IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU **Civil Appeal Case No. 17 of 2010**
(Civil Appellate jurisdiction)

BETWEEN: SIMEON TULA AND FAMILY
Appellant

AND: JEFFREY WEUL, MOFRESER WEMANAR & FAMILY WEMAL & SAWON FAMILY, HAROLD NAIS HOPKINS, KEITH SAWON, FRANK BOLLEN
Respondents

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John Mansfield
Hon. Justice Edwin Goldsbrough
Hon. Justice Nevin R. Dawson
Hon. Justice Daniel Fatiaki

Counsel for the Appellant: *S. Stephens*
Counsel for the Respondents: *D. Yawha*

Date of hearing: *23 November 2010*
Date of decision: *3 December 2010*

JUDGMENT OF THE COURT

1. This is an appeal against a decision of the Supreme Court sitting in Gaua, Torba Province delivered on 9 June 2010 and published on 14 June 2010. That decision was the determination of an appeal from the decision of the Banks and Torres Island Court of November 2005 over the ownership of Nebeklave land.

2. In the Banks and Torres Island Court ownership of the land known as Nebeklave was declared as being with the Respondents to this appeal. The Appellants were a party to that hearing and were acknowledged as having some limited rights to parts of the land under the stewardship of the Respondents.

3. The appeal to the Supreme Court was brought under section 22 (1) Island Court Act [Cap 167]. Such an appeal is by way of rehearing and not review. This is

provided by section 22 (3) of Cap 167, and reflects the very practical issue of the possible lack of an accurate record from an Island Court proceeding. The powers on appeal are to be found in section 23 of Cap 167 and allow for a remittal for rehearing to the same or another Island Court and for the Supreme Court to make any order that the Island Court may have made.

4. There is then to be found a provision in section 22 (4) of no appeal to the Court of Appeal following a subsection (1) (a) appeal. This appeal, therefore, is limited only to the question of jurisdiction. That principle is well established in this jurisdiction and was set out clearly by this Court in ***Matarave v Talivo*** *[2010] VUCA 3 (Matarave).* That judgment was delivered 30 April 2010.

5. Of the various grounds of appeal set out in the Notice of Appeal there appear several that, given the above decision, this Court may not entertain. Indeed the notion that an Appellant may appeal generally on points of law, as opposed to fact, which appears to be the route sought by this Appellant, is simply not available to him. It is necessary to consider which of the grounds of appeal, if made out, would lead to the conclusion that the Supreme Court did not properly exercise its jurisdiction according to law.

6. Going to jurisdiction are points two to five set out in the Notice of Appeal that go to the appointment of the Assessors who sat with the Judge in the Supreme Court, and point 6 that goes to apprehended bias, also dealt with in *Matarave.*

7. Point 7 in the Notice of Appeal raises a procedural matter concerning whether the judge should have allowed the Respondent to Cross examine the Appellant's witnesses when they were in a position of default themselves. The decision to allow cross examination in those circumstances amounts to the exercise of a discretion, not a decision on a question of law. As such it does not raise an issue of jurisdiction and cannot be brought on appeal to the Court of Appeal.

8. In point 8 of the appeal grounds there is reference to conduct on the part of the Magistrate sitting in the Island Court. That generally raises the issue of apprehended bias and could have been dealt with at the Island Court hearing, were the conduct complained of known about at that stage or at the Supreme Court hearing otherwise, if it were the case that the Supreme Court appeal was undertaking a judicial review of the work of the Island Court rather than an appeal by way of rehearing. Whilst relevant on review, where the matter is to consider how it was that the Island Court arrived at its decision and whether this was the proper course, on an appeal the whole matter is looked at afresh and any procedural irregularity found to have taken place in the Island Court is not carried through into the new hearing. Thus the point raised cannot be an issue in this appeal; nor was it a matter that the Supreme Court necessarily had to deal with in determining the appeal before it. It cannot demonstrate that, in the circumstances, the Supreme Court lacked jurisdiction.

9. Ground 6 raises the question of the apprehension of bias by the parties to the Supreme Court appeal, seeing the Judge and the two Assessors meeting with and going to the commercial premises of one David Alban who had sat in the Island Court on the initial hearing. Evidence of that can be seen in the sworn statement of Danstan Tula filed 29 October 2010. That evidence suggests that, during the hearing, the judge and assessors would 'stap spel mo storian wetem David Alban long store blong Mr. Alban during long ol short breaks'. It was further suggested that evidence that a more appropriate resting place was available in the Tourism Office.

10. Conduct leading to an apprehension of bias was also discussed in *Matarave*. At paragraph 3 of page 11 of the judgment it was said:-

"The test we apply is whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the questions which the court was required to decide. In the case of the assessors the test is the same."

