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

Civil Appeal Case No. 01 of 2010

BETWEEN: SAWA MATARAVE
Applicant

AND: PETER TALIVO
First Respondent

AND: FAMILY RASU
Second Respondent

AND: GEORGE LIPLIP
Third Respondent

Civil Appeal Case No. 03 of 2010

BETWEEN: FAMILY RASU
Applicant

AND: PETER TALIVO
Respondent

Civil Appeal Case No. 04 of 2010

BETWEEN: GEORGE LIPLIP
Applicant

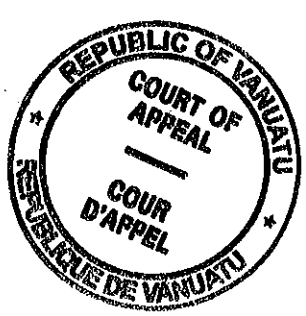
AND: PETER TALIVO
First Respondent

AND: SAWA MATARAVE
Second Respondent

AND: FAMILY RASU
Third Respondent

Coram: ***Hon. Chief Justice Vincent Lunabeck***
Hon. Justice Bruce Robertson
Hon. Justice John von Doussa
Hon. Justice Nevin R. Dawson
Hon. Justice Daniel Fatiaki

Counsel: *Mr. E. Nalyal for Sawe Matarave*
Mr. Saling Stephens for Family Rasu
Mr. Tapura for George Liplip
Mr. J. Kilu for Peter Talivo



Hearing Date: *21st and 28th April 2010*

Decision Date: *30th April 2010*

JUDGMENT

These three matters have been heard together as they are inter-related and involve similar issues. In each matter the Applicant seeks leave to appeal against a decision of the Supreme Court sitting on appeal from the Santo/Malo Island Court in a matter concerning disputed customary ownership of land. Appeals from decisions of Island Courts are covered by section 22 of the Island Courts Act [CAP. 167]:-

"***22. Appeals***

(1) Any person aggrieved by an order or decision of an island court may within 30 days from the date of such order or decision appeal therefrom to:

(a) the Supreme Court, in all matters concerning disputes as to the ownership of land;

(b) the competent Magistrate's Court in all other matters.

(2) The court hearing an appeal against a decision of an island court shall appoint two or more assessors knowledgeable in custom to sit with the court;

(3) The court hearing the appeal shall consider the records (if any) relevant to the decision and receive such evidence (if any) and make such inquiries (if any) as it thinks fit;

(4) An appeal made to the Supreme Court under subsection (1) (a) shall be final and no appeal shall lie therefrom to the Court of Appeal;

(5) Notwithstanding the 30 day period specified in subsection (1) the Supreme Court or the Magistrate's Court, as the case may be, may on application by an appellant grant an extension of such period provided the application therefore is made within 60 days from the date of the order or decision appealed against."

Before the Island Court there were 5 claimants namely Tom Rasu for the Family Rasu, George Liplip (now deceased) for himself and Tarivaginogino Family, Sawa Matarave for the Matarave Family, Peter Talivo for himself and Vevanuaturu and

David Molivaginogino Family, and Titus Malehi. The last claimant was not a party to the appeal in the Supreme Court, and is not involved in the applications to this Court.

Before the Supreme Court Family Rasu and Peter Talivo appealed about the dismissal of parts of their claim to lands which the Island Court held to be in the ownership of George Liplip and Sawa Matarave.

The hearing of the appeal in the Supreme Court took place on 23rd February 2009. The Court was constituted by a single judge of the Supreme Court, Justice Saksak, and two assessors Chief Saki Robert and Chief Salehoro Moli (the assessors). The assessors were appointed by the judge and sat as required by section 22 (2) of the Island Courts Act.

At the hearing the Supreme Court received written and oral submissions from the parties, and then retired to consider them along with all the material which had been placed before the Island Court. The Supreme Court delivered its decision on 17th December 2009. The Supreme Court allowed the appeal in part and set aside substantial portions of the Island Court Judgment. In the result Peter Talivo and Veranuatura and David Molivaginogino Family who he represented were found to be the custom owners of much of the subject land.

