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

Civil Appeal
Case No. 18/2128 CoA/CIVA

**BETWEEN: NALIU BEBE**
Appellant

**AND: REPUBLIC OF VANUATU**
Respondent

**AND: FRESHWIND LIMITED**
First Interested Party

**AND: WILLIAM MORRIS**
**SUZIE RUTH**
**BILL RUTH**
**DANIEL RUTH**
Second Interested Party

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| ***Coram:*** | ***Hon. Justice John von Doussa***<br>***Hon. Justice John Hansen***<br>***Hon. Justice Oliver A. Saksak***<br>***Hon. Justice Daniel V. Fatiaki***<br>***Hon. Justice Gus Andrée Wiltens***<br>***Hon. Justice Stephen Felix*** |
| ***Counsel:*** | *G. Boar for the Appellants*<br>*Sammy Aron for the Respondent* |
| ***Date of Hearing:*** | *14th February 2019* |
| ***Date of Judgment:*** | *22nd February 2019* |

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## JUDGMENT

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1. This appeal seeks to set aside an order made on 14th March 2018 in the Supreme Court which struck out a constitutional application brought by the appellant in a representative capacity on behalf of 255 people (the claimants) who are or once were residents of Ohlen Freshwind old title 1.40 which covers some 23 hectares of land located at Port Vila.

2. The undisputed background to the claims which the claimants seek to raise in the constitutional application was set out in the judgment of this court in Combera and others v Barak Sope and others [2016] VUCA 42; Civil Appeal Case 2211 of 2016. That was also a representative action brought on behalf of the present claimants.

"1. *On 15 November 1929, Mr Henri Ohlen, a French citizen of Port Vila having on the 25th October 1929 applied to the Court in conformity with Article 29, paragraph 1(B) of the Convention to be substituted for the Société Française des Nouvelle Hebrides in respect of a parcel of land of 21 hectares 40 acres situated at Port Vila which by deed of 29th September 1929 he acquired the said company (Société Française des Nouvelle Hebrides), was granted with the judgment made in his favour by the Joint Court of the New Hebrides concerning the New Hebrides Registry of Land Titles Registration No. 40.*

2. *After Independence, Henri Ohlen was entitled to remain on the land subject of this matter until such time when custom owners pay for improvements on that land pursuant to section 3 of the Land Reform Act [CAP 123] which commenced on 30 July 1980.*

3. *By Land Reform (Declaration of Public Land) Order No.26 of 1981 dated 26 January 1981, the land area covered by the New Hebrides Registry of Land Titles registration No.40 was declared public land and became part of the Urban Physical Planning Boundary of Port Vila.*

4. *Between the period of 1982-1985 the Claimants settled onto the part of the land declared as public land of Order No. 26 of 1981 at Ohlen Freshwind with knowledge and consent of the Third Defendant.*

5. *On 12 January 1995 lease title 11/0133/008 ("lease 008") was registered for 50 years between the Minister of Lands (lessor) and Freshwind Limited (lessee).*

   a. *Lease 008 covers the land area of Ohlen Freshwind which was formerly the New Hebrides Registry of Land Titles registration No.40 and it is an urban land pursuant to the Land Reform (Declaration of Public) Order No.26 of 1981.*

   b. *On 28 April 1997, lease 008 was surrendered for the purpose of subdivision.*

   c. *Following the Surrender of lease 008, derivative lease titles were created."*

3. The claimants say that following the surrender of lease 008 on 28th April 1997, and once the derivative lease titles were created, the titles were put up for public sale in disregard of the claimants' continuing occupancy of the land. The sales of these titles have led to the progressive eviction of the claimants from the land by the new lessees.

4. In Supreme Court proceedings, Combera and others v Sope and others [2015] VUSC 114; Civil Case 171 of 2011, the claimants sought to protect interests claimed by them in the Ohlen Freshwind land. The proceedings alleged trespass and nuisance, and sought orders restraining the respondents from sub-dividing the land. These proceedings failed at trial. The Supreme Court held that the claimants had no interest in the land. They had gone onto the land as squatters and their status remained as squatters. As such they were liable to be evicted.

