

IN THE SUPREME COURT  
OF THE REPUBLIC OF VANUATU  
(Civil Jurisdiction)

Enforcement  
Case No. 212 of 2017

**BETWEEN: BANK SOUTH PACIFIC**

Applicant/Interested Party

**AND: IFIRA PORT DEVELOPMENT AND  
SERVICES COMPANY LIMITED**

First Respondent/Judgment Creditor

**AND: FLORAL KALSAL**

Second Respondent/Judgment Debtor

**Date of Hearing:** 17<sup>th</sup> September, 2018  
**Delivered:** 26<sup>th</sup> April, 2019  
**Before:** *The Master Cybelle Cenac-Dantes*  
**In Attendance:** *Abel Kalmet counsel for the Judgment  
Creditor, Garry Blake counsel for the  
Interested Party*  
**Present:** *Floral Kalsal, Barnabas Hinge  
representing his mother Bride Hungai  
as purchaser*

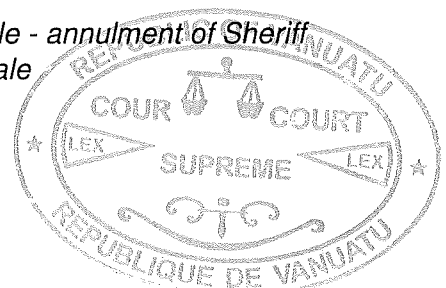
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## JUDGMENT

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### Headnote

*Application to add an interested party – formalities of a Sheriff sale - annulment of Sheriff  
Sale – extinction of encumbrances on Land Register by Sheriff sale*



## INTRODUCTION

It is unusual for me to have a delay of the delivery of my judgments by 7 months but it could not be helped due to my taking maternity leave immediately following the hearing of the application.

My oral decision in this matter was delivered on the same day of hearing and I promised counsel to reduce my decision and reasons into writing. At the behest of counsel for the interested party I indicated that I would include certain statements regarding the process of judicial sales conducted in the jurisdiction for the purpose of elucidating a most opaque area of the rules.

My order was as follows:

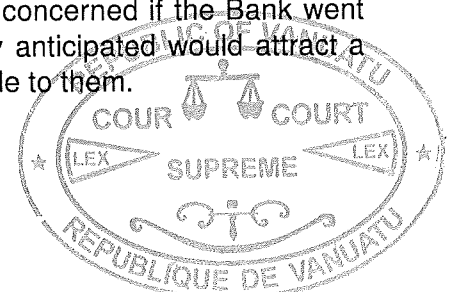
1. That application for BSP to be added as an interested party is granted.
2. That Sheriff Sale of the 16<sup>th</sup> August, 2018 is declared void and therefore any order suspending enforcement proceedings is now moot.
3. That renewal of enforcement warrant granted on the 13<sup>th</sup> July, 2018 to expire on the 13<sup>th</sup> September, 2019 is withdrawn by the court as incompatible under Part 14.11(2) of the CPR with the mortgagee sale order granted to the interested party BSP in CC 3610 of 2016 on the 30<sup>th</sup> March, 2017 by Justice Saksak.
4. That the sale price of VT5 million to be returned to the purchaser Bride Hungai forthwith by the Sheriff's office.
5. That no further enforcement proceeding is to take place until after the mortgagee sale is executed.
6. That matter listed for status update before the Master on the 22<sup>nd</sup> April, 2018 at 9 a.m.

This matter was initiated by an application by the interested party, filed on the 12<sup>th</sup> September to be added as a party, along with a second application of the same date to annul the sheriff sale of the 16<sup>th</sup> August, 2018 and suspend enforcement proceedings. Both applications were supported by the sworn statement of Evelyn Blake of even date.

The matter was dealt with as an urgent hearing as the sale of the property had already been concluded on the 16<sup>th</sup> August with the monies held in the Chief Registrar's trust account for dissemination. All parties were notified by the court, including the purchaser Ms. Bride Hungai of the hearing date. Ms. Hungai sent her son Mr. Hinge to represent her interests.

Mr. Hinge being unrepresented was briefed by the court on the nature of the hearing and of his right to request time to retain an Attorney. Mr. Hinge did not request the time but indicated to the court that his mother and himself were not contesting the return of the property to the debtor but were only concerned with whether the sale price of VT5 million would be returned to them. The court informed him that if the outcome of the hearing was to annul the sale then an order would follow that the funds be returned forthwith. He appeared satisfied with that outcome.

The creditor offered no objection to the possibility of the sale being annulled. Their reason was, that as they did not rank in priority for payment they were aware that they would receive no payout as the sale price was clearly insufficient to cover even the debt of the interested party. They felt it would be in the best interest of all concerned if the Bank went ahead to execute under their mortgagee sale order which they anticipated would attract a higher price and hopefully allow for a surplus payment to be made to them.



The court being unconvinced of the merit of the applications, despite both Respondents' non-objection, proceeded to hear them in full. The application to be added as an interested party was heard first and granted. The second application was presented by counsel for the interested party on the grounds that the sale had to be annulled for failure of the Sheriff to observe certain essential formalities under the Civil Procedure Rules (CPR) in order to obtain the best possible price which directly prejudiced his client as the sale price obtained did not meet or come sufficiently close to the market value of the property to satisfy their debt.

