

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

Civil Appeal Case No.1396 of 2017

**BETWEEN: JEFFREY LAHVA & TOM SAUTE trading as  
LAHSAUT of Lenakel Tanna Island, Tafea  
Province, Vanuatu  
Appellant**

**AND: REPUBLIC OF VANUATU  
Respondent**

**Coram:** *Hon. Vincent Lunabek, Chief Justice  
Hon. Justice John von Doussa  
Hon. Justice Ronald Young  
Hon. Justice Oliver Saksak  
Hon. Justice Daniel Fatiaki  
Hon. Justice Dudley Aru  
Hon. Justice David Chetwynd  
Hon. Justice Paul Geoghegan*

**Counsel:** *Daniel Yawha for the Appellants  
Lennon Huri for the Respondent*

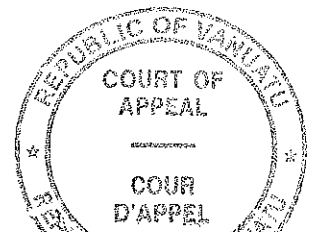
**Date of hearing:** *11<sup>th</sup> July 2017*  
**Date of Judgment:** *21<sup>st</sup> July 2017*

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**JUDGMENT**

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1. In June 2006 the Republic of Vanuatu issued Lahsaut ( the appellants) with a sandalwood licence to carry out sandalwood licence operations ( S47 (1) Forestry Act CAP 276) . The licence authorised the use of 10 tonnes of sandalwood per annum for 5 years until 2011.
2. In August 2006 another licence holder, Tropical Rainforest Aromatics Limited obtained an injunction in the Supreme Court ( Tuohy J) restraining Lahsaut from conducting sandalwood operations under the licence. Tropical had alleged the

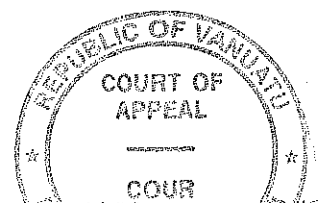


Republic could not validly issue the licence because, amongst other reasons the 10 tonne allocation of sandalwood to Lahsaut exceeded the sustainability limit of 80 tonnes.

3. Shortly afterwards Lahsaut says the Republic cancelled its licence. Lahsaut sought damages from the Republic in the Supreme Court firstly based on an alleged settlement of their claim for VT 60 million and secondly, based on allegations the Republic acted negligently when it granted the licence.
4. In the Supreme Court the Judge concluded there was no finalised settlement of the claim between Lahsaut and the Republic. As to the alternative claim without deciding liability, the Judge said that given the claim was for pecuniary damages and Lahsaut had failed to specifically prove the loss the claim must fail.

### **The Appeal Grounds**

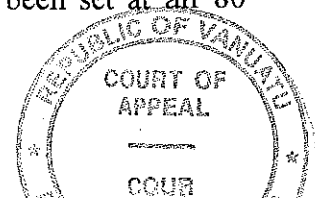
5. In this Court Lahsaut accepted that their claim based on a settlement between the parties was correctly rejected by the Trial Judge. As to the claim for damages based on the Republic's negligence Lahsaut says the Republic was negligent when it granted the licence and it did prove its claim for pecuniary damages at trial.
6. The Republic's case on appeal is that it did not act negligently in granting the licence. It denies the licence granted was subject to the 80 tonne sustainability rule and was therefore a valid, properly granted, licence. Further it denies it ever cancelled Lahsaut's licence. It submits that if Lahsaut suffered any loss it was caused by both its own actions and by Tropical's actions in obtaining the injunction. It submits Lahsaut



should pursue Tropical on its undertaking as to damages given to Lahsaut when the August 2006 injunction was granted.

### **Statutory Context**

7. Section 31 of the Forestry Act ( CAP 276) provides that commercial forestry operations, including sandalwood operations, require a licence.
8. Section 47 (1) empowers the Director of Forests to grant a sandalwood licence for “ *sandalwood operation*”. That phrase is defined in s.3 as “ *the purchasing or trading of sandalwood, sandalwood oil or any sandalwood product.*” Other licences are concerned with the harvesting of timber. Section 44 entitles the holder of a harvesting licence to harvest certain volumes of timber including sandalwood.
9. The issue of sandalwood operation licences is not unrestricted. Section 4 of the Act requires the Director to have regard to the need to sustainably manage the forests of Vanuatu when granting licences.
10. Arising from the obligation in the Forestry Act (s.9) to develop a Forestry Plan, the Department of Forests on behalf of the Director prepared a National Sandalwood Policy for Vanuatu. This Policy was intended to inform the Director in the performance of his statutory function including issues of sustainability and the grant of sandalwood operation licences.
11. The relevant policy for 2006 is the 2003 National Sandalwood Policy document. It provides for limitations on sandalwood purchases through the licensing system to reflect the need for sustainability. This limitation seems to have been set at an 80



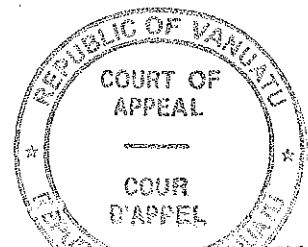
tonne purchasing limit for processing in the 2006 year although 70 tonnes is also mentioned).

