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

Civil Appeal Case No. 23 of 2010

BETWEEN: **LAHO LIMITED**
Appellant

AND: **MORRIS TAKALO**
Respondent

Coram: *Hon. Justice J. Mansfield*
Hon. Justice E. Goldsbrough
Hon. Justice N.R. Dawson
Hon. Justice D. Fatiaki

Counsel for the Appellant: *M. N. Ferrieux Patterson*
Counsel for the Respondent: *M. Vire*

Date of hearing: *30 November 2010*
Date of decision: *3 December 2010*

JUDGMENT

1. This appeal follows a refusal to set aside a default judgment by the Supreme Court on 4 August 2010. That default judgment was entered against the Appellant company on 8 February 2010 and an assessment of damages hearing took place on 22 March 2010 with judgment published on 26 March 2010.

2. Default judgment was entered subsequent to the filing of a response to the claim, which response was not dated. Following the default judgment an assessment of damages hearing took place on 22 March 2010.

3. As regards service of the original claim, the Court at first instance was not required to consider service as a response had been filed by the Appellant

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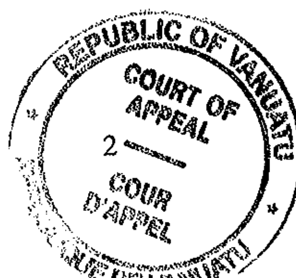
company. Once a response has been filed, the party so filing submits to the jurisdiction of the Court to hear and determine the claim and no further evidence of service is required. Whilst the point made in submissions by Counsel now acting for the Appellant company is clear, it is equally clear that neither the Respondent nor the Court would have any reason to doubt that the Response was filed other than in accordance with proper procedure and with proper authority.

4. It is worth noting at this point that the Response form itself is quite clear as to what must happen after it is filed. "If you have ticked box 2 or 3 you must file a defence, and serve a copy on the claimant, in 28 days from when you received the claim." A clearer statement could hardly be imagined and yet the employee responding on behalf of his employer thought better.

5. The relevance of the actions of the employee of the Appellant who filed the response is, though, more significant when considering Rule 9.5(2)(b) wherein the Appellant "must set out the reasons why the Defendant did not defend the claim" and Rule 9.5(3) wherein the Court needs to be satisfied that the Defendant has shown reasonable cause for not defending the claim if there is an application for the default judgment to be set aside.

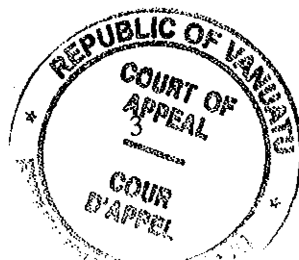
6. Clearly the employee who considered that nothing further was necessary after the response was filed was in error. If the same notice had come to the attention of an officer of the corporation under Rule 5.8(2)(a) the response may have been different.



7. On the same point there is no evidence before this Court, nor was there evidence before the Court below, as to the registered address of the corporate Appellant. Absent that information it is not possible to determine whether Rule 5.8(2)(b) was complied with or not although, because of the response filed, the matter is not determinative.

8. All of this may have been avoided if the respondent through their counsel had served the original claim in accordance with the Rules having established the address registered with the Registrar of Companies, and had left the claim at the registered office in accordance with Rule 5.8(2)(b) or had given the claim to an officer of the corporation in accordance with Rule 5.8(2)(a).

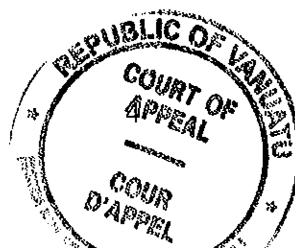
9. As to service of a notice of hearing for the assessment of damages hearing there is nothing in the Appeal book to indicate service. In submissions, counsel for the Respondent could point to nothing other than a sworn statement of service of submissions for the assessment of damages hearing. That sworn statement itself was deficient in that it recited only personal service, not where the documents were served, and also demonstrated non-compliance with the orders of the Court to serve submissions by 1 March 2010 to allow for a response by 15 March 2010 by itself noting service only on 15 March 2010. No notice of hearing notifying the Appellant of an assessment of damages hearing on 22 March 2010 was put before this Court, or any evidence of service of the default judgment itself prior to the assessment hearing. For that reason alone it would be proper to set aside the orders made on the assessment of damages hearing.



