

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

Civil Case No. 29 of 2011

BETWEEN: BILL STEPHEN
Claimant

AND: MARTIN MAHE
Defendant

Coram: *Justice Oliver A. Saksak*

Counsel: *Silas C. Hakwa for the Claimant*
Colin B. Leo for the Defendant

Date of Hearing: *7th April 2015*

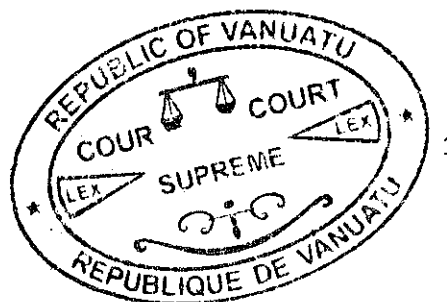
Date of Judgment: *27th July 2015*

JUDGMENT

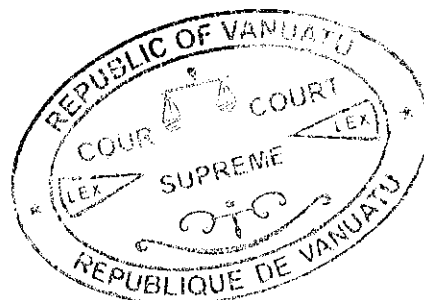
- A. Judgment is entered in favour of the Claimant for the sum of VT8,157,000 against the Defendant.
- B. The Claim for damages is declined.
- C. The Claim for Interests is allowed at 5% per annum from 1st June 2010 to date of Judgment.
- D. The Claimant is entitled to his costs of and incidental to the proceeding, on the standard basis as agreed or taxed by the Court.
- E. The Counter-Claims of the Defendant are dismissed.

REASONS

1. The Claim



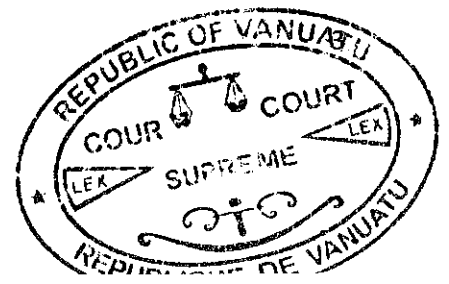
- 1.1. The Claimant's claims are set out in his Supreme Court Claim dated 22 June 2011 and filed on 28 June 2011.
 - 1.2. The claim is essentially for VT8,157,000 being moneys had and received by the defendant, and damages for breach of contract, negligence and for the defendant to account for all moneys belonging to Family Salathiel Stephen Dule, deceased ("FSSD").
 - 1.3. The Claimant also claims interests and costs.
2. Background Facts (in chronological order)
- 2.1. On 8th November 2009, during a family meeting held at the deceased's home at Chapuis, Luganville whereby a verbal agreement was reached between the deceased acting in his own right and on behalf of the FSSD and the defendant. The parties agreed that the defendant would perform and carry out certain tasks in relation to Nasulnun and Artacha lands for and on behalf of the FSSD. The agreement was verbal.
 - 2.2. On 1st December 2009, the defendant prepared a document which he described as a power of attorney entitled "*To How (sic) MAY IT (sic) CONCERN*": Re: Power of attorney granted to Mr MAHE Martin "*herein - after referred to as the First Power of Attorney*".
 - 2.3. On 31st May 2010, the defendant signed a Deed of Release with the Government to enable him to collect the sum of VT9,864,517 being annual rents in relation to Nasulnun land for and on behalf of FSSD. (the First Payment).
 - 2.4. On 2nd June 2010, the defendant uplifted the first payment of VT9,864,517 from the Government under the Deed of Release.



- 2.5. On 4th June 2010, the defendant transferred VT4,000,000 of the First Payment into the bank account of the deceased and retained the balance of VT5,864,517.
- 2.6. On 6th June 2010, Salathial Stephen Dule passed away. The First Power of Attorney came to an end.
- 2.7. On 15th June 2010, the claimant and the other siblings of the deceased made another power of attorney in similar terms as the first power of attorney granting power to the defendant to perform and carry out various tasks in relation to Nasulun and Artacha Lands. This is referred to as "*the Second Power of Attorney*".
- 2.8. On 2nd December 2010, the claimant wrote a letter to the defendant giving him formal notice that the Second Power of Attorney had been revoked.
- 2.9. Despite that notice, the defendant proceeded and uplifted from the Government on 6th December 2010 the sum of VT2,292,483 (the Second Payment) which were annual rents for leases of land being part of Nasulun Land.

3. Allegations

- 3.1. The claimant alleges that –
 - a) The defendant had wrongfully retained, misused or misappropriated the sum of VT2,292,483 which is the property of FSSD.
 - b) The defendant had no right, authority or the consent of the deceased or FSSD either to retain the sum of VT5,864,517, pay himself by using such money or use such money to pay lawyers or any other person or apply such money for any other purposes whatsoever.
 - c) The defendant had no right, authority or the consent of the deceased or FSSD either to retain the sum of VT2,292,483, pay himself or use

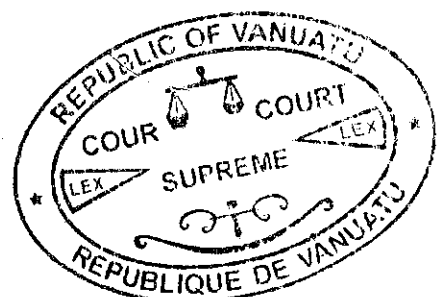


such money to pay lawyers or any other person or apply such money for any other purposes whatsoever.

- d) The defendant had failed and neglected to properly account to FSSD for the sums of VT5,864,517 received as the first payment and VT2,292,483 received as the second payment.

4. Defence and Counter-Claim

- 4.1. The defendant filed an undated defence on 27th July 2011. It is a bare defence but generally and in essence the defendant is denying any liability and relying on the First and Second Powers of Attorney granted in his favour by the deceased and by the surviving siblings of the deceased. Further, the defendant relies on the Powers of Attorney as the basis for him entering into the Deed of Release with the Government to collect the First and Second Payments in 2010.
- 4.2. Further, the defendant states in his defence that he had used the balance of the money he received to pay Barthelemy Ngwele, Bill Stephen (claimant), Steve Stephen, lawyers John Timakata and Less John Napuati and to pay for incidentals and reasonable expenses.
- 4.3. Further by way of counter-claims the defendant alleges he was unlawfully detained on 7th December 2010 as a result of allegations of misappropriation of funds and theft which he claims affected his reputation. Further, he alleges that he had suffered loss of business as a result of the claimant's actions in engaging the police to arrest and detain a vehicle Reg. No. 6594, and an assault by the Claimant at the Police Station.
- 4.4. The defendant claims damages in the sum of VT3.000.000 with interests at 6% per annum, and costs.



