

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

**Civil Appeal**  
**Case No. 24/2061 COA/CIVA**

**BETWEEN:** REPUBLIC OF VANUATU  
Appellant

**AND:** JOSEPHO SUTA  
Respondent

**Date of Hearing:** 6 November 2024

**Coram:** Hon. Chief Justice V. Lunabek  
Hon. Justice M. O'Regan  
Hon. Justice R. White  
Hon. Justice D. Aru  
Hon. Justice V. M. Trief  
Hon. Justice E. P. Goldsbrough

**Counsel:** F. Bong for the Appellant  
K. T. Ture for the Respondent

**Date of Decision:** 15 November 2024

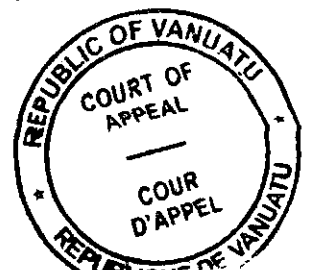
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**REASONS FOR JUDGMENT**

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**Introduction**

1. In December 2022, the Appellant, Mr Suta, lodged documents at the Office of Citizenship to support his request that he be issued with a certificate of citizenship. The Citizenship Office issued the certificate and Mr Suta used it to support his application for a Vanuatu passport. The Citizenship Office later realised that a mistake had been made. It revoked the certificate and cancelled Mr Suta's passport.
2. The primary Judge found that the Citizenship Office had breached the duty of care. He considered it owed to Mr Suta "to scrutinize the documents he submitted and his reasons for submitting them" and that it had, accordingly, been negligent in issuing the requested certificate to him: *Suta v Republic of Vanuatu* [2024] VUSC 152. The Judge went on to find that the Republic is liable to Mr Suta for damages yet to be assessed and adjourned the matter for that assessment.
3. The Republic now appeals against the finding of negligence.



## The circumstances

4. Mr Suta was born on 14 August 1968 in Port Vila, that is, before Vanuatu achieved independence on 30 July 1980. Mr Suta's birth certificate states that both his mother and father were born on Wallis.
5. Neither of those two circumstances rendered Mr Suta automatically a citizen of Vanuatu. This is made clear by Articles 9 and 10 of the Constitution:

### **9. Automatic citizens**

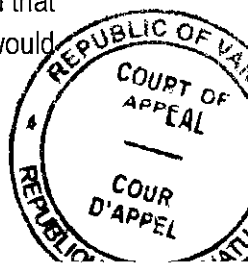
On the Day of Independence the following persons shall automatically become citizens of Vanuatu –

- (a) a person who has or had four grandparents who belong to a tribe or community indigenous to Vanuatu; and
- (b) a person of ni-Vanuatu ancestry who has no citizenship, nationality or the status of an optant.

### **10. Entitlement to citizenship**

Every person who on the Day of Independence is a person of ni-Vanuatu ancestry and has the nationality or citizenship of a foreign state or the status of an optant shall become a citizen of Vanuatu if he makes an application, or an application is made on his behalf by his parent or lawful guardian, within 3 months of the Day of Independence or such longer period as Parliament may prescribe. The Vanuatu citizenship of such a person shall automatically lapse if he has not renounced his other citizenship or nationality within 3 months of the granting of Vanuatu citizenship or such longer period as Parliament may prescribe, except that in the case of a person under the age of 18 years the period of renunciation shall be 3 months after he has reached the age of 18 years.

6. The Judge found at [32] that there was no evidence at all about Mr Suta's grandparents, let alone that they had belonged to a "*tribe or community indigenous to Vanuatu*". This could have resulted in a finding that Article 9(a) of the Constitution did not apply to Mr Suta, but the Judge said only that there was insufficient evidence to determine that question, at [33].
7. There was no suggestion in the Supreme Court that Mr Suta was able to bring himself within Article 9(b) or Article 10 of the Constitution.
8. The effect of the Judge's findings was that, if Mr Suta was to obtain citizenship, he had to make an application for that status, as contemplated by Articles 12 and 14 of the Constitution and in the manner contemplated by Citizenship Act. The Judge accepted at [41] that this was the position.
9. The Judge also appears to have accepted that Mr Suta had believed that he had citizenship of Vanuatu by virtue of his birth in 1968 in Port Vila, at [28], [30]. We note in passing that that finding appears inconsistent with paragraph 3 of Mr Suta's filed statement of claim in which he asserted that he had, in November or December 2022, applied for citizenship of Vanuatu. Obviously, there would



been no cause for him at that time to apply for citizenship if he had believed that he was already a citizen.

