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

Civil Appeal
Case No. 21/1993 CoA/CIVA

BETWEEN: Clarence Ngwele
First Appellant

Teouma Holdings Limited
Second Appellant

AND: Bred (Vanuatu) Limited
Respondent

Coram: ***Hon. Chief Justice V. Lunabek***
Hon. Justice J. Mansfield
Hon. Justice R. Young
Hon. Justice O. Saksak
Hon. Justice D. Aru
Hon. Justice G. Andrée Wiltens

Counsel: ***Mr R. Sugden for Appellant***
Ms S. Mahuk for the Second Respondent

Date of Hearing: ***9 July 2021***

Date of Judgment: 16 July 2021

JUDGMENT OF THE COURT

A. Introduction

1. This was an appeal against a Supreme Court decision to not strike out an 11 February 2020 application made pursuant to section 59 of the Land Leases Act [Cap 163]. The application sought orders permitting the sale and transfer of a registered mortgage against property in the name of Teouma Holdings Limited entered into to secure advances made by Bred (Vanuatu) Limited to Ms Ngwele.

B. Background

2. The strike out application was preceded by numerous earlier reference of this dispute to the Courts. Accordingly the history of the matter bears outlining.

3. The original advance by Bred (Vanuatu) Limited to Ms Ngwele occurred in October 2007. The advance was secured by a collateral mortgage over Title No. 12/0923/394 which was held in the name of Teouma Holdings Limited. Ms Ngwele was, and remains, the Director of Teouma Holdings Limited.

4. The arrangements between Bred (Vanuatu) Limited and Ms Ngwele in relation to the advance were varied in 2010 and again in 2013.

5. Unfortunately there was a default in repayment, which led to Bred (Vanuatu) Limited issuing a formal demand on 13 June 2014. That led to Civil Case No. 15/746 between Bred (Vanuatu) Limited and Ms Ngwele seeking orders enabling the sale of the property secured by the mortgage. As a result of an apparent agreed compromise between the parties, this action was dismissed without prejudice on 10 August 2017. The Master of the Supreme Court had conduct of the case at that stage.

6. Thereafter further repayments in respect of the advance followed, but there was then further default by Ms Ngwele. This led Bred (Vanuatu) Limited to issue a new formal demand on 25 April 2019, which was served on both Ms Ngwele and Teouma Holdings Limited.

7. The formal demand went unanswered. This caused Bred (Vanuatu) Limited to file the application pursuant to section 59 of the Land Leases Act dated 11 February 2020.

8. The Master resumed conduct of the matter. The following litigation then ensued. Firstly, the Master's jurisdiction was unsuccessfully challenged by Ms Ngwele, which then led to a successful application to the Supreme Court by Ms Ngwele for judicial review to prohibit the Master from hearing the application; see *Ngwele v The Master of the Supreme Court* [2020] VUSC 247. In that application there was considerable focus on the different functions of sections 58 and 59 of the Land Leases Act. That was then followed by an appeal from that decision to the Court of Appeal by Bred (Vanuatu) Limited, which resulted in the ruling that the Master did not have jurisdiction to deal with such applications: *Bred (Vanuatu) Ltd v Ngwele* [2021] VUCA 118. Hence the appeal was dismissed. As the Court of Appeal said at [8], the appeal stood or fell on the issue of the Master's jurisdiction.

9. In the course of short remarks about the other ground of appeal, the Court of Appeal stated at [13] that section 59 applications did not first require the filing of a Claim and the making of any orders under section 58 of the Land Leases Act as they are stand-alone applications. The Court went on to state that:

> *"... in accordance with the Rules, the application must set out both the orders sought and the grounds relied on (the mortgagor's default) and must be filed with a sworn statement in support..."*

10. Following the Court of Appeal decision, the strike out application went to the primary judge to hear the remaining two grounds of the application not answered by the Court of Appeal judgment. The primary judge dismissed the application to strike out in a judgment of 26 May 2021, which is the subject of the present appeal.

11. The remaining grounds of the strike out application considered by the primary judge were that: (i) the section 59 application contained no grounds and therefore denied Ms

Ngwele the ability to file a proper defence, and (ii) it was a re-litigation of Civil Case No. 15/746 and accordingly an abuse of process and *res judicata*.

C. The Decision

12. The primary judge in the judgment of 19 February 2021 set out the background to the application and what had transpired previously between the parties, in much the same terms as described above. On the appeal, counsel for Ms Ngwele accepted that the judge's recital of the background to the claim (occupying 19 lines of text) represented the grounds of the claim, in terms which would satisfy the Rules and fairly put Ms Ngwele on notice of what she had to meet. Counsel for Bred (Vanuatu) Limited accepted that they were accurate.

