

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

Civil Appeal
Case No. 20/3144 CoA/CIVA

BETWEEN: Bred (Vanuatu) Limited
First Appellant

AND: The Master of the Supreme Court
Second Appellant

AND: Clarence Ngwele
First Respondent

AND: Teouma Holdings Limited
Second Respondent

Coram: Hon. Chief Justice V. Lunabek
Hon. Justice J. Mansfield
Hon. Justice J.W. Hansen
Hon. Justice D. Aru
Hon. Justice V.M. Trief

Counsel: Ms S.S. Mahuk for the First Appellant
Mr L. Huri for the Second Appellant
Mr R.E. Sugden for the Respondents

Date of Hearing: 16 February 2021

Date of Judgment: 19 February 2021

JUDGMENT

A. Introduction

1. This appeal arises from judicial review of proceedings before the Second Appellant Master of the Supreme Court for mortgagee power of sale orders pursuant to s. 59 of the *Land Leases Act* [CAP. 163] (the 'Act'). The First Appellant Bred (Vanuatu) Limited ('Bred Bank') appeals against the Supreme Court's judgment as to the jurisdiction of the Master and the procedure for applications pursuant to s. 59 of the Act.
2. The Master will abide the orders of the Court.

B. The Law

3. Sections 58 and 59 of the Act provide:

"58. Any principal sum or interest due under a mortgage may, subject to the provisions of section 59(4), be recovered by action in any competent court.



59. (1) *Except as provided in section 46 a mortgage shall be enforced upon application to the Court and not otherwise.*
- (2) *Upon any such application, the Court may make an order –*
- (a) *empowering the mortgagee or any other specified person to sell and transfer the mortgaged lease, and providing for the manner in which the sale is to be effected and the proceeds of the sale applied;*
- (b) *empowering the mortgagee or any other specified person to enter on the land and act in all respects in the place and on behalf of the proprietor of the lease for a specified period and providing for the application of any moneys received by him while so acting; or*
- (c) *vesting the lease in the mortgagee or any person either absolutely or upon such terms as it thinks fit but such order shall, subject to subsection (5), not take effect until registration thereof.*
- (3) *The Court shall, in exercising its jurisdiction under this section, take into consideration any action brought under section 58 and the results thereof.*
- (4) *After the Court has made an order under paragraphs (a) or (c) of subsection (2) or while an order under paragraph (b) of subsection (2) is in force, no action may be commenced or judgment obtained under section 58 in respect of the mortgage except with the leave of the Court and subject to such conditions (if any) as the Court may impose.*
- (5) *Any order made by the Court under this section shall for the purposes of subsection (4) be effective from the time when it is made."*

C. Background and Judgment appealed

4. The Master's judgment dated 12 June 2020 in Civil Case No. 276 of 2020 held that the Master had jurisdiction to determine applications under s. 59 of the Act.
5. The Respondents Clarence Lavinya Ngwele and Teouma Holdings Limited commenced judicial review proceedings that the proceedings before the Master were not begun as required by the *Civil Procedure Rules* (the 'Rules') as no Claim was filed and did not afford natural justice to the mortgagor, and that the Master did not have jurisdiction to hear proceedings for enforcement of a mortgage as she is not a judge of the Supreme Court.
6. By judgment dated 22 October 2020, the primary Judge held that applications under s. 59 of the Act must be governed by the Rules and therefore be filed with a Claim, and a Supreme Court Judge must first grant orders under s. 58 of the Act before the matter proceeds to enforcement before the Master by way of a s. 59 application.
7. Bred Bank's appeal to the Supreme Court judgment is on the grounds that the Master does have jurisdiction to determine s. 59 applications, and that the primary Judge erred in holding that s. 59 applications are not stand-alone and must be preceded by an action under s. 58 of the Act. The Respondents in turn argued



that the primary Judge did not err in his judgment. We thank counsel for their considered and careful submissions.

8. This appeal stands or falls on the issue of the Master's jurisdiction. The starting point is articles 47(1) and (2) of the Constitution which provide that the administration of justice is vested in the judiciary and that the judiciary except for the Chief Justice shall be appointed by the President of the Republic:

"47. (1) *The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law...*

(2) *Except for the Chief Justice the judiciary shall be appointed by the President of the Republic acting on the advice of the Judicial Service Commission."*

9. In contrast, a Master and Deputy Masters of the Supreme Court are appointed by the Judicial Service Commission pursuant to subs. 42(1) of the *Judicial Services and Courts Act* [CAP. 270] (the 'JSC Act'):

"42. (1) *The Commission must appoint on merit a master and such deputy masters of the Supreme Court."*

10. Articles 49(1) and (2) of the Constitution provide for the constitution of and the jurisdiction of the Supreme Court as follows:

"49. (1) *The Supreme Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings, and such other jurisdiction and powers as may be conferred on it by the Constitution or by law.*

(2) *The Supreme Court shall consist of a Chief Justice and not more than twelve other judges."*

11. The Supreme Court has unlimited jurisdiction pursuant to art. 49(1) of the Constitution. The Master not being a judge of the Supreme Court does not. The Master's jurisdiction is provided in subs. 42(3) of the JSC Act as follows:

"42. ...
(3) *The master or a deputy master:*

(a) *may hear and determine all or any of the following matters:*

- (i) *application for directions relating to matters of procedure;*
- (ii) *taxation of bills of costs;*
- (iii) *applications for probate;*
- (iv) *preliminary matters in relation to applications for adoption;*

(b) *may exercise such of the powers, functions and jurisdiction of the Supreme Court as may be prescribed by the Rules of Court."*

12. We agree therefore with the Respondents' submissions that the Master does not the original jurisdiction of a Supreme Court Judge. The Master therefore does not

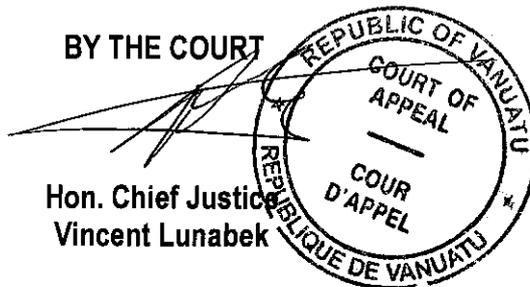


have jurisdiction to determine applications under s. 59 of the Act. Such applications must be determined by a Supreme Court Judge although he or she may before doing so refer the matter to the Master for the purpose of case management within a given timeframe. This disposes of the primary ground of the appeal.

13. As to the other ground of the appeal, it appears to be the case that the primary Judge was working from a copy of the Act before it was amended. With respect:
- a) We do not agree with the primary judge that applications under s.59 of the Act must be filed in proceedings that are commenced by a Claim, due to the difference in s. 59 of the Act providing for "upon application" and s. 58 for "by action". Section 59 applications are stand-alone although in accordance with the Rules, the application must set out both the orders sought and the grounds relied on (the mortgagor's default) and be filed with a sworn statement in support; and
 - b) For the same reason as above, a s. 59 application does not require orders to first be made in proceedings under s. 58 of the Act.
14. The appeal is dismissed with no order as to the costs of the appeal as the issue is an important one of general significance, and the appeal has been successful on one of the grounds raised.

DATED at Port Vila this 19th day of February 2021

BY THE COURT



**Hon. Chief Justice
Vincent Lunabek**