Counsel for the interested party, referring to his application indicated to the court, that the Sheriff was obligated to seek their consent prior to finalizing any sale at which time the insufficiency of the purchase price would have been raised and consent denied.

The court asked both counsel to address it on the nature of the title passed from the Sheriff to a purchaser and the possibility of such a sale having the effect of extinguishing all encumbrances against the property, thereby passing a title to a purchaser free and clear. Neither counsel was able to address the court on the point of law, but counsel for the interested party did indicate that it might be useful if the court could offer some guidance in such matters as there appeared little to no case law in Vanuatu capable of illuminating Rule 14.18.

My judgment therefore will contain some discussion regarding the interpretation of the said Rule and the role of the Sheriff in operating under that rule.

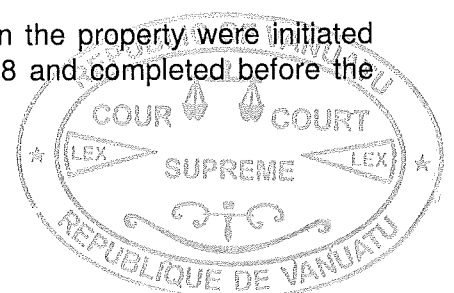
## **BACKGROUND FACTS**

The judgment creditor obtained default judgment against the debtor on the 22<sup>nd</sup> July, 2016 under order of Justice Aru in the amount of VT4, 586, 608 with interest at 5% per annum from 11<sup>th</sup> May, 2016. An application filed on the 7<sup>th</sup> February, 2017 for enforcement warrant was sought following breach of enforcement order of the 30<sup>th</sup> August, 2016. A warrant was granted on the 20<sup>th</sup> April, 2017 to expire 21<sup>st</sup> April, 2018 (the First Warrant) wherein the creditor Ifira at paragraph 3 and 4 stated that the proceeds of sale are to first be paid to BSP (the interested party in these proceedings) and any surplus to the creditor. An application to renew the warrant was filed on the 27<sup>th</sup> March, 2018. The Application to renew was granted on the 13<sup>th</sup> July, 2018 to expire on the 13<sup>th</sup> July, 2019 (the Second Warrant). It was an exact replica of the First Warrant.

It is to be noted that prior to the grant, a report of the 23<sup>rd</sup> April, 2018, 9<sup>th</sup> July, 2018 and 12<sup>th</sup> July, 2018 from the office of the Sheriff all indicated that Notice of Seizure was effected one day prior to the expiration of the First Warrant (the 20<sup>th</sup> April, 2018). The process of execution; advertisement, tender etc. continued unobstructed from the 23<sup>rd</sup> April, 2018 till the grant of the Second Warrant. According to the final report of the Sheriff of the 20<sup>th</sup> August, 2018 tender notices were posted via government email, judiciary website and Au Bon Marche Supermarket at Manples, Freshwota, Namba 2 and Market Place. Seven (7) tenders were put in and on the 17<sup>th</sup> May, 2018 the Tender Board Committee met and selected the following bids:

- Vevi Rennie VT 9 million
- Mr. Morris Charley VT6 million
- Bride Hungai VT5 million

All these acts, save for the posting of the notice of seizure on the property were initiated after the expiration of the First Warrant on the 21<sup>st</sup> April, 2018 and completed before the



renewal of the Second Warrant on the 13<sup>th</sup> July, 2018 which was, according to the report, received by the Sheriff's office on the 17<sup>th</sup> July, 2018.

On the 3<sup>rd</sup> March, 2017, about 6 weeks prior to the grant of the First Warrant to the creditor Ifira, BSP was granted a judgment for mortgagee sale in Civil Case 3610 of 2016 by Justice Saksak of the same leasehold title in relation to a different debt owed by the debtor.

## ISSUES

The issues to be addressed by this court are:

1. Were the formalities for sale under the CPR observed by the Sheriff?
2. Was the Sheriff required to seek and obtain the consent of the interested party before completing the sale?

The formalities of a sale under seizure must adhere to the following guidance under CPR 14.16, 14.17 and 14.18:

1. There must be an existing enforcement warrant.<sup>1</sup>
2. The sale must be conducted by an enforcement officer only.<sup>2</sup>
3. The sale must be publicly advertised.<sup>3</sup>
4. Unless stated otherwise the Sheriff must conduct the sale by public auction.<sup>4</sup>
5. The best possible price must be obtained.<sup>5</sup>
6. The sale must be adjudged to the highest bidder.<sup>6</sup>

### 1) *Were the formalities for sale under the CPR observed by the Sheriff?*

Looking to the formalities implicit in a sale, and examining the facts, one could say that only 4 of the 6 essential formalities were satisfied:

- (1) The sale was conducted by the Sheriff, an enforcement officer.
- (2) The sale was publicly advertised, albeit not in strict compliance with Rule 14.19(1), that is, that there was no advertisement via newspaper or radio or posted at the court office or police station. Notwithstanding, the purpose was achieved, which was to bring it to the attention of the public.
- (3) The sale was conducted by public tender as instructed to be done by the court, and
- (4) Being aware that the first two bidders offering VT9 million and VT6 million respectively were unable to pay, the property was adjudged to the remaining highest bidder Bride Hungai for VT5 million.<sup>7</sup>

In spite of the above, it would appear that the Sheriff is nonetheless guilty of a double fault; he proceeded to execute an expired warrant and failed to obtain the best possible price. The question for this court then is whether the absence of these two formalities is sufficient to justify the annulment of the sale.

