

**IN THE COURT OF APPEAL**                      **Civil Appeal**  
**OF THE REPUBLIC OF VANUATU**   **Case No. 17/2629 CoA/CIVA**  
*(Other Jurisdiction)*

**BETWEEN:** Peter Iaus, Ken Nauka, Sam Iaei, Ioran  
Namonike, Itis Iamorile, Sam Kulu  
(K), William Iasu, Jeak Iasu, Mako Iasu,  
Stephen Nawa, Pakoa Charley, Marcel  
Namtengas, Tom Iaute, Kasoi Rosikai,  
Charley Kuei, Charley Caledonia, Milli  
Laukuasuas, Kuai Ianpisin and Namei  
Iaukun

**Appellants**

**AND:** Tom Noam  
**Respondent**

**Civil Appeal Case No. 17/2637 CoA/CIVA**

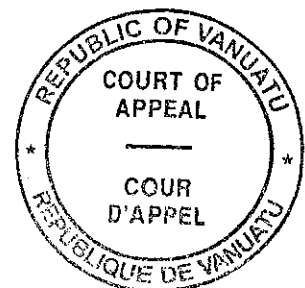
**BETWEEN:** Johnson Namtengas, Martin Iapatu, Tau  
Nimanse, Nalpini Iatimu, Kauei Harry, Iapit  
Kamiliapin, Muna Iapatu, Kapalu Kauiel,  
Jimmy Nital, Rauh Kapalu, William Kapalu,  
Jimmy Kauiel, Charley Naknaou and Iasu  
Steven

**Appellants**

**AND:** Tom Noam  
**Respondent**

*Date of HEARING:*                      *November 13<sup>th</sup>, 2017 at 11:00 AM*

*Date of JUDGMENT:*                      *17<sup>th</sup> day of November 2017 at 4:00 pm*



*Before:*

*Hon. Chief Justice Vincent Lunabek*

*Hon Justice von Doussa*

*Hon. Justice Ronald Young*

*Hon. Justice Daniel Fatiaki*

*Hon. Justice Dudley Aru*

*Hon. Justice David Chetwynd*

*Hon. Justice Paul Geoghegan*

*In Attendance:*

*Eric Molbaleh for 14 appellants in CAC  
17/2637*

*Colin Leo for 19 appellants in CAC 17/2629*

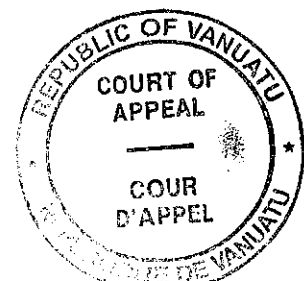
*Less Napuati for Respondent*

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## JUDGMENT

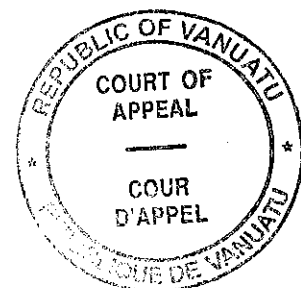
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1. This is an appeal from a judgment issued in the Supreme Court on September 13<sup>th</sup> 2017 where the trial Judge entered summary judgment on behalf of the respondent Mr Noam and issued an eviction order against the appellants and the other defendants in the Supreme Court proceedings evicting them from custom land known as Lapangnapeuk located in Tanna.
2. The claim filed in the Supreme Court had been issued against 59 named defendants all of whom were alleged to be residing unlawfully on Mr Noam's land. Mr Noam asserted that a decision of the Tanna Island Court on November 27<sup>th</sup>, 2014 had declared him and his family to be the custom owners of Lapangnapeuk and that the



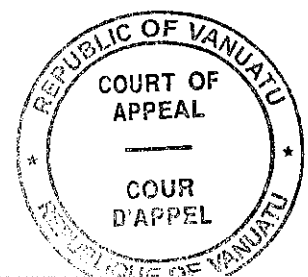
defendants were residing unlawfully on the land. Mr Noam sought an order for eviction of the defendants *"from the claimant declared customary boundary"*.

