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

Civil Appeal
Case No. 18/2665 CoA/CIVA

BETWEEN: **JOHN DELWIN KALSONG MANAON and BETTY AMOS**

Appellants

AND: **DOLCY PAKOA**

First Respondent

AND: **THE MINISTER OF LANDS**

Second Respondent

AND: **THE DIRECTOR OF LANDS**

Third Respondent

Coram: ***Hon Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver A. Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru

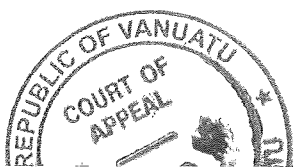
Counsel: *Mr Willie Daniel for the Appellants*
Mrs Marie- Noelle Ferrieux Patterson for the First Respondents
Mr Sakiusa Kalsakau for the Second and Third Respondents

Date of Hearing: *13th November 2018*
Date of Decision: *16th November 2018*

JUDGMENT

Introduction

1. David Kalsong, the late father of the appellants and first respondent was the lessee of lease 11/OF21/030 at Melcofi, Port Vila. On 23 January 2009 the lease was transferred into Dolcy Pakoa's name as lessee. The appellants'



claim the transfer was made arising from the fraud of Ms Pakoa. The Supreme Court disagreed. It rejected the appellants' claims. The appellants say in this appeal the Judge was wrong to reject their claim of fraud.

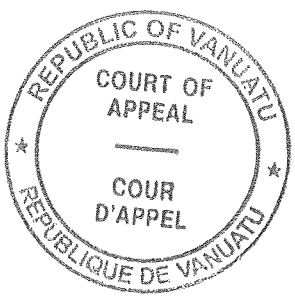
2. Ms Pakoa filed a counter-claim in the Supreme Court. She sought orders evicting the appellants who were living on the land, and extensive damages for the use of and damage to the land. Further she sought damages for assaults and injury by the appellants.

3. The Judge did not make any orders arising from the counter-claim in his first judgment. Given the difficult family situation he directed the parties to mediate the issues raised in the counter-claim. He gave an indication where, if mediation was unsuccessful, orders in Ms Pakoa's counterclaim might be made. Unfortunately no mediation occurred.

4. In a second judgment the Judge refused to make an eviction order but made orders restraining further conduct of the appellants, and compensation orders totalling VT4.15 million together with interest at 5% from 2009 when Ms Pakoa became the leasee. Ms Pakoa's cross-appeal challenges the refusal by the Judge to grant an eviction order. The appellants also appeal the award of damages.

5. It was common ground that Ms Pakoa was the lessee of lease no. 030 and that she had become the lessee in January 2009. The essence of the appellant's case was that Ms Pakoa had become the lessee by fraud and trickery with respect to her father.

6. The appellants accepted they had to establish fraud on Ms Pakoa's behalf in obtaining registration of the lease in her name before the Court could set aside the registration of lease 030 in her name (S100, Land Leases Act). It was common ground that until the 2009 transfer to Ms Pakoa, Mr David Kalsong, the father of the litigants was the lessee of the land.



7. Mr Manaon's allegations of fraud or trickery at trial were based on these claims. First that Mr Manaon's father Mr Kalsong had always promised him the lease of the land.

8. Secondly Mr Kalsong had signed a transfer of the lease to him (Mr Manaon) in 2008.

9. Thirdly Mr Kalsong had completed a will in July 2009 which provided that Mr Manaon would inherit the lease on Mr Kalsong's death.

10. Fourthly there was an arrangement between Mr Kalsong and Ms Pakoa where Mr Kalsong would transfer the lease to Ms Pakoa for VT500,000 but Ms Pakoa had never intended to pay the VT500,000. The transfer of the lease between Mr Kalsong and Ms Pakoa recorded consideration of VT500,000.

11. Finally during Mr Manaon's evidence he claimed his father had intended to divide the land in one thirds between the three siblings, Mr Manaon, Ms Amos and Ms Pakoa.

12. At trial the Judge rejected much of the evidence of Mr Manaon and Ms Amos as untrue or unreliable for identified reasons. He concluded the evidence of Ms Pakoa was essentially true and accurate. In important aspects he considered her evidence was supported by Mark Robert, and Madeleine Manuari two siblings of the litigants. He said that the appellants had not proved any fraud or tricky on Ms Pakoa's behalf.