<sup>1</sup> CPR 14.16(1)

<sup>2</sup> CPR 2002, 14.16(2), 14.17, 14.18(1), (*Financiere du Vanuatu Ltd v Morin*, 2008) VUCA 4; Civil Appeal Case 05 of 2008 (30 April 2008) p. 5

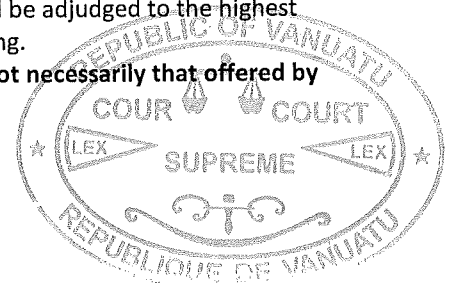
<sup>3</sup> CPR 14.19

<sup>4</sup> CPR 14.18(1)

<sup>5</sup> CPR 14.18(3)

<sup>6</sup> CPR 14.18(3); the Rule does not specify that property is to be sold to the highest bidder but inclusive in the phrase "must do everything practicable" is the expectation that the property will be adjudged to the highest bidder. Further, it is the practice of the court to do so based on this understanding.

<sup>7</sup> According to *Keightley v Birch* (1814) 3 Camp 520 at 523-4; "The best price is not necessarily that offered by the highest bidder when this is well under value."



### (a) Annuling a Sheriff's Sale

There is currently no provision under the Rule or under Statute that stipulates criteria that the court should look to if asked to annul or void a Sheriff sale and neither counsel has provided nor has the court been able to obtain relevant case law for the jurisdiction. As the court is charged with assigning remedies occasioned by breaches of the law, it will be necessary to use, as a comparative aid, relevant statute and case law from foreign jurisdictions which share a commonality with Vanuatu.

As countries more and more seem to share similar problems, courts are frequently looking to other jurisdictions to understand their approaches and views on legal challenges. This type of approach has become increasingly easier to accommodate due to the ready access of online reports from numerous jurisdictions.

One must be mindful though of a tendency to an overuse of such judgments. Therefore, I am guided by the main thrust of certain criteria as set out in Practice Direction<sup>8</sup> out of the UK on the use of foreign judgments, particularly in lower courts: that the authority must bring something to the body of law that cannot otherwise be found in its own law.

I am of the view that such material must be used considerately, and when properly applied can assist in illuminating our understanding of our own laws and procedures.

**Lord Bingham** himself is of the opinion that *“the law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, a decision is given in this country which offends one’s basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question. In a shrinking world ... there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.”*<sup>9</sup>

Vanuatu has the peculiar circumstance of maintaining a bijural system, wherein both the English Statutes and French Civil Code make up the whole of the law of Vanuatu since independence<sup>10</sup>. This calls for an interaction between the two and a harmonization in spite of potential conflicts that may arise.

The learned Justice Harrop in the matter of **MM**<sup>11</sup> invoked consideration of both the English and French statute and found that neither law was afforded primacy of place over the other, as together they both formed the whole of the law of Vanuatu. His position is fortified by the Constitution of the Republic of Vanuatu at Article 95(2) which states that:

*“Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu.....”*

In the case at bar there is no conflict between the two laws. It is simply a case of the absence of any provision in Statute or the Code.

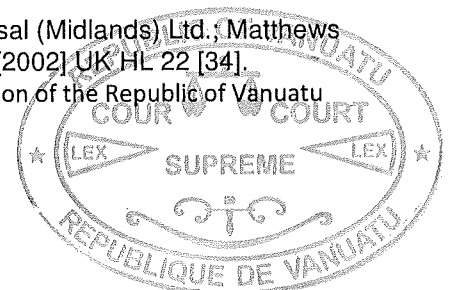
<sup>8</sup> Practice Direction of 9<sup>th</sup> April, 2001,

<https://webarchive.nationalarchives.gov.uk/20110204002153/http://www.hmcourts-service.gov.uk/cms/814.htm>

<sup>9</sup> Fairchild v. Glenhaven Funeral Services Ltd. and others; Fox v. Spousal (Midlands) Ltd.; Matthews v. Associated Portland Cement Manufacturers (1978) Ltd. and others, [2002] UK HL 22 [34].

<sup>10</sup> MM, Adoption case 3 of 2014 [VUSC 78] and Section 95(2) of the Constitution of the Republic of Vanuatu

<sup>11</sup> Ibid



Therefore, in an effort to formulate settled criteria to be considered in any application to annul or void the sale of the Sheriff I have looked to the jurisdictions of Canada and Saint Lucia which share a similar bijural system with Vanuatu.

