

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

Civil
Case No. 19/1985 SC/CIVL

BETWEEN: National Bank of Vanuatu Limited
Claimant

AND: Estate of the late Colin Pierre Venter
First Defendant

AND: Ritana Brenda Jeursen
Second Defendant

AND: Republic of Vanuatu
Third Defendant

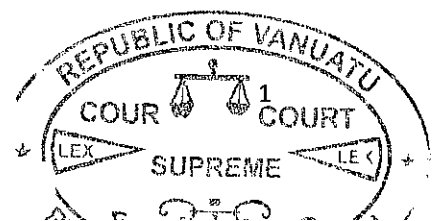
AND: Matilda Cole and Dennis Cole
First Interested Parties

AND: Jenver Inc.
Second Interested Party

Date of Hearing: 26 October 2021
Before: Justice V.M. Trief
In Attendance: NBV– Mr M. Hurley
First Defendant – no appearance (excused)
Second Defendant & Interested Parties – Mr M. Fleming, by phone link from Australia and Mr Berger present
Third Defendant – Mr K. T. Tari
Date of Decision: 27 October 2021

DECISION AS TO STRIKE-OUT APPLICATION

1. The Claimant National Bank of Vanuatu Limited ('NBV') sued for mortgagee power of sale orders in relation to the registered mortgage over leasehold title no. 04/2642/001. The registered proprietors of leasehold title no. 04/2642/001 are Colin Pierre Venter (deceased; his estate is named as First Defendant) and the Second Defendant Ritana Brenda Jeursen. They became the registered proprietors under the Change of Name Form registered on 12 March 2013.



2. The Second Defendant and Second Interested Party's Application to Strike Out was filed on 17 August 2021 (the 'Application'). The Orders sought were:

1. *Claim of the Claimant filed 8 August 2019 be struck out.*
2. *Indemnity Costs.*
3. *Any other order deemed suitable.*
4. *Counsel be allowed to appear by video.*

3. Mr Hurley submitted that:

- a. By letter dated 23 July 2021 (at p. 66 of the attachments to the Sworn statement of Paul Gambetta), the Director of Lands gave notice of his intention to exercise his power under s. 99 of the *Land Leases Act* [CAP. 163] (the 'Act') to cancel the registration on 12 March 2013 of the Change of Name Form that changed the name of the lessee of leasehold title no. 04/2642/001 from the Second Interested Party Jenver Inc. to Mr Venter and Ms Jeursen, stating *inter alia* that:

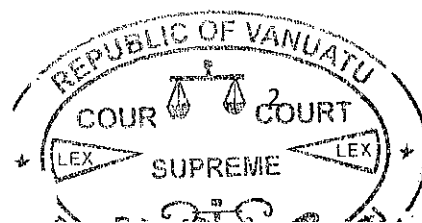
This is... formal notice of the Director of Lands' intention to correct the mistake erred in registering Colin Pierre Venter & Ritana Brenda Jeursen as the proprietor over the subject land lease title.

... the entry made to change the name of the lessee was not in accordance with the Land Leases Act [CAP. 163], it is a wrongful, erroneous and imperfect registration that must be rectified pursuant to section 99 of the Land Leases Act.

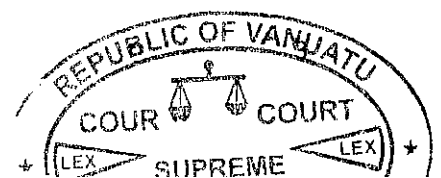
This will be done by the Director rectifying the Register to declare the actual interest registered to be of Jenver Incorporation as the correct and legal proprietor of land lease title 04/2642/001.

Therefore, in accordance with section 99 under the Land Leases Act, you have 15 days effective from the date of this letter to provide to the Director of Lands, Survey and Land Registry your response.

- b. Mr Hurley then met with the Attorney General, Mr Tari and the Director of Lands following which the Attorney General by letter dated 5 August 2021 to Mr Hurley stated that the Director's notice would not be withdrawn but would "stay its advancement" pending the outcome of this matter;
- c. On 8 October 2021, the Director of Lands Mr Gambetta filed his sworn statement. He stated at para. 7 of the sworn statement that a Certificate of Change of Name document is used by the Department of Lands for minor changes on the Register of any registered lease but should not be viewed as having an effect of transferring the recorded interest of the lessee to another person, which would defeat the purpose of Part 9 of the Act; and
- d. Mr Hurley brought the Director's sworn statement to his client's attention and obtained further instructions as a result of which his client is of the view that if this matter went to trial, the NBV would be unable to persuade the Court to find contrary to the Director of Lands' view;



