

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

Civil  
Case No. 20/276 SC/CIVL

**BETWEEN:** BRED (Vanuatu) Limited  
Applicant

**AND:** Clarence Ngwele  
First Respondent

**AND:** Teouma Holdings Limited  
Second Respondent

*Date of Hearing:* 19 April 2021  
*Before:* Justice V.M. Trief  
*In Attendance:* Applicant – Ms S.S. Mahuk  
Respondents – Mr A. Godden, holding papers for Mr R.E. Sugden  
*Date of Decision:* 26 May 2021

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### JUDGMENT

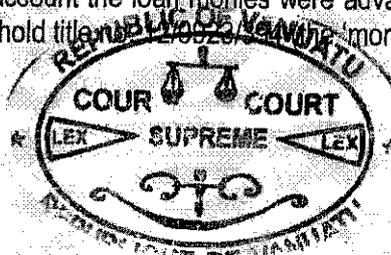
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#### A. Introduction

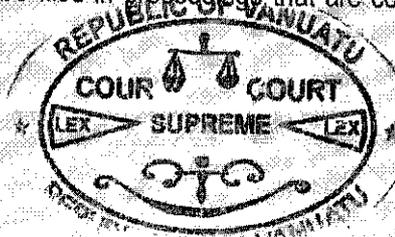
1. The Applicant Bred (Vanuatu) Limited (the 'Bred Bank') is seeking mortgagee power of sale orders. The Respondents Clarence Ngwele and Teouma Holdings Limited ('Teouma Holdings') filed an Amended Application to Strike Out Proceeding ('Strike-out Application').
2. Subsequently, the parties engaged in separate litigation culminating in the Court of Appeal judgment in *Bred (Vanuatu) Ltd v Ngwele* [2021] VUCA 7.
3. This matter then proceeded by way of hearing of the Strike-out Application. I now set out my decision.

#### B. Background

4. The Bred Bank is the registered mortgagee, Teouma Holdings the mortgagor and Ms Ngwele the customer to whose account the loan monies were advanced pursuant to a Third Party Mortgage over leasehold title no. 10923/2019 (the 'mortgage').



5. Teouma Holdings is the registered proprietor of leasehold title no. 12/0923/394. Ms Ngwele is the director of Teouma Holdings.
6. On 13 June 2014, the Bred Bank issued a formal notice of demand for breaches of the mortgage.
7. The Bred Bank then sued Ms Ngwele in Civil Case No. 746 of 2015 pursuant to the mortgage although she was not the mortgagor. It filed a Claim and an Application seeking the same orders as it now seeks in this matter.
8. In July to August 2017, agreement was reached as to future payments.
9. At the conference on 10 August 2017, the Hon. Master was informed that the case was virtually settled. She dismissed the proceeding without prejudice and with no order as to costs.
10. Ms Ngwele defaulted in loan payments.
11. On 25 April 2019, the Bred Bank served a formal notice of demand on her.
12. Teouma Holdings had been struck off the register on 31 August 2016. On 8 August 2019, it was re-instated for the purposes of this litigation. This explains the delay in service of the notice of demand on it.
13. The notice of demand has gone unanswered. As at 17 January 2020, the amount of VT34,388,109 was owed with daily interest accruing.
14. On 12 February 2020, the Bred Bank filed its Application Pursuant to Section 59 of the *Land Leases Act* [CAP. 163] (the 'Act') in this matter seeking mortgagee power of sale orders ('Section 59 Application').
15. By judgment dated 12 June 2020, the Hon. Master held that the Master had jurisdiction to determine applications under s. 59 of the Act.
16. Ms Ngwele and Teouma Holdings commenced judicial review proceedings that the proceedings before the Master were not begun as required by the *Civil Procedure 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.
17. The Supreme Court judgment dated 22 October 2020 was appealed to the Court of Appeal.
18. The Court of Appeal held in its judgment that the Master does not have jurisdiction to determine applications under s.59 of the Act; these must be determined by a Supreme Court Judge: *Bred (Vanuatu) Ltd v Ngwele* [2021] VUCA 7. Further, that s. 59 applications need not be filed in proceedings that are commenced by a Claim.



Such applications must set out both the orders sought and the grounds relied on and be filed with a supporting sworn statement.

19. The Court of Appeal having delivered its decision, this matter was brought on for hearing of the Strike-out Application.

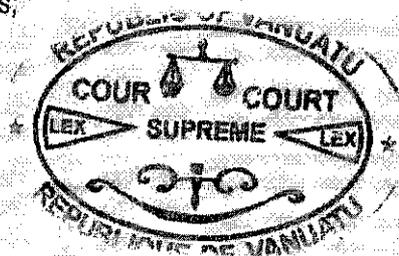
C. The Strike-out Application

20. At the hearing, Mr Godden distilled the grounds of the Strike-out Application down to the following:

- That the Section 59 Application must set out both the orders sought and the grounds relied on: *Bred (Vanuatu) Ltd v Ngwele* [2021] VUCA 7. Mr Godden submitted that these are required by natural justice so that the Respondents know the case against them. Further, that the Bred Bank is well aware of this Court of Appeal judgment so it should have amended the Application before the hearing but it did not;
- The proceeding is an abuse of process because it repeats, as to the mortgage, the Bred Bank's claim in Civil Case No. 746 of 2015 against Ms Ngwele to which Teouma Holdings should have been joined as a Respondent under the rule in *Henderson v Henderson* (1843) 67 E/R313 and the principle in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45 ('Anshun Estoppel'). He submitted that the same mortgage is involved and the same remedy sought as in Civil Case No. 746 of 2015 therefore Anshun Estoppel applies; and
- A litigant must raise all causes of action available to him/it in the proceeding it is pursuing or defending and will not be able to raise, in subsequent proceedings, causes that it could have pursued initially.

