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

Civil Appeal
Case No. 19/1705 CoA/CIVA
Case No. 19/2544 CoA/CIVA

BETWEEN: STEPHEN QUINTO
Appellant

AND: NICOLAS GEORGE (SIMO)
First Respondent

AND: RAFF SIMOLO
Second Respondent

AND: NOEL RAFF
Third Respondent

AND: LINBOS PILAIR, MARSIAL TAVUE, MARCEL TAVUIT, WILLIAM TAVUIT, DUMBO KARAE, NOEL MALAO, LINO RAVU, WYCLIFF KARAE, ABRAHAM LULU, JOHN WILL, FERDINO ERIC, TORI JOHN, NICOL RAVUPAY, DOROTHY ALIE, CHRISTIAN MALIU, BENO BRITAIN, EMMIE JOHN, BRUNO TINOI, MARCO MALAU, MARTINO JIMMY, NARSIS DANIEL, LINBOS SUPE, FRANCISE RAP, RUDOLF TAVUE, DAVID ARU, MALAU SAMUEL, TIMOTHY MALAU, NICOLA SIELO, JEAN BAPTISTE, RODOLF TAVUE, SUPE RAVOLINE, SETHY JEVI, JOEL RAV, PITOR RAV, MARK RAV, ABRAHAM RAV, JOHN KARA, ARNOLD RAV, JAMES RAV, MERELYINE AMBAE, STANLEY RAV, MICHEL MALAU, NAKOU GARAE, EMMIE VITIRO and JACOB USON
Fourth Respondents

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John William von Doussa*** ***Hon. Justice John Hansen*** ***Hon. Justice Dudley Aru*** ***Hon. Justice G Andrée Wiltens*** ***Hon. Justice Viran Molisa Trief***
Counsel:	*Mrs MNF Patterson and Ms Viska Muluane for the Appellant* *Mr George Boar for the Respondents*
Date of Hearing:	*5th November 2019*
Date of Judgment:	*15th November 2019*

JUDGMENT

A. Introduction

1. There are two separate matters advanced before this Court both concerning orders made in the course of ongoing litigation between the parties in the Supreme Court. The first matter is against interlocutory orders made on 26th June 2019 which is brought before the Court as an appeal without leave from the judge who made the order as required by Rule 21 of the Court of Appeal Rules 1973. The second matter is an appeal against final orders made on 1st August 2019 and 27th August 2019 which dismissed three applications to commit the respondents and members of their family for contempt for alleged breaches of injunctive orders made against them on 12 April 2017. Each of the orders under challenge were made by the docket judge managing the substantive litigation between the parties.

B. Background

2. The litigation arises out of activities undertaken by the appellant on lands known as Pwelvunsupe and Pakakara in the Big Bay area of Santo. In 2015 the appellant obtained from the Council of Ministers approval to conduct a conservation project known as the Edenhope Project on the island of Santo. In pursuit to that project the appellant claims to have obtained custom owner approval to carry out earth works, principally to create 35kms of road and associated improvements. The works started on Pakakara land but then extended on to the Pwelvunsupe land. The respondents and members of their extended family group say that they and their families before them have for a very long time been the occupiers and users of the lands affected by the Edenhope Project works. They contend that the custom ownership of the lands remains to be determined and that the two individuals who have purported to give the appellant permission to undertake the Edenhope Project had no authority to do so. The respondents have all along asserted that the appellant is simply a trespasser on the Pakakara and Pwuelvunsupe lands.

3. On 6th April 2017 the appellant made ex-parte application to the Supreme Court for an urgent injunction against the respondents and their families. In support of the application the appellant deposed that the respondents and their families had trespassed onto the Pakakara land carrying muskets and had put namele leaves on the boundary and the new road then being built between the Pakakara and the Pwelvunsupe land with the intention of stopping the appellant's ongoing activities and its conservation project. The appellant deposed he, his family and his employees were in consequences fearful of continuing to work. The appellant also referred to a number of civil actions for trespass which had been taken against people assisting the project by persons opposed to it. The appellant asserted all these actions were manufactured to create trouble and to harass the appellant. On 12th April 2017 the Supreme Court granted an urgent ex-parte injunction restraining the three named respondents, their family members and their agents from harassing and intimidating the appellant, his family members, the workers and agents under the Edenhope Project and the two people who as putative custom owners had purported to give permission for the project to proceed. The injunction also restrained those for whom the order was directed from trespassing within the whole of the Pakakara land and from other specified conduct. After the urgent ex-parte injunction was granted the appellant commenced a substantive claim in the Supreme Court seeking permanent injunctive orders against the respondents and for damages caused by the disruption to the project works by the protesters.

