

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

Judicial Review
Case No. 24/1966 SC/JUDR

BETWEEN: Richard Timothy Silhath & Derrick
Timothy Silhath
Claimants

AND: National Coordinator of the Custom Land
Management Office
First Defendant

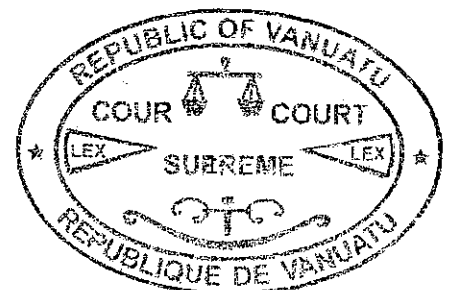
AND: Nicolas Nakar
Second Defendant

AND: Republic of Vanuatu
Third Defendant

Date: 11 March 2025
Before: Justice V.M. Trief
Counsel: Claimants – Mr R. Rongo
First & Third Defendants – Mr F. Bong
Second Defendant – Mr T.J. Botleng
Copy to: Sheriff of the Supreme Court

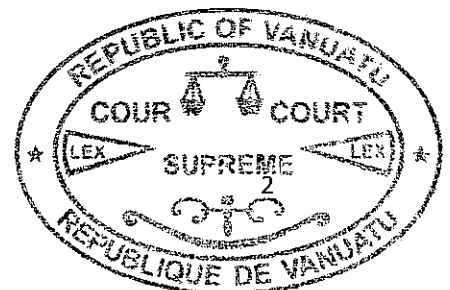
**DECISION AS TO NOTICE UNDER SECTION 6 OF THE STATE PROCEEDINGS ACT
AND AS TO RULE 17.8 MATTERS**

1. The Sheriff is requested to serve today's Orders on the Claimants and file proof of service by 4pm on 25 March 2025.
2. In para. 1 of the Orders dated 24 December 2024, I noted the following:

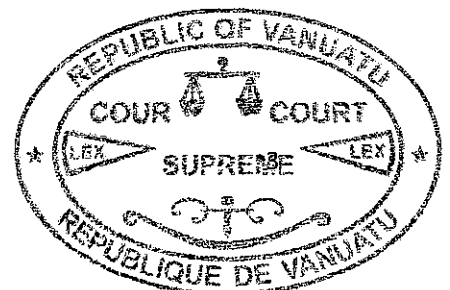


The Court's decision as to rule 17.8 matters is pending however it is alleged in para. 9(d) of the First and Third Defendants' Defence filed on 17 September 2024 that the Claimant failed to give notice to the State as required by s. 6 of the State Proceedings Act. There is no point in issuing a rule 17.8 matters decision if this proceeding cannot proceed due to non-compliance with s. 6 of the State Proceedings Act. Accordingly, the Sheriff is requested to serve today's Orders on the First and Third Defendants, and file proof of service, **by 4pm on 20 January 2025.**

3. The First and Third Defendants have not complied with the Court's Orders dated 24 December 2024 (at [2]) to file submissions and sworn statements by 4pm on 31 January 2024 as to whether or not notice was given pursuant to s. 6 of the *State Proceedings Act*.
4. On 29 January 2025, the Claimants filed Additional Sworn statement of Derrick Timothy attaching as "DT1" a copy of the letter to the Attorney General dated 19 June 2024 giving notice pursuant to s. 6 of the *State Proceedings Act*. This additional sworn statement was served on the Attorney General's on 31 January 2024 (proof of service filed on 14 February 2025).
5. This was conceded by the First and Third Defendants' Memorandum filed on 27 February 2025.
6. For the foregoing reasons, I am satisfied that **the Claimants gave notice** to the Third Defendant pursuant to s. 6 of the *State Proceedings Act*.
7. On 13 February 2025, the Second Defendant filed Application seeking strike-out of the Claim on the grounds of non-compliance with the Court's Orders and that the giving of a notice pursuant to s. 6 of the *State Proceedings Act* does not mean that the Claimants are directly affected by the decision under challenge or that the Claimants have an arguable case. First, I decline to strike out the Claim for non-compliance with the Court's Orders as the Claimants have filed a sworn statement, albeit late, attaching a copy of the notice pursuant to s. 6 of the *State Proceedings Act*. Secondly, the Second Defendant's Application is misconceived in that the Court will not assess the rule 17.8 matters with reference to the notice given pursuant to s. 6 of the *State Proceedings Act*, but with reference to the Claim. Accordingly, the Second Defendant's Application filed on 13 February 2025 is **declined and dismissed**. There is no order as to the costs of that Application.
8. I now set out the Court's decision as to the matters set out in rule 17.8 of the *Civil Procedure Rules* ('CPR').
9. Amended Claim filed on 22 August 2024. Sworn statements of Derrick T. Silhath filed in support on 27 June 2024, 1 August 2024 and 22 August 2024. Sworn statement of Robea Patrick Timothy filed on 29 July 2024.

