IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU

CIVIL APPEAL NO. 42 OF 2013

(Civil Appellate Jurisdiction)

BETWEEN: **TIMOTHY MOLBARAV, AMALI SOLOMON, PETER NATU AND JAMES TAMATA AND SINGO MOLVATOL**
First Appellants

AND: **THOMPSON WELLS**
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 Mary Sey
Hon. Justice Stephen Harrop

Counsel: Felix Laumae for the Appellants
Colin Leo for the First Respondent
Viran Trief (SLO) for the Second Respondent
Robert Sugden for Rachel Molsakel and Mathias Molsakel (Interested Parties)

Date of Hearing: Thursday 28 March, 2014

Date of Judgment: Friday 4 April, 2014

JUDGMENT

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1. The appellants seek leave to appeal against two interlocutory orders made against them on 2nd April 2012 and 6th July 2012 in the Supreme Court in Civil Case No. 18 of 2012. These orders had the effect of restraining a distribution to the appellants of part of the purchase price due to the custom owners of land known as Belbarav in the South East Santo area following the compulsory acquisition of a portion of that land by the second respondent.

2. The appellants have been seeking to have their custom ownership of Belbarav formally recognized since Independence. Many other parties have claimed customary ownership rights in the Belbarav land or part of it during this period. There has been much ongoing litigation, and cases involving these disputes have reached the Court of Appeal on four occasions, the present appeal being the most recent. The appellants contend that the various claims disputing their custom ownership made in the course of the many Court cases have now all been finally resolved in their favour. The appellants base the recognition of their entitlement as custom owners on decisions of the Veriodali Village Land Tribunal dated 20th May 2005 and 16th April 2012 which they contend now stand as final decisions. The appellants contend that there is no longer any basis for the injunctions, and that they should be set aside.

3. The first respondent contends that the injunctions should remain in place as the decisions of the Veriodali Village Land Tribunal are not final. By cross appeal he seeks orders to this effect.

4. The second respondent who presently holds the moneys in dispute pending determination of the person or persons entitled to them has informed the Court that it will abide the outcome of this appeal.

5. The Veriodali Village Land Tribunal was set up to hear the dispute over the Belbarav Land in late 2004. A public notice was given about the dispute, and 13 parties lodged counterclaims for custom ownership. The first respondent was not one of them. However in recent years he has been continuously challenging the custom ownership of the appellants and has commenced, or attempted to commence, proceedings in the Supreme Court, before the Santo Supenatavuitano Council of Chiefs (the Council of Chiefs) and before a Joint Area Land Tribunal. Before the last of those bodies the first respondent sought in April 2012 to have the decisions of the Veriodali Village Land Tribunal reviewed on appeal and overturned. The first respondent contends that there are still outstanding live issues in these proceedings which remain to be resolved.

6. The decision of the Court of Appeal in Molvatol v. Boetara Trustees Ltd and The Republic of Vanuatu, [2012] VUCA 9, 10 and 13, delivered on 4th May 2012 concerned issues which had arisen regarding distribution of monies due to the custom owners consequent on the compulsory acquisition of part of Belbarav. The first injunction under challenge was made shortly before the Court of Appeal hearing. Following delivery of the Court of Appeal decision a Judge of the Supreme Court took steps to bring all related files relating to the Belbarav land together, to determine what live issues remain for determination, and to give directions to hasten their final resolution. A number of conferences were conducted thereafter during 2012 and 2013.

7. At a conference on 6th July 2012 the Court identified 2 proposed appeals that were said to be on foot challenging the decisions of the Veriodali Land Tribunal. In each matter the validity of the purported appeal was under challenge. One purported appeal was by the first respondent, and the second was by Rachel Molsakel and Mathias Molsakel (the Molsakels): see Civil Case No. 124 of 2011 and Judicial Review Application No. 8 of 2013.

8. The Molsakels are not parties to the present appeal, and are not named as applicants in Civil Appeal Case No. 18 of 2012 in which the injunctions under challenge were made. However they were parties before the Supreme Court on 6th July 2012 when the continuation of the injunction made on 2nd April 2012 was ordered. As this Court considered it likely that the Molsakels would believe that they do have the benefit of the restraining orders, the Court invited their counsel, Mr Sugden, to address the Court. He confirmed that the Molsakels considered that the injunction protected them. The appellants thereupon conceded that the proceedings by the Molsakels are still outstanding and that the injunctions should remain in place for their benefit, should the Court otherwise allow this appeal.

9. The dispute between the appellants and the first respondent has been bitterly contested for a long time and at great expense to the parties. The material now before the Court enables a final determination to be made on the status of the claims being made by the first respondent, and the Court agrees that it should now determine the issues which remain between the appellants and the first respondent. To this end the appellants will be granted leave to appeal.

