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

Civil Appeal Case No. 08 of 2010

BETWEEN: CHIEF EDWIN HAPSAI
Appellant

AND: ATTORNEY GENERAL
Respondent

Civil Appeal Case No. 18 of 2010

BETWEEN: CHIEF EDWIN HAPSAI
Appellant

AND: FAMILY ALBERT
Respondent

Coram:	***Hon. Justice O. Saksak*** ***Hon. Justice J. Mansfield*** ***Hon. Justice E. Goldsbrough*** ***Hon. Justice D. V. Fatiaki***
Counsel:	*Mr. Saling Stephens for the Appellant* *Mr. A. Godden for the Attorney General* *Mrs. Mary-Grace Nari for Family Albert*
Date of Hearing:	*23 November, 2010*
Date of Judgment:	*3 December, 2010*

JUDGMENT

BACKGROUND

1. These two appeals were heard together. They relate to the same land, and raise similar issues.

2. The background extends over a very long time. In a legal sense, it started with a decision of the Malekula Island Court made on 20 December 1988. It declared that Family Albert is the custom owner of the Tnvanah land situated at Northwest Malekula (the land). Chief Edwin Hapsai has been trying to upset that decision since then, now over nearly 22 years, because he claims to be the custom owner of the land.

3. His efforts have involved a number of different proceedings.

4. His first proceeding started in 1993. Belatedly Chief Hapsai appealed from the decision of the Malekula Island Court to the Supreme Court (Supreme Court Land Appeal Case No. 14 of 1993). The respondents were the Family Albert. That proceeding was barely progressed over a number of years. It is not clear why. Eventually, on 25 October 2005, a judge of the Supreme Court made ex-parte orders in that case that:-

(1) the Family Albert's costs in relation to an application by Chief Hapsai to call fresh evidence are determined in the sum of VT 113,116; and

(2) those costs of VT 113,116 must be paid by Chief Hapsai to Family Albert by 3 pm on 22 November 2006 *"failing which the appeal will be deemed to be abandoned"* (the "*unless*" order).

The *"unless"* order was not complied with as the costs were not paid, so that order meant that on 22 November 2006 that appeal was deemed to be abandoned. Chief Hapsai then on 8 December 2005 filed a Notice of Discontinuance of that appeal proceeding. On 13 December 2005, the Court on that appeal ordered that:

(a) pursuant to the notice of discontinuance dated 8 December 2006, the proceeding is discontinued; and

(b) Chief Hapsai must pay costs to Family Albert on a standard basis or as agreed or as determined by the Court.

5. Civil Appeal Case 18 of 2010 is an appeal from the making of the *"unless"* order, instituted by leave (as the *"unless"* order was an interlocutory order) and pursuant to an extension of time to do so, both were granted on 13 July 2010.

6. On 19 February 2007 the Family Albert, following those events, brought proceedings in the Magistrates' Court for an order that Chief Hapsai be evicted from the land, because he had remained in occupation of it despite the decision of the Malekula Island Court. In May 2008, the Magistrates' Court gave summary

judgment against Chief Hapsai, ordering Chief Hapsai and his family to vacate the land within 30 days. That order was reversed on appeal. Another application for summary judgment was met by Chief Hapsai challenging the standing of the Family Albert to seek his eviction because the decision of the Malekula Island Court was still under challenge. When the objection to standing was rejected, Chief Hapsai appealed against that ruling (Supreme Court Action No. 122 of 2008). That appeal was dismissed on 9 July 2009. Then, in the eviction proceeding in the Magistrates' Court, on 6 November, 2009 summary judgment was again ordered against Chief Hapsai and he was directed to vacate the land by 6 February 2010. He has not complied with that order.

7. The eviction proceedings apparently prompted Chief Hapsai's second proceeding. On 27 July 2007, Chief Hapsai brought a Constitutional Application (Application No. 1 of 2007) naming the Attorney General as respondent as another means of asserting his claim to custom ownership in the land, despite the decision of the Malekula Island Court nearly 20 years before. On 9 July 2009, on the same occasion as the Supreme Court Action 122 of 2008 was dismissed (that is, the appeal against the Magistrates Court ruling that the Family Albert had standing to apply in the Magistrates' Court for an order that Chief Hapsai be evicted from the land), the Constitutional Application was also dismissed.