The appellants in the 3 matters before this Court seek to challenge the decision of the Supreme Court on numerous grounds. The appellants seek leave to appeal. They do so because section 22 (4) of the Island Courts Act by its terms says that the decision of the Supreme Court shall be final and no appeal shall lie therefrom to the Court of Appeal.

The applicants contend that leave to appeal should be granted because there are major errors in the reasoning of the Supreme Court including errors of law such that the Court of Appeal should treat the issues raised as constituting exceptional circumstances which warrant interference and correction by this Court. The applicants contend that if leave to appeal is granted, the Court of Appeal could

exercise its power of review under s.48 (3) (c) of the Judicial Services and Courts Act.

Errors alleged in the applications for leave to appeal, and in draft notices of appeal, concern errors of law and procedure made in the course of evaluating the evidence and in the reasoning process. The alleged errors include taking into account evidence not tendered by the parties, reaching conclusions not consistent with other judgments in similar cases, making findings which were inconsistent with the ultimate conclusion, dismissing aspects of the appeal as being out of time when leave to appeal had been given at an earlier stage in the proceedings, not thoroughly examining customary law that dictates the practice of land tenure in Malo, failing to give consideration or sufficient weight to a family tree of the Family Rasu, and not following conclusions of the Santo/Malo Island Court in respect of Malo custom. All these matters, and others of a like kind also alleged would, if established, be errors committed by the Supreme Court in carrying out the function given to it under s.22 of the Island Courts Act to hear and determine the appeal.

In addition two Appellants allege that circumstances exist which give rise to a reasonable apprehension of bias. The appellant Family Rasu allege apprehended bias on part of the assessors, and Sawa Matarave alleges apprehended bias on the part of Justice Saksak.

Relevant to the allegation of apprehended bias on the part of the judge is section 38 of the Judicial Services and Courts Act [CAP. 270]. That section provides:-

"***38. Disqualification***

(1) If:

(a) a judge has a personal interest in any proceedings; or

(b) there is actual bias or an apprehension of bias by the judge in the proceedings;

he or she must disqualify himself or herself from hearing the proceedings and direct that the proceedings be heard by another judge.

(2) A party to any proceedings may apply to a judge to disqualify himself or herself from hearing the proceedings.

(3) If a judge rejects an application for disqualification, the applicant may appeal to the Court of Appeal against the rejection. If an appeal is made, the judge must adjourn the proceedings until the appeal has been heard and determined.

(4) A judge who rejects an application for disqualification must give written reasons for the rejection to the appellant."

It will be noted that section 38 by its terms does not apply to the assessors. However there are well established principles of general law which deal with the consequences of apprehended bias on the part of a member of a tribunal, whether judicial or administrative in nature.

We consider the submissions of counsel identify the following questions the answers to which lead to the disposal of each of the 3 matters now before this Court. Those questions are:-

(a) Do the terms of s. 22 (4) of the Island Courts Act prevent this Court in all circumstances, however exceptional or serious alleged errors by the Supreme Court might be, from entertaining an appeal from the decision of the Supreme Court where the Supreme Court has exercised the function committed to it under s.22 (1) of the Island Courts Act to hear an appeal from an Island Court?

(b) Are there circumstances which can render the apparent exercise of the function granted to the Supreme Court under s.22 (1) an invalid exercise of the function? If so, was there apprehended bias on the part of the judge or an assessor in such a case?

(c) If yes, to the preceding question, does the evidence placed before this Court establish apprehended bias on the part of the judge or the assessors?

(d) If apprehended bias is established what remedy is available, and when should a court exercise its power to grant a remedy?

Question (a) – Section 22 of the Island Courts Act

This question in substance raises the meaning s.22 (1) of the Island Courts Act. Stated bluntly, we consider this statutory provision means exactly what it says: the decision of the Supreme Court is final and cannot be the subject of an appeal to the Court of Appeal. However, the limitation imposed by s.22 (4) is in relation to an "*appeal made to the Supreme Court*". This requirement is only met if the body hearing the appeal is a court validly constituted by a Supreme Court judge and two or more assessors appointed by the judge as required by s.22 (2). That requirement will not be met if any one of those persons is subject to any matter that disqualifies them from exercising their statutory functions. Moreover, the "*matter*" the subject of the appeal must be one concerning disputes as to the ownership of land (*see*: s,22(1)(a)), that is, a particular area of land identified by the disputants as the land subject to the dispute. It follows that if the court which purports to exercise the appellate functions under s.22 (1) (a) is not properly constituted, or if the court properly constituted purports to decide custom ownership of land which is not subject to the dispute submitted to the Island Court, the court will not be validly exercising its statutory function. For example, if the court was constituted only by a judge and one assessor, the court would not be validly exercising the statutory function. Nor would it be if it purported to decide ownership of land outside the area of the disputed land the subject of the appeal.

