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

Civil Appeal
Case No. 22/2927 CoA/CIVA

BETWEEN: **Louis Kalnpel**
Appellant

AND: **The Government of the Republic of Vanuatu**
Respondent

Coram:	***Hon Justice J Hansen*** ***Hon Justice D Aru*** ***Hon. Justice V M Trief*** ***Hon Justice R White***
Counsel:	*L Kalnpel in person* *F Gilu for the Respondent*
Date of hearing:	*9 February 2023*
Date of Decision:	*17 February 2023*

REASONS OF THE COURT

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1. The Appellant defaulted in the repayment of loans made to him by the ANZ Bank (Vanuatu) Limited (ANZ). The action taken by ANZ to enforce mortgages over two properties the Appellant had provided as security has given rise to repeated litigation in the Supreme Court. Throughout that litigation the Appellant has represented himself.

2. In the decision giving rise to the present appeal (*Kalnpel v Republic of Vanuatu* [2022] VUSC 227), the primary Judge dismissed two Constitutional Applications brought by the Appellant.

3. In the first Constitutional Application filed on 14 December 2021 (Action No. 4126/2021), the appellant sought two "*orders*". First, an order that the "*failure or omission*" he alleged of the Registrar and the Sheriff of the Supreme Court to notify him that an application he had filed in the Supreme Court on 22 November 2021 would be heard on 23 November, with the consequence that it was heard in his absence, constituted an infringement of his rights under Articles 5(1)(d) and (j) of the Constitution. Secondly, that the failure or omission of the Registrar, the Sheriff and the Commissioner of Police on 23 November 2021 "*to consider*" that they should not commence eviction of the Appellant from the properties over which the ANZ held security while he had pending both an appeal and a set

aside application in respect of ANZ's enforcement orders constituted an infringement of his same constitutional rights.

4. In the second Application filed on 12 May 2022 (Action No. 932 of 2022), the Appellant sought an "*order*" that the decision of Andrée Wiltens J on 21 December 2021 that the file in Civil Appeal Case No. 3887/2021 be closed before the Court of Appeal could hear and determine the matter also constituted an infringement of his rights under Articles 5(1)(d) and (j).

5. The primary Judge struck out each of these applications.

6. For the reasons which follow, we consider that the Appellant's appeal against the strike out orders fails.

Factual Setting

7. On 14 June 2015, ANZ commenced in the Supreme Court enforcement action against the Appellant following his defaults in repayment of his loans (Action 110/2015). On 15 February 2016, the parties informed the Court of ANZ's agreement to restructure the Appellant's facilities, and sought an adjournment of the proceedings to allow a settlement to be finalized. The proceedings were then adjourned to a succession of management conferences to which it is not necessary to refer in detail. Of significance to the determination of the Appellant's complaints on the present appeal, are the orders made by Saksak J at the conference on 19 April 2016.

> "*After hearing discussions and arguments from both Mr Kalmet and Mr Kalnpel, and upon the Court being satisfied that the defendant has taken some positive steps to make repayments for his outstanding arrears of loan from January to 13 April 2016.*
>
> ***It is ordered that –***
>
> 1. ***The matter be adjourned for one month from the date hereof for the defendant to make final arrangements with the claimant bank about his housing rentals and employment status.***
>
> 2. ***Within the same period as allowed (above) the defendant is to file and serve a sworn statement to that effect.***
>
> 3. ***The matter be adjourned to Tuesday 19th May 2016 at 09:00 hours.***"

8. One month later, on 19 May 2016, the Appellant lodged an appeal against the continuation of Action 110/2015 and against the orders made on 19 April 2016. This was Action 1612/2016. The Appellant lodged this appeal despite the fact that he had not made any application in Action 110/2015 for a stay of the proceedings. He seemed to contend that he and ANZ had reached a binding settlement of Action 110/2015 on 12 February 2015 so that ANZ could not continue its action.

