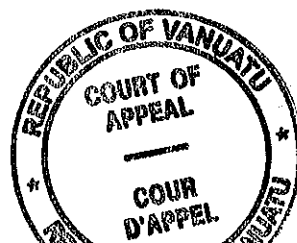


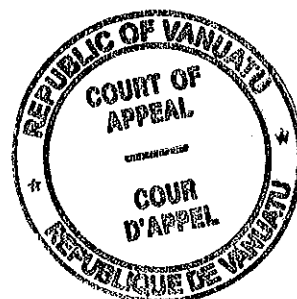
Respondent's counsel in a letter from the Appellant's counsel dated 19th March, 2009. Counsel for the Respondent says that he did not receive the Defence with that letter but conceded that he did have a copy of the Defence on his file.

3. On 14th October, 2008, the Respondent filed a Request for Default Judgment (Damages) said to be pursuant to Rule 9.3 of the Civil Procedure Rules. On 7th July, 2009, the Court issued a Notice of Pre-trial Conference for the 27th July, 2009. The following day, 28th July, 2009 the Court granted Default Judgment. No-one appeared for the Appellant.
4. The Appellant filed an Application to Set Aside the Default Judgment on 31st July 2009 and a sworn statement in support was filed on 28th September, 2009. An Application to Strike Out was filed by the Appellant on 6th October, 2009 along with a sworn statement in support. On the 17th December, 2009 the Court issued a Notice of Hearing for the 4th February, 2010 to hear these applications. The Court made an oral ruling and orders that day, confirmed in the written Ruling dated 5th February, 2010.
5. Counsel for the Appellant did not appear in Court on the 4th February, 2010. In a sworn statement counsel said that he did not receive any notice of the hearing and was unaware it was to be held. The Appellant personally received a notice of hearing from the Court. He appeared on the fixed date. When Mr Joel, the Appellant's counsel was rung by the Court on 4th February he said he did not know of the fixture. Mr Joel told his client to ask for an adjournment. The request was denied, the Appellant's Application was dismissed and counsel for the Appellant was ordered to personally pay costs.
6. The application for an adjournment should have been granted. The Appellant's counsel advised the Court he had not been told of the hearing date. In the absence of anything to the contrary that assertion should have been accepted by the Court. From the Court file it is evident that a Defence had been filed prior to the filing of the Request for Default Judgment which

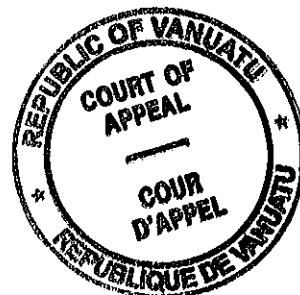


questioned the existence of a contract upon which the claim was based. This raised a serious question for the Court to consider and the Appellant needed legal representation to make his submissions.

7. The reasons why the Default Judgment should not have been granted are:
- (i) For the reasons set out in paragraph 6, the hearing should not have proceeded on that day but been adjourned so the Appellant could be legally represented.
 - (ii) The purpose of the default process is to allow for a speedy entry of judgment where the defendant has been served with a claim but has not filed a defence. In this case, the Appellant was late in filing his Defence, but as mentioned in paragraph 6, it was filed prior to the filing by the Respondent of its Request for Default Judgment. The Defence filed complies with Civil Procedure Rules and adequately addresses the pleadings in the claim. The decision as to whether or not a court should grant a default judgment application is discretionary but in these circumstances where a Defence has been filed raising serious issues that need to go to trial, a default judgment order should not be made.
 - (iii) The default judgment process in the Civil Procedure Rules cannot be used to obtain the equitable relief of specific performance. In a claim for equitable relief, if a defendant has not filed a defence, then to obtain judgment the claimant would need to proceed according to Rule 12 of the Civil Procedure Rules, and in particular, Rule 12.9. To obtain a judgment for equitable relief, pursuant to Rule 12.9 the Claimant would need to call evidence to establish the claim. Equitable relief cannot be granted pursuant to Rules 9.1 and 9.3 as stated in the Default Judgment.



- (iv) In the Default Judgment, damages were awarded to the Respondent. Pursuant to Rule 9.4, the Court must hold a trial to determine the quantum of damages. No trial was held.
- (v) There was a serious error of fact in the Respondent's Supreme Court Claim and the Request for Default Judgment, as both documents allege the existence of a contract between the parties dated 5th July, 2004. The Appellant in his Defence denied the existence of any such contract but accepted the existence of a contract dated 5th July, 2006. At this point, the only proper course for the Respondent would have been to apply to the Court for leave to file an Amended Supreme Court Claim. If granted the Appellant was entitled to time to file a response. The Respondent should not have proceeded with its Request for Default Judgment.
8. During the hearing of this appeal, this Court heard that the Supreme Court had issued ex parte Interlocutory Orders dated 20th June, 2008, restraining the Appellant from transferring or otherwise dealing with the land in question until final determination of the claim. Counsel for the Respondents accepts that no undertaking as to damages pursuant to Rule 7.8(5)(e) was given. Rule 7.8(5) says that an application must include an undertaking as to damages. The requirement is mandatory and an order cannot properly be made without the undertaking having been given. The Interlocutory Order must therefore be set aside. It is open to the Respondent to make a new application in proper form, as it is also open for the Respondent to register a caution on the land to protect its legal position.
9. The decisions of this Court are:-
- (i) The Ruling of the Supreme Court dated 5th February, 2010 is set aside and quashed.
- (ii) The Default Judgment dated 28th July, 2009 is set aside and quashed.

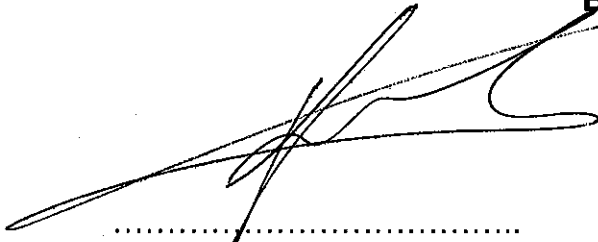


(iii) The Interlocutory Orders dated 20th June, 2008 are set aside and quashed.

10. Costs are ordered in favour of the Appellant on a standard basis, as agreed by the parties, or failing agreement, as taxed by the Supreme Court.

DATED at Port-Vila this 16th day of July 2010

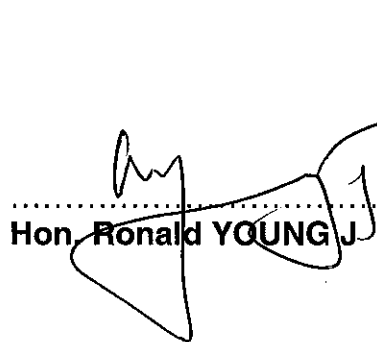
BY THE COURT



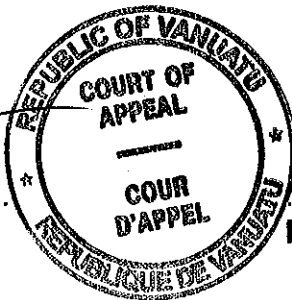
.....
Hon. Vincent LUNABEK CJ



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Hon. John von Doussa J



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Hon. Ronald YOUNG J



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Hon. Nevin R. Dawson J



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Daniel FATIAKI J