13. The Judge found:

> "50. There are numerous other explanations why the lease title was transferred to Ms Pakoa. The fact that a consideration figure is written on the transfer is not evidence that in fact such consideration has been given or was required. Further, I accept the evidence that Ms Pakoa was the one family member who looked after the patriarch in the latter stages of his life when he was unwell and needed care. That fact, coupled with the fact that (i) she was her father's favourite and (ii) Mr Manaon was a bully who expected that the land would be devolved to him on his father's passing as it was his birth-right; but had demonstrated, by his threats, actual violence and unwarranted demands on more than one occasion, his unsuitability to inherit and manage the family affairs in a manner fair to

all, makes it relatively easy for me to determine that the transfer by their father to Ms Pakoa was entirely *bona fides*.

51. As earlier discussed, I do not accept that **Exhibit C** is a valid will or even a document setting out Mr Kalsong's intentions or state of mind. I am very dubious of the signature. However, what is more of a difficulty is the so-called witnessing of the "testator's" signature, which is improper and unacceptable. Whoever typed out the document could have given evidence regarding the provenance of the document – such evidence is entirely lacking. The content of the document is at odds with the large body of evidence which I accept to the effect that Mr Kalsong transferred his lease title to Ms Pakoa willingly and without any improper pressure or inducement. I do not accept the allegation of fraud on Ms Pakoa's part.

52. The claimants sought orders to the effect that Ms Pakoa had obtained title by means of "fraud and mistake" – I reject both those contentions due to a lack of proof of those matters. It follows that the second order sought, the removal of Ms Pakoa's name from the title, simply cannot be made. The third order sought is to require the Second and Third Defendants to register a transfer of the title to Mr Manaon – that order also is not appropriate."

The Appellants' Appeal and Discussion

14. The first ground of appeal is that the trial Judge erred when he ruled evidence from Mr Manaon relating to a power of attorney, inadmissible when he refused to admit evidence relating to an earlier civil claim, and when he recorded a sworn statement of Ms Amos of 4 May was not relied on by the appellants (we note the Judge in error identified the deponent as Ms Pakoa).

15. The Judge said an earlier civil claim (civil case 81/2011) had been dismissed by the Court and therefore was irrelevant to the present case. The claimed power of attorney was sought to be introduced into evidence at trial through Mr Manaon referring to evidence filed in civil case 81/2011. This was a claim brought by Mr Peter Naviti a son of David Kalsong against Ms Pakoa also relating to the January 2009 transfer of lease 030 to her. Mr Kalsong was alive at the time these proceedings were brought.

16. Mr Naviti claimed Mr Kalsong had appointed him his attorney through a power of attorney. Mr Naviti claimed the transfer of lease 030 to Mrs Pakoa was obtained by fraud and trickery, at least in part the same allegations as in these

proceedings. When the matter came before the Supreme Court the claim was dismissed. In the meantime both Mr Kalsong and his son Mr Naviti had died. Mr Manaon claimed that their death was the reason why the claim was dismissed.

17. The Judge in these proceedings concluded that Mr Manaon's evidence about the circumstances of the 81/2011 claim, including the claimed power of attorney was not relevant.

18. We agree that the evidence Mr Manaon wished to introduce about the 81/2011 claim was not admissible. Mr Manaon claimed that the 81/2011 proceedings were instituted partly by Mr Kalsong. They were not. He was not a party to the proceedings. Mr Naviti claimed he brought the proceedings as attorney of Mr Kalsong. The proceedings were dismissed. There is nothing in the Court record to say why. Certainly the death of Mr Naviti and Mr Kalsong would not have prevented the proceedings being pursued. Further there was no claim by Mr Manaon that he had any personal knowledge of any of the material relating to the 81/2011 claim. He was not a party to the claim. We agree with the Judge this material was not admissible or relevant. We reject this ground of appeal.

19. As to the power of attorney which does seem to have been admitted in evidence (assuming it was in existence at the time of the transfer to Ms Pakoa) the appellants say that this power of attorney given by Mr Kalsong to Mr Peter Naviti prevented Mr Kalsong from transferring his land to Ms Pakoa. Counsel had no authority for such a proposition. We reject it. Mr Kalsong was free to deal with his leasehold interest as he saw fit irrespective of any power of attorney.