5. The Evidence (by Claimant)

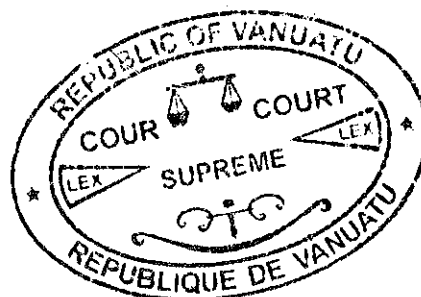
- 5.1. The claimant called 3 witnesses to give evidence in support of his claims namely (a) the claimant himself; (b) Barthelemy Ngwele; and (c) Vira Natu.
- 5.2. The claimant filed a sworn statement dated 10th October 2014 tendered into evidence as Exhibit C1. He gave evidence in-chief and was cross-examined by Counsel for the defendant.
- 5.3. Barthelemy Ngwele and Vira Natu filed sworn statements on 1st October 2014 tendered into evidence as Exhibits C2 and C3 respectively. Both witnesses gave evidence in-chief and were cross-examined by Mr Leo.

6. Evidence by Defendant

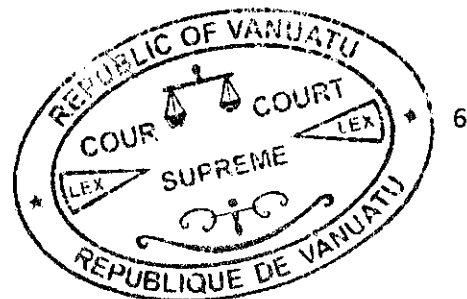
- 6.1. Initially the defendant filed three sworn statements in his defence. On 23rd June 2012, he filed a sworn statement by Thomsen Andrew Steven in support of his defence dated 23rd May 2012. During the course of the trial the defendant advised the Court he would not call Thomsen Andrew Steven as a witness.
- 6.2. On 28th June 2012, the defendant filed his sworn statement in support of his defence which he tendered into evidence as Exhibit D1. He filed an additional sworn statement on 11th November 2013 which he tendered into evidence as Exhibit D2. He was cross-examined at length by Mr Hakwa in relation to his sworn statements.

7. Considerations, Discussions, Findings and Determinations

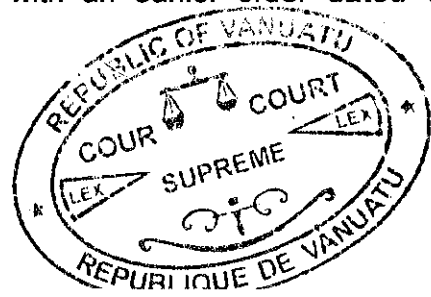
- 7.1. I consider first the Counter-Claims of the defendant as follows –
 - a) The allegation of unlawful imprisonment and defamation in paragraph 24 of his Defence and Counter-Claim was withdrawn by the defendant at the commencement of his opening address at trial on 7th April 2015.



- b) For allegation of loss of business due to his vehicle being detained by the claimant; and
- c) For allegation that the claimant had threatened to cut the defendant's throat at the Police station.
- 7.2. Mr Hakwa submitted these were seriously misconceived, totally without any proper foundation or merit or evidence, frivolous and vexatious, amounting to an abuse of process, not disclosing any or reasonable cause of action against the claimant, and as such they should be dismissed.
- 7.3. Mr Leo did not address the counter-claims of his client in his written submissions.
- 7.4. The defendant has no evidence in support of the balance of his counter-claim in his sworn statement filed on 28th June 2012 (Exhibit D1). Similarly in his sworn statement filed on 11th November 2013 (Exhibit D2) at paragraph 9 the defendant makes reference to a letter written by a Police Officer namely Eric Bob (Annexure P4), dated 28th October 2013. The defendant seeks to rely on this letter as evidence to show the unfriendly approach by the claimant to him at the police station.
- 7.5. During his evidence-in-chief the defendant was not asked by Mr Leo about the vehicle, loss of business or threats against him by the claimant.
- 7.6. In cross-examination, Mr Hakwa questioned the defendant at length about the vehicle, his daily and monthly earnings and the threats. In response, the defendant said the vehicle was earning about VT8.000 per day and therefore for 10 days it would have made about VT90.000. As for the threats the defendant said "*they did this to me*" and said that as it was related to the loss of his business and reputation, he was claiming VT3,000,000 in damages.



- 7.7. Mr Hakwa submitted the court should disregard the letter by the police officer. I accept that submission. The defendant could not rely on the letter as he was not the maker of it. He could have called the police officer as a witness but he did not. The letter is therefore rejected by the Court as evidence to support the defendant's counter-claims for loss of business and threats.
- 7.8. Further, the defendant did not produce any evidence to show he had a valid business license to operate a transport service. The vehicle was not registered in the defendant's name but in Credit Union's name. See Annexure 2 to Stephen's sworn statement – Exhibit C1.
- 7.9. Mr Hakwa in cross-examination asked the defendant whether he made any complaint to the police about the claimant's behavior but the defendant avoided the question and simply answered by saying "*They did this to me*".
- 7.10. I therefore find that the counter-claims of the defendant relating to his loss of business and threats are not substantiated. Accordingly they are dismissed in their entirety.
- 7.11. The Court records as the final reason for dismissing the defendant's counter-claims is due to non-payment of filing fees for the counter-claim. Schedule 1 of the Civil Procedure Rules No. 49 of 2002 under Part 2 provides for filing fees in relation to counter-claims. The fees are VT15.000. There is no record that the defendant paid those fees upon the filing of his defence and counter-claim.
- 7.12. Further, the Court directed the Parties to pay their trial fees by Order dated 16th October 2014. Only the claimant paid their trial fees of VT15.000 again on 3rd December 2013 on Receipt 823015. It appears the claimant paid VT15.000 in compliance with an earlier order dated 7th



February 2013 on 14th February 2013 (Receipt No. 649767). There is no record showing the defendant ever paying his portion of the trial fees. Therefore he must reimburse the claimant in the sum of VT15.000 which the claimant is to include in his Bill of Costs as disbursements.