3. Two groups of appellants have filed notices of appeal against the Supreme Court decision. Mr Molbaleh acts for 14 of those appellants while Mr Leo acts for 19 appellants. Accordingly 26 persons potentially affected by the eviction order have not taken any steps in respect of the judgment.
4. The appellants represented by Mr Molbaleh appealed against the judgment on the following grounds:-
  - a) That the Judge should not have dealt with the matter summarily.
  - b) That the Judge should have permitted more time for the appellants to file evidence.
  - c) That some of the persons named in the proceedings did not live on the land in respect of which the eviction order was sought and others were granted rights to live on the land.
5. The appellants represented by Mr Leo appealed against the decision on the following grounds:-

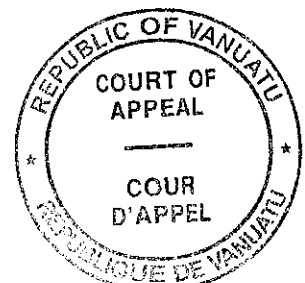


- a) That the Judge erred in failing to consider that the appellants lived in an adjacent area of custom land known as Laruanu, were the custom owners of that land and therefore could not be evicted from it.
  - b) That the trial judge failed to consider that the subject land was under appeal from the decision of the Tanna Island Court and was wrong in asserting that the judgment had not been appealed.
  - c) That Mr Noam's claim lacked clarity and that the appellants had never resided in Lapangnapeuk custom land.
6. The decision of the Tanna Island Court issued on November 22<sup>nd</sup> , 2014, made declarations in respect of custom ownership of different areas of land, including Lapangnapeuk and two other land areas, Lanuanu and Lautaliko both of which border Lapangnapeuk.
7. Mr Noam was declared on behalf of family Iouniwan to be the customary owner of Lapangnapeuk. Immediately after the declaration of custom ownership the judgment also contained the following paragraph:-

*"That family Ioukoupā and Nauanapkai be given the right to use the land areas of Lapangnapeuk declared to family Iouniwan. These family units will have to seek permission from the head of family Iouniwan should they wish to further develop the land for all purposes".*



8. Family Iamanik were declared custom owners of Laruanu and family Kuau were declared custom owners of Lautalico.
9. The Island Court judgment annexed a plan which showed the boundaries between Laruanu, Lautauko and Lapangnapeuk land.
10. With reference to the right of use referred to in the Island Court judgment, it is unclear whether or not the court was purporting to confer a customary use right upon the families referred to or simply recognizing an existing right. In any event, we consider that it would not be open to the Island Court to have imposed any conditions upon, or vary, a customary right.
11. The statement of claim in the Supreme Court was filed on November 23<sup>rd</sup> 2016. A sworn statement of service by Mr Napuati, counsel for Mr Noam establishes that Mr Napuati served Peter Iaus and Martin Iapatu with the statement of claim. That service occurred on November 24<sup>th</sup> 2016. Mr Napuati's statement of service refers to service upon Namtengas Iaus however it also records Peter Iaus "*signing off*" on behalf of both he and Namtengas Iaus. It is clear that all 59 defendants needed to be served with the proceedings and yet at all relevant times there has been proof of service upon only two of the 59 defendants.
12. What is also clear is that the claimant seemingly ignored the fact that many of the named defendants would have had families and that given the nature of the

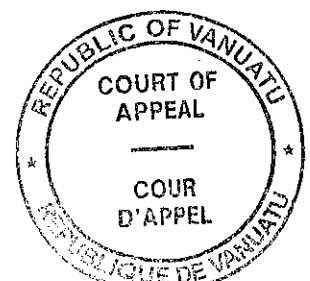


proceedings all adults allegedly wrongfully occupying the land should have been named as parties and served. The claimant has presumably proceeded on the basis that service of the proceedings upon the male occupants constituted service upon the female occupants. Such an approach is fundamentally flawed.

13. On January 20<sup>th</sup> 2017, a statement of defence was filed by a lawyer Mr Godden on behalf of 13 named defendants. These appear to be the appellants now represented by Mr Molbaleh, although we note that the appellant Johnson Namtegas was not named as a defendant in the statement of defence filed. The statement of defence contained general denials but pleaded that the defendants were residing lawfully on Lapangnapeuk land and so denied they were trespassers. It did not refer to the customary right set out in the Island Court judgment and did not identify which of the named defendants were members of the families who had the benefit of the customary use right.