5. The claimants appealed to the Court of Appeal, but the appeal was dismissed on 18th November 2016: Combera v Barak Sope [2016] VUCA 42.

6. The constitutional application the subject to this appeal was filed on 17th July 2017, and amended on 6th March 2018. The amended application was struck out at a conference hearing on 14th March 2018. Although this court does not have the reasons for the strike out decision undoubtedly it was on the ground that the issues raised by the claimants in the constitutional application had been tried and determined against them in the Supreme Court and in the Court of Appeal. Those decisions held that they had no legal rights in respect of the Ohlen Freshwind land, and for this reason they failed to demonstrate that any legal rights held by them had been infringed.

7. The grounds on which this appeal is brought are to be found in part 2 of the appellant's written submissions which reads:

*"FRESH EVIDENCE AND LAW*

*2.1 The appellants' contention before this Honorable Court is based on fresh evidence and law which were not ventilated before this Honorable Court in Civil Appeal Case No. 16/2211. That is to say the Port Vila Urban Land Corporation Order No. 30 of 1981, coupled with the sworn evidence of Barak Sope established the fact that:*

*a. The settlement of the Appellants on then 1.40 at Ohlen Freshwind (which became a Port Vila Urban land pursuant to Land Reform (Declaration of Public Land) Order No. 26 of 1981) was done by the Port Vila Land Corporation which was the statutory institution charged with managing the Port Vila Urban land with powers to issue the leases on the land.*

*b. The Appellants had moved in, cleared the land and settled thereon, and were reasonably expected to be issued residential leases by the Corporation, whilst the Corporation completed the road and water services to the land which it has started by then.*

*2.2 It is the Appellants' contention that if Port Vila Urban Land Corporation and the sworn statement of Barak Sope were before this Honourable Court in Civil Case No. 16/2211, this Honorable Court would not find the Appellants to be squatters on Freshwind public land."*

8. In the Supreme Court proceedings Civil Case 171 of 2011 the claimants pleaded:

*"5. Between the period 1982 and 1995 the claimants took possession of the said premises under representation and inducement of the first and third defendants acting as minister in the government of the Republic of Vanuatu.*

*6. Acting on first and third defendants representations and inducements, the claimants entered upon the premises and began making building and growing fruit trees and crops on the premises.*

9. The first defendant was Barak Sope, and the third defendant the Republic.

10. It was these alleged representations and inducements that the claimants said gave rise to their rights.

11. In the course of the Supreme Court judgment that dismissed the claims the trial judge held that:

> "*Just because the first defendant was a government minister and MP that did not give him the right to deal with the land ... In any event the only evidence produced by the claimants is the purported action by the first defendant in a personal capacity as custom land owner not as a representative of the government*".

The full passage from which these sentences are taken is quoted later in this judgment, but these sentences standing alone help to explain the appellant's submissions to this court.

12. The appellants now contend that the Port Vila Urban Land Corporation Order No. 30 of 1981 was not part of the material canvassed in the earlier proceedings. That order established the Port Vila Urban Land Corporation. The corporation had wide powers and functions to manage public land within the Port Vila Urban Physical boundary which included the Ohlen Freshwind land. The corporation had five directors who were:

Kaloris Abel – Chairman
Pio Festa – Lord Mayor
Barak Sope – Member
Dick Kalsong – Member
John Kalotiti – Member

13. The amended constitutional application pleads:

> "*10. At all material times the Corporation (which was an agent for the Defendant) through its members of the board encouraged and solicited the claimants to move in, cleared the old title 1.40 Ohlen Freshwind and settled thereon and later for the Corporation to tend (sic – then) issue to them residential leases.*
>
> *11. About 1982 and 1983 the claimants acting on the Defendant Corporation's Members' instructions, moved onto the said old title 1.40, cleared the land and thereafter build their houses and occupied the land.*"

14. The change in the claimants' case which is said to arise from the introduction of the Port Vila Urban Land Corporation Order No. 30 of 1981 is that now it is alleged that the Port Vila Land Corporation, as agent of the government, and Barak Sope in his capacity as a director of the Corporation (impliedly with the authority to act on its behalf) is responsible for making the representations and inducements. In short now there is reason to hold the Republic responsible.

