IN THE COURT OF APPEAL

OF THE REPUBLIC OF VANUATU

Civil

Appeal Case No.598 of 2018

BETWEEN: **Family Boetara represented by Lauren Solomon, John Tari Molbarav, Jerome Natu and Michel Tamata**

Appellant

AND: **Mathias Molsakel**

First Respondent

Zebedee Molvatol

Second Respondent

Republic of Vanuatu

Third Respondent

Date of Hearing of Appeal: Tuesday, 10 July 2018

Before: Chief Justice V. Lunabek

Justice J. Mansfield

Justice D. Fatiaki

Justice D. Aru

Justice G.A. Andrée Wiltens

Counsel Appearing: Mr F. Laumae for the Appellant

Mr G. Blake for the First Respondent

No appearances for Second and Third Respondents

JUDGMENT

A. Introduction

1. This was an appeal against the whole of the Judicial Review decision of Justice Geoghegan of 19 December 2017 in which he made orders as follows:

- quashing the 2004 order of the Santo/Malo Island Court - which transferred Land Case No. 5 of 1992 to the Veriondali Land Tribunal;

- quashing the 30 May 2005 subsequent decision of the Veriondali Land Tribunal - which named the Molvatol family and the Boetara family as the customary owners of what is known as the Belbarav land;

- directing the Island Court to hear Land Case No. 5 of 1992, if possible, as a matter of urgency; and

- awarding costs to the Molsakels, the claimants.

2. The effect of these 2017 orders was that the customary ownership of Belbarav land in East Santo was directed to be the subject of a determinative hearing in the Island Court involving all those who may have a claim to that particular piece of land – including the Boetara, Molvatol and Molsakel families. All previous so-called determinations of customary ownership, dating back to 1982, were no longer of any legal effect. The Island Court was to now finally determine exactly, and definitively, who the customary owners of the Belbarav land are.

B. The Background Facts

3. The Boetara family claim that, following Independence in 1982, they were named as the customary owners of the Belbarav land by the Minister of Lands, following a declaration to that effect by the Chiefs of South East Santo.

4. The Molsakel family maintain they filed a claim in 1992 in respect of the Belbarav land in the Santo/Malo Island Court - which matter was known as Land Case No. 5 of 1992. Following a change of legislation which determined that cases such as this would in future be heard and decided by Customary Land Tribunals, the Santo/Malo Island Court

transferred Land Case No. 5 of 1992 to the Veriondali Customary Land Tribunal as the appropriate venue to determine the claim. That occurred at some stage in 2004.

5. Subsequently, the Veriondali Customary Land Tribunal released a decision on 30 May 2005 ("the 30 May 2005 decision"), declaring the Molvatol and Boetara families as the customary owners of the Belbarav land. That decision was appealed, which resulted in the matter being remitted back for further consideration. The Veriondali Customary Land Tribunal then issued a second decision declaring Timothy Molbarov, Amal Solomon, Peter Natu, James Tamata and Singo Molvatol as the customary owners.

6. It was claimed that the Molsakel family appealed the 30 May 2005 decision; and that the appeal was never brought on for hearing. Other parties dispute this.

7. What is not disputed is that the Molsakel family brought on the application for Judicial Review of the decision to transfer Land Case No. 5 of 1992 from the Island Court to the Customary Land Tribunal, and seeking to quash the Veriondali Customary Land Tribunal decision of 30 May 2005 as unlawful. It was hotly contested by the Boetara family that Land Case No. 5 of 1992 ever existed; and secondly, that it was ever a transfer from the Island Court to the Customary Land Tribunal.

8. Evidence supporting the two sides of the argument was presented over some 6 days. Justice Geoghegan, having carefully considered and weighed all the evidence, made a number of relevant factual findings in his judgment, including the following (paraphrased):

- Rachel Molsakel registered Land Case No.5 of 1992 at the Santo/Malo Island Court seeking to confirm her customary ownership of Belbarav land ("the Molsakel claim").

- The land referred to in the 30 May 2005 Veriondali Customary Land Tribunal decision is the same as the land known as Belbarav land.

- The Molsakel claim was transferred from the Santo/Malo Island Court to the Veriondali Customary Land Tribunal.

