

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

**Civil Appeal**  
**Case No. 19/2291 CoA/CIVA**

**BETWEEN:** Pacific Autronics Limited  
Appellant

**AND:** Amit Lal  
Respondent

***Date of Hearing:*** 18 February 2020

***Before:*** Chief Justice V. Lunabek  
Justice J.W. Hansen  
Justice R.C. White  
Justice O. Saksak  
Justice G.A. Andrée Wiltens  
Justice V.M. Trief

***In Attendance:*** Mr D. Yahwa for the Appellant  
Mr M. Hurley for the Respondent

***Date of Decision:*** 20 February 2020

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**JUDGMENT**

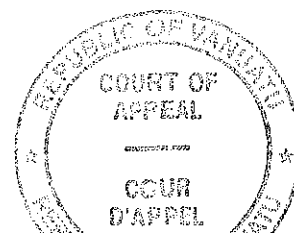
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**A. Introduction**

1. This is an appeal from the 5 July 2019 striking-out of a counterclaim in a civil action.
2. Due to the interlocutory nature of the proceeding, leave to appeal was required. Further, as the Notice of Appeal was not filed until 28 August 2019, leave to extend the time to appeal was required. Both prior to and at the hearing, neither matter was addressed by counsel for the appellant.

**B. Background**

3. It is necessary to set out the history of this matter to some degree.



4. On 10 May 2017, the amended counterclaim was filed.
5. On 14 May 2019, an application to strike out was filed. By that time the Claim had been set down for substantive hearing on 22 and 23 May 2019.
6. On 21 May 2019, the scheduled substantive hearing date was vacated. Pacific Autronics Limited was given 7 days in which to file and serve a response to the strike-out application, which was then scheduled to be heard on 31 May 2019.
7. On 31 May 2019, Pacific Autronics Limited was given a further 7 days to file and serve their response. The application was re-scheduled to be heard on 19 June 2019.
8. On 19 June 2019, the hearing of the strike-out application was further adjourned by consent to 5 July 2019.
9. On 5 July 2019, the primary judge was faced with the position that there was no appearance by or for Pacific Autronics Limited to oppose the strike-out application. Further, the response that had been directed to be filed and served by the primary judge's written directions on 21 May 2019, repeated on 31 May 2019 and again on 19 June 2019, had still not been filed. This meant that there were no submissions on the file in opposition to the striking out application.
10. At the hearing, the primary judge struck out the counterclaim, with costs.
11. No reasons for striking out the counterclaim were provided at that time. A case management conference was then scheduled for 23 July 2019
12. On 23 July 2019, Mr Lal was given 7 days to file and serve written submissions in support of an application for Summary Judgment which had been filed post the strike out - those submissions were filed on 1 August 2019. Pacific Autronics Limited was given a further 14 days to respond to the application and to file and serve submissions in opposition. The application for Summary Judgment was scheduled to be heard on 28 August 2019.
13. On 28 August 2019, the Notice of Appeal relating to this matter was filed. Further, the case was stayed pending the outcome of this appeal against the strike-out ruling.



14. On 29 August 2019, the primary judge published his reasons for granting the strike-out application.

**C. Reasons**

15. The primary judge identified two reasons for granting the application to strike out the counterclaim.
16. Firstly, the judge recorded that Pacific Autronics Limited had been given time to respond to the application but had not complied with those orders. The judge noted that the application and sworn statements in support had been served on Mr Yahwa's office on 14 May 2019, yet no response had been filed by 5 July 2019.
17. Furthermore, Counsel did not appear at the hearing.
18. Secondly, the primary judge struck out the counterclaim as there had been an admission made, which precluded that subject again being raised.