10. Essential to the first respondent's claim that he is the custom owner of Belbarav is a decision to that effect by the Council of Chiefs made on 5th November 2001. That decision was made shortly before the Customary Land Tribunal Act [Cap. 271] (the Tribunal Act) came into force on 10th December 2001.

11. This Court held in Valele Family v. Touru [2002] VUCA 3 that prior to the Tribunal Act a body such as the Council of Chiefs which sat on 5th November 2001 had no lawful authority to determine disputed claims for custom ownership of land. That authority before the Tribunal Act was vested in the Island Courts which had been given the necessary jurisdiction by the Island Courts Act [Cap. 167], a jurisdiction which had been anticipated in the Constitution.

12. After the Tribunal Act came into force, the jurisdiction to hear and determine land claim matters became vested exclusively in the Land Tribunal system established by the Tribunal Act. The Veriodali Village Land Tribunal was a tribunal constituted under the Customary LandTribunal Act with jurisdiction to make decisions over land in the location of the Belbarav land.

13. In the course of the litigation between the appellant and the first respondent, the Supreme Court has repeatedly pointed out to the first respondent that the decision of the Council of Chiefs could not and does not decide custom ownership under the law of Vanuatu, and a decision of the Council of Chiefs cannot determine his legal rights as custom owner. This conclusion must follow from the reasoning of the Court of Appeal in Valele Family v. Touru, and no argument to the contrary has been addressed to this Court.

14. The first respondent's attack on the custom ownership of the appellants must therefore be directed to the validity and finality of the decisions of the Veriodali Village Land Tribunal of 20th May 2005 and 16th April 2012.

15. In Civil Case No. 7 of 2011 the first respondent sought leave to bring an application out of time under s. 39 (2) of the Tribunal Act for an order that the Supreme Court judicially review the validity of the membership of the 2005 Veriodali Village Land Tribunal. That application seems to have merged into Civil Case No. 18 of 2012 which is not otherwise supported by a substantive application for any final remedy. At the conference before the Supreme Court on 6th July 2012 when all parties were present the future conduct of Civil Case No. 7 of 2011 was discussed. It was agreed between counsel before this Court that the Supreme Court was informed that the first respondent intended to appeal against the Veriodali Village Land Tribunal decision. The Judge enquired of the first respondent's counsel whether the application to extend time to bring judicial review proceeding would be maintained. The Court was informed that the application in Civil Case No. 7 of 2011 was withdrawn, and that the first respondent would henceforth pursue rights of appeal.

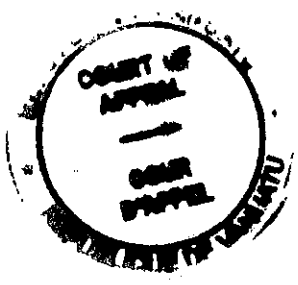
16. The Supreme Court was informed by the first respondent that an appeal by him to a Joint Area Land Tribunal was to be heard in Santo on 10th July 2012. In a Minute recording that conference the Judge observed:-

> *"7. Until the appeals by Thompson Wells and the Molsakals to the joint area land tribunal has (sic) been resolved, and any further appeal rights are extinguished, this Court cannot be certain who are the custom owners. Without that certainty, or some agreement reached between those claiming custom ownership as to the distribution of funds in trust, there can be no question of any relaxation of the restraining order*
>
> *8. The joint area land tribunal hearing is only 5 days away and once that is resolved then the position as to custom ownership will hopefully be clearer.*
>
> *9. I do not decline Mr Laumae's application at this time. I simply adjourn it on the basis that it may be brought back for hearing as soon as there is some clarity as to custom ownership."*

17. Documents before this Court include a *"Notice of Appeal"* simply dated *"June 2012"* addressed to the Joint Area Land Tribunal of South East Santo. The notice is headed *"This appeal is made pursuant to orders of Justice Robert Spear in Civil Case No. 7 of 2011 dated 21st May 2012"*. That statement is not correct. Justice Spear said only that the claimants need to focus on the decision of the Veriodali Village Land Tribunal of 16th April 2012 and decide whether they wish to challenge the decision by way of appeal or by application to the Supreme Court on the grounds that it is somehow irregular.

18. Minutes of a *"Joint Area Land Tribunal blong Santo"* dated 10th July 2012 indicate that such a body convened that day, apparently to consider the Belbarav customary land. The Minutes record that the matter was adjourned to 23rd July 2012.

