

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

Civil Case 17/1591 SC/CC

**BETWEEN: JUDE MALINGY (Representing Family
Malingy)
First Claimant**

**AND: PIERRE MASSING NALE (Representing
Family Nale)
Second Claimant**

**AND: HERVE LEYMANG (Representing Family
Leymang)
Third Claimant**

**AND: ETUEL HABONG KEKEI (Representing
Family Kekei)
Fourth Claimant**

**AND: PERCY ASHEM (Representing Family
Ashem)
First Defendant**

**AND: CEDRIC PHILIP (Representing Family
Philip)
Second Defendant**

**AND: SETHY WILLIAM (DECEASED)
Third Defendant**

**AND: THE REPUBLIC OF VANUATU
Fourth Defendant**

Hearing: 4th October 2017

Before: Chetwynd J

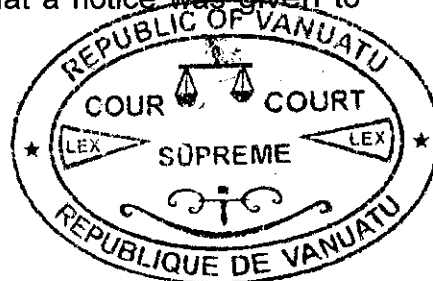
Counsel: Mr Molbaleh for the Claimants

Ms Williams for the Fourth Defendant

No appearances for the First, Second or Third Defendants

DECISION ON APPLICATION TO STRIKE OUT

1. The Fourth Defendant ("ROV") has filed an application to have the proceeding struck out. The Claim was served on ROV by the Claimants on 26th June 2017. On 11th July 2017 The Attorney General wrote to the Claimants' counsel saying that counsel had not given the appropriate notice pursuant to section 6 of the State Proceedings Act. Apparently there was no response to that letter and so the application to strike out was lodged. The Claimants say that a notice was given to the State law Office by way of a letter on 31st August 2016.



2. The Government Proceedings Act (No.9 of 2007) was amended by the Government Proceedings (Amendment) Act (No. 4 of 2010). One of the effects of the latter act was to change the title of the former to the State Proceedings Act. By section 6 of the State Proceedings Act a notice has to be given by a Claimant in proceedings involving the State;

6 Notification of intention to institute proceedings

(1) No proceeding against the State other than an urgent proceeding, may be instituted under section 3 unless the party intending to do so first gives written notice to the State Law Office of such intention.

(2) The notice under subsection (1) must:

(a) include reasonable particulars of the factual circumstances upon which the proposed proceedings will be based; and

(b) be given not less than 14 days and no more than 6 months prior to the institution of proceedings.

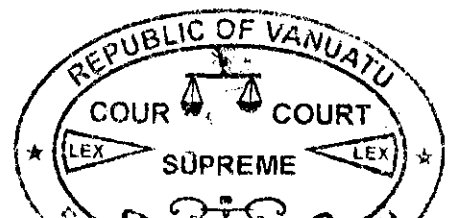
3. The effect of section 6 was considered by the Court of Appeal in the case of *Kwang Sing* ¹ where the Court said:

"It is timely to mention that it is not clear on the papers filed whether this proceeding was commenced subsequent to the requisite notice having been given under s. 6 of the State Proceedings Act No. 9 of 2007 [as amended by the Government Proceedings (Amendment) Act No.4 of 2010]. Section 6 prohibits the commencement of a proceeding against the State unless detailed notice of the intention to commence the proceeding is given to the State at least 14 days and not more than 6 months before the proceeding is commenced."

After setting out the section (as above) the Court added:

*"This was not an issue raised at any time in the Supreme Court. Accordingly, we do not consider that it should be a factor taken into account in respect of the matters in issue before us; particularly given the way in which the appeal has been determined. **However, it does appear that the failure to give such notice will operate as a complete prohibition to the commencement of a proceeding against the State. Those contemplating commencing proceedings against the State need to appreciate the likely***

¹ *Republic of Vanuatu v Kwang Sing* 1 [2013] VUCA 35; Civil Appeal Case 21 of 2013 (22 November 2013)



consequences of proceeding without the giving of notice under s. 6."
(My emphasis.)

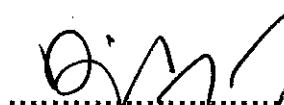
4. The Claimants do not say this is an urgent proceeding and so the Claimants must comply with the requirements of the section. The Claimants say they have by giving notice by letter on 31st August 2016. Unfortunately for them the notice given on 31/8/16 was not an effective notice pursuant to section 6 because it was given over 10 months before the institution of proceedings; that is the filing of the Claim. The only proviso that would enable the Claimants to escape the complete prohibition to the institution of proceedings would be if they were urgent. As we have seen, they are not.

5. The remaining question is whether or not the prohibition against the institution of proceedings covers proceedings only against the State. In other words, could the claim be struck out against the State but remain effective against other parties. Given the nature of the claim in this case I do not believe that is a realistic proposal. The Claim is in respect of a lease. It is a lease the Claimants say was wrongly issued by ROV or the State. One of the remedies sought is the cancellation of the lease. This is on the basis that the land subject to the lease is disputed between the Claimants and the First and Second Defendants. If the claim was left effective against the First, Second and Third Defendants that would be tantamount to the Supreme Court being involved in a decision about the customary ownership or use of land. As has been said many, many times in this Court and in particular in the Court of Appeal, that is not something that the Supreme can get involved with at first instance.

6. The application to strike out the Claim must succeed. The Claim is accordingly struck out and dismissed as against all the Defendants. The Claimants ignored the letter from Attorney General dated 11th July 2017 and must therefore pay the Fourth Defendant's costs from that date. If those costs cannot be agreed they will be taxed on a standard basis. There has been no decision on the merits and so whether or not a fresh claim is issued is a matter for the Claimants. If they want to issue fresh proceedings they should, of course, make sure they comply with section 6 of the State Proceedings Act.

Dated at Port Vila this 6th day of October 2017.

BY THE COURT


.....
David Chetwynd
Judge