**Article 558 of the French Civil Code of Saint Lucia** provides that, *“where there has been a failure to observe essential conditions and formalities the judicial sale may be annulled.”*

Out of Quebec the case of **Garcia**<sup>12</sup> refers to **Article 698 of their Code of Civil Procedure:**

*“A Sheriff’s sale may, at the instance of an interested party, be vacated:*

*(1) If, with the knowledge of the purchaser, fraud was employed to keep persons from bidding;*

*(2) If the essential conditions and formalities prescribed for the sale have not been observed.....”*

I have taken the time to look up the amended **Code of Civil Procedure for Quebec (Art. 735)** and there is no material difference between the amended procedure and the former.

I find the case of **Garcia** helpful in its discourse on the indefeasibility of a Sheriff sale which is of import in understanding the inviolability of a such a sale before any attempt is made to annul it.

*“Titles granted by Sheriff Sales in Quebec’s civil law are treated with a considerable degree of respect and courts do not tamper with them lightly. Strict rules govern them and stringent conditions must be met to vacate them....”*<sup>13</sup>

*“Given their role in the execution of Judgments and the rights conferred by them, as well as the necessity of guaranteeing the stability and certainty of titles, sheriff’s sales cannot be easily attacked.”*<sup>14</sup>

The case of **Morille** out of Saint Lucia instructs, that *“Given the strict formalities which precedes sheriff sales, and the relative comfort with which interested parties, most notably the owners of the property may oppose the seizure and sale before the latter takes place, a petition to vacate the sale will be scrutinized strictly and granted only exceptionally.”*<sup>15</sup>

In the above-mentioned **Morille** case, the learned Judge, in referring to the case of **Peter JnMarie et al v Winston Cenac et al and National Commercial Bank of Saint Lucia v Laurima Lowrie et al**<sup>16</sup> restated the finding of **Patton v Morin**<sup>17</sup>, one of the first cases to emphasize this point:

*“The importance of protecting the Sheriff’s sale should be emphasized. It attacks one of the most important acts of procedure of any court of record – the enforcement of its own judgment, and puts in issue not only the regularity of that procedure, but jeopardizes the rights of innocent third parties, who*

<sup>12</sup> Garcia Transport Ltee v Royal Trust Co. (1992) 2 SCR

<sup>13</sup> Ibid, p. 44

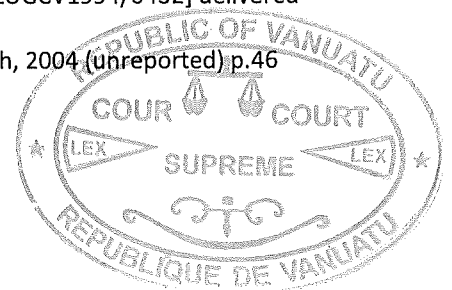
<sup>14</sup> Ibid, p.45

<sup>15</sup> FirstCaribbean International Bank (Barbados) Limited v Jacob Morille et al [SLUGCV1994/0432] delivered

17<sup>th</sup> September, 2004, Hariprashad-Charles J

<sup>16</sup> Consolidated claims No. 695 of 1995 and No. 789 of 1995, delivered 1<sup>st</sup> March, 2004 (unreported) p.46

<sup>17</sup> (1865) 16 L.C.R. 267 (Q.B.)



***purchase property put up for public judicial sale under all the solemnities and formalities of the law. So an attack upon the Sheriff's sale is to my mind, an attack upon a title conferred not just by an individual but by the justice system as a whole.***

It is plain to see therefore that both the jurisdictions of Quebec and Saint Lucia are firm in the shared position that an attack on a Sheriff's sale is an attack on the entire justice system, and as such, any challenge to vacate such a sale must demonstrate some serious breach.

The **Code of Civil Procedure** out of Quebec provides that a sale may be vacated in certain circumstances. The use of the word 'may' suggest a discretion to be exercised by the court in its assessment of any annulment. It is in consonance with common sense and the law then, that the absence of conditions and formalities does not necessarily void a sale; for e.g. if the warrant of execution specified that a sale was to be conducted by public tender and the Sheriff conducted it by public auction.

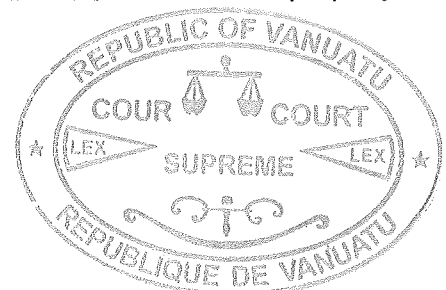
The exercise of a discretion would suggest some extrinsic consideration that was not written into the law which the court would have to bring to mind in its examination of the absence of one or more of the essential conditions. I am of the opinion therefore that part of the exercise of this discretion must be a consideration of that condition which the applicant alleges was breached. In so doing, the court would have to assess whether that condition went to the root of the sale. **Garcia** espouses that it is not enough to establish a breach, but that that breach must be considered in light of a real prejudice that has been suffered by the applicant. In fact, the amendment to the Code of Civil Procedure of Quebec refers to the annulling of a sale affected by an irregularity resulting in a serious prejudice.