19. On 2nd August 2012 an application for an urgent ex-parte injunction was made on behalf of the appellants' family group to the Supreme Court in Santo in Civil Case No. 7 of 2012 to stop the Council of Chiefs and the Joint Area Land Tribunal (which had apparently been set up by the Council of Chiefs) from further hearing a purported appeal



against the decisions of the Veriodali Village Land Tribunal. The order was granted. The defendants immediately gave notice that they intended to apply to set aside the injunction. However when they received the reasons of the Judge for making the interlocutory injunction, they withdrew that application. The Judge's reasons record that the appellants sought a permanent injunction restraining the defendants from proceeding with the hearing on grounds that included that the custom ownership of the Belbarav land had been finally decided by the decisions of the Land Tribunal: that the defendant bodies were not properly constituted; and that in any event they would lack jurisdiction to hear the purported appeal.

20. The defendants sought leave to appeal against the injunction dated 2nd August 2012 to the Court of Appeal. Leave was granted and orders were made to expedite the preparation of papers so that the appeal could be heard in the October 2012 Session of the Court of Appeal.

21. Counsel for the defendants in Civil Case No. 7 of 2012 also acted generally for the first respondent, but the first respondent was not a party in Civil Case No. 7 of 2012. At the callover stage for the proposed appeal, the defendants decided that the first respondent should be a party to Civil Case No. 7 of 2012, and to the appeal itself. The proposed appeal was withdrawn from the October Session list and the first respondents applied to the Supreme Court to be joined as a party in Civil Case No. 7 of 2012. The application was refused. The proposed appeal was then apparently abandoned. The Supreme Court in a judgment dated 5th February 2013 in Civil Case No. 7 of 2012 held that there was no appeal on foot. Another application was then made by the first respondent to be joined as a party to Civil Case No. 7 of 2012. Again the application was dismissed, this time on the ground that the first respondent's application was misconceived as there was in reality no valid appeal instituted by him from the decision of the Land Tribunal. The Court held that the first respondent had no standing to lodge an appeal as he was never a party to the dispute decided by the Veriodali Village Land Tribunal concerning the Belbarav Land.

22. The applicants also applied to the Supreme Court for orders in the nature of contempt orders against members of the Council of Chiefs and the Santo Area Land Tribunal for embarking on the hearing of an appeal over the Belbarav land when they had no jurisdiction to do so. The Supreme Court dealt with that matter on 6th February 2013. The defendant bodies informed the Court that they now accepted that they had had no jurisdiction but that they had initially embarked on a hearing on erroneous advice received from a Senior Lands Officer in the Lands Department. However on receiving advice from the Attorney-General they stopped sitting. The senior member of the defendant bodies apologized to the Court for what had happened. The Court accepted the apology and thereafter treated the matter as at an end. There has been no appeal concerning any of the matters decided in 2013 in Civil Case No. 7 of 2012.

23. Given that the first respondent's application for an extension of time to seek judicial review under s. 39 of the Tribunal Act has been withdrawn, the sole remaining ground on which he can rely to support the injunctions under appeal is that he still has a valid appeal on foot against the decisions of the Veriodali Village Land Tribunal. We understood counsel for the first respondent to concede that the outcome of this appeal turns on that question. We propose to consider the first respondent's argument on its merits, but we note that his argument directly challenges the finding of the Supreme Court made on 5th February 2013 when the first respondent's application to be joined as a party in Civil Case No. 7 of 2012 was dismissed.

24. The purported appeal relied on by the first respondent is that instituted by the June *"Notice of Appeal"* lodged with the *"Joint Area Land Tribunal blong Santo"*. The appellants contend there are two reasons why this Notice of Appeal failed to institute a valid appeal, even if the Land Tribunal was duly constituted as required by the Tribunal Act (that being a question that has not been debated before this Court and need not be considered as the appeal must otherwise suceed).

25. The two reasons are first that the first respondent was not a party to the decision of the Veriodali Village Land Tribunal and therefore has no standing to appeal; and, secondly

that in any event the purported appeal was not instituted within the mandatory 21- day period for appeals prescribed in s. 12 (1) of the Tribunal Act.