9. At an appeal management conference in Action 1612/2018 on 29 June 2016, Saksak J "*disallowed*" the appeal and directed that it "*not go beyond this point unless and until Rule 21 is complied with*". His Honour did so on the basis that the Appellant was seeking to appeal against interlocutory orders (the orders of 19 April 2016) but had not sought leave to do so as required by Rule 21(1) of the Court of Appeal Rules. The Appellant did not attend the hearing before Saksak J on 29 June 2016 and His Honour made the order disallowing the appeal in his absence.

10. Subsequently, on 3 August 2016, the Appellant did file an application for leave to appeal against the interlocutory orders made by Saksak J on 19 April 2016 and an application to stay ANZ's enforcement action in Action 110/2015 until his appeal in Action 1612/2016 was determined. That application was heard by Saksak J on 4 August 2016. His Honour dismissed the application for leave to appeal, noting that the orders of 19 April 2016 had been made for the purpose of "*helping the parties move forward in a sensible manner*" and that the appeal would be "*a waste of time and resources*". His Honour also dismissed oral applications made by the Appellant during the course of the hearing for the claims of ANZ to be dismissed. Instead, Saksak J ordered the Appellant to file his defence to ANZ's claim in Action 110/2015, together with his sworn statements in support, by 31 August 2016 and directed ANZ to file its response by 16 September 2016.

11. Instead of complying with the orders binding him, the Appellant on 15 September 2016 filed a document in the Action 1612/2016 entitled "*Amended Notice of Appeal against the Proceeding of Civil Case 110/2015 and the orders [of Saksak J] on 19 April 2016 and 4 August 2016*". He did not file any application for leave to appeal against the latter decision. The Appellant filed an application for a stay of proceedings in 110/2015 until his appeal was determined. That application was dismissed on 19 September 2016.

12. The substantive hearing in Action 110/2015 took place before Saksak J on 28 September 2016. In the judgment delivered on 6 December 2016 (*ANZ Bank Ltd. v Kalnpel* [2016] VUSC 164), Saksak J dismissed various collateral applications of the Appellant and rejected his claim that the agreement for restructuring of the loans constituted a final settlement of Action 110/2015. His Honour also noted that the Appellant had not in any event complied with his repayment obligations under the loan restructure. The Judge went on to make an order empowering ANZ to sell the mortgaged properties, to enter the properties, and granted ANZ leave to issue an enforcement warrant, as well as various consequential orders.

13. It is not clear, on the papers provided to this Court, whether ANZ took any enforcement action immediately after 6 December 2016 pursuant to the orders it had obtained that day.

14. By some means not explained in the documents before this Court, Action 110/2015 became Action 2346/2018.

15. On 5 November 2021, Saksak J issued to ANZ in Action 2346/2018 an "*enforcement warrant*". ANZ issued to the Appellant a "*Notice of Seizure*" and a "*Notice to Vacate*". The execution of the enforcement warrant was to take place on 23 November 2016. This prompted a flurry of activity, commencing with the Appellant filing at 4pm on 22 November 2021 an urgent application in Action 2346/2018 for a stay of ANZ's enforcement action and the setting aside of the Notices it had served on 5 November 2021. His substantive complaint seemed to be that it had been wrong of Saksak J to hear and determine Action 110/2015 on 6 December 2016 before his appeal in Action 1612/2016 (originally lodged on 19 May 2016 and purportedly amended on 15 September 2016) had been determined. The Appellant thereby overlooked that the place for him to agitate an appeal against the interlocutory orders of Saksak J in 2016 had been in an appeal against the final orders made by Saksak J on 6 December 2016, and he had never lodged such an appeal.

16. On the following day (23 November 2021) the following occurred:

(i) in the morning, the Appellant served a copy of his application of 22 November 2021 on the Sheriff's office and on the Police;

(ii) later that morning, Andrée Wiltens J dismissed the Appellant's application of 22 November 2021 in Action 2346/2018. Although the order of the Court shows that the Appellant was present at the hearing, the Appellant denied that this was the case. The primary Judge in the judgment under appeal presently accepted the "*probability*" that the Appellant had not been present at the hearing, at [14];

