

IN THE COURT OF APPEAL
THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

Civil Appeal Case No's 9, 10 and 13 of 2012

BETWEEN: ZEBEDEE MOLVATOL
Appellant

AND: BOETARA TRUSTEES LTD
First Respondent

AND: THE REPUBLIC OF VANUATU
Second Respondent

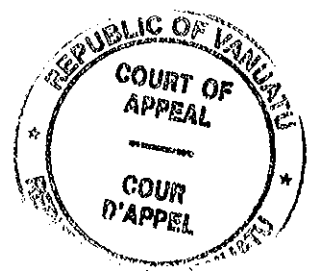
Coram : *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Daniel Fatiaki
Hon. Justice Robert Spear

Hearing: *27 April 2012*

Appearances : *Appellant: George Nakou*
First Respondent: Felix Laumae
Second Respondent: Justin Ngwele

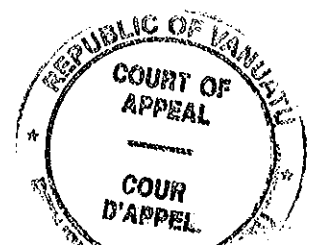
Decision: *4 May 2012*

JUDGMENT OF THE COURT



Introduction

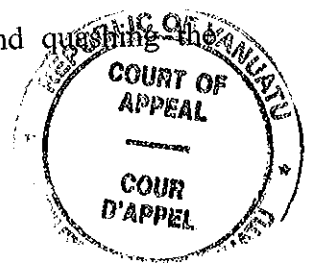
1. These three separate cases are in effect appeals against four interlocutory decisions. In each respect, leave to appeal is required.
2. Before dealing with the actual orders under appeal, it is necessary to dispose of the uncertainty that surrounds the Supreme Court case within which each of these interlocutory orders have been made. The Supreme Court orders under appeal bear the case reference SCC 42/07. In the Notices of Appeal that have been filed, Mr Nakou endeavours to correct that mistake as to the reference by noting that it should be SCC 02/06. It took some time for the correct case references to be revealed in this long standing dispute. The correct Supreme Court reference for the appeals identified as CAC 09/12 and CAC 10/12 is SCC 211/07. The correct Supreme Court reference for the CAC 13/12 appeal is SCC 02/06
3. There is no relevant case to this ongoing dispute that bears case reference SCC 42/07. What has clearly happened is that the Court of Appeal case reference number (CAC 42/07) for the appeal from orders in SCC 02/06 has been somehow adopted by the Supreme Court at Santo, following the appeal, as the case reference number for the on-going dispute. However, SCC 02/06 was “*dismissed in its entirety*” by the Supreme Court on 10 December 2007. The resulting appeal in CAC 42/07 was effectively resolved by agreement between the parties but not so as to enliven SCC 02/06. That agreement is recorded in a Minute of the Court of Appeal dated 30 April 2008: *Molvatol v Amalee and others CAC 42/07 (30 April 2008)*.
4. The land central to this on-going dispute between the parties is known as *Belbaraf* land and it is situated in the south east of the Island of Espiritu Santo near Luganville. It is very valuable land and, indeed, it has already generated a substantial compensation payout of Vt 196,888,300 for part of the land compulsorily acquired by the Republic for the purposes of the Vanuatu Agricultural College – see *Republic of Vanuatu v. Boetara Family [2011] VUCA 6; Civil Appeal 04 of 2011 (8 April 2011)*. There is also a substantial subdivision planned for part of the land on the coast.



