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

Civil Appeal
Case No. 17/1946 CoA/CIVA

BETWEEN: DEREK LEONA
First Applicant

AND: ROSEMARY SPRIGGS
Second Applicant

AND: RICHARD LEONA
Third Applicant

AND: HUHU GAITUVWA ASSOCIATION COMMITTEE
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Ronald Young*** ***Hon. Justice Paul Geoghegan***
Counsel:	*C. Leo for the Appellants* *MG Nari for the Respondent*
Date of Hearing:	*13th February 2018*
Date of Judgment:	*23rd February 2018*

JUDGMENT

1. The applicants seek leave to appeal out of time against two orders made in the Supreme Court. The first is dated 22nd April, 2016 which declined to set aside a default judgment entered against the applicants. The second is dated 22nd July, 2016 which refused an application by the applicants to order the respondent (the association) to hold an annual general meeting (AGM). The application for leave was not filed until 28th July 2017, more than a year after the second order and more than 15 months after the first. The default judgment which was not set aside by the order dated 22nd April 2016 had been entered in the Supreme Court on 28th September 2015. In so far as these orders concern the applicants' attempt to have an AGM held, the time which has gone by militates against any possible utility that the holding of an AGM in 2015 could have had.

2. The association is registered under the Charitable Associations Act [CAP. 140] with members of the traditional tribes known as the Atin Tagaro and Atin Mwalau

from North Pentecost. The applicants prior to 2015 held executive positions in the association. The applicants were then removed from the positions they had held, and thereafter mounted a campaign to challenge the decisions and policies of the new executive. The applicants asserted that the new executive was destroying the economic and business prospect of the association to the detriment of its members. The applicants did not vacate premises belonging to the association which they had formerly used, and took steps to assert that they were still entitled to roles in the management of the association.

3. In 2015 the National Bank of Vanuatu (NBV) as the bankers for the association was expressing concern to the new executive that there were irregularities in the financial affairs of the association. Ultimately the NBV served formal demand on the association to repay outstanding loans.

4. On 18th August 2015 the association commenced proceedings, the subject of this appeal, against the applicants and the NBV. The NBV was later dismissed from the proceedings and it has no present role in them. The statement of claim alleged against the applicants that they had opened accounts with NBV that were not authorized by the association, and that funds of the association had been withdrawn and expended in ways that were not authorized. The statement of claim also alleged that the supreme body of the association in January 2015 gave notice calling the 2014 AGM to be held on 13th and 14th March 2015. They did so as the applicant Derek Leona, in his role as then chairman of the executive committee had failed to call a meeting. The statement of claim goes on to allege that Derek Leona ceased to be the chairperson on 1st April 2015 and that he then called another meeting of the association that purported to be "*HGA AGM*" to be held on 13th and 14th April 2015. The proceedings were served. A conference was held by the Supreme Court on 28th August 2015 when the matter was adjourned for 28 days to 28th September 2015. On 16th September, 2015 the association filed an Urgent Application for Default Judgment which was supported by four sworn statements that canvassed in detail the allegations raised in the statement of claim concerning the alleged interference by the applicants in the ongoing affairs of the association. The urgent application was set down for hearing at the 28th September 2015 listing.

5. At the hearing on 28th September, 2015 counsel for the association appeared and sought the orders claimed in the urgent application. There was no appearance by the applicants or by the lawyer who was acting for them, Mr. Leo. The Court granted the following Default Judgment against the applicants which was substantially in terms of the orders claimed in the statement of claim:

    1. That the Annual General Meeting of Huhugaituvwa Association Committee Inc, (HGA) held on 30th and 31st March 2015 was convened in accordance with the constitution of HGA.

2. The Annual General Meeting of HGA held on 13th and 14th April 2015 is hereby declared void and no effect as it was convened in breach of the HGA constitution.

3. The Second, Third and Fourth Defendants (the applicants) be hereby restrained from assuming and exercising the roles of Executive Members of HGA.

4. The renewed appointment of Derick Leona made by Richard Leona (Snr) as Chairman of the Executive of HGA is null and void and of no legal effect.

