

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

REPUBLIC OF VANUATU COURT
Civil Case No. 01 of 2009

BETWEEN: VICTOR RON

First Claimant

First Claimant

AND: MOSES MOLI

Second Claimant

Second Claimant

AND: ESLINE TURNER

First Defendant

First Defendant

AND: JAMES NWANGO

Second Defendant

Second Defendant

**AND: ZEBEDEE MOLVATOL & MORRIS
MOLVATOL**

**ZEBEDEE MOLVATOL & MORRIS
MOLVATOL**

Third Defendants

Third Defendants

AND: THE MINISTER OF LANDS

THE MINISTER OF LANDS

Fourth Defendant

Fourth Defendant

AND: THE DIRECTOR OF LAND RECORDS

THE DIRECTOR OF LAND RECORDS

Fifth Defendant

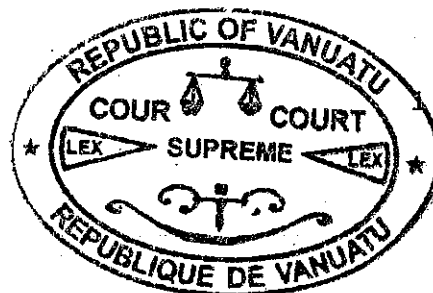
Fifth Defendant

Coram: *Mr. Justice Oliver A. Saksak*

Counsel/Parties: *Mr. Saling N. Stephens for the First Claimant*
No appearance by Second Claimant
Mr. George Nakou for First Defendant
Mr. Stephen Joel for Second Defendant
No appearance by Third Defendants
Attorney General for Fourth and Fifth Defendants

Date of Hearing: *29th April 2011*

Date of Judgment: *19th February 2014*



JUDGMENT

History

1. This case was originally heard on 23rd July 2009 and 19th – 20th August 2009.

2. On 20th August 2009, the Court gave its decision which recorded that –

(a) The Claimant had no Section 17(g) rights;

(b) He had no standing to bring claims against the First, Third, Fourth and Fifth Defendants and all his claims against them failed.

(c) His claims succeeded against the Second Defendant and judgment was entered in his favour. Damages were to be assessed with directions that the Claimant was to file and serve written submissions and sworn statements within 14 days. Costs were reserved.

3. On 4th September 2009, the Court published its reasons for the decisions dated 20th August 2009. Paragraph 14 records as follows –

"The First Claimant succeeded against the Second Defendant on the basis that the evidence adduced against him were unchallenged. He is entitled to damages against the Second Defendant but these will be assessed pending further sworn statements and evidence."

4. The Second Defendant James Ngwango did not appeal against that decision and judgment.

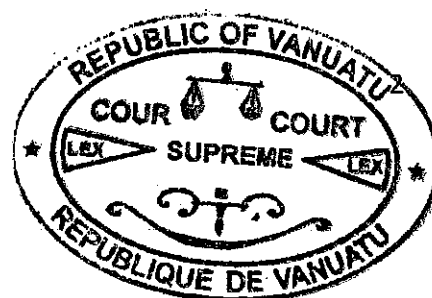
5. On 5th November 2010, Mr. Stephens filed sworn statements of the Claimant in support of damages which are categorized as –

(a) Labour Costs – VT494,843

(b) Damages – VT7,270,703

(c) Interests – VT 2,327,503

Total – VT10,085,848



6. On 20th January 2011, Mr. Stephens filed an application seeking an order for damages in the sum of VT10,800,000 against the First and Second Defendants for damage and loss caused to the Claimant's leasehold property together with costs of the application.

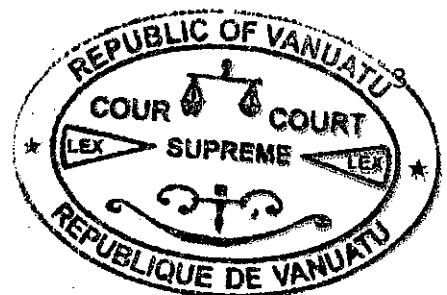
7. The application was first listed for hearing on 29th April 2011 when further directions were issued with a return date being 27th May 2011. On this date only Mr. Saling Stephens appeared and sought extensions of previous orders. The Court allowed extensions to 14th June 2011. On this date Mr. Stephens, Mr. Nakou, Mr. Gilu and Mr. Joel were present. A Further adjournment was granted to 1st July 2011. There is no record of any sitting on 1st July 2011. The matter remained dormant until Mr. Joel filed submissions on behalf of the Second Defendant on 12th August 2011. Mr. Stephens has not filed any written submissions to date.