(iii) at 2:45pm, the Appellant filed a notice of appeal against the dismissal of his 22 November application, on the ground that he had not been informed of the hearing earlier that day and consequently had lost his right to be heard. This became Action 3887/2021. It is pertinent that the Appellant did not raise any other ground. In the filed notice of appeal, the Appellant mistakenly attributed the dismissal of his application to Saksak J instead of Andrée Wiltens J. Nothing turns on that mistake for present purposes;

(iv) at 3:20pm, the Appellant filed an application in Action 3887/2021 seeking a stay of the Notices and Warrant served by ANZ on 5 November 2021;

(v) the Registrar, in response to a letter from the Appellant of the previous day, informed him that Civil Appeal 1612/2016 "*is now completed before the courts*". He attached the copy of the order made by Saksak J on 29 June 2016 as evidence; and

(vi) at 4:24pm, the Appellant provided the Sheriff, who was then in the course of executing the enforcement warrant by, with copies of the documents he had filed in Action 3887/2021. Both the Sheriff and the Police Officers assisting him refused to desist from the eviction.

17. On 14 December 2021, the Appellant filed the Constitutional Application No. 4126/2021 to which we referred at the commencement of these reasons. By that application, he seeks to impugn the conduct of the Registrar and the Sheriff, in relation to the hearing before Andrée Wiltens J on 23 November 2021.

18. The appeal proceedings (Action 3887/2021) came before Andrée Wiltens J on 16 December 2021. The Minute of His Honour's orders states:

(1) Mr Kalnpel seeks to appeal a decision of 23 November 2021 by which an application by him for a stay of enforcement was declined;

(2) As this matter relates to an interlocutory determination, leave is required. There is presently no application for leave with the Court. Mr Kalnpel needs to address this;

(3) The issue of whether to grant leave to appeal will be heard at 2pm on 20 December 2021.

19. At the resumed hearing on 20 December 2021, Andrée Wiltens J ordered as follows:

"1. Mr Kalnpel seeks to appeal a decision of 23 November 2021 by which an application by him for a stay of enforcement was declined.

2. The judgment which was being enforced was made on 6 December 2016 in Civil Case 15/110 (which later became Enforcement case 18/2346) which granted, among other things the powers of sale to the ANZ Bank;

3. The enforcement sought to be stayed was to occur on 24 November 2021.

4. Mr Kalnpel submits that prior to the judgment of 6 December 2016 in Civil Case 15/110 being published, he had sought a stay of that proceeding as he had filed an appeal against an interlocutory decision in the case. The appeal was said to be filed on 15 September 2016, which created Appeal Case No. 16/1612. Mr Kalnpel submits his application has not been heard, and that accordingly the 6 December 2016 judgment should not have issued.

5. The Court file in Appeal Case No. 16/112 evidences that the matter was heard by Justice Saksak on 29 June 2016, and the appeal was disallowed, pending compliance with the rules first requiring leave before the filing of such an appeal. This undermines the basis of the application for a stay.

6. The Court file in Civil Case No. 15/110 evidences that no appeal against the decision of 6 December 2016 has been lodged. This was the decision being enforced, and as it was not appealed, it was right that enforcement action continue.

7. As this present matter relates to an interlocutory determination, namely the stay of an enforcement wrrant, leave is required.

8. No application for leave has been made – the Notice and Ground of Appeal document has simply been filed with the Court. The legal effect of what has occurred is that the Notice and Grounds of Appeal is a nullity and the matter cannot be entertained.

9. Accordingly, this file is now closed."

20. In short, Andrée Wiltens J found that the appeal in Action 3887/2021 was a nullity because the Appellant was seeking to appeal against an interlocutory order, and he had not sought the required leave to do so.

21. The next step of present significance occurred on 12 May 2022 when the Appellant filed an "*Urgent Constitutional Application*" asserting that the decision of Andrée Wiltens J of 20 December 2021 (wrongly stated by the Appellant as 21 December 2021) that Appeal 3887/2021 "*be closed before the Court of Appeal could hear and determine the matter*" constituted an infringement of the Appellant's rights under Articles 5(1)(d) and (g) of the Constitution. This became Action No. 933/2022.