26. S. 12 (1) of the Tribunal Act relevantly provides:

> *"**12.** (1). If a person or group of persons:*
>
> *(a) is a party to a decision of a single or joint village land tribunal; and*
>
> *(b) wants to appeal against the decision;*
>
> *the person or group must give a notice of appeal in accordance with subsections (2) and (3) within 21 days after the announcement of the decision."*

27. The first respondent was not a named party before the Village Land Tribunal, nor did he participate in the hearing. The first respondent nevertheless contends that this does not prevent him from appealing as the description *"a party to a decision"* in s. 12 (1) is not defined in the Act, and is to be widely interpreted to include any person who claims to have an interest in the land. In support of this submissions he relies upon the Court of Appeal decision in West Tanna Area Council Land Tribunal v. Natuman [2010] VUCA 21. In that matter the Court of Appeal discussed who might be able to invoke the review jurisdiction of the Supreme Court under s. 39 of the Tribunal Act. Section 39 provides that a party to the dispute may apply to the Supreme Court. The Court said at [20]:

> *"20 The term "the parties to the dispute" is not defined. Clearly any person to the initially-notified dispute will be a party. The term is not intended to be a restrictive one. Otherwise it would not be consistent with the way the various tribunals are to operate. However, especially because section 27 provides for all parties to be given a full and fair hearing, it is clear that the "parties" may include any party whose proper interests may be affected by the resolution of the dispute. Those parties will depend on the circumstances of the particular case. In certain circumstances, as the primary judge observed, those persons may include persons who under custom law may have an interest in the land in dispute even though they are not named in the original notice of dispute."*

In s. 12 the relevant expression is *"party to a decision"* which we consider is a narrower description of the person or persons who can invoke section 39.

28. The observations in the West Tanna case are expressed in very general terms, and were all that was required for the disposition of that appeal. The precise scope of the expression *"the parties to the dispute"* was left for further elaboration in future cases where the scope of the expression could be considered in a known and specific factual context: hence the observation that *"in certain circumstances"* the expression may extend beyond persons actually named in the original notice of dispute. Ordinarily all those who have participated in the case before the Tribunal will be parties to a decision. In a particular factual context that definition may need to be widened.

29. In this case the factual context is as follows. In September 2004 the Chairman of the South East Santo Land Tribunal gave notice that the Veriodali Village Land Tribunal would sit to determine the custom ownership of Belbarav (referred to in the notice and sometimes as *"Pelparav"*). It seems that the notice was widely published and 13 counterclaims were received. This is not a case where a putative claimant did not receive notice of the proposed Tribunal hearing and was not aware of it at any stage before decision. The first respondent was well aware of the notice and the subject matter of the proposed hearing. However, he chose not to participate and not to file his claim with the Tribunal. The affidavits of the first respondent show that in late 2004, after he would have become aware of the public notice, he engaged in frequent communications with an officer of the Customary Lands Tribunal, with the Council of Chiefs, and with others asserting that the decision of the Council of Chiefs made on 5th November 2001 in his favour had finally determined the question of custom ownership. He contended that the Veriodali Village Land Tribunal should not be *"reopening"* disputes about the Belbarav land. On this evidence, his choice not to participate in the hearing before the Land Tribunal was a deliberate decision, made, apparently, on the advice of a certain officer from the National Lands Tribunal Office to the effect that custom ownership had already been determined in his favour. If that was the advice he was given, it was plainly wrong in light of the Court of Appeal decision in Valele Family v. Toura, and in light of the provisions, first of the Island Courts Act, and

secondly those of the Tribunal Act all of which were well known to the first respondent. The decision not to participate, but rather to take the high-handed position that the matter was already resolved in his favour, is a decision for which he must bear responsibility.

30. His decision not to participate was a surprising one as his affidavit of 14th November 2013 discloses that the same officer on whose advice he says he relied by letter on 19th August 2003 recommended to him that he lodge an application to the Area Land Tribunal to look into the land ownership of Belbarav (and other lands as well in which he claimed custom ownership rights).

31. This is a case where a person has deliberately chosen not to become a party to the Land Tribunal proceedings, and not to participate in them. In these circumstances we consider that the first respondent is very clearly not a person who was a party to the Veriodali Village Land Tribunal decision, and therefore is not a person who has a right of appeal under s. 12 (1) of the Tribunal Act. The contention of the first respondent to the contrary must be dismissed.

32. On the second point relied on by the appellants, whatever the date in June 2012 when the purported notice of appeal was filed, it was filed well beyond the 21-day time limit in respect of the 16th April 2012 decision, and many years out of time in respect of the decision of 30th May 2005. The time limit of 21 days prescribed in s. 12 is mandatory. There is no statutory or other power to extend this time. It is the apparent intent of the Tribunal Act that disputes over custom ownership, once they are placed before a Land Tribunal, must have finality at an early date following the Tribunal's decision. Prompt finality can only be achieved by imposing a very strict time limit on further appeals.

33. For these reasons the appellants have made out their case that the injunctions made on 2nd April 2012 and 6th July 2012 against them in favour of the first respondent should be set aside.