11. Given that the parties to this case had no difficulty in observing this conduct, it is apparent that it was not done other than in public glare. It was not surreptitious. It was not conducted in a way that the conversations could not be overheard. Further it is clear that it amounted to no more than a social convenience rather than anything more extensive. As was further set out in *Matarave* at page 13 paragraph 3:-

"It is not uncommon in the day to day relationships of parties in a community that a decision maker will come into the same place as a party in a current case. Casual meetings may unexpectedly occur, for example in shopping centres, churches or other meeting places. Sometimes there are public functions to which the decision maker and the parties are invited, and at which they are all expected to attend. A fair minded observer would not apprehend bias just from contacts of this kind."

12. We view the conduct described in the statement of Danstan Tula as just such common conduct. It was not a discussion or discussions between one party to the Supreme Court proceedings in the absence of another party, or with a witness for one party to the proceedings. It is not conduct which, in our view, could lead to an apprehension of bias on the part of a fair minded observer. We further note that there were no additional factors as may have been present in *Matarave* where gifts were later exchanged. We further observe that in the circumstances of this appeal to the Supreme Court, heard as it was in Gaua, it would be even more difficult not to come into contact with people connected in some way or other with the present

case. To elevate the apprehended bias test to a level where it would be impossible for the presiding officers to maintain at least the semblance of a normal life would not, in our view, serve any useful purpose.

13. Grounds 9, 10, 11 and 13 set out matters which this court cannot entertain, being alleged errors not amounting to lack of jurisdiction but going to the merits of the appeal, described variously as errors of law or fact. We agree that, as is set out in Ground 12, this judgment is "prejudicial" to the Appellants in the sense that the decision went against the Appellants but simply note that this is nothing on which to base an appeal, even where an appeal is available as of right.

14. Finally we turn again to Grounds 2 to 5 and the questions about the appointment and qualification of Assessors. Given the earlier decision of this court it is clear that a Supreme Court not properly constituted may face an order made declaring that its decision should be quashed as not having been made within its powers.

15. In this appeal it is submitted that the Assessors were not appointed by the Court but by a member of court staff married into the respondent's family. That can be found in the sworn statement of Danstan Tula. There is no further evidence to support this submission. Counsel referred during this hearing to the lack of a certificate signed by the Judge appointing the two Assessors, and to the failure to inform counsel prior to the hearing, which in effect means prior to the parties travelling for the hearing, of who the Assessors were to be.

16. Assessors are to be appointed by the Court, under Section 22 (2) Cap 167. There is no provision that requires evidence of their appointment to be Gazetted or signified in any way further than them sitting with the judge during the hearing. That both of these gentlemen did just that is indicative that they were appointed 'by the court' for the hearing, otherwise the judge would not be sitting with them.

17. It is without doubt that support staff employed by the Judiciary are involved in practical arrangements to ensure the availability of Assessors in any particular case, and that this should be so is quite proper. This practical necessity, though, does not detract from the appointment of the Assessors by the Court nor does it relieve the Assessors of the duty to disclose to the Judge and then, if required, through him to the parties of any reason why they may not sit.

18. Section 22 (2) further provides that assessors are to be 'knowledgeable in custom'. No doubt assessors knowledgeable in custom are also better suited with local knowledge of the area in question as well but equally too close a connection with the same area on their part will result in more submissions for recusal or disqualification based on being too closely related to the land or the families involved in the dispute.

19. Assessors, just as is the case with judges, are subject to the duty to disclose any reason for not sitting on a case, more so where the reason is only known to them, for similar reasons an Assessor or potential Assessor should indicate prior to the hearing if he or she does not have the requisite knowledge. Before confirming any appointment it will be for the judge to ascertain that the Assessors have the appropriate knowledge necessary to assist him or her in the determination of the issues before the Court. It is not for the parties to undertake their own assessment of the knowledge of the Assessors, but a decision that rests with the Court.

20. For the avoidance of doubt, we do not accept, as suggested in Ground 4, that there were ever nominations of the Assessors from the Respondents nor that there should ever be such nominations from any party. In our judgment, there is no merit to be found in the various grounds raised against the appointment or qualifications of the Assessors, nor is there any merit in the attack on the decision of the Supreme Court because, in the course of the hearing, there were communications which

gave rise to a reasonable apprehension of bias. We do not accept those contentions. Consequently we reject all of the grounds of appeal which might otherwise have shown that the Supreme Court acted without proper jurisdiction. Accordingly this appeal must be dismissed.

21. In the previous Court of Appeal decision it was determined that as no right of appeal exists the application for leave to appeal should be refused but that since the Supreme Court in that instance had not been properly constituted, a declaration would issue as to the validity of its decision. In this case, for the reasons set out above, we are of the view that the Supreme Court was properly constituted and that therefore no declaration should issue and that leave to appeal should also be refused. Costs of this appeal are ordered to be paid by the Appellants to the Respondents to be agreed or taxed.

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

BY THE COURT

.....
Chief Justice Vincent Lunabek

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Justice J. Mansfield

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Justice E. Goldsbrough

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Justice N. R. Dawson

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

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Justice D. Fatiaki