IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appeal Jurisdiction)

Civil Appeal Case No. 53 of 2012

BETWEEN: SAM NAFILUA

Appellant

AND JIMMY IALIPEN

Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Oliver A. Saksak*** ***Hon. Justice Ronald Young*** ***Hon. Justice Daniel Fatiaki*** ***Hon. Justice Robert L. Spear*** ***Hon. Justice Mary Sey***
Counsel:	*Mrs. M. G. Nari for the Appellant* *Mr. H. Vira for the Respondent*
Date of Hearing:	*16 April 2013*
Date of Decision:	*26 April 2013*

JUDGMENT

1. The appellant appeals against a summary judgment given by the Supreme Court on the following grounds:

> *"(1) The Court erred in law and procedure when it did not ensure that the defendant or his lawyer had notice to attend the hearing of the application for Summary Judgment before entering the judgment;*
>
> *(2) The Court erred in law and fact in granting the application when there is a question as to the identity of the person(s) that assaulted the claimant ...*
>
> *(3) The Court erred in law and procedure for granting quantum that is not substantiated by further evidence ..."*

2. On 23 September 2011 the respondent issued proceedings in the Supreme Court against the appellant seeking "*... general damages of an amount of VT4,000,000, interest at 5% per annum and costs*". The claim and sworn statement in support also annexed a copy of the appellant's medical report.

3. The respondent's case was that he was angrily accosted at his home at the Blacksands, Efate, and badly assaulted by the appellant. As a result of the assault, the respondent lost consciousness and sustained bodily injuries, the most serious of which was a raptured spleen. The respondent was hospitalized and in spite of inpatient treatment and care, his spleen was eventually removed.

4. The respondent's claim was in substance, a claim for damages for personal injuries. Traditionally, in such a claim the quantum of the damages is left to be assessed by the court on the basis of the evidence led in the proceedings.

5. We note however the requirements of Rule 4.10 of the Civil Procedure Rules requires claims for damages to "*... also state the nature and amount of the damages claimed*" and, more particularly, sub-rule (2) requires several particulars to be included where general damages are claimed including:

> "*(c) the basis on which the amount claimed has been worked out or estimated*".

6. Plainly, Rule 4.10 seeks to ensure that where damages are claimed, the claim will contain at least some details which the defendant and the court will have to consider. It does not mean thereby that the claim for damages is transformed into a claim for a liquidated sum nor does it obviate the need for the court to assess and finally determine the amount of damages to be awarded.

7. On 3 November 2011 the appellant filed a defence in which he admitted "*... assaulting the claimant by slapping him on the face*", he also said that "*... the claimant's relative Jimmy lala lalipen was the one responsible for further assaulting the claimant by punching and kicking him*". No reply was filed by the claimant and in terms of Rule 4.6 (1) "*... the claimant is taken to deny all the facts alleged in the defence*".

8. No attempt was made by either party to join Jimmy lala lalipen in the proceedings either as a defendant or third party nor were the pleadings served on him as might be expected given the nature of the claim and defence advanced in the case.

9. On 12 March 2012 the respondent filed an application for summary judgment together with a sworn statement. In it, the respondent failed to depose to his belief that there is *'no defence to the claim'* or that the *'facts in the claim are true'* as required in terms of Rule 9.6 (3). Instead, the relevant sworn statement is entirely devoted to identifying apparent short-comings in the appellant's defence as to the identity of a second assailant and to the absence of a sworn statement in support of his defence that the named second assailant was responsible for causing the respondent serious injury.

10. After several fruitless conferences in which defence counsel failed to appear, the Court on 14 August 2012 again in the absence of defence counsel,

directed the respondent to serve the appellant with the summary judgment application. The appellant was also given time to serve a response and the matter was listed "*... for 8.30 a.m. on 12 September 2012 to deal with the Application for Summary Judgment*". The application and sworn statement were served on the respondent.

11. On 3 September 2012 the respondent filed a Response to the summary judgment application in which he clarified that "*the name of the other person who assaulted the claimant is Jimmy lala lalipen and not Jimmy lalipen*" and the appellant asserted that there was a "*substantial dispute of fact*" relating to who actually caused the respondent's injury and the extent of the appellant's responsibility (if any) for the respondent's injury.

12. On 9 September 2012 the appellant filed a sworn statement in which he admitted to entering the respondent's yard "*wetem* (with) *Jimmy lala lalipen*" and slapping the respondent. He further deposed:

> "*After mi slappem hem finis nara family nao Jimmy lala lalipen istap kickem hem mekem se i kasem bigfala trabol long bodi blong hem. Long taem ya claimant ino save from se hemi foldaon istap long graon.* (translation: After I slapped him another family member Jimmy lala lalipen kicked him causing him serious injuries. At that time the claimant was unaware as he had fallen down on the ground)."

13. By a Notice of Conference dated 6 September 2012 issued by the Court, the date for dealing with the application for summary judgment was deferred to 11 October 2012. There is no record of this Notice ever having been served on the appellant or his counsel or being brought to their attention. The respondent's counsel in his submissions said: "*... the respondent does not know whether or not this Notice of Conference was served on the appellant or his lawyers*".

14. On 11 October 2012, in the absence of the defendant and his counsel, the Court gave the respondent summary judgment in the sum of Vt 4 million as claimed together with costs of VT20,000.