Subject to this qualification, the direction in s.22 (4) that the appeals to the Supreme Court shall be final and not subject to appeal to the Court of Appeal, means that the resolution of the dispute as to the ownership of the land is finally ended by the decision of the Supreme Court regardless of errors that may have been made by the Supreme Court in the exercise of its function, and whether the errors might be described as errors of law, or errors of fact. Thus, if the Supreme Court misapprehends an aspect of the evidence, and makes a finding of fact which is wrong, or fails to follow strictly the laws of evidence the error does not expose the decision of the Supreme Court to review or appeal. In our opinion all

the possible errors by the Supreme Court alleged in the applications for leave to appeal and the draft notices of appeal, save for the allegations of apprehended bias, are errors of this kind.

We note in passing in relation to allegations that the Supreme Court took into account matters that were not strictly the subject of evidence that the Supreme Court is entitled to make inquiries of its own, and, further, that by appointing assessors who are knowledgeable to the relevant custom to sit with the Court, the Act intends that the knowledge of these assessors may be taken into account to influence the outcome of the appeal.

In counsels' submissions it was suggested that by excluding a right of appeal from the Supreme Court to the Court of Appeal, Parliament had legislated inconsistently with Article 50 and also with Articles 73, 74 and 75 of the Constitution, and that s.22 (4) of the Island Courts Act was invalid, and could be the subject of a constitutional application.

Articles 50 and 52 provide:-

> "***APPEALS FROM SUPREME COURT TO COURT OF APPEAL***
>
> *50. Parliament shall provide for appeals from the original jurisdiction of the Supreme Court and may provide for appeals from such appellate jurisdiction as it may have to a Court of Appeal which shall be constituted by two or more judges of the Supreme Court sitting together.*
>
> ***VILLAGE AND ISLAND COURTS***
> *52. Parliament shall provide for the establishment of village or island courts with jurisdiction over customary and other matters and shall provide for the role of chiefs in such courts.*

There is no inconsistency between these Articles and s.22 of the Island Courts Act. Article 52 requires Parliament to establish island courts, and this Parliament has done by the Island Courts Act which gives those courts original jurisdiction. Section 22 then provides for a right of appeal as required by Article 50. Under Article 50 it is for Parliament to decide if there should be a second right of appeal

from the Supreme Court to the Court of Appeal, and by s.22 Parliament has decided that there should not be.

Articles 73 – 75 provide:-

> ***LAND BELONGS TO CUSTOM OWNERS***
> *73. All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants.*
>
> ***BASIS OF OWNERSHIP AND USE***
> *74. The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu.*
>
> ***PERPETUAL OWNERSHIP***
> *75. Only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a recognized system of land tenure shall have perpetual ownership of their land."*

The argument that s.22 (4) is inconsistent with these Articles overlooks Articles 76 and 78 of the Constitution which, like Articles 73 – 75 are included in Chapter 12 of the Constitution dealing with land. Articles 76 and 78 provide:-

> "***NATIONAL LAND LAW***
> *76. Parliament, after consultation with the National Council of Chiefs, shall provide for the implementation of Articles 73, 74 and 75 in a national land law and may make different provision for different categories of land, one of which shall be urban land.*
>
> ***DISPUTES***
> *78. (1) Where, consequent on the provisions of this Chapter, there is a dispute concerning the ownership of alienated land, the Government shall hold such land until the dispute is resolved.*
>
> *(2) The Government shall arrange for the appropriate customary institutions or procedures to resolve disputes concerning the ownership of custom land."*

The Island Courts Act is a national law as envisaged by Article 76. The provisions in the Island Courts Act for the establishment of the Island Courts and for the inclusion of assessors knowledgeable in custom to sit with a Supreme Court judge on an appeal meet the requirement of Article 78 (2).

