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

Civil Appeal
Case No. 21/3058 COA/CIVA

BETWEEN: REPUBLIC OF VANUATU
Appellant

AND: JONG PHIL SHIN / JUAN YEUN YU
Respondents

Date of Hearing:	***12th November 2021***
Before:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Raynor Asher*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice Gus Andrée Wiltens*** ***Hon. Justice Dudley Aru***
Counsel:	***Mr. H. Tabi for the Appellant*** ***Mrs. T. Harrison the Respondent***
Date of Decision:	***19th November 2021***

JUDGMENT

Introduction

1. This is an appeal against a judgment of the Supreme Court dated 31 August 2021, where the learned trial judge made an award of damages in favour of the claimants. The claim for damages was based on a default judgment arising from the Republic of Vanuatu's revocation of the respondent's citizenship certificates.

2. The judgment was based on evidence indicating that once notice of intention to revoke citizenship was given on 16 October 2014, and the Vanuatu Investment Promotion Authority (VIPA) declined to re-issue the claimants an approval certificate, the claimants had to close their businesses and abandon their home with substantial losses. A judgment for a total of VT$92 million was entered against the Republic of Vanuatu, together with interest and costs.

3. The Republic of Vanuatu is the appellant and has applied to adduce further evidence on appeal. That evidence was documents received from VIPA which showed that the respondents on 8 November 2016 obtained a VIPA certificate authorising a company they controlled to carry out new businesses under the name of Kovan Global Trading.

Discussion

4. These documents, coupled with the fact that the actual revocation took place after 8 November 2016, is information that is potentially highly relevant if it shows that the respondents were able to stay in business, and had the ability to mitigate all or part of their losses. We accept that this could materially affect the outcome of the case. It could mean that there was a significant injustice if the judgment was allowed to stand.

5. The Court has "full discretionary power" under cl 27(2) of the Court of Appeal rules to receive further evidence on questions of fact, with the proviso that in the case of an appeal from a judgment after a trial on the merits, no such further evidence shall be admitted "except on special grounds". Generally such evidence is only admitted if first it is fresh evidence that could not have been obtained with reasonable diligence at trial, second it would have an important influence on the outcome of the case although it need not be decisive, and third it must be credible although it does not need to be incontrovertible[1]. The criterion of freshness is not immutable.[2]

6. We do not think the evidence could be regarded as "fresh". The material in question was in the possession of VIPA. VIPA is a government agency. It seems that for unknown reasons VIPA did not respond to queries from the State Law Office about the claim. The key documents the appellant seeks to adduce were copied to Mr Melton Aru, who was a witness actually called at the hearing by the Republic of Vanuatu. Reasonable diligence should have uncovered the evidence.

7. Nevertheless, in this exceptional case we have decided to allow the evidence to be adduced. This is first because the new evidence seems to us to be uncontestable. It is a matter of documentary record. Second, because of the high degree of relevance to the evidence and the need for the credibility of the Court's judgments to be maintained. Potentially it could mean that the respondents are not entitled to any damages. Third, because we are surprised that the VIPA document were not produced by the respondents, although we note the submission that the broad circumstances were referred to in Court.

8. This evidence might also mean that the default judgment was wrongly obtained. The appellant may choose to apply to set aside that default judgment.

9. However, these are matters for the future. We record that despite its apparent high relevance, it is possible that in the end it does not change anything and that the Supreme Court judgment stands. That is certainly the submission of Mrs Harrison for the respondents. Mrs Harrison made it plain that she would have difficulties in preparing a prompt response to the evidence. While wanting to retain the judgment, she did not argue against a re-hearing if the new evidence was admitted.

10. It does seem to us that to deal with the new evidence will require further evidence on the part of the respondents. In our view the only way to deal with the evidence in a way that is fair to both parties is for us to remit the proceeding back to the Supreme Court for a re-hearing. The delay will be relatively short. The judgment was only issued on 31 August 2021. The only alternative would be for this Court to effectively re-hear the case, and deal effectively at first instance with the new

[1] See the discussion in the English case of *Ladd v Marshall* [1971] AC 666 at 676

[2] *R v Bain* [2004] 1 NZLR 638 at para [22] (this was a criminal case but the lack of immutability also applies to civil cases)

evidence and the evidence in reply filed for the respondents, which could be extensive. That is not the function of this Court.

11. Counsel do not suggest that the trial judge could not re-hear the case. It is possible that much of the evidence previously adduced that is not in contention can be admitted by consent.

12. We propose therefore to grant the application for leave to adduce the further evidence. This must mean that the present judgment has to be set aside, so that the new evidence can be tested, and any new evidence filed in reply can also be tested. It may well mean that the ultimate Supreme Court judgment is different from that of 31 August 2021.

Result

13. We therefore, subject to the costs condition below, admit the new evidence, allow the appeal, and remit the existing proceeding back to the Supreme Court for a further hearing as to the quantum of damages.

Costs

14. However, as a condition of this order, made at the request of the Republic of Vanuatu, it must meet all the respondents' legal costs and disbursements incurred to date in the Supreme Court hearing and this Court of Appeal hearing. These orders are conditional on those costs being met.

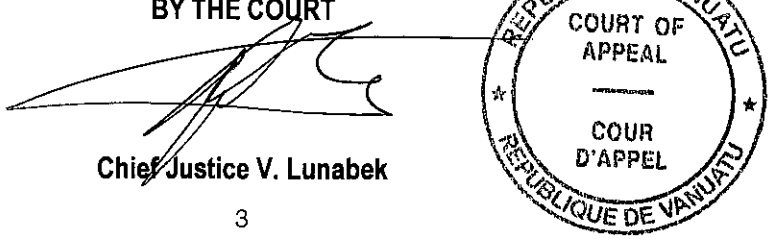
15. We appreciate that this will involve Mrs Harrison, who has not yet rendered a bill, rendering an invoice for her time and the disbursements incurred. The charges should be reasonable and consistent with fees charged generally for this type of litigation.

16. We make a costs order of this type because in our view there is no excuse for the Republic of Vanuatu to have failed to come up with this evidence. It may have been the fault of VIPA in refusing to cooperate, but the responsibility must ultimately rest with the Republic. VIPA is an agency of the Republic. Whatever the ultimate outcome, it would be unfair for the respondent to have to meet two sets of costs and not one, because of the Republic's error.

17. In summary, the reasonable costs of the respondents' to date are to be treated as costs awarded against the Republic of Vanuatu, and must be paid immediately by the Republic before the orders allowing the appeal and other orders have effect. If these costs cannot be agreed they can be taxed. The taxation will be on an indemnity basis.

DATED at Port Villa this 19th day of November 2021

BY THE COURT



Chief Justice V. Lunabek