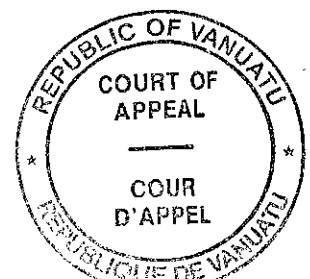
14. On January 31<sup>st</sup> Mr Molbaleh filed a notice of beginning to act stating he had begun to act for all of the defendants in the proceedings. For the reasons referred to in this judgment we have considerable doubt as to whether that was the case.

15. The proceedings were adjourned on two occasions to enable settlement negotiations between the parties to take place. They were again adjourned by the trial Judge to



June 1<sup>st</sup> 2017 with the parties being advised that they needed to settle the case by that date.

16. Counsel for both the claimant and defendants appeared on June 1<sup>st</sup> however the conference had to be adjourned to June 5<sup>th</sup> because of a requirement on the part of the trial Judge to attend the official opening of Parliament.
17. On June 5<sup>th</sup> there was no appearance for either party and the matter was adjourned to July 5<sup>th</sup>. On July 5<sup>th</sup> there was no appearance for either party and the proceedings were adjourned to August 22<sup>nd</sup> at the direction of the trial Judge for the claimants to show cause why the proceedings should not be struck out for want of prosecution.
18. On August 22<sup>nd</sup>, Mr Napuati appeared for the claimants and requested that a date be set for the hearing of a summary judgment application which had been filed on August 18<sup>th</sup> 2017. The trial Judge adjourned the proceedings for a hearing of the summary judgment application on September 6<sup>th</sup> and directed that the defendants were to file their responses and submissions by August 31<sup>st</sup>. Mr Molbaleh did not appear on August 22<sup>nd</sup>.
19. On September 6<sup>th</sup>, both Mr Napuati and Mr Molbeleh appeared. Mr Molbaleh had not complied with the previous timetabling direction and a request by him for an extension of time to file evidence was declined. Directions were made for the filing of written submissions with a decision to be delivered on September 13<sup>th</sup>. That decision is the one now appealed from. At no stage was any evidence filed from the defendants or any submissions filed in opposition to the summary judgment.

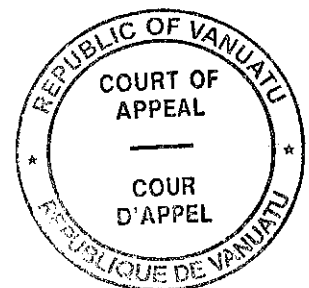


20. After considering the submissions of the claimant the trial Judge granted summary judgment in favour of Mr Noam, made an order requiring the defendants to deliver vacant possession of the land by October 12<sup>th</sup>, 2017 and directing that an eviction order would issue after October 12<sup>th</sup> *“against the defendants or anyone who does not vacate the claimant’s land willingly, peacefully and voluntarily.”*

21. Clearly such an eviction order had the potential to impact upon any existing customary rights not only of the defendants but anyone else residing on the land such as the families of the defendants. While this appeal focuses on the appellants it was not open to the Judge to make an eviction order in such wide terms.

22. In his judgment the Judge referred to the statement of defence filed and stated at paragraph 13 that :

*“The defendants have complained against the claimants in their defence that the Claimant never held any meeting with them or given any advise to them to leave the land. Reading paragraph 4 of the Island Court’s declaration as quoted in part in paragraph 10 of this judgment that is contrary to the Island Court’s direction. That direction is to the defendants to arrange to meet with the claimant and make “appropriate arrangements” about their continuous occupation. That is not for the claimant to do, rather it is for the defendants. And they have never done that although this Court gave them opportunities to do it since the first conference on 31<sup>st</sup> January 2017.”*

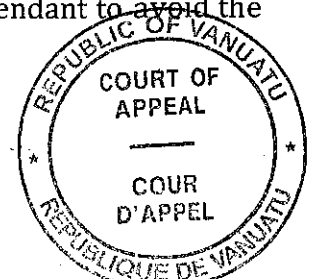




23. We have already stated that it was not open to the Island Court to make customary rights conditional on the appellants making some further arrangements with the respondent. And accordingly the Judge in the Supreme Court was wrong to conclude that somehow the appellants lost their use rights because that condition had not been fulfilled. Given these appellants therefore held customary use rights relating to the land the Judge could not have made an eviction order against them.