22. Also on 12 May 2022 the Appellant applied for his two "*constitutional cases*" (Actions 4126/2021 and 933/2022) to be consolidated. This occurred in the sense that both applications were heard together.

The Decision of the Primary Judge

23. The primary Judge struck out each of the Constitutional Applications. His Honour struck out Action 4126/2021 on the application of the Attorney General who contended that it was inappropriate, an abuse of process, and clearly untenable. His Honour struck out Action 932/2022 at the first conference on the basis that it had no merit. He did so on his own motion, as he was empowered to do so: *Wass v Republic of Vanuatu* [2019] VUCA 11 at [25] – [27].

Constitutional Applications generally

24. Constitutional Applications may be brought in the Supreme Court to enforce rights guaranteed by the Constitution. For the purpose of this appeal, those rights are found in Article 5, which provides relevantly:

> ***"Fundamental rights and freedoms of the individual***
>
> *(1) The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health –*
>
> *...;*
> *(d) protection of the law;*
> *...;*
> *(j) protection for the privacy of the home and other property and from unjust deprivation of property;*
>
> *..."*

25. The "*protection of the law*" to which Article 5(1)(d) refers is elaborated in Article 5(2). However, as the judge noted in the decision presently under appeal, Article 5(2) can have no application in this case because it is concerned only with criminal charges and trials. We accept however that the protection of the law to which Article 5(1)(d) is not confined to criminal charges and trials.

26. Article 6 of the Constitution provides for the enforcement of the fundamental rights referred to in Article 5. It provides:

> ***6. Enforcement of fundamental rights***
>
> *"(1) Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.*
>
> *(2) The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right."*

27. The roles of Articles 5 and 6 were explained by this Court in *François v Ozols* [1998] VUCA 5 as being to regulate the relationship between the Republic and its people. The Court went on to say that Article 5 is "*a* covenant *by the Republic* (subject only to a qualification in respect of a non-citizen) that, in its relationship with them, the Republic will recognize the fundamental rights and freedoms set out in Article 5" and that the provisions of Article 6 "*provide the means by which compliance* ***by the Republic*** *can be enforced*".

(Emphasis added)

28. The Court also said that Articles 6 and 53 "*provide a new procedure for seeking the review of* ***administrative*** *decisions by organs of government and public officials, and the correction of inappropriate, unlawful or unjust exercises of government power.*"

(Emphasis added)

29. This understanding of Articles 5 and 6 indicates, in our view, that applications under Article 6 are not available in respect of decisions of the Supreme Court. That is because the Supreme Court is not the Republic. Instead, it is to be the means by which individuals who consider that their fundamental rights have been infringed may obtain redress. It is not to be expected that the Constitution contemplates that individuals would have to apply for redress for an infringement to the very Court said to have engaged in that infringement. Moreover, the Constitution requires that the Parliament provide for appeals from the Supreme Court to a Court of appeal (Article 50) and thereby provide means by which such infringements of fundamental rights as may occur in decisions of the Supreme Court may be redressed. We note in this respect the decision in *Nari v The Republic of Vanuatu* [2015] VUSC 132 at [11] – [15] and the decisions of the Privy Council referred to therein.

30. The Court did not receive submissions on this important issue and the disposition of this present appeal does not require a final decision on it. In those circumstances, we will refrain from expressing a final view and will address the principal issues arising on the appeal.

The Appeal to this Court

31. The Appellant's notice of appeal and his submissions in support were prolix, and with respect to him, diffuse, diverse and seemingly directed to having this Court engage in some general review of many of the decisions of the Supreme Court we have recounted in the above chronology. Such a course is inappropriate, especially having regard to the limited content of the constitutional applications determined by the primary Judge.

32. Given the diffuse nature of the Appellant's submissions, we consider it appropriate to proceed by addressing the matters raised by the particular orders which the Appellant sought in the two Constitutional Applications. Like the Judge, we will consider the two Applications separately.

Constitutional Application Action 4126/2021

33. The Appellant's claim that his urgent application of 22 November 2021 had been heard and determined in his absence by reason of the "*failure or omission*" of the Registrar and the Sheriff to inform him of the hearing before Andrée Wiltens J on the morning of 23 November 2021 was bound to fail for the reasons which follow.

