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

Civil
Case No. 23/3460 SC/CIVL

BETWEEN: **MALASIKOTO FAMILY represented by CHIEF SILU MALASIKOTO, TORIKI MALASIKOTO and FREDDY MALASIKOTO**
Claimants

AND: **JOHN NALWANG, Acting National Coordinator, Custom Land Management Office**
First Defendant

AND: **SILAS VATOKO, NAKMAU SAMBO and EDWIN MALAS and DEE-JONES VATOKO**
Second Defendants

Date of Hearing: ***5 June 2024***

Counsel: ***P. Fiuka for the Claimants***
G. M. Blake for Sambo Vatoko
F. Bong for the First Defendant
E. I. Nalyal for the Second Defendants – not present

Date of Decision: ***12 June 2024***

DECISION

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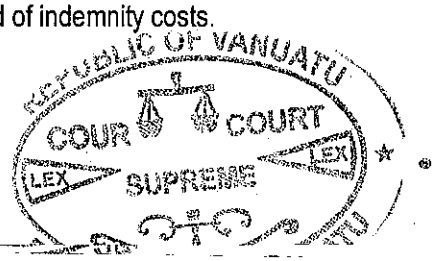
1. The application for Judicial Review has been discontinued by the Applicant, by notice filed on 13 May 2024. This followed the beginning of a Conference under Rule 17.8 of the Civil Procedure Rules. That Conference was adjourned to allow counsel for the Applicant to produce written submissions on the contested elements of the 17.8 Conference.

2. This decision relates to the application for costs filed by two of the Second Defendants, namely Nakmau Sambo and Dee-Jones Vatoko. There are no other applications for costs.

3. The application for costs is for indemnity costs to be ordered against the Applicant of VT 800,000. Indemnity costs are, it is submitted, appropriate because of behaviour at the ex parte stage of the proceedings and thereafter for pursuing a particularly hopeless claim.

4. The applicant in submissions addresses the latter part of the submission but does not address the former. Concerning the latter submission, of pursuing a hopeless case, the Applicant submits that there has been no finding of the strengths or weaknesses of the case by a Court, which, it is further submitted, must be a prerequisite for the award of indemnity costs.



5. It is correct to submit that there is no finding by a Court of pursuing a hopeless case, but by discontinuing the action, the applicant has ensured that there will never be such a finding. That will not preclude the Court seized of the matter to consider the same question based on the material filed within the proceeding.

6. The Rule 17.8 Conference had begun and written submissions were filed on behalf of these two names Second Defendants. It was adjourned to allow counsel for the Applicant to file written submissions in response when it became clear he was not prepared even to make oral submissions. At the adjourned hearing, or a few days in advance of that resumed hearing, the indication of discontinuance was given.

7. In submissions, counsel seeks to explain why the notice to discontinue was given seemingly through some agreement between the remaining 2nd defendant and the applicant, to the exclusion of these two named second defendants. Such an agreement cannot affect the rights and interests of people not a party to it. To discontinue without qualification means just what it says.

8. The rules provide for an award of indemnity costs. This court in determining the matter will attempt to apply those provisions as set out in Rule 15 5 (5). To do that requires consideration of the substance of the claim. Previous litigation, including multiple appearances in the Court of Appeal, led to the situation where, given that a family had been declared customs owners, a meeting was to be held of that family to determine who should represent the family in land dealings. That meeting, often referred to as a section 6H meeting, a name derived from the section of the legislation which governs such meetings, was properly arranged and commenced. The present Applicants did not appreciate the composition of the meeting and withdrew from the meeting before any decision being made.

9. The decision of those who remained at the meeting ultimately led to the disputed Certificate of Recorded Interest being issued.

10. In pre-filing correspondence, many and very serious allegations of dishonesty and corruption were made against the 1st defendant, his Minister and the 2nd defendants. Post-filing, attempts were made to obtain ex parte relief, all of which were unsuccessful. Ex parte applications were made and relief was granted on 18 January 2024. An inter partes application to discharge the interim relief was heard and refused in March 2024. That interim relief will now fall away as a result of the discontinuance.

11. In the claim, the only readily identifiable relief sought which could flow from a successful judicial review would be the quashing of the Certificate of Recorded Interest (the Green Certificate). Punishment for contempt is not a readily identifiable relief in judicial review proceedings nor is enforcement of previous Court of Appeal decisions. Thus, most of the prayer for relief would inevitably fail.

12. The parties, once representatives have been appointed following a properly constituted and minuted meeting are thereafter entitled to seek a further meeting to change the appointed representatives. This, it seems, is at the heart of the alleged agreement between the Applicant and one of the 2nd defendants. Whether such further meetings will occur and whether a different

decision will result is a matter of speculation. Unless and until such a meeting takes place and a proper determination is made, the representatives previously appointed remain so.

13. It seems from the above that this should, indeed, be categorized as hopeless. The CPR category is not so colourfully described. In the rules, in particular Rule 15.5 (5) (b) when proceedings are brought in circumstances or at a time that amount to a misuse of the litigation process, indemnity costs may be ordered. Equally under Rule 15.5 (d) in any other circumstances where the court considers it appropriate.

14. To commence litigation when you have walked out of a properly arranged meeting for your own reasons before the meeting has made any decision, to complain about the decision made by the meeting, in my view, falls within both Rule 15.5 (5) (b) and (d).

15. Indemnity costs will be awarded. The amount sought is VT 800,000 based on a charging rate of VT 30,000 per hour. Costs awarded on an indemnity basis should reflect all costs reasonably incurred and proportionate to the matters involved in the proceedings. Whilst the Applicants had sought to introduce all manner of irrelevant material, the issue itself is simple.

16. In my view, costs of VT 800,000, given the applicable test in Rule 15.5 (2), would be too high and a more reasonable figure should be VT 200,000.

17. Thus, an order for costs against the Applicants of VT 200,000 is awarded.

DATED at Port Vila, this 12th day of June, 2024.

BY THE COURT

Hon. Justice E. P. Goldsbrough

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