

IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU

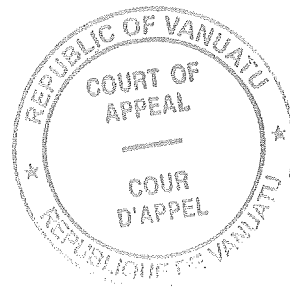
Civil Appeal
Case No. 19/1568 CoA/CIVA

BETWEEN: **Motuka Sosue and Tui Soane**
Appellants

AND: **Horizon Development Ltd**
First Respondent
Fiakaifonu Nazario
Second Respondent
Minister of Lands
Third Respondent
Director of Land, Survey and Records
Fourth Respondent

Date: 12 July 2019
Before: Justice J. Mansfield
Justice J. Hansen
Justice D. Fatiaki
Justice S. Felix
Justice G.A. Andrée Wiltens
In Attendance: Mr E. Molbaleh for the Appellant
Mr J. Malcolm for the First Respondent
Ms M-N Ferrieux Patterson for the Second Respondent
Mr T Loughman for the Third and Fourth Respondents
Date of Decision: 19 July 2019

JUDGMENT



A. Introduction

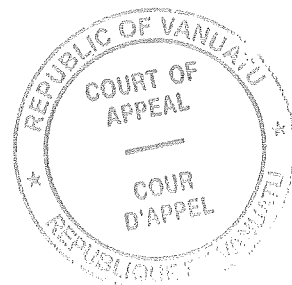
1. The appellants sought to challenge a 2014 Supreme Court decision relating to a land dispute. It was claimed that the transfer of a lease had been fraudulently obtained; and it was sought that some ten subsequent on-leases to innocent purchasers for value be rectified. The claim was dismissed, and it was that decision that was sought to be overturned.

B. Steps Taken

2. Mr Molbaleh filed a Notice of Appeal on 21 June 2019. It was unaccompanied by an application for leave to appeal out of time – as it should have been, and also without a supporting sworn statement explaining the reasons for the delay and setting out the prospects for success, as well as dealing with possible prejudice to the other parties. The Notice was also not served on the First or Second Respondents – their counsel were coincidentally at the call-over of the appeal cases on the first morning of the current Court of Appeal session. That is when counsel for the First and Second Respondents first learnt of the proposed appeal.
3. Mr Molbaleh had also failed to file an Appeal Book and his submissions in support of the appeal as directed by the Listing Judge. He was strongly and explicitly advised at the call-over as to what steps he needed to complete in order to progress the matter.
4. Mr Molbaleh was required to attend Court at 9am on 12 July 2019, having in the meantime attended to the matters required, so that it might be ascertained if leave was to be granted and, if so, when this matter could be heard in the current session.

C. Applications

5. At 4.30pm on 11 July 2019 Mr Molbaleh filed an application to adjourn the appeal to the November session of the Court of Appeal, on the basis of late instructions and the realisation of having to do considerable more preparatory work. Mr Molbaleh was also under work pressure due to his six other appellate matters in the current session.
6. At the same time, Mr Molbaleh also filed some Grounds of Appeal, setting out five aspects of the decision to be appealed which were said to be errors by the primary Judge. We have looked at those grounds and we are unimpressed.
7. After the case was called on at 9am on 12 July 2019, and while Mr Molbaleh was addressing the Court, he tendered an application for leave to appeal out of time. It neither deals with the issue of delay, nor the prospects of success. There is also no discussion regarding possible prejudice to the other parties involved. It was not accompanied, as required and as explained to Mr Molbaleh by the Court on 8 July 2019, by a sworn statement in support so that the Court had evidence as to those matters.



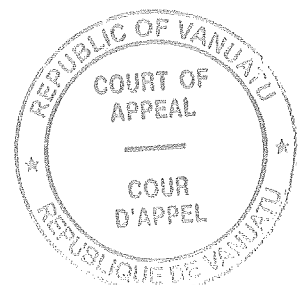
8. In the meantime, at 2.15pm on 11 July 2019 Mr Malcolm filed a memorandum opposing leave to appeal out of time and seeking costs against Mr Molbaleh personally. At the hearing on 12 July 2019, Ms Ferrieux Patterson supported both those contentions and filed a sworn statement evidencing the fact that the appellants' previous counsel had explained the effect of the 2014 Supreme Court decision to his then clients prior to being instructed to forward his file to other counsel.

D. Discussion

9. Mr Molbaleh was asked to make oral submissions in support of his application for leave to appeal out of time – to explain the delay and deal with the prospects of the appeal succeeding. It became apparent from his responses that no real consideration had been given to either issue; and further, that there was just no possibility of the appeal succeeding due to the very clear language of section 100(2) of the Land Leases Act [Cap 163].
10. In those circumstances, we could see no merit in further adjourning this case, nor in granting leave to appeal out of time. To do so would have simply wasted time and incurred further costs.
11. Mr Malcolm submitted that Mr Molbaleh be ordered to pay costs personally for his irresponsible and unprofessional actions in simply accepting instructions from his clients and acting on them without giving them suitable legal advice regarding their prospects.
12. Mr Molbaleh responded that he was acting for clients who had no other spokesman and who were poorly educated, unemployed and with no place to go. In the event, he accepted that costs were appropriate and agreed with the suggested figure of VT 10,000 for both Mr Malcolm's and Ms Ferrieux-Patterson's clients. Mr Loughman did not seek costs.

E. Decision

13. We consider it the duty of counsel to carefully scrutinise their instructions and to give firm legal advice in relation to those instructions. It is not good enough to simply do what a client instructs, without first explaining clearly the relevant legal principles involved and the client's chances of succeeding/failing.
14. In this instance, we consider proper legal advice to the appellants would have included the fact that there was no satisfactory explanation for the lengthy delay prior to seeking to appeal; and further, given the clear legislation against the appellant's claims, that the proposed appeal was doomed to fail. Had the appellants been so advised, they would then have been in the position of making an informed decision whether to proceed or not – and if they elected to proceed in any event, that would have been in the knowledge that they were likely to lose and to have to pay to costs.



15. It appears to us that the appellants instructed Mr Molbaleh to appeal, and he filed the Notice of Appeal accordingly - without first considering if there were good grounds to do so. He failed in his professional obligations to his clients; incurring costs for the other parties and wasting valuable Court time and resources. It is accordingly appropriate that costs be ordered against counsel personally.

F. Orders

16. In the circumstances, we decline to further adjourn the case.

17. We also decline to grant leave to appeal out of time. This proceeding is therefore at an end.

18. We order costs against Mr Molbaleh personally. He is to pay VT 10,000 each to Mr Malcolm and Ms Ferrieux Patterson within 21 days.

Dated at Port Vila this 19th day of July 2019
BY THE COURT


Justice J. Mansfield