8. Civil Appeal Case 8 of 2010 is an appeal from the order of the Supreme Court of 9 July 2010 dismissing the Constitutional Application.

9. As if quantity rather than quality will lead to success, the Court was told that Chief Hapsai has instituted a third proceeding in the Supreme Court on 22 March 2010. That matter is not before this Court.

10. That litigious history deserves comment, before considering the two present appeals. It is an appalling history. It is difficult to understand why so much time and resources have been wasted on procedural fights, at least one of which was clearly unmeritorious. To contend that the custom owners of the land as decided by the Malekula Island Court in 1998 (and whose decision has not been set

aside) have no standing to seek his eviction from the land was plainly unmeritorious. In 1993 Chief Hapsai instituted an appeal to challenge the correctness of the decision of the Malekula Island Court. He should have focused his efforts on having that appeal heard, and his claim competing as against those of the Family Albert decided on that appeal. Instead he has involved the Family Albert in the litigation morass described above.

Appeal 8 of 2010

11. There are 2 short points of this appeal.

12. The first is that the Constitutional Application could not have been summarily dismissed on 9 July 2009, because the judge then constituting the Supreme Court was dealing only with the appeal in Supreme Court Action No. 122 of 2008 so the Constitutional Application *"was not before him, thus wrongly seized of a matter which is before another judge".*

13. The second is that the order was made without Chief Hapsai being given the opportunity to be heard.

14. The orders appealed from of 9 July 2009 were drawn up only in Supreme Court Action 122 of 2008. Both Chief Hapsai and Family Albert were apparently then represented by counsel on 9 July 2009. The orders recorded in that action on that date were:

    1. *"The Appellants Constitutional Application 01/2007 filed in the Santo Office of the Supreme Court is dismissed as the grounds pleaded all relate to custom and customary rights which do not come within the jurisdiction of this Court. The Appellant's oral offer today to pay the costs of VT 113,116 ordered to be paid by this Court on 25th October 2005, if their appeal is granted, is at the very least derisory and at worst could be considered as contempt of Court. These costs should be paid immediately.*

    2. *The Appellant has not appealed the granting of customary ownership of land made in 1988 to the Respondents and have no grounds or standing to appeal the decision of the Magistrates Court dated 30th June, 2008. This appeal is dismissed.*

    3. *Costs on a standard basis are awarded against the Appellant in favour of the Respondent, as agreed, or failing agreement as taxed by the Court.*

4. *A copy of these Orders is to be sent to the Santo Office of the Supreme Court so their Constitutional Application file 01/2007 can be closed".*

15. The appeal book comprises the notice and grounds of appeal (which the Court of Appeal was told has the incorrect heading Civil Appeal Case No. 36 of 2009) the orders, the Constitutional Application, and a sworn statement of Chief Hapsai of 7 August 2009 (also apparently incorrectly headed Civil Appeal Case 36 of 2009). That affidavit deals with three general topics: The merits of Chief Hapsai's claim to be custom owner of the land, the hardship to him and those he employs on that land if he is not recognized as the custom owner or if his Constitutional Application is not restored, and thirdly, it points out or asserts that he did appeal against the Malekula Island Land Tribunal decision but that his appeal was brought to an end by the *"unless"* order. The submissions of the Attorney General indicate that there is a Civil Appeal Case No. 36 of 2009, but that it is not being actively pursued by Chief Hapsai.

16. The Court also had the benefit of written and oral submissions from counsel on behalf of Chief Hapsai, the Attorney General, and Family Albert (which, in this appeal was heard as an interested party).

17. There is no material to support the contention that the judge on 9 July 2009 did not have, or could not properly have had, management of the Constitutional Application as well as Supreme Court Action No. 122 of 2008. Nor is there any material to support the second of the two grounds, namely that counsel for Chief Hapsai was not given an opportunity to be heard before the orders were made on 9 July 2009. That is an unsupported assertion.