8. First Power of Attorney

8.1. This document is annexed to the sworn statement of the claimant (Exhibit C1) as Annexure BS1. I set out the full text of it below –

"TO HOW (sic) MAY IT (sic) CONCERN

Re: Power attorney granted to Mr MAHE Martin

Mi, SALATHIEL DULE STEPHEN, mi givim full power of attorney blong mi igo long Mr MAHE Martin.

Power of attorney we mi grantem blong givim full power mo authority blong mi igo long MAHE Martin blong hemi isave deal wetem graon blong mi we Land Tribunal I approvum long 9 September 2008:

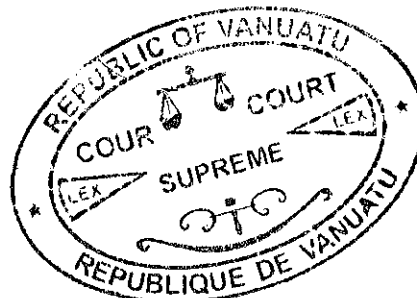
- *NASULNUN CUSTOM LAND long South Santo Eria II*
- *MO ARTACHA CUSTOM LAND long South Santo Eria II*

Skej Map blong tufala custom land ia I attached wetem document ia.

Mi givim Power of attorney long MAHE Martin, blong hemi I mekem ol negotiation wetem any persons mo signem any instrument, createm any leases mo registration blong lease.

(Signed)

.....
Salathiel Dule Stephen



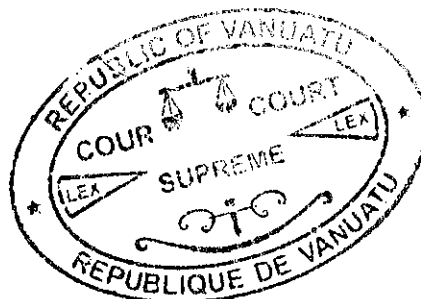
*Customary Land Owner blong Nasulnun Custom Land mo Artacha
Custom Land (South Santo Cattle Project)*

Witnesses:

- *Bill Stephen (Mobile 5449957) (Signed)*

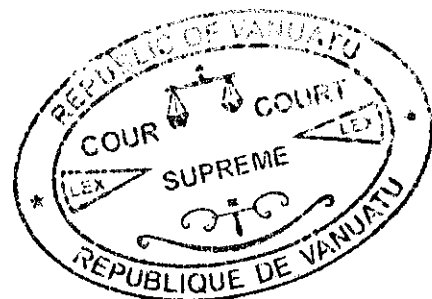
.....
- *Barthelemy Ngwele (Mobile 7741267) (Signed)*

- 8.2. The defendant's general defence is that this instrument gave him the authority to do what he did, and in particular to uplift the VT5,864,517 and VT2,292,483 in 2010 for and on behalf of the deceased and FSSD.
- 8.3. Mr Hakwa for the claimant argued and submitted that the defendant clearly had no power or authority under the terms of the First Power of Attorney to do anything beyond what is set out in the operative parts of the power in paragraphs (1) and (2) which were –
- (i) to deal with Nasulnun;
 - (ii) to deal with Artacha;
 - (iii) to negotiate with any person for any lease of land being part of Nasulnun or Artacha;
 - (iv) to sign any instrument in relation to such negotiations;
 - (v) to create leases in relation to Nasulnun or Artacha; and
 - (vi) to register leases in relation to the land being part of Nasulnun or Artacha.
- 8.4. The law on interpretation of powers of attorney is well established. In an old English case of Bryant v. Banque du Peuple [1893] 3A.C 177 the Privy Council said this:



“Powers of attorney are to be construed strictly – that is to say, where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that, on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication.”

- 8.5. In light of this principle of interpretation and upon reading the terms of the First Power of Attorney, I am not satisfied that the defendant had any right or authority to uplift and collect the rental monies paid in respect of leases executed over parts of Nasulun and Artacha Lands. The instrument lacked any express terms to convey such right or authority to the defendant. To suggest the authority was available by necessary implication was or is an impossibility because of the overwhelming evidence produced by the claimant and his witness, Barthelemy Ngwele.
- 8.6. The claimant gave evidence at paragraph 29 of his sworn statement (Exhibit C1) relating to a meeting held at his father's house (the deceased) on 8th November 2009, when the defendant along with Barthelemy Ngwele, Vira Natu and Christian Ben went to see the deceased. The claimant was present and the following evidence reflects what he saw and heard –
- “(a) *The defendant asked my father to show him documents in relation to FSSD's claims for custom ownership of Nasulun and Artacha which he did.*
- (b) *The defendant took about 15 minutes to read the documents which my father provided to him, then shook my father's hand and said or words to the effect:*



"evri samting istret, ol pepa blong yu blong land tribunal ia, mi save prosesem blong yu save karem ol money blong lease blong graon blong yu long katel projek."

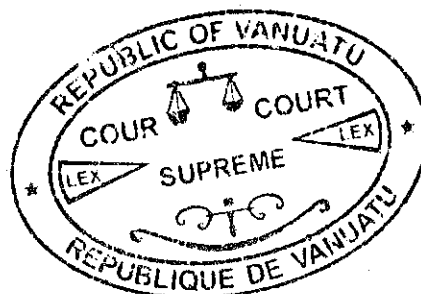
(c) My father said or words to the effect in response: "Mi no hariap blong karem moni blong lease blong graon, mi wandem tumas se bae mi mas karem bak mo sekiurem gud ful graon blong Nasulhun mo mi mas karem bak part blong Artacha we SMJALT hemi kivim long nara klemens mo pat blong Nasulhun we SMJALT hemi givim long Family Noel Vari fastaem mo no hapi long jajmen we SMJALT hemi mekem mo mi wantem se apil blong mi iko long SMILT mo sipos yu save helpem mi long olgeta wok ia bae mi save givim wan presen long yu....."

(d) In response to my father the defendant said or words to the effect: "yu no wari uncle bae mi kasem Vila mi wok long hem....."
(emphasis by underlining).

8.7. Barthelemy Ngwele confirmed all that evidence in his evidence by sworn statement (Exhibit C2) at paragraphs 16, 17, 18, 19, 20 and 21. He confirms he was present at the meeting held at the deceased's house in Chapuis on 8th November 2009. He described what he saw and heard in paragraphs 19, 20 and 21 as follows –

"19. The defendant took about 10 minutes to read the documents. He then shook SSD's hands and said or words to the effect:

"Evri samting istret, ol pepa blong land tribunal ia, mi save prosesem blong yu save karem moni blong lease blong graon blong yu long katel projek....."