### **Factual Background and Discussion**

12. In July 2005 Lahsaut wrote to the Ministry of Agriculture and the Director setting out a proposal to establish a sandalwood processing plant in Tanna purchasing locally grown sandalwood and applying for a sandalwood operation licence. The Board deferred approval of the licence on the basis that a distillery plant for the processing of the sandalwood would need to be purchased before a licence would be granted. We will return to the exchange of correspondence between the parties relating to the distillery plant later in this judgment.

13. Lahsaut then purchased a distillery plant from an Australian company and advised the Board they had fulfilled the requirement asked of them. A few days later on 13<sup>th</sup> June 2006 the s.47 (1) licence was granted. The licence was for 5 years from 13 June 2006 until 13 June 2011. It authorised the purchase and processing of 10 tonnes of sandalwood per annum. Other conditions were imposed which are of no relevance to this case.

14. Two companies, Tropical and North Far Limited each held 40 tonne, s.47 (1) licences ( total 80 tonnes ) at the beginning of the sandalwood season in July 2006. On 26 July 2006 shortly after the season began Tropical filed proceedings in the Supreme Court seeking judicial review of the Director's decision to grant Lahsaut a sandalwood licence. On 14 August 2006 Tropical sought an urgent injunction to suspend Lahsauts 10 tonne license from operating until the substantive hearing. The other parties to the



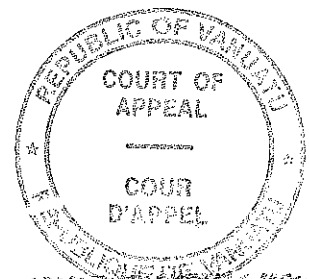
proceedings were, the Minister of Agriculture, the acting Director of Forests, and the Attorney- General, and Lahsaut.

15. In granting the injunction Tuohy J accepted there was an arguable case to support Tropical 's judicial review application. Tropical said that the total quota allowed for sandalwood operation licences in Vanuatu was 80 tonne. The 80 tonne limit had already been filled by Tropical and North Far's licences. The decision to grant Lahsaut's licence of 10 tonnes meant the 80 tonne limit was exceeded. In addition the Judge concluded the status quo favoured the suspension of the licence and that damages would not be a suitable remedy for Tropical. He noted that if the injunction turned out to be wrongly granted Lahsaut had an undertaking as to damages from Tropical.

16. As a result Lahsaut was required to stop buying and processing sandalwood. The case came back for review before Tuohy J on 1/11/07. The Judge noted the licence for Lahsaut had been cancelled by the Republic. We return to this point later in the judgment. The proceedings were further adjourned and ultimately struck out.

17. Apart from the few weeks from the grant of the licence in June 2006 until the injunction in August 2006 Lahsaut has not purchased or processed sandalwood.

18. Given the trial Judge did not consider the question of whether Lahsaut had established negligence by the Republic in issuing the licence it falls to us to consider that question. Two factual issues need to be resolved before we return to Lahsaut's claim-



a) Did the licence granted by the Republic come within the 80 tonne limit, therefore making it a valid licence?

b) Did the Republic cancel the licence?

19. The Republic's case is that the licence granted to Lahsaut did not breach the 80 tonne limit and was therefore a valid licence. And it claimed the Republic did not cancel Lahsaut's licence. We consider each in turn.

### **80 Tonne Limit**

20. The Republic's case is that the judicial review proceedings could not have ultimately succeeded because it was based on an incorrect proposition of fact; Lahsaut's licence for 10 tonnes was not subject to the 80 tonne sustainability limit.

21. The Republic's case is that the 80 tonne prohibition related to the harvesting of sandalwood. Lahsaut's licence was only to purchase and process sandalwood and so was not covered by this 80 tonne rule. The licences held by Tropical and North Far were harvesting licences which were covered by the 80 tonne prohibition. And so the Republic argues it properly granted Lahsaut's licence in 2006. If Lahsaut has a complaint about the injunction it should look to Tropical to make good on its undertaking as to damages.