18. There is in the file of the Constitutional Application an affidavit of counsel for Chief Hapsai which says that the Constitutional Application was filed in the Supreme Court at the Luganville Registry at Santo, and on 10 September 2008 an order was made transferring the matter to the Port Vila Registry of the Court. The conference at which that order was made was then adjourned to a date to be fixed. There is however, nothing put before this Court, to show that the judge

who made the order on 9 July 2010 could not, on that day, properly deal with that matter.

19. In our view, there is no merit in either of the grounds of appeal. The Supreme Court had jurisdiction to hear and determine the Constitutional Petition. There is no material to suggest that the judge who made the order dismissing it on 9 July 2010 was not able to have a review or directions hearing on that date with respect to the Constitutional Petition. It appears that the Constitutional Application was before the judge who made the orders because the Family Albert had requested it be listed for review at the same time as Supreme Court Action No. 122 of 2008. Nor is there any material to suggest that Chief Hapsai through his counsel was deprived of the opportunity to make submissions generally on that occasion, including about the constitutional petition.

20. In addition, counsel for Chief Hapsai did not endeavour to address the concerns of the primary judge about the Constitutional Application. They are only obliquely referred to in the brief reasons accompanying the order of 9 July 2009, but are set out in greater detail in the submissions of the Attorney General. We note, in particular, that the Constitutional Application names the Attorney General rather than the Republic of Vanuatu as the Respondent, contrary to Rule 2.4(1) (b) of the Constitutional Procedures Rules 2003 made under section 66 of the Judicial Services and Courts Act [CAP. 270]. The Constitutional Application then complains of procedural and factual errors by the Malekula Island Court (paras 9 – 18), but those alleged failings on the part of the Malekula Island Court are not matters for which the Republic of Vanuatu is accountable. Under Article 78(2) of the Constitution, the Republic of Vanuatu requires the Government to arrange for appropriate customary institutions or procedures to resolve disputes concerning the ownership of custom land. The Customary Land Tribunals Act [CAP. 271] has been enacted to give effect to that constitutional obligation, as its objective clearly states. The earlier allegations complain about the result of the Malekula Island Court decision, but that was the outcome of the process established under legislation. The Constitutional Application also complains of errors on the part of the Supreme Court (paras 19 – 26). The Island Courts Act [CAP. 167] provides for land appeals to be heard by the Supreme Court. Section 22 of that Act deals

with such appeals. Section 22 (4) precludes the appeal from the Supreme Court under that Act, subject of course to the Supreme Court being properly constituted and acting within its jurisdiction: see ***Matarave v. Talivo*** [2010] VUCA 3. A Constitutional Application is not intended as a vehicle to have a factual review of the merits of the decision of an Island Court, but to a degree that is what the Constitutional Application seeks to do – that is what Chief Hapsai's affidavit says, because he asserts that he and his family are the custom owners of the land as a foundation for the relief claimed. In ***Malas v. Republic of Vanuatu*** [2007] VUCA 2 the Court pointed out that a claim for breach of fundamental rights in relation to custom land first requires the Claimant to establish the right to the custom land in dispute, and then to establish that the right has been infringed. It is not necessary to formally decide those matter on this appeal, but we note that Chief Hapsai has not responded to any of those contentions. Consequently, to the extent that there is any obligation on Chief Hapsai to make out an arguable case for relief if the Constitutional Application were to be reinstated, he has failed to do so.

21. For those reasons, the appeal in Civil Appeal Case No. 8 of 2010 is dismissed. Chief Hapsai must pay to the Attorney General the costs of the appeal. The intervening party, Family Albert, made submissions on the appeal by leave. We think, in those circumstances, that the intervener should bear its own costs.