10. In any event, the Judge rejected Mr Suta's claim that he had made an application for citizenship in December 2022, at [30]. Instead, the Judge found that, acting in accordance with the belief that the circumstances of his birth rendered him a citizen of Vanuatu, Mr Suta had attended the Office of Citizenship in December 2022 with a view to obtaining proof of citizenship so that he could obtain a passport, employment and a loan, at [28].
11. On 22 December 2022, Mr Liki, then Acting Secretary-General of the Citizenship Office provided to Mr Suta a letter with the heading "*Certification of Vanuatu Citizenship*" which was addressed "*To Whom It May Concern*". The letter stated:

This is to certify that Mr Suta Josepho is a Citizen of Vanuatu by virtue of Article 9 of the Constitution of the Republic of Vanuatu. His father is from Efate Island, Shefa Province. Josepho was born in Vila Central Hospital Efate on 14<sup>th</sup> day of August 1968.

He obtained his French Passport on the 10th September 2022 and has been classified as a Dual Citizen.

12. The Judge found that, using that letter, Mr Suta had then applied for and obtained a Vanuatu passport which was issued on 27 February 2023; that he had entered into an employment contract (the Judge made no finding about when that occurred but Mr Suta had pleaded that that it had been "*on or about 27 February 2023*") at a salary of "VT4,800,000 per annum with other entitlements", and had secured a loan from Bred Bank to assist with the purchase of a vehicle (again the Judge made no finding about the date, but Mr Suta had pleaded that it had been "*in or about January or February 2023*").
13. Subsequently, on 2 May 2023, the Citizenship Office issued to Mr Suta a letter revoking the certificate of citizenship issued on 22 December 2022. In the letter, Mr Liki said:

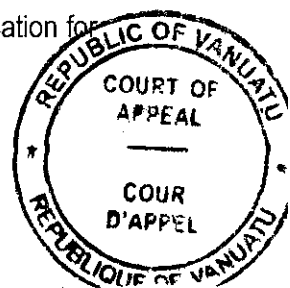
After careful considering to the certification letter issued by Citizenship Office dated 22 December 2022 at your request, we conclude that your request [does] not qualify you on any of the eligible requirements set out under the Citizenship Act [CAP. 112].

Therefore, we revoke our letter dated 22 December 2022 with immediate effect from the date of this letter.

14. Mr Liki went on in the letter to say that he was instructing the Passport Office to cancel Mr Suta's Vanuatu passport.

### **Commencement of proceedings**

15. The Judge accepted that Mr Liki had advised Mr Suta on 29 May 2023 to submit an application for citizenship using the appropriate form, and had offered to assist him in doing so.



16 Mr Suta did not act in accordance with Mr Liki's advice. Instead, just on two months later, on 20 July 2023 he commenced proceedings in the Supreme Court entitled "*Urgent Supreme Court Claim*". Nothing in the pleaded claim identified circumstances of urgency.

17 In the claim, Mr Suta pleaded that, by reason of the circumstances outlined above, the Republic had been negligent in issuing the certificate of citizenship on 22 December 2022 and in issuing him with a Vanuatu passport. He claimed that he had, as a result, suffered loss. The relief he claimed was as follows:

- (a) Special damages in the amount of 10,000,000VT in respect of the consequences reasonably arising from the breach complained of;
- (b) General damages in the amount of 10,000,000VT to cover future losses in respect of applying for residential permits and or visas, and or travel arrangements, and injured reputation as a French Veteran and or Commando;
- (c) Exemplary damages and or punitive damages in the amount of 10,000,000VT to deter, or prevent the Defendant from committing the same and or similar action;
- (d) Alternatively, an order that the decision of the defendant revoking the claimant's Vanuatu citizenship and cancelling his passport was unlawful, unreasonable, and unjustified; and to direct the defendant to re-issued the claimant with his Vanuatu citizenship as he was born in Port Vila, in the Republic of Vanuatu, hence, he is entitled to a Vanuatu Citizenship by birth under the relevant provision of the Constitution and the Citizenship Act; and
- (e) Disbursement costs in the amount of 300,000VT.