4. The respondents applied on 28th April 2017 to set aside the ex-parte order on the ground that the scope of the injunctions prevented the respondents and their families from using bush tracks and roads to get to medical clinics, schools and churches and gardens.

5. On 19th May 2017 the judge refused to set aside the injunction as he considered the orders could not interfere with any rights the respondents have over the land which they are entitled to use by custom or as a result of agreements or authorisations of the custom owners. The judge recognised that there was a dispute about whether the permission given to the appellant was given by the appropriate custom owner or owners or by persons having authority to give permission. He considered there was a serious question to be tried about that, and the balance of convenience was in favour of the leaving the injunction in place.

6. Those in the area who claimed to have occupation rights, including the respondents, continued to protest against the project and they gained the support of the Sanma Provincial Government Council in opposing the project. On 15th July 2017 there was a ceremony at a village in the area where many people were present Chief William Dee and his two younger brothers were there. William Dee was the President of the Sanma Provincial Supenatavuitano Council of Chiefs who had signed, along with others, a declaration in support of the project. At this ceremony an event occurred which gave rise to the first contempt application seeking the committal of the respondents and their family, and specifically eleven named persons. Sworn statements in support alleged that those specifically named or some of them abused and threatened Chief William Dee and one of the putative custom owners who had given permission for the project to proceed. The three named respondents in the proceedings were not among the eleven people specifically named in the application.

7. The contempt application was before the docket judge at a case management conference in the substantive proceedings on 14th September 2017. At that conference there was discussion about the future conduct of the proceedings including the counterclaim filed by the respondents and numerous other people who claimed as occupiers of part of the land for damage to their gardens and properties caused by the project. The judge recorded in a conference minute that:

> *"I do not propose to deal with the contempt applications either. I have made it clear that the order is there to maintain good public order. I do not accept that the order does not cover people who are supporters of one side or the other rather than actual family or agents. I have told those who attended the conference in Luganville how I will deal with further breaches of the peace reported to me.*
>
> *The two factions must allow the proper process leading to a decision on customary ownership and/or use of the Land in question."*

8. The minute also records:

> *"There are also problems because of NR4 giving the impression that others have interests over Bakakara (sic Pakakara) Land. The parties have now agreed to try and resolve some of the problems by correctly and specifically identifying damage caused or said to have been caused by Mr Quinto or to be exact the Edenhope Ltd project. This will involve approaching an officer from the Ministry of Agriculture and Rural Development to assist and help identify alleged damage.*

There is also the question of others being joined as counterclaimants. The people involved are listed in the application to become parties filed on 14th September 2017."

9. At that conference the judge made orders including:

> *"(iv) Those persons named in the application to be joined as parties in CC 872 of 2017 and dated 14th September 2017 are granted leave to be joined as counter-claimants and shall file a counterclaim accordingly;*
>
> *(v) The parties in CC 872 of 2017 (including those persons referred to in (iv) above) shall be at liberty to identify exactly the damage alleged to been caused by the Claimant. This shall be done with the assistance of an Agricultural Officer from the Ministry of Agriculture and Rural Development;*
>
> *(vi) The Claimants in CC 872 of 2017 shall be granted leave to file a defence to any counterclaim or counterclaimants in respect of (iv) above."*

10. The second contempt application, brought against the respondents, their family members and agents and relatives, was filed on 10th October 2018. The appellant alleged the breaches of the injunction granted on 12th April 2017. He alleged that certain people who are members of the third respondents family had on 4th and 5th October 2018 thrown stones at a machinery operator and attacked the project workers with stones and spears (although no personal injury was caused).