Further, in considering this argument, it is necessary to step back and look at the overall intent of the Constitution which is by Article 1 to establish the Republic of Vanuatu as a sovereign democratic state. Article 2 provides that the Constitution is the supreme law of the Republic. A fundamental notion of a democratic state is that its governance will be subject to the rule of law. Chapter 8 of the Constitution establishes the judiciary and a court structure which Parliament has implemented, including by the enactment of the Island Courts Act.

In any system of governance under the rule of law, there must be a dispute resolution system administered by courts, and this system must impose finality on the resolution of disputes at some point. Wherever that point may be in the process for the resolution of disputes, there will be both winners and losers. The losers are likely to be dissatisfied with the outcome. However finality requires that they have no further avenue available to perpetuate the dispute. Even where a disputed claim ends with a decision of the Court of Appeal, one of the parties at least is likely to be dissatisfied. However that is a feature of the system. The fact that for disputes over ownership of land the legal structures allows only one level of appeal after a hearing by the primary court established by Parliament to meet the requirements of Articles 76 and 78 of the Constitution does not render a limitation on further appeal unconstitutional.

Question (b) – An invalid exercise of statutory function

We have already referred to section 38 of the Judicial Services and Courts Act. Section 38 (1) recognizes that actual interest or bias or an apprehension of bias by a judge is an absolute disqualification. A judge in all circumstances must disqualify himself or herself from hearing the proceedings, and direct that the proceedings be heard by another judge. The requirement is mandatory. However, s.38 is cast in terms which suggest that the judge has, or will obtain, knowledge of the circumstances which give rise to the obligation to disqualify. In the ordinary case it can be expected that a judge who has an interest will be aware of that fact. However, in the case of bias, particularly apprehended bias, a judge might not realize that particular circumstances constitute bias or give rise to the

apprehension of bias. Hence s.38 (2) provides for a party to make application to a judge, thereby bringing the circumstances said to give rise to the bias or apprehension of bias to the attention of the judge. Moreover this section anticipates that the procedure under this section will occur before the judge brings down a decision disposing off the matter before the Court. Once judgment is entered the function of the judge is complete, and the time when the judge can withdraw and arrange for another judge to hear the matter has passed. However, s.38 is declaratory of the common law in so far as it imposes disqualification upon a judge who has an interest in the matter, or is actually biased, or where an apprehension of bias arises.

In so far as s.38 declares the general law, it follows that even when a judge has delivered judgment and completed the judicial function the obligation to disqualify which arose, but was not recognized or exercised before judgment, has the effect of rendering the decision of the court voidable at the instance of the parties or one of them. In the case of an administrative tribunal the decision is, as a general rule, considered void if a tribunal member has a direct interest, or is affected by bias. However in the case of a court decision, the general rule is that a decision infected with error of this kind remains valid as part of the public record unless and until a court declares it to be invalid. In this sense the decision is voidable but not void until so declared.

The decision is voidable because the tribunal was not validly constituted, and therefore was not in a position to legally carry out the function which it was otherwise empowered to exercise.

In the present case, even though the allegation of disqualification for apprehended bias on the part of the judge and the assessors is now raised after the delivery of judgment, we consider that if the ground for disqualification against one or other of the judge or assessors is established, that renders the decision of the Supreme Court voidable. Whether that necessarily leads to the grant of a remedy declaring the decision void and therefore no longer of any effect we consider under question (d) below.

Question (c) – Is apprehended bias established?

It must be stressed that it is not alleged that the judge had any direct interest in the proceedings or that he was actually biased. The allegation against him is based only on there being, objectively assessed, an apprehension of bias. The test to ascertain whether in a particular case an apprehension of bias arises has been slightly differently expressed in different jurisdictions, but the difference is one of expression rather than substance, and in this case the decision turns not on the particular test applied, but on the facts.

In the case of the assessors, as we understand the submission of Family Rasu who raised the point, the allegation is one of apprehended bias.