- e. This is regrettable considering this matter is the third set of proceedings between the parties, following on from Civil Case No. 826 of 2015 heard by the Hon. Chief Justice and Civil Appeal Case No. 2845 of 2017 in the Court of Appeal;
 - f. The NBV accepts that once the Director of Lands exercises his power under s. 99 of the Act as per his 23 July 2021 notice, the registered mortgage that was the subject of the Claim would fall away as the mortgagor would no longer have an interest in leasehold title no. 04/2642/001 that the mortgage could attach to;
 - g. However, that would not be an end to the issues in dispute as he is instructed that as soon as the title reverts to Jenver Inc., the NBV will lodge a caution to protect its equitable mortgage and commence new proceedings; and
 - h. In the circumstances where the Application effectively succeeded because of the Director of Lands' 23 July 2021 notice, he is instructed that the NBV does not oppose the Court granting Order 1 sought in the Application.
4. The first order sought in the Application not being opposed, I ordered that the NBV's Claim filed on 8 August 2019 is **struck out**.
 5. There is no fetter to the Director of Lands exercising his power under s. 99 of the Act in the manner that he has given notice of in his letter dated 23 July 2021.
 6. There is also no longer any need for any stay of the Director of Lands' notice as stated by the Attorney General in his letter dated 5 August 2021.
 7. The other pleadings filed were:
 - a. Defence of the First-Named Defendant filed on 10 June 2020;
 - b. Reply of the Third and Fourth Respondents/Interested Parties filed on 2 December 2019;**
 - c. Amended Defence and Counter Claim of the Second Respondent filed on 6 November 2020;**
 - d. Reply to Amended Defence and Defence to Counter Claim of the Second Defendant filed on 1 February 2021;
 - e. Cross Claim of the Second Defendant and Second Interested Party against Third Defendant filed on 8 July 2021;**
 - f. Third Defendant's Defence to Cross Claim; and
 - g. Reply to Third Defendant's Defence to the Cross Claim of the Second Defendant and Second Interested Party.
 8. Mr Fleming and Mr Hurley were agreed that once the Director of Lands has exercised his power under s. 99 of the Act as he has given notice of in his 23 July 2021 letter,



there would effectively be nothing left for the Court to determine in the Second Defendant's Counter Claim and the Cross Claim against the Third Defendant.

9. However, Mr Fleming submitted that the one remaining issue from the pleadings, from the Reply of the Third and Fourth Respondents/Interested Parties (First Interested Parties Mr and Mrs Cole) filed on 2 December 2019, is the declaration sought under s. 17(g) of the Act.

10. The prayer for relief in the Reply of the Third and Fourth Respondents/Interested Parties is in the following terms:

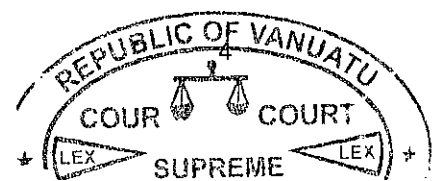
- A. *That claim/application of the claimant/applicant be dismissed.*
- B. *In the alternative, should the claimant obtain powers to sell the property that the third and fourth respondents be paid compensation of \$1,923,324 AUD plus 10% interest and any further costs incurred in caring for the property until sale pursuant to their section 17(g) of the Land Leases Act right and/or equitable proprietary interest.*
- C. *In the alternative, that the contract pleaded in paragraph 7 and 8 be satisfied with whoever the court determines in the lawful registered owner of the title.*
- D. *In the alternative, a declaration that the third and fourth respondents' equitable proprietary interest will continue for the length of the lease.*
- E. *Costs.*
- F. *Any other order deemed suitable.*

11. The first order sought in the Reply of the Third and Fourth Respondents/Interested Parties is that the Claim be dismissed. The declaration now sought by Mr Fleming under s. 17(g) of the Act was not sought in such terms in the Reply but even if it was, it was sought in the alternative. The Claim having been struck out, I need not consider nor make any of the alternative orders sought. Accordingly, with respect, I do not agree with Mr Fleming that a declaration as to s. 17(g) right remains for my determination and I decline to make such declaration.

12. In his written submissions emailed prior to today's hearing, Mr Fleming also sought a number of other orders including an order pursuant to s. 100 of the Act to restore Jenver Inc. as the registered proprietor, an injunction preventing any further proceedings or lodging of a caution over the property, and that Mr Hurley be restrained from acting or taking any further part in any matter in connection with the property. Mr Fleming submitted that the Court make these orders on the evidence before the Court.