34. However, as we indicated earlier in this judgment, the injunctions should remain in place for the benefit of the Molsakels until their proceedings are determined in Civil Case No. 124 of 2011 and Judicial Review Application No. 8 of 2013.

35. We mention three other matters raised on the papers. Civil Case No. 1 of 2013 we are told still awaits judgment in the Supreme Court. Civil Case No. 1 of 2013 is a file in the Port Vila Registry. It is not one in respect of an entirely new matter. It is a new file that was opened administratively as the record of the former Civil Case No. 7 of 2012 which had been commenced in the Santo Registry and later transferred to Port Vila. In reality the subject matter of Civil Case No. 1 of 2013 is that of Civil Case No. 7 of 2012 in which members of the appellants' family group seek the relief described in [19] above. As this Court has now held that there is no appeal by the first respondent on foot against the decision of Veriodali Land's Tribunal, the relief sought is unnecessary, and the case has become moot and should be struck out by the Supreme Court.

36. The first respondent's notice of cross appeal raises 2 grounds that were not the subject of oral argument before this Court but upon which we think it appropriate to make comment. The first is that the Judge who heard Civil Case No. 7 of 2012 in Santo and made the ex-parte restraining order on 2nd August 2012 had previously disqualified himself for hearing matters in relation to the Belbarav Customary Land and was therefore disqualified in Civil Case No. 7 of 2012. We can see no basis for such a submission. Even if the Judge had earlier disqualified himself from making any decision on the merits of the claims of disputing parties to the Belbarav land, that would not disqualify him from sitting on an urgent application to make an interim injunction based on purely legal questions. Of particular importance is the fact that the decision was only of an interim nature, and it remained open to the parties to apply to argue the matter in full before another Judge on a later occasion. It is of significance, indeed fatal significance, to the present submission that the disqualification point was not taken in the hearings before the Judge concerned.

37. The other ground raised in the notice of cross appeal is that the issue of proceedings in Civil Case No. 7 of 2012 before a Judge in the Santo registry was an abuse of process as

it amounted to *"Judge shopping"* as a Judge in Port Vila was already seized of the matters then on foot in Civil Case No. 18 of 2012. Whilst it is undesirable when the subject matter of a particular dispute is before a particular Judge for a party to bring on an interlocutory application by separate proceedings before another Judge, whether that amounts to an abuse of process will depend on all the circumstances of the case. In this case, the application in Civil Case No. 7 of 2012 was one urgently made, and necessarily made in Santo where the purported hearing before the Santo Area Land Tribunal and the Council of Chiefs was underway. Practical considerations dictated that it was not possible for the application to be urgently made in Port Vila. Counsel concerned with the matter were in Santo, and the urgency overrode other considerations. Again, this was not a point taken in subsequent hearings in Civil Case No. 7 of 2012 as it should have been if the first respondent intended seriously to rely upon it.

38. For these reasons the following orders of this Court are as follows:

1) Leave is granted to the appellants to appeal against the interlocutory orders made on 2nd April 2012 and 6th July 2012;

2) The appeal is allowed and the injunctions made on 2nd April 2012 and 6th July 2012 are set aside in so far as they protect the first respondent. For the removal of doubt, the injunctions however will remain in place for the benefit of Rachel Molsakel and Mathias Molsakel until Civil Case No. 124 of 2011 and Judicial Review Application No. 8 of 2013 are determined or a Judge of the Supreme Court otherwise orders.

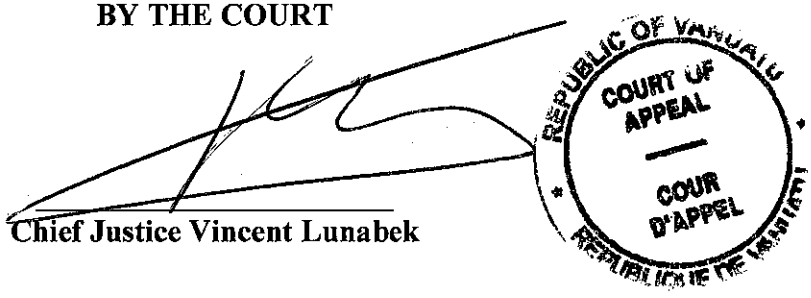
3) Declaration that the first respondent has no continuing claim at law either actual or potential as custom owner to any part of the proceeds due to the custom owners of Belbarav in respect of the compulsory acquisition of part of that land.

4) The cross appeal is dismissed.

5) The first respondent must pay the appellants' costs and the second respondent's costs for this appeal on the standard basis.

Dated at Port Vila this 4th day of April, 2014

BY THE COURT



Chief Justice Vincent Lunabek