8. The File was only brought before the Judge in October 2013 when the Claimant wrote a letter to the Court dated 29th October 2013 enquiring about the status of his claims. The Court regrets the long delay but emphasizes that such delay is not deliberate or intentional. The oversight or delay is attributed to the Claimant's Counsel.

Issues

9. From Mr. Joel's written submissions there are essentially two issues –

- (a) Whether or not the Claimant had a contract with the Second Defendant to provide a survey plan?; and
- (b) Whether there was a breach of that contract by the Second Defendant to give rise to the Claimants' claims for damages?



10. Mr. Joel submitted that as there was no request for survey plan by the Claimant, it follows there was no contract. And Counsel submitted further that without a contract there could be no liability.

11. Mr. Joel urged the Court to consider paragraphs 13, 14, 15 and 16 of the Claimant's claims in contending that no contract was pleaded. The pleadings in those paragraphs read as follows:-

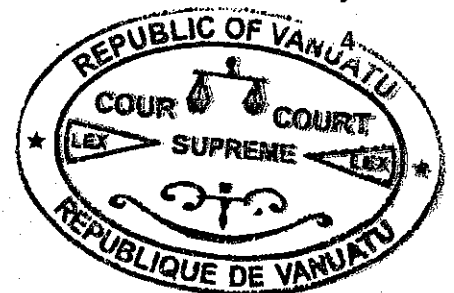
13. That immediately after the grant of a registered negotiators certificate by the claimant "requested" the Minister of Lands, the claimant "requested" the second defendant to demarcate the land and thereafter to provide a survey plan on the subject land which would eventually enable the registration of the lease.

14. The second defendant having surveyed the subject land, has a survey plan which unreasonably withheld the survey plan when the claimant repeatedly demanded to have the original copy of the survey plan in order to speed up the survey process.

15. Whilst the claimant was desperately attempting to convince the second defendant to hand deliver to him the original copy of his survey plan, the second defendant secretly and without notifying the claimant of his hidden agenda, collaborated with the third defendant thereby cheated the claimant and sold the survey plan and had negotiation with the third defendants thereafter showed her interest in acquiring the said land.

16. That after negotiations made with the first and third defendants, the second defendant has without the claimants knowledge and consent, resurveyed the same plot of land on 16 April, 2006 in favour of the first defendant and thereafter created a new Title number for the particular plot of land."

12. Mr. Joel stated in his submissions that his client did not file any defences to the above pleadings. Mr. Joel was mistaken. His client's defences are dated 7th May



2009 which were filed by him on 27th May 2009. In paragraph 5 of the defence, Mr. Ngwango admitted to paragraph 13. In paragraph 6 Mr. Ngwango admitted partially to paragraph 14 in that he stated he carried out the survey of the Claimant's land but denied unreasonably withholding the plan until all required fees were paid. Mr. Ngwango denied paragraph 15 and admitted to paragraph 16 save as to prior knowledge and consent not being required from the Claimant.

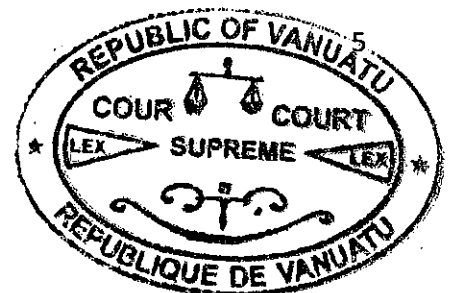
13. Mr. Joel again stated in his written submissions on page 4 that although his client did not file any defence, he had denied ever being engaged by the Claimant to carry out a survey plan. Counsel refers to a sworn statement dated 30 June 2011. There is no copy of this sworn statement on the Court File. Even if there was, those statements are contrary to the admissions Mr. Ngwango makes to the Claimant's pleadings against him in paragraphs 13, 14 and 16.

14. On 5th November 2010, Mr. Stephens filed the Claimants' evidence in support of damages claims against Mr. Ngwango in two separate statements. One relates to damages pursuant to the Court's Judgment dated 4th September 2009 and the other is a further sworn statement of even date that provides evidence of the First Defendant's involvements in the allegations made by the Claimant.

