent purported clarification of the Verondali Land Tribunals decision which went beyond clarification by adding the names of new custom owners other than *"Zebedee Molvatol"* and *"Boetara Family"*. Plainly these grounds are not the same as those raised in the earlier Civil Case No. 08 of 2010.

22. Furthermore when reference is made to the amended judicial review grounds dated 02 September 2014 one finds the following additional information:

> *"In 2004 the Santo/ Malo Island Court made a decision which brought an end to proceedings in Land Case No.05 of 1992 and the same land became the subject of the dispute before the Verondali Customary Land Tribunal. Through no fault of the Claimant they only recently became aware that their wish expressed to the Island Court, that Land Case No.05 of 1992 continued in the Island Court meant that the Island Court decision that day to transfer the proceedings to a Customary Land Tribunal and the subsequent Customary Land Tribunal preceded were seriously flawed".*

23. This additional ground which found favour with Harrop J. further distinguishes and differentiates Judicial Review No.08 of 2013 from Civil Case No.08 of 2010, such that, any possible plea of *"res judicata"* cannot be entertained or succeed against the Judicial Review No. 08 of 2013.

24. Section 5 of the Customary Lands Tribunal Act provides:-

> ***"5. Pending court proceedings***
>
> *(1) If:*
>
> *(a) a person is a party to a proceeding before the Supreme Court or an Island Court relating to a dispute about customary land; and*

(b) *the person applies to that Court to have the proceeding withdrawn and the dispute dealt with under this Act; and*

(c) *the other party or parties to the proceeding consent to the withdrawal and to the dispute being dealt with under this Act; and*

(d) *that Court consents to the withdrawal and to the dispute being dealt with under this Act;*

the dispute must be dealt with under this Act and one of the parties must give notice under section 7.

(2) *The Supreme Court or an Island Court may:*

(a) *order that any fees paid to that Court in respect of such proceedings be refunded in full or in part to the applicant or any of the other parties; and*

(b) *make such other orders as it thinks necessary.*

(3) *To avoid doubt, if proceedings before the Supreme Court or an Island Court relating to a dispute about customary land are pending, the dispute cannot be dealt with under this Act."*

25. The section deals with customary land proceedings pending before the Island Court by directing that such proceeding "*must be dealt with*" under the provisions of the Customary Land Tribunals Act if four (4) pre-conditions are met or exist.

26. The four pre-conditions are conjunctive ("*and*") such that the absence or non-fulfillment of any one will result in the pending court proceeding continuing within the provisions of section 8 of the Island Courts (Amendment) Act No. 15 of 2001 which reads:

"*If:*

(a) *Proceedings concerning disputes as to ownership of land are pending in an Island Court immediately before the commencement of this Act; and*

(b) *The proceedings continue on and after that amendment;*

The Island Court is to hear and determine the proceedings as if the amendments made by items 1 to 7 of this schedule had not been made".

27. Included in the pre-conditions under Section 5 is a requirement that there must be an application to the Island Court before which the proceeding is pending to withdraw the proceeding and have the dispute dealt with under the provisions of the Customary Land Tribunals Act. Subsection 2 then gives the Supreme Court or Island Court a discretion ("*may*") to

make an order about the fees already paid in the proceeding and *"make such other orders as it thinks necessary".*

28. The unchallenged evidence placed before Harrop J. indicates that the decision to transfer the proceedings before the Island Court was made by the presiding Magistrate. If this decision or order was void and the proceedings before the Verondali Land Tribunal were a continuation of the Island Court case No. 5 of 1992, that would arguably provide a jurisdictional basis to review the Tribunal proceedings.

29. The grant of leave to apply for judicial review under Rule 17.5 (2) of the Civil Procedure Rules is an interlocutory decision involving the exercise of a judicial discretion guided by *"substantial justice".*

30. The principle(s) that guide an appellate Court reviewing an exercise of discretion are well-established and was considered by this Court in Fisher v. Fisher [1991] VUCA 2 and more recently in Dumdum v. East Malo Island Land Tribunal [2010] VUCA 32 where the Court said:-

> *"...a discretionary order, will not be lightly overturned or set aside on appeal unless it is clearly established that the decision was wrong in that the judge took into account irrelevant matters which he ought not to have done or failed to take into account relevant matters or misdirected himself with regard to the relevant principles applicable to the exercise of the discretion. In other words, it will only be set aside if it is shown that the discretion miscarried or there was a miscarriage of justice."*

31. In making the *"2 December 2014 orders"* in the absence of counsel (Mr. Felix Laumae) who is incorrectly recorded as additionally representing the Second Defendant (Zebedee Molvatol) whereas it should have been the Third Defendant (Boetara Family), the primary Judge noted various failures on Mr. Laumae's part effectively resulting in the Molsakels' applications for leave being unopposed and said:

