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

CIVIL APPEAL CASE NO. 22 OF 2014

BETWEEN: **DUNSTAN HILTON**
Appellant

AND: **THE REPUBLIC OF VANUATU**
Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Daniel Fatiaki
Hon. Justice Oliver Saksak
Hon. Justice Stephen Harrop
Hon. Justice Dudley Aru

Counsel: Robin Tom Kapapa for the Appellant
Florence Williams for the Respondents

Date of Hearing: Monday 21 July, 2014

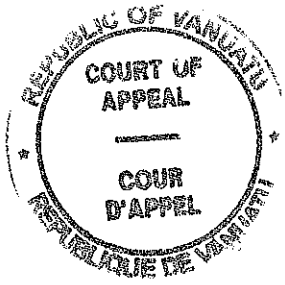
Date of Judgment: Friday 25 July, 2014

JUDGMENT

---

1. This appeal is brought by leave against an order made in the Supreme Court on 22nd August 2013 that struck out the appellant's claim in which he sued the respondent for damages for alleged false imprisonment, wrongful arrest and wrongful prosecution following his acquittal in criminal proceedings. He had been charged with aiding forgery and uttering a forged document, namely a cheque.

2. The orders made on 22nd August 2013 read:



"1. *In the absence of Mr Bani yet again and in the light of his non-compliance with Court Orders dated 27th February 2013, 22nd March 2013, 12th April 2013, 23rd May 2013, 27th June 2013 & 31st July 2013 this case is hereby struck out pursuant to Rule 9.10(1)(b) of the Civil Procedure Rules No. 49 of 2002.*

2. *Costs of Vt50,000 awarded to the Defendant to be paid within 14 days from today together with the previous wasted costs of Vt10,000 as per Court Order dated 27th June 2013."*

3. At the time, Mr Bani was the counsel on the record for the appellant. On each of the days mentioned in the order, other than 22nd August 2013, directions had been given for the filing or serving of sworn statements in the appellant's case. On 23rd May 2013, 31 July 2013 and 22nd August 2013 Mr Bani had failed to appear at a scheduled conference.

4. Before the conference Judge made the order now under appeal, neither Mr Bani nor the appellant had forewarning either from the Court or from the respondent that such an order might be made, and no opportunity was accorded to them to be heard in opposition to the order.

5. Rule 9.10 of the Civil Procedure Rules No. 49 of 2002 provides:

*"**Striking out***

9.10 (1) This rule applies if the claimant does not:

(a) take the steps in a proceeding that are required by these Rules to ensure the proceeding continues; or

(b) comply with an order of the court made during a proceeding.

(2) The court may strike out a proceeding:

(a) at a conference, in the Supreme Court; or

(b) at a hearing; or

(c) as set out in subrule (3); or

(d) without notice, if there has been no step taken in the proceeding for 6 months.

(3) If no steps have been taken in a proceeding for 3 months, the court may:

(a) give the claimant notice to appear on the date in the notice to show cause why the proceeding should not be struck out; and

(b) if the claimant does not appear, or does not show cause, strike out the proceeding.

(4) After a proceeding has been struck out, the Registrar must send a notice to the parties telling them that the proceeding has been struck out."

6. This Court has on many occasions stressed that the power in rule 9.10(1)(b) cannot be exercised without prior notice to affected parties in the manner and form required by rule 18.11. Rule 18.11 provides:

> ***"Failure to comply with an order***
>
> *18.11 (1) This rule applies if a party fails to comply with an order made in a proceeding dealing with the progress of the proceeding or steps to be taken in the proceeding.*
>
> *(2) A party who is entitled to the benefit of the order may require the non-complying party to show cause why an order should not be made against him or her.*
>
> *(3) The application:*
>
> *(a) must set out details of the failure to comply with the order; and*
>
> *(b) must have with it a sworn statement in support of the application; and*
>
> *(c) must be filed and served, with the sworn statement, on the non-complying party at least 3 business days before the hearing date for the application.*
>
> *(4) The court may:*
>
> *(a) give judgment against the non-complying party; or*
>
> *(b) extend the time for complying with the order; or*
>
> *(c) give directions; or*
>
> *(d) make another order.*
>
> *(5) This rule does not limit the court's power to punish for contempt of court."*

7. A similar power to strike out pleadings or proceedings for default contained in rule 6.8 (2) for a failure to comply with an order made at a conference without reasonable excuse is also qualified by the requirements of rule 18.11.

8. In **Government and the Republic of Vanuatu v. Carlot** [2003] VUCA 23 the Court of Appeal considered a case where a defence had been struck out for persistent failure to make disclosure within times directed by the Court. The struck out was said to be authorized by rule 6.82. The Court of Appeal said:

> *"Rule6.8 refers to failures which have occurred without reasonable excuse. It is not possible for any Court to be satisfied ahead of time that a failure has been without reasonable excuse.*
>
> *A court cannot make an order which has the effect of striking out a proceeding under the rule, without providing an opportunity for the parties to address all fundamental issues. An order which is self executing at a subsequent date without any further enquiry or assessment of the reasons for the failure to comply, cannot be valid and must be scrutinized with utmost care.....*
>
> *The provision of rule 18.11 will also come into play when there is a failure to meet a timetable. Adherence to this will ensure that before the Court exercises this grave and significant power of*

denying a party the right to maintain and pursue a defence, it has before it all relevant information.....
Rule 18.11 (1) is clear and unambiguous. That rule will apply whenever a party fails to comply with an order in a proceeding unless there is a patent abrogation of that position, e.g. 18.14 (1) (a)." (Rule 18.14 (2) deals with contempt situations).