- The purported transfer was unlawful in that there was no application to transfer, and only a majority vote was used to determine whether to transfer rather than it being

done by full agreement (as required by the relevant legislation), and a number of parties did not consent to the transfer and actively protested. The legislation enabling transfer, section 5(1) of the Customary Land Tribunal Act was breached in the ways described and therefore the Magistrate had no jurisdiction to transfer the matter.

- Accordingly, as the purported transfer was unlawful, the Santo/Malo Island Court was the only forum able to properly and lawfully deal with the Molsakel claim.

- Despite one of the Molsakel family appearing at, and taking part in, the hearing of Land Case No. 5 of 1992 in the Veriondali Customary Land Tribunal which resulted in the 30 May 2005 decision, the family was not estopped due to that fact from pursuing their judicial review claim.

- The issue of *res judicata* does not arise, although certain aspects of the case have been variously litigated, as customary ownership of Belbarav land has never been determined.

- Even if the claim for judicial review were made out (as it was on the merits), there was a residual discretion available as to whether or not the relief sought should be granted.

- The importance of proper adherence to lawful procedure in matters of such significance as legal declarations of customary land ownership in Vanuatu must not be undermined. Despite the lengthy history involved, this case needed to go back to the beginning and be properly and lawfully completed.

C. <u>The Law</u>

9. This Court in *Molvatol v Molsakel* [2015] VUCA 22 relevantly commented that the principles that guide an appellate Court reviewing an exercise of discretion are well-established as previously considered in *Fisher v. Fisher* [1991] VUCA 2 and *Dumdum v East Malo Island Land Tribunal* [2010] VUCA 32. The Court said:

"...a discretionary order, will not be lightly overturned or set aside on appeal unless it is clearly established that the decision was wrong in that the judge took into account irrelevant matters which he ought not to have done or failed to take into account relevant matters or misdirected himself with regard to the relevant principles applicable to the

exercise of the discretion. In other words, it will only be set aside if it is shown that the discretion miscarried or there was a miscarriage of justice."

D. The Alleged Errors

10. Mr Laumae set out extensive submissions as to what he asserted were errors in the primary judge's dealing with this case. We summarise the main submissions for convenience:

- The primary judge failed to hear and consider the application to strike out the claim for judicial review – given the outcome, it can safely be assumed or implied that the application was doomed to fail; given the various findings it is inevitable the application would be dismissed.

- The primary judge continued to hear the matter despite a lack of records of the case, the filing receipt, the map filed in support and of the transfer decision – the lack of records cannot equate to a finding of no case having been filed or existing; nor of the transfer having not taken place. In fact, the primary Judge found to the contrary on the evidence.

- The primary judge wrongly accepted Mathias Molsakel as having standing or *locus* , even though the evidence related to his deceased mother – the lack of a formal application to vary the parties is insignificant and inconsequential when dealing with these claims by members of the same family.

- The primary judge accepted Mr Garae, the Magistrate who transferred Land Case No. 5 of 1992, as a witness over the objection of incompetence – Mr Garae was obviously competent, and able to give directly relevant evidence; to disallow him to testify would have been a denial of justice.

- The primary judge unfairly accepted various items of evidence, although as developed it was really that the primary judge preferred one version or versions to that of others – that is exactly what is expected of a judge as a fact-finder, and no error is shown in that process.

- The claimant have been estopped from pursuing the claim at first instance – we disagree; we can see no basis for this submission.

- The primary judge ought to have considered the case as being *res judicata* – we disagree; Justice Geoghegan looked at this issue closely and was satisfied, as are we, that this doctrine has no application to this case.

- The primary judge ought to have followed the decision in *Family Kalmet v. Family Kalmermer* [2014] VUCA 11 as similar and binding – Justice Geoghegan distinguished this authority, for reasons we agree with.

- The primary judge erred in holding that Land Case No.5 of 1992 was lodged, did exist, and was transferred – those are all factual determinations made after careful analysis of the available evidence. This is really a complaint amounting to disagreeing with the judge's conclusions – they are not errors in the sense that there was no evidence to support these findings; nor is there any suggestion that incorrect weight was given to any particular aspects. Mr Laumae points to an absence of documentation supporting the oral evidence – but that does not amount to an error by the primary judge. He too was aware of those absences, and he took them into account.