20. SSD said or words to the effect: "Mi no hariap blong karem moni blong lease blong graon but mi wandem tumas blong karem bak ful baondri blong Nasulnun mo tekem bak pat blong graon we land tribunal hemi givim long Noel Vari mo haf pat blong Artacha we land tribunal hemi givim long olgeta nara faevman. Mi no hapi long disisen we land tribunal hemi mekem mo mi apil agensem disisen ia, Sipos yu save mekem wok ia blong mekem se ful baondris blong Nasulnun mo Artacha ikam bak long family blong mi, bae mi save kivim wan presen long yu."
21. The defendant said and words to the effect: "Yu no wari uncle bae mi kasem Vila mi wok long hem" (emphasis by underlining).

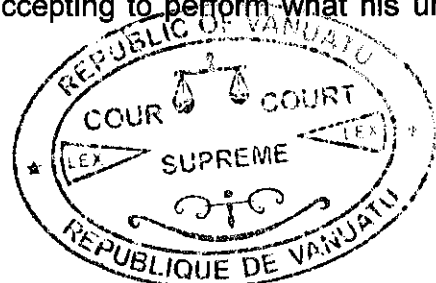
8.8. From all that the Court deduces –

(a) From the defendant, that he was misapprehending from the very beginning that his uncle was giving him the authority to uplift moneys. He was thinking money.

(b) From the deceased that –

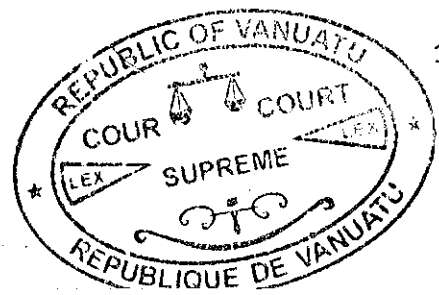
- (i) the money was not his priority as that would come later.
- (ii) his priority was to secure ownership of the full boundary of Nasulnun land and part of Artacha land.
- (iii) to achieve that goal, he wanted assistance in appealing the judgment of the Santo Malo Area Lands Tribunal to the Santo Island Land Tribunal. The deceased was more keen in securing ownership to whole of Nasulnun land and part of Artacha land by appealing. To that end and effect he sought the assistance of his nephew, the defendant.

8.9. When therefore the defendant said: "Yu no wari uncle bae mi kasem Vila mo wok long hem", he was in effect accepting to perform what his uncle



had clearly described. It was clear from the deceased that did not include any instructions about money.

- 8.10. It was obvious however that the defendant had different intentions. He was more interested in the money. All this is clear from the evidence of Barthelemy Ngwele by sworn statement (Exhibit C2) at paragraph 24. The defendant went to Vila the next day after their meeting on 9th November 2009. He spoke with the witness by telephone on several occasions. On one of those occasions the witness had asked him if he had taken steps to secure custom ownership of the whole of Nasulinun and Artacha lands for FSSD as discussed and agreed on 8th November 2009. In response the defendant said or words to the effect: "Bae yumi prosesem moni blong lease fastaem, taem yumi winim ok bae yumi tes mekem wanem SSD (deceased) hemi wandem." (emphasis by underlining).
- 8.11. Clearly and certainly what the defendant said to the witness was contrary to and not consistent with the wishes and the instructions of the deceased.
- 8.12. But the defendant was determined to do what he said because Barthelemy Ngwele said at paragraph 26 of his sworn statement (Exhibit C2) that the defendant had returned to Santo on 1st December 2009 and sought the witness's permission to use the college computer to prepare a power of attorney which he would like the deceased to sign giving him authority to have access to FSSD's documents and moneys maintained by the Government.
- 8.13. At paragraph 27 of the sworn statement the witness says that they both attended the Computer Laboratory of the College and that the defendant called Mr Timakata in his presence and they spoke for some time. That at one stage the defendant turned to the witness and said or words to the effect: "*Lawyer Timakata hemi askem sipos power of attorney ia bae hemi tokbaot moni blong FSSD tu?*" That the witness said or words to the

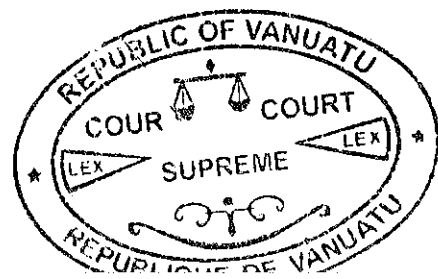


effect: "Ansa hemi no. SSD (deceased) hemi no agri mo hemi no kivim otority long yu blong tekem moni blong FSSD mo hemia ino mass tap long power of attorney." That the defendant returned to Mr Timakata (over the telephone) and said or words to the effect: "No, bae ino kat toktok long saed blong moni blong FSSD long power of attorney." (emphasis by underlining).

8.14. Then at paragraph 28 of his sworn statement the witness says after the defendant had spoken with Mr Timakata, he prepared the power of attorney himself and asked who would sign as a witness. That the witness had told the defendant that he and Bill Stephen (Claimant) would witness the signing. That later the defendant had asked the witness to bring the power of attorney to the deceased to sign and witnessed by both of them and that he was to send the document to the defendant in Port Vila by plane. That the defendant left Santo on 2nd December 2009 to Vila.

8.15. Then at paragraph 30 of his sworn statement the witness says that he took the power of attorney to the deceased on 2nd December 2009 and explained to him that the defendant has sent him to ask that he sign the document. That the deceased read the document and said or words to the effect: "power of attorney ia hemi talem tu se Martin (defendant) hemi save handelem moni blong lease blong graon blong mi or no?" That the witness replied and said or words to the effect: "Martin hemi askem mi sipos hemi save putum toktok forom moni tu be mi talem long hem se no." At that time the deceased said or words to the effect: "Yes, igud olsem. Bae Martin hemi wok fastaem mo sipos hemi fulfilim wanem nao mi askem hem blong mekem bae mi tes kivim wan presen long hem." (emphasis underlining).