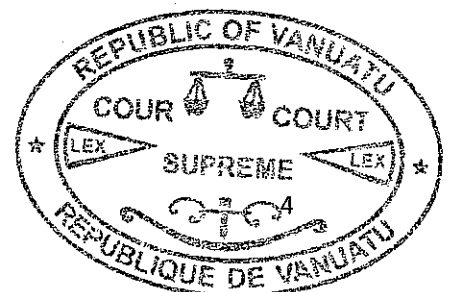


10. Second Defendant's Defence filed on 16 September 2024. Affirmed statement of N. Nakar filed in support on 16 September 2024. Reply to Second Defendant's Defence filed on 10 October 2024.
11. The First and Third Defendants' Defence filed on 17 September 2024. Sworn statements of Jason Moli filed on 12 November 2024 and Jimmy Pierre filed on 13 November 2024. Reply to First Defendant's Defence filed on 24 September 2024.
12. The Claimants filed submissions as to rule 17.8 matters on 21 November 2024. Despite the Orders of the Court dated 25 October 2024, the First and Third Defendants have not filed submissions.
13. Rule 17.8(3) of the CPR provides that the judge will not hear the claim unless he or she is satisfied as to all four matters set out in that rule:
 - (i) the Claimants have an arguable case (rule 17.8(3)(a), CPR);
 - (ii) the Claimants are directly affected by the decision under challenge (rule 17.8(3)(b), CPR);
 - (iii) there has been no undue delay in making the Claim (rule 17.8(3)(c), CPR); and
 - (iv) there is no other available remedy which resolves the matter fully and directly (rule 17.8(3)(d), CPR).
14. If the judge is not satisfied about those matters, he or she must decline to hear the claim and strike it out (r. 17.8(5), CPR).
15. Having considered the pleadings, the sworn statements and the submissions, I am satisfied of the following:
 - a) It is alleged in the Amended Claim that at all material times, the Claimants have resided on Nun custom land which is inside the larger Nivmeru custom land at North West Malekula, both of which lands have never had their custom ownership declared;
 - b) It is also pleaded in the Amended Claim that on 18 October 2005, the Joint Village Tribunal declared the Second Defendant as the custom owners of Tapenpel and Lamu custom lands at North West Malekula;
 - c) It is pleaded in the Amended Claim that the Claimants do not dispute the Second Defendant's custom ownership of Tapenpel and Lamu custom lands, however, the green certificate overlaps into the Claimants' Nun and Nivmeru



custom lands (undeclared custom ownership) as it covers the boundary where the Brenwei Hydropower Station is located;

- d) It is also pleaded in the Amended Claim that therefore on 18 June 2024, the Claimants filed a new claim with the CLMO for the custom ownership of the Nun and Nivmeru custom lands;
- e) The First and Third Defendants' case is that on 26 February 2024, the First Defendant National Coordinator of the Custom Land Management Office ('CLMO') issued a Certificate of Recorded Interest in Land ('green certificate') to the Second Defendant based on the Joint Village Tribunal decision and subsequent decisions of the Sub-Area Land Tribunal and Island Court (Land) decisions;
- f) The Second Defendant's case is that he is the declared custom owner of the Tapenpel and Lamu custom lands and that he was issued his green certificate according to law;
- g) It is pleaded in the Reply to the Second Defendant's Defence that there was no sketch map attached to either the Joint Village Tribunal decision or the Island Court (Land) decision;
- h) It is pleaded in the Reply to the First Defendant's Defence that accordingly, the relief sought is either the quashing of the green certificate and the Claimant's claim for the custom ownership of the Nun and Nivmeru custom lands be heard OR that the present proceeding be stayed pending the outcome of the Claimant's claim for the custom ownership of the Nun and Nivmeru custom lands which will make clear which custom land(s) the Brenwei Hydropower Station is located is located on;
- i) It is clear from the foregoing summary of the pleadings that there are issues in dispute between the parties and that the Claimants have an arguable case (rule 17.8(3)(a), CPR);
- j) As set out in the Amended Claim, the Claimants are directly affected by the decision, namely the green certificate, under challenge (rule 17.8(3)(b), CPR);
- k) There has been no undue delay in making the Claim as the green certificate was issued on 26 February 2024 and the Claim was filed on 27 June 2024 (rule 17.8(3)(c), CPR); and
- l) There is no other available remedy which resolves the matter fully and directly as the claim for judicial review filed in the present proceeding and the relief sought including that the proceeding be stayed pending the outcome of the Claimant's claim for the custom ownership of the Nun and Nivmeru custom lands (rule 17.8(3)(d), CPR).