20. Finally with respect to this ground of appeal is the Judge's statement that the parties had agreed that Ms Amos' 4 May 2018 statement would not be relied upon. Counsel for the appellants told this Court he had made no such concession. The Judge's notes made at the time of trial record counsel for the appellants stating that "1st statement by Betty Amos will not be relied upon". Ms Amos' first statement is 4 May 2018. Ms Amos' statement of 4 May made it clear she had no interest in the dispute between Mr Manaon and Ms Pakoa

as to who was the legitimate owner of the lease. However she wished to be reimbursed for the payments she made towards the land rent. We have taken this evidence into account in our assessment of damages with the agreement of the parties, their evidence of 4 May had no relevance to the S100 claim.

21. The second ground of appeal is that the Judge wrongly excluded evidence from Mr Manaon that Ms Pakoa had not been paying outgoings on the land. Further the appellants say the Judge was wrong when he "failed to see that the Appellants also have equitable interest in the Land..."

22. We agree with the Judge it was not relevant whether Ms Pakoa was or was not paying the outgoings on the land with respect to the allegation of fraud.

23. Further the appellants' claim of an equitable interest is irrelevant to a S100 Land Leases Act claim based on fraud. We note in any event a claim of an equitable interest was never pleaded by the appellants.

24. The next ground of appeal claims the Judge erred when he did not accept and take into account Ms Amos' evidence related to the obligation to pay the VT500,000 for the lease transfer.

25. The Judge did not rule this evidence of Ms Amos was inadmissible. The Judge concluded for reasons given that Ms Amos was "not a reliable witness". He gave reasons for his conclusion. He was entitled to do so. We note however that Ms Amos' evidence did not support any allegation of fraud. It was essentially a complaint that Ms Pakoa had failed to pay the VT500,000. We reject this ground of appeal.

26. The next ground of appeal alleges the Judge was wrong to find Mr Manaon an unreliable witness.

27. The appellants say the Judge was wrong to reject his evidence because there was documentary evidence to support their claim that Ms Pakoa had agreed to pay VT500,000 for the land.

28. The Judge based his assessment on the credibility and reliability of Mr Manaon on his established exaggeration, his attempt to belittle other witness, his failure to accurately describe documents he thought favoured his case and that he had made up evidence when challenged in Court. Given the Judge's comprehensive identification of the reasons for his rejection of Mr Manaon's evidence we see no reason to interfere in his assessment.

29. In any event it was never in dispute the transfer provided for Ms Pakoa to pay VT500,000 for the lease. The existence of that fact did not bolster the credibility of Mr Manaon's evidence. We reject this ground of appeal.

30. As to the claimed will of Mr Kalsong the appellants submit that the Judge was wrong to place no weight on the content of the will. The appellants accept in their submissions that the document produced was not a will in proper form. The appellants claimed the *"will"* was signed by Mr Kalsong but not properly witnessed. The document was dated 15 July 2009. The transfer of the lease to Ms Pakoa was signed in October 2008 and registered in February 2009. In those circumstances it hardly be any evidence of any fraud some months earlier relating to the October 2008 transfer. The Judge was entitled to find in any event that this document was in conflict with evidence he had accepted that at the time of transfer of the lease to Ms Pakoa there was no improper pressure and the transfer was given willingly. We reject this ground of appeal.

31. The next ground of appeal was that the Judge erred when he was not satisfied the evidence established fraud and mistake in the registration of the lease into Ms Pakoa's name. We have already dealt with most issues the appellants have raised in support of this ground of appeal. Essentially the Judge rejected the evidence of the appellants as to how Ms Pakoa came to be the registered owner and accepted Ms Pakoa's evidence. These findings unsurprising led to the Judge's conclusion that fraud and mistake in registration had not been established.

32. The appellants also raised additional quite separate issues under this ground. They submitted that because of the terms of S15 of the Land Leases Act Ms Pakoa's right as a proprietor of lease 030 was not protected as a good title.