5. The First Defendant (NBV) be hereby required to lift the freezing of the Claimants' funds forthwith.

6. Damages and costs be reserved.

6. The applicants immediately applied to set aside the judgment. That application was refused on 22nd April 2016 and is the subject to the present application. The grounds advanced by the applicants were that the claim and the urgent application had not been duly served, that the claim was not one for a fixed amount and therefore not a matter within the Civil Procedure Rules (CPR) that permit a default judgment for a fixed amount; that the applicants had an arguable defence to the association's claims; and that the matter should not be the subject of a court decision but should be remitted to the AGM for resolution.

7. The court was satisfied that the proceedings had been duly served, that the default judgment was not contrary to the CPR, and that there was no arguable defence. On the remaining ground concerning the AGM the applicants had produced documents that suggested that the parties wished to reach agreement to resolve their disputes. The Court considered that if those documents truly reflected the intentions and desires of the parties the Court should give them the opportunity to do so, as after all, the association is owned by the people and the people should be better placed to decide, according to the association's constitution and internal rules. Accordingly the court decided to defer further consideration of the claim and "*remit the matter back to the AGM but subject to the following conditions:*

"(a) *Both the claimant and the three defendants be required to work together to arrange for an AGM with the current executive Council, the Committee and Togotogon Vanua.*

(b) *Both the claimants and the three defendants be required to make themselves available at the AGM at their own costs.*

(c) *The AGM shall be held within 3 months from the date hereof.*

(d) *Both parties shall file a joint memorandum with the Court informing the Court of the outcome of the AGM.*

(e) *The matter be returnable for review on 22nd July 2016 at 0900 hours."*

8. Before the appointed review on 22nd July 2016 the association filed a memorandum which informed the Court that the parties had not been able to agree on the business to be discussed at the proposed meeting, and that it had not been possible to hold the meeting. The trial judge in a minute concerning that review hearing said:

"*5. Mr Leo draws the Court's attention to the orders of the Court that stays their own application pending the outcome of the AGM. And counsel submits that the Court should assist by giving another chance for the AGM to be held. Mrs. Nari* (lawyer for the association) *opposes the suggestion or submission.*

6. The Court is not convinced that if another chance is given that it would make any difference. The request by Mr Leo is therefore declined."

9. The Court's decision to decline making an order or direction that an AGM be held is the second order the subject of this application.

10. Since 22nd July 2016 the parties have engaged in several inconclusive arguments over, first, an application to commit the applicants for contempt for their failure to deliver up books and records of the association, and the keys of the association's premises in Pentecost, and, secondly, over an application to dismiss the proceedings on the ground that the association is noted in the records of the Vanuatu Financial Services Commission as being in receivership. We shall return to these two issues at the end of these reasons. They are both unnecessary distractions from the substantive issues raised by the statement of claim.

11. Factors to be considered on an application to extend the time are well established: Laho v. QBE Insurance Ltd. [2003] VUCA 26. They include the length of the delay, the reasons for the delay, the chances of the appeal succeeding if time for appeal is extended, and the degree of prejudice to the potential respondent if the application is granted.

12. In this case the length of delay is considerable. The explanation for it is weak. The applicants say they were waiting to see if the proposed AGM led to a compromise. However it was clear before 22nd July 2016 that the AGM they proposed would not occur. Possible prejudice to the association if time were extended has not been explored in the material placed before this Court, but it is

inevitable that there would be prejudice to the association that has been conducting its affairs during the period of delay on the footing of the declaratory and restraining orders made on 28th September 2015. These considerations all point strongly against granting leave to appeal. However, the hopelessness of the chances of success if the appeal were to proceed are in our opinion alone sufficient to refuse the application.

