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

Civil Appeal
Case No. 24/3301 COA/CIVA

BETWEEN: **Jerome Natu**
Appellant

AND: **Michael Siba and Arthur Nasia**
Respondents

Date of hearing:	***Tuesday 7th May 2024***
Coram:	***Hon Chief Justice Lunabek*** ***Hon Justice J von Doussa*** ***Hon Justice R Asher*** ***Hon Justice O Saksak*** ***Hon Justice D Aru*** ***Hon Justice E P Goldsbrough*** ***Hon Justice W K Hastings***
Counsel:	***M. Manuariki for the Appellant*** ***R. Tevi for the Respondents***
Date of Decision:	***Friday 17 May 2024***

JUDGMENT OF THE COURT

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1. Jerome Natu, the Appellant, previously held a lease over Biria custom land on the island of Santo. That land was eventually acquired from him by a compulsory purchase for the purposes of extending Pekoa airport. He received a substantial sum by way of compensation from the government.

2. The two respondents to this appeal, Michael Siba and Arthur Nasia, were part of a larger group of people who brought an action in the Supreme Court against the Appellant for compensation for damages. Each of them had at one time occupied part of the land acquired, and each believed that they should receive a share of the compensation paid under the land acquisition process to represent their loss.

3. During that claim, several claimants withdrew from participation as their claims were either settled in full or settled to their satisfaction, leaving only these two respondents when judgment on the claim was delivered. Judgment was entered for the respondents in the sum of VT3,253,125 in respect of parcel 04/3022/594 for Michael Siba and VT332,498 for 04/3022/594 and 04/3022/596.

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for Arthur Nasia. That latter amount represented what Mr Nasia described as the '*shortfall*' as he had been paid a major part of his claim at an earlier time.

4. Both Respondents moved onto this land after signing a Sale and Purchase Agreement with JBN Estate in 2014. However, the terms of those agreements, which are identical and set out in JN2 to the sworn statement of the Appellant of 8 September 2021, were not complied with. The agreements stipulated monthly instalments and a balance of the purchase price to be paid on or before May 2017. Unfortunately, neither the instalments nor the balance of the purchase price were paid, leading to eviction proceedings initiated by the Appellant against Arthur Nasia and others. Notably, these proceedings did not include Michael Siba, who had already vacated the land and relocated to Port Vila at the time of the proceedings. The eviction proceedings were filed in the Supreme Court on 21 April 2017.

5. References in the judgment of 31 October 2023, the subject of this appeal, to the respondents as trespassers, must be read in the above context. The trial judge was invited to make orders in favour of the respondents based on the valuation report from the government that had identified the various heads of compensation payable attributable to the various subdivisions. At this point, it is necessary to consider the individual claims and circumstances of each of the two respondents.

Michael Siba

6. Michael Siba claimed only that which he submitted had been spent by him on improvements to the land whilst he occupied it. That claim accorded with the report of the government valuers that identified an incomplete 7 bedroomed house having been constructed on this parcel of land. It did not include, for example, agricultural or forestry improvements. A value of VT3,253,125 was put on the incomplete house by the government valuation and this is the figure claimed by this respondent. No issue was taken by either party on this figure.

7. By the time of the compulsory acquisition, the same parcel of land and the same incomplete house had been sold by the Appellant to another, Michael Siba having long since abandoned the property. In his defence, the Appellant submitted that the property had been sold to another by the time of the acquisition and any right of this respondent to compensation had been extinguished.

8. In the judgment, the claim was upheld. The trial judge found that the Respondent had made the improvements and was entitled to be compensated. This is the subject of the appeal.

Arthur Nasia

9. Mr Nasia claimed nothing more than what he identified as a 'shortfall' in his compensation. He agreed, as did the Appellant, with the government valuation figures. The two valuations showed a total amount payable of VT5,491,000. From that, he agreed that the Lessee's interest was not payable to him (being a total of VT3,126,000), leaving VT2,365,000. He accepted that he had

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received VT2,232,852. That left a balance of VT132,148. In the judgment, different figures appear as the trial judge in paragraph 31 mistakenly arrived at VT1,557,000 rather than a correct figure of VT1,357,000. This concession was agreed on the appeal with the assistance of counsel.

10. In his claim, Mr Nasia did not set out any specific figure. The claim was for a total amount that covered all of the original claimants. In his statement, Mr Nasia said he had received less than the full total amount in the government valuation. Those concerned with figures should not be concerned as the decision on this appeal is not based on mathematics but on a question of principle.

11. The shortfall comprised reductions in the total amounts made by the Appellants who felt entitled to reduce the amount payable for the hardship caused by acquisition. The effect of that reduction was to bring the total payable, and indeed the total paid, down by VT427,000.

12. This respondent had received, and acknowledged receiving VT2,232,252, when he signed a disbursement advice on 3rd March 2021. He signed two documents, one for each parcel of land that he had occupied, and both of those documents are exhibited to his sworn statement at AN2 and appear on pages 55 and 69 of the Appeal Book. In that sworn statement, the Respondent raises the issue of the shortfall, explaining that he believed he should receive the total as set out in the valuation and that no one had explained to him that he was not receiving that same total.

