

BETWEEN: BOETARA FAMILY
Appellant

AND: SOCIETE CIVILE IMMOBILIERE DU CANAL
First Respondent

PETER COLMAR
Second Respondent

THE REPUBLIC OF VANUATU
Third Respondent

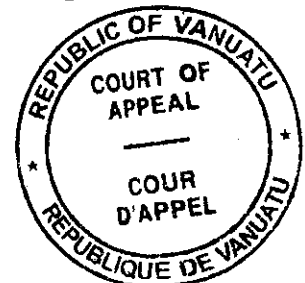
Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Ronald Young
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice Paul Geoghegan
Hon. Justice Mary Sey

Counsel: *Mr Felix Laumae for the Appellant*
Mr Nigel Morrison for the First and Second Respondents
Mr Sammy Aron (SLO) for the Third Respondent

Date of Hearing: *Thursday 30th March 2017 at 9:00 am*
Date of Judgment: *Friday 7th April 2017 at 4:00 pm*

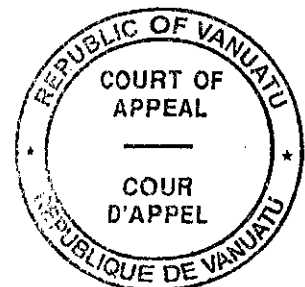
JUDGMENT

1. This appeal is another step in the extensive disputation about the Belbarav land near Luganville airport on Santo.
2. In the Supreme Court Civil Claim 51 of 2002, the Boetara Family say they are the custom owners of that land, and so they became the lessors of Agricultural Lease

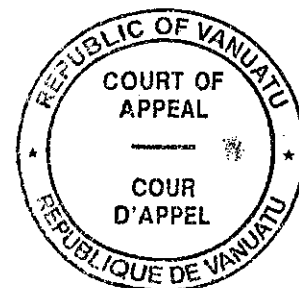


04/3021/001 (transferred to the Boetara Family by the Santo Land Council following a declaration of the South East Santo Land Tribunal). They challenge the validity of two lease transactions made over the Belbarav land, because they had not taken place with the approval or knowledge of the Boetara Family.

3. The lease was a 30 year lease to Societe Civile Immobiliere Du Canal (SCC). It was due to expire on 30 July 2010. It was apparently surrendered by the action of the Minister or Acting Minister of Lands on or about 28 June 2006 without reference to, or the consent of, the Boetara Family. The surrender of that lease was registered on 2 August 2007.
4. At the same time, a new Commercial/Residential lease 04/3021/608 (the new lease) was granted for 75 years to SCC, and that grant was also registered. Again, it is said, that occurred by the actions of the Minister without any knowledge or consent or involvement of the Boetara Family.
5. Peter Colmar is said to hold a power of Attorney of SCC, and to have been involved in the two transactions on its behalf. It is not necessary to refer to him specifically further for the purposes of addressing this appeal.
6. The Republic of Vanuatu represents and supports the actions of the Minister for the time being in relation to the two transactions.



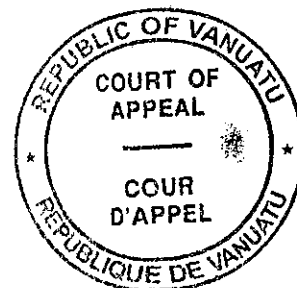
7. The basic complaint, as noted, is that the two lease transactions were made without reference to the Boetara Family as the custom owners of the land, and that the new lease was issued without payment of any premium, and at a very low rental. It is alleged that the two lease transactions therefore occurred, and were registered, through fraud or mistake and without reference to or awareness of the South East Santo Area Lands Tribunal Declaration as to custom ownership dated 31 May 2005. The Court notes that the defences refer, instead, to a decision of the Veriondale Village Land Tribunal. Nothing presently turns on that.
8. It is not necessary to refer to the complex pleadings in detail. Nor is it necessary to refer to the history of the conduct of that claim.
9. The appeal arises from two interlocutory applications.
10. Family Boetara on 3 November 2016 applied for summary judgment on their claim, on the ground that the respondents had no reasonable prospects of defending the claim, and therefore relying on rule 9.6 of the Civil Procedure Rules 2002.
11. In turn, SCC on 3 December 2016 applied to strike out the claim of the Boetara Family altogether, on the basis that the Boetara Family has no standing to maintain the claim. That is because, it was said, there is an as yet unresolved dispute about whether the Boetara Family are in fact the custom owners of the Belbarav Land.



