IN THE COURT OF APPEAL OF VANUATU AT PORT VILA

APPEAL CASE NO. 7 OF 1995

BETWEEN : ADELYNE NELSON

- Applicant/Appellant

AND : THE ATTORNEY GENERAL REPRESENTING THE REPUBLIC OF VANUATU

- Respondent

Coram : Mr Justice Geoffrey Martin
Mr Justice Kubulan Los

Mr Robert Sugden for the Applicant/Appellant
Mr Patrick Ellum for the Respond

JUDGMENT

The applicant seeks leave to appeal against an order by Mr Justice Lenalia on the 5th June 1995 and orders by the Chief Justice on the 14th June 1995 and 10 July 1995. Leave is required in all appeals because the orders were interlocutory orders (see r.21 of the Rules of the Court of Appeal) 1973.

Before his Lordship on 5th June 1995 was an appeal to stay execution of a default judgment entered against the Respondent/Defendant on the 15th May 1995 in a proceeding commenced by the Applicant/Appellant. An application to set aside that judgment was for hearing on 14 June 1995. We note the argument by the applicant's counsel that the application to stay execution was brought on so suddenly and without any sufficient notice to himself and his client that he could not prepare well to argue against the application. In view of the very short period mentioned we consider that it was reasonable for his Lordship to make a stay order as a holding order to give sufficient time for the parties to prepare for a full argument.

First Order of His Lordship the Chief Justice.

On the 14 June 1995 His Lordship, the Chief Justice took on where His Lordship Justice Lenalia had left.

The power to set aside a default judgment is derived for O.29 r.12 of the Blue Book (The High Court (Civil Procedure) Rules 1964) 'the 1964 Rules. The power is discretionary but the rule does not list or give guidance as to what may be the necessary circumstances or factors to be considered when the Court is faced with a question of whether or not a default judgment should be set aside. From the case law in UK, Australia and PNG, the two main necessary consideration would appear to be whether the party that seeks to set aside a default judgment has any reasonable explanation why the judgment was let to be entered in default and secondly whether the party has any defence on the merits. We are supported in this view by various notes in O.29 r.12 in the 'White Book' (the Supreme Court Practice 1958 Vol.1. page 130). The defence on the merits must normally be shown by facts deposed in an affidavit. In a regular judgment, failing to give any reasonable explanation for letting the judgment be obtained by default and failing to state facts which show a defence in the merits, an order to set aside may not be granted at all "except for some very sufficient reason" (see Hoption v Robertson 23 QBD 126).

The Applicant/Defendant raised a defence, that is the Plaintiff/Appellant had instituted proceedings without first obtaining leave as required by O.61(2), of the Blue Book.

The application for leave must be made within six months (O.61(3). It was submitted on behalf of the Plaintiff/Applicant that by virtue of the operation of O.56, leave is not required in this case because the rule permits mandamus to be claimed by writ, for which no leave is required . It is our view that O.56 requires claim to be endorsed on a Writ but it does not alter the requirement for leave in O.61(2).

It was also suggested in argument that no leave was required because the Plaintiff only sought declaration. There is no merit in this suggestion. The declaration sought had the same effect as mandamus. All other relief sought would flow from those declarations.

In our view leave was required before this action could be brought.

It remains for us to decide whether failure to obtain leave before initiating proceedings is a "very sufficient reason" to be applied in favour of setting aside the default judgment. In our view it is a "very sufficient reason". The action suffered a fundamental flow from the start. There is a further reason why the default judgment should have been set aside. That is, the declaratory order was made simply in default of pleading. It should not have been given because such an order could only be granted on sufficient evidence normally produced by an affidavit. (Wallerstenia v Moir [1974] 3 All ER 217, at p. 251). There was no such evidence before the Court.

Leave is also sought to appeal against the order of His Lordship the Chief Justice that the Teaching Service Commission be joined as a party. His Lordship included in the order sanctions to force compliance with his order. We respectfully agree with his Lordship that the Commission being a body created by Statute (Teaching Service Act Cap 171, section 2) it is capable of being sued. The real question is whether it is a necessary party to this action. Of immediate importance is the Commission's statutory powers which include ability to engage, assign, transfer and discipline (in Part III, IV and V of Cap 171). The Commission also has power (in Part VI) to act as an appeal body to hear and determine the appeals by officers and employees engaged in the Service. Any person who is affected by the exercise of any of these powers must have a right of action against that body.

In our view, the Teaching Service Commission is a necessary party to this action, for 2 reasons :-

1. If an order is sought against a particular organ of the state, with independent powers (as has the Teaching Service Commission) that body should be joined as a party both to enable it to be heard in its own right and to facilitate the enforcement of any orders which may be made against it.

2. This action seeks an order for mandamus against the Republic. In practice, courts do not make such orderagainst the state. They make declarations as to the rights of the parties which are normally complied with by the Government of the day.

For the reasons that we have given, leave to appeal orders of 5th June 1995, 14th June 1995 and 10th July 1995 is refused. But time for compliance by the Appellant/Plaintiff with the order of 10th July 1995 is extended to 7 days from today.

This appeal having failed on all points, the appellant must pay the costs of this appeal to be taxed if not agreed.

DATED at Port Vila this 6th day of October 1995.

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

MR JUSTICE GEOFFREY MARTIN
Judge of Appeal

MR JUSTICE KUBULAN LOS
Judge of Appeal

IN THE COURT OF APPEAL OF VANUATU AT PORT VILA

APPEAL CASE NO. 7 OF 1995

BETWEEN : ADELYNE NELSON

- Applicant/Appellant

AND : THE ATTORNEY GENERAL REPRESENTING THE REPUBLIC OF VANUATU

- Respondent

Coram : Mr Justice Geoffrey Martin
Mr Justice Kubulan Los

ORDER

Upon hearing Counsel for the Appellant and for the Respondent

IT IS ORDERED THAT :

1. The application for leave to appeal against the order of 5th June 1995, 14th June 1995, and 10th July 1995 are dismissed.

2. Time for the Appellant to comply with the order of 10th July 1995 be extended to 13th October 1995.

3. The Appellant do pay the Respondents cost of this appeal to be taxed if not agreed.

DATED at Port Vila this 6th day of October 1995.

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

MR JUSTICE GEOFFREY MARTIN
Judge of Appeal

MR JUSTICE KUBULAN LOS
Judge of Appeal