

(Civil Jurisdiction)

BETWEEN: BOETARA TRUST

Claimants

contest?

AND: JOHNNY JOSEPH

First Defendant

AND: MINISTER OF LANDS

Second Defendant

**AND: DIRECTOR OF LAND
RECORDS**

Third Defendant

**Coram: Mr Justice Oliver A. Saksak
Mrs Anita Vinabit – Clerk**

**Counsel: Mr Felix L.Kabini for Claimants
Mr Ronald Warsal for First Defendant
Mr Kiel Loughman for Second & Third Defendants**

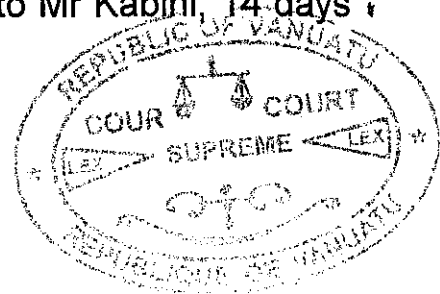
Date of Hearing: 15th July 2005 and 15th – 16th September 2005

Date of Judgment: 15th March 2006.

JUDGMENT

Introduction

This is a reserved judgment. After completion of the evidence from the Defendants on 16th September 2005 the Court issued Directions in respect of written submissions giving 7 days to Mr Kabini, 14 days



thereafter to Mr Warsal and 14 days thereafter to Mr Loughman. A further 7 days were allowed to Mr Kabini to reply. On 1st December 2005 the Court received written submissions from Mr Kabini. On 22nd February 2006 the Court received written submissions from Mr Loughman. As at the date of writing on 9th March 2006 no written submissions were available from or by Mr Warsal. As such the Court will dispense with their submissions as they have been given more than ample time to lodge one.

Nature of Case

This Claim is made pursuant to Section 100(1) of the Land Leases Act CAP. 163 which reads:

“Subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.”

Facts

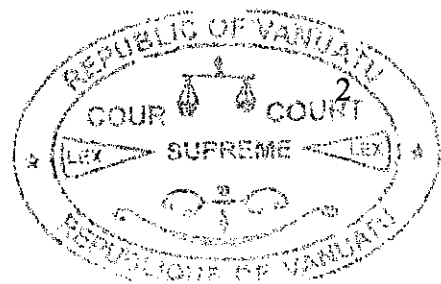
On or about 14th October 2003 the Second Defendant granted a Negotiator Certificate to the First Defendant to negotiate with the custom-owners whose trustees are the Claimants, to act on their behalf to acquire lease over customary land in part of title 479. The Certificate was valid up to 14th October 2004.

On or about 18th December 2004, Zebedee Tari, John Tari Molbarav and Peter Natu gave their consent for the First Defendant to lease part of title 479 but without knowledge that the Certificate had expired.

On or about 11th June 2004 the Second Defendant signed and issued a lease title 04/3021/606 to the First Defendant. The Lease was signed by the First Defendant on 4th June 2004 and registered by the Third Defendant on 7th September 2004 at 0945 hours.

Allegations

Based on those backgrounds facts the Claimants allege that there was fraud on the part of the Defendants.



In the alternative, the Claimants also allege that the lease was issued by reason of mistake or mistaken belief.

Reliefs Sought

The Claimants therefore seek the following reliefs:-

1. An Order that the register kept in respect of registered lease title 04/3021/606 be rectified by canceling the registration of the said lease.
2. An Order directing the Third Defendant to effect such cancellation.
3. Costs of and incidental to this action.

Issue

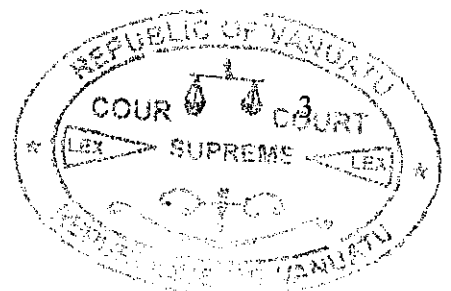
There is only one essential and basic issue for the Court to determine. It is whether or not there was mistake and/or fraud on the part of the Defendants.

Burden and Standard of Proof

The Claimants have the burden of proof on the balance of probabilities.

The Elements Required To Be Proven

1. In relation to fraud, the Claimants had to show there was dishonesty in the First Defendants' dealings in obtaining Leasehold Title No. 04/3021/606.
2. In relation to mistake, the Claimants had to show that proper procedures were not followed and that had it or they been followed, the lease would not have been granted.



Defence

The Defendants deny there was any fraud and/or mistake on their part. As such the Court heard evidence.

Evidence By Claimants

The Claimants adduced evidence from John Tari Molbarav, Steven Tahu and Michael Bakeoliu. They gave oral evidence in addition to their sworn statements which were tendered as part of the evidence for the Claimants.

Evidence By Defendants

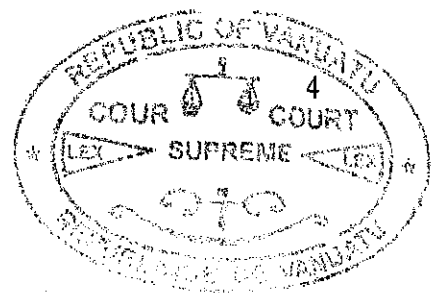
The Defendants adduced evidence from Johnny Joseph, John Morrison Willie, Andrew John, Jean-Paul Savoie and Harold Moli. These witnesses gave oral evidence in addition to their respective sworn statements which were tendered as part of the evidence for the Defendants.