12. The primary Judge refused the application of SCC. That decision has not been appealed. As custom owners, or at least as persons who have an arguable case that they are custom owners, it would appear that there is no basis to dispute at present that Boetara Family has standing to bring the claim. Whether, ultimately, it succeeds will of course depend upon Boetara Family proving that they are the custom owners duly recognized.

13. The primary Judge also refused the application for summary judgment by Boetara Family. The Judge thought the material evidence in the supporting sworn statements fell short of proving fraud. There is no appeal from that part of the decision. The primary Judge did not expressly refer to the other grounds of the claim, but (as we note below) because there is a separate proceeding in the Supreme Court which might disturb the status of the Boetara Family as the custom owners, it would appear in any event to be proper not to grant to them the summary judgment that they were seeking, and which would finally have resolved their status as custom owners.

14. The appeal arises because, at the hearing of the two interlocutory applications, counsel for SCC applied orally to have the Boetara Family claim summarily dismissed. The primary Judge said that for the *"Reasons stated in Counsel's written submissions and Court of Appeal Case No. 25 of 2015"*, he accepted the submission made on behalf of SCC, and he dismissed the Boetara Family claims in their entirety. The appeal is from that order only.



15. In our view, the appeal must be allowed and the order dismissing the claim must be set aside.
16. The focus of the written submissions for SCC concerned only the question of the standing of Boetara Family to bring the claim. It was based on the decision of the Court of Appeal in Acting Director of Lands v. John Tari Molbarav and Others¹, given on 20 November 2015. In that decision the Director of Lands had appealed from a decision of the Supreme Court.
17. The Supreme Court had decided that the decision of the Veriondale Village Land Tribunal that the Boetara Family were the custom owners of the Belbarav Land, rather than the second respondent Thompson Wells was final. The Supreme Court had directed also that the Republic of Vanuatu pay in excess of Vt 29 million to the Boetara Family, being the outstanding monies owing for the compulsory acquisition or part of the Belbarav Land.
18. In its decision, the Court of Appeal at [5] – [11] referred to the extensive litigation arising from the dispute over the custom ownership of the Belbarav land. We will not repeat it. The then state of the dispute was referred to in general terms at [6] in that decision:-

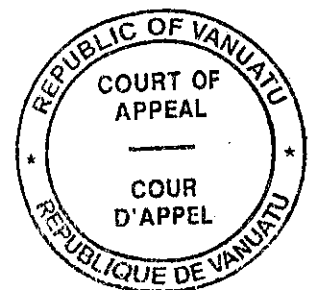
“In CAC 42 of 2013 the Court of Appeal finally determined in favour of [The Boetara Family] that the second respondent (Thompson Wells) had no claim to the custom ownership of Belbarav, but amongst the unresolved litigation was a claim

¹ [2015] VUCA 36

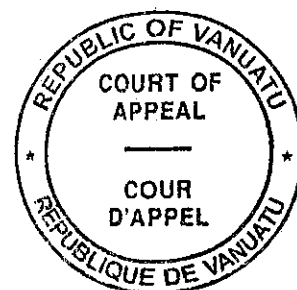
by the third respondents [Mathias Molsakel and Rachel Molsakel] which challenge the custom ownership of the [Boetara Family]."

19. Mathias Molsakel and Rachel Molsakel (the Molsakel claimants) had separately commenced proceedings which were outstanding, and which asserted their status as custom owners of the Belbarav Land, rather than the Boetara Family. They challenge the validity of the decision of the land tribunal on which the Boetara Family were relying.

20. In that Court of Appeal decision, the Court set aside the judgment of the Supreme Court which had determined that the Molsakel claimants had no entitlement to be the custom owners of the Belbarav land. The Boetara Family were ordered to pay the costs of the appeal and of the Boetara Family application in their proceeding leading to the order of the Supreme Court which was set aside. Those costs were ordered on an indemnity basis, because the Court of Appeal was critical of the Boetara Family and its counsel in pursuing summary judgment order on an interlocutory application when they well knew that the claim of the Molsakel claimants to be recognized as the custom owners of the Belbarav Land was outstanding. The Court of Appeal said at [18] of their reasons for judgment that the Boetara Family should have informed the Judge of the existence of the Molsakel claim, as well as the injunctive orders made by the Court of Appeal which was to preclude any resolution of the status of either the Boetara Family or the Molsakel claimants by any interlocutory process.