In the United Kingdom, the House of Lords in *R. v. Gough [1993] 646* held that the test for apprehended bias was whether in all the circumstances of the case there appear to be a real danger of bias concerning the member of the tribunal in question so that justice requires that the decision issued should not stand. In Australia it is settled that the test is whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide: *Antoun v. R. [2006] HCA 2* and *Ebner v. Official Trustee and Bankruptcy (2000) 205 CLR 337.*

This same test is applied in New Zealand. In *Saxmere Company Ltd. v. Wool Board [2009] NZSC 72* the Supreme Court of New Zealand:-

> *"First it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot likely throw the "bias" ball in the air. The second inquiry is then to ask whether those circumstances as established might lead a fair minded lay observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case."*

A similar formulation had earlier been adopted in New Zealand by the Court of Appeal in Auckland in *Casino Ltd. v. Casino Essentiel Authority [1995] 1NZLR 142* where at 149 Cooke P. observed:-

> "*If a reasonable person, knowing all the material facts, would not consider that there was a real danger of bias, it would seem strained to say that nevertheless he or she would reasonably suspect bias. One must query whether the law should accounted in such requirements*".

In *Picchi v. Attorney General [2002] VUSC 90* Coventry J. did not distinguish between the formulation of the test in *Gough* and the Australian and New Zealand Authorities.

The test we apply is whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the questions which the Court was required to decide. In the case of the assessors the test is the same.

Before this Court Sawa Matarave tendered affidavit evidence from Toa Joseph and Patrick Tavtavis Jarawari (Patrick) alleging that the Respondent Peter Talivo and Justice Saksak had a very close relationship; they came from the same island and from the same church, Apostolic Life Ministry, and that they had worked closely to build the church house at Naviaiu on Malo island which was opened on 26th September 2009. The witnesses deposed to having observed at the church opening Peter Talivo and Justice Saksak talking together, and further that Peter Talivo had coordinated the programs at the opening at which Justice Saksak presided as the President of Apostolic Life Ministry. He asserted that Judge Saksak spent two nights at Naviaiu during the celebrations for the opening of the church Toa Joseph is a member of Family Matarave, and he deposed that no one in his family spoke to Justice Saksak because at the time the Supreme Court decision had not been made. The submissions of Sawa Matarave contended that this relationship between the respondent Peter Talivo and the judge clearly constitute reasonable grounds to apprehend bias. The submissions

went further to imply that the bias was evidenced by the degree of success that the Peter Talivo had in the Supreme Court decision given later.

In answer to the allegations made by Sawa Matarave, Peter Talivo tendered an affidavit denying the closeness of the relationship alleged against him, and asserted that Sawa Matarave and the Family Matarave had at the opening of the church lured him into a position where they could then assert bias against Judge Saksak and himself.

Peter Talivo deposes that he lives some 2 – 3 km away from Naviaiu where the church opening took place. However Toa Joseph and Patrick live at Naviaiu and Patrick is a member of same church as Justice Saksak, and Patrick is one of the church leaders. It was Patrick and others who chose to open the church in September 2009 and to invite Justice Saksak to preside over the opening despite the fact that the judge had not yet handed down his judgment. Peter Talivo concedes that he became the chairman of the organizing committee responsible for overseeing programs for the church opening, but says he did so at the request of Patrick and the church pastor as they needed his assistance. During the opening celebrations Family Matarave killed two buluks and provided a lot of other food items to feed the judge, his delegation and all the other invited guests.

Peter Talivo also deposes that the judge and his wife spent two nights in the house of Patrick, and that at the end of the celebrations, Family Matarave gave the judge a live pig and yams to take with him. Peter Talivo said he was quite conscious of the fact that it would be improper for any of the disputing parties to get too close to the judge so he himself kept a look out for any of the other parties getting too close to the judge so that he could have complained about them if this happened. However, it will be noted that whatever he witnessed on the occasion of the celebrations, he made no formal complaint about it until after the decision of the Supreme Court was handed down.

Where a suspicion or apprehension of apparent bias is said to arise from particular circumstances, the test is an objective one. The test requires the

Court's assessment of the perception which the circumstances would give rise to in the mind of a fair minded lay observer informed of the facts. The test is to be applied at the time when the circumstances arose. The test is not one to be applied after the judgment is delivered and with knowledge of the outcome of the case. In the matter before the Court, the test must be applied to the facts as they existed when the celebration to open the church concluded, and without taking account of which party succeeded or failed. If a fair minded observer at that time would have reasonably apprehended the judge might not bring an impartial mind to the resolution of the case, it is not to the point to explore whether the outcome of the case adds weight to that apprehension. Indeed, this would be an impossible exercise as the possible effect of relationships, gifts and improper contacts could influence the decision maker in a myriad of ways either consciously or, more relevantly, subconsciously.

