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

Judicial Review
Case No. 23/3460 SC/JUDR

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 of the Application:	***1st day of March, 2024***
Date of Delivery:	***6th of March, 2024***
Before:	***Justice E.P. Goldsbrough***
In Attendance:	***Fiuka, P for the claimants*** ***Yawha, D for the 1st defendants*** ***Nalyal, E for the 2nd defendants***

DECISION ON APPLICATION TO DISCHARGE INTERIM RELIEF ORDER

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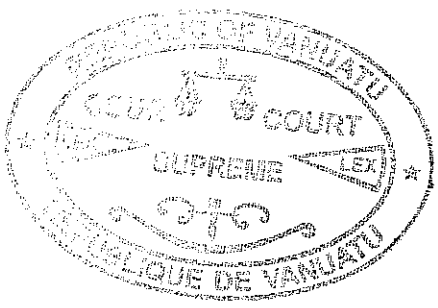
1. This is an *inter partes* application to discharge interim relief granted on an *ex parte* basis on 18 January 2024. The substantive matter is a Judicial Review of the decision of the National Co-Ordinator, Customary Land Management Office, to issue a Certificate of Recorded Interest (Green Certificate). The application for interim relief was filed at the same time as the application for Judicial Review of the decision of the National Co-Ordinator (Acting) of the Custom Land Management Office. An undertaking as to damages was also filed at the same time



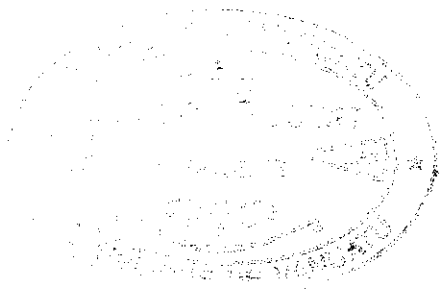
2. The Green Certificate, exhibited in illegible form as SM 15 to the sworn statement filed 19 December 2023 of the claimant/applicant Silu Malasikoto, was issued on 11 November 2023. A more legible copy is annexed as SM8 to a sworn statement filed 18 December 2023 by the same deponent. It shows Family Malasikoto amongst three other family as the custom owners of Pangona Custom Land.

3. In proceeds to record Silas Vatoko as representing Family Malasikoto. It seems that it is this provision that Family Malasikoto seek to have rectified.

4. Representatives of custom owners must be determined and recorded at a meeting called for that purpose under the relevant legislation that is the amended Land Reform Act. That meeting should be properly called and should include amongst its numbers the custom owners and members of the wider customary ownership group. Only the declared custom owners can decide who will represent them, even though the meeting will be attended by many more than the declared custom owners. It is the function of officials from the Custom Land Management Office to record the decisions of the meeting and to secure the signatures of the custom owners on the decision made at the meeting.

5. Family Malasikoto submit that they did not attend the meeting and so it was irregular. They further submit that they knew of the meeting but told the Co-Ordinator that they would not attend until after an awaited decision from the Efate Island Court. The submission did not include what that case was about but there is exhibited a letter from counsel about the case which the Efate Island Court struck out. The matter has been appealed and is pending a hearing. It seems to concern custom and in particular whether descent is patrilineal or otherwise.

6. Over the years, the holding of a meeting to determine who should represent the custom owners has been fraught with difficulty. Often, as counsel for the claimant confirmed, the claimant will be given notice but will make the decision not to attend because of other invited participant, suggesting that the other people of whom they do not approve or with whom they do not wish to associate are invited. When a meeting is delayed because of this and takes place outside of the time limits, they raise a complaint of none compliance with



orders. When meetings are held in their absence, after their choice not to attend, they complain.

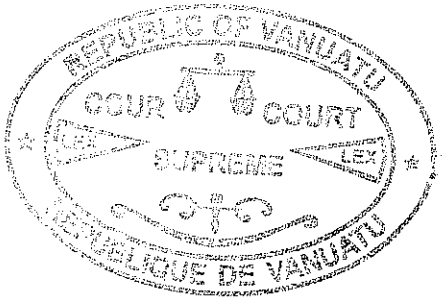
7. The same can be said to apply to Silas Vatoko and his supporters. They prefer to arrange and hold meetings without the wider Family Malasikoto. It is difficult to see how a meeting under the legislation (section 6 H) will ever successfully take place. That, perhaps, is dependent upon the skill of the National Co-Ordinator. Yet no demonstration of such skill has been in evidence yet.