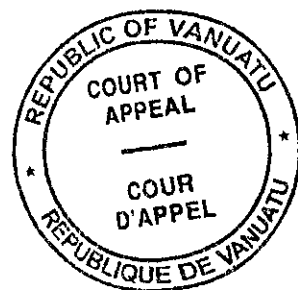


21. It is still the case that the Molsakel claimants, who challenge the declaration of the Land Tribunal that the Boetara Family is the custom owner of the Belbarav Land, is outstanding. Depending upon the success of that challenge, the Molsakel claimants are then claiming to be the custom owners of the land. As was said then and is still correct now, that claim is *"alive and well and still awaiting trial in the Supreme Court"*: see at [17] of the Court of Appeal judgment.
22. It is also clear that in the Supreme Court in Civil Claim 51 of 2012 the claim of the Boetara Family to be recognized as the custom owners of the Belbarav land is also outstanding.
23. It was therefore inappropriate to resolve that claim on that application of SCC. There are two outstanding competing claims.
24. In addition, the assessment of the merits of the Boetara Family claim (apart from its standing) was not a matter raised specifically by SCC on its application. The primary Judge should not therefore have made an order which necessarily determined on the merits that their claim had no substantial merits. The Boetara Family was not on notice that their claim was to be argued on that basis, and may not have presented all the material and evidence that they intended to produce if the matter proceeded to trial.
25. The SCC in its submissions proposed that the order on this appeal should be to quash or set aside the order dismissing the Boetara Family claim in its entirety, and that the



matter should be remitted to the Supreme Court for trial. It was said that such an order should be made conditional upon the agreement of the Boetara Family that their Supreme Court Claim should be adjourned pending the hearing and determination of the Molsakel claimants challenging the validity of the Land Tribunal decision upon which the Boetara Family relies.

26. That is, in effect the view which the Court of Appeal has reached in any event. It is not therefore necessary to address in detail the submissions of the Republic of Vanuatu, as a respondent to the appeal. It is noted that the Republic argued that the decision of the primary Judge summarily dismissing the claim of Boetara Family was a correct one.
27. As it is our view, as evidenced also in the previous Court of Appeal decision, that the Boetara Family interlocutory application was inappropriate, we propose to make no order in its favour on the appeal even though it has been successful. That is so even if it was necessary for the Boetara Family to appeal to preserve its position. It is not practicable to dissect the course of it doing so for the purpose of costs. SCC applied for leave out of time to cross appeal to challenge the order that the Boetara Family had status to maintain the claim. That application for an extension of time was not ultimately pursued. That application is therefore refused. We have taken that into account in determining to make no order as to the costs of the appeal.
28. If, as counsel for the Boetara Family said in the course of submissions, the Boetara Family is anxious for the ongoing dispute to be resolved, it may be appropriate to



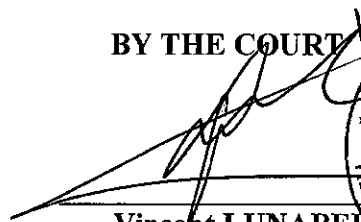
apply to have their Supreme Court claim and that of the Molsakel claimants be heard together, at least in relation to the questions concerning the status of, or the identity of, the custom owner of the Belbarav land. Once that question is resolved, if it is resolved in favour of the Boetara Family, they can then pursue the other relief sought in their Supreme Court action against SCC and the Republic. If it is resolved adversely to them, by a decision of the Court, it will be clear that they have no standing to continue to maintain that claim.

29. The formal orders are:-

- 1) Appeal allowed.
- 2) Order made by the Supreme Court in Civil Case No. 51 of 2010 on 7 December 2016 that the claims of the claimants in that proceeding be dismissed in their entirety be set aside.
- 3) The application of the first respondent and the second respondent for leave to file a cross appeal out of time is refused.
- 4) The matter is remitted to the Supreme Court for further hearing and determination.
- 5) No order as to costs of the appeal or of the application for leave to file a cross appeal out of time.

DATED at Port Vila this Friday 7th day of April, 2017

BY THE COURT


Vincent LUNABER
Chief Justice