22. We reject this submission. We are satisfied that the 80 tonne limit applied to the s.47

(1) licence issued to Lahsaut. The licences for Tropical and North Far were also s.47

(1) licenses for purchasing and processing sandalwood. None of these licences were



for harvesting sandalwood. These are separate licences under s.44. A copy of Tropical's 40 tonne licence was in evidence. This licence was for purchasing and processing not for harvesting.

23. . And it is clear from the evidence that the 80 tonne limit applied to the s.47 (1) licences. There are some years of correspondence and minutes of meetings between the Forestry Board, the Director Tropical and North Far about the appropriate sustainability limits on S47 (1) licences.

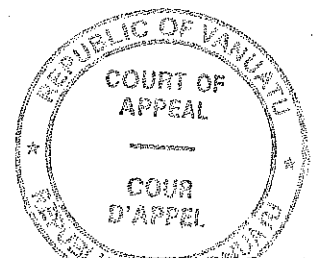
24. We are therefore satisfied the 80 tonne sustainability limit applied to s.47 (1) licences. Tropical and North Far held s.47 (1) licences for a total of 80 tonnes for the 2006 year. Lahsaut was issued with a 10 tonne s.47 (1) licence in 2006. Which meant the sustainability limit was exceeded.

### **Cancellation**

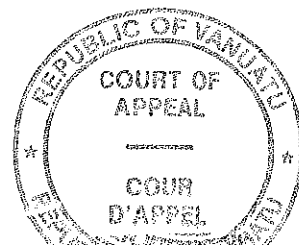
25. As to cancellation Lahsaut's case was that shortly after the injunction was granted suspending their licence it was cancelled by the Director.

26. The Republic deny the licence has ever cancelled. They submit that there was no evidence led at trial that the statutory requirements of cancellation in the Forestry Act were complied with.

27. Lahsaut accepts the statutory process set out in s.37 of the Forestry was not undertaken by the Republic. Its evidence is that it was told by the Director its licence was cancelled.

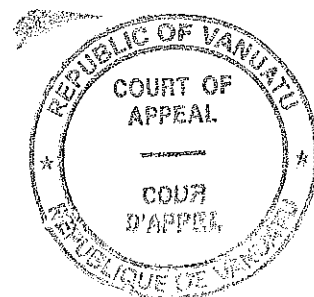


28. Section 37 (1) sets out three grounds on which a licence may be cancelled. Subsections (1) (3) (6) and (8) set out the circumstances under which cancellation may occur. There are significant protections in the Forestry Act to ensure licensees are given rights of response to allegations of non-compliance and proposed cancellation. The Republic's case is that Lahsaut did not prove that the Republic had gone through the statutory cancellation process and so no cancellation in fact occurred.
29. However the Republic submits that if the Court finds there was cancellation then s.37 (5) prohibits any compensation for the cancellation and s.38 provides appeal rights from cancellation which were not exercised by Lahsaut.
30. We are satisfied the Republic did tell Lahsaut that the sandalwood licence was cancelled but that the Republic did not follow any of the statutory procedures set out in the Forestry Act.
31. After the Supreme Court had granted the injunction in the Tropical case the judicial review proceedings came back before Tuohy J on 18<sup>th</sup> July 2007 for review. The minute of the Judge records "*Lahsauts license has been cancelled by the Government of its own accord. Therefore the proceeding is academic except for costs*".
32. The Judge's note of the Government cancellation of the licence obviously meant that Tropical's judicial review challenge to the licence grant need no longer continue. There was no longer any point in pursuing the judicial review when the licence was no longer in existence. The minute recorded that Mr Botleng appeared on behalf of various State entities, the 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> defendants.





33. In several letters to the Republic (June 2009 and March 2011) Lahsaut's solicitors noted the licence had been cancelled. The Republic did not challenge these claims.
34. In a paper from the Minister of Agriculture to the Council of Ministers ( undated but likely in 2011) the Minster noted the Government had cancelled Lahsaut's licence in 2007. We note the paper claims a new licence to Lahsaut had then been granted. We will return to the issue of whether a new further licence was granted to Lahsaut later in the judgment but we are satisfied no such licence was granted.
35. Further, as Lahsaut pointed out in their submissions Mr Hannington Tate, who was at the time of the grant of the licence the Principal Forestry Officer, agreed in evidence that the Director had cancelled Lahsaut's licence.
36. This evidence clearly establishes the Republic told Lahsaut their licence was cancelled. There is no evidence the Republic used the s.37, 38 Forestry Act processes to do so. Given the extensive licence protection set out in s.37 did not therefore apply to this cancellation the s.38 (8) (b) prohibition against a damages claim by Lahsaut against the Republic could not apply.
37. In any event we have found the licence should not have ever been granted and so the cancellation of such a licence is of no significance.