In spite of the 4 conditions having seemingly been complied with by the Sheriff, it is difficult for the court to declare any compliance when the very basis of the compliance was fundamentally flawed. That is, that the Sheriff proceeded, after executing the First Warrant on the 20<sup>th</sup> April, 2017, one day prior to its expiry, to continue to proceed with and complete the execution under the expired warrant which was not renewed until after the sale was completed. The Sheriff simply lacked all authority to continue with the execution after the 21<sup>st</sup> April, 2017. All actions initiated after that date were void and of no effect and consequently no sale flowing therefrom could ever be deemed valid. There could be no greater flaw than the absence of a live warrant.

Notwithstanding my finding that the absence of a live warrant voided the sale, I will go further to address the prejudice that would have to be shown to be present in any application to annul.

**(b) What was the prejudice suffered by the creditor and debtor?**

**Rule 14.18(1)** gives the court the discretion to choose some other means for the property to be seized and sold other than by public auction. The rule though only prescribes the procedure to be followed as it relates to public auctions. In the absence of such direction the court would have to invoke **Rule 1.7** in giving specific directions as to the procedure to be engaged. I observe that save for the direction at paragraph 2 under the warrant, that the sale is to be conducted by public tender, there is no other guidance as to how this is to be effected and none was sought by the Sheriff in the execution of his duties. Notwithstanding, whatever procedure engaged by the Sheriff, one major formality needed to have been observed, that is, that at all times he had to do everything practicable to ensure the property was sold for the best price obtainable.



This point was clearly enunciated in the cases of **Cyrel v National Bank of Vanuatu**<sup>18</sup> and **Financiere du Vanuatu v Morin**.<sup>19</sup> In the case of **Cyrel** the court was to decide a Bank's duty of care to the mortgagor to obtain the best possible price of a property under public tender;

***"I am of the view that in the law of Vanuatu the appropriate duty of a mortgagee exercising its power of sale is to take reasonable care to obtain the best price reasonably obtainable at the time of sale."***<sup>20</sup>

In the case of **Financiere**, while the court was not called to address the issue of "best price obtainable" it did indirectly make the point that a warrant granted to the individual in the case did not require him "to get the best price reasonably obtainable....."<sup>21</sup>

The cases establish therefore that the criterion to obtain the best possible price is an essential ingredient to every sale. The Sheriff's neglect and breach of duty in not employing all reasonable means to obtain such a price must go to the root of the sale, and more particularly where prejudice directly follows. In fact, it is almost implicit that a failure to obtain the best possible price will directly prejudice both the creditor and debtor.

**Garcia** goes on at page 49 to elucidate why prejudice must be evident in any bid to annul a Sheriff sale.

***"Consequently, while it remains possible, it is only exceptionally that the vacating of sales at law will be permitted and then, only on certain limited and enumerated grounds. ...Article 698 allows "any interested person", including the debtor whose property is seized, to seek the vacating of a sheriff's sale on the grounds of fraud, or the non-observance of essential conditions and formalities prescribed for the sale. An informality will not generally give rise to the vacating of a sale, however, unless the petitioner can show that he or she was prejudiced by it: Fort Garry Trust Co. v Roberts Sprinkler Ltd., [1981] C.S. 905."***<sup>22</sup>

Therefore, while the duty to obtain the best price possible did not extend to the individual in the case of **Financiere**, there was always an expectation by the court that any warrant issued to an enforcement officer must be executed in such a way as to obtain the best possible price. In other words, the Sheriff has a far greater duty to obtain the best possible price than an individual seller.

The applicant was able to show, by production of a valuation from 2013 that the market value of the property then was VT11 million and the mortgagee sale value VT7.5 million. The applicant argued that it would be reasonable to conclude that there would have had to have been an increase to the value over the last 5 years and the court is prepared to accept this line of reasoning. The applicant submitted to the court its outstanding debt of over VT9 million, clearly demonstrating a huge gap between the price obtained by the Sheriff of VT5 million and the price that could have been obtained if the Sheriff had simply undertaken certain basic steps to assure a more favourable outcome.

From the report of the Sheriff it is clear that two very important steps were not taken that would have changed the outcome of the entire sale. There is no indication in the report of

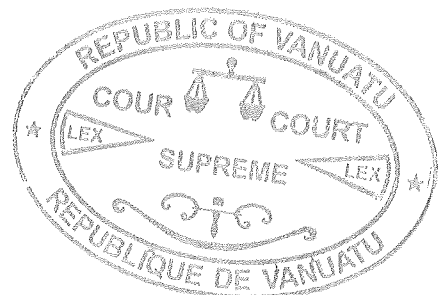
<sup>18</sup> [2008] VUSC 55; Civil Case 35 of 2006 (16 July 2008)

<sup>19</sup> [2008] VUCA 4; Civil Appeal Case 05 of 2008 (30 April 2008)

<sup>20</sup> Supra, n.18, para. 18

<sup>21</sup> Supra, n.19, p. 5

<sup>22</sup> Supra, n.11, p.49





the Sheriff that any valuation of the property had been undertaken nor a search at the Land Registry to ascertain any encumbrances against the property. This has to be an essential part of the process as the Sheriff's knowledge of the encumbrances against the property would be paramount to determining what would be a fair price.

