

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

Civil Appeal
Case No. 24/3073 COA/CIVA

BETWEEN: **NARU KALBEAU KALSAKAU**
Appellant

AND: **CHIEF MANAREWO FAMILY**
First Respondent

AND: **JAMES KALUA LAURU**
Second Respondent

AND: **FAMILY BAKOKOTO**
Third Respondent

AND: **FAMILY KALPRAM**
Fourth Respondent

Civil Appeal
Case No. 24/3121 COA/CIVA

BETWEEN: **CHIEF MANAREWO FAMILY**
Appellant

AND: **NARU KALBEAU KALSAKAU**
First Respondent

AND: **JAMES KALUA LAURU**
Second Respondent

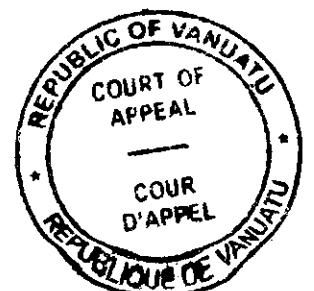
AND: **FAMILY BAKOKOTO**
Third Respondent

AND: **FAMILY KALPRAM**
Fourth Respondent

Date of Hearing: **8 November 2024**

Before: **Hon. Chief Justice V. Lunabek,**
Hon. Justice M. O'Regan
Hon. Justice R. White
Hon. Justice O. A. Saksak
Hon. Justice V. M. Trief
Hon. Justice E. P. Goldsbrough
Hon. Justice M. A. MacKenzie

Counsel: **S. Kalsakau for Applicant in CIVA 24/3073**
A. Godden for Applicant in CIVA 24/3171



*D. K. Yawha for Second and Fourth Respondents
J. L. Mesao for Third Respondent*

Date of Decision: 15 November 2024

JUDGMENT

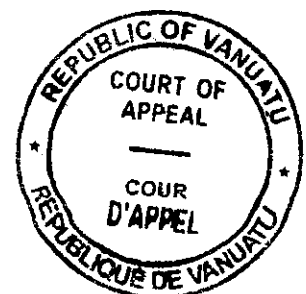
Introduction

1. These two applications for leave were heard together, as they were applications by two separate parties relating to a single judgment of the Supreme Court.

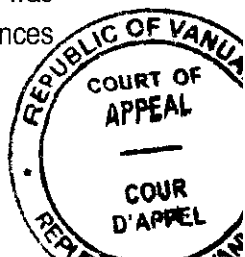
Background

2. The judgment of the Supreme Court dealt with two appeals from a decision of the Efate Island Court dated 13 March 1995. Mr Naru Kalbeau Kalsakau (N K Kalsakau) filed his notice of appeal against the Island Court decision on 29 June 2004. Chief Manarewo Family (Chief Manarewo) filed its appeal on 29 June 2011. Both parties were granted extensions of time to file their appeals by the Supreme Court.
3. Inordinate delays plagued the conduct of the appeals in the Supreme Court. These are detailed in the judgment of the Supreme Court and we will not repeat the details. For present purposes, it suffices to say that there was a tentative hearing date for the appeals in October 2015, but due to non-compliance with Court orders this fixture was vacated. Proposed fixtures in October 2017, August 2023, October 2023, November 2023 and March 2024 were also vacated, and the appeal was then listed for hearing at a two-day fixture commencing on 2 September 2024.
4. When the Court convened for the hearing of the appeal on 2 September 2024, counsel for N K Kalsakau, Mr S Kalsakau, and counsel for Chief Manarewo, Mr A Godden, were absent. Efforts to contact them failed. Neither had alerted the Court to their potential absence. Mr Kalsakau asked his client to request an adjournment from the Judge but this was refused. Instead, the Judge decided to strike out the appeals and ordered that N K Kalsakau and Chief Manarewo pay costs of VT40,000 to the other parties.

The applications



5. N K Kalsakau and Chief Manarewo applied for leave to appeal to this Court against the Supreme Court judgment striking out their appeals. We have treated these applications as applications for leave to seek an order setting aside the Supreme Court judgment.
6. Mr S Kalsakau and Mr Godden appeared for N K Kalsakau and Chief Manarewo respectively in this Court, as they would have done in the Supreme Court if they had attended the hearing. Mr S Kalsakau filed a sworn statement containing what he characterised as an explanation for his absence. Mr Godden did not file a sworn statement explaining his absence, but endeavoured to give an explanation from the bar table. We allowed the admission of Mr Kalsakau's statement but we found his explanation and that of Mr Godden inadequate. Their non-attendance at the Supreme Court hearing was unprofessional and a gross discourtesy to the Court and to the other parties. It meant a two-day fixture for which the other parties, the Judge and the assessors had prepared, had to be vacated. That compounded with the fact that they did not seek to apologise to the Court and explain their absence as they should have done.
7. The applications were advanced on the basis that the decision to strike out the appeals by the primary Judge was contrary to the rules of natural justice and to the Civil Procedure Rules. It was argued that the primary Judge should have put the parties on notice before striking out their appeals, on the basis that rule 18.11 of the Civil Procedure Rules applied (these Rules apply to appeals to the Supreme Court from the Island Court – rule 16.34).
8. We do not consider that rule 18.11 applies in the present situation. It deals with non-compliance with Court orders rather than failure to attend a Court hearing. For this reason, the decisions of this Court in *Esau v Sur* [2006] VUCA 16 and *Government of the Republic of Vanuatu v Carlot* [2003] VUCA 23, on which the applicants relied, are inapplicable.
9. The applicants argue that, even if rule 18.11 did not apply directly to the situation before the Supreme Court, the Judge should have adopted an analogous procedure before striking out their appeals to the Supreme Court. This would have involved giving notice to the applicants, providing them with an opportunity to show cause why an order striking out the appeals should not be made. While that may be appropriate in some cases, we do not consider that there is any rule requiring a Supreme Court Judge to do so.
10. Mr Godden argued that the decision to strike out the appeal of Chief Manarewo was different from that of N K Kalsakau in that Chief Manarewo's appeal books had been filed and Mr Godden had prepared submissions and was ready to argue the appeal on 2 September. He argued that the vacation of an earlier fixture for the hearing of an application by one of the respondents to strike out Chief Manarewo's appeal had led him to think that the hearing of the appeal on 2 September would not go ahead. We do not think there was any justification for him to hold that view.
11. Nevertheless, we accept that Mr Godden had complied with the processes of the Court and was ready to proceed with the appeal, unlike the position of N K Kalsakau where earlier non-compliances