33. S15 of the Land Lease Act provides:

> ***"RIGHTS OF PROPRIETOR***
>
> ***15.*** *The rights of a proprietor of a registered interest, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court shall be rights not liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all rights, privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-*
>
> *(a) to the encumbrances and to the conditions and restrictions shown in the register;*
>
> *(b) unless the contrary is expressed in the register, to such of the liabilities, rights and interests as are declared by this Act not to require registration and are subsisting:"*

34. The appellants' case is that Ms Pakoa's failure to pay the VT500,000 meant there was no "valuable consideration" in terms of S 15 and therefore her rights were not protected as holding a good title to lease 030.

35. This submission misunderstands the concept of valuable consideration. The consideration for the transaction was expressed as VT500,000. And so in terms of S 15 there was valuable consideration.

36. The Judge found either Mr Kalsong did not ask Ms Pakoa to pay the money or that he forgave the debt given Ms Pakoa's nursing of him. This finding did not affect the fact there was valuable consideration for the transaction. In any event even if contrary to the Judges finding Ms Pakoa still owed the VT500,000 this would be a debt to Mr Kalsong's estate. Valuable consideration would still have been part of the sale.

37. We do not express any view as to what the position would be with respect to a complete failure of consideration on the unassailability (subject to S 100) of those registered on the title. We reject this ground of appeal.

38. The appellants' also submit that the Judge was wrong to conclude Ms Pakoa was looking after her father in his last days and that Judge was wrong to reject Ms Amos evidence on this point. We do not consider a

resolution of the different evidence as between Ms Amos and Ms Pakoa as to who nursed their father in his last days was pivotal to any fraud or mistake issues. In any event the Judge gave his reasons for accepting Ms Pakoa's evidence. Ms Amos did not claim in her sworn statement that she took care of her father shortly before his death. We reject this ground of appeal.

39. Finally the appellant says the Judge erred in not waiting for the appellants to file their final submissions before releasing his judgment.

40. The trial finished on 26 July 2018. At the end of the trial the Judge told the appellant's counsel he should provide a translation of the claimed will from Bislama into English and he should file his final submissions by 8 August 2018. By 30 August, the date of the Supreme Court judgment no such translation or submissions were received. The appellants' counsel cannot complain about his own failure. However in this appeal the appellant has had the chance to advance any matters he wishes. In those circumstances there has been no prejudice to the appellants. We reject this ground of appeal.

41. The appellant's appeal with respect to the S100 claim will therefore be dismissed.

Damages Appeal

42. The respondents' counterclaim in the Supreme Court sought the following damages:

(a) for an assault by Mr Manaon VT1,000,000
(b) unpaid reimbursement of land rental paid VT275,000 as at 12 April 2015 and continuing
(c) unpaid rental of land and buildings VT3,010,000 and continuing
(d) unspecified damages VT5,000,000
(e) loss of income VT2,184,000.

The Judge awarded the following damages:

"(v) Ms Pakoa is entitled to be paid compensated. However, I am very mindful that these orders have been many years in the making, and that they involve members of the family having to pay another member which can cause resentment. I am therefore deliberately making only moderate orders, as follows:

- for the treatment (physical and mental) meted out to her by Mr Manaon, VT 500,000. This is to be paid by Mr Manoan within 21 days from the date of this decision. Interest is to run on this amount from 13 July 2009 until full payment has been made at the rate of 5% per annum.

- for the rent she has paid while the family continued to reside on her land, VT 250,000. This is to be paid by the two claimants equally within 21 days from the date of this decision – they can seek contributions from other family members, but the liability is theirs solely. Interest is to run on this amount from 13 July 2009 until full payment has been made at the rate of 5% per annum.

- for loss of income, VT 1,500,000. This is to be paid by the two claimants equally within 21 days from the date of this decision – they can seek contributions from other family members, but the liability is theirs solely. Interest is to run on this amount from 13 July 2009 until full payment has been made at the rate of 5% per annum.

- for loss of rental income by the family not paying Ms Pakoa for residing on the land, VT 900,000. I would expect that if rent were expected to be paid by family members it would be of an extremely minimal amount, so I set this at VT 100,000 p.a. This is to be paid by the two claimants equally within 21 days from the date of this decision – they can seek contributions from other family members, but the liability is theirs solely. Interest is to run on this amount from 13 July 2009 until full payment has been made at the rate of 5% per annum.