34. First, as in all cases in the law in which a claimant alleges a failure or omission by another to act in a certain way, the claimant must first establish that the person was subject to a duty or obligation to do so. Persons do not infringe an entitlement of another by failing to do something which they are not bound to do. In this case, the Appellant had to establish that it was the duty or the function of the Registrar and the Sheriff to notify him of the hearing before Andrée Wiltens J. He did not do so.

35. The functions of the Registrar are identified in ss. 40 and 41 of the Judicial Services and Courts Act 2008. Some of those functions are expressed in general terms, but none require the Registrar, as a matter of course in *all* matters, to notify the parties of *all* hearings. Nor do the Civil Procedure Rules 2002 impose such an obligation. The Appellant did not point to any general practice of the Supreme Court by which the existence of such an obligation on the Registrar could be inferred.

36. No doubt the Registrar may be directed from time to time by a judicial officer to give a Notice of Hearing before a judicial officer, but there is no evidence of such direction having been given in respect of the hearing before Andrée Wiltens J on 23 November 2021.

37. The claim that the Sheriff had the duty or function to inform the Appellant of the hearing before Andrée Wiltens J is even more baseless. The functions of the Sheriff specified in Section 43 of the Judicial Services and Courts Act do not include such a responsibility. Neither do the Civil Procedure Rules 2002. No one would sensibly regard the Sheriff as having such a function unless directed to do so by a judicial officer in the circumstances of a given case.

38. Even putting that consideration to one side, the Appellant's complaint that the hearing before Andrée Wiltens J proceeded in his absence is really a complaint of a denial of procedural fairness. It was the decision of Andrée Wiltens J to proceed in that way and it is fanciful to suppose that either the Registrar or the Sheriff participated in that decision. Instead, with respect to the Appellant, his claim in Action 4126/2021 has the appearance of a contrivance by which he seeks to involve two officers of the Court in a decision for which they had no responsibility at all.

39. We add that, like the primary Judge, we are far from satisfied that the decision of Andrée Wiltens J on 23 November 2021 is affected by a denial of procedural fairness to the Appellant. It may well be the case that Andrée Wiltens J appreciated, amidst the press of his other judicial work on the morning of 23 November 2021, that the Appellant's Application had to be determined urgently, and for that reason decided to proceed in the Appellant's absence. We also note that Andrée Wiltens J had the benefit of the Appellant's sworn statement which set out the matters on which he relied for his application.

40. The Appellant's complaint is really that he was not given an oral hearing, but it is not the case that procedural fairness requires in all cases that a litigant have an *oral* hearing: see by way of example in the context of administrative decisions the decisions in *Local Government Board v Arlidge* [1915] AC 120 at 132 – 133; *Jeffs v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551 at 566–7, 568–9. We accept however that generally the administration of justice will often require an oral hearing.

41. Finally, it cannot be held that the decision of Andrée Wiltens J deprived the Appellant of the protection of the law. The decision was, pursuant to s.48 of the Judicial Services and Courts Act, amenable to appeal, subject to a grant of leave pursuant to Rule 21(1) of the Court of Appeal Rules, to which we will return. The Appellant purported to exercise that right. We will return to the manner in which he did so when addressing the second Constitutional Application.

42. In the second part of the Action 4126/2021, the Appellant sought an order that the "*failure or omission*" of the Registrar, the Sheriff and the Commissioner of Police to "*consider*" whether to defer the eviction while his appeal and application to set aside the enforcement warrant were pending infringed his rights under Articles 5(1)(d) and (j).

43. Again, this application was bound to fail for a number of reasons. First the Appellant did not point to any duty or obligation of the named officers to "*consider*" deferring the eviction. Certainly, these were not rights bestowed on the Appellant by the Constitution.

44. Secondly, on the Appellant's own evidence, the Sheriff and the Police officers effecting the eviction did "*consider*" his request that they desist from the eviction. They refused to do so.

45. Thirdly, and in respect of the Registrar, there was no evidence before the Judge that the Appellant had even requested him to defer the eviction.