Case history

5. The relevant and brief case history is as follows:

- a. The Veriodali Village Land Tribunal determined on 30 May 2005 that the custom owners of Balbaraf land were the Boetara Family and Zebedee Molvatol;
- b. The Boetara Family disputed that decision on the basis that Zebedee Movatol only had rights though the Molvatol family on the basis that he was an adopted son of the family;
- c. Zebedee Molvatol then commenced SCC 02/06 (out of the Luganville Registry) seeking a declaration of the Supreme Court that he was entitled to a 50% share in the land and any income it generated. As mentioned, that claim was dismissed by the Supreme Court;
- d. Zebedee Molvatol also commenced another claim in the Supreme Court (out of the Port Vila Registry) on 17 December 2007 (SCC 211/07) effectively seeking the same relief as sought earlier in SCC 2/06 which had just been dismissed 7 days previously. This case remains extant.
- e. Zebedee Molvatol appealed the dismissal of his claim in SSC 02/06 (CAC 42/07) with the consent result that the customary ownership issues were to be referred to the Land Tribunal for resolution;
- f. The Land Tribunal did not reconvene and resolve the customary land ownership issues until early 2012. This was notwithstanding a minute issued by the Chairman of the Land Tribunal on 16 December 2010 purporting to declare Zebedee Molvatol as being entitled to a 50% share in the ownership of the land;
- g. The Boetara Family then issued two separate claims against the Land Tribunal (SCC 43/11 and SCC 1/12) seeking orders that the Land Tribunal meet and determine the customary ownership claim (SCC 43/11) and quashing the



purported decision of the Land Tribunal as noted in the minute of its Chairman dated 16 December 2010. The Supreme Court quashed the purported decision without opposition and directed the Land Tribunal to meet and determine the customary land ownership issues;

- h. The Veriodali Land Tribunal duly reconvened on 16 April 2012 and determined that customary ownership was held equally between Timothy Molbarav, Amal Solomon, Peter Natu, James Tamata and Singo Movatol. Significantly, Zebedee Molvatol was not recognised as a customary owner.

Orders under appeal

6. In chronological order, the orders of the Supreme Court under appeal are as follows:-

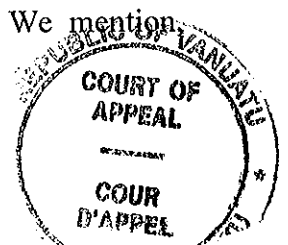
a) 20 February 2012 (CAC 10/12) – declining to direct that Mr Laumae not represent the first respondent;

b) 6 March 2012 (CAC 9/12):

1. setting aside orders earlier made that required Mr Laumae to disburse funds held in trust by him to the Registrar of the Supreme Court;
2. requiring Zebedee Molvatol to pay Vt 6 million into court as security for costs

c) 30 March 2012 (CAC 13/12) – the decision to issue an enforcement warrant against the Second Respondent in certain terms.

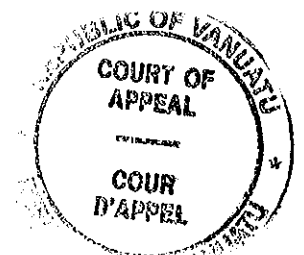
7. The Court also received an application within CAC 13/12 by one Thompson Wells seeking to be made a party to this appeal proceeding. Colin Leo appeared in support of that application. Following a short discussion with the Court, Mr Leo accepted that the application was irregular. The application was set aside. We mention



however, that this does not prevent Mr Wells from applying to be joined as a party to any extant Supreme Court case, and in particular SCC 211/07, but whether such joinder would be permitted or not will be a matter entirely for the Supreme Court Judge hearing that application.

Felix Laumae – Conflict of Interest?

8. There is no dispute that Mr Laumae has acted for Boetara Trustees Ltd and the Boetara Family (the nominated party in other related cases) for a number of years. However, when difficulties arose in respect of the payment of compensation for the land compulsorily acquired by the Republic, Mr Laumae was instructed to act for both the appellant and the Boetara Family. He negotiated a settlement of the compensation claim on behalf of the appellant and the Boetara Family. He continued to act for those two parties until it became apparent that there was a dispute between them as to the division of the compensation proceeds. From that point, Mr Laumae acted solely for the Boetara Family (and Boetara Trustees Ltd) and referred the appellant for independent legal advice.
9. Mr Nakou argues that the primary judge was wrong to hold that Mr Laumae did not have a conflict of interest and that the primary judge should have ordered that Mr Laumae not be permitted to act for Boetara Trustees Ltd or any related party. However, this complaint cannot be sustained on close scrutiny.
10. The primary judge was correct to hold that a conflict of interest did not arise. The nature of the joint representation in relation to the compensation payment did not place Mr Laumae into a position where he gained an advantage for the Boetara Family at the expense of the appellant. It certainly did not provide him with inside knowledge which he could use to take unfair advantage in the ongoing dispute. In particular, Mr Laumae has never acted for the appellant in respect of any issue directly relating to the custom ownership of the Belbaraf land. Accordingly, there was and remains no illegitimate prejudice to Zebedee Molvatol with Mr Laumae continuing to act for Boetara Trustees Ltd within SCC 211/07.
11. Leave to appeal this order is refused.

