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

Civil Appeal Case No. 25 of 2015

BETWEEN: ACTING DIRECTOR OF LANDS SURVEY AND REGISTRY
First Appellant

AND: GORDON ARNHAMBAT AS ACTING SENIOR LANDS TRIBUNAL OFFICER
Second Appellant

AND: JOHN TARI MOLBARAV, LAURENSOLOMON, JEROME NATU, MATHEW TAMATA REPRESENTATIVES OF TIMOTHY MOLBARAV, AMALI SOLOMON, PETER NATU, JAMES TAMATA and MOLVATOL
First Respondents

AND: THOMPSON WELLS
Second Respondent

AND: MATHIAS MOLSAKEL and RACHEL MOLSAKEL
Third Respondents

AND: BEN TUNALA
Fourth Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Daniel Fatiaki
Hon. Justice David Chetwynd

Counsel: *Mr. K. Tari for the First and Second Appellants*
Mr. F. Laumae for the First Respondents
Mr. C. Leo for the Second and Fourth Respondents
Mrs. E. Blake for the Third Respondents

Date of Hearing: *9 November 2015*

Date of Judgment: *20 November 2015*

JUDGMENT

1. This appeal is against the following orders made by a Supreme Court judge on 9th July 2015:

   "*(a) The decision of the Tribunal dated 20th May 2005 is final and is to be enforced forthwith;*

   (b) The fourth defendant be hereby restrained from rectifying leases within the Belparav Land into the First Defendant's (Thompson Wells) name;

(c) *An Enforcement Order requiring payment to be issued separately within 24 days (to be issued separately);*

(d) *The claimants are entitled to their costs of and incidental to the proceeding on the standard basis as agreed or be taxed*".

2. The decision of the Tribunal referred to in paragraph (a) was one made by the Veriondali Village Land Tribunal that determined that the First Respondents were the custom owners of certain lands known as the Belbarav land. The reasons for judgment that support these orders disclose that the money to be paid is the sum of VT29,533,245 plus interest as calculated in the reasons for judgment. A separate enforcement orders directed that the money be paid to the lawyers for the First Respondents.

3. The separate enforcement orders direct that the money be paid by the Republic of Vanuatu. However the Republic is not a party to these proceedings. As we understand the papers filed before this Court the First and Second Appellants were named as parties to the proceedings to restrain the rectification of the lease of the Belbarav land into name of the Second Respondent as the lessor. However the First and Second Appellants are, in effect bringing this appeal to protect the Republic from having to pay the money contemplated by the judgment. No objection is raised about their status to do so. In our opinion as parties to the proceedings the First and Second Appellants are entitled to bring this appeal for that purpose as the appeal is grounded on the submission that the orders under the appeal were obtained contrary to an injunction confirmed by the Court of Appeal prohibiting orders of the kind that were made until other proceedings in the Supreme Court have been finally determined. That injunction is included in the orders made by the Court of Appeal in Timothy Molbarav & Others v. Wells and the Republic of Vanuatu [2014] VUCA 13 Civil Appeal Case No. 42 of 2013.

4. The monies to which the judgment under appeal relate comprise the unpaid balance of monies due to the custom owners of the Belbarav land for the compulsory acquisition by the Republic of Vanuatu of a proportion of the Belbarav land.

5. The dispute over the custom ownership of the Belbarav land has been ongoing since Independence. It has been the source of much litigation. For present purposes sufficient of the history of the litigation between numerous parties is described in the judgments of the Court of Appeal in CAC 42 of 2013, Molvatol v. Boetara Trust and the Republic of Vanuatu [2012] VUCA 13, Civil Appeal Cases 9, 10 and 13 of 2012, Timothy Molbarav v. Wells and the Republic of Vanuatu [2013] VUCA 14, and in Molvatol v. Molsakel & Others [2015] VUCA 10 Civil Appeal Case No. 12 of 2015. As these judgments reveal there were many sets of proceedings issued in and around 2012 involving the present

parties, or some of them. The proceeding giving rise to this appeal is but one of them.

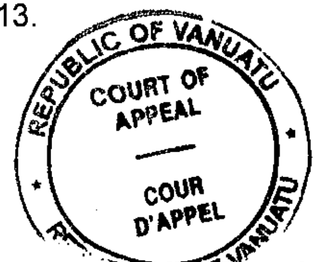
6. In CAC 42 of 2013 the Court of Appeal finally determined in favour of the First Respondents that the Second Respondent (Thompson Wells) had no claim to the custom ownership of Belbarav, but amongst the unresolved litigation was a claim by the Third Respondents which challenged the custom ownership of the First Respondents. The Third Respondents had on foot at the time of the hearing of CAC 42 of 2013 two sets of proceedings (which effectively made the same claims) the success of which depended on the outcome of one of those proceedings, Judicial Review Application No. 8 of 2013. In the course of management conferences in the various proceedings then on foot in the Supreme Court, including the sets of proceedings by the Third Respondents, the Supreme Court had made injunctions on 2nd April 2012 and 6th July 2012 restraining the Republic from releasing the balance of compensation held in its trust account to the First Respondents.