18 As is apparent, sub-paras. (a) and (c) did not particularise any loss and para. (b) indicated that Mr Suta was not alleging actual loss, only potential future loss. By sub-para. (d), Mr Suta sought a form of declaratory relief.

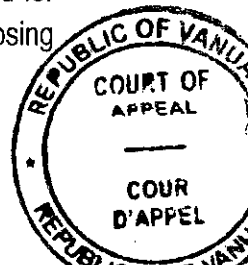
### **The Course of proceedings**

19 When the trial commenced on 29 January 2024, counsel told the Judge that they had agreed on a question to be decided in advance of all other issues in the proceedings, namely:

Whether Mr Suta had made an application for citizenship in December 2022.

Whether Mr Suta had made such an application was one, but only one, issue in the proceedings because the Republic had, by its filed defence, denied Mr Suta's allegation that he had done so.

20 The Judge agreed to proceed in accordance with counsel's request and the trial concerned the identified issue alone. After Mr Suta and Mr Liki had given evidence, the matter was adjourned for written submissions. There were no oral closing submissions. The Republic filed its closing



submissions on 16 April. Instead of addressing in those submissions the agreed question, the Republic's submissions addressed another question:

Whether the Claimant was entitled to become an automatic citizen of Vanuatu under Article 9 of the Constitution, when his parents and grandparents do not belong to a tribe or community indigenous to Vanuatu?

21 The submissions of Mr Suta's counsel on 22 April 2024 addressed neither the agreed preliminary issue nor the issue identified in the Republic's submissions. Instead, Mr Suta's counsel identified the issue for the Court's determination as being:

Whether the Defendant through the Office of Citizenship was negligent (statutorily) in issuing the certification reference note that led the claimant to place reliance on that reference note to apply for Vanuatu Passport and employment.

### The Judgment

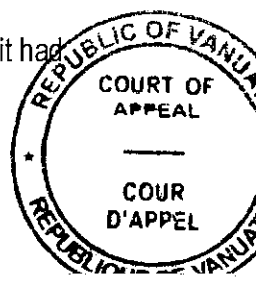
22 The Judge found:

- (a) Mr Suta had gone to the Citizenship Office in December 2022 intending to obtain an official acknowledgement of Vanuatuan citizenship and had not made an application for citizenship at that time, at [30];
- (b) In relation to the issue addressed by the Republic in its closing submissions, there was no evidence about Mr Suta's grandparents and no evidence as to whether they had belonged to a tribe or a community indigenous to Vanuatu. That meant there was insufficient evidence to answer the issue as framed by the Republic. As already noted, that could have resulted in a finding that Mr Suta had not proved that he was entitled to citizenship under Article 9(a), but for reasons which are unclear, the Judge did not make that finding;
- (c) The Office of Citizenship had been negligent in issuing the certification letter on 22 December 2022;
- (d) Mr Suta had relied on that certification in applying for a passport and in seeking employment.

23 The Judge then adjourned the matter to a further hearing for an assessment of damages. He concluded the judgment with a recommendation that Mr Suta lodge an appropriate application for citizenship.

### The Appeal

24 In its appeal to this Court, the Republic contended that the Judge had been wrong to find that it had been negligent.



- 25 We mention two preliminary matters. First, although the Judge made a *finding* of negligence, he did not make any *order* consequent on that finding.
- 26 Secondly, as the primary judgment did not determine the rights of the parties, it was interlocutory in nature and so, strictly speaking, an appeal against it required leave.
- 27 However no issue was taken at the appeal hearing about the competence of the appeal. In those circumstances, we will treat the appeal as including an application for leave to appeal and will grant that leave.

### Consideration

- 28 Two matters indicate that the proceedings in the Supreme Court miscarried and that the appeal must be allowed.