8.16. I have gone to this extent of the claimant's evidence to show that he and his witness have told a very consistent story about the firm position of his father, that he did not want the defendant to have any right, authority or



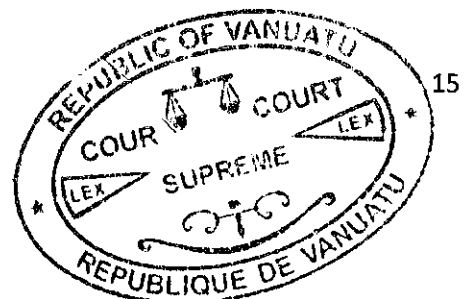
dealing with the money held by the Government as rentals in respect of leases over Nasulnun and Artacha lands. Further, it is to show that clearly the defendant had acted outside of the express terms of the purported power of attorney. The defendant did not challenge those evidences and did not produce any evidence in rebuttal.

8.17. I therefore answer the fundamental legal issue posed by Mr Hakwa whether the defendant had power or authority under the terms of the First Power of Attorney to do what he did, in the negative.

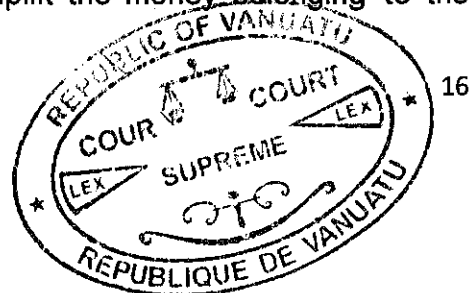
9. Preliminary Legal Issues

9.1. Mr Hakwa raised the following legal issues as well:-

- a) What is the nature of the relationship between SSD (deceased) and the defendant?
- b) What is the nature of the First Power of Attorney. Is it a Power of Attorney or a contract?
- c) If it is accepted that it is a Power of Attorney, whether or not it is valid?
- d) Is there any formal requirement prescribed by statute law which must be complied with to make a valid and binding Power of Attorney?
- e) Is there any statute law in Vanuatu prescribing the form of a Power of Attorney?
- f) Was the First Power of Attorney made in contemplation of any lease, its creation or registration within the terms of the Land Leases Act CAP 163 (the Act).
- g) Was the First Power of Attorney made in the prescribed form?
- h) Did an authorized officer within the meaning of Section 78 of the Act verify the execution of the first Power of Attorney in accordance with Section 77 of the Act?
- i) Did the defendant made any application to the Director of Lands Records to enter the First Power of Attorney on the index of Powers of Attorney in accordance with Section 82(2) of the Act.



- 9.2. Mr Hakwa argued and submitted that –
- a) The relationship between the deceased and the defendant was that of a principal and agent created by the First Power of Attorney.
 - b) From the wording, the instrument concerned was a Power of Attorney.
 - c) The Power of Attorney was not valid.
 - d) Vanuatu does not have any specific statute law on Powers of Attorney but relied on the statute laws of England applicable in the New Hebrides on 30th July 1980 and which would continue to apply by virtue of Article 95(2) of the Constitution –
 - e) Further Counsel relied on Sections 77, 78 and 82(2) and 82(3) of the Land Leases Act.
 - f) From the wording of the First Power of Attorney, the answer to this legal issue is in the affirmative.
 - g) Relying on section 83(3) and Statutory Order No. 4 of 1984 as amended by Statutory Order No. 11 of 1986, the answer to this issue is in the negative.
 - h) Relying on section 77 of the Act, the answer to this issue is in the negative.
 - i) Relying on section 82(2) of the Act, the answer to this issue is in the negative.
- 9.3. Mr Leo did not respond to or address these legal issues in his written submissions. All Counsel says in his paragraph 6 is that the defendant acted pursuant to the Powers of Attorney he was granted. Further at paragraph 19, Counsel submits that the claimant has not sought any declaration in relation to the powers of attorney.
- 9.4. Mr Leo's submission is untenable. The claimant pleaded a "*purported power of attorney*" throughout his claims filed on 28th June 2011. Further, the claimant pleaded that the defendant had no right, power or authority to execute the Deed of Release and to uplift the money belonging to the



deceased and FSSD from the Government and to wrongly apply or appropriate the money to his own use. Further, the claimant claimed for "***such further or other orders as this Court shall deem fit***" as their final relief in paragraph 60 of the claim. In my view that is wide enough to enable the Court to make a finding and ruling on the validity of the First and Second Powers of Attorney.

The Legal Provisions

9.5. Before I answer the legal issues raised by Mr Hakwa I set out the necessary statutory provisions applicable to Powers of Attorney in Vanuatu under the Land Leases Act [CAP 163] as follows –

a) Section 77 states:

"Execution of instruments

(1) *Every instrument evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and by all other parties to the instrument:*

Provided that the Director may dispense with execution by any particular party (other than a done under a disposition by way of gift) where he considers such execution is unnecessary.

(2) *An instrument shall be deemed to have been executed only –*

(a) *by a natural person, if signed by him or his duly authorized attorney:*

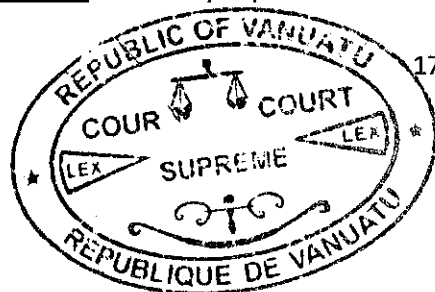
(b) *by a corporation.....*" (Not applicable).

(emphasis added).

b) Section 78 states:

"Verification of execution

(1) *Subject to subsection (5), a person other than a body corporate, executing an instrument required to be registered under this Act shall appear before an authorized officer for the purposes of this*



Section and, unless he is personally known to the authorized officer, he shall be accompanied by a credible witness for the purpose of establishing his identity.

(2) The authorized officer shall satisfy himself as to the identity of the person appearing before him and ascertain whether he freely and voluntarily executed and appeared fully to understand the instrument and shall complete a certificate to that effect.

(emphasis added).

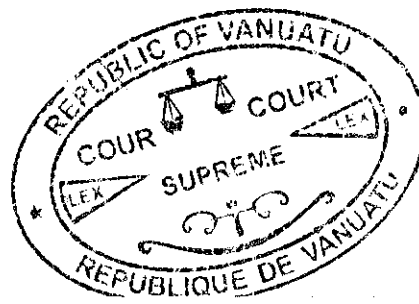
(3) Authorized officers for the purpose of this Section are –

(a) Within Vanuatu –

- (i) the secretary to any local government council;
- (ii) a magistrate;
- (iii) the Registrar of the Supreme Court;
- (iv) the Registrar and Receiver General;
- (v) persons for the time being registered as legal practitioners;
- (vi) notaries public;
- (vii) commissioners for oaths;
- (viii) managers for the time being of any bank or branch thereof;
- (ix) surveyors in the Department of Surveys;
- (x) such other persons or class of persons as the Minister may by notice published in the Gazette approve.