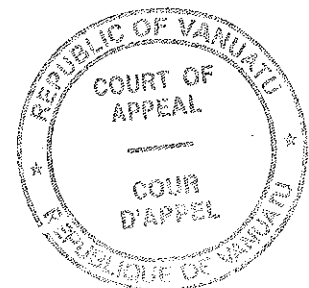
## New Licence

38. In correspondence from Lahsaut's then solicitors to the Republic claiming loss arising from the injunction and cancellation the solicitor mentioned that a new sandalwood operations licence had been granted to Lahsaut. This proposition seems to have been repeated in the Minister of Agriculture's note to the Council of Ministers when a potential settlement was being discussed. We are satisfied no such new licence was granted. Lahsaut denied ever receiving such a licence and the Republic accepted no such further licence had ever been granted.

39. We are satisfied that as pleaded by Lahsaut, the Republic's action, through the Forestry Board and Director in granting the Forestry Board and Director in granting the 13 June 2006 sandalwood operations licence fell below the standard of care expected and was negligent. In particular the licence granted was in breach of the sustainability levels of processing 80 tonnes of sandalwood and was therefore unlawful as in breach of the Forestry Act. The Republic knew or ought to have known that when it granted the licence the Director was in breach of s.4 of the Forestry Act in granting a licence which breached the sustainability obligations.

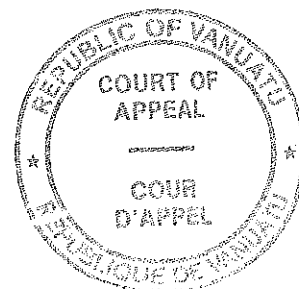
40. Further the injunction granted by Tuohy J in the Tropical proceedings was in part based on the claim that Lahsaut's licence was in breach of the sustainability levels. The error in granting the licence was therefore the Republic's and no damages could accordingly be sought by Lahsaut against Tropical.

41. We now consider the question of damages.



## Damages

42. Lahsaut's claim for damages was in two parts. First Lahsaut claimed the immediate loss from granting the licence. This included the purchase of the distillery machine, wages for its employees and other such establishment costs.
43. The second part was a claim for loss of profits for the five years of the licence from 2006 to 2011.
44. The Judge in the Supreme Court concluded there was no evidence to support the damages claim. That was not correct. There were sworn statements from Mr Jeffrey Lahua relating to the costs incurred in setting up the business and an accountant Anniva Tarilongi relating to the claim for loss of profits. There was very limited cross examination of these two witnesses at trial relating to Lahsaut's damages claim. The cross-examination consisted of an enquiry as to the basis on which the loss of profits claim was calculated.
45. The Judge in the Supreme Court did not decide whether the damages claims were claimable in law. We now do so.
46. First the claim is for costs incurred from the negligent issue of the licence. Lahsaut's claim under this head of damages includes a claim for the purchase of and the costs associated with the distillery machine. Lahsaut's claim is that the purchase of such a machine was a condition of granting the licence.



47. The Republic deny that such a condition was imposed by the Director. We are satisfied the purchase of a distillery plant was a condition of the grant of the sandalwood licence. After Lahsaut made its application to the Licensing Board the Board held a meeting to consider the application. The Secretary of the Board subsequently advised Lahsaut by letter that the Board had deferred the issue of a license. The letter then said “ .....and a Sandalwood license will be issued once the distillery has been purchased by the company.”

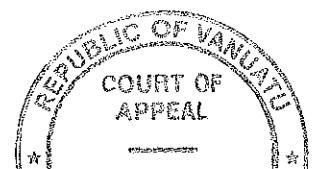
48. Lahsaut then ordered the distillery from an Australian company. On 30<sup>th</sup> May 2006 Lahsaut told the Board it had purchased the distillery plant and advised the machine was due to arrive in Vanuatu late June 2006. On 13<sup>th</sup> June 2006 Lahsaut’s licence was granted.

49. The Board therefore made it clear the license would only be granted if the distillery was purchased. Lahsaut made the purchase and immediately the licence was granted.

50. We are therefore satisfied that the costs, associated with the purchase of the distillery plant arise directly from the wrongful cancellation and are claimable as damages.

51. The claim for damages for the costs arising from the issue of the licence are in terms of the statement of claim as follows.