7. The orders made in CAC 42 of 2013 on 4th April 2014 included:

> "(1) *Leave is granted to the appellants to appeal against the interlocutory orders made on 2nd April 2012 and 6th July 2012;*
>
> (2) *The appeal is allowed and the injunctions made on 2nd April 2012 and 6th July 2012 are set aside in so far as they protect the first respondent. For the removal of doubt, the injunctions 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;*
>
> (3) *Declaration that the first respondent has no continuing claim at law either actual or potential as custom owner to any part of the proceeds due to the custom owners of Belbarav in respect of the compulsory acquisition of part of that land.*
>
> (4) *The cross appeal is dismissed;*
>
> (5) *The first respondent must pay the appellant's costs and the second respondent's costs for this appeal on the standard basis*".

8. At the time of the Court of Appeal decision JR 8 of 2013 was procedurally defective in that the application for judicial review had not been filed within six months of the decision under challenge Civil: CPR, rule 17.5 (1). The Third Respondents required an order extending time within which to make the judicial review application.

9. Since the decision was given in CAC 42 of 2013 the Third Respondents have pressed on with their claims. On 2nd December 2014 Justice Harrop gave leave to the Third Respondents extending time to commence JR 8 of 2013.



10. The First Respondents' appealed against the orders extending time. Extensive sworn statements were filed in support of the appeal which sought to establish that the Third Respondents' claim to custom ownership had been decided against them in other proceedings so that their claim in JR 8 of 2013 was destined to fail and for that reason that the extension of time should not have been granted. The appeal was first listed before the Court of Appeal in April 2015 but was adjourned to allow a change of representation by the Third Respondents and for the filing of more material. The appeal was heard by the Court of Appeal in July 2015 and dismissed on 23rd July 2015: Molvatol v. Molsakel CAC 12 of 2015. In the result JR 8 of 2013 is now regularly on foot and awaits determination.

11. This appeal concerns orders made in Civil Case No. 25 of 2012 which involves the same main parties in CAC 42 of 2013 and CAC 12 of 2015 and concerns the same issues as the proceedings that led to CAC 42 of 2013. The judgment in CAC 42 of 2013 effectively overtook Civil Case No. 25 of 2012 but was not specifically referred to in the judgment of CAC 42 of 2013. It is astonishing that the First Respondents should within two months of the decision in CAC 42 of 2013 bring an enforcement application in Civil Case No. 25 of 2012. That application would seem to be directly contrary to the injunction confirmed by the Court of Appeal and in contempt of it. Apparently in an attempt to get around the injunction the First Respondents supported the enforcement application with sworn material to the effect that Third Respondents had no valid and unresolved appeal on foot against the decision of the Veriondali Village Lands Tribunal made on 30th May 2005.

12. Regrettably the Supreme Court judge hearing the enforcement application seems to have been inadequately informed by counsel for the First Respondents about the implications of the Court of Appeal decision in CAC 42 of 2013 although it is clear from the reasons for judgment under appeal that the judge had been informed about the proceedings in CAC 42 of 2013, at least to the extent that the judgment of the Court of Appeal finally defeated the claim of the Second Respondent (Thompson Wells).

13. The orders under appeal were made as the judge was satisfied by the sworn material filed on behalf of the First Respondents that the Third Respondents did not have any continuing claim to be recognised as a custom owner, hence the order that the balance of the compensation monies be paid out to the First Respondents. The effect of the judgment under appeal is to finally determine the custom ownership claim of the Third Respondent adversely to them.

14. In the reasons for judgment, in reference to the sworn material relied upon, the judge said "*that evidence is unchallenged*". He accepted it. Without reference to the terms of the Court of Appeal injunction he then made the orders which he did. There is no suggestion in the reasons for judgment that the judge interpreted the order of the Court of Appeal as allowing a single judge in

proceedings other than CC 124 of 2011 and JR 8 of 2013 to dissolve the injunction. In any event, in our opinion the Court of Appeal did not envisaged that a single judge in other proceedings would be so empowered. The statement in the judgment that the evidence was unchallenged is mystifying as the Third Respondents who were directly affected by it were not represented before the Supreme Court. The reasons for judgment record that they were not represented, and on information given to this Court from the bar table that is correct. At the first hearing of the enforcement application in Civil Case No. 25 of 2012 on 27th May 2014 Mr. Saling Stephens appeared and informed the Court that he had no instructions from the Third Respondents, and the Third Respondents took no part in the hearing of the application.

