IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

CIVIL CASE No.209 OF 2007

BETWEEN: **SNOOPYS STATIONARY and OFFICE SUPPLIES LIMITED**
Claimant

AND: **MINISTER OF EDUCATION**
First Defendant

AND: **THE VANUATU GOVERNMENT**
Second Defendant

Mr Daniel Yawha for the Claimant – present
Ms Jennifer Harders and Christine Lahua for the First and Second Respondents - present

JUDGMENT ON REFUSING LEAVE TO APPEAL AN INTERLOCUTORY DECISION

INTRODUCTION

This is an application for leave to appeal an interlocutory Decision. It is filed by the Applicant's counsel on 15 April 2009. The Applicant intended to appeal a decision of the Supreme Court dated 3 February 2009 striking out the claim in Civil Case No.209 of 2007 and costs ordered against the Applicant for the reasons set out in that Order.

Leave to appeal is a discretionary power vested in the Court to allow or not to allow an application for leave to appeal against an interlocutory decision. The requirements are set out under Rule 21(1) (2) of the Court of Appeal Rules 1973.

Mr. Daniel Yawha filed a sworn statement in support of the application on 15 April 2009. Another sworn statement of Raymond Michel was filed in support of the Application on the same date. Ms Jennifer Harders filed a sworn statement on 15 April 2009 with written submissions in response to the Application.

BACKGROUND

The submissions of counsel for the Respondents summarize the background of this case in this way:-

- The claim in this matter was filed on 18 December 2007.
- The Defence was filed on 30 January 2008.
- No other steps have been taken by the Claimant.
- On 14 July 2008, the State Law Office received a letter from Raymond Michel stating that he had appointed Daniel Yawha as counsel.
- On 4 August 2008, the State Law Office wrote to Mr Yawha noting that he had not yet filed a notice of beginning to act.
- Apparently a notice of beginning to act was filed on 18 December 2008, but was not served on the State Law Office.
- During a conference on 5 December 2008, the Claimant was given notice to attend the Supreme Court on 15 December to show cause why the proceedings should not be struck out. The Claimant was also ordered to pay to the Defendants costs in the amount of VT5,000 by 15 December 2008.
- On 15 December 2008, there was no appearance by the Claimant and the matter was adjourned to 18 December 2008. The Claimant's lawyer on the record, Felix Laumae, was ordered to inform the Court by urgent formal notice in the event that he no longer acted for the Claimant.
- On 18 December 2008, the matter was adjourned to 3 February 2009. Mr Yawha attended the conference on behalf of the Claimant and heard the orders made (although the orders made on that date incorrectly record the appearances).
- On 21 January 2009 Mr Yawha filed a sworn statement of Raymond Michel on behalf of the Claimant, presumably in response to the notice to show cause.
- The sworn statement contains (much objectionable material and) fails to show cause why the proceedings should not be struck out.
- On 3 February 2009, there was no appearance by the Claimant. The claim was struck out pursuant to Rule 9.10(3) for the reasons set out in that order.

GROUNDS OF APPLICATION

The grounds of the application are various and are contained in the Application itself. The first three grounds relate to some alleged procedural error in the decision of the Court of 3 February 2008 striking out the claim under Rule 9.10(3) of the Civil Procedure Rules, when the Applicant had taken steps to progress the hearing of his claim.

These grounds are baseless as they do not portray the sequence of events leading up to the impugned striking out order of 3 February 2009 for the following reasons:

First, the claim was filed on 18 December, 2007; the defense was filed on 30 January 2008; no other step taken by the Applicant; the Applicant was legally represented by Mr. Felix Laumae.

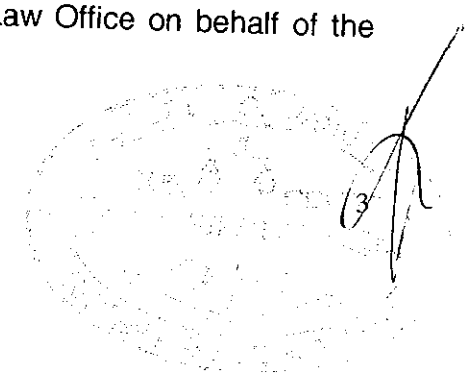
Second, on 14 July 2008, the Applicant informed the State Law Office that he had appointed Mr. Daniel Yawha as counsel.