As the passage quoted from the Supreme Court of New Zealand emphasizes, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the judge may be seen to be biased and that the factual enquiry should be rigorous. In this case there were factual issues raised by the disputed allegations made on the one hand by Toa Joseph and Patrick, and on the other hand by Sawa Matarave. However, whichever version of the facts is correct, there was a close relationship between some of the parties and the judge during the opening celebrations. The assertion that at the conclusion of the ceremonies the judge accepted gifts from one of the parties was not disputed.

It is not uncommon in the day to day relationships of parties in a community that a decision maker will come into the same place as a party in a current case. Casual meetings may unexpectedly occur, for example in shopping centres, churches or other meeting places. Sometimes there are public functions to which the decision maker and parties are invited, and at which they are all expected to attend. A fair minded observer would not apprehend bias just from contacts of this kind.

However, matters of fact and degree inevitably arise. Casual meetings may lead to discussion, and the subject matter of the discussion might be important. As the

cases emphasize, all the circumstances must be considered. In the present case, the mere attendance of the judge in his role as leader of the church at the opening ceremony and his participation in formal celebrations would not be sufficient to give rise to a reasonable apprehension of bias. Further, the mere fact that the judge comes from the same island as one of the parties would not give rise to a reasonable apprehension of bias. However the matter did not end there. The contact continued over some two days in which the judge and his wife resided in the home of one of the parties. Of even greater significance is the giving and receiving of a significant gift at the conclusion of the ceremony. Those factors must go into the balance.

There is one additional circumstance in this case which in our opinion makes a finding of apprehended bias on the part of the judge inevitable.

Before the trial commenced, Family Rasu applied to the judge to disqualify himself from hearing the appeal and that the appeal be heard by a different judge. The judge received affidavit evidence for that application and heard submissions from the parties. On 29th October 2008 he delivered reasons for his decision not to disqualify himself. In those reasons he considered the circumstances which at that time were said to give rise to the apprehension of bias in favour of Peter Talivo. The judge acknowledged that they were both members of the same church but he said that they did not worship under the same roof, and that at no time had he visited Peter Talivo and his family. In relation to an allegation raised that the Apostolic Life Ministries Church had sometime during the year held a crusade a Peter Talivo's house. The judge said "*whilst it is true there was a crusade held at Mr. Talivo's earlier in the year, the head of the church (ie. the judge) turned down an invitation to attend due to this matter.*"

So here, before the judge entered upon the hearing of the appeal, he has acknowledged the sensitivity of attending a church function at which a party to the proceedings would be present. Given this acknowledgment by the judge of this situation, for him to later attend a two day church celebration whilst decision on the appeal is reserved must inevitably give rise to a reasonable suspicion of bias

in the mind of a fair minded observer. After that, the receipt by the judge of gifts from a party whilst judgment was reserved adds further weight to the inevitable conclusion.

Given this conclusion, it is not necessary for the Court to explore the allegations of bias on the part of the assessors. It is sufficient to invalidate the decision of the Supreme Court that there was apprehended bias on the part of one member of the Court. However, we point out that the allegations of circumstances giving rise to apprehended bias on the part of the assessors are seriously contested between the parties.

The Island Courts Act recognizes that assessors will come from the same geographic area as the disputed land, and that they will bring to the decision making their own expert knowledge on matters of custom. In these circumstances the fact that the chosen assessors have themselves participated in claims over custom land ownership, or have particular knowledge of the customs of an area will not establish a basis for an apprehension that they will not decide the matter fairly and in accordance with the scheme of the legislation. Moreover, issues of necessity might arise. For example, in this case when Family Rasu informed the judge before the hearing that they had objections to the two assessors who were ultimately appointed, and other possible assessors identified, other parties objected to the new names. Given the scheme of the Island Courts Act, it would be impossible in some cases to find assessors that were not familiar with the issues involved in the dispute, and who did not know any of the parties.

Question (d) – What remedy might be possible, and should the Court grant it?