13. The trial judge found that the Appellant was not entitled to make that reduction from the valuation provided in the report and ordered payment accordingly of the '*shortfall*'.

Discussion

14. This trial heard no *viva voce* evidence. The parties had filed sworn statements, and although there were disputed facts, neither counsel gave notice to cross-examine or raised the issue of cross-examination with the trial judge. In those circumstances, it is difficult to see how the trial judge could make findings, let alone for counsel to raise issues of disputed fact on appeal.

15. Starting an appeal is still governed by the Court of Appeal Rules of 1973. Several of them were not complied with by the Appellant. The Notice of Appeal filed was lacking in that it did not set out any grounds of appeal (Rule 5). The grounds of this appeal remain unfiled and only appear in a submission made on 23 April 2024. The defective Notice of Appeal was filed on 30th November 2023. There is still nothing setting out what final order is sought on appeal (Rule 19).

16. No complaint was raised by counsel for the Respondents. Submissions in response to the late appeal grounds were filed and available to this Court at the hearing. In those circumstances, the effect of non-compliance was effectively waived (Rule 18). It is unwise for counsel to rely on a waiver rather than comply with the relatively simple rules. Equally, counsel are encouraged to comply with directions made for the management of the appeal, rather than filing a memorandum setting out how a cancelled flight caused submissions to be received late, when those submissions were weeks overdue before despatch.

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Michael Siba

17. In the case of the Respondent, Michael Siba, by the time of acquisition, he had long gone from the land. This fact does not appear in his sworn statement but in submissions from his counsel where it is admitted. That submission goes on to maintain that, even though he had left the property, he was still entitled to the development he made on the land. The value of the development was not in dispute, nor the fact that he was responsible for it.

18. The only timing possible to attribute to the vacation of the property by Michael Siba was that he was gone before eviction proceedings were begun in June 2016 (although not filed until April of the following year). The compulsory acquisition process appears to have begun in 2017, with the valuation report dated March 2019. The proceedings to recover this loss were begun in May 2021. Given that the development must have taken place between 2014 and 2016, it had occurred at least five years before the proceedings commenced and had been abandoned for the same five-year period. In the intervening time, the land had been made the subject of a lease to another.

19. At the hearing and accepted by the judge, this Respondent maintained that even though he had vacated the property and abandoned his development of it, he remained entitled to compensation. This was a fixture on the land, and so belonged to the lessee, and any right to claim from that owner for the improvement was long extinguished prior to 2021, when this claim was filed. We, therefore, conclude that this submission cannot be upheld.

20. We also note that the Sale and Purchase Agreement, which the Respondent signed, provided at paragraph 4: -

> *"It is further agreed between the parties that the Purchaser, on execution of the Agreement have the right to use this land for temporary purposes such as Vegetable gardening and but the Purchaser must not invest in permanent development on or to the subject land until such time ownership of the title is transferred to the Purchaser."*

21. The building of the house was a breach of that agreement, the very agreement giving the Respondent the right to occupy. It is difficult to see how he could recover his loss when he embarked upon an activity specifically prohibited in the agreement he signed.

22. For those reasons, the appeal in respect of Micheal Siba must succeed.

Arthur Nasia

23. Again, there is no dispute that the amount handed over to Mr Nasia was less than the government valuation. The figures appear clear. He received less than the total because of a deduction made by the Appellant. At the time that he received his share of the compensation for the two parcels of land, he signed an acknowledgement that it was in full and final settlement of any claim he might have against the Appellant.

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24. Given that document, to succeed in his claim, the Respondent must show bad faith on the part of the Appellant. Only with that proved to the requisite standard can his claim succeed. The trial judge found that bad faith had been shown. We respectfully disagree.

25. There is little, if any, evidence of bad faith. From his statement, the Respondent had access to both the Government Valuation and a document setting out what he was to receive from the Appellant. Signing, as he did, a waiver on receipt of the lesser amount in the knowledge that it was not the full amount and saying nothing at that stage is not evidence of bad faith on the part of the Appellant. There is no other evidence to rely on to establish bad faith. Whilst one might not agree with the decision made by the Appellant to reduce various heads of compensation, that is far from showing that he acted in bad faith when entering into the settlement with this Respondent.

26. For that reason, the appeal on this ground must succeed.

Decision

27. The appeal is allowed. The decision of the Court below to award damages to Michael Siba and Arthur Nasia is set aside, as is the order for costs in the Court below. Costs in the court below are to be paid by the two Respondents on this appeal, formerly claimants to the present Appellant, who was then the defendant, to be agreed upon or taxed.

28. We have considered whether the costs on this appeal otherwise payable to the successful Appellant should be reduced given the failure of counsel properly to conduct this appeal. As that failure was not the responsibility of the Appellant, we determined not to do so but alert counsel to the future possibility. Costs of this appeal in the sum of VT 100,000 are to be paid by the Respondents to the Appellant.

DATED at Port Vila, this 17th day of May, 2024

BY THE COURT

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Hon. Chief Justice Vincent Lunabek

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