

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Appellate Jurisdiction)

Land Appeal Case No. 14 of 1993

IN THE MATTER OF: LAND KNOWN AS NT'VANA

BETWEEN: CHIEF EDWIN HAPSAI
Appellant

AND: FAMILY ALBERT
Respondent

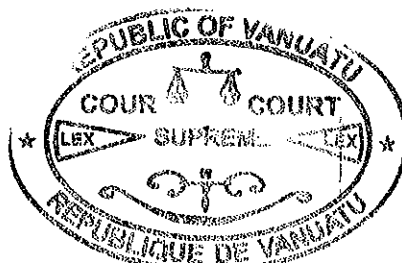
Coram: Justice D. V. Fatiaki

Counsels: Mr. S. Stephens for the Appellant
Mrs. MG Nari for the Respondent

Date of Ruling: 26 January 2012

RULING

1. This is an application to reinstate the above appeal and to have it heard and determined on its merits.
2. For one reason or another the appeal which was filed in 1993, and which asserts a lack of qualification on the part of the Lay Justices who sat in the Island Court and "actual bias" on the part of one of the Lay Justices in rendering his decision in the Island Court, was never heard. Instead, the appeal got "side-tracked" by interlocutory matters, including, the non-payment of a substantial costs order imposed when the appellant unsuccessfully sought to lead further evidence at the hearing of the appeal.
3. The relevant costs order of **Treston J.** is dated **25 October 2005** and reads:
 - "(1) The Family Albert's costs in relation to an application by Chief Hapsai to call fresh evidence are determined in the sum of VT113,116; and
 - (2) Those costs of VT113,116 must be paid by Chief Hapsai to Family Albert by 3 p.m. on 22 November 2006 "failing which the appeal will be deemed to be abandoned" (**the unless order**)"



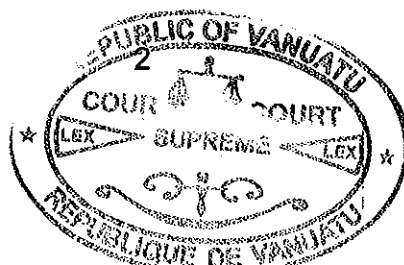
4. Costs were not paid within the time given and the appeal was therefore "deemed to be abandoned". Whatever may be the status of the appeal, it is common ground that the costs order was fully paid up on 20 October 2009.
5. On 13 July 2010 this Court granted the appellant leave to appeal to the Court of Appeal against the unless order and extended the time for the lodgement of the appeal. (see: Civil Appeal No. 18 of 2010)
6. On 3 December 2010 the Court of Appeal delivered its judgment in **Civil Appeal No. 18 of 2010**. The Court recognized that the two points raised by the appellant in challenging the unless order had "... some merit" but, neither was "... conclusive as to the outcome of the appeal".
7. The Court of Appeal's simple straight-forward reason for dismissing the appellant's appeal is set out in its judgment in the following paragraphs:

"29. However, as we have said, we do not need to finally decide those issues. In this matter, it is apparent that Chief Hapsai did not accept that, by the elapse of time after the order of 25 October 2005 as to costs had not been complied with, the appeal from the Malekula Island Court had been brought to an end. It also appears that the Court itself also accepted that the appeal was still alive. There was a conference on 16 September 2005 which was adjourned to 13 December 2005. On 9 December 2005, Chief Hapsai filed a notice of discontinuance of the appeal. On 13 December 2005 the Court made orders that:

1. Pursuant to the notice dated 8 December 2005, the proceeding is discontinued;
2. The appellant must pay costs to the respondent on a standard basis or as agreed or determined by the Court.

30. That is what brought the proceeding to an end. See Rule 9.9 (4) of the Civil Procedure Rules, and the observations in Inter-Pacific Investment Ltd. v. Sulis [2007] VUSC 59. Once the proceeding by way of appeal was brought to an end by the notice of discontinuance, Chief Hapsai lost the opportunity of complainant about the two matters underlying the "unless" order of 25 October 2005 raised on this appeal.

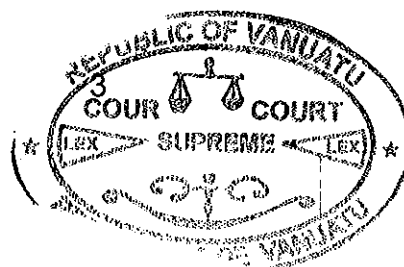
31. For those reasons, in our judgment, this appeal should also be dismissed. Chief Hapsai as the appellant must pay to the



respondent the costs of the appeal, including the costs of securing leave to appeal."