10. In the decision of 4 August 2010 the learned judge refusing the application to set aside the default judgment indicated that his refusal was based on lack of jurisdiction. As has been conceded on this appeal, that was clearly wrong. A default judgment may be set aside at any time. (Rule 9.5(2)(a)). The application may be heard by the same or a different judge, although convenience dictates that the same judge should be approached where possible. Whilst there may be force in the argument that a judge becomes *functus officio* after a case has been determined by final order, such final order if based on default which may be set aside is no bar to the same judge hearing an application properly brought to set aside under Rule 9.5(2). Consequently, the order refusing to set aside the default judgment based on a lack of jurisdiction must be set aside, for there is jurisdiction and the correct question to consider is whether the available discretion should be exercised in favour of the Appellant.

11. The grounds upon which the Appellant relies to demonstrate that the judgment should be set aside, as opposed to the power to consider the application to set aside, are set out in the Notice of Appeal filed 15 November 2010. Therein can be found the grounds upon which the Appellant seeks to defend the claim on liability as well as on quantum. A defence was filed as part of the application to set aside the default judgment and that defence is still relied upon within this appeal and, if successful, will be at any subsequent trial.

12. Given that it is conceded that the power exists for the judge to set aside his default judgment, we turn to consider in this case whether that default



judgment should be set aside. The Appellant company has set out the defence that it seeks to raise against both liability and quantum.

13. In submissions, counsel for the Respondent acknowledged that, as regards the alleged defamation, there is no assertion of publication to a third party contained in the statement of claim and therefore no basis on which the Court below could find in favour of the Respondent. Given that concession it is difficult to see how this appeal cannot succeed. It is not submitted that this Court may or should set aside only part of the judgment.

14. There is no evidence before this court of service of a Notice of Hearing or other documentation referring to the date and time of the assessment of damages hearing and that itself appears to be a further reason to set aside the orders made by the judge below.

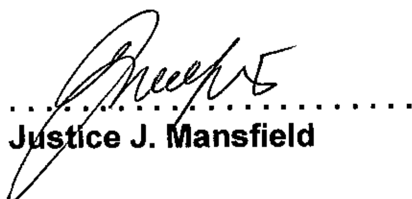
15. In the event, the appeal is allowed and the order of 4 August 2010 refusing to set aside the default judgment is quashed. The default judgment entered on 8 February 2010 is set aside, the subsequent orders assessing damages made on 26 March 2010 are also set aside and the matter is remitted to the Supreme Court for a hearing based on the draft defence. That defence is to be formally filed within fourteen days from the date of this judgment.

16. No order for costs is made on this appeal. The primary judge made an order made on 4 August 2010 reserving costs. In our view an order should be made that the Appellant pay those costs of the application to set aside the default judgment. In making these orders this Court takes into account

that the Appellant company made the error, which is admitted, in not properly responding to the claim, and thereafter that the Respondent did not serve as they should have done the default judgment and notice of hearing for the assessment of damages.

DATED at Port Vila, this 3rd day of December 2010

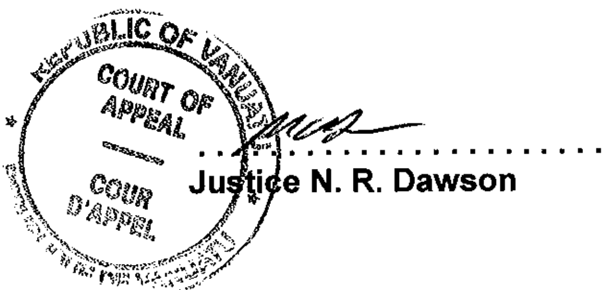
BY THE COURT



Justice J. Mansfield

Justice E. Goldsbrough

Justice D. Fatiaki



Justice N. R. Dawson