46. In relation to both aspects of the first Constitutional Application, we refer to the relief sought by the Appellant in the Constitutional Application and again on this appeal. In substance, he seeks to restore the situation to what it was before Saksak J made the orders on 5 November 2021 by having the Court set aside those orders and by having the secured properties returned to his possession. The Appellant overlooks that the orders of Saksak J on 5 November 2021 were made in enforcement of the orders entered on 6 December 2016, which amongst other things, required him to give possession of the secured properties to ANZ. As we will note later, the judgment of 6 December 2016 was a final judgment against which the Appellant has never lodged an appeal. The only reason the ANZ needed the orders of 5 November 2021 was because the Appellant had not complied with the Court's order that he give possession to ANZ. There is an incongruity in the Appellant seeking in Constitutional Applications to invoke the protection of the law when he was himself acting in defiance of the law. We also note the inappropriateness of the Appellant seeking orders in the Constitutional Application which affects the interests of ANZ when it is not a party to the proceedings.

47. For these reasons, we consider that the Judge was correct to dismiss the Constitutional Application in Action 4126/2021.

Constitutional Application in Action 932/2022

48. By this application, the Appellant contends that the direction of Andrée Wiltens J on 21 December 2021 that the file in Action 3887/2021 (the appeal lodged on 23 November 2021) be closed infringed his rights under Articles 5(1)(d) and (j).

49. As previously noted, the appeal in Action 3887/2021 was lodged against the decision of Andrée Wiltens J (not Saksak J) dismissing the application to stay the enforcement proceedings and to set aside the enforcement orders which the Appellant had filed on 22 November 2021.

50. A conference in the appeal proceedings took place before Andrée Wiltens J on 16 December 2021, and as noted, His Honour told the Appellant that, as the order made on 23 November 2021 was interlocutory, he required leave to appeal. The Judge adjourned the conference to 20 December so as to give the Appellant the opportunity to apply for leave and to consider any application for leave he may make. Despite that clear indication, the Appellant did not file any application for leave.

51. The orders and reasons of Andrée Wiltens J on 20 December 2021 have been set out earlier in these reasons. In essence, the Judge ordered that the appeal file be closed because, without an application

for leave to appeal, the Appellant's purported appeal was ineffective. Plainly, this was a correct decision having regard to Clause 21(1) of the Court of Appeal Rules:

> *"21. (1) No notice of appeal against any interlocutory order of the [Supreme] Court, whether made at first instance or in exercise of its appellate jurisdiction, in any civil case or matter shall be filed unless leave to appeal has first been obtained by a judge of the [Supreme] Court ... or, if such leave be refused, from the Court of Appeal."*

52. The terms of Rule 21(1) are strict: an appeal against an interlocutory order is not to be filed without the appellant having first obtained a grant of leave to appeal. In practice, and despite the terms of Rule 21(1), applications for leave to appeal are often contained in the notices of appeal and, sensibly, no issue is taken about that.

53. Rule 21(1) distinguishes interlocutory orders (orders which do not finally determine the rights, duties and obligations of the parties to a proceeding – Rule 7.1 of the Civil Procedure Rules) from final orders which do have that effect. Sometimes the distinction between final orders and interlocutory orders can be difficult to draw – see the discussion in *Hall v Nominal Defendant* [1966] HCA 36, 177 CLR 423 and in *Licul v Corney* [1976] HCA 6, 1994 180 CLR 213 at [11]. However, the orders of Andrée Wiltens J on 23 November 2021 which the Appellant wished to appeal were plainly interlocutory in nature. They did not finally determine the rights of the Appellant and ANZ: only whether the enforcement of the final order made by Saksak J on 16 December 2016 should be stayed in the circumstances then known to the Court. It was open to the Court to re-open or vary its decision on a proper application with proper evidence. The Appellant was told on 16 December 2021 that he required leave to appeal and was given an adjournment in which to make the application. He chose not to do so.