(b) In any foreign country –

- (i) consular officers or pro consular officers of Vanuatu;
- (ii) notaries public;



(iii) such other persons or class of persons as the Minister may by notice published in the Gazette approve.

(4) Every certificate of verification required for the purpose of this section shall be in the following form which may be printed on or otherwise incorporated in any instrument presented for registration-

" I certify that the above-named
Appeared before aton thisday of
.....20.....

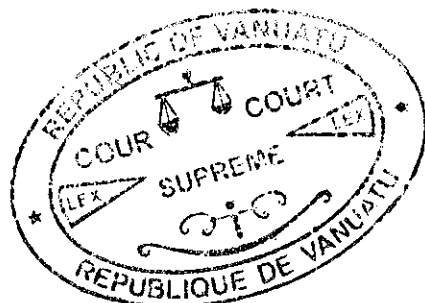
- being identified to me by of.....
- (or) being personally known to me and, that he/she/they freely and voluntarily signed and appeared fully to understand this instrument.

- delete the underlined alternatives inapplicable signature, name, designation and seal/stamp of office of person completing certificate."

(5) The Director may dispense with verification under this Section –
(a) if he considers that it cannot be obtained or can be obtained only with difficulty and he is otherwise satisfied that the document has been properly executed; or

(b) in cases in which to his knowledge the document has been properly executed,
and shall record or the document his reasons for dispensing with verification."

(c) Section 79 states:
"Stamps



No instrument required by law to be stamped shall be accepted for registration unless it is duly stamped."

(emphasis added).

(d) Section 82 states:

Powers of Attorney

(1) The Director shall, subject to the provisions of this section, maintain an index of powers of attorney in such form and manner as he may deem fit.

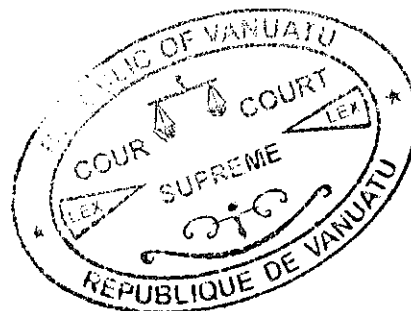
(2) Upon the application of the donor or the donee of a power of attorney which contains any power to dispose of any registered interest in land, such power shall be entered in an index of powers of attorney and the original, or with the consent of the Director, a copy thereof certified by the Director, shall be filed.

(3) Every such power shall be in the prescribed form and shall be executed and verified in accordance with Sections 77 and 78 except where the Director in any particular case otherwise permits.

(emphasis added).

(4) The donor of a power of attorney recorded under this Section may at any time give notice to the Director in the prescribed form or in such other form as the Director may approve, that the power has been revoked.

(5) Any interested person may give notice in writing to the Director that a power of attorney which has been registered under this Section has been revoked by the death,



bankruptcy or disability of the donor, accompanied by such evidence as the Director requires.

(6) Subsections (4) and (5) shall not apply to any power of attorney given for valuable consideration during any time during which it is by virtue of the terms thereof, irrevocable.

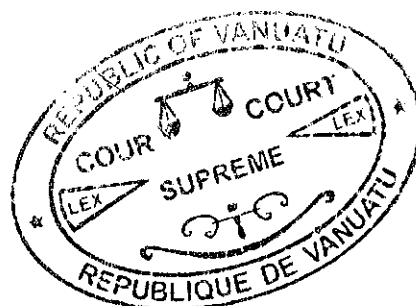
(7) If owing to the length of time since the execution of a power of attorney or for any other reason the Director considers it desirable, he may require evidence that the power has not been revoked and may refuse to register any disposition by the donee of the power of attorney until satisfactory evidence is produced."

(e) Section 83 States:

"Effect of registered powers of attorney

(1) A power of attorney which has been recorded under Section 82 and of which no notice of revocation has been received under that Section shall be deemed to be subsisting as regards the Director and any person acquiring any interest in land affected by the exercise of the power, for valuable consideration and without notice of revocation and in good faith, or any person deriving title under such a person.

(2) Any person making any payment or doing any act in good faith in pursuance of a power of attorney recorded under Section 82, shall not be liable in respect of the payment or act by reason only that before the payment or act the donor of the power had died or become subject to a disability or become bankrupt, or had revoked the power, if the fact of death, bankruptcy or revocation was not at the time of the



payment or act known to the person making or doing the payment or act.”

(f) For Completeness –

(a) “Disposition” is defined in Section 1 of the Act to mean “any act inter vivos by a proprietor whereby his rights in or over his registered lease, sublease or mortgage are affected, but does not include an agreement to transfer, sublease or mortgage.”

(emphasis added).

(b) “Proprietor” is defined to mean:

(i) in relation to a registered lease the person named in the register as the proprietor thereof; and

(ii) in relation to a mortgage of a registered lease the person named in the register as the person in whose favour the mortgage is made.”

(emphasis added).

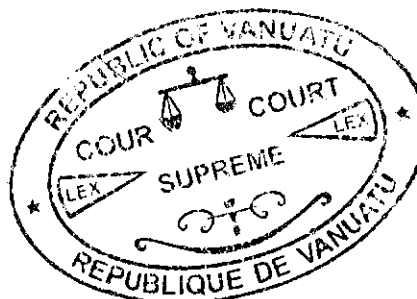
9.6. The defendant asserted he acted on the First Power of Attorney given to him by the deceased and therefore denied any liability for the moneys he uplifted from the Government acting under such power and pursuant to a deed of release. It is trite law that he who asserts must prove. What therefore did the defendant have to prove under the legal provisions of Sections 82, 77 and 78 and 79 of the Land Leases Act?

9.7. Under Section 82, the defendant had to show –

(a) an index of powers of attorney (subsection(1))

(b) an application by the deceased as donor of that power (subsection (2))

(c) that the power of attorney given to him was in the prescribed form (subsection (2)) pursuant to Sections 77 and 78



- (d) the power of attorney was executed by all parties including himself (Section 77 (1))
- (e) the instrument was verified by an authorized officer (Section 78)
- (f) a certificate of verification by an authorized officer (Section 78)
- (g) the instrument was duly stamped (Section 79).