11. The third contempt application was filed on 12th February 2019. This application sought enforcement warrants for contempt against 13 named people "and any other persons who disturbed ... the conservation project ...". This application recited many past events including the events the subject of the earlier two contempt applications, and concluded with a general complaint that breaches of the restraining orders were continuing.

12. The applications for contempt were in each instance served on the lawyer on the record for the respondents and cross-claimants but were not personally served on any of the people against whom orders for contempt was sought until 15th July 2019.

13. In the meantime, on 15th March 2019 the proceedings in the substantive claim came before a new docket judge who had taken over management of the case on the retirement of the previous judge. On this occasion there were three applications before the judge. There was no appearance filed on behalf of the respondents and no explanation for their absence. The judge was concerned about the delay that was occurring. The appellant's lawyer produced a report from a person who claimed to be an officer from the Ministry of Agriculture and Rural Development who said he had received no cooperation from the respondents to show him the alleged damage (referred to in the counterclaim) and he himself saw none.

14. The respondents had not filed any counterclaim after the orders made on 14th September 2017. The first of the applications before the judge, filed by the appellant, resulted in orders which had allowed the joinder of new counterclaimants being vacated. The second application on file had been made by the respondents' lawyer to otherwise vary the orders made on 14th September 2017. That application was dismissed. The third application was by the applicant to strike out the counterclaims by the three respondents and many others for damage to their crops and trees. In

light of the report from the officer for the Ministry the judge granted this application and counterclaims were struck out.

C. The 26 June 2019 decision

15. The foregoing is the history leading up to the interlocutory orders made by the docket judge on 26th June 2019 that are the subject of the first matter before the Court. As already noted leave to appeal has not been obtained from the judge, and as such there is no competent appeal on foot. Nevertheless we think it is important to deal briefly with that order as it is an important one which was intended to push forward the proceedings to trial so that the many contentious issues between the parties can be properly aired, and the relationship between the parties put on a firm footing.

16. On 26 June 2019 the substantive proceedings were brought before the docket judge by application made by a new lawyer on the record for the respondents. The Court was informed that the new lawyer had filed a notice that he was now acting on 1st March 2019 but unfortunately that information was not brought to the judge's attention at the 15th March 2019 hearing and apparently was not served on the appellant's lawyers. Notwithstanding that irregularity the judge considered that as steps had been taken since 15th March 2019 by the new lawyer to comply with the leave to add new parties and generally to progress the matter fairness and natural justice required that the orders made on 15th March 2019 should be recalled. The judge also considered a fresh application by the respondents to set aside the ex-parte orders made on 12th April 2017. The judge noted that there was now new evidence in sworn statements to the effect that the injunction was being used by the appellant and his workers to their advantage to get the upper hand against simple village people. The statements disclosed that ongoing complaints were being made by opponents to the project that offered support to the claims of the respondents. Moreover the matter had become more complicated by developments that had occurred in the ongoing dispute over custom ownership. The judge considered that the ex-parte injunction should be vacated and so ordered. Orders were also made for the addition of new parties to the counterclaim being many people who alleged that their gardens had been damaged.

17. In place of the ex-parte injunction that was directed only to restraining the conduct of the respondents side of the dispute the judge made extensive injunctive orders directed to both sides which are clearly intended to require both sides to keep the peace and behave in ways that avoid confrontation until their substantive claims have been determined.

18. Whilst we have noted that the purported appeal against the orders made on 26th June 2019 is incompetent, we see no reason why this order would be disturbed on appeal. The order was intended to advance the eventual resolution of the disputes between the parties, and in the meantime to place balance restraints on both sides. The role of an appellate court when asked to review an interlocutory order of the kind in question is eloquently expressed in the following passage from the judgment of the High Court of Australia in Adam P Brown Male Fashion Propriety Limited v Phillip Morris Inc. (1981) 148 CLR 170 at 177:

> *"Nor is there any serious disputes between the parties that appellate courts exercise particular caution in reviewing decisions pertaining to practice and procedure. Counsel for Brown urged that*

specific cumulative bars operate to guide appellant courts in the discharge of that task. Not only must there be error of principle, but the decision appealed from must work a substantial injustice to one of the parties. The opposing view is that such criteria are to be expressed disjunctively. Cases can be citied in support of both views ... For ourselves, we believe it to be unnecessary and indeed unwise to lay down rigid and exhaustive criteria. The circumstances of different cases are infinitely various. We would merely repeat, with approval, the oft-cited statement id Sir Frederick Jordan in Re Will of FB Gilbert (dec'd) (1946) 46 SR (NSW) 318 at 323:

> *"... I am of the opinion that ... there is a material difference between an exercise of discretion on a point of practice and procedure and an exercise of discretion which determines substantive rights. In the former class of case if a tight rein were not kept upon interference with the orders of judges of the first instances, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could at will, in effect transfer all exercises of discretion in interlocutory applications from a judge in chambers to a court of appeal"*

... it is safe to say that the question of injustice flowing from the order appealed from will generally be a relevant and necessary consideration"

19. As there is no valid appeal against them, the orders of 26th June 2019 remain in place and will continue to guide the management of the case unless and until the docket judge considers they require modification to facilitate ongoing management.

D. The decisions of 1 August 2019 and 27 August 2019

20. We turn to the appeal against the orders made by the trial judge that dismissed the applications for contempt. There are well established principles that apply to an application to commit a person for contempt for breaking an injunctive order of a court. The applicant carries the onus of establishing according to the criminal standard, that is beyond reasonable doubt, the following matters:

a) That an order was made by the Court,
b) That the terms of the order are clear, unambiguous, and capable of compliance,
c) That either:
   i. The order was served on the defendant; or
   ii. Failure to serve the order was excused in the circumstances, or
   iii. Service was dispensed with pursuant to the rules of the Court;
d) That the defendant if not named as a party to the proceeding is either an agent or an aider and abbetter, and
e) That the defendant breached the terms of the order.

(See National Australia Bank v Juric [2001] VSC 375 at [37] and Deputy Commissioner of Taxation v Rasim Gashi and other [2011] VSC 351 at [18]).

21. Besides these requirements an application to have a defendant committed must also be personally served. We have already noted that the applications in this matter were served soon after they

were filed on the lawyer on the record but they were not personally served on any of these three respondents, let alone the alleged family members, who were specifically named until 15th July 2019. An application to commit a person for contempt is in the nature of a criminal proceeding and strict compliance with the rules relating to such an application is required. In this jurisdiction the Civil Procedure Rules, No. 49 of 2002, apply. Rule 18.14(4) provides:

> *"The application:*
>
> *(a) must have with it a sworn statement giving details of the contempt; and*
>
> *(b) must be served personally on the person."*

22. Two reasons were given for the dismissal of the first application. The first was that the ex-parte injunction had now been vacated. The second reason was that two of the named defendants who had since been dealt with for the crimes of assault were not defendants named in the proceedings in 2017 and were therefore not covered by the orders. The fact that the ex-parte orders had since been vacated cannot be a reason for dismissing the application. Whilst the orders remained in place they had to be complied with by those bound by them. The fact that a defendant has otherwise been dealt with through the criminal process cannot be a ground of defence to a civil application for contempt, although it would be a highly relevant fact in fixing penalty for contempt if the contempt were found proved.

23. Nevertheless, in our opinion the application was properly dismissed. First the application concerned events that had occurred almost two years before. The docket judge at that time had declined to hear the application in September 2017. When the application was served on the respondents' lawyer at the time, the lawyer filed a response indicating that the factual allegations in the application were hotly disputed. To call on the defendants to answer the disputed facts and allegations so long after the event would in our opinion, in the circumstances of this dispute, be an abuse of the court processes, and on that ground alone the application should be dismissed. Moreover, by 26th June 2019 the applications had not been properly served and should also have been dismissed on that ground. In the case of the first application the occasion to consider the other requirements necessary to sustain a finding of contempt does not arise. The first application was rightly dismissed.