24. As to the appellants represented by Mr Leo, namely those persons claiming to be residing on Laruanu custom land, we received an acknowledgment by Mr Napuati at the outset of this hearing that Mr Noam acknowledged their custom ownership and did not seek to evict them from their land. They should never have been named as defendants. The appeal must therefore be allowed in respect of those appellants. As to the appellants represented by Mr Molbeleh in this appeal, with the exception of Johnson Namtegas, they submitted to the jurisdiction of the Supreme Court by filing a statement of defence. Despite this however, we are satisfied that the eviction order made against them cannot stand for the reasons set out in paragraph [23].

25. As to the remaining 26 defendants named in the Supreme Court proceedings there appears to have been genuine confusion as to whether or not Mr Molbeleh did represent all of the defendants as indicated in his notice of commencement to act. Mr Molbeleh's explanation for having taken no steps in the proceedings was that there was a "*communication breakdown*". It is abundantly clear that he did not have specific, if any, instructions from all 59 defendants. In circumstances such as these counsel should always obtain a written authorization to act from each defendant to avoid the



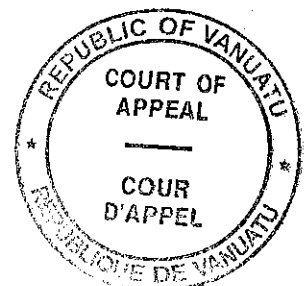
very confusion which has now arisen. There is substantial doubt as to whether Mr Molbeleh was representing the 26 defendants referred to and in such circumstances the eviction order against that group cannot stand as there is simply no proof that they were served with the proceedings.

26. Having resolved the issue of the appeal it is clear that the matter needs to be remitted to the Supreme Court save for the claims against the appellants represented by Mr Leo. However we do not consider that that is necessarily the most satisfactory way of dealing with the matter.

27. Given that the matter involves the assertion of customary rights and the possible ambit of those rights we observe that the matter is one that is more appropriately dealt with by bodies which are uniquely equipped to deal with matters of custom. We consider that rights of customary use of land are entwined with the issue of customary ownership.

28. The Constitution recognizes the importance of both custom and the need to be able to resolve disputes arising from custom. Article 51 provides that :

*"Parliament may provide for the manner of the ascertainment of relevant rules of custom except for the rules of custom relating to ownership of custom land, and may in particular provide for persons knowledgeable in custom to sit with the judges of the Supreme Court or the Court of Appeal and take part in the proceedings."*



29. Article 52 provides that:

*"Parliament shall provide for the establishment of village or island courts with jurisdiction over customary and other matters and shall provide for the role of chiefs in such courts."*

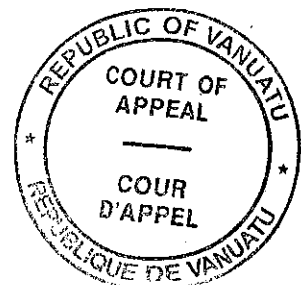
30. Article 74 of the Constitution recognizes the importance of the rules of custom in land matters and provides that:-

*"The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu".*

31. The Custom Land Management Act No. 33 of 2013 which came into force on February 20<sup>th</sup> 2014 provides at section 1 (1) that:-

*"The Parliament of Vanuatu has formalized the recognition of customary institutions termed "nakamals" and "custom area land tribunal" in this act to determine the rules of custom which form the basis of ownership and use of land in Vanuatu" ( underlining added ).*

32. The Act provides for the resolution of disputes over ownership of custom land. A "land dispute" is defined in section 2 of the Act as meaning:-



*"A dispute between two or more indigenous citizens or groups about the ownership of custom land".*

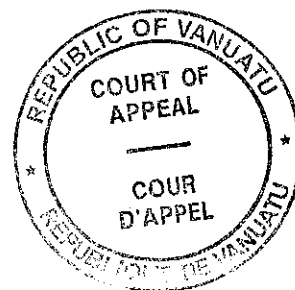
33. The concept of "use rights" is referred to in the definition of "membership of the custom owner group" in section 2 which provides:

*"membership of the custom owner group means the members including all descendants of a custom owner group who are determined by customary processes and in accordance with the rules of custom to be members of that group and includes all people who hold ownership or use rights over land in accordance with the rules of custom." ( underlining added ).*

34. The significance of usufructuary or secondary rights was referred to in Family Kaltapang Malastapu v Family Kaltongo Marapongi & Ors<sup>1</sup> where the Chief Justice stated :