- for damages, including for the protracted nature of the dispute, VT 1 million. This is to be paid by the two claimants equally within 21 days from the date of this decision – they can seek contributions from other family members, but the liability is theirs solely. Interest is to run on this amount from 13 July 2009 until full payment has been made at the rate of 5% per annum."

43. The appellants say in this appeal the awards made were either excessive or should not have been made at all. The appellants proposed appeal was out of time. The respondent did not oppose leave to extend time we therefore grant such leave.

44. First as to the damages for assault the appellants submit that the assault was during a meeting at the property and was *"spur of the moment"* because Ms Pakoa had lied to get the title transferred into her name, further the

injuries were not as severe as the medical report and relevant authorities suggest the award of VT500,000 was too high.

45. We do not consider the context of the assault is a basis of a reduction in the damages awarded. The Judge found Ms Pakoa did not lie and that she was the legitimate lessee. The medical report was an independent assessment of Ms Pakoa's injuries. The context of the assault was very serious. Mr Manaon had become frustrated at Ms Pakoa's refusal to accept his claim to full ownership of the land. In that context he assaulted her. Other than the most serious assault there were threats of violence by Mr Manaon toward Ms Pakoa all related to her refusal to allow Mr Manaon to have the land. Ms Pakoa said her injuries from the assault were red bruises on her back, swollen lips, bruises all over her nose and head, dizzyness and back ache. As a result of the assault Ms Pakoa had to leave her house because she feared for her life and was scared to stay in her property. In the context of these assaults and threats this was understandable.

46. The appellants also submit they tried to reconcile with Ms Pakoa and invited her back to live on the land but she refused. The VT500,000 was never paid by Ms Pakoa for the land and the respondent contributed to her own loss by refusing to live on the land when invited to.

47. None of these issues is relevant to the damages awarded for assault. Ms Pakoa had been assaulted and threatened by Mr Manaon. He claimed he was the rightful owner of the land. It was hardly unreasonable for Ms Pakoa to refuse to return to live on the land under those conditions. The failure to pay the VT500,000 was of no relevance to this damages claim.

48. The award of VT500,000 damages was significant but in the particular aggravating circumstances we have identified the award was justified. We reject this ground of appeal.

49. We now consider the challenge to the claim for unpaid rental. Ms Pakoa has been trying to return to her land since 2009 when the title has transferred into her name. Mr Manaon and Ms Amos have never accepted her entitlement to the lease or her right to live exclusively on the land. They have

occupied the land effectively on the basis of unauthorised sub-leasees paying no rent.

50. Ms Pakoa's claim for unpaid rental on the 030 lease was VT3,560,000. This claim was based on rental charges per room paid to her father when he was the lessee. There was no evidential challenge to the calculation of rent for 9 years of occupation of the property at VT3,560,000. We are satisfied however that the land rental payments made by Ms Amos should be deducted from this sub lease payment. Ms Amos' evidence was that she paid three sums for land rental to avoid forfeiture of the lease from 2013. The total payments were VT1,260,908. The appellants could not identify any other outgoings they had paid with respect to the property since Ms Pakoa's ownership in 2009. The deduction of this sum from the rental sum leaves a balance of VT2,300,092. We are satisfied this is an appropriate sum for rental for the sub lease.

51. Given this award we do not consider any award could properly be made for reimbursement of the rent Ms Pakoa had to pay from 2009. With the rent payment award we propose to make Ms Pakoa has been reimbursed for the loss of the return on her land.

52. We allow the appeal with respect to the claim for payment by the appellants to Ms Pakoa for rent given the appellants' occupation of the land. We make an order for damages in Ms Pakoa's favour for VT2,300,092.

53. We allow the appeal with respect to the award of damages for reimbursement of Ms Pakoa's house rental costs. No damages are payable.

54. Finally we allow the appeal with respect to the award of damages for the *"prolonged nature of the dispute"*. We do not consider this was an appropriate head of damage. In any event much of such a claim is covered by the damages award for rent from 2009. We allow the appeal also with respect to this claim for damages.