21. Ms Mahuk submitted in response that:

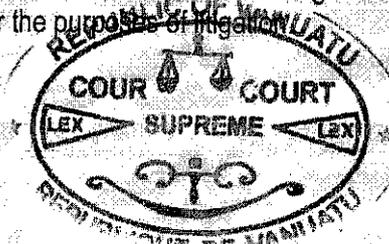
- The submission that the Section 59 Application must set out both the orders sought and the grounds relied on was an argument of form over substance. The Respondents have had notice of the Section 59 Application since February 2020 and having filed judicial review proceedings that have been heard as far as the Court of Appeal, they understand exactly the case against them in the Section 59 Application. That is, that there has been default in loan repayments, a notice of demand was served and not complied with. She submitted that this ground of the Strike-Out Application is simply aimed at further delaying this matter even though the Section 59 Application was filed over a year ago;
- The Master's Orders dated 10 August 2017 dismissed the proceeding Civil Case No. 746 of 2015 without prejudice following the parties' out of Court settlement, regardless of whether Teouma Holdings was added as a party or not. The mortgage has never been discharged and its terms continue which are binding on the parties;



- Since cessation of the Claim in Civil Case No. 746 of 2015, Ms Ngwele has again breached the mortgage. This led the Notice of Demand dated 25 April 2019 being served and it remains unsatisfied. The present case does not contravene Anshun Estoppel as it is an entirely new claim based on non-compliance with the notice of demand dated 25 April 2019; and
- The present case relates to a breach of contractual obligations by Ms Ngwele occurring since September 2019 when she last paid the mortgage. It is not barred by Anshun Estoppel nor is it an abuse of process. The facts are not the same as those which led to Civil Case No. 746 of 2015; there is a new breach and new notice of demand in the present case albeit in relation to the same underlying contract (the mortgage): *Republic of Vanuatu v FR8 Logistics Ltd* [2020] VUCA 15.

D. Discussion

22. The Section 59 Application sets out the Orders sought but not the grounds for the Application. However, given the history of litigation between the parties since the Section 59 Application was filed on 12 February 2020 culminating in the *Bred (Vanuatu) Ltd v Ngwele* [2021] VUCA 7 decision, I accept Ms Mahuk's submission that the grounds for the Application are well understood by the Respondents: that there is a mortgage, it has been breached, a notice of demand was served and it remains unanswered.
23. The *Bred Bank* decision held in part that s. 59 applications must set out both the orders sought and the grounds for the application. However, in the particular and specific circumstances of this case, I consider that the Respondents are well aware of the case against them and the grounds for the Section 59 Application. I therefore reject Mr Godden's submission that the Section 59 Application must set out the grounds relied on.
24. The Court of Appeal considered and applied the principles in *Henderson v Henderson* and Anshun Estoppel in *Republic of Vanuatu v FR8 Logistics Ltd* [2020] VUCA 15. The Court held that the facts of storage and the contract were the same one but the time period claimed for storage provided was completely different. It was nonsensical to suggest that the facts were the same in both proceedings. Therefore *res judicata* and Anshun Estoppel did not apply.
25. The fact of the mortgage is the same in both Civil Case No. 746 of 2015 and in this matter. The mortgage was not discharged as a result of Civil Case No. 746 of 2015 nor since. However, the facts of Teouma Holdings' default in loan payments and the ensuing notice of demand are completely different in the two proceedings:
- In Civil Case No. 746 of 2015, Teouma Holdings' default in loan payments led to the notice of demand issued on 13 June 2014; and
  - In this matter, Teouma Holdings' default in loan payments after the dismissal of Civil Case No. 746 of 2015 led to the notice of demand served on Ms Ngwele on 25 April 2019 and on Teouma Holdings after it was reinstated on 8 August 2019 for the purpose of litigation.



26. I therefore reject Mr Godden's submissions that res judicata and Anshun Estoppel apply. I consider the balance of the grounds of the Strike-out Application have not been made out. The Application must be declined and dismissed.

E. Result and Decision

27. The Respondents' Amended Application to Strike Out Proceeding is declined and dismissed.

28. The Respondents are to pay the Applicant's costs of the Application as agreed or taxed by the Master. Once settled, the costs are to be paid within 21 days.

29. This matter is listed for Hearing of the Applicant's Application Pursuant to Section 59 of the *Land Leases Act* [CAP. 163] at 1.30pm on 17 June 2021.

DATED at Luganville this 26<sup>th</sup> day of May 2021

BY THE COURT

  
Viran Molisa Trief  
Judge