13. We deal in turn with the proposed grounds of appeal advanced by the applicants.

Service

14. The question of service of the proceedings on the applicants prior to the hearing on 28th September 2015 was decided against them by the Supreme Court in its decision on 22nd April 2016. That issue arose again in oral argument before this Court but the evidence establishes beyond doubt that the proceedings were duly served and the applicants had proper notice of the claim and application for urgent relief. Mr Leo in his capacity as lawyer for the applicants had appeared before the Court on 28th August 2015 when the hearing date on 28th September 2016 was set. Directions had been given in his presence about the filing of evidence by the parties in the meantime. By 16th September 2015 the applicants were in default with a response to the statement of claim and the association filed its urgent application for a default judgment. That was duly served on Mr Leo. On 14th September 2015 the four sworn statements relied upon were personally served on the second applicant, and also on Mr Leo. The applicants had the opportunity to respond but they failed to file a response to the claim. They failed to adduce any evidence, and they failed to attend the hearing.

Default Judgment not for a fixed sum: Civil Procedure Rules

15. The primary ground advanced by the applicants is that the application for the default judgment was not an application made in respect of a claim for a fixed amount, and accordingly the application in its entirety was misconceived, and the court was not empowered by the CPR to grant the orders made on the application.

16. This argument requires consideration of the orders made by the court. Whilst the orders are entitled "*default judgment*" in reality they reflect a grant of summary relief that does not come within any of the provisions of Rule 9 of the Civil Procedure Rules.

17. The overriding objective of the CPR is to enable the Court to deal with cases justly: Rule 1.2(1). The CPR provides guidance as to procedures to be followed on claims falling within the scope of specific rules, but the fact that the rules do not in terms cover a particular situation does not mean that the Court is without jurisdiction to intervene and grant a fair and appropriate remedy.

18. In this case no order in the judgment imposes liability on the applicants for liability for a fixed amount. Rule 9.2 does not apply to any of the orders.

19. It became apparent during oral argument that the parties have been under a misapprehension that order 6, which reads *"damages and costs reserved"* was a default judgment under Rule 9.3 for an amount to be determined by the Court through the process of assessment provided in Rule 9.4. We considered this is not the meaning and effect of order 6. Order 6 recognizes that the association in its statement of claim sought an order for damages to be assessed. The order does no more than reserve for later consideration that part of the claim. The merits of that claim are not addressed by order 6. The association's several claims for damages remain to be considered by the Court, both on the question whether the applicants have any legal liability to the association, and if so for what amount.

20. The nature of the claims for damages made in the Supreme Court is not such that an overall judgment on liability could be entered for damages to be assessed at a later date. The complains made by the association are that numerous individual transactions have occurred each of which has led to particular financial losses. Consideration of the alleged justification for each transaction would be closely tied up with the particular financial loss said to have followed. Each transaction will have to be separately considered as the trial of the claims proceeds. Hopefully however, the parties would before trial agree, or at least identify in a schedule, each transaction in question, the monetary consequence of the transaction, and the applicants' explanation and asserted justification for the outlay which followed. Of necessity this will be a time consuming and painstaking exercise. The parties would be well advised to confer over how best to move forward to resolve the damages claim before more is spent on lawyers and Court fees than the alleged claims justify.

21. The orders numbers 1, 2 and 4 in the judgment are declaratory orders and orders 3 and 5 are mandatory restraining orders. Rule 9 gives no guidance as to how the jurisdiction of the Court is to be exercised on claims of this kind in default of a response from a respondent. In such cases the Court must adopt a process that ensures fairness to all parties in the exercise of its undoubted jurisdiction to make declaratory and monetary orders.

22. In this case the process adopted gave notice to the applicants that urgent relief was being sought, gave notice of the evidence on which the association relied, and provided an opportunity to respond and be heard. This was an entirely fair process that does not contravene the CPR.

An AGM

23. We suspect that the misinterpretation of order 6 to which we have made reference may be a reason why the applicants are so earnestly pressing the

present application and their claim for an AGM. As we understand the reason for the desire to have an "AGM" it is to give the applicants the opportunity to explain their administration and use of the association's funds and in this way to defeat or deflect a pending assessment of damages.

