

**BETWEEN:**                 **GEORGE BOAR**  
  Appellant

**AND:**                       **THOMAS FELIX**  
  First Respondent

**AND:**                       **THE REPUBLIC OF VANUATU**  
  Second Respondent

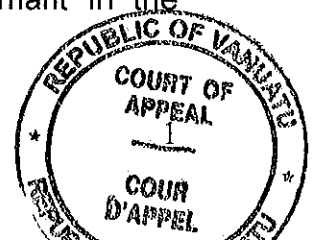
**Coram:**             *Hon. Chief Justice Vincent Lunabek  
                                Hon. Justice John von Doussa  
                                Hon. Justice Daniel Fatiaki  
                                Hon. Justice Ronald Young  
                                Hon. Justice Oliver Saksak  
                                Hon. Justice Dudley Aru*

**Counsel:**           *Mr. George Boar in person  
                                Mr. Felix Laumae for the First Respondent  
                                Mr. Justin Ngwele for the Second Respondent*

**Date of hearing:**     23<sup>rd</sup> April 2012  
**Date of judgment:** 4 May 2012

## **JUDGMENT**

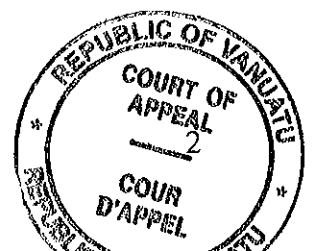
1. This is an appeal against a Ruling of a Supreme Court Judge made on 29 February 2012 which ordered Mr Boar personally to pay costs thrown away in a matter. The costs were fixed at VT500,000 to each of the First and Second Respondents to this appeal, in all a total of 1 million Vatu.
2. The principal proceedings in the Supreme Court out of which this matter arises had been listed for trial over three days, commencing on the morning of 29 February 2012.
3. Mr Boar had been the counsel on the Court record for three of the Respondents in the proceedings throughout the pre-trial stages of the matter. Mr Laumae was counsel on the record for the Claimant in the



proceedings and the State Law Office was on the court record as the counsel for the fourth Respondent, the Republic of Vanuatu.

4. The case was placed on the ready list for trial in mid 2011 with all counsel confirming at that stage that the case was ready for hearing. As it happened, in February 2011 time became available in the week commencing Monday 27 February 2012 to accommodate the trial, and notice was given on 22 February 2012 that the trial would commence on Wednesday 29 February 2012, with three days set aside for it. No one objected to the short notice.
5. When the matter was called on for trial on 29 February 2012, Mr Laumae appeared for the Claimant and Mr Ngwele appeared for the Republic of Vanuatu. However there was a no appearance by or on behalf of Mr Boar. All attempts on that morning to contact Mr Boar were unsuccessful.
6. The Judge was satisfied that Mr Boar was aware of the trial fixture as the Court Registry had been advised by Mr Boar's Office that Mr Boar had filed a Notice that he had ceased to act for the three Respondents who up until then he had represented. That notice was received by the Court on Monday 27 February 2012, although it was dated the preceding Friday.
7. The trial fixture for 29 February 2012 had to be vacated. Time set aside by the Court and by other counsel was wasted. The trial judge considered that in the circumstances Mr Boar should be ordered to compensate counsel for the Claimant and for the Republic for that wasted time. The Judge said:

*"As has been stated on countless occasions by Judges of both the Supreme Court and the Court of Appeal, counsel do not escape their responsibilities either to the Court or to their clients simply by filing a notice of ceasing to act. Counsel have a continuing obligation to the Court which survives the filing of a notice of ceasing to act. Counsel on the record is required to obtain leave of the Court to withdraw unless replacement counsel appears. That process is essential particularly as it enables the Court to be satisfied that the particular parties represented by that counsel are aware of the state of the case and they are able to make the best decisions as to legal representations."*



8. The Civil Procedure Rules No.49 of 2002 (CPR) r.18.8 provides:

***"Lawyers ceasing to act***

*18.8 (1) A lawyer who begins to act for a party during a proceeding, or ceases to act for a party, must:*

*(a) as soon as practicable, file a notice in Form 35; and*

*(b) serve the notice on each party to the proceeding.*

*(2) The notice is effective after the last service.*

*(3) Filing the notice does not affect the power of the court to make an order for costs against the lawyer personally under these Rules."*

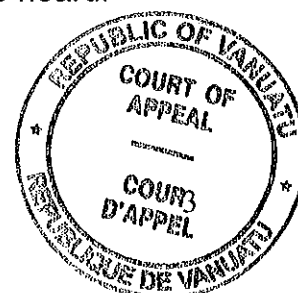
9. Mr Boar had not served the notice of ceasing to act on the other parties to the proceedings, and, in terms of the above Rule, the notice had not become effective by the time of the trial.

10. The remarks of the trial judge above are not based on r.18.8 and the failure of Mr Boar to serve the notice of ceasing to act on the other parties. They are based on the practice of the Court which has evolved through many cases and observations made by judges sitting at first instance and in the Court of Appeal.

11. The interest of justice and the business of the Court cannot be effectively managed unless the practice described by the trial judge is followed. We endorse the statement of principle made by the trial judge. That practice must be followed by lawyers when they cease to act for a party in litigation.

12. In the present case, as there was nothing before the Court to indicate that the clients represented by Mr Boar were aware of the Court fixture, or of his intention not to appear, and as those three parties were not at Court, the matter could not proceed until another trial date could be fixed and his former clients are properly advised.

13. The trial judge thereupon made the orders under appeal. This was done in the absence of Mr Boar and he was offered no opportunity to be heard.