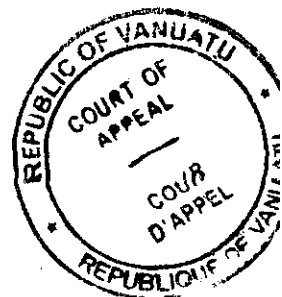
#### ***Denial of procedural fairness***

- 29 First, although the Republic did not rely on this issue until it was raised at the appeal hearing, it is plain that the Republic was denied procedural fairness in the proceedings at first instance. That is because the Judge made the finding of negligence against the Republic even though it has not been part of the preliminary issue identified by the parties at the commencement of the trial and had not been addressed at all by the Republic in its submissions of 16 April. The Judge had received submissions on the issue of negligence from Mr Suta's counsel only. The Republic was not given any notice that the Judge may decide the issue of negligence as a, or the, preliminary issue.
- 30 Procedural fairness in the judicial process generally requires that a party who may be affected by a court order or finding be given the opportunity to address the court before the court makes the order or finding. That did not occur in this case. For that reason alone, the judgment that the Office of Citizenship had been negligent must be set aside.

#### ***No damage***

- 31 A duty of care giving rise to an action of negligence does not exist in the abstract: *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; (2007) 234 CLR 330 at [43], [46] (Gummow J). A duty, when it arises, is a duty to take reasonable care to avoid causing another to suffer loss of a particular kind or character. The identification of the loss, or at least the class of loss in question in a given case, can be important in determining the existence and scope of an alleged duty of care. So it was that in *Sullivan v Moody* [2001] HCA 59; (2001) 2017 CLR 562 the majority said at [50]:

Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care. Sometimes **the problems may be bound up with the harm suffered by the plaintiff**, as, for example, where its direct cause is a criminal conduct



of some third party. Sometimes they may arise because the defendant is the repository of a statutory power or discretion. Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits. Sometimes they may concern the need to preserve the coherence of other legal principle, or of a statutory scheme which governs certain conduct or relationships. The relevant problem will then become the focus of attention in a judicially evaluation of the facts which tend for or against the conclusion, to be arrived at as a matter of principle.  
(citations omitted and emphasis added)

32 For that reason, damage is often described as the “*gist*” of an action in negligence – see for example *Tabet v Gett* [2010] HCA 12 at [27], [38], [50], [109].

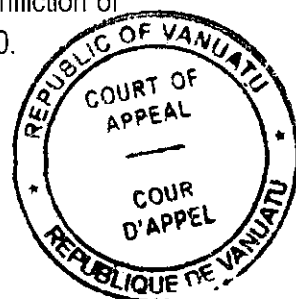
33 In this case, there was no examination by the Judge of whether Mr Suta had in fact suffered any loss which could found an action in negligence.

34 At its heart, Mr Suta’s claim seems to have been that the Citizenship Office owed him a duty to take reasonable care to avoid causing him financial loss by issuing him with evidence that he had a citizenship status to which he was not entitled. If the claimed duty is framed in that way, there is an evident difficulty in Mr Suta complaining that he had suffered loss by reason of having been given a benefit to which he had no entitlement. However, that can be put to one side because Mr Suta did not, in any event, prove that he had suffered any loss. Mr Suta’s statement of claim referred to three matters:

- (a) He had applied for and had received the passport which was later cancelled;
- (b) He had obtained employment;
- (c) He had obtained a loan to assist in the purchase of a vehicle.

35 A difficulty for Mr Suta is that he still has the employment, still has the loan and still has the vehicle so those matters have not been the cause of any loss. Perhaps Mr Suta had to pay a fee as part of his application for the passport, but there was no evidence that that was so, or that the Republic has refused to repay it, or that it has refused to apply that fee to a renewed application for a passport once Mr Suta does obtain citizenship.

36 In paragraph (b) of the claim for damages quoted earlier in these reasons, Mr Suta claimed general damages of VT10 million future losses in respect of applying for residential permits and/or visas, and/or travel arrangements, and “injured reputation as a French veteran and or commando”. With the exception of damage to reputation, these are pure economic losses only. There are recognised complexities in the imposition by the law of duties to take reasonable care to avoid the infliction of pure economic loss on another – see *Perre v Apand Pty Ltd* [1999] HCA 36; 198 CLR 180.