15. Neither Mr. Ngwango nor Mrs. Esline Turner have filed any evidence in defence or in rebuttal to those allegations.

16. The Claimant annexes as "G" to his sworn statement dated 26th January 2009 a survey plan done by N.L.S.S which stands for Ngwango Land Survey Services. This plan bears the stamp of N.L.S.S and it is duly signed by Mr. Ngwango as registered surveyor. In light of all this unchallenged evidence it is hard to accept that –

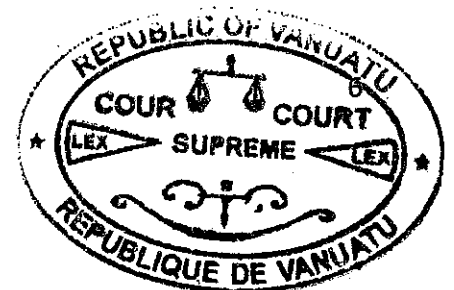
- (a) The claimant had not engaged the services of N.L.S.S for the provision of a survey plan.
- (b) With the plan in existence, the claimant's request was not accepted to bring to birth contractual relationship between the Claimant and the Second Defendant.



17. In his defence, the Second Defendant stated that he had withheld the plan until all survey fees were paid. He has no evidence to show how much if any was paid and how much remained outstanding. He had no evidence as to how much he charged for his services.

18. It was the Claimant who produced evidence of the fees in his letter dated 30th September 2006 annexed "H" to his sworn statement dated 20th January 2009. He deposed to the agreed fees at VT15,000. He deposed to not paying as he received advice against payment. The Claimant then deposed to an arrangement with his bank to pay the fees and that Mr. Ngwango had increased the fees to VT68,000. Despite his being surprised the Claimant deposed to him going back to the bank and seeking a proforma invoice, which the Bank provided. Subsequently, the Second Defendant went to work and completed the plan. However, the Claimant contacted the Second Defendant and went into his office personally but the Second Defendant was avoiding him or evading service or an appointment. It was only on 20th September 2006 when the Claimant finally met Mr. Ngwango who told him that there was another custom landowner. He deposed to the Second Defendant selling the Claimant's original plan to the First Defendant for VT80,000. Mr. Ngwango did not respond to the Claimant's letter of 30th September 2006. Mr. Ngwango did not file any evidence to challenge or rebut the evidence against him.

19. It is unfortunate that Mr. Ngwango did not see fit or proper to take necessary steps to defend himself from the Claimant's allegations at the time. He was a registered surveyor at the time and to persistently avoid appointments or evade contacts by clients, who like the Claimant, had engaged his services for a survey plan at an agreed price facilitated by the client's bank, it amounts to nothing but professional negligence. And professional negligence always entitles the person who suffers loss or damage to found his claims on either tort or contract. In this case it is both.



20. Although the First Defendant is implicated in the evidence of the Claimant of wrongdoing, it was largely the fault of Mr. Ngwango and his failure to be involved actively in the proceeding that the Court arrived at its original decision that the Claimant did not establish any fraud or mistake against the First Defendant or establish any section 17(g) rights. The Claimant did not appeal against those findings and they remain such that the First Defendant cannot be liable for any damage or loss incurred by the Claimant.

Conclusion

21. For the reasons given, the Court enters judgment in favour of the Claimant for damages against the Second Defendant, James Ngwango. The claims are however reduced from VT10,085,848 down to VT3,970,763. This is the damages claim assessed on a "As is where is" basis by Mr. Lenga of Tanonda Real Estate. The Claimant is entitled to his costs of and incidental to this proceeding on the standard basis as agreed or taxed. This part of the claim does not concern or involve the Second Claimant, First Defendant, Third, Fourth and Fifth Defendants therefore none of these parties are entitled to claim any costs.

ORDERS

22. The Second Defendant, James Ngwango be hereby required to –
- (i) Pay damages to the Claimant in the sum of VT3,970,763.
 - (ii) Pay the Claimant's costs of and incidental to this whole action on the standard basis as agreed or taxed.

DATED at Luganville this 19th day of February 2014.

BY THE COURT


OLIVER A. SAKSAK

Judge