*"The customary land disputes in the Courts of Vanuatu show that absolute ownership of land is the greatest interest in land recognised by the customs of different Islands and areas of Vanuatu. However, they reveal also that custom ownership is not the only interest in land. There are other interests in land than customary ownership interest which are recognised by the customs of Vanuatu. A member of a land-owning group, family or clan or community has a custom interest to use, occupy or reside and make gardens on the land. That custom right includes taking fruits from trees on the land, water and Salt and fishing and to cut trees for houses and pass across the land. These rights are also recognised to a person who is married to a member of land-owning family or group. These rights are described as usufructuary rights or secondary rights.*

<sup>1</sup> Supreme Court Land Appeal Case No. 58 of 2004 ( 14/09/09 ).



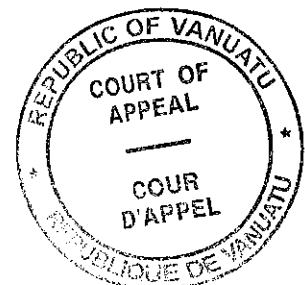
*Land courts established through out the country have to bear in mind that when dealing with customary land disputes after determining the customary ownership interests, they must also consider and determine the existence of the secondary rights on the land in dispute. This is important for three (3) reasons:*

*First, to set the extent and scope of the secondary rights within the traditional purposes and customary limits vis-à-vis the primary ownership rights. Second, to limit future internal disputes between the declared custom owners and other members of the land-owning families, groups, tribes or communities and others. Third, to develop a consistent body of customary law on the land in accordance with [Chapter 12 of the Constitution – Land: Articles 73, 74, 78(2), 79(2) and 81] and the land courts legislations and rules (when relevant).*

*This approach allows the land courts to have wider and better understanding of the customary law and concepts on the customary lands in Vanuatu in the performance of their duties. It will assist the land courts to discover, apply and make declarations of the applicable relevant rules of custom concerning the form of ownership of customary land whether the form of ownership is individual or family/group or communal. If it is a group (family) or communal ownership whether the members of the group or community own joint individual interests in the land where the group or community is located. What is the basis of their relationship to ownership interest? Blood relationship which means that they all related by blood, having descended from a common ancestor or tribes relationships or titles in the land in question (or both of these).*

*If it appears that only some members of the group/family or community, according to custom, have rights to ownership of that land, are both male and female legitimate descendants of the original owners have equal rights or only male or female legitimate descendants of the original owners are regarded as having ownership rights.*

*If the relevant custom is that only male (or female) legitimate descendants of the original owners are entitled to customary ownership of land, the relevant land courts must determine whether or not other legitimate descendants have some custom rights other than customary ownership interests. The same exercise must be done for illegitimate and adopted children in relevant land cases.*



*If the relevant custom is that individuals have rights to customary ownership of land, according to custom, the relevant land courts must declare so in accordance with the relevant custom rule. It is important to note that some land cases before the courts reveal that customary land is attached to a chiefly title, and the holder of a chiefly title has power under custom to determine what is done with the land attached to his (or her) title. Land courts may appreciate that the power is a very different thing from beneficial ownership. The land courts may appreciate in relevant cases that a chief holding land under his unlimited customary administrative powers, may hold the land in the capacity of trustees of his people but not for his personal benefit. The chief may have rights of control rather than ownership rights.*

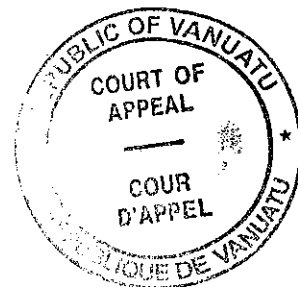
*Apart from the form of customary ownership, the land courts are also confronted with the basis of rights in custom to ownership of land.*

*The land courts may inquire in relevant cases as to the method of land acquisitions and transfer of customary interests in land. Discovery or original occupation of land constitutes each a basis of the rights in custom to ownership of land. Inheritance, that is, succession to the original owners is another. The land court must determine the relevant custom for succession. The land courts must consider (when relevant) whether succession is based on patrilineal system (only male children to succeed to their father's interests) or matrilineal (only female children to succeed to their mother's interest or ambilineal (children succeed to both either their mother or father's interests or bilineal (children succeed to both their father and mother).*