Whilst section 38 of the Judicial Services and Courts Act, like the general law, imposes an absolute disqualification on a judge who has a personal interest in proceedings, or where there is actual bias or an apprehension of bias, a judgment once given where the judge has not disqualified himself or herself, is merely voidable not void. As we have earlier indicated, there must be an order of the court declaring the decision void before it ceased to have effect. The granting of a declaration is a discretionary remedy. We have no doubt that the Court of Appeal

has an inherent jurisdiction in a case such as this to make a declaration to enable it to fairly dispose of the matter before it and to do justice between the parties. This inherent power arises directly under section 65 of the Judicial Services and Courts Act.

The general law relating to apprehended bias is well established. If a party with knowledge of the circumstances said to give rise to the apprehension of bias chooses for whatever reason not to raise the issue promptly, the Court is entitled having regard to all the circumstances to refuse to exercise its power to declare that the resulting decision is void or voidable. This is frequently the outcome where a party knowing of the circumstances which that party later seeks to rely upon to establish apprehended bias, chooses to allow the proceedings to go ahead in the hope that a favorable judgment will be received.

In this present case even if circumstances had been established against the assessors which could give rise to a reasonable apprehension of bias, those circumstances were known to Family Rasu at the out set, and Family Rasu chose not to further challenge their appointment. An application could have been made for a declaration that the appointment of the assessors or one of them was invalid by reason of apprehended bias, but that did not occur. No further complaint was made about the assessors until after the decision with which Family Rasu were dissatisfied.

The same considerations in our view arise where there is an application made after delivery of judgment to challenge the judgment on the ground of bias on the part of the judge based on circumstances which became known to the complaining party well before the judgment was delivered. In deciding whether the Court should exercise its discretion to grant a remedy by way of declaration the delay in this case by the applicants must be brought to account. However on the other hand, the weight must be given to the judge's own appreciation of the sensitivity of the situation evidenced in his decision on 29th October 2008, and to the extent of his involvement in the celebrations, and the receipt of gifts in September 2009 which give rise to a strong case of apprehended bias. As the

case developed and the sworn statements were received it seems an inevitable inference that whoever was unsuccessful was going to claim the appearance of bias. In our opinion the discretion should be exercised in favour of granting the declaration.

For these reasons the Court finds that apprehended bias on the part of the judge has been established and declares that the decision of the Supreme Court is void because the Court had become compromised at the time that it delivered judgment. Having declared the decision void, the Court in its inherent jurisdiction directs that the appeal from the Santo/Malo Island Court be returned to the Supreme Court to be heard afresh by another judge and assessors.

It follows from section 22 (4) of the Island Courts Act that the applications for leave to appeal must in any event be dismissed as this Court has no power to entertain an appeal on the merits from a decision.

How the question of costs should be dealt with in light of the orders we propose is a difficult question. It seems unfair to the applicants Liplip and Family Rasu, who were not involved in the celebrations for the opening of the church that they should now be facing a rehearing of the appeal in the Supreme Court. On the other hand, these parties receive an indirect benefit as the judgments adverse to them made by the Supreme Court no longer stand. It seems to us that the fairest outcome overall would be to make no order as to costs in relation to the appeal to the Supreme Court which is now being declared void, and no orders as to costs of the proceedings in this Court. We consider the costs of the parties in both proceedings should now be ordered to abide the decision of the Supreme Court of the rehearing of the appeal. Orders for costs then made will reflect the outcome of the merits of the competing claims to land ownership.

The formal orders of the Court are:-

1. Applications for leave to appeal dismissed.

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

2. Declaration that the decision of the Supreme Court in Land Appeal Case NO. 7 of 1996 is void and of no effect.

3. Direct that Land Appeal Case No. 7 of 1996 be heard afresh by the Supreme Court.

4. There be no order for costs for any party in this Court.

5. The costs of the parties in the proceedings in the Supreme Court and the costs of the parties in this Court to be decided by the Supreme Court on the further hearing Land Appeal Case No. 7 of 1996.

DATED at Port Vila, this 30th day of April, 2010.

BY THE COURT

.....
Chief Justice Vincent Lunabek

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Justice J. B. Robertson

.....
Justice John von Doussa

.....
Justice Nevin R. Dawson

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Justice Daniel Fatiaki