55. The other claim by Ms Pakoa was for her loss of income from a business she says she operated from the 030 lease property before she left. We do not consider this claim can be justified. We do not consider there was any

reason why this business could not be carried on elsewhere. We also consider such a damages claim was too remote from the appellants' actions.

Interest

56. The Judge ordered interest on the total rental payments at 5% from 2009 until judgment. However the total amount of unpaid rental payments was not owing as at 2009. The rental arrears slowly built up over the years. We propose to allow 5% interest on 50% (that is 5% interest on VT2,300,092 x ½ = 1,150,046 i.e VT57,502 per annum) of the awarded rental payments each year from 2009 to judgment in 2018.

57. As to assault damages we allow interest at 5% from the date of filing of these proceedings 15 February 2015 until judgment. We consider calculation of interest generally more appropriately begins from this date.

Appeal against refusal to grant Eviction – Cross Appeal

58. At the end of his judgment of 30 August 2018 rejecting the appellants' claims the Judge referred the question of eviction and damages sought by the respondent to mediation. The mediation did not work.

59. On 12 September the Judge released a judgment on the counter claim with respect to damages and eviction. As to eviction the Judge said:
"I do not make an eviction order. The upheaval of so many family members, a large number of whom have had no part to play in this dispute, seems too drastic a remedy – and I do not think it realistic to evict only individual members of the various families involved. However, as the lease title is in the name of Ms Pakoa, it is clear that she has the pre-eminent right to decide who will occupy which parts of the various dwellings on the site. She could, within her legal rights, for example, decide to reside in one or more of the rooms occupied by either of the claimants' families, and require those displaced persons to move to another part of the land. If this leads to further conflict that cannot be amicably resolved between the parties, then I give leave to Ms Pakoa to bring this matter back to the Court for final eviction

orders against those members of the family still standing in the way of her wishes. It seems to me that as the registered lease title-holder, only she can determine where people actually occupy parts of her land – and if individuals do not agree or accept her views, they should find elsewhere to reside."

60. The respondents' case on appeal is that the Judge found she was the proprietor of the lease. She was therefore entitled to enjoy quiet possession. Ms Pakoa had given notices to the appellants, who are residing on the land, to leave the land. They refused to leave. Given those facts the respondents say she was entitled to an eviction order.

61. The appellants submit that an eviction order should not be made because they have an equitable interest in the land as a result of long occupation and payment of taxes and rents due on the land.

62. The appellants do not identify how in law their occupation could result in an equitable interest or how such an interest could prevent the respondent from obtaining eviction orders. As we have noted the appellants have never pleaded that they have an equitable interest in the land which would prevent their eviction. We do not consider there is now any reason why on eviction order should not be made.

63. We understand why the Judge in the Supreme Court was reluctant to immediately make eviction orders. Clearly members of the wider family had been living on the land for many years. However it does help that the appellants continue to refuse to accept Ms Pakoa is the lessee of the land. She has a right to occupy the land. It is for her to decide who also can occupy the land. The appellants by the judgment of this Court have exhausted their legal remedies. The continuing occupation of the land is now entirely in the hands of Ms Pakoa. Unless they can reach some arrangement as to future occupation with Ms Pakoa then the appellants must leave the land. It will be entirely up to Ms Pakoa whether she accepts any proposal from the appellants.

64. We therefore allow the appeal against the refusal to grant an eviction order. We make an eviction order with respect to the appellants. Given the appellants and their families have been living in the property for many years the eviction order will not come into force until 1 March 2019 to give them an opportunity to lease the property.

In summary

1. We dismiss the appeal against the Section 100 claim that Ms Pakoa obtained registration of the 030 lease by fraud or mistake.

2. We allow the cross appeal and make an order for eviction against the appellants as from 1 March 2019.

3. We confirm the damages award of VT500,000 for the assaults with interest at 5% but from 15 February 2015.

4. We award damages against the appellants for unpaid rent of VT2,300,092 with interest on half this sum being VT1,650,046 at 5% per annum (non compounding) from 23 January 2009 until judgment.

4. We set aside all other damages awards.

5. Costs to the first respondent of VT75,000 from the appellants.

DATED at Port Vila this 16th day of November, 2018.

BY THE COURT

.....

Hon. Vincent Lunabek

Chief Justice

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU