

IN THE COURT OF APPEAL OF CIVIL APPEAL CASE NO. 21 OF 2013
THE REPUBLIC OF VANUATU

(Appellate Jurisdiction)

BETWEEN: REPUBLIC OF VANUATU
Appellant

AND: KWANG SING 1
Respondent

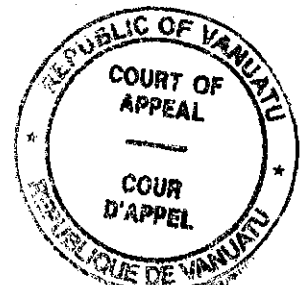
Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Robert Spear
Hon. Justice Mary Sey

Counsel: Attorney General for the Appellant
Mr. Colin Leo for the Respondent

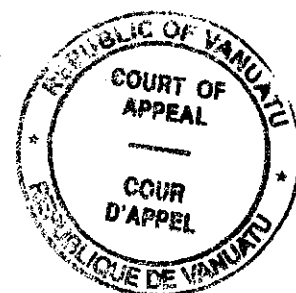
Date of hearing: 13th November 2013
Date of judgment: 22nd November 2013

JUDGMENT

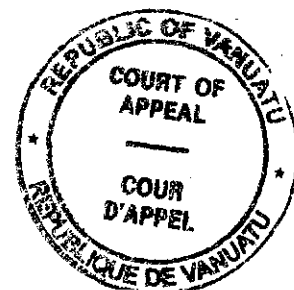
1. This appeal follows the making of a default judgment in a claim against the Appellant for monies said to be for road works carried out by the Respondent, and then the refusal by Aru J. to set aside the default judgment on 3 July 2013.
2. The default judgment was ordered, according to the Civil Procedure Rules, for a failure to file a defence within 28 days of the service of the claim. The Appellant had filed its response so the lawyers for the Respondent knew they were acting. Nonetheless, without notice and on the day after the 28 day period expired, they requested the default judgment.



3. It is now nearly 9 months' later, and it is fair to ask what has been achieved. The interlocutory skirmish is now before the Court of Appeal. The Respondent has not been paid what is claimed, and the claim is no nearer to a hearing. Significant costs have been incurred. Commonsense and professional courtesy as well as the interest of both parties (who have incurred unnecessary costs) may well have been better served if the Respondent's lawyer had written to or spoken to the lawyer for the Appellant instead of proceeding as he did.
4. It is necessary to consider the merits of the appeal filed by the Appellant for orders that:
 - 1) The whole ruling of Justice Aru dated 3 July 2013 (in which the Court dismissed the Appellant's application to set aside the default judgment) be set aside;
 - 2) The default judgment dated 6 March 2013 be set aside;
 - 3) The Court admit further evidence by sworn statement;
 - 4) The matter be referred back to the Supreme Court; and
 - 5) Costs.
5. The Appellant also seeks orders that the Court admit further evidence by sworn statements from Agnes Tari Siro, Sam Namuri and Viran Molisa Trief on the grounds that the evidence, if given, will have an important influence on the result of the case in terms of showing to the Court good reason for not defending the claim.
6. The relevant background to this appeal is as follows:
 - 6.1. The Respondent issued Proceeding against the Appellant on **28 January 2013**



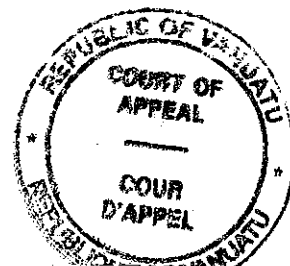
- 6.2. The Supreme Court Claim and the Response Form were served on the Reception of the State Law Office on **28 January 2013.**
- 6.3. A sworn statement of service indicating service was sworn on 28 January 2013 and was consequently filed in Court on **30 January 2013.**
- 6.4. A Response was filed by the Appellant on **4 February 2013** in which the Appellant disputed all of the Claim.
- 6.5. On **26 February 2013,** the Respondent filed a Request for default judgment (fixed amount) pursuant to Rule 9.3 of the Civil Procedure Rules.
- 6.6. On **6 March 2013,** default judgment was entered against the Appellant.
- 6.7. On **5 April 2013,** the Appellant applied to set aside the default judgment.
- 6.8. On **18 June 2013,** a Response to the application to set aside the default judgment was lodged by the Respondent.
- 6.9. On **3 July 2013,** the Appellant's application to set aside the default judgment was dismissed with Costs.
7. Rule 9.5 of the Civil Procedure Rules 2002, provides that a defendant against whom a default judgment has been signed may apply to the Court to have the judgment set aside. The application may be made at any time; it must set out the reasons why the defendant did not defend the claim; it must give details of the defendant's defence to the claim; and it must have with it a sworn statement in support of the application. We consider that there should also be some evidence to support the draft defence to show the Judge that the intended defence has merit.