15. This shift in the basis of the case is also apparent in sworn statements filed in support of the amended constitutional application. In her first statement sworn on 19th July 2017 the nominal claimant, Naliu Bebe, deposed:

*"I confirm whilst Barak Sope on more than one occasion used Ohlen Freshwind for purposes of his political ambitions, and or "my land my life" policy, he was at that stage a Government official when he asked us to move in, clear the land and settle on 1.40 title later to be head lease title 11/0133/008. The Government must be blamed in this regard for the mess that we now find ourselves in."*

In a further sworn statement filed by Naliu Bebe after the amendment was introduced to plead Order No. 30 of 1981 she added:

*"I confirm since 1982 the whole of 1.40 ... was occupied by the claimants based on Port Vila Urban Land Corporation encouragement and assurance for us to clear the land and make our living thereon and later to be accorded leases on this land".*

16. A sworn statement in support of the amended constitutional application was filed by the claimants from Barak Sope (who had been a defendant in the Supreme Court proceedings). The statement confirms his position as a member of the Port Vila Urban Land Corporation, and that the corporation administered all alienated land including the Ohlen Freshwind land. He says:

*"About 1982 and 1983 these people were encouraged and invited to settle on Ohlen Freshwind 1.40 land. Annexed and marked BT1 is a list of the people whom the Government encouraged and asked them to clear 1.40 and settle on the land for the Government to then issue them leases ... ".*

These assertions are so general in nature as to have little evidentiary value, and the sworn statement fails to say how the Government encouraged the claimants, or whom on behalf of the Government gave the encouragement. But in a broad sense the statement indicates support for the shift in the claimants' case so that now, through the new evidence, it is the Port Vila Urban Land Corporation which should be held responsible for any representations and encouragements.

17. The respondent opposes the appeal. The respondent submits that the evidence is not new. Order 30 of 1981 was there to be relied on in the Supreme Court if it was important to the claimants' case. The respondent argues that in reality the claimants are seeking to present through the constitutional application exactly the same case that they presented in the Supreme Court, and on essentially the same factual evidence.

18. We consider that submission is correct. That is a conclusion which is put beyond doubt when the reasons for decision of the Supreme Court and the Court of Appeal in the civil proceedings are considered.

19. Paragraph [5] of the Court of Appeal decision sets out the full passage from which the sentences earlier quoted were taken. The full passage reads:

> 5. In his judgment Chetwynd J. quoted extensively from the judgment of this Court in Kalomtak Wiwi Family v. Minister of Lands [2005] VUCA 29 which he summarised in the following passage:

> *"For the avoidance of any doubt and so that the claimants are clear as to the effect of the 1981 Order I will repeat what the Court of Appeal has said. As from 26th January 1981 the owners of Ohlen Freshwind land have been the Government of Vanuatu. Any former custom land owner, if they had any rights, would only have rights with regard to compensation. As a result of the 1992 'deal' done between representatives of the affected people and the Government the question of compensation has long been settled and dealt with as well. There has been no legal challenge to the 1992 deal and subsequent agreement. The Claimants cannot have been given permission to enter onto or settle on Ohlen Freshwind land by the First Defendant. He ceased to have any authority over the land, if ever he had any in the first place, from 26th January 1981. Just because the First Defendant was a Government Minister and MP that did not give him the right to deal with the land. Between 1982 and 1992 the Urban Land Corporation was the only body capable in law of controlling what happened on the land. In any even the only evidence produced by the Claimants is the purported actions by the First Defendant in a personal capacity as custom land owner not as a representative of the Government. The end result is the Claimants have no authority to be on the land, they are squatters."*