Now, this is not to say that a fair price means that the Sheriff must obtain the market value of the property as this would be an unrealistic expectation. Indeed, there is almost an expectation that property subject to a Sheriff or mortgagee sale would be less likely to attract the exact market value price, but, armed with a valuation and the list of encumbrances the Sheriff would be in a position to determine whether a reserve price needed to be set by the court so bids could commence from a certain threshold and therefore be more likely to attract a price closer to market value or of sufficient value to satisfy or substantially satisfy the outstanding debts.

By so doing the applicant, as the interested party and a creditor was able to establish, to the satisfaction of the court that his client had suffered a direct prejudice in that, this being the only asset of the debtor they would be short at least VT5 million to satisfy their debt with no alternative means to recover the balance from the debtor who had neither additional assets or any or insufficient income. Further, the creditor Ifira, for whom the enforcement proceedings were commenced, would also clearly suffer a potential prejudice as there was no chance of them even being able to claim any surplus of funds from the sale.

In this case, a property worth in excess of VT11 million, with a single debt of VT9 million was sold for a mere VT5 million, insufficient to meet the debt of the first debtor BSP (the applicant), much less the second. Not only would this undoubtedly prejudice both creditors but also the debtor who would now have to be pursued for the balance of both debts personally even though she had a property that was able to comfortably pay off at least one of the debts. By the negligence of the Sheriff in inadequately performing his functions he directly prejudiced both creditors and the debtor in the process. In fact, by dint of his negligence the Sheriff has opened himself to a possible claim in damages.<sup>23</sup>

I pause here to say that it has always been a concern of mine that in Vanuatu neither creditor nor debtor ever applies to the court to set a reserve or upset price to guard their interest. In the absence of both law and procedure on who is responsible for obtaining a reserve price the practice has been that the Sheriff, after examination of the valuation and encumbrances register will determine the price at which he will commence taking bids. I think the time has come to consider the implementation of detailed rules to guide the Sheriff in his duties, provide certainty to creditors and debtors as to the procedure and so that the court may be assisted in its function when called upon to determine issues of this nature.

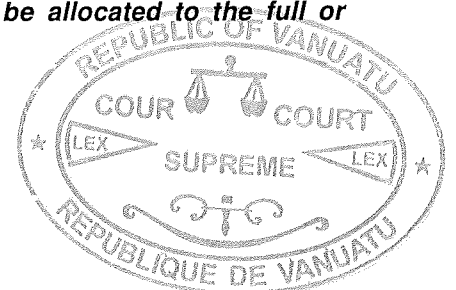
## **2. Was the Sheriff required to seek and obtain the consent of the interested party before completing the sale**

The applicant submitted that the Sheriff, before completing the sale had to obtain his consent as only the mortgagee could discharge his debt against the property.

**Articles 2475-2481 of Chapter VI, titled Redemption – Discharge of Privileges and Hypothecs** of the English translation as of 1<sup>st</sup> July, 2013 of the French Civil Code of Vanuatu reads as follows: -

**Art. 2475 - *If, on the occasion of the sale of an hypothecated immovable, all the registered creditors agree with the debtor that the proceeds shall be allocated to the full or***

<sup>23</sup> Bales v Wingfield (1843) 4 A&E 580; 114 ER 1016



*partial payment of their claims or of some of the claims, they shall exercise their right of preference on the price and may assert it against any assignee as well as any creditor attaching the claim on the proceeds.*

*Through that payment, the immovable is cleared from the right to follow attached to the hypothec. Without an agreement such as provided for in the first paragraph, the formalities of redemption are proceeded to in accordance with the following Articles.*

**Article 2477 - ..... The seller transfers to the buyer only the ownership and rights that he himself had in the thing sold: he transfers them subject to the same privileges and hypothecs with which the thing sold was burdened.**

**Article 2478 - If a new owner wishes to protect himself against the effect of the proceedings authorized in Chapter VI of this Title, he is bound, either before the proceedings, or within the month, at the latest, after the first demand is made to him, to serve on the creditors, at the domiciles they have elected in their registrations, notice of:**

- 1. An extract of his title, containing only the date and character of the act, the name and precise designation of the seller or of the donor, the nature and situation of the thing sold or donated; and where a set of things is concerned, only the general designation of the domain and of the arrondissements in which it is situated, the price and the costs forming part of the sale price, or the appraisal of the thing when it has been donated;**
- 2. An extract of the publication of the act of sale;**
- 3. A summary hypothecary status on formalities showing the real charges that burden the immovable.**