8. A proposed defence was annexed to the sworn statement of Tom Loughman as annexure "TL1" and filed in the course of an application to set aside the default judgment. The Appellant has submitted that there was an arguable defence on the face of the draft defence which disputed the quantum of the claim on the basis that the Respondent had already been paid in relation to 2 of the 9 items of which he was seeking payment (with the exception of VT65,625 remaining to be paid in relation to item 9).
9. What this Court has to consider is:
- (a) Whether the Appellant had shown reasonable cause for not defending the claim under Rule 9.5; and
 - (b) Whether there is an arguable defence, either about liability for the claim or about the amount of the claim.
10. At first instance, Aru J. was not satisfied on either of those matters.
11. The Director of Public Works Department, Samuel Namuri, deposed in paragraph 5 of his sworn statement dated 11th November 2013 as follows:

"The claimant in his claim sought payment in relation to 9 contracts. The PWD's position in relation to these is:

- 11.1 Items 1-4: no contracts have been signed and/or executed but PWD has confirmed the works were performed and issued works completion certificates;*
- 11.2 Item 5: a works completion certificate is required;*
- 11.3 Item 6: need to make payment;*
- 11.4 Item 7: the PWD disputes that it was expected to cover the cost of demobilization of this particular equipment, as this equipment was already working on Ambae clearing*



sites of Rural Electrification initiatives. PWD through VTSSP, hired this machine briefly on another work. Furthermore PWD has not received any invoices regarding this particular cost;

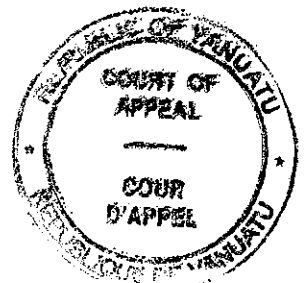
11.5 Item 8: no amount outstanding as the claimant has been paid the full contract amount of VT16,853,250;

11.6 Item 9: the full contract amount is VT28,665,000 of which the claimant has been paid VT28,597,375 with VT67,625 balance remaining to be paid."

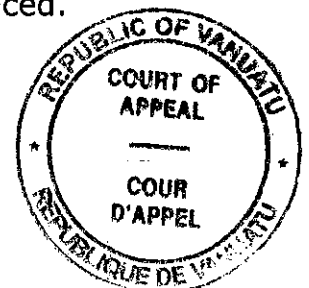
12. It is significant that this piece of evidence now relied on was not disclosed in the sworn statement filed by counsel Tom Loughman in support of his application to set aside the default judgment. It was imperative for the Republic to have complied with the requirements for setting aside a default judgment and, in particular, it should have been mindful of what evidence to adduce in relation to those requirements. It is now accepted that affidavit material was necessary to show an arguable case, and that just presenting the draft defence was not sufficient.

13. As we have said, also of significance is the failure of counsel for the Respondent to call the State Law office to notify them that he was going to apply for a default judgment. In paragraph 8 of the sworn statement of Agnes Tari Siro dated 11th November 2013 she stated as follows:

"8. The State Law Office's record of incoming mail received shows that no notice was received from the claimant's lawyer as to a request for default judgment nor of his filing proof of service. Further, no notice was received from the Court Registry listing this matter in relation to a request for default judgment."



14. Whilst there was no strict legal obligation to do so, the duty of lawyers and clients under Rule 1.5 to assist the court in the prompt and just dealing with cases is a real and important one.
15. It is clear that had all these pieces of the Appellant's further evidence, as contained in the sworn statements of Samuel Namuri, Agnes Tari Siro and Viran Molisa Trief, been placed before the primary Judge he would have set aside the default judgment.
16. Having put this to the parties in the course of the hearing, it was accepted that it would be appropriate to set aside the default judgment on the basis that the Appellant pays to the Respondent the sum of Vt 10 million by the end of the year and then go to trial in respect of the remaining sum of Vt 6 million. That is because the Appellant now accepts that in addition to what had already been paid, it cannot dispute liability for the further amount of Vt 10 million.
17. In the circumstances, on the condition that the Appellant pays to the Respondent by the end of the year the sum of Vt 10 million, the appeal is allowed and the default judgment is set aside. The matter is remitted to the primary judge to hear the remaining issues. The Appellant must pay the Respondent's costs of the appeal at the standard rate. If the Vt 10 million payment is not made on time, the appeal will be dismissed and the default judgment will stand.
18. It is timely to mention that it is not clear on the papers filed whether this proceeding was commenced subsequent to the requisite notice having been given under s. 6 of the State Proceedings Act No. 9 of 2007 [as amended by the Government Proceedings (Amendment) Act NO. 4 of 2010]. Section 6 prohibits the commencement of a proceeding against the State unless detailed notice of the intention to commence the proceeding is given to the State at least 14 days and not more than 6 months before the proceeding is commenced.



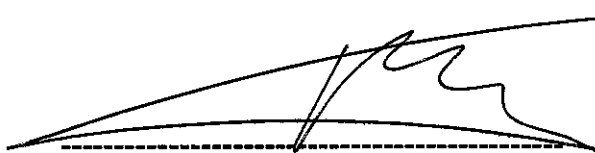
"6 Notification of intention to institute proceedings

- (1) *No proceeding against the [State], other than an urgent proceeding, [or a Constitutional Proceeding, may] be instituted under section 3 unless the party intending to do so first gives written notice to the State Law Office of such intention.*
- (2) *The notice [under (1)] must:*
- (a) include reasonable particulars of the factual circumstances upon which the proposed proceedings will be based; and*
 - (b) be given not less than 14 days and no more than 6 months prior to the institution of proceedings."*

19. This was not an issue raised at any time in the Supreme Court. Accordingly, we do not consider that it should be a factor taken into account in respect of the matters in issue before us; particularly given the way in which the appeal has been determined. However, it does appear that the failure to give such notice will operate as a complete prohibition to the commencement of a proceeding against the State. Those contemplating commencing proceedings against the State need to appreciate the likely consequences of proceeding without the giving of notice under s. 6.

Dated at Port Vila this 22nd day of November, 2013.

FOR THE COURT



Hon. Chief Justice Vincent Lunabek