9.8. The defendant did not adduce any evidence to show he had complied with all the legal requirements of Sections 82, 77, 78 and 79 of the Act.

9.9. I am therefore satisfied that the purported power of attorney given by the deceased to the defendant was in every respect made contrary to Sections 77, 78, 79 and 82 of the Land Leases Act and as such it is invalid, void and of no legal effect.

9.10. I therefore answer the preliminary legal issues raised by Mr Hakwa which are listed out paragraph 9.1 of this judgment as follows –

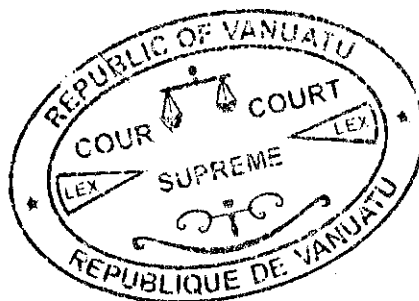
- (a) To (d) – Is there any formal requirement prescribed by statute law which must be complied with to make a valid and binding power of attorney?

The answer is in the affirmative. These are provided in Sections 77, 78, 79 and 82 of the Act.

- (b) To (e) – Is there any statute law in Vanuatu prescribing the form of a power of attorney?

The answer is in the affirmative. Section 82(3) requires that every power of attorney shall be in the prescribed form.

- (c) To (f) – Was the First Power of Attorney made in contemplation of any lease, its creation or registration within the terms of the Land Leases Act?



The answer from the defendant's perspective is in the negative. From the evidence the defendant was the author of the purported power of attorney. From the conversation that transferred between the deceased and the defendant on 8th November 2009 as witnessed and confirmed by the Claimant and Barthelemy Ngwele in their sworn statements, it is clear the defendant had the money in mind, while the deceased had his lands at Nasulnun and Artacha to be secured in mind. From this I can deduce that there was no meeting of the minds. Section 77 of the Act presents some problems for the deceased as the purported donor of the First Power of Attorney because of the terms "disposition" and "proprietor". It is clear the deceased was not the registered proprietor as yet as lessor of any leases existing on Nasulnun and Artacha lands. As such he was not capable of making any disposition of his interest by any instrument capable of being a power of attorney.

(d) To (g) – Was the Power of Attorney made in the prescribed form? The answer is in the negative.

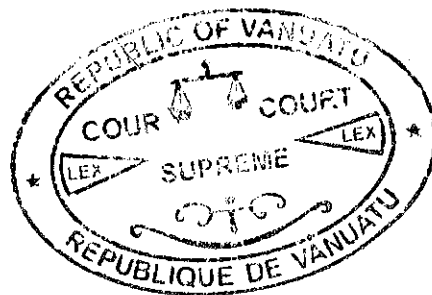
(e) To (b) – Did an authorized officer within the meaning of Section 78 of the Act verify the First Power of Attorney in accordance with Section 77 of the Act?

The answer is in the negative.

(f) To (i) – Did the defendant make any application to the Director to enter the Power of Attorney in the index of powers of attorney in accordance with Section 82(2) of the Act?

The answer is in the negative.

9.11. So if the instrument produced by the defendant purporting to be a power of attorney was not in fact and in law a valid power of attorney then was it



a contract? This was the first preliminary legal issue raised by Mr Hakwa and which is stated in paragraph 9.1 of the judgment at (a) and (b).

9.12. Having found and ruled that the instrument produced by the defendant was not a power of attorney, then it follows logically that there was therefore no relationship of a principal and agent in existence between the deceased and the defendant.

9.13. But was it a contract? Mr Hakwa submitted that it was not. I agree with Mr Hakwa for the following reasons –

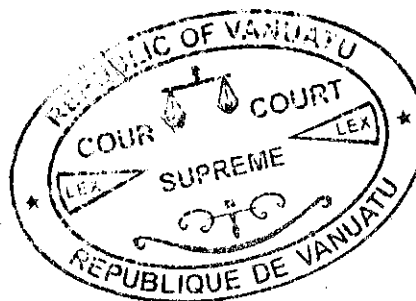
(a) A contract must be signed by all parties to it.

Section 77(1) of the Act requires this as well. The instrument is only signed by the deceased and not by the defendant.

(b) Although it is witnessed by the claimant and Barthelemy Ngwele, the signing of the instrument remains a mystery. Barthelemy Ngwele did not say in his evidence where the document was signed and when he signed to witness it. He does say that the claimant signed it but he did so at his place of work at the LCM Store and sometime after the deceased had signed. Therefore it is not altogether correct and proper to state that the claimant had witnessed the signing of the instrument.

(c) The deceased did not understand the contents of the instrument. This is apparent from the fact that he asked Barthelemy Ngwele whether the instrument made had any mention of the defendant's authority to uplift his money held as rentals by the Government.

(d) There was no meeting of the mind. The instrument took account of the deceased's desires but did not take account of the defendant's desire which was to give him express authority to uplift the deceased's money.



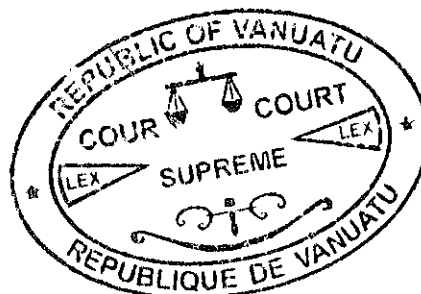
9.14. I reach the conclusion therefore that the instrument was neither a power of attorney nor a contract. So what was it therefore that governed the relationship of the deceased and the defendant ultimately?

There is only one possible conclusion: it has to be the verbal agreement reached between them at their meeting on 8th November 2009. That verbal agreement was never superseded by the purported power of attorney as is submitted by Mr Hakwa.

9.15. A further legal issue to be answered is whether the defendant performed in accordance with that verbal agreement? The answer is clearly, no. The defendant breached the verbal agreement. He went out of his way to deceive his uncle by an instrument which he himself was the author. It explains why the instrument contained a couple of major errors at its very beginning. His actions were deceptive, dishonest and criminal. He uplifted moneys over which he had no right or claimed any such right and authority to uplift them. He deceived even the government by the purported power of attorney which was clearly illegal to secure a deed of release to uplift the deceased's money on two occasions. How this could have been allowed without detection or making any necessary enquiries to check on the legality of the purported power of attorney is beyond comprehension. Those actions were purely illegal actions. Moreover, the defendant expended VT8,157,000 of the deceased's and FSSD's money without any authority, such action amounting to misappropriation for which he is clearly liable and is accountable for.