8. By the same token, only declared custom owners can make the decision as to who will be their representatives. Whilst a larger group are entitled to attend the section 6 H meeting, the decision is that of the declared custom owners alone. There is nothing exhibited in the material from the 1st or Second defendants showing a record of any meeting at which they were declared to be representatives of the custom owners. That record of the meeting is a statutory requirement as is the agreement signed by the custom owners appointing their representatives. If that material were available, it would make this decision relatively straightforward.

9. The Green Certificate allows those named to deal with the land. Immediately following the issue of the Certificate, the 2nd defendants asked various groups to release money pending distribution. A request for six million to be released by a local estate agent for 'Christmas celebrations' is but one example.

10. All counsel present were asked to make submissions on the correct test to determine whether interim relief should be ordered and/or maintained. They were unable to do so, being unaware of the test to be applied. That was less than helpful.

11. As far as the Court is concerned, the applicant must show that there is a serious issue to be tried about its entitlement to relief; and it is likely to suffer injury for which damages will not be an adequate remedy; and the balance of convenience favours the granting of an injunction. The Court of Appeal has set out this test in *Valele Family v Touru* [2002] VUCA 3 and counsel are well advised to follow it. See also *Australian Broadcasting Corporation*



v Lenah Game Meats Pty Ltd (2001) 208 CLR 199 at [8]–[16], [60], [91] and *American Cynamid Co v Ethicon Ltd* [1975] AC 396 at 406.

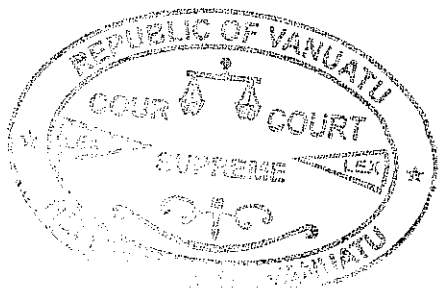
12. In order to obtain an interlocutory injunction (or an order for the preservation of property), the applicant must identify the legal (which may be statutory) or equitable rights which are to be determined at trial and in respect of which final relief is sought. The applicant for interim relief must also show that the balance of convenience is in favour of granting the relief. Relevant matters on this issue will depend on the nature of the case or the property in dispute, but may include such considerations as whether irreparable harm will be suffered by the plaintiff if the relief is not granted; whether damages will be a sufficient remedy and whether the defendant will be in a position to pay such damages if ordered; whether delay in making the application has or may prejudice the defendant in some way, e.g. if it would prevent him carrying on a successful established business; whether the interlocutory relief sought would overturn or merely maintain the status quo; and the sufficiency of the plaintiff's undertaking as to damages.

13. There is a serious issue to be tried here. In normal circumstances, as this is all about money, damages would be an adequate remedy. The balance of convenience is in favour of the 2nd defendants given the reluctance of the custom owners to participate in the process to appoint representatives.

14. The 2nd defendants maintain that they are part of the Malasikoto family, and the claimants are trying every which way to show that they are not part of that family. It is that very question that the Efate Island Court was asked and recently refused to determine. Whether the pending appeal will resolve the question is an open question.

15. Yet damages are only an adequate remedy if the money is still available to be handed over when the issue is finally resolved. If six million vatu is to be spent on Christmas celebrations, it must be in doubt as to whether there would ever be a further six million to come from the second defendants, in the event of an award made against them.

16. The effect of the decision of the Court of Appeal in 2022 was to confirm that the decision of the Efate Island Court in determining customary ownership included Silas Vatoko as



part of Family Malasikoto and therefore a member of the customary owners of Pangona Land. Subsequent attempts to exclude him from the family through pursuing decision based on the mode of descent have all been described as unnecessary to be determined.

17. Whilst this is but a preliminary view on the material and not in any way a determinative finding, it seems that presently all that is left to determine is whether, by proceeding in the absence of part of Family Malasikoto represented by Chief Silu, the Section 6 H meeting miscarried.

18. In the event, noting that damages are not likely to be paid if ordered and then considering the balance of convenience, the interim relief will remain in place. Nothing has been said by either party that important development will not take place or losses incurred if the land cannot be utilised. Money earned by the land is making local estate agents no doubt a tidy profit, and only the combative landowners lose out through being unable to cooperate to the extent that the situation can be resolved between them. The resolution rests in their hands. The application to discharge the interim order for interlocutory relief is dismissed

19. A Rule 17.8 Conference is ordered after the defence, now probably overdue, although the date of service of the claim has not yet been proved, is filed. That should not be too far into the future. Currently it is tentatively booked for 29 April 2024 at 09:30 hrs.

20. Costs of this application will be costs in the cause.

DATED at Port Vila this 6th day of March, 2024.

BY THE COURT

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E.P. Goldsbrough
Judge of the Supreme Court