15. Against that background we turn to consider the grounds of appeal.

The Court erred in law and procedure when it did not ensure that the defendant or his lawyer had notice to attend the hearing of the application for Summary Judgment before entering the judgment.

16. In Vanuatu Commodities Marketing Board v. Dornic [2010] VUCA 4 this Court relevantly observed:

> "*29. ... Having hearings without proper service and sufficient notice in the long run gains nothing. Where a party fails to appear at a hearing the Court*

should not proceed to hear the case until it has sufficient proof that there has been proper service on all parties effected in a timely manner.

30. *Where the lawyer for a claimant has a date of hearing the sensible and responsible practitioner will at least a week before telephone the lawyers for the other parties to ensure they know the case is on and that everyone is prepared for a hearing which will get to the issues so the Court can provide a just answer.*

31. *.....*

32. *Judgment which will withstand appeal on issues of process need to have been obtained strictly in accordance with the Rules and after there has been a sensible opportunity for all interested and affected parties to be considered."*

17. We accept that the particular Notice of Conference complained about was initiated and issued by the Court but that does not obviate the respondent or his counsel from his primary obligation to ensure that the appellant and his counsel are made aware of the deferred hearing date of his application for summary judgment.

18. In this regard we can do no better than to repeat what this Court said in Dinh v. Samuel [2010] VUCA 6:

"*39. The first point concerns service. There seems to be an assumption afoot that the Court has an obligation to serve notices, particularly notices of hearing, on the parties. The Court has no such obligation. The Civil Procedure Rules, Part 5.1 is perfectly clear. That Rule says:*

"5.1 (1) If these Rules require a document to be served, the party who filed the document is responsible for ensuring that the document is served.

(2) The party responsible for service may apply to the court for an order that the document be served by an enforcement officer or other person.

(3) The court may order that the document be served by an enforcement officer or other person if the court is satisfied that the circumstances of the proceeding require it."

40. Rule 5.1(2) and (3) make provision for a party to obtain an order for service by an enforcement officer or other person, but the primary obligation stated in Rule 5.1(1) continues to apply. The party who files a document which requires service must serve it or arrange for it to be served.

41. The Supreme Court often issues notices of hearing or notices of conference, as to which see CPR Part 6, and endeavours to circulate them to all the parties. However this is an administrative step taken as a convenience to the parties and to move matters along. This practice of the Court in no way lessens the obligation under Rule 5.1. The party who files an application, that is the party who is seeking an order or remedy, is responsible for serving it."

19. In the context of an application for summary judgment Rule 9.6 (4) relevantly provides:

"*The claimant must*

(a) file the application and statement; and

(b) get a hearing date from the Court and ensure the date appears on the application; and

(c) serve a copy of the application and sworn statement on the defendant not less than 14 days before the hearing date."

20. It is plainly the on-going duty of the claimant to "*get*" a hearing date for the application for summary judgment and to "*ensure*" that the defendant is aware of that date 14 days before the hearing. This did not occur in the present case. There is therefore no evidence the appellant knew of the October 2012 hearing date. For that reason alone this appeal must succeed.

The Court erred in law and fact in granting the application when there is a question as to the identity of the person(s) that assaulted the claimant.

21. There is a further reason why this appeal must succeed and that is because of the dictates of Rule 9.6 (9) which states:

"*The court must not give judgment against a defendant under this rule if it is satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law*".

22. The pleadings and appellant's sworn statements raised a serious dispute about the identity of the second person who assaulted the respondent and, more particularly, whether the appellant was liable for the serious injury caused to the respondent.

23. In his judgment the primary judge deals with this aspect of the case as follows:

"*7. Secondly the defendant in admitting the assault alleged that he slapped the claimant on the face but someone by the same name as*

the claimant Jimmy Ialipen was the one who punched and kicked the claimant.

8. *Again there was no evidence put forward by the defendant to support this allegation as he admitted in his defence that he entered the claimant's residence ...".*

24. We disagree. At the time summary judgment was given, the court had before it the appellant's Response to the application for summary judgment and, more importantly, his sworn statement which in terms of Rule 11.3 and 11.7 constitutes "*evidence in chief*". In both documents the second assailant is named as: "*Jimmy Iala Ialipen*" and he is identified as causing the respondent's injuries. There is therefore a dispute between the parties as to a substantial question of fact. In such a situation the Court "*must not give judgment*" (Rule 9.6 (a)).

The Court erred in law and procedure for granting quantum that is not substantiated by further evidence ...

25. In this regard other than the appellant's medical report and the VT4 million figure set out in the claim for general damages there was no other evidence from which damages could be assessed. For instance there is no expert assessment of the respondent's disability as a result of his injuries nor is it known whether or not the respondent was in paid employment at the time of the assault or lost his job as a result of his injuries. In those circumstances we do not consider that the amount claimed for general damages was either substantiated or assessed.

26. For the foregoing reasons the appeal is allowed. The summary judgment and costs order are set aside and the case is returned to the Supreme Court for trial on both liability and the damages to be assessed (if any).

27. The appellant is entitled to standard costs in respect of this appeal.

DATED at Port Vila, this 26th day of April, 2013.

FOR THE COURT

Hon. Vincent LUNABEK
Chief Justice.