

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

Civil Appeal
Case No. 17/3490 CoA/CIVA

BETWEEN: JAMES RAD

Appellant

AND: PETER COLMAR

First Respondent

**AND: MORRIS MOLIDOVO (Deceased)
JOHN TARI MOLBARAV**

Second Respondents

AND: SAMSON LIVO

Third Respondent

**AND: JOSEPH SAVA
ROY MOLI
JOSEPH WARI
BEN MATA**

Fourth Respondents

AND: THE DIRECTOR OF LAND RECORDS

Fifth Respondent

AND: THE GOVERNMENT OF VANUATU

Sixth Respondent

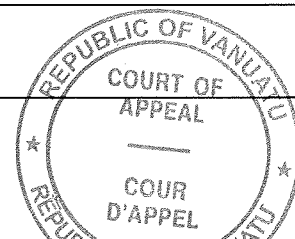
Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Oliver A. Saksak
Hon. Justice John William Hansen
Hon. Justice Gus Andrée Wiltens
Hon. Justice Stephen Felix*

Counsel: *Robert Sugden for the Appellant
Nigel Morrison for the First Respondent
Felix Laumae for the Second Respondent – no appearance
Tom J. Botleng for the Third Respondent
Fourth Respondent – no appearance
Sammy Aron for the Fifth and Sixth Respondents*

Date of Hearing: 13th February 2019

Date of Judgment: 22nd February 2019

JUDGMENT



1. This appeal is brought to set aside the following order made in the substantive proceedings in the Supreme Court, being Civil Case 150 of 2010 (CC150/10) on 8th November 2017:

“This matter is struck out pursuant to Rule 9.10.2 of the Civil Procedure Rules”.

2. Rule 9.10.2 provides:

(1) *This rule applies if the claimant does not:*

(a) *take the steps in a proceeding that are required by these Rules to ensure the proceeding continues; or*

(b) *comply with an order of the court made during a proceeding.*

(2) *The court may strike out a proceeding:*

(a) *at a conference, in the Supreme Court; or*

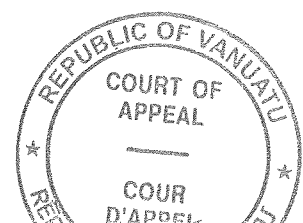
(b) *at a hearing; or*

(c) *as set out in subrule (3); or*

(d) *without notice, if there has been no step taken in the proceeding for 6 months.*

3. The order was made as part of the administration of the business of the court. No party applied for the order. No notice was given to any party, in particular to the appellant who was the claimant in the proceedings that the dismissal was contemplated. No party was heard before the order was made.

4. The appellant’s claim was filed on 1st October 2010. He sought an order under s.100 of the Land Leases Act rectifying the land register by setting aside a registered lease in favour of Aljan (Vanuatu) Ltd over part of the Aese Island, South East Santo, on the ground that the registration of the lease had been caused by several mistakes and also fraud. The principal mistakes alleged were that as the appellant had been declared as the custom owner of that land by the Vunambulu Joint Village Customary Land Tribunal by decision dated 20th August 2007 he was the person who should have granted consent to the lease, whereas the consent of others had been relied on.



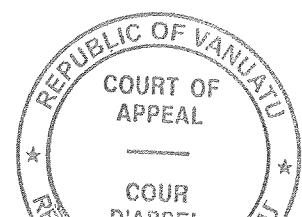
5. Those proceedings were however not the only ones on foot concerning the subject land on Aese Island. By judicial review proceedings, Civil Case 24 of 2010 commenced in the Santo registry on 7th June 2010 which after the case was transferred to the Port Vila registry became Civil Case 195 of 2010 (CC195/10), the second respondent had sought (i) an order quashing the decision made by the Vunambulu Land Tribunal, and (ii) other ancillary orders to have the question of custom ownership of the land otherwise determined by a properly constituted tribunal with the necessary jurisdiction to do so.
6. The two proceedings plainly involve the same land, and as the fourth and fifth respondents in their submissions to this court say:

"A final determination of the custom ownership is pivotal in determining the issues of fraud or mistake in the registration of the leases in the proceeding CC150/10".

7. The inter-relationship between the issues in the two proceedings was identified early in the management of the cases, and on 2nd December 2010 the court ordered that CC150/10 and CC195/10 be listed together in Port Vila.
8. Thereafter the cases have been managed as related cases. On 19th August 2016 the judge managing the cases (who was the judge who later made the order under appeal) made the following orders in CC150/10:

"This matter is adjourned to await the court's ruling in CC195/10".

Thereafter, the only order that was made in CC150/10 prior to the strike out was made on 24th October 2016 when the judge refused the appellant's application that the judge recused himself for apprehended bias. On the same day in CC195/10 the judge delivered his reserved ruling in CC195/10 and made consequential directions that the first respondent and the appellant file submissions relevant to the matters required to be considered under r.17.8 in CC195/10. The appellant filed its submissions on 15th November 2016, but in the meantime the dismissal order under appeal had been made in CC150/10 on 8th November 2016.



9. The appellant's ground of appeal against the dismissal order is simply that the decision is one that no reasonable person could come to in the circumstances.
10. The court's power under Rule 9.10.2 is a discretionary power. The principles governing an appeal against the exercise of a discretionary power of this kind are not in doubt. They were summarized in High Court of Australia in *House v The King* (1936) 55 CLR 504/505:

"The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

11. In this case no reasons were published. It is not known what matters the decision maker took into account or left out of account, and no particular error in the exercise of the discretion can be identified. However, having regard to the history of the matter and the inter relationship of the issue in CC150/10 with that in CC195/10 we think the ground of appeal on which the appellant relies is clearly correct. The decision to strike out CC150/10 was at the very least the result of not taking into account that relationship and past orders that recognized that the outcome in CC195/10 would be pivotal in deciding the claim in CC150/10.
12. The effect of the decision was both unfair and unjust. The decision should be set aside so that when CC195/10 is concluded the appellant's customary rights, if any, can be determined according to the legal system of the Republic of Vanuatu.
13. The appeal must therefore be allowed.
14. The position of the respondent parties who appeared on this appeal, save for the third respondent, was neutral. They noted what had happened. They treated the

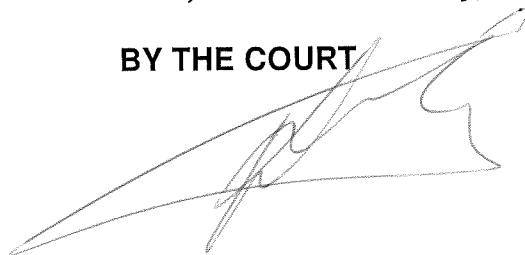


order as part of the administration of the court, and said that they will abide the outcome of the appeal. The fifth and sixth respondents however filed helpful submissions summarizing the history of the case management of the two cases for the assistance of the court, and we thank them for that.

15. The position of the third respondent was that no submissions could be made by him or the family he represented as the third respondent had recently died and so far no competent customary court has decided who is to be the next of kin. Counsel appearing for the families submitted that the appeal should be adjourned until this happen. We did not accept that submission, and we proceeded to hear the appeal as the outcome could not affect the proper adjudication of substantive rights of the third respondent. The appeal concerns the adjudication of the rights of the appellant and his status to continue prosecuting CC150/10.
16. The appeal is allowed. Civil Case 150 of 2010 is reinstated. It is not appropriate that there be any order for costs.

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

BY THE COURT



Hon. Vincent Lunabek
Chief Justice.

