

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

Civil Case No. 57 of 2010

**BETWEEN: ENTERPRISE DINH VAN TU LTD**  
*Claimant*

**AND: IVUKI KALTAK**  
*First Defendant*

**TIMOTHY KALTAK  
ANDREW KALTAK  
RUSSEL KALTAK**  
*Second Defendants*

**THE ESTATE OF KATAPU KALTAK** by its Administrator, **ANDREW  
KALTAK**  
*Third Defendant*

*Hearing :* 12 September 2011  
*Before:* Justice RLB Spear  
*Appearances:* Daniel Yawha for the Claimant  
No appearance for the First, Second or Third Defendants (Tom Joe Botleng)

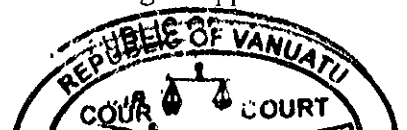
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**JUDGMENT OF THE COURT**

**Urgent Application by Claimant for Restraining Orders**

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1. This is the hearing of an application for urgent interim relief by way of restraining orders against the three sets of defendants. The application indeed seeks a number of orders but it is clear that the only appropriate order at this stage is one restraining the defendants from permitting anyone other than the claimant from extracting aggregate metal or other such material from the quarry owned by the defendants on their land known as *Eruelep* until the substantive claim is resolved.
2. It is of significance, again, that there is no appearance today by Mr Botleng who is acting for all the defendants. Mr Botleng last appeared for the defendants on 29 August 2011 at a conference which was then set to reconvene before me on 14 November 2011.
3. The claimant then filed this application for urgent relief by way of restraining orders and that came before me at a hearing on 31 August 2011. Mr Yawha again appeared



for the claimant. Mr Andrew Kaltak, the above named second defendant and the administrator of his deceased father's estate, appeared in person. It was noted at that time that Mr Botleng was on Tanna involved in other legal work and that he was unable to attend that conference. Be that as it may, the appropriate course was for Mr Botleng to arrange for another lawyer to act as his agent and appear at that hearing rather than send one of the defendants.

4. The urgent application was then adjourned for hearing at 10 am on 8 September 2011.
5. At that hearing on 8 September 2011, there as again no appearance by Mr Botleng for the defendants nor was there any representation of any of the defendants. As I noted at paragraph 6 of the notes made of that hearing, Mr Botleng was involved at that time in another case in Luganville. He had written a letter to my Secretary seeking another date for the hearing. It is of significance that I set out paragraph 6 and 7 of those hearing notes which were circulated to Mr Botleng

*6 Mr Botleng represents the defendants. He was not at this hearing. He wrote to my Secretary by letter dated 4 September 2011 referring to the orders made on 31 August 2011 which fixed the date of the hearing of the urgent application for restraining orders. In his letter he stated that it, "serves to formally inform you that Mr Yawha and Mr Botleng had a trial in a probate case before Justice Saksak in Lunganville on 8 and 9 September". He sought a further date for the hearing of this application.*

*7 It is important to make the point again - counsel who are unable to attend a hearing, even to seek an adjournment, need to instruct another counsel to appear as his or her agent to seek that adjournment or whatever. It is not appropriate for counsel simply to write to the Court and say that they have a conflict of fixtures or for whatever reason they are unable to attend the hearing. That is a failing in the duty that counsel owes the Court. It also places the position of their client at distinct risk.*

6. The application was adjourned through to today at the nominal time of 3 pm to follow the criminal case that I was scheduled to hear. As it happened, that case did not finish until approximately 4 pm. This case however was called at 3 pm and stood down to 5 pm. Mr Yawha was present. Mr Botleng was not present. I understand from Mr Yawha that Mr Botleng is aware of the hearing. He left a message with Mr Yawha's secretary that he could not attend the hearing as he had a sick child.
7. Mr Yawha has, on behalf of the claimant, shown remarkable patience and tolerance. However, he is entitled to have his application for urgent relief determined relatively



urgently. I am not aware of any reason why the defendants, through Mr Botleng or otherwise, could not have arranged alternative counsel to appear for them today. A respondent to an application for urgent relief cannot obstruct the hearing of the application in such a manner as this.

8. The application must be heard today.
9. As will be seen from the conference notes and the hearing notes that have issued in this matter, the claim against the defendants is that the claimant entered into a contract on 17 December 2009 with the then custom owner of the land –Mr Kaltapu Kaltak. That contract was for the exclusive right to remove aggregate, metal or other such material from the quarry in question for a 20 year period from 19 September 2009 to 17 December 2009. It is of some significance that this simply formalised an arrangement that had been in place for some years leading up to the formation of that contract.
10. The complication that has arisen appears to be because the custom owner of the land at that time the contract was entered into, and the person who had dealt with the claimant over the years, subsequently passed away. The deceased's sons are the first and second defendants and they have apparently decided that they do not want to deal further with the claimant in respect of the quarry and that they prefer to deal and contract directly with *MCI* (Melanesian Commerce and Industries Ltd). As I have been at pains to point out on a number of occasions, the contract is not brought to an end simply because one of the contracting parties had died. The successors in law, custom or otherwise, to the land known as *Eruelep* are bound by law to respect the contract entered into. There appears to be an overwhelming case for the claimant in that respect. There is certainly a serious question to be tried.
11. The next issue is whether the Court should exercise its discretion to grant the interim relief which will effectively restrain the defendants from allowing MCI, or any company other than the claimant, including them-selves, from mining the quarry. In this respect, the pertinent question is whether the contractual rights of the claimant could be appropriately redressed by an order for damages in due course. There is, however, uncertainty as to whether damages would be adequate relief if the claim by the claimant is found ultimately successful. There is no evidence as to the financial



circumstances of any of the defendants. Accordingly, the claimant could not, with justification, have any confidence at this stage that, if it can only look to recover damages for wrongful repudiation of contract, it will be able to recover any sum of damages eventually adjudged due to it. This is significant given that the contract is for a 20 year term and the damages could end up being quite substantial if the claim succeeds.

12. There is one uncertainty in relation to the material filed by the claimant. The undertaking as to damages is given by its director and specified to be in his capacity as director. The undertaking as to damages, in an appropriate form, should be given by the company under seal and that is now required to be attended to. Mr Yawha gives his undertaking that he will promptly attend to that and file that in the Court.
13. While the application seeks restraining orders in respect of MCI as well, that company has not yet been joined into the proceeding although Mr Yawha informs me today that the application for adding MCI as fourth defendant has now being filed. Be that as it may, Mr Yawha accepts that it is appropriate to limit the relief sought at this stage solely to a restriction on the first, second and third defendants. Furthermore, that no other restraining order as sought should be made at this stage to support the claimant mining the quarry. That might simply serve to inflame the already tense situation that has evolved. However, that issue can be reviewed in due course. It can perhaps be hoped that the restraining order that is made will bring the defendants to the discussion table.
14. **ORDER** This Court orders that the first, second and third defendants, their agents and servants, are now restrained from permitting any aggregate, metal or other such material to be extracted or removed from the quarry on their land known as "Eruelep" until further order of this Court.
15. The costs of this interlocutory proceeding are reserved.

BY THE COURT