*The land courts must also consider (when relevant) whether all children descendants are treated alike or whether the relevant custom makes ranking priorities between oldest and younger children; male children and female children; legitimate and illegitimate children; natural and adopted children; adopted children within the family or adopted children outside the family."*

35. The decision of the Chief Justice was referred to in Kalwatsin v Willie<sup>2</sup> where the Court of Appeal, by agreement with counsel, framed questions to enable the Malekula Island Court to clarify its judgment relating to rights of representation and issues of

<sup>2</sup> [2009] VUCA 47

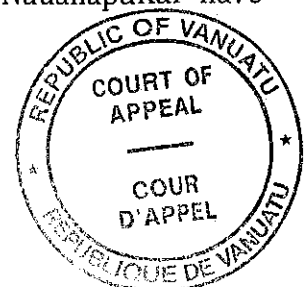


customary interests in circumstances where there was a lack of clarity in the Island Court judgment.

36. The statutory framework for the resolution of customary disputes over land whether such disputes are as to ownership or use does not contemplate such disputes being resolved in the Supreme Court but in legislatively sanctioned bodies which are uniquely equipped to deal with matters of custom.

37. We would accordingly invite counsel to consider the possibility of dealing with this matter through customary processes rather than in the Supreme Court. This will enable all affected individuals to be heard and will hopefully lead to an outcome which will provide unity and clarity rather than the division which has been so evident in the Supreme Court process.

38. The judgment of the Island Court has been appealed by Mr Noam and that appeal is yet to be resolved in the Supreme Court. In his appeal Mr Noam asserts that the Island Court was wrong to declare Families Iamanik and Kuau as custom owners of Laruanu and Lautalico respectively. Mr Noam asserts that those areas of land are part of Lapangnapeuk and that he should accordingly be named as the custom owner. There is no challenge to the rights of use referred to in the judgment in favour of Families loukaupa and Nauanapakai save for an assertion that Family Iouniwan be given the power to "waive" those rights. Neither Family loukaupa or Nauanapakai have



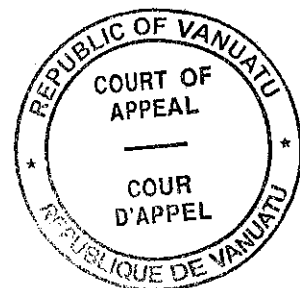
challenged the judgment and in such circumstances are bound by it. However, any dispute as to the extent of such rights would appear to be a new dispute.

39. That new dispute is in respect of the nature and extent of the customary use rights referred to in the Island Court judgment. These rights may include both collective rights held by a family and individual rights of members within the family. These are issues which would need to be determined by the Island Court.

40. In those circumstances it would appear that any new dispute could be dealt with pursuant to the Custom Land Management Act and could be dealt with under the mediation provisions set out in Part 5 of the Act. That would require the agreement of the parties.

41. In the event that the respondent wishes to continue with this matter in the Supreme Court he will need to ensure that all persons potentially affected by the orders sought are named and served with the proceedings ( save those appellants identified in paragraph [13] of this judgment.

42. The appeal is allowed. Orders 1 to 5 ( inclusive ) of the Supreme Court judgment dated September 13<sup>th</sup> are quashed and the matter is remitted back to the Supreme Court.

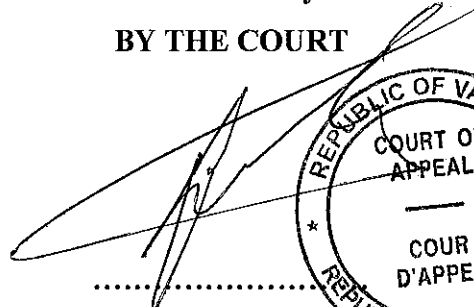




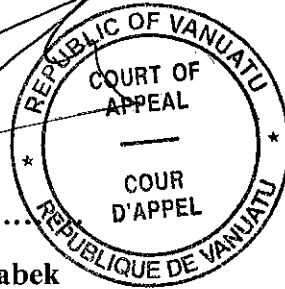
43. Given the issues relating to service and representation there shall be no order for costs.

**DATED at Port Vila this 17th day of November, 2017**

**BY THE COURT**



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**Vincent Lunabek**

**Chief Justice**