IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Appeal Jurisdiction)

Civil Appeal Case No.04 of 2012

BETWEEN: JOSHUA MATHEW
Appellant

AND: CHIEF GIDEON ORHAMBAT
First Respondent

AND: JACK TAMAI
Second Respondent

Coram: ***D. V. Fatiaki***

Counsel: *Mr. T. J. Botleng for the Appellant*
Mr. R. Tevi for the Respondents

Date of Judgment: *11 July 2014*

JUDGMENT

1. On 20 March 2012 the Magistrates' Court sitting at Lakatoro, Malekula delivered a judgment in Civil Case No. 23 of 2011 dismissing the appellant's claim in its entirety.

2. The appellant had claimed that agents and/or servants of the defendants had damaged a boundary fence erected on the appellant's land at "*Lamu*" near Wearu village thereby causing damage of VT374,370. The respondents who denied the claim are the chief of Wearu village and his cultural advisor respectively.

3. At the trial the claimant gave evidence of the costs he incurred in purchasing materials for his fence. He also called an expert witness who had visited the land and estimated the value of the damage that was caused to the appellant's fence posts and barbwire. The appellant's case was that the persons who damaged his fence were members of the first respondent's village and acted as his servants and agents when they damaged the appellant's fence.

4. The respondents also gave evidence and called three (3) other witnesses who were instrumental in damaging the appellant's fence. The latter 3

witnesses all frankly admitted damaging the appellant's fence on two occasions but all denied they had acted as servants or agents of the respondents. They had collectively and independently agreed to damage the appellant's fence, in their words,: "*to protect the chief*" (whatever that means).

5. The trial magistrate who saw and heard the witnesses, made two (2) crucial findings against the appellant as follows:

> "*16. The claimant has failed to prove on balance of probability that the first and second defendants instructed or coerced members of the Wearu village to cause damage to the claimant's property during August and September 2010.*
>
> *17. The claimant also failed to prove that members of Wearu village were acting in their capacity as servants and agents of the defendants. The common principles for a person to be recognized as a servant or agent is if such person is employed or paid a commission for the service they undertaken. There is no evidence of a written agreement or oral agreement between the defendants and the members of Wearu village to damage the property.*"

6. In brief, the claim was dismissed because the appellant had failed to establish to the required standard, that the persons who actually caused the damage were acting as the servants and/or agents of the respondents at the time.

7. The appellant appealed the decision on 3 grounds as follows:

> "*1. The learned magistrate fail to hold that the respondents did not seek clarifications from their agents if they damage the appellant's fence and posts at Lamu land;*
>
> *2. The learned magistrate fail to hold that the respondents' servants and agents made admissions during the trial that they work as the respondents' agents and servants;*
>
> *3. The learned magistrate fail to hold that the respondents' servants and agents damaged the appellant's posts and fence at Lamu during the course of their employment.*"

8. If I may say so, ground (1) appears to contain an implied concession that the perpetrators (for want of a neutral term) were not agents of the respondents and that there was no prior arrangement or engagement of the perpetrators by the respondents to damage the appellant's fence.

9. As for ground (2) the judgment of the trial magistrate clearly records (without comment, discussions, or elaboration) that each of the persons who frankly admitted damaging the appellant's fence had done so: "*... to protect his chief*". The judgment also records that each perpetrator denied acting with the knowledge of or on instructions of the respondents. In respect of the perpetrators the trial magistrate found each: "*a credible and reliable witness*" who was unshaken in cross-examination.

10. Ground (3) fares no better as there was not a shred of evidence before the trial magistrate that the perpetrators were either paid employees or commission agents hired by the respondents to damage the appellant's fence or, for that matter, had been instructed, counseled, or procured to do so.

11. When the appeal was called for hearing counsel for the appellant sought an adjournment as he had an urgent matter to attend to outside Lakatoro. After discussions it was agreed that the appeal could be dealt with by way of written submissions on two agreed issues as follows:

> "*(1) Was an implied agency raised on the evidence before the trial magistrate between the defendants and the 3 defence witnesses who actually damaged the claimant's property?*
>
> and
>
> *(2) If so, did the trial magistrate err in rejecting that evidence? of implied agency?"*

12. On 18 September 2013 appellant's counsel filed his submissions and this was eventually responded to by the respondents' counsel on 10 June 2014 after some prompting from the Court. I have found the submissions helpful.