9. In **Esau v. Sur** [2006] VUCA 16 the Court of Appeal considered a case where an order for summary dismissal of proceedings had been made in the Supreme Court under rule 9.10(1) (b) for a persistent failure to give particulars of the claim. The claimant had received no forewarning that such an order might be made. In allowing the appeal, the Court of Appeal said:

> *"In the present case no application of the kind required by Rule 18.11 (3) was made. The judge was therefore unaware that the appellant's counsel was under a misapprehension that the proceedings would be adjourned and that the appellant had not been warned that non compliance with earlier orders could bring about the summary dismissal of the proceedings. Moreover this procedural irregularity was compounded by the failure of the Court to follow the time honoured requirement that before the Court proceeds to make an order against a party who is not within the hearing room, that the party will be called. This is traditionally done by a Court officer three times loudly calling the name of the party outside the hearing room so that all those who might be waiting about will hear. Had that occurred in the present case, the presence of the appellant and his daughter would have come to the attention of the judge and the appellant could have been heard.*
> *The procedural irregularity was also compounded by the failure to make any inquiry to ascertain why the appellant's counsel was not present. Telephones are there to be used. After all the warnings which this Court has given about the need to make inquiry before making orders that foreclose the opportunity of other parties to continue the proceedings, the failure to inquire will almost inevitably result in orders so made being set aside. Those warnings were clearly given in Fujitsu (NZ) v. International Business Solution & others [1998] VUCA 13, and have been regularly repeated, most recently today in the Court's judgment in Gilbert Dinh v. Polar Holdings Ltd CAC 16 of 2006.*
> *In these circumstances it would be unjust to allow the dismissal of the appellant's proceedings to remain."*

10. In the first session of this Court earlier this year this Court once again emphasized that before action is taken to strike out proceedings for failure to take steps required in the proceedings, rule 18.11 must be complied with: **Peter v. Daniel** [2014] VUCA 8.

11. In the present case, rule 18.11 was not complied with. No notice as required by that rule was filed or served. The strike out order must therefore be set aside.

12. The respondent very properly conceded that rule18.11 was not followed. However the respondent has argued that the dismissal of the claim should not be set aside as the appellant's claim in any event has no prospect of success. A detailed submission on

legal points raised by the appellant's claim has been filed. The submission amounts, in effect, to an application for summary dismissal of the claim. This is an application which the respondent could have made at any stage in the proceedings before 22nd August 2013, but did not do so.

13. The submission of the respondent makes certain assumptions as to the facts which are adverse to the appellant, and poses difficult questions of law which we consider are best dealt with once the factual basis of the appellant's claim is clarified by the evidence led in support of his claim. Having considered the material presently before this Court we are not persuaded that the appellant's claim has no merit. The points of law raised by the respondents may in due course prove fatal to the appellant's claim, but until the precise factual basis of his case is clear such a determination should not be made.

14. The appeal will be allowed, the order striking out the appellant's claim will be set aside, and the matter will be returned to the Supreme Court.

15. Orders were made in the Supreme Court for wasted costs against the appellant. Even though his claim will be reinstated, the fact remains that the respondent has suffered wasted costs for the failure to comply with orders directing steps by the appellant, and due to the failure of the appellant's counsel to appear at some conferences. This Court was concerned that these orders were simply made against the appellant without enquiry whether the default might have been that of the appellant's lawyer for which the appellant should not be personally liable. Accordingly, the Court requested the attendance of Mr Bani to offer explanation about the failures to take steps or to appear. Mr Bani informed this Court very frankly and properly that the defaults were his, and he accepted that the costs orders should be against him personally.

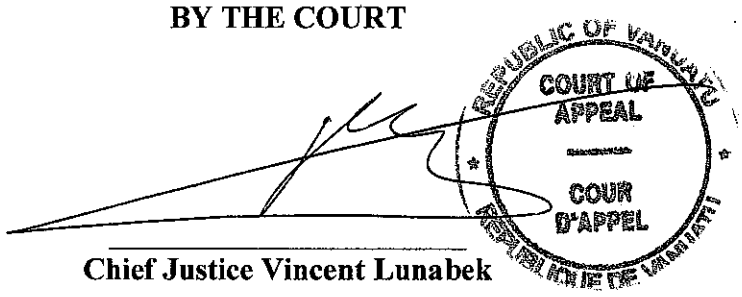
16. The award of Vt 50,000 made against the appellant in paragraph 2 of the orders under appeal appears to us to be an order covering the costs of the whole of the proceedings then being dismissed. On the claim being reinstated, the costs of the underlying proceedings will remain to be awarded once the claim is determined. The wasted costs in relation to the conference on 22nd August 2013 would be much less than the sum of Vt 50,000.

17. The following orders are therefore made to dispose of this appeal:
    1) The appeal is allowed;
    2) Civil Case 35 of 2012 is reinstated and returned to the Supreme Court;
    3) The order made in the Supreme Court on 27th June 2003 is varied so that the award of costs of Vt 10,000 in favour of the respondent is to be paid personally by the appellant's lawyer, Mr Bani;
    4) In respect of wasted costs for the conference on 22nd August 2013, costs of Vt 5,000 are awarded in favour of the respondent to be paid personally by Mr Bani;

5) The respondent must pay the appellant's costs of this appeal fixed at Vt 50,000 including disbursements.

Dated at Port Vila this 25th day of July, 2014

BY THE COURT



Chief Justice Vincent Lunabek