> *"For the reason contained in the documents filed by Mr. Sugden* (for the Molsakels), *I am satisfied that the Court should exercise its jurisdiction to extend time for making this judicial review claim out of time and I order accordingly."*

32. Earlier the Judge said:

> *"Based on the amended application I have no hesitation in granting the application for leave because the issue as to whether the case was properly transferred from the Island Court to the Customary Land Tribunal has only just come to light recently and that is therefore a justification for the case being filed out of time in the amended form that it is now in"*

And later:

> *"It is always a factor in leave application as to whether there is an arguable case and that us because Rule 17.5 (2) require the Court to consider whether substantial justice requires an extension of time for falling a claim. Here there is no doubt that criterion is met because if the claim was not properly removed from the Island Court to the Customary Land Tribunal, which is certainly the position on the evidence presently filed, then the judicial review claim is not only arguable but will definitely succeed..."*

CONSIDERATION

33. A similar application was refused by the Supreme Court on 23 April 2015 and is now being renewed before this Court.

34. There is, as the primary Judge acknowledged, an arguably good reason why that extension of time should not be given. There may be other reasons. We have carefully considered what has been argued on behalf of the Appellant. However, the primary Judge was finally influenced by the desireability of proceeding, to maintain his decision on leave, and to get on with deciding the real disputes. We note that the Third and Fourth Respondents have also taken that view, and have gone about preparing for the hearing even though they may also have had the same concerns about the leave decision now challenged.

35. We are not persuaded that it is necessary or appropriate to grant leave to apply out of time to set aside the leave application. It would serve little purpose to do so. The Appellant would raise on the further hearing of the leave application the same matters he would raise on the hearing of the JR claim itself. It is much better that those arguments take place where they can and will be finally decided. Much of the evidence at the hearing will be documentary.

36. Accordingly, we decline the Application for leave to apply out of time for leave to apply to set aside the extension of time order made on 2 December 2014.

37. The costs of this Application are referred to the primary judge to be dealt with at the same time as the costs on the JR claim. We would expect they would follow that decision, as it is clear that the Appellant did not act unreasonably in pursuing this Application.

38. We note that the issues in the JR claim present considerable challenges to the Molsakels. The submissions on this application identified some of them. We record them simply to show what will have to be considered. They are, however, appropriately decided at the hearing of the judicial review claim.

39. They include (not exhaustively)

    (1) Whether there was an Island Court Land Case No.5 of 1992;

    (2) If so, whether the area of land it related to is the same as, or the extent to which it overlaps, the Belbarav Land dealt with by the Verondali Land Tribunal decision of 23 May 2005;

    (3) If so, whether that claim was "transferred" to the Verondali Land Tribunal in 2004, or whether the Verondali Land Tribunal simply received and decided a separate claim over Belbarav land independently;

    (4) If so, and the Island Court claim was "withdrawn" to the Verondali Land Tribunal –

        (a) How that happened and was it in accordance with section 5 of the Customary Land Tribunal Act;

        (b) Whether the Molsakels are estopped from saying that the withdrawal was not in accordance with section 5 of the Customary Land Tribunal Act.

(5) The significance and effect of prior Supreme Court and Court of Appeal proceedings, including those referred to in the defence.

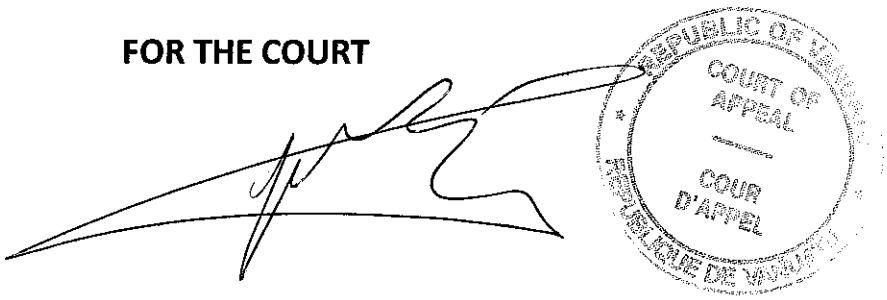
40. We have not referred to factual or legal issues arising, or that may arise, in relation to the alternative claim as that was not the focus of submissions.

CONCLUSION

41. For the reasons given, the Application is refused. The costs of the Application are referred to the Supreme Court Judge who hears the judicial review claim.

DATED at Port Vila this 23rd day of July 2015.

FOR THE COURT



HON. Vincent LUNABEK
Chief Justice.