16. For the reasons given, I am satisfied as to all four matters set out in rule 17.8(3) of the CPR.
17. However, rather than listing the Amended Claim for hearing, for the reasons set out above, the present proceeding will likely need to be stayed. However, that should only occur if restraining orders have first been sought and obtained.
18. The Court of Appeal held as follows in Mataskelekele v Bakokoto [2020] VUCA 31 at [24]-[25]:

24. *In relation to the second ground of appeal Mr Mataskelekele submitted that the judge in the Supreme Court had jurisdiction to issue the interlocutory orders he sought in paragraphs 3 and 4 of the appellants claim. Mr Mataskelekele relied on what this Court said in Valele Family v Touru [2002] VUCA 3 in the following passages:*

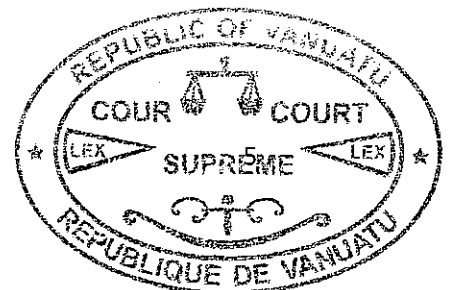
"Generally speaking, it is not appropriate upon an application for an interlocutory injunction for the Court to finally decide disputed questions of fact. That is for the ultimate trial. At the interlocutory stage it is sufficient that there is evidence that could be accepted at trial which raises a serious question to be tried. The application which the parties argued before the primary judge was only for an interlocutory injunction. However, the case was unusual in that the evidence put before the primary judge by Mr. Touru raised factual and legal arguments as to why the claim for an account of moneys received by him would inevitably fail. It was necessary in this circumstance for the primary Judge to go further than would have normally been necessary and decide the substance of Mr. Touru's arguments that custom ownership had already been finally determined.

The affidavit material before the primary judge identified a serious issue to be tried, namely whether Mr. Valele and his family are custom owners of the land, and if so, the extent of their interest. The proper body to determine that issue is the Island Court (or its successor in law), but the Island Court lacks the full extent of the power of the Supreme Court to order an account of the past rents received. The originating summons therefore properly initiated a cause or matter in the Supreme Court, and the claim for an interlocutory injunction to hold the position until the Island Court determines the ownership dispute was properly made. In our opinion upon the appellant giving the usual undertaking as to damages, there should be an interlocutory injunction in terms of paragraphs 2, 3, 4, 5, 7 and 10 of the originating summons with liberty to apply on short notice to a single judge of the Supreme Court."

25. *The Valele Case is totally different and it does not assist the appellant. It is applicable only to disputes relating to customary ownership of land which have not yet been determined in any way by a Court of competent jurisdiction. In such disputes, disputing parties may seek interlocutory orders to maintain the status quo pending final determination of customary ownership. But parties doing so must file proper applications with supporting sworn statements, statements of urgency and undertakings as to damages in accordance with Rule 7.5 and Rule 7.8 of the Civil Procedure Rules.*

[emphasis added]

19. Accordingly, the Claimants are to file and serve application for restraining orders and/or stay of the green certificate **by 4pm on 8 April 2025.**



20. The Defendants are to file and serve submissions in response **by 4pm on 22 April 2025.**
21. Any submissions in reply **by 4pm on 29 April 2025.**
22. The Court will issue its decision on the papers after that.

**DATED at Port Vila this 11th day of March 2025
BY THE COURT**

V.M. Trief

Justice V.M. Trief

