

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

Civil Appeal
Case No. 18/2748 CoA/CIVA

BETWEEN: Kalsef Tangraro
First Appellant

AND: Steven Kalsakau
Second Appellant

AND: Erick Gorrrytal
Third Appellant

AND: The Republic of Vanuatu
Respondent

Coram: *Hon. Justice John von Doussa*
Hon. Justice John William Hansen
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice Viran Molisa Trief

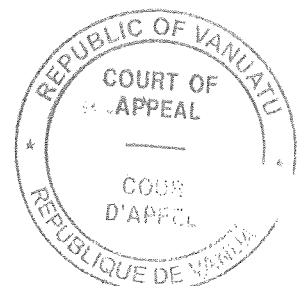
Counsel: *Mr. G. Boar for the first, second and third Appellants*
Mr. H. Tabi and Mr. S. Aron for the Respondent

Date of Hearing: *11th November 2019*

Date of Judgment: *15th November 2019*

REASONS FOR DECISION
(Application to adduce further evidence)

1. This appeal was set down for hearing on 11th November 2019, but following an application by the appellants, the hearing of the substantive appeal has been adjourned to the February session in 2020. The reason being that given the significance of the case, the respondents were late in serving the appellants with their response and written submissions.
2. On 4th November 2019 the appellants filed an application for leave to adduce further evidence before the Court of Appeal. Before granting the adjournment of the substantive appeal the Court heard that application and dismissed it. We now provide our reasons for doing so.



Background

3. In summary, these proceedings were brought as a constitutional application pursuant to Article 6 and 53 of the Constitution. It was amended twice and the final amendment to the constitutional application was made and filed on 19th May 2017. The main relief sought was a declaration that an agreement signed by the Government in 1992 for payment of compensation to former custom owners of Port Vila Land was in breach of Articles 5 and 77 of the Constitution.
4. The constitutional application was heard and dismissed on 14th September 2018. This is the judgment being appealed.

Application to adduce further evidence

5. The evidence which is being sought to adduce is the evidence of Mr Ioan Kaltabang, Mr Matai Noel Kalwatmanu and Mr Barak Sope. The evidence of Mr Kaltabang and Mr Kalwatmanu relate to events in Pango village around 1991 to 1995 when part of the money paid as compensation was given to their representatives. Mr Sope's evidence relates to events from 1981 onwards leading to the establishment of the Port Vila Urban Land Corporation, its investments and its final closure in 1988. These events had been the subject of evidence called on the hearing of the constitutional application.
6. Rule 27(2) of the Court of Appeal Rules is quite specific on the requirements for admitting further evidence and provides:-

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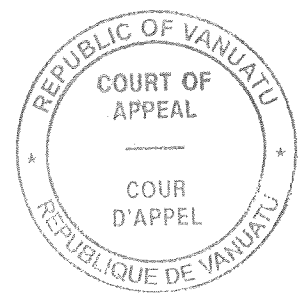
(2) The Court of Appeal shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in Court, by affidavit or by deposition taken before an examiner or Commissioner:

Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."

7. The Court of Appeal in **Salwai v Boulekone** [2012] VUCA 19 set out what it considered to be special grounds to admit further evidence as follows:-

*"We accept that the phrase "special grounds" is wide in its ambit but the cumulative conditions which must be fulfilled by a party seeking to have **fresh evidence** received by an appellate court are well established. These are:*

(a) That the evidence could not have been procured by the exercise of reasonable diligence for use at the trial;



- (b) The evidence is relevant and otherwise admissible;
- (c) The evidence is apparently credible; and
- (d) There is a significant possibility that the evidence, if believed, would have an important influence on the result of the case."

8. And went further to refer to observations made by the Court of Appeal in **Adams v. Public Prosecutor [2008] VUCA 20** that:-


"The purpose of these principles is to require that at a trial each party leads all of the evidence which they wish to rely on, and to prevent an unsuccessful party later reformulating the basis of this case and seeking to have a second attempt to establish a position which failed at the first trial. Finality in litigation both criminal and civil, is a fundamental object of the court process. Subject to the right of appeal, it is only in exceptional circumstances that a party can revisit the evidence by supplementing that given at the trial" (see also: Neel v. Blake [2004] VUCA 6)."

9. The evidence being sought to be called is evidence of events which occurred prior to the trial and was available. When put to Mr Boar he conceded the point. He submitted that the reason for applying was that the appellant's former counsel refused to present more evidence at trial. The appellants are bound by decisions taken by their counsel on how the case is to be run. In our view there are no special grounds why the evidence should be admitted at this stage. Mr Kaltabang, Mr Kalwatmau and Mr Sope were available to be called to give evidence at the trial but counsel opted not to call them.

10. On that basis the application was refused and costs are in the cause.

DATED at Port Vila this 15th day of November, 2019

BY THE COURT



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Hon. John von Doussa

Judge