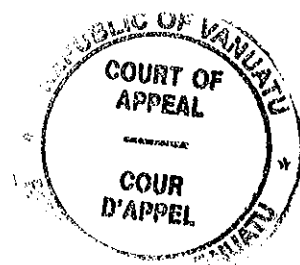


The Funds of Vt 13,530,726

12. On 30 September 2011, Mr Laumae was left holding funds of Vt 13,530,726 in trust for Zebedee Molvatol. Those funds were so held on account of legal costs incidental to the compensation claim. Zebedee Molvatol unsuccessfully sought an order in the Supreme Court that Mr Laumae pay those funds into the Supreme Court.
13. The primary judge accepted, however, that Mr Laumae had a lien over the funds in respect of his appeal costs pursuant to *s. 22 (6) (a) of the Legal Profession Act*. The immediate difficulty with that order is, while the *Legal Profession Act* was passed by Parliament in 2005, there has, so far, been no order for its commencement. The *Legal Practitioner's Act [Cap.119]* remains in force today but that does not provide a statutory basis for a legal practitioner to exercise a lien over the funds.
14. Be that as it may, Mr Laumae has provided a sworn statement confirming that the funds received have, in fact, been applied to the legal costs arising out of the compensation claim. In short, there are no such funds now held in trust by Mr Laumae. In any event, we find it a little difficult to see what sound basis Zebedee Molvatol could have for not wishing to settle his share of the legal cost with Mr Laumae in view of the most favourable outcome to that compensation claim. If the appellant considered that the legal costs were excessive then, of course, he could have had them taxed. However, he has not chosen to do so.
15. Leave to appeal this order is refused.

Security for Costs

16. On 6 March 2012, the Supreme Court ordered that the appellant pay Vt 6 million into Court as security for costs. Mr Nakou takes particular umbrage at that order given the complete absence of any evidence that would suggest that the appellant would not be able to meet legal costs ordered against him in the event that his claim was unsuccessful.

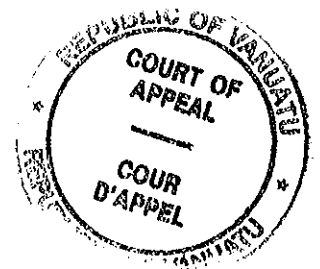


17. Rule 15.19 of the Civil Procedure Rules sets out six different situations where the Court may order a claimant to give security for costs. It was accepted that the only category applicable in this case was the final category in R 15.19 (f) where, *“the justice of the case requires the making of the order”*.
18. What clearly prompted the oral application by Mr Laumae for Zebedee Molvatol to give security for costs were the various orders for costs in a number of proceedings made against the appellant and which remain unsatisfied. In one case, the costs had been taxed and thus the settled amount is owing. Mr Laumae has summarised the costs owing by Zebedee Molvatol to Boetara Family and/or Boetara Trustees Ltd as follows. No dispute was taken with the accuracy of this summary:

Bill of Costs dated

- | | | |
|----------------------|-----------------------------|------------------|
| a. Vt 4,228.875 | SCC 02/06 (indemnity costs) | 10 December 2007 |
| b. Vt 832,725 | SCC 42/07 | 11 April 2008 |
| c. Vt 770,175 | SCC 49/07 (as taxed) | 29 June 2010 |
| d. Vt 832,725 | SCC 42/07 | 1 April 2008 |
| e. <u>Vt 912,963</u> | SCC 42/07 | 20 February 2012 |
| Vt 7,577,463 | | |