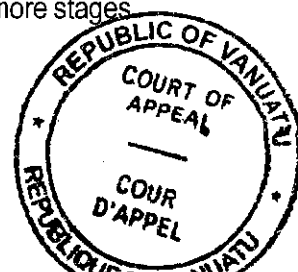
- 37 Quite apart from those complexities, a difficulty for Mr Suta is that the future expenses he claims are costs which, if ever incurred, will be required because the circumstances of his birth do not render him automatically a citizen of Vanuatu. They cannot be attributed to the conduct or omissions of the Citizenship Office on 22 December 2022 or 2 May 2023. Further still, it would be absurd to hold that the Republic owed Mr Suta, as a non-citizen of Vanuatu, a duty to take reasonable care to avoid causing him loss by requiring him to make payments required by the law of Vanuatu to be paid by persons seeking citizenship or a Vanuatu passport.
- 38 It would also be absurd for the Court to hold that the Republic owed Mr Suta a duty to take reasonable care to avoid causing him economic loss by cancelling a passport to which he has no lawful entitlement.
- 39 In short, Mr Suta had not proved in the trial a loss which could found the basis for the imposition of a tortious duty of care.
- 40 For these reasons, the appeal must be allowed.

#### **Determination of Preliminary issues in a trial**

- 41 In *Teaching Service Commission v Vanuatu Teachers' Union* [2024] VUCA 5 at [46] this Court cautioned against the separate determination of some issues in a proceeding in advance of other issues. The Court said:

“Before leaving the matter, we note that this case is another illustration of the long experience of the courts that the benefits of hearing and determining some issues in a proceeding in advance of others are often more illusory than real. It is not uncommon in litigation in which this course has been adopted for it to be found that other issues arise which were not anticipated, that the court does not have all the necessary evidence, or that there is an overlap with other issues not then being tried. Another disadvantage is the fragmentation of the litigious process, including while appeals are pursued. This is not to deny that there may be cases in which the determination of one or more issues in the litigation in advance of others will be appropriate, but considerable care is required before that course is adopted.”

- 42 We repeat those comments. The power of the Supreme Court to order that some issues in the trial be heard and determined in advance of other issues should be exercised sparingly. Instead, all issues of fact and law arising in a proceeding should generally be determined in the one trial.
- 43 We add, in addition to the matters mentioned in *TSC v VTU*, that it will usually be inappropriate for a question to be determined in advance of other issues in a trial if there is likely to be a significant overlap between the evidence adduced at both stages of the trial or if the judge may be required to make assessments of the credibility and reliability of witnesses giving evidence in two or more stages in the one proceeding.





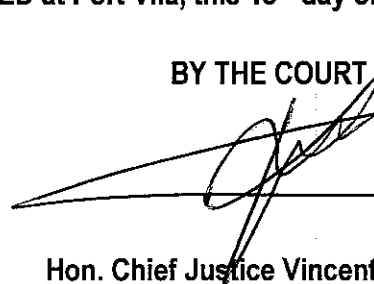
- 44 We do not wish to be understood as saying that the determination of one question in advance of others will never be appropriate, only that the occasions in which it will be appropriate are likely to be rare.
- 45 Had Mr Suta's trial proceeded on all issues, it is likely that the issue of damage to which we have referred would have been addressed. It is also likely that the issue of mitigation of loss would have arisen. That is because, in the assessment of loss which can be recovered in damages for breach of contract or negligence, that loss which is due to the unreasonable or improvident action of the claimant is generally disregarded. That is likely to have been an issue in the present case given the Judge's finding at [7] that Mr Liki had advised Mr Suta on 29 May 2023 to submit an application for citizenship in the proper form and had offered to assist him in doing so. It is unclear why Mr Suta did not adopt that course, which appears to have been an obvious way of resolving his concerns. At [41] of the reasons, the Judge urged Mr Suta to accept Mr Liki's offer of assistance and Mr Suta's counsel indicated Mr Suta's willingness to lodge the application. It is unclear why, even now, Mr Suta has still not lodged the application for citizenship. It is sufficient to say that these circumstances by themselves seem to give rise to a very real issue as to whether Mr Suta is himself the author of the losses in respect of which he claims damages from the Republic.

### Conclusion

- 46 As indicated, the appeal is allowed. We set aside the whole of the judgment at first instance and remit the matter to the Supreme Court.
- 47 Mr Suta is to pay the costs of the Republic on the appeal fixed in the sum of VT75,000. Given the manner in which the trial at first instance was conducted, we consider it appropriate that each party bear their own costs of that trial.

DATED at Port Vila, this 15<sup>th</sup> day of November, 2024.

BY THE COURT

  
Hon. Chief Justice Vincent Lunabe