13. The primary judge considered that the formal demand of 25 April 2019 and the plentiful history of the litigation between the parties meant that there could not be any confusion by Ms Ngwele regarding the grounds of the current section 59 application. That is clearly correct. The words of the Court of Appeal quoted above were merely a recital of the content of the relevant Rule. The primary judge considered that in this instance Ms Ngwele well understood that there was a mortgage which had been breached, and that there then followed a formal demand which had been served but not answered. There was accordingly, in the primary judge's view, no breach of natural justice

14. The overriding objective of the Rules is to deal with cases justly, and that involves dealing with cases expeditiously, and efficiently: see Civil Procedure Rules, Rule 1.2; and includes, in Rule 1.5, the duty of counsel to assist the Court to achieve that objective. Where, as here, it is clear from the circumstances and the past history of the dispute what the issues in the case are, it is appropriate for the judge who is managing the case to proceed without strict compliance with the Rules where strict compliance would simply involve unnecessary expense and delay. If, in the course of a hearing a matter arises which takes one party or the other by surprise, then the judge will ensure that the necessary opportunity to present the case on that issue is given, and in certain circumstances may not permit the point to be taken.

15. In relation to the second remaining ground the primary judge held that the present section 59 application was quite different to that in Civil Case No. 15/746 as the present application followed the default which led to the 25 April 2019 formal demand and not the default which had led to the 13 June 2014 formal demand. While the same mortgage was involved in both instances, the primary judge considered the section 59 applications related to quite different time periods and different defaults. Accordingly, the primary judge held that principles of *Anshun estoppel* and *res judicata* had no application to the present application.

D. The Appeal

16. The Notice of Appeal set out five grounds. The Notice did not set out the relief sought. Mr Sugden sought leave to amend the Notice to include a prayer for relief, namely that

the primary judge's judgment be set aside, the section 59 application be dismissed and for costs in this Court and the Court below. Leave was granted without opposition.

17. The Notice of Appeal firstly contended that failure to adhere to the Court of Appeal's guidance that both the orders sought and the grounds for a section 59 application must be clearly set out was fatal to the present application. It was additionally submitted, secondly, that the primary judge's finding that Ms Ngwele well understood the case against her was an error of fact and law.

18. Thirdly, it was contended that mortgage No. 12/0923/394 could no longer be validly enforced following the disposal of Civil Case No. 15/476. Relatedly, fourthly, it was submitted that the formal demand of 13 June 2014 ended the security given for advances under that mortgage.

19. Finally, it was submitted to be an error of law and fact that the primary judge had held the proceedings were not *res judicata.*

20. At the hearing before us, Mr Sugden argued grounds 1 and 2 together. He abandoned grounds 3, 4 and 5.

21. We now go on to consider the grounds argued.

E. Discussion

22. Mr Sugden submitted that the primary judge was bound to follow the Court of Appeal's guidance and the failure to do so was an error of law.

23. He maintained it was important that a section 59 application include both the orders sought and the grounds for the application. This was submitted to be a matter of natural justice and necessary so that a proper defence was able to be filed. Further, the supply of grounds would result in the applicant being able to be confined to the pleadings, and it would enable issues such as relevancy/admissibility of evidence be properly considered.

24. He insisted that without the grounds being set out, Ms Ngwele could not be sure what the case against her comprised. It was contended to be an error of fact that the primary judge had held that Ms Ngwele well understood the case against her due to the long history of the dispute.

25. Mr Sugden was unable to readily answer the proposition that the primary judge had successfully managed to completely understand and correctly summarise the applicant's case against Ms Ngwele, as confirmed by Ms Mahuk, while he apparently was not able to do so despite having the same material available to him.

26. Mr Sugden was also unable to refute the contention that his argument was no more than a submission that form should prevail over substance.

27. We consider Mr Sugden's arguments held no substance.

28. The guidance in the earlier Court of Appeal judgment that the grounds of a section 59 application must be set out can only be regarded as designed to ensure fairness to respondents. In this particular instance, the history of the dispute means there is no possibility that Ms Ngwele can be in any doubt about what Bred (Vanuatu) Limited contends against her in the current section 59 application.

29. A reading of paragraphs 4 to 14 of the primary judge's judgment sets that out, and enables any defences to the application to be adequately put forward.

30. We cannot see any error by the primary judge either in law or in fact. Accordingly the appeal must be dismissed.

F. Result

31. The appeal is dismissed.

32. Costs are to follow the event.

33. As the appeal had no merit, Ms Ngwele is to pay VT 100,000 towards Bred (Vanuatu) Limited's costs before this Court. That is in addition to the costs awarded by the primary judge.

34. The costs are to be paid within 21 days.

DATED at Port Vila, Vanuatu, this 16th day of July, 2021

BY THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

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Hon. Chief Justice
Vincent Lunabek