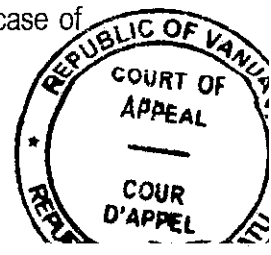
had occurred. In those circumstances we consider that it was not appropriate to strike out Chief Manarewo's appeal without first giving counsel an opportunity to show cause why this should not happen. However, the same considerations do not apply in the case of the appeal of N K Kalsakau.

Jurisdiction

12. Counsel for the fourth respondent, Mr Mesao, argued that the Court should not give leave to the applicants to proceed before the Court on the basis that the decision under appeal was a decision relating to an appeal to the Supreme Court from an Island Court, and therefore not amenable to a further appeal to this Court: Island Courts Act [CP 167] section 22(4). While that is true, it is clear from earlier authorities of this Court, such as *Matarave v Talivo* [2010] VUCA 3 and *Sovrinmal v Nalekon* [2022] VUCA 25, that an unsuccessful party in a decision of the Supreme Court in relation to an appeal from an Island Court may seek the leave of this Court to set aside a Supreme Court decision in the event that the Supreme Court has made a jurisdictional error.
13. This is a marginal case because the complaint about the Supreme Court decision is that the Judge acted without procedural fairness and that this meant there was not a valid hearing of the appeal by the Supreme Court (or, indeed, any hearing of the merits of the appeal at all). On balance, we consider this Court does have jurisdiction to set aside the Supreme Court decision, given our conclusion that the striking out of the appeal was not appropriate in the circumstances and that this has led to the substantive issues in the appeal to the Supreme Court not being heard by the Court.
14. Returning to that aspect of the case, we accept Mr Godden's submission that, in circumstances where his client had been compliant with Court orders up until the date of the hearing, the striking out of Chief Manarewo's appeal on the basis of Mr Godden's failure to attend the hearing was procedurally unfair. We would not say the same in relation to the N K Kalsakau appeal, but, as we are reinstating the appeal to the Supreme Court we consider it is appropriate to reinstate it in full, to allow both N K Kalsakau and Chief Manarewo to have their appeal against the Island Court decision decided on the merits.

Result

15. We give both parties leave to apply to this Court for the setting aside of the Supreme Court judgment and set that judgment aside. We remit the matter to the Supreme Court for hearing.
16. This decision should not be seen as in any way excusing the unforgiveable conduct of both counsel in failing to attend Court for the hearing of the appeal. Our concern is to avoid the situation where the clients of the offending counsel are effectively bearing the brunt of the punishment for their lawyers' misconduct and being deprived of a substantive hearing of their appeals to the Supreme Court. However, that is not to say that a strike out will not be an appropriate step in a case of



unprofessional conduct by counsel leading to non-compliance with orders of the Court or failure to attend Court. Each case must be assessed on its merits.

Costs

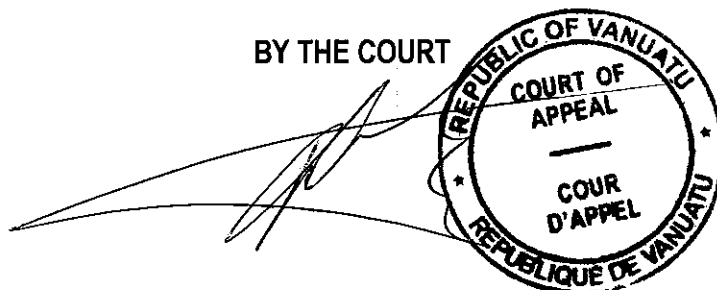
17. We make it clear that we do not condone in any way the conduct of counsel. We put it to counsel that they should personally pay costs in relation to the present appeal and the aborted Supreme Court hearing. Both counsel accepted this. Each of the applicants' counsel must pay costs to the respondents of VT50,000 in relation to the appeal to this Court and VT20,000 in relation to the Supreme Court hearing. Those costs are to be payable by counsel personally, and not by their clients. Those costs must be paid within 21 days of the date of this judgment.

Notice for the future

18. We also put all lawyers on notice that conduct of the kind addressed in this judgment can amount to professional misconduct and Judges may refer counsel who act unprofessionally in the manner that counsel in this case have to the Law Council for the consideration of disciplinary action.

DATED at Port Vila this 15th day of November 2024

BY THE COURT



Hon. Chief Justice Vincent Lunabek