It may be said in passing that the government may have some liability in this, but as they have not been sued as a party to respond adequately the Court is simply making an observation. The deed of release and its validity may have to be the subject of a separate litigation so I can say nothing further about it.

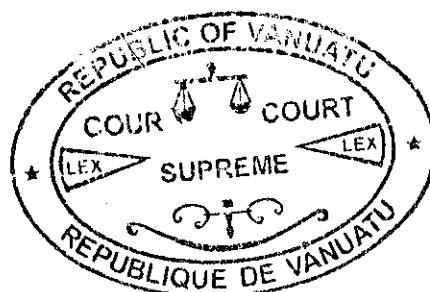
10. The Second Power of Attorney.



- 10.1. Mr Hakwa submitted that the Second Power of Attorney is inadmissible and cannot be accepted as evidence in this proceeding because there was not stamp duty paid in respect of it. Counsel relies on Section 19 of the Stamp Duties Act [CAP 68]. Counsel urged the Court to disregard it.
- 10.2. I accept Mr Hakwa's submissions not only for reason of Section 19 of the Stamp Duties Act but for the same and very reasons advanced earlier in the judgment concerning the validity of the purported First Power of Attorney.
- 10.3. I find therefore that the uplifting of the additional VT2,292,483 by the defendant under a deed of release with the government was done without any right or authority of the FSSD. Further, I find the application or expending of such moneys without any authority by FSSD was unlawful and the defendant is liable and stands accountable for that money.

11. Secret Profits

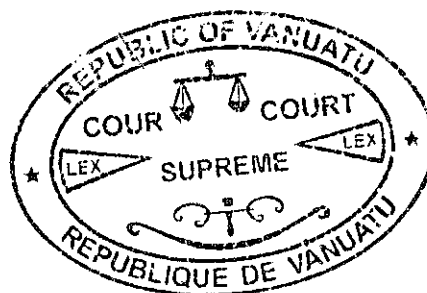
- 11.1. Mr Hakwa submitted that the defendant wrongfully retained the sum of VT8,157,000 and used the money to make secret profits, Counsel relied on the case of Boardman v. Phipps [1966] 3 ALL ER 721, [1967] AC 46 HL.
- 11.2. Firstly, having found and held that the purported Power of Attorney relied upon by the defendant as his authority to do what he did was and is invalid and of no legal effect, no agency existed between the deceased and the defendant. Therefore it follows that the case of Boardman is not relevant.
- 11.3. Secondly, I find insufficient evidence or at all by the claimant to show the defendant used any of the VT8,157,000 he retained to make secret profits. But I find he clearly unjustly enriched himself by retaining the money. And I am satisfied he clearly misappropriated those moneys for which he



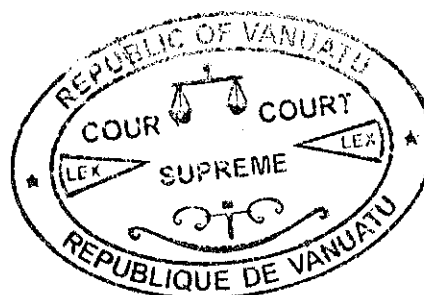
clearly had no right or authority. As such he is liable and must make good the legal wrong he had done by paying back all those moneys.

12. Defendant's submissions

- 12.1. First, the defendant argued that he acted under the Power of Attorney donated in his favour by the deceased "to deal and negotiate with any person and to sign any instruction, create a lease and to do the registration of leases on behalf of the late Mr Stephen."
- 12.2. That argument is untenable. The defendant did not produce any evidence to show he negotiated with any person or signed or created any leases or any registration thereof. Indeed according to the verbal agreement that is what he agreed with his uncle to do but he failed. Instead he drafted a purported Power of Attorney that was not included in the verbal agreement. The only document he appeared to have engaged Mr Timakata to draft was the purported deed of release. And for that minor job alone, he claimed he paid VT3,600,000. That is a ridiculous and a deceptive lie.
- 12.3. Secondly, the defendant argued the defendant was given a power of attorney which exclusively related to two customary lands namely Nasulnun and Artacha. Mr Leo submitted that following the Court of Appeal's ruling in the case of Re: Estate of Molivono [2007] VUCA 22 Civil Appeal Case No. 37 of 2007 the claimant has no right to administrate customary land.
- 12.4. I have read Mr Hakwa's response in relation to the defendant's submission at paragraphs 7, 8, 9 and 10 and I agree entirely with them. The case of Molivono is not relevant. I reject the defendant's submissions that the claimant has no right or standing to claim for the moneys uplifted by him from the Government under a deed of release.



- 12.5. Thirdly, Mr Leo submitted that the claimant had proved that he paid VT3,600,000 to the Legal Firm of Mr Timakata and to Less John Napuati and further that he expended VT2,600,000 on transport, rentals and services.
- 12.6. I have read the submissions in response by Mr Hakwa at paragraphs 11, 12, 13 and 14 and I agree with entirely with Mr Hakwa. I do not agree with Mr Leo that his client had paid. Mr Timakata at VT3,600,000. There was no evidence by the defendant showing what else Mr Timakata did apart from drawing up the deed of release. And there was no evidence of any invoice. There was no evidence showing what Mr Napuati did for the defendant and any invoice for the services rendered or charged. Further, I find no evidence by the defendant showing receipts or invoices for his transport costs, including airfares, rentals and services he rendered. There was no evidence showing the defendant operates a consultancy business to entitle him to charge for his services.
- 12.7. Fourthly, the defendant alleged that the deceased never complained about what the defendant did. I agree with Mr Hakwa that this argument is seriously misconceived. There is clear evidence at paragraph 38 of Barthelemy's statement (Exhibit C2) which is unchallenged evidence. Further, I accept Mr Hakwa's response at paragraph 15 that the claimant's father had fallen seriously ill and was admitted into the Northern District Hospital on 3rd June 2010 and died on 6th June 2010. He therefore could not complain under those circumstances.
- 12.8. Finally, the defendant submitted that the claimant is not entitled to the reliefs he claims and submits the defendant is entitled to costs.
- 12.9. I reject those submissions as they are misconceived.




13. The Result

13.1. The claimant is successful in his claims and judgment is entered in his favour against the defendant. He is entitled to the reliefs he seeks. These are set out at the forefront of this judgment in A, B, C, D and E.

DATED at Port Vila this 27th day of July 2015.

BY THE COURT


OLIVER A. SAKSAK
Judge