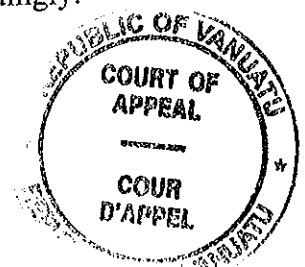
19. It is appreciated that the majority of the costs have not been taxed and so the final amount could well be significantly less than the bills of costs submitted by Mr Laumae. However, it is clear that a relatively significant sum will be eventually determined to be owing by Zebedee Molvatol. That begs the question why the Boetara interests have not taken steps to have the costs taxed and accordingly access enforcement action. Equally, Zebedee Molvatol could have sought to have the costs taxed if he did not consider that they were reasonable.
20. We consider that there should be a modest order for security for costs to reflect the outstanding or unresolved costs' orders in the various proceedings. They demonstrate how consistently unsuccessful Zebedee Molvatol has been over a number of years in various proceedings in respect of his claim to custom ownership of the Belbaraf land and his failure to pay costs ordered against him.



21. We grant leave for this appeal and allow it. We quash the order of costs of Vt 6 million and substitute Vt 1,500,000. That amount is to be paid into Court as security for costs within 28 days of the date of this judgment and all other related orders of the Supreme Court apply with the necessary changes.

Enforcement Warrant

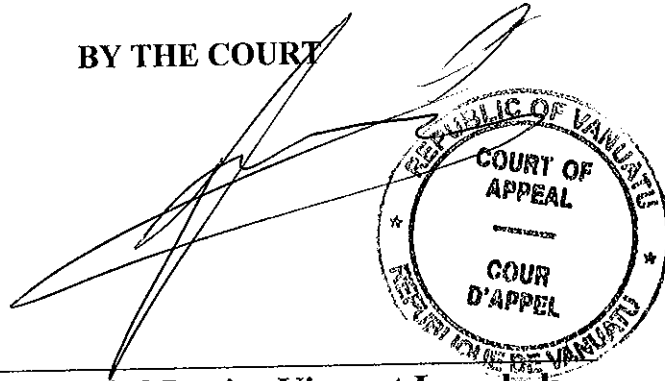
22. On 30 April 2012, the Supreme Court issued an enforcement warrant against the Republic of Vanuatu in respect of the sum of Vt 33,036,569.50 said to be the unpaid balance of the compensation payment from the compulsory acquisition of part of Belbaraf land.
23. That Enforcement Warrant was specified to be within case SCC 42/07. However, it is more correctly a warrant issued out of SCC 02/06 given the judgment sum it seeks to enforce. However, that is not the principal difficulty with the warrant.
24. The enforcement warrant is directed either to the Sheriff of this Court or to any Police officer and purports to authorise them to act as follows:-
- *"To attend at the Department of Finance on 30th March and ordered the Director of Finance to raise cheque for the sum of Vt 33,036,569.50 payable to Trans-Melanesian Lawyers (Mr Laumae's firm) Trust Account.*
 - *If the Director of Finance and any officer who is signatory to government cheque refused to sign the cheque you are order to arrest him/her and brought him/her to the Court to be dealt with for contempt of Court.*
 - *ALTERNATIVELY, you authorized to cease all vehicles belonging to the Ministry of Agriculture, Department of Agriculture and Agriculture College and sell them and proceeds be paid into Trans-Melanesian Lawyers Trust Account."*
25. The Solicitor General became aware of the enforcement warrant and she obtained an interim stay of execution on 30 March 2012 pending appeal.
26. Mr Laumae accepted that the warrant should not have been issued in this form and that it should be stayed. We agree. The warrant is stayed accordingly.



Costs

27. In the circumstances, each party to this appeal will bear their own costs.

BY THE COURT



Honourable Chief Justice Vincent Lunabek