54. The protection of the law guaranteed by Article 5(1)(d) did not free the Appellant from his obligations to comply with the law and its procedures. Even if the Appellant disagreed with the view that leave was required, it would have been a relevantly simple matter for him to have made the application. If he had applied for the leave and it had been refused by Andrée Wiltens J, he could then have renewed his application to the Court of Appeal.

55. When this is understood, it could not be held that the decision of Andrée Wiltens J on 20 December 2021 involved any infringement of the Appellant's fundamental rights under the Constitution. Instead, he was responsible himself for filing a notice of appeal which was ineffective.

56. The Appellant submits before this Court that it had been inappropriate for Andrée Wiltens J to deal with the appeal file because the judgment against which he wished to appeal had been made by His Honour. It is often convenient for a judge with involvement in a matter to consider applications for leave because of his/her familiarity with the matter. That does not offend the principle that justice be administered impartially because, if that judge does refuse leave, the application for leave can be renewed before the Court of Appeal.

57. Having regard to all of these circumstances, the primary Judge was correct to find that the Constitutional Application in Action 932/2022 was devoid of merit and should be dismissed.

58. We note these matters concerning the Appellant's two Constitutional Applications:

(a) There was no doubt about the Appellant's indebtedness to the ANZ. He had borrowed significant sums from it and, as Saksak J found in the judgment on 6 December 2016, had not even complied fully with his repayment obligations under the loan restructure of 12 February 2016;

(b) The place for the Appellant to advance any evidence and submissions to the effect that the ANZ's claim in Action 110/2015 had been compromised by the restructure agreement of 12 February 2016 was in Action 110/2015 but the Appellant did not ever file a defence to ANZ's claim;

(c) Despite that, the Appellant was permitted to advance that defence at the trial of Action 110/2015, and it was rejected;

(d) The Appellant also complained of the interlocutory orders made by Saksak J during the course of Action 110/2015 and before its trial. It was open to him to raise the same issues at the trial before Saksak J and, if he considered that the final judgment was affected by errors in those decisions, to appeal against that judgment;

(e) The Appellant did not ever appeal against the judgment of Saksak J on 6 December 2016, let alone the orders empowering ANZ to sell the mortgaged properties and requiring him to give ANZ possession of them;

(f) The Appellant did commence a constitutional application on 25 November 2019 seeking, in the diverse ways, to complain of the judgment of Saksak J on 6 December 2016. That application was dismissed on 16 December 2019 as entirely lacking in merit: Constitutional Case No. 19/3214 SC/CON.

59. These matters, together with our reasons for judgment above, suggest that the Appellant's two Constitutional Applications and the appeal to this Court have a frivolous and vexatious quality. The Appellant has had the protection of the law. He may be disappointed with the outcome of his litigation but his present use of Constitutional Applications is inappropriate. We repeat the observations of d'Imecourt CJ in *President of the Republic of Vanuatu v The Attorney General* [1992] 2 Vanuatu Law Reports 575 at 591 and cited by the present Chief Justice in *In re the President's Referral* [1998] VUSC 18:

"[G]reat caution will be exercised by the Supreme Court of Vanuatu to ensure that the safeguards guaranteed under the Constitution are not abused and that its value is not diminished by applications to the Supreme Court that are frivolous, vexatious or abuse of the process of the Court."

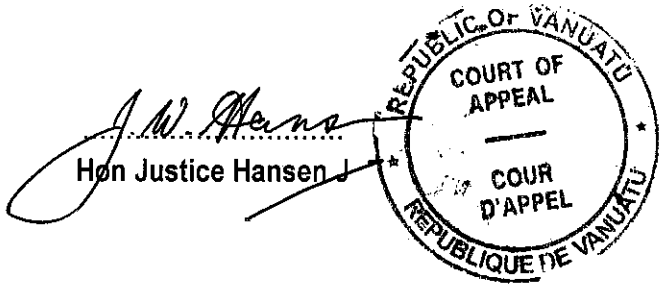
Conclusion

60. For the reasons given above, the appeal is dismissed.

61. The Solicitor General did not seek costs. Accordingly, we make no order with respect to the costs of the appeal.

DATED at Port Vila, this 17th day of February 2023

BY THE COURT



Hon Justice Hansen J