(my underlining)

8. Not satisfied with the outcome, the appellant seeks to re-instate and/or revive its appeal in **Land Appeal Case No. 14 of 1993** in order to have "*the substantive issues fully determined and disposed*"presumably on their merits. The basis for this submission is that "... *discontinuing a case does not necessarily mean that the case is res judicata, thus can not be reopened*". That is a non-sequitur. A discontinuance is a decision of a claimant to a proceeding whereas the reinstatement of a discontinued proceeding is a decision for the court if jurisdiction exists.
9. The respondent, equally forcefully, submits that the present application is "*misconceived*" in so far as the appellant discontinued his appeal and in accordance with **Rule 9.9 (4) (a)** of the **Civil Procedure Rules (CPR)** the discontinued appeal cannot be revived. In simple terms "*... there is no Land Appeal Case No. 14 of 1993 and there is nothing to set aside or reinstate*".
10. In reply, the appellant submits that what the Court of Appeal dealt with in its judgment in **Civil Appeal Case No. 18 of 2010** was the appellant's appeal against the unless order and **not** the appellant's substantive appeal in **Land Appeal Case No. 14 of 1993** which remains extant before the Supreme Court since it was first filed on 26 July 2004.
11. After careful consideration there is no doubt in my mind that the Court of Appeal did **not**, consider and determine the merits of **Land Appeal Case No. 14 of 1993**. That substantive appeal was **not** before the Court of Appeal in its consideration of **Civil Appeal No. 18 of 2010** and could never have been before the Court of Appeal as **no** determination has yet been made by the Supreme Court which has a final non-appealable jurisdiction in the matter (**see**: Sections 21 and 22 (4) of the Island Courts Act).
12. Equally the question whether or not the Supreme Court has power to reinstate a discontinued appeal was **not** determined by the Court of Appeal which based its decision purely and simply on the existence of the appellant's pre-emptive Notice of Discontinuance filed on 9 December 2005.
13. Having said that the Court of Appeal, and the Supreme Court in its orders of 13 December 2005, recorded and accepted that with the filing of the appellant's Notice of Discontinuance "*... the proceeding by way of appeal*



was brought to an end ...". That is also the effect of **Rule 9.9** of the **Civil Procedure Rules**.


14. Furthermore, at the time of filing the Notice of Discontinuance the only proceeding that was extant and to which the Notice specifically referred was **Land Appeal Case No. 14 of 1993** and nothing else.
15. The reason(s) why the appellant filed a Notice of Discontinuance does not alter the legal effect of the Notice which was to bring the appeal proceedings to an end. I accept that a withdrawal or discontinuance of the appeal does not raise a "*res judicata*", but neither, does that feature inevitably permit the discontinued proceeding to be revived at the behest of the party who discontinued the proceedings **and** contrary to the clear prohibition of **Rule 9.9 (4) (a)**. In this latter regard see the reserved judgment of Tuohy J. in **Inter Pacific Investment Ltd. v. Chris Sulis** (No. 2) [2007] VUSC 21.
16. Appellant's counsel accepts that the **CPR** provides that once a proceeding is discontinued it may not be revived, but nevertheless, counsel submits (without detailed reference to any particular decision or statutory provision), "... that the Supreme Court has jurisdiction to reinstate the appeal if substantial justice of the matter requires it to be reinstated pursues (sic) the provision of the Vanuatu Constitution" (whatever that may mean).
17. The expression "*substantial justice*" occurs in **Rule 1.7 (b)** of the **Civil Procedure Rules** which deals with the position if **no** provision exists in the CPR dealing with a proceeding or a step in a proceeding. It also occurs, in **Article 47 (1)** of the Constitution "*where there is no rule of law applicable to a matter*".
18. This application therefore reduces to a simple question: "*whether or not there exists a provision or rule of law applicable to the revival or reinstatement of a discontinued proceeding*". In response, I am satisfied that **Rule 9.9 (4) (a)** of the **Civil Procedure Rules** is the relevant applicable provision and, in unequivocal terms, expressly prohibits the revival of the discontinued appeal by the appellant.
19. For the foregoing reasons the application for reinstatement of **Land Appeal Case No. 14 of 1993** must be and is hereby dismissed with costs to be taxed if not agreed.
20. I acknowledge that this ruling means that the appellant's appeal in **Land Appeal Case No. 14 of 1993** will not be determined on its merits but that is an inevitable consequence of the actions of the appellants, and the



subsequent decision of the Court of Appeal read with the applicable provisions in the Civil Procedure Rules.

DATED at Port Vila, this 26th day of January, 2012.

BY THE COURT


D. V. FATIAKI
Judge.