24. The second application was dismissed on the ground that none of the people who were specifically named as offenders were named defendants in the Supreme Court proceedings. The third application was dismissed as the judge considered it would be grossly unfair for the Court to punish the defendants for contempt when they themselves had grievances against the appellant.

25. It is not necessary to analyse the reasons given for these dismissals as in our opinion the applications had to fail for more fundamental reasons. It is essential for an injunctive order to be enforced that the applicant must establish that the order has been either personally served on the defendant or that the service has been excused or dispensed with by order of the Court. That has not occurred. Not even the three named respondents have been personally served with the ex-parte order, let alone any other family member. Nor is there evidence adduced by the appellant

that could establish that the named defendants were aware of the terms of the injunction. There is no evidence that their lawyer ever gave the respondents or any of the other named defendants a written copy of the injunctions and explained the meaning of them. To be aware of the terms the applicant would have to establish beyond reasonable doubt that the defendants understood the restraints and obligations placed on them by the order. Merely to show an order written in the English language to someone whose language is likely different cannot be a solid basis for finding that the defendant was aware of the terms.

26. The applications were therefore rightly dismissed as the defendants had not been personally served with the injunction, and further that the sworn statements in support failed to establish that the offenders were aware of the terms of the orders.

27. The lawyer representing the appellant recognized the difficulty in establishing knowledge by the defendants of the terms of the order, and applied to the judge at the time the applications first came before the Court to have the defendants called for cross-examination so that the appellant's counsel could elicit information from them about their knowledge of the orders. The judge refused this application, and rightly so. The onus rested on the appellant to establish knowledge. To follow the course proposed would have reversed the onus resting on the appellant to substantiate the allegation of contempt.

28. In our opinion the appeal against the dismissal of the contempt application fails and the appeal must be dismissed.

29. The circumstances of the dispute between the parties require that the claim and the counterclaims be resolved as soon as possible. The docket judge, by the orders now under challenge, has endeavoured to take steps to achieve this, but unfortunately the appellant's recourse to the Court of Appeal has delayed the matter further. It behoves both sides to cooperate with each other and the court to get the proceedings on for trial. Counsel for the appellant has raised a difficulty about obtaining the particulars about the many counterclaims. So far as the appellant needs particulars of the losses by each of the many counterclaimants, those particulars should be sought immediately and the counterclaimants should respond as best they can promptly. If they fail to do so the judge has the power to summarily strike out the counterclaims. They should understand that if they do not give particulars promptly, and in due course lead evidence to support their claims, those claims will fail.

E. Result

30. For these reasons the orders of the Court are:

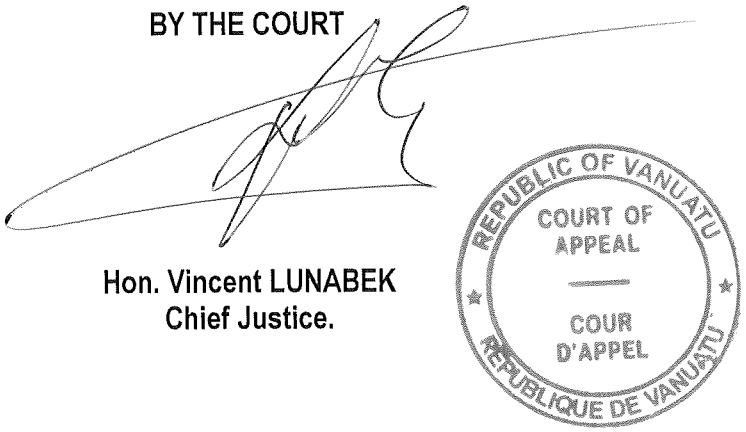
1. Purported appeal against the interlocutory decision of the Supreme Court on 26th June 2019 is dismissed as incompetent;

2. The appeal against the dismissal of the three contempt applications on 1st August 2019 and 27th August 2019 is dismissed;

3. The appellant is to pay the respondents' costs of proceedings in this Court which are to be agreed or taxed;

DATED at Port Vila, this 15th day of November, 2019.

BY THE COURT



Hon. Vincent LUNABEK
Chief Justice.