14. As the notice of ceasing to act which Mr Boar had lodged at the Court Registry was not effective he was, for the purposes of the CPR, the lawyer on the record. Rule 15.26(2) makes specific provision for the Court to order a lawyer to pay costs wasted in a proceeding. Relevantly, Rules 15.26(2) and (3) provide:

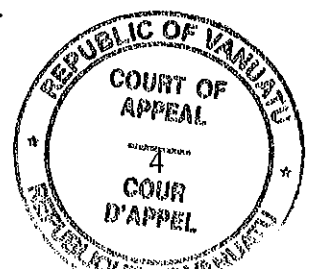
- “(2) The Court may order that the costs of the whole or a part of a proceeding be paid by a party’s lawyer personally if the court is satisfied that the costs of the proceedings were increased because the lawyer:*
- (a) did not appear when required to; or*
  - (b) was not ready to proceed or otherwise wasted the time of the Court;*
  - (c) incurred unnecessary expense for the other party.*
- (3) The court must not make an order for costs against a lawyer personally without giving the lawyer an opportunity to be heard.”*

15. In this case, the procedure followed by the trial judge in ordering costs against Mr Boar in his absence did not meet the requirement of Rule 15.26(3). Moreover, Rule 15.27 makes specific provision for how an application for costs against a lawyer personally should proceed. Rule 15.37 provides:

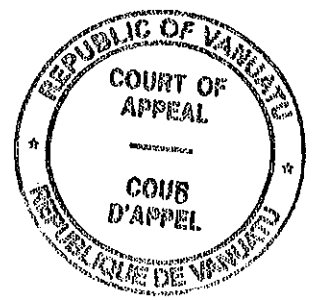
***“Application for costs against lawyer***

- 15.27 (1) *A party may apply for an order for costs against a lawyer personally under rule 15.26.*
- (2) *The application must:*
- (a) Set out the reasons why a costs order is being applied for;*
  - and*
  - (b) fix a date, being not sooner than 14 days, for the lawyer to file a sworn statement in answer to the application; and*
  - (c) fix a date for hearing the application.*
- (3) *A copy of the application, and notice of the hearing date, must be served on the lawyer concerned.*
- (4) *The application is to be dealt with by the trial judge, if practicable.”*

16. The procedure set out in Rule 15.27 was not followed in this case.



17. Mr Boar appeals against the orders made against him. These were final orders in so far as Mr Boar was concerned and we do not consider that leave to appeal is necessary. However, were leave necessary, we think in the circumstances of this case leave should be granted.
18. Mr Boar's grounds of appeal are confined to complaint about the trial judge's failure to give him the opportunity to be heard and further, failure to give him the opportunity to apply to have the wasted costs submitted to taxation.
19. Before this court, Mr Boar has had the opportunity to be heard. He acknowledges to this court that he should have been present when the case was called in the court below. He acknowledges that he should suffer a costs order under CPR Rule 15.26(2). However, he challenges the amount awarded to each of the Respondents to this appeal. The award of VT500,000 to each of them was, he argues, grossly excessive.
20. The power under Rule 15.26 is a power to award "wasted costs". To ascertain what costs are wasted when a trial day is vacated consideration should be given not only to costs incurred by clients in respect of the wasted lawyers' fees they may incur, but also to out of pocket expenses that may have been incurred by the parties themselves and in respect of witnesses. In this case we were informed that there were no claims for expenses for witnesses or other out-of-pocket expenses, and the wasted costs related only to the fees of the two counsel who were present at Court. It seems that the amounts awarded were arrived at by applying an hourly rate over many hours over three days. Such a mechanical approach in our view overlooks the realities of life. When a trial fixture falls over, even at short notice, counsel are unlikely to be sitting idle for the expected duration, nor will it be expected that they will charge their clients without regard to the opportunity which has become available to them to attend to the affairs of other clients, and outstanding work no doubt awaiting their return to their office. In cases like this, although it is proper to make an award for wasted costs, the award should be a conservative one having regard to the new opportunities which the vacation of the trial fixture opens to them.



21. It has been customary in this Court to make awards in the order of 50,000VT for each affected party where cases have been called but cannot proceed because of a default by another party. Moreover, similar orders for costs have commonly been made against unsuccessful parties in short appeals. In the present case Mr Boar contended that the award against him should be reduced to VT50,000 to each Respondent, a total of VT100,000. Such amount would be consistent with recent orders made in this Court, and we accept Mr Boar's submission.
22. The appeal will therefore be allowed. The Ruling made by the trial Judge on 29 February 2012 in so far as it ordered costs of VT500,000 to be paid to Mr Laumae and the State Law Office is set aside. The wasted costs of Mr Laumae and the State Law Office should be fixed at the sum of VT50,000 for each of them.
23. Finally, there is the issue of costs of this appeal. Consistent with the observations we have made above, Mr Boar, as appellant in this short appeal where he has had substantial success entitles him to an order for costs against the Respondents. We think that those costs should be fixed at VT50,000 payable as to VT25,000 by each of the Respondents. The Court orders that these costs be set off against the amounts otherwise payable by Mr Boar. In the result, in lieu of the Ruling made by the trial Judge, Mr Boar is ordered to pay to each of the present Respondents a sum of VT25,000. Payment must be made on or before 1<sup>st</sup> June 2012.

**DATED at Port-Vila this 4<sup>th</sup> day of May 2012**

**ON BEHALF OF THE COURT**

.....  
**Vincent LUNABEK**  
**Chief Justice**

