

**BETWEEN:** The Melanesian  
Appellant

**AND:** Apolina Teveri  
Respondent

**Coram:** *Hon. Chief Justice Vincent Lunabek*  
*Hon. Justice John Mansfield*  
*Hon. Justice John Hansen*  
*Hon. Justice Daniel Fatiaki*  
*Hon. Justice Oliver.A.Saksak*

**Counsel:** *Daniel Yawha for the Appellant*  
*Pauline Malites for the Respondent*

**Date of Hearing:** *9<sup>th</sup> July 2019*  
**Date of Judgment:** *19<sup>th</sup> July 2019*

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## JUDGMENT

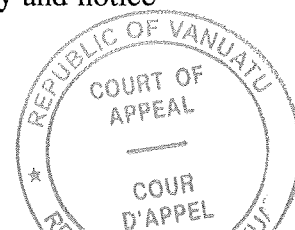
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### Introduction

1. On 12<sup>th</sup> March 2019 a Supreme Court Judge struck out the appellant's proceedings for lateness and non-compliance with a Court order. The Judge exercised his discretion under Rule 9.10 of the Civil Procedure Rules.
2. The appellant appealed against that judgment. It contended the judge was wrong in law by failing to give notice to show cause pursuant to Rule 18.11 (2). It argued that Rule 9.10 (3) requires notice to be given for a hearing to show cause why the proceeding should not be struck out. It submitted that Rule 9.10 should be exercised in conjunction with Rule 18.11 of the Rules.

### Background Facts

3. The initial claim started in the Magistrate Court on 20 October 2014 when Apolina Teveri ( respondent) filed her claims for severance, annual leave, maternity and notice



entitlements. The claim was disputed. A trial hearing was held and concluded on 11<sup>th</sup> May 2015. Written judgment of the Magistrate was issued in favour of the respondent on 21<sup>st</sup> August 2018. The Magistrate Court awarded the total sum of VT 911,000 inclusive of interest and cost, with an order that the judgment sum be paid within 30 days.

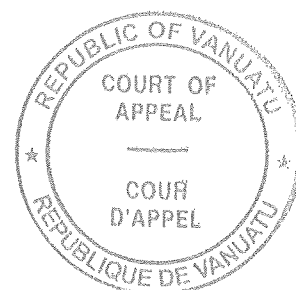
4. The Hotel ( appellant) appealed that judgment. It filed an appeal on 21<sup>st</sup> September 2018.
5. On 7<sup>th</sup> December 2018 the judge in the Supreme Court ( the judge) set timetabling for an Appeal Book and submissions within 28 days and allocating a hearing date of the appeal on 18<sup>th</sup> March 2019.
6. On 12<sup>th</sup> March 2019 the judge struck out the proceeding in the absence of both counsel. The judge awarded costs of VT 7,500 to the respondent.

#### **Judgment appealed.**

7. The judge referred to the directions issued on 7<sup>th</sup> December 2018. He noted Mr Yawha had agreed to the directions but had failed to comply by more than two months. He noted the scheduled hearing for 9am on 18<sup>th</sup> March 2019 and that it was too late for Ms Kalwatman (Malites) to have sufficient time to respond and to be ready for the appeal hearing. The Judge noted the unfairness done to the respondent who had been patiently waiting for the hearing and outcome of the appeal. The judge then struck out the appeal proceeding under Rule 9.10 of the Rules for those reasons.

#### **Issues on Appeal**

8. From the arguments by Mr Yawha the issue raised is whether the judge was in error when he struck out the proceeding without exercising his inherent jurisdiction in conjunction with Rule 18.11 (2).



## Submissions

9. Mr Yawha submitted that the judge was in error when he failed to apply Rule 9.10 in conjunction with Rule 18.11 (2). Counsel argued that where there was non-compliance with a Court order, the proper course was to have adjourned the hearing with costs and issue a notice to show cause on 18<sup>th</sup> March 2019 why the proceeding should not be struck out. Mr Yawha relied on the case of Esau v Sur [ 2006] VUCA 16.
10. Ms Malites submitted that although the judge did not strictly comply with Rule 9.10 and Rule 18.11, substantial justice required the dismissal of the appeal and it was within the inherent jurisdiction of the Court.

## Discussion

11. At the outset of the hearing the Court asked Mr Yawha specifically whether he had failed to comply with direction orders of 7 December 2018 and Mr Yawha readily conceded he had. Mr Yawha offered to pay costs of the hearing of the appeal in the Supreme Court, and also accepted that it would be appropriate for the judgment sum to be paid into Court pending any rehearing of the appeal, having regard to the time that has elapsed since the claim and the amount involved.
12. Rule 9.10 of the Civil Procedure Rules gives jurisdiction to a judge to strike out a proceeding either at a conference or at a hearing. But this Court in Esau v Sur [2006] VUCA 16 said the Rules also qualify the exercise of the power in conjunction with Rule 18.11.
13. Rule 9.10 states:-

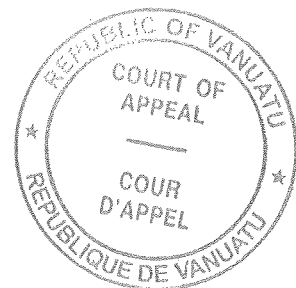
*Striking out*

*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 sub rule (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.

14. Rule 18.11 states:-

*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:

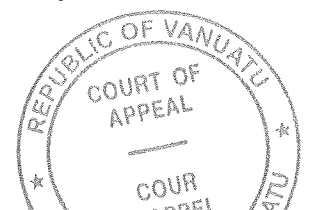
- (a) give judgment against the non-complying party; or
- (b) extend the time for complying with the order; or
- (c) give directions; or
- (d) make another order.

(5) This rule does not limit the court's powers to punish for contempt of court.

15. In an earlier case of Republic v Alfred Carlot [2003] VUCA 23 this Court considered whether Rule 6.8 which provides for the effect of non-compliance with orders of the Court made at conferences could be read in isolation from Rule 18.11. The Court said a Court cannot make an order which has the effect under the rule without giving an opportunity to the parties to address all issues and that such an order cannot be valid.

16. But specifically on Rule 18.11 the Court said:-

*“ The provision of Rule 18.11 will 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....”*

17. Clearly in this case there was a timetabling order made on 7<sup>th</sup> November 2018 when both Mr Yawha and Ms Malites were present. The returnable date for hearing of the appeal was fixed for 18 March 2019.

18. Had the hearing been held on 18 March 2019 and the strike out application made on that date for non-compliance with orders when counsel were present, clearly that could have been a proper exercise of power under Rule 9.10 (a) (b) and (2) (b). That is a course the judge might also have considered of his own initiative. But when on 12<sup>th</sup> March 2019 six days earlier, the strike out was made without counsel being present to be heard, it was irregular to have issued the strike out order on that date. The proper course should have been to await the hearing on 18<sup>th</sup> March 2019 and give notice in advance under Rule 18.11 that the appeal might be struck out for failure to comply with the directions.

19. The irregularity arises by reason of Rule 18.10 which states-

*Failure to comply with these Rules*

*(1) A failure to comply with these Rules is an irregularity and does not make a proceeding, or a document, step taken or order made in a proceeding, a nullity.*

*(2) If there has been a failure to comply with these Rules, the Court may:*

*(a) set aside all or part of the proceeding, or*

*(b) set aside a step taken on the proceeding, or*

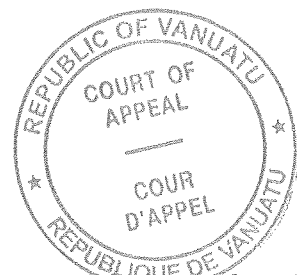
*(c) declare a document or step taken to be uneffectual, or*

*(d) declare a document or step taken to be effectual, or*

*(e) make another order that could be made under these orders, or*

*(f) make another dealing with the proceeding generally that the Court considers appropriate.”*

20. The Court pointed out this Rule to Mr Yawha who made no specific responses but maintained his submissions that the appeal should be allowed.

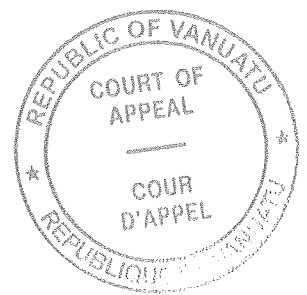


## The Result

21. We are of the view the failure by the Court to comply with Rule 18.11 in exercising its inherent jurisdiction or under Rule 9.10 was an irregularity under Rule 18.10. That is not to say that there are no instances where the exercise of the inherent power of the Court may not be exercised notwithstanding strict compliance with Rule 18.10 but in this instance, and in the particular circumstances, it was appropriate to follow the requirements of Rule 18.10.
22. We declare, therefore, that the strike out order issued on 12<sup>th</sup> March 2019 is ineffectual. Accordingly we order that it be set aside. And we order that the proceeding be reinstated and the appeal remitted back to the same judge of the Supreme Court to fix a hearing date of the appeal. We do not see any reason why the matter should not be heard by the same judge. We also direct that it is a condition of these orders that the sum of VT 911,000 be paid into Court by 2 August 2019 on account of the judgment sum, and to be paid out according to the orders of the judge who rehears the appeal. To make that order effective, we direct that the remaining orders made in this paragraph be stayed until August 2019. In the event that the payment is not made, the appeal to this Court be dismissed.

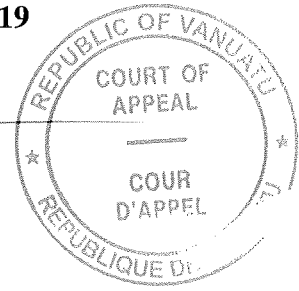

## Costs

23. Mr Yawha conceded the appellant had failed to comply with the orders of the Court and agreed to pay costs. We order that the appellant pays the respondents costs as ordered in the Supreme Court and in any event of the appeal in this Court which are to be standard costs as agreed and taxed.
24. It is necessary to be reminded that the overriding objective of the Civil Procedure Rules enable the Courts to deal with cases justly, includes doing so speedily and fairly. For each occasion that a hearing is adjourned because of non-compliance with directions, the resources of the Court in time and expense are wasted and the other parties in cases before the Courts are put back in the hearing of their own cases.



**DATED at Port Vila this 19<sup>th</sup> day of July 2019**

**BY THE COURT**



**Honourable Vincent Lunabek**

**Chief Justice**