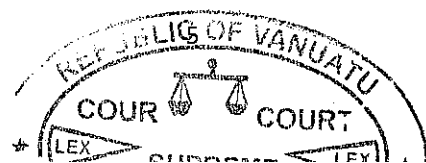
13. Mr Hurley submitted in response that the Court should not make a decision based on contested factual material as the Court has not made any factual findings. He cited the Court of Appeal judgment in *Gouras v NACA Ltd* [2020] VUCA 53 at [22]:

22. *There is a final observation to be made. The outcome of interlocutory applications such as the present will rarely be successful when there are matters of disputed fact. The admissibility of certain evidence and the weight to be given to certain evidence are matters for trial. Parties and counsel cannot expect the Court on such applications to hear a 'mini-trial' or to make a decision based on contested factual material. So care should*



be taken to ensure that any such applications are meaningful and cost effective. That observation is not intended to be critical of counsel or the parties in this particular matter.

14. Having neither conducted a trial in this matter nor made any factual findings, including that the subject registration was obtained by fraud or mistake, any order now made pursuant to s. 100 of the Act to restore Jenver Inc. as the registered proprietor would be based on contested factual material. I therefore decline to make such an order. In any event, the Director of Lands has already given notice of his intention to exercise his power under s. 99 of the Act to restore Jenver Inc. as the registered proprietor, which the NBV has accepted, hence the lack of opposition today to the Application and to my striking out of the Claim.
15. For the same reason that such orders made would be based on contested factual material, I decline to make the injunction sought preventing the NBV from commencing any further proceedings or lodging a caution, and restraining order against Mr Hurley.
16. Finally, indemnity costs were sought in the Application.
17. Rule 15.5(5) of the *Civil Procedure Rules* provides as follows:
 - 15.5 (5) *The court may also order a party's costs to be paid on an indemnity basis if:*
 - (a) *the other party deliberately or without good cause prolonged the proceeding; or*
 - (b) *the other party brought the proceeding in circumstances or at a time that amounted to a misuse of the litigation process; or*
 - (c) *the other party otherwise deliberately or without good cause engaged in conduct that resulted in increased costs; or*
 - (d) *in other circumstances (including an offer to settle made and rejected) if the court thinks it appropriate.*
18. Mr Fleming submitted that his clients are entitled to indemnity costs given that NBV officers were involved in the 2013 registration of the Change of Name Form, it is trite law that a Change of Name Form is not a registerable instrument, the three sets of proceedings since and that his clients have been put to great expense. Further, his clients made 5 offers to NBV to settle, all of which were rejected. Mr Fleming submitted that the itemised bill attached to his submissions was very reasonable.
19. Mr Hurley submitted that any costs order is resisted, much less one for indemnity costs. He submitted that his client also has been put to substantial costs in its honest and genuine belief in the validity of the Change of Name Form registered, the registration of which was never challenged in either of the previous two sets of proceedings in which Mr Venter and Ms Jeursen were at all times represented. Alternatively, if the Court were to order costs against the NBV, any such costs should be indemnified by the State as the Director of Lands could have said at any time since 2013 that the Change of Name Form was not a registerable instrument but has only stated so in his 23 July 2021 notice (acknowledging that the State was only recently joined as a party). As to the 5 offers to settle made, he submitted that the Court should



take into account the pleadings, evidence and stage that this matter was at at each of those times and not hold that against the NBV in rejecting the offers.

20. Mr Tari submitted that any costs must be assessed. He opposed any costs order against the NBV being indemnified by the State as the State was not added as a party in this matter until the Cross Claim was filed.
21. Again, I have not conducted a trial in this matter nor made any factual findings. Whether or not NBV officers were involved in the 2013 registration of the Change of Name Form and whether or not the registration of that Form was obtained by mistake are matters of disputed fact. Further, not having made any factual findings, I fail to see how I can determine that the NBV without good cause prolonged the proceeding or brought the proceeding in circumstances that amounted to a misuse of the litigation process or otherwise engaged in conduct that resulted in increased costs (rule 9.5(5)(a)-(c), *Civil Procedure Rules*).
22. As to the 5 offers to settle that were made and rejected, Mr Fleming's clients have effectively succeeded not after a trial but as a result of the Director of Lands giving notice of his own motion to exercise his power under s. 99 of the Act. In those circumstances, I do not see why the NBV's rejection of the offers should result in indemnity costs being ordered against it.
23. As to the submission that the State indemnify the NBV, I note that the State was added as a party on the filing of the Cross Claim on 8 July 2021. Within a month, the Director of Lands on his own motion gave his 23 July 2021 notice. The State has acted quickly to address the matter within the control and responsibility of the Director of Lands. Accordingly, I am not persuaded that the State should indemnify any party in this matter nor have costs ordered against it.
24. In the circumstances, costs should lie where they fall. I so order.
25. I thanked counsel for their submissions which assisted me.

**DATED at Port Vila this 27th day of October 2021
BY THE COURT**

V.M. Trief

V.M. Trief
Judge