20. We emphasise the sentence "*Between 1982 and 1992 the Urban Land Corporation was the only body capable in law of controlling what happened on the land*". The "*Urban Land Corporation*" refers to the Port Vila Urban Land Corporation. That is clear when reference is made to the judgment in the Kalomtak Wiwi decision.

21. The role, powers and functions of the Port Vila Urban Land Corporation were part of the material considered in the Supreme Court. There is nothing new about Order 30 of 1981.

22. In our opinion the Supreme Court was correct to strike out the constitutional application as the allegations and claims made in it had already been heard and determined in the civil proceedings. It had already been determined by the final court of law in the jurisdiction that the claimants do not have the rights which they assert have been infringed.

23. This appeal has been brought and argued on the assumption that if the material advanced by the appellants was truly fresh evidence, the claimants' claims could be revived and remedies granted by the Supreme Court in a constitutional application notwithstanding the final decision made in the previous civil claim. In our opinion that assumption is not correct. Whilst the final decision of a court of record in the civil claim remains on the record it is determinative of the claimants' rights of law. That final decision cannot be by-passed by a collateral attack on it brought through a constitutional application.

24. This conclusion does not mean that there is no remedy available to a claimant who later uncovers truly fresh evidence of such quality and weight that the result in the civil proceedings would likely have been different had the evidence been

before the court, or if the claimant discovers evidence that would otherwise have justified overturning the decision in the civil claim.

25. Whilst a court has power to recall a decision after it is announced but before it is formally sealed and entered on the record, once it is formally recorded in the records of the court, the court generally speaking, cannot recall or otherwise revisit the decision. See: Autodesk Inc v Dayason (No. 2) (1993) 176 CLR 300 per Mason CJ at 2012, Brennan J at 308 and Gaudron J at 322. We say generally speaking as there are very limited circumstances where a court has jurisdiction to correct slips or judgments that do not reflect what the court intended: Thynne v Thynne [1955] P 272 [per Morris L. J. at 313 – 315. These very limited exceptions do not extend to a case where fresh evidence or fraud is relied on to challenge the recorded decision.

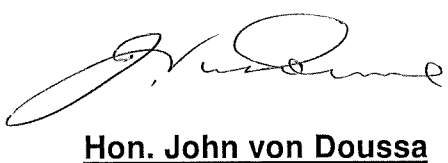
26. Once the judgment of a civil court is recorded, and it has become final in the sense that appeal rights have been exhausted or have expired, the correct procedure to challenge the decision is by fresh proceedings in the Supreme Court seeking an order to set aside the earlier decision. See: Wentworth v Rogers (No. 5) 1986 6 NSWLR 534 per Kirby J at 538; Owens Bank Ltd v Bracco [1992] 2AC 443 per Lord Bridge of Harwich at 483; and Monroe Schneider v Raberem (1992) 109 ALR 137 at 140.

27. It must be stressed that whilst these cases provide examples of situations where a new action has been commenced to set aside an existing final decision of a court on the ground of fresh evidence or fraud such as perjury and concealment of evidence, the onus resting on the party asserting the fresh evidence or fraud is a heavy one and the jurisdiction of the court to set aside the earlier decision will be sparingly used. Clear and cogent evidence will be required to justify such an extreme measure which will revive litigation and the underlying dispute long after many people in the community will have assumed it was finally resolved, and who have gone about their lives accordingly.

28. This appeal is dismissed. The appellant must pay the respondent's costs fixed at VT40,000.

**DATED at Port Vila, this 22nd February, 2019.**

**BY THE COURT**



**Hon. John von Doussa**
**Justice.**