Civil Appeal Case 18 of 2010

22. Chief Hapsai makes two points in support of this appeal.

23. The first is that the order of the Supreme Court of 25 October 2005 was invalid, because the Court at the time was not properly constituted. If that point is correct, the Court of Appeal would have power to set aside that order, even though the decision of the Supreme Court was final under section 22 (4) of the Island Courts Act [CAP. 167], because there was no lawful order of the Supreme Court: see ***Matarave v. Talivo*** [2010] VUCA 3. The Court of Appeal in that case explained the difference between errors which show that the Court had no jurisdiction to make the orders it made, and errors (whether factual or legal) which a Court

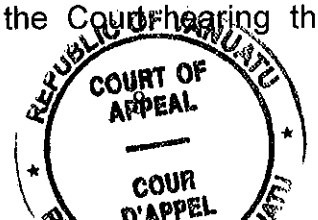
makes within and while exercising its jurisdiction. In that latter category of cases, the decision of the Supreme Court is final.

24. The second point is that Chief Hapsai was not given an opportunity to be heard on the order as to costs made on 25 October 2005.

25. There is some merit in each of Chief Hapsai's contentions. However, for reasons which appear below, we do not consider that they are conclusive as to the outcome of the appeal. We shall briefly address each of the two contentions first.

26. Section 22 of the Island Courts Act [CAP. 167], which provides for an appeal to the Supreme Court or the Magistrates' Court from the decision of an Island Court, then provides in section 22 (2) that the Court hearing the appeal shall appoint two or more assessors knowledgeable in custom to sit with the Court. We do not consider that the Supreme Court must be constituted by a judge and two assessors for all the preliminary attendances before the hearing. There are several reasons for that view. First, it is necessary for the Court, once an appeal is duly instituted, to take steps to appoint the two or more assessors. As in the matter at first instance (Land Appeal Case 14 of 1993), the Court would ordinarily give the parties to the proceeding the opportunity to be satisfied that any proposed assessors were eligible to participate, in particular that they did not have a conflict of interest. That happened in that matter by hearings at least on 26 July 2004, 11 March 2005 and 3 August 2005. Chief Hapsai did not object to the Court as constituted by a single judge attending to such pre-hearing issues. Secondly, section 22 (2) and (3) appears to refer to the composition of the Court for the hearing of the appeal, rather than to the pre-hearing interlocutory processes. It also appears to us as a matter of practical common sense that that is what section 22 (2) is intended to achieve, and section 22 (5) fortifies that because the Court could not be composed of a judge and assessors when it is requested to extend the time for appeal.

27. However, whilst a judge of the Supreme Court may sit alone to address pre-hearing issues, including directions about the filing of further evidence for the hearing, it is clear that the Court hearing the appeal is to decide on what



evidence it receives: section 22 (3). The judge sitting alone can properly ensure that all proposed evidence is filed in advance of the hearing, but probably does not have power at that point to exclude from the hearing material which has been filed and which is properly admissible. It is also doubtful that a judge sitting alone has the power to make an order dismissing an appeal, for example for non-compliance with directions about the filing of evidence. There is scope, therefore to question whether the "*unless*" order made on 25 October 2005 was within the jurisdiction of the Court as so constituted because the "*unless*" order involved the potential end of the appeal, even though the assessors had not been appointed to deal with it. If that is correct, that order is voidable and this Court has power to set it aside: Matarave v. Talivo [2010] VUCA 3.

28. The second contention of Chief Hapsai also has merit. There is no reason why the Court constituted by a single judge cannot impose costs orders upon a party for failure to comply with directions in a timely way. Nor is there any reason why the parties cannot agree (as they did here) that such costs issues may be addressed ex parte, that is in the absence of parties or their counsel. However, it is a further step to impose as part of a costs order an "*unless*" order which may have the consequence of the appeal being brought to an end. If such a step is contemplated, the parties have the right to be heard, and a failure to give them that right would be a failure to accord them natural justice. It is also arguable that the failure to accord natural justice is also an error which goes to the jurisdiction of the Court: ***Matarave v. Talivo*** [2010] VUCA 3.

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 complaining 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.

Dated at Port Vila, this 3rd day of December, 2010

BY THE COURT

Hon. Justice J. MANSFIELD

Hon. Justice E. GOLDSBROUGH

COURT OF APPEAL
COUR D'APPEL

Hon. Justice O. SAKSAK

Hon. Justice D. V. FATIAKI