24. This leads to consideration of the final ground advanced by the applicants in support if their application. They contend that the Supreme Court erred on 22nd July 2016 in declining to order that an AGM be conducted. The applicants continue to argue that if an AGM were held they could present their financial reports (presumably for the period leading up to them ceasing to be members of the executive in early 2015) and a proposed organizational report.

25. The Supreme Court was satisfied by 22nd July 2016 that the relationship between the parties and their responses to the earlier order indicated that it would be pointless to make the orders sought. We consider the Supreme Court was plainly correct in this conclusion both for the reasons given by it, and more specifically because such an order in any event could not be implemented in the way emphasized by the applicants. The 2014 AGM had already been held and concluded on 30-31 March 2015. As a matter of both law and business practice it could not be reopened. It might have been possible to call an extraordinary general meeting (EGM) but the applicants indicated that it was an AGM not an EGM that they wanted. Moreover, when a general meeting is called it is the function of the then executive to decide the business of the meeting, and by 22nd July 2016 the current executive was not prepared to include the items of business desired by the applicants in the EGM they proposed.

26. There is also the further consideration that as the claim for damages arising from the financial dealings of the applicants whilst controlling the association was already on foot, the most appropriate forum to receive and adjudicate on the applicants report about their dealings is the Court.

27. For these reasons we consider that the proposed appeal would have no prospect of success, and the application to extend time to appeal must be refused.

Other matters

28. We return to two matters touched on earlier in these reasons. The first is the assertion by the applicants that during much of 2015-2017 the association was *"in receivership"*, and for this reason the association's claim should be struck out.

29. This allegation is based on the administrative decision of the Vanuatu Financial Services Commission to assign the status of *'in receivership"* to associations after the 2015 amendments to the Act until such time as associations updated themselves in the electronic register. The association did not do this until 11th of December 2017. In the meantime the association had continued in existence and

its status to sue and be sued had not altered. The applicants misunderstood the situation. The point taken by them had no substance whatsoever.

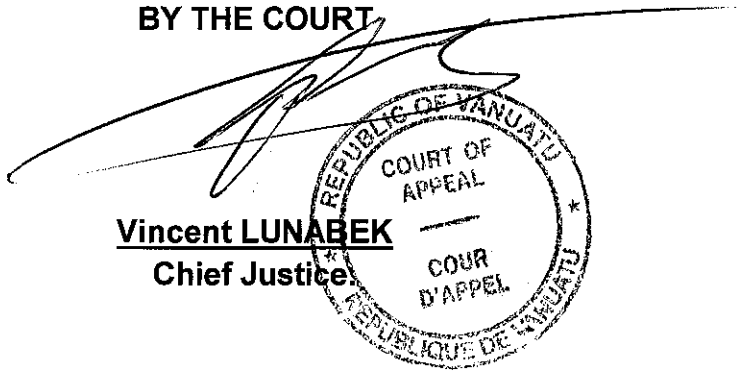
30. The second point concerns the contempt proceedings that have been on foot since late 2015, and remained to be finally resolved. We have been informed by counsel that the outstanding issue is the hand over to the present executive of keys to and possession of the association's buildings in Pentecost. We have been informed that the keys are presently held by the custom owner who considers that whilst the Supreme Court proceedings are continuing between the two disputing membership factions he should hold the keys.

31. As we have pointed out to counsel, the orders of the Supreme Court which require the applicants to hand over the keys, indeed to hand over all property of the association, are quite clear and continue in full force. The keys should be handed over immediately by whoever holds them, and the applicants will remain in contempt if they fail to give all necessary authority to the key holder to do so. We have also pointed out to counsel for the association that as the buildings in Pentecost are the association's buildings, they are fully entitled to gain entry and to change the locks. It would, of course, be much better that the keys are simply handed over as they should be.

32. The formal order of the Court is that the application for leave to appeal out of time against the orders of the Supreme Court dated 22nd April 2016 and 22nd July 2016 is dismissed. The applicants must pay the costs of the Respondent in this Court on the usual basis.

DATED at Port Vila, this 23rd day of February, 2018.

BY THE COURT



Vincent LUNABEK
Chief Justice