**D. Appeal**

19. The appeal was based on the ground that the primary judge had erred in vacating the trial and not providing lawful reasons substantiating the strike-out. The first ground was merit-less as there will be a hearing of the issues in due course, regardless of the outcome of this appeal. The second ground was obviated by the reasons being provided the next day.
20. Alternatively, it was submitted that if the strike-out was granted due to *res judicata*, that was in error as not all the matters raised in the counterclaim had been litigated.
21. In oral submissions, Mr Yahwa resorted to the issue of overall fairness. We consider he may have been referring to passages in *Western Pacific Cattle Company Limited v Mass* [2019] VUCA 19 as follow:

*"The well-known and leading case which expounds that liberal view, Fujitsu (NZ) Ltd. v International Business Solutions Ltd. [1998] VUCA 1 is relied on by the appellant. Based on that decision and later cases that have applied observations of the Court of Appeal made in Fujitsu, the appellant argues that the guiding principle is that the Court should ensure that the matter is*



determined according to substantial justice. See also the overriding objectives of the Civil Procedure Rules, Rule 1.7(b). The appellant argues that substantial justice in the circumstances of this case requires that it be permitted to prosecute its counterclaim."

22. However, as also stated in that same case in rejecting that argument, the Court of Appeal said:

*"A liberal approach to excusing non-attendance, and non-compliance generally with court rules and their technicalities is justified where a party to the proceedings would otherwise be denied a fair opportunity to put the case relied upon to advance or resist the claim. Every case is likely to be different, but where in all the circumstances the party in default has had a reasonable opportunity to advance its case, and the other party has given the defaulting party reasonable opportunity to do so before seeking to rely on strict form, the substantial justice of the matter is likely to favour the application of the rules according to their strict requirements."*

#### **E. Discussion**

23. As earlier mentioned, there was no application for leave to appeal filed. Rule 21 of the Court of Appeal Rules 1973 mandates this. Even when this was raised at the hearing of the appeal Counsel did not address the issue. We are at a loss to understand this.
24. The decision being appealed was published on 5 July 2019. Rule 20 of the Court of Appeal Rules 1973 enables an appeal to be filed within 30 days. This Notice of Appeal was not filed until 28 August 2019, some 3 weeks out of time. An application for leave to file out of time was accordingly required to be made, with some evidence in support explaining the delay. Again, when this was discussed at the hearing of the appeal, counsel did not address this. Again, we are at a loss to understand.
25. These are procedural issues that must be addressed. To leave these matters unattended to, as counsel has done in this instance, results in the appeal having no legitimacy. We urge counsel to have due regard to this in future and to deal with these matters prior to the hearing of any appeal.
26. That said, we will deal with the matters raised on the merits.
27. We agree with Mr Hurley, that the grounds of the appeal do not challenge the foremost findings of the primary judge. That is an insurmountable difficulty for Mr Yahwa.



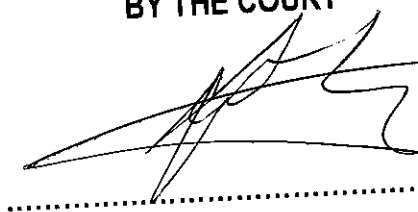
28. We agree with the primary judge that counsel, in this instance, was remiss in his duty to his client and to the Court in not complying with the time-tabling orders made, and in not appearing at the scheduled hearing.
29. Rule 6.8(2) of the Civil Procedure Rules provided the primary judge with a discretion to do as he did. Indeed, the appellant is fortunate the primary judge did not go further and strike out the defence filed.
30. Counsel has not identified any error on the part of the judge in exercising his discretion. In considering the merits of this appeal, therefore, we would also disallow it.

**F. Result**

31. Had leave to appeal been sought, we should have disallowed the same as there is no merit in the appeal.
32. As we are uninformed as to any reasons for the delay in filing the Notice of Appeal, we cannot comment on whether leave to extend time might have been appropriate.
33. There is no merit in the grounds advanced. The appeal is dismissed. The case is now remitted to the trial judge for hearing of the substantive issues.
34. Costs are to follow the event. We set them at VT 65,000 and order they be paid within 21 days.

**Dated at Port Vila this 20th day of February 2020**

**BY THE COURT**



**Chief Justice V. Lunabek**