Findings of the Court

Based on the evidence available before me I find in relation to the issue of fraud, that there was fraud by the First Defendant in his dealings when he obtained Leasehold Title No. 04/3021/606. I am also satisfied that there was mistake on the parts of the Second and Third Defendants.

I provide the following reasons for these findings:-

- (a) From the evidence of John Tari Molbarav he annexed a Certificate of Registered Negotiator (Annexure JTM1) dated 14th October 2003.
- (b) The First Defendant, Johnny Joseph did not adduce any evidence showing that he negotiated with the other custom-owners as named in the Certificate during the 12 months following until 14th October 2004.
- (c) John Tari Molbarav's evidence was that he and the other custom-owners would never accept an annual rent of



VT21,852 for the land because the land is situated on prime high-class residential area. This indicates clearly that the First Defendant never negotiated this amount of rent with the other named representatives of custom-owners. His failure and/or omission indicates a dishonest dealing on his part.

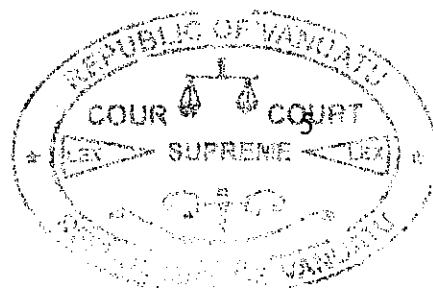
- (d) John Tari Molbarav's evidence also was that although they had consented to the First Defendant obtaining a lease by signing the Consent (see Annexure JTM2) which consent was withdrawn by them in a letter dated 11th October 2004. The Consent is purportedly dated 18th December 2004. His evidence also was that on 4th June 2004 the First Defendant had signed the lease. On 11th June 2004, some 7 days later the Second Defendant signed the lease. After a month later on 7th September 2004 the lease was registered by the Third Defendant.

The Court finds that if therefore Mr Molbarav, Mr Solomon, Mr Natu, Mr Molvatamol and Mr James withdrew their consent on 11th October 2004, it indicates a clear possibility that the Consent was signed earlier than 11th October 2004. The Court also draws a possible and probable inference that when the First Defendant approached Mr Molbarav and the others to obtain their signature on the Consent Form, it was a partly completed form. The date being 18th December 2004 was filled in by some one else. The writing is not the same as the other handwriting or prints on the Form. That is not difficult to notice.

A Consent cannot be given after a lease was already signed on 4th June, 11th June and registered on 7th September 2004. This was something the Minister as Second Defendant failed to pick up and clearly it indicates a mistake on his part.

Further if, as it is the evidence, that Consent was withdrawn on 11th October 2004 and the Minister not being made aware of such withdrawal, clearly this indicates a mistake again on his part.

A withdrawal is an indication or sign of discontentment on the part of the Claimants. If that withdrawal was not communicated to the



Minister and he signed the lease on the same day, he did it under a mistaken belief that all was fine.

All those go to the issue of mistake. The evidence of Steven Tahi shows he advised the First Defendant about the irregularities about approving a plan which had government and private assets on it. His evidence was that the First Defendant should do certain things to rectify the situations. It is clear from the evidence that the First Defendant did not follow those advices and simply went ahead to obtain a lease. The Court concludes that it is satisfied from the overwhelming evidence presented by the witnesses for the Claimants, that there was dishonesty on the part of the First Defendant, and further there was mistaken belief on the parts of the Second and Third Defendants that all legal procedures and processes had been complied with.

Those findings are sufficient to dispose of the matter. I am satisfied that the First Defendant had knowledge of this fraud and yet proceeded to obtain the lease without any regard for the Claimants position.

I accept the submissions and the legal authorities cited by Mr Kabini to support the findings of fraud and mistake.

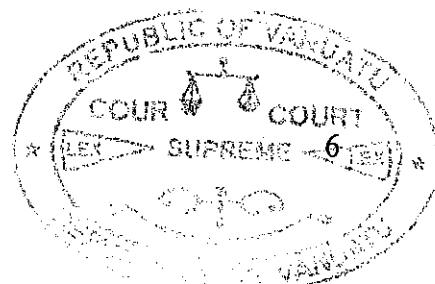
I reject the submissions made on behalf of the Second and Third Defendants. Whilst the cases of Kalou and Bouchard are good guiding legal principles, those cases are clearly distinguished from the present case.

Conclusion

I am satisfied from the evidence on the balance of probabilities, that Leasehold Title No. 04/3021/606 was obtained through fraud and mistake.

Orders

Accordingly, pursuant to Section 100 of the Land Leases Act CAP. 163 the Court hereby Orders that –



- (1) The register kept by the Third Defendant in respect of Leasehold Title No. 04/3021/606 be rectified by canceling the said Title and its registration.
- (2) The Third Defendant is hereby ordered to effect such cancellation forthwith.
- (3) The Defendants will pay the Claimant's costs of and incidental to this proceeding within 28 days after receipt of a Memorandum of Costs, failing which the matter be brought on for determination by the Court.

DATED at Luganville this 15th day of March, 2006.

BY THE COURT



OLIVER A. SAKSAK
Judge