15. The same sworn material placed before the Court in Civil Case No. 25 of 2012 in support of the enforcement order has been included in the mass of material put before the Court of Appeal in CAC 12 of 2015. In the Court of Appeal dispute had been raised by the Third Respondents about the veracity and accuracy of the sworn material which the judge was asked to rely upon, and the sworn statements had not satisfied the Court of Appeal that the Third Respondents had no arguable case in JR08 of 2013. The reasons for judgment now under appeal indicate that the judge was not so informed by counsel for the First Respondent.

16. At the hearing on 27th May 2014 the judge directed the parties to file submissions, and it seems that the judge then intended to publish reasons without further hearing the parties. Submissions were filed by the First Respondents in June 2014 but none were filed by any other party. As the Third Respondents were not represented at that time and there is no evidence to suggest that they became aware of the directions, it is hardly surprising that they did not file submissions.

17. The next development in Civil Case No. 25 of 2012 was notice to the parties, at least to the First Respondents and the Appellants, that judgment was to be delivered on 15th July 2015. This notice was apparently received shortly before the delivery of judgment. Then the judgment was delivered. Both the reasons for judgment and the orders made indicated that the judge was unaware of the developments since June 2014. In particular the judgment by inference indicates that the judge was unaware orders had been made by Justice Harrop in JR 8 of 2013 on 2nd December 2014, and was unaware of pending proceedings in the Court of Appeal challenging that order. In our view counsel who had been involved in the enforcement application in May and June 2014, and in particular counsel for the First Respondents who was seeking the enforcement orders, were under an obligation as officers of the court to keep the judge informed of events that were relevant to the issues to be decided. Possibly counsel could be excused if they thought the subsequent events in the latter part of 2014 and 2015 had, in effect, completely overtaken Civil Case No. 25 of 2012 and that it had fallen by the wayside. But once notice of the pending

judgment was received such a belief should have been dispelled. The First Respondents should have informed the judge that the Third Respondents' claim was alive and well and awaiting trial in the Supreme Court.

18. Once the reasons for judgment were received and read it must have been starkly clear to the First Respondents and their counsel that the judge was not aware of the developments since June 2014. He should have been immediately informed and asked to withdraw the judgment and orders, and to reconsider the matter in light of recent developments. The judge should have been informed in plain and unmistakable terms that the Court of Appeal injunction was still in place and the orders he propose were contrary to the terms of the injunction.

19. Not only was the judge not so informed, when this appeal was brought to correct the position the First Respondents and their counsel sought to defend the orders.

20. What has happened is most regrettable. It does no credit at all to counsel for the First Respondents or indeed to the First Respondents themselves who must be well aware of all that had happened since the enforcement application was made, and of the pending trial in JR 8 of 2013.

21. Neither the application for the enforcement order, nor the orders themselves should have been made. The orders under appeal should be set aside in their entirety. This will have no effect on the Second Respondent whose rights have already been finally determined by CAC 42 of 2013.

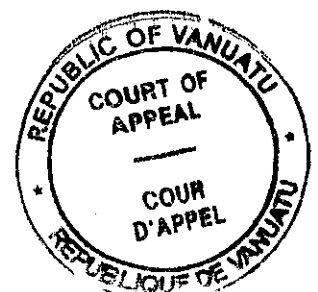
22. The proceedings in the court below, (Civil Case No. 25 of 2012) should be dismissed as they have been overtaken by later proceedings. There will be an order that the First Respondents pay the costs (if any) of each of the respondents in the Supreme Court in Civil Case No. 25 of 2012. The First Respondents must pay the costs of the other parties to this appeal. Those costs should be on an indemnity basis as the orders sought in the Supreme Court should not have been sought in light of the injunction made in CAC 42 of 2013, and once the orders were pronounced in the Supreme Court the First Respondents failed to take immediate steps to have the orders recalled or to consent to this appeal.

23. The formal orders of the court are as follows:

    (a) Appeal allowed;

    (b) Orders made in Civil Case No. 25 of 2012 on 7th July 2015 are set aside in their entirety;

    (c) Proceedings in Civil Case No. 25 of 2012 stand dismissed;

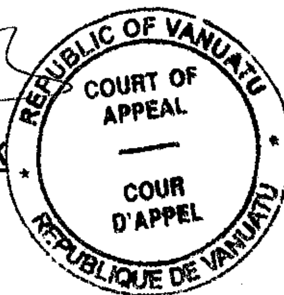


(d) The First Respondents shall pay the costs (if any) of the other parties in Civil Case No. 25 of 2012 in the Supreme Court on the standard basis;

(e) The First Respondents to pay the costs of the Appellants and the Second, Third and Fourth Respondents in this appeal on an indemnity basis.

DATED at Port Vila, this 20th day of November, 2015.

BY THE COURT



<u>Hon. Vincent LUNABEK</u>
Chief Justice.