- I. Loan agreement VT 6,800,000. This claim relates to the money borrowed to purchase the distillery machine and the interest payable. Lahsaut borrowed VT 3,400,000 to purchase the machine and faced interest payments over the course of



the loan of VT 3,400,000. This claim assumes a total loss of value of the distillery machine. Even taking into account what is likely a limited market for such a second hand machine we consider it is likely to have some value. On the other hand Lahsaut would have incurred some considerable costs in transporting the plant to and from Tanna.

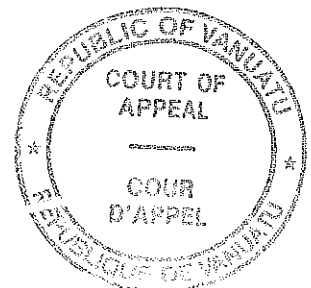
We accept the whole of the interest charge is a loss in the absence of any complaint by the Republic of mitigation of damages of the VT 60,000,000 claim. We allow VT 5,000,000.

II. Management costs, contractors and casual workers employed. The total claim is VT 5,820,000. In addition there are associated VNP contributions of VT 480,000. No challenge was made to these claims and we allow them.

III. Business license and Bank Guarantee, respectively VT 200,000 and VT 1,075,000. No challenge was made to these claims and we allow them.

IV. Legal fees relating to the setting up of the business and those incurred prior to this litigation VT 9,500,000. Again there was no challenge to this claim. These legal fees do not appear to have been incurred directly from this litigation we are satisfied they are properly payable.

V. Farmer Royalties- VT 1,892,000 This is a claim for royalties paid to farmers for sandalwood purchased. It has not been challenged and is payable.



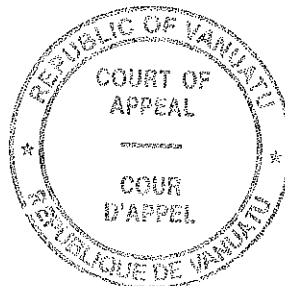
### **Claim for loss of Profits**

52. As we have noted Lahsaut claimed loss of profits for the period of the licence as granted from 2006 to 2011. This totalled just over VT 10,000,000. Anniva Tarilongi set out the basis on which this loss was calculated. No challenge to the quantum was made other than to suggest the claim was all supposition. All claims for future loss of profits will be based primarily on estimated gross income and estimated costs.

53. We do not consider that on the facts of this case such damages are payable. The facts in this case established that Lahsaut had never been entitled to the licence it was granted. No profits could ever have been expected or earned because, as Lahsaut accepted, it was not entitled to a sandalwood licence to purchase and process the 10 tonnes. As they could not have lawfully processed the 10 tonnes Lahsaut could never have earned the profit hoped for. We therefore reject Lahsaut's damages claim for loss of profits.

### **In summary**

54. (a) We are satisfied the Republic was negligent in the issue of a sandalwood licence to Lahsaut.
- (b) Arising from that negligence Lahsaut suffered damages totalling VT 23.967.000 being the costs incurred from the licence grant.
- (c) The claim for loss of profits damages fails.



(d) Given the commercial aspect of this litigation we consider the Republic should pay interest on the damages awarded at 10% from the date of filing the claim 13 April 2015 until the date of this judgment.

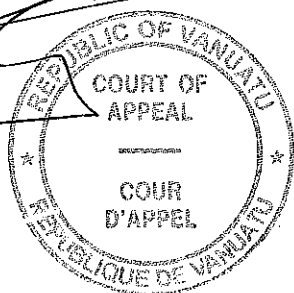
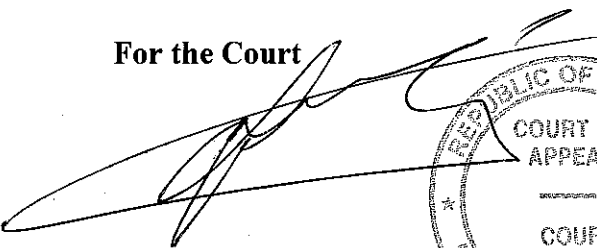
**Costs**

55. (a) Lahsaut, having mostly succeeded before us is entitled to costs in the Supreme Court and in this Court against the Republic to be the agreed or taxed on the standard basis.

(b) We note the Republic cross- appealed the decision of the Supreme Court Judge to award costs to Lahsaut. The cross appeal was premised on the hope that Lahsaut would not succeed on this appeal. However Lahsaut has succeeded and the cross appeal therefore need not be considered. The cross appeal is therefore dismissed with no order as to costs.

**DATED at Port Vila this 21<sup>st</sup> day of July 2017**

**For the Court**



**Vincent Lunabek**

**Chief Justice**