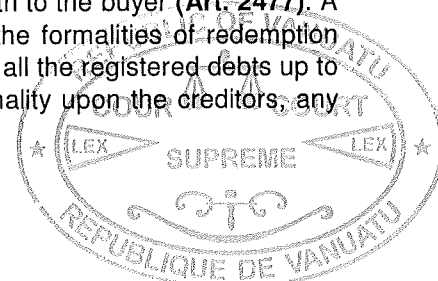
**Article 2479 – The purchaser or the donee shall declare, in the same act, that he is ready to pay, forthwith, the hypothecated debts and charges, up to the amount of the price, or, if he received the immovable by donation, to the value he has declared, without distinction between debts due or not due.**

**Article 2480 - When the new owner has served this notice within the time period fixed, any creditor whose title has been registered may require the sale of the immovable at public auctions and tenders, provided that:**

- 1. The request is served on the new owner within forty days, at the latest, of the notice served at his request;**
- 2. It contains a tender from the petitioner to raise the price, or to have it raised, to one-tenth above the price stipulated in the contract, or declared by the new owner;**
- 3. The same notice will be served within the same period of time on the previous owner, the principal debtor;**
- 4. The original and the copies of these notices are signed by the petitioner-creditor, or by one holding his express authority, who, in that case, is obliged to give a copy of his authority;**
- 5. He offers to provide a surety up to the amount of the price and charges. All of which, on pain of nullity.**

**Article 2481- If the creditors fail to require a sale by auction within the period of time and in the forms prescribed, the value of the immovable remains definitely fixed at the price stipulated in the contract, or declared by the new owner, who is in consequence freed from all privilege and hypothec, by paying the said price to the creditors as allowed according to their rank, or by consigning it.**

**Article 2475** empowers a creditor to follow a hypothec against an immovable if the debt has not been redeemed. To redeem that debt the debtor must agree with the registered creditors that following the sale of the immovable the debt will be paid. If there is no redemption then the seller transfers all his rights, together with all encumbrances which the property is burdened with to the buyer (**Art. 2477**). A new owner, in order to free himself of such burden must comply with the formalities of redemption (**Art. 2478**) and the new buyer must declare his intention to pay forthwith all the registered debts up to the amount of the purchase price (**Art. 2479**). Upon service of this formality upon the creditors, any



registered creditor may require the sale of the property at public auction or public tender (**Art. 2480**), and if the creditors fail to require such a sale within the stipulated time then the value of the immovable remains fixed at the purchase price or the donor valuation and the property is henceforth freed from all privileges and hypothecs upon payment of the price to the creditors in priority of ranking.

**Articles 2475-2481** set out a very distinct procedure for the discharge of privileges and hypothecs against immovables. I understand the Articles to provide for an agreement between creditors and debtor for payment of price in order for any charge against the property to be lifted. These are the conditions evident in a private sale transaction. The Code goes on to allow for circumstances where creditors disagree with the purchase price and have the option to force a sale by public auction or public tender which would then be accommodated under the provisions for forced sales. The Code goes on to provide that if creditors, with the option to force a sale fail to avail themselves of it then they are prevented from obstructing the new buyer from taking his title free and clear once the purchase price is paid to the creditors in order of ranking.

**The Code of Civil Enforcement Procedures** for France provides, at **Section 4** under **Common Provisions** that:-

***“The payment of the price or its deposit and the payment of the costs of the sale shall automatically purge the property of any hypothec and any lien on the part of the debtor as from the publication of the sales document.”***

This would be in conformity with the provisions of **Articles 2475-2481** of the Civil Code.

There must be something distinctly different between a voluntary private sale and a forced sale by the court. There must be something in the nature of a Sheriff's sale that distinguishes it from a private sale.

In a private sale the vendor or his agent can pass no more than the title and interest registered to the vendor. If encumbrances are not negotiated for the purpose of discharge then that title is passed subject to those encumbrances.

In a forced sale, under the authority of the court, and clothed in all its formalities the Sheriff is an independent agent of the court and must act in the best interest of both the debtor and creditor in spite of the fact that the creditor initiated the process. The court stands on impartial ground so that the rights of the debtor are protected against the potential greed of a creditor.

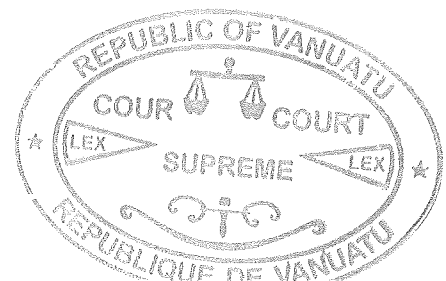
The case of **Anjou**<sup>24</sup> states that, ***“A Sheriff sale is a procedure which confers more absolute rights on the purchaser than a voluntary sale. It is preceded by strict formalities aimed at protecting the judgment debtor and the purchaser.....The adjudication of property under execution transfers the ownership thereof to the purchaser from the date, and that this principle is in the public interest.”***

**Garcia** fortifies the point in its finding that, ***“....a Sheriff's sale confers more rights upon a buyer than an ordinary sale, because it discharges the immovable from all real rights save those mentioned”***<sup>25</sup> in law.