13. The gist of the appellant's arguments is conveniently encapsulated in the following paragraph of counsel's submission where he writes:

> "*It is submitted that the evidence demonstrated that the Chief of Weary village had an on-going issue with Joshua Mathew* (over his

boundary fence). *Thus his servants and agents had to cut Joshua Mathew's fence and posts to show their frustration and anger. It was done during the course of their employment in order to display the chief's frustrations and that they would do anything to defend their chief*".

I confess to some difficulty in understanding or accepting the proposition that the mere existence of an "*on-going issue*" between 2 parties necessarily leads to unlawful acts by an unaffected third party.

14. The respondents' response is equally straight forward in his counsel's submissions where he writes:

> "*... before any relationship could be defined between two parties on an agency relationship point of view, one must be sure that the two parties were conducting their relationship on an agency basis ...*
>
> *In a society like Vanuatu, the people under the authority of a chief were never regarded as agents of that particular chief. Therefore, in order to say that a person is acting as an agent of his chief ... that person has to satisfy the elements of such a relationship. ... (such as) ... payments in the form of money or in kind could easily justify such a relationship. In this particular case there was no such comment. The only relation that brings the issue of implied agency is the fact that the 3 defence witnesses address the first respondent as their chief*".

and counsel also writes:

> "*In fact, the appellant should have claim for damages against the 3 defence witnesses and not Chief Orhambat and Jack Tamai ... there was no authorization made by the Chief, and nor does the chief made individual payments to individual defence witnesses to commission them for their actions.*"

15. The learned editor of **Bowstead on Agency** (15th edn) states in Article 3 (at p. 28):

> "*The relationship of Principal and Agent may be constituted –*
>
> *(a) By agreement, whether contractual or not, between principal and agent which may be express or implied from the conduct or situation of the parties*".

16. I also accept as correct, the submission of appellant's counsel:

> "*... that an agency may exist by reason of express or implied agreement between the parties. Where agency between the parties is not by express agreement, the existence of agency may as a matter of law be determined objectively from the conduct of the parties and the nature of the relationship*".

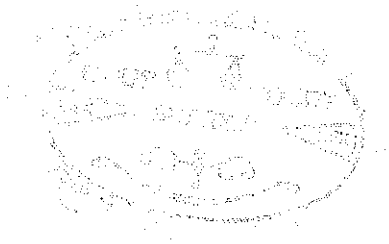
17. In the present appeal, in the absence of express agreement, what can be implied from: "***the conduct***" or "***situation of the parties***" (viewed objectively)?

18. The trial magistrate was plainly aware **(i)** of the issue or disagreement that existed between the parties surrounding the appellants damaged fence which was erected on a customary land boundary that was shared by the appellant and the first respondent; **(ii)** of the unsuccessful attempts by the Lakatoro police to reconcile the parties; and **(iii)** the appellant's failed attempts to get the first respondent to sign an agreement to compensate him for the damage caused to his fence. There was also the matter **(iv)** of the appellant's unpaid fine for his "*disrespectful manner*" towards the first respondent his traditional chief. That was the "***situation***" that existed between the parties before the trial magistrate.

19. As for the "***conduct of the parties***", the trial magistrate had the sworn denials of the respondents and of the actual perpetrators that they had not acted as servants or agents of the respondents in damaging the appellant's fence, against, the appellant's bare uncorroborated (denied) assertion that the first respondent had personally accepted responsibility for the damage caused to his fence and each perpetrators' admission of protecting his chief.

20. If I may say so, even if there had been such an acceptance (which is denied), that alone, does not give rise to any culpability on the first respondent's part. Such an acceptance, in my opinion, is equally consistent with innocence and is readily explained by the first Respondent's paternal chiefly position vis-à-vis the perpetrators.

21. Although not specifically highlighted in the judgment, the damage to the appellant's fence resulted in the appellant's cattle escaping and "*damaging* (the respondents') *crops*". That factor in my opinion, would also have been a strong "*disincentive*" for the first respondent to damage the appellant's fence if at all.



22. In my view the "*agreed issues*" raises matters of both fact and credibility which a trial court is singularly suited to determine and which this court would upset only where it is clearly demonstrated that the trial court ignored relevant material or had not properly assessed the evidence or made findings that were not supported by the evidence. That is a heavy onus placed on the appellant in this appeal which, I find, has not been discharged.

23. Accordingly the appeal is dismissed and the appellant is ordered to pay the respondents the costs of the appeal which is summarily assessed at VT40,000 each to be paid by 30 July 2014.

DATED at Port Vila, this 11th day of July, 2014.

BY THE COURT

D. V. FATIAKI
Judge.