- The primary judge erred in explaining that perhaps the file had been damaged in the fire at the Sanma Island Court – this is not a matter of significance, nor a positive finding of fact. This is not an error.

E. Discussion

11. As we have stated in relation to the above submissions, we do not consider that any of them have been made out. There was a careful explanation by the primary judge of the issues and a careful analysis of the evidence, and the findings were readily available on the evidence.

12. There remains to be considered the contention that the primary judge erred in a reviewable way in the exercise of his discretion to make the orders he made. The circumstances in which this court (and appellate courts generally) will interfere with the exercise of a judicial discretion are limited and are well known: see e.g. *House v R* [1936] HCA 40.

13. Mr Laumae did not persuade us that the primary judge took irrelevant matters into account which he ought not to have done; nor that he failed to take into account relevant matters.

14. Significantly, there was no submission that the primary judge misdirected himself with regard to the relevant principles applicable to the exercise of the discretion. Indeed we note that this issue of the exercise of residual discretion was not addressed either before us in written submissions or before the primary judge at all, save that there was mention of the proposition that it would be unfair for Mr Molsakel to be afforded a second opportunity to press his claim for customary ownership as he had presented his claim and failed to succeed before the Veriondali Customary Land Tribunal. Mr Blake pointed out that the different compositions and processes of the Island Courts could well result in Mr Molsakel achieving a different result in the Island Court – but he confirmed that this was not a matter raised before Justice Geoghegan.

15. There is no reason to consider that the primary judge did not exercise his discretion after consideration of the relevant factors. He was mindful of the fact that the Molsakels had, reluctantly, participated in the hearing before the Veriondali Customary Land Tribunal, so in one sense they had had a full hearing. But, he gave greater weight to the fact that the legislation provided expressly to preserve the existing claims (including Land Case No. 2 of 1992) before the Island Court unless it was properly transferred to a Land Tribunal. There was no such proper transfer. He was conscious of the practical difficulties which might follow from the orders he made, in re-establishing records and the like.

16. In fact, we endorse his call for adherence to proper, lawful compliance with statutory procedure in all matters; and while accepting that perhaps in more minor instances of departure from processes the consequences would not require relief, where there are considerable consequences that flow on in matters of great importance to individuals, such as decisions on custom ownership, then strict adherence to procedure should generally be insisted upon.

17. The submission of the appellants that *Family Kalmet v Family Kalmermer* [2014] VUCA 11 requires to, or points to, the contrary conclusion is not correct. In that case it was accepted that there two alternative Tribunals with concurrent jurisdiction. In this case, the primary judge held that that was not the case, and we have not disturbed that finding. Nor has it been shown that the primary judge overlooked the public interest in seeking finality of litigation, as discussed in that case. It is an important consideration. Here, however, it was not found to overcome the importance of following a lawful following of the procedures under the Customary Lands Tribunal Act.

18. We cannot see any miscarriage of justice following Justice Geoghegan's decision.

G. Result

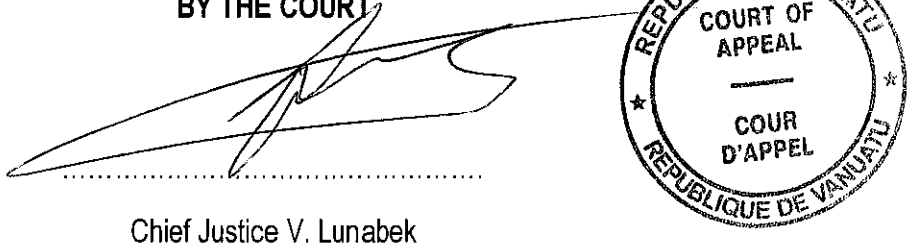
19. The appeal is dismissed.

20. The appellant is to pay to the First Respondent costs of the appeal, which we fix at VT 80,000.

21. It is appropriate to remind the parties that the consent orders made by this court on 27 April 2018 are to remain in force, pending the hearing of the issues as directed by the primary judge, unless otherwise discharged or varied by an order of the Court.

Dated at Port Vila this 20th day of July 2018

BY THE COURT



Chief Justice V. Lunabek