The nature of a forced sale by public auction or public tender is that the sale must be concluded at the point when the Sheriff declares the highest bidder. There could be no other conceivably acceptable outcome as (1) the advertisement puts all registered and unregistered creditors on notice of the intended sale, allowing them the opportunity to either oppose the sale or produce their judgment to the Sheriff for payment prior to or following sale and (2) every legitimate bidder presents himself as a bona fide purchaser for value. The

<sup>24</sup> *Anjou (Town of) v C.A.C. Realty Ltd. et al* [1978] 1 SCR, p.4

<sup>25</sup> *Supra*, n.11, p.30



very nature of the contract being created between the successful bidder and the Sheriff is that the Sheriff offers a property for sale and the bidder conditionally accepts that offer by bidding, and if successful in his bid expects, once the gavel is lowered to receive, without conditions, that property.

Not knowing the outcome of any public auction or tender the rule could not contemplate that the Sheriff would be required to negotiate with all registered creditors prior to the sale or after in order that consents be obtained before title was passed. If this were the intention of the rule it would mean that a Sheriff sale conducted under the authority of and on behalf of the court would be no better than a private sale, and the necessity of such a procedure would be of no effect to the court in the enforcement of its judgments. It would lead to numerous administrative difficulties and render the entire process oppressive and ineffective. It would mean that the court would be subject to the whims and fancies of creditors. The practical problems that would lie would be that:-

- (i) all creditors would want their debt taken into consideration of the price. Should those debts exceed the value of the property or even the potential sale value, any forced sale would be unnecessarily stalled.
- (ii) On account of (i) above the initiating creditor may not or may find it difficult to ever have that property sold.
- (iii) If the sheriff is deprived of the ability to sell for the best possible price he may find the property being unable to be sold.
- (iv) If a Sheriff sale could not expunge the register, property would unlikely sell as no purchaser would wish to buy property with liabilities they did not personally incur and which could later result in their loss of the land and their having to pursue the debtor for that loss.

Once the Sheriff has satisfied the formalities of the sale a title must pass free and clear of encumbrances. Any and all creditors interest would thereby attach to the proceedings of sale, and any debts not repaid would have to be pursued against the debtor by any means of enforcement e.g. garnishment of wages. The Sheriff's responsibility following the sale therefore would be to pay out to the creditor(s) in accordance with their priority of ranking.

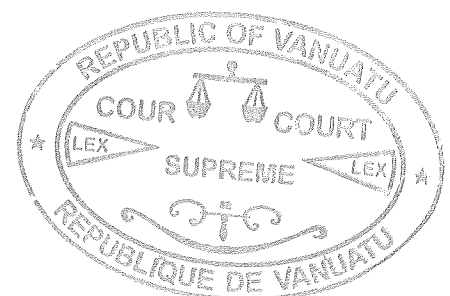
By way of comparative analysis I look at the procedure for sale by a Receiver under the Insolvency Act<sup>26</sup>. The Receiver, in negotiating a sale, taking into account all outstanding debts and obtaining discharges by consent of all creditors has the right, if a mortgagee objects to the sale to apply to the court for an order that the property be sold.

A receiver sale is conducted in a controlled environment similar to any private sale. A Sheriff sale is conducted to a certain extent outside such a controlled environment, meaning, there is no certainty of the final selling price. In the instance of the Receiver, the court can order the sale to proceed. In other words, the court order has the power and effect of expunging the record and allowing title to pass free and clear with the interest of all creditors resting in the proceeds of sale to be distributed according to their priority.

It could not therefore be that the court can so empower a receiver sale yet be denied or deprived that power under its own hand to simply expunge the record under its own order for sale executed by the Sheriff.

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<sup>26</sup> Companies (Insolvency & Receivership) Act, Schedule 9, Part 1, Clause 6



## CONCLUSION

Though my decision to annul the sale is grounded in the singular flaw that the Sheriff executed an expired warrant, it in no way detracts from my other findings regarding the Sheriff's neglect of duty in obtaining the best possible price and the prejudice that consequently arose. Even had the First Warrant not expired I would have still concluded that the sale should be annulled for all the reasons discussed above.

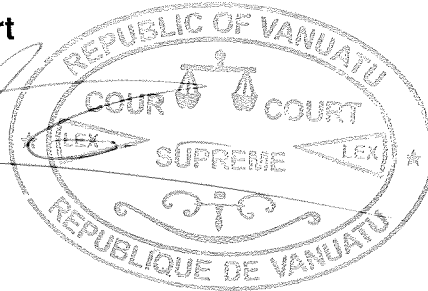
What this case proves is the importance of strict observance to the rules of court by the Sheriff in relation to forced sales. The inviolability of a Sheriff's sale must be cherished for the public interest and for all parties concerned ***"given the role of Sheriff Sales in the execution of judgments and the rights conferred by them and the necessity of guaranteeing the stability and certainty of titles..."***<sup>27</sup>

The Sheriff and his officers must always be attentive to the rules, and where they are unsure to seek the guidance of the court. Creditors and debtors must themselves keep a watchful eye over the process as their failure to act would be interpreted as compliance with whatever irregularity they later chose to invoke.

By The Court



MASTER



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<sup>27</sup> Taschereau J in *Boileau v Procureur General du Quebec* [1957] S.C.R. 463, p.470