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IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU **Civil Case No.308 of 2014**
(Civil Jurisdiction)

BETWEEN: JIMMY TOARA as Administrator of the Estate of Late TOARA SEULE
Claimant

AND: VANUATU PROJECT MANAGEMENT UNIT
First Defendant

AND: REPUBLIC OF VANUATU
Second Defendant

Coram: ***Mr. Justice Oliver A. Saksak***

Counsel: ***Eric Molbaleh for the Claimant***
Sakiusa Kalsakau for the Defendant

Date of Hearing: ***20th September, 2016***
Date of Judgment: ***12th December 2016***

JUDGMENT

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1. The Court heard evidence from witnesses for both the claimant and the defendants on 20th September 2016 and reserved judgment pending the Parties Counsel filing written submissions within 21 days by the claimant, and within 14 days by the defendants. No such submissions have been filed and the Court now dispenses with them due to the delay of more than two months.

2. The claim is a simple claim for an unpaid Invoice dated 6th July 2010 issued by the late Toara Seule in respect of coral or limestone extracted from the Epule Quarry. The quantity extracted was 86.475 m3 multiplied by VT 10.000 per cubic metre. The total amount claimed was VT 864.750.000.

3. The claim was initially filed by Leo Lawyers on 10th October 2014. The claimant passed away on 13th December 2014. In May 2015 the deceased's son Jimmy Toara applied for letters of administration over the estate of his late father. Administration was granted to him on 25th May 2015.

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4. Mr Colin Leo then fled an application for leave to amend the original claim on 22nd June 2015. Leave was granted on 28th July 2015. And an amended claim was filed. Substituting the claimant's name with "Jimmy Toara as lawful administrator of the estate of late Toara Sueule", as the claimant. This was the only change made to the original claim.

5. The amended claim was served but the defendants failed to file defences within the periods allowed by the Rules. The claimant then applied for a default judgment. Counsel had then changed to Eric Molbaleh of Lent Tevi & Associates.

6. Default Judgment was entered on 11th November 2015 for the total sum of VT 865.273.000. The defendants then applied to have the default judgment set aside, which application was heard on June 2016. And on 16th June 2016 the Court published its reasons for its oral decision allowing the application and setting aside the default judgment on 10th June 2016.

7. The case was then managed to the final hearing on 20th September 2016, when the Court received evidence from Jimmy Toara as the only witness for the claimant, and from Jean Marc Pierre and Johnson Wabaiat as witnesses for the defendants.

8. The claimant confirmed and relied his sworn statements filed on 12th August 2015 (Exhibit C1) and the Statement filed and dated 24th September 2014 (Exhibit C2).

9. The defendants relied on the sworn statement of Jean Marc Pierre filed on 20th July 2016 (Exhibit D1) and of Johnson Wabaiat filed on 9th August 2016 (Exhibit D2).

Discussions

10. The claimant relies heavily on a document he refers to as a subcontract signed by his late father with the Millenium Challenge Account Vanuatu (the MCA) on 3rd September and 7th September 2009. He annexes this document as "JT2" to his sworn statement dated 24th September 2015.

11. The claimant's late father signed under the Headings "leaseholder" and "custom-owner". However the spaces provided for "designations" are not completed or filled in. By comparison with the Agreement for Access dated 21st August and 24th August 2009 attached to the annexure "JT3", the Agreement (" JT2") is incomplete.

12. What this document really is is an Agreement for Access and Temporary Occupation of Land. The claimant's late father represented himself purportedly as leaseholder and custom owner.

13. It is an undisputed fact that the late Toara Seule was leaseholder of title 12/0431/001 from September 1988. However he transferred that lease to Tropical Sea Breeze Estate Ltd (the Company) on 17th October 2006. The deceased owned shares in the Company and was one of the directors of the Company.

14. But his status as a custom owner is in doubt. If the claimant is to succeed in his claims he has to show evidence of custom ownership of the land his late father was once the lessor but was no longer at the time of his death.

15. The evidence of Johnson Wabaiat disclosed the decision of the Efate Island Court in Land Case No. 3 of 1985 annexed as "JW8" to his sworn statement (Exhibit D2). The declared custom owner of the land on which quarrying was done is Chief Manukat & Family. The case lists Families and Chiefs who were claimant and counter-claimants. The deceased, the late Toara Seule is not named as a counter-claimant or claimant.

16. Following that decision Chief Manukat and Family were paid the sum of VT 11.299.596 in January 2013 as royalties in respect of material extracted at Epule Quarry on Wanakopa land. A Deed of Release to that effect was signed and is annexed "JW7" to the sworn statement of Johnson Wabaiat (Exhibit D2). That sum represents 40% of the royalties.

Relevant Law

17. The relevant law to be applied is section 67 of the Mines and Minerals Act [CAP 190] (the Act). From the facts not in dispute, MCA had a valid Quarry Permit issued by the Commissioner pursuant to section 62 of the Act.

18. Section 2 of the Act vests all property in minerals in their natural conditions on the Republic of Vanuatu.

19. Section 67 of the Act makes provision for royalty payments. Subsection (1) states:

> *" Subject to this Act, the holder of a mining licence shall in accordance with his licence and this Act, pay to the Republic royalty in respect of minerals recovered by him in the mining area."*

20. Subsection (6) States:

> *" There shall be paid to the custom owners of the land and to the Local Government Council of the local Government Region from which the minerals or building materials come an amount not exceeding 40 percent and 20 percent, respectively out of the revenue received in respect of royalties in each particular case in accordance with this section."*

21. Subsection (7) states:

> *" In subsection (6), " custom owners" shall have the same meaning assigned thereto by section 72."*

22. Section 72 of the Act states:

> *"Custom owners" means the person or persons who in the absence of a dispute, the Minster responsible for land is satisfied are the custom owners of land."*

23. Wanakopa Land on which Epule Quarry is located was disputed and determined in the Efate Island Court and therefore it appears it does not fall within the definition of custom owners under section 72 of the Act. However payments of royalties were made under the Deed of Release to Chief Manukat and Family in January 2013. That was some two years after the decision of the Efate Island Court was made on June 2011. Absent any appeal, there was no longer any dispute and as a result payments of royalties were made to Chief Manukat and Family as the declared custom owners.

Conclusion

24. Having found as I have, I arrive at the conclusion that the claimant has no standing to claim for royalties as he nor his late father are the declared custom owners of the land on which the Epule quarry is situated. His claims are therefore misconceived.

The Result

25. The claims of the claimant fails and they are dismissed in its entirety.

Costs

26. This is a case where in my view there should be no order as to costs. Each party is to bear their own costs.

DATED at Port Vila this 12th day of December 2016

BY THE COURT

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OLIVER.A.SAKSAK

Judge