Third, on 4 August 2008, the State Law Office wrote to Mr. Yawha noting that he had not filed a notice of beginning to act for the Applicant.

Fourth, during a conference on 5 December 2008, the Applicant was given notice to attend the Supreme Court on 15 December to show cause why the proceedings should not be stuck out; he was also ordered to pay the Respondents costs in the amount of VT5,000 by 15 December 2008.

Fifth, on 15 December 2008, there was no appearance by the Applicant and the matter was adjourned to 18 December 2008; the Applicant's lawyer on the record, Mr. Felix Laumae, was ordered to inform the Court by urgent formal notice in the event that he no longer acted for the Applicant.

Sixth, on 18 December 2008, Mr. Daniel Yawha, filed a notice of beginning to act for the Applicant (which apparently was not served on the State Law Office on behalf of the First and Second Respondents).



Seventh, on 18 December 2008, Mr. Yawha attended the conference on behalf of the Applicant when the Court made orders relating to the matter (although the orders made on that date incorrectly recorded the appearances). The matter was adjourned to 3 February 2009. There was no progress of the claim at that stage so far.

Eight, on 21 January 2009, Mr. Yawha filed a sworn statement of Raymond Michel on behalf of the Applicant, presumably in response to the notice to show cause; the sworn statement contains (much objectionable material and) fails to show cause why the claim should not be strike out.

Ninth, on 3 February 2009, there was no appearance by the Applicant. The last tenth but not least reason is that the payment of costs (wasted) resulting from failure by the Applicant or his counsel to attend court conferences, does not constitute a step in the progress of the case. It is quite the contrary. The claim was struck out pursuant to Rule 9.10(3) for the reasons set out in that order.

The next category of grounds relate to the failure of the Applicant's former lawyer to take steps to progress the claim. Ground 6 specifically is to the effect that on the 15 December 2008, counsel for the Applicant failed to appear in Court as he was not aware of Court Orders of 5 December 2008.

The next category of grounds relate to the fact that the Applicant had changed lawyer by appointing Mr Daniel Yawha as their counsel. Mr Yawha filed a notice of beginning to act for the Applicant on 18 December 2008. Mr Yawha failed to attend the Court on 3 February 2 009. Mr Yawha did not provide the reasons for his non-attendance in his sworn statement filed 16 April 2009 in support of this application.

To my mind the failure of counsel to attend Court conferences, to take necessary steps to progress the case of his client is not a good ground for an appeal. The remedy for an aggrieved client for such a failure by his counsel must sound in damages based in negligence.

The last category of grounds is that the Applicant did file a sworn statement to progress his case on 21 January 2009. This ground is also rejected. First, it failed to show cause why the claim should not be strike out. Second, filing of sworn statement is not a proper course to pursue. Disclosure is warranted. Thus, no steps taken by the Applicants counsel to progress the claim.

THE LAW AND ITS APPLICATION

Rule 21(1) (2) of the Court of Appeal Rules 1973 is the relevant Rule. It reads (with relevant adaptation to the local circumstance of Vanuatu):

"Leave to appeal required in interlocutory matters.

21.(1) ***No notice of appeal against any interlocutory orders of the Supreme Court, whether made at first instance or in exercise of its appellate jurisdiction, in any civil case or matter shall be filed unless leave to appeal has first been obtained from a judge of the Supreme Court..., or, if such leave be refused, from the Court of Appeal.***

(2) Every application for leave to appeal under this rule shall be by summons in chambers to be filed with the Registrar of the Supreme Court or with the Registrar of the Court of Appeal, as the case may be, within the period prescribed in rule 20 for the filing of notice of appeal:

Provided that upon the filing of an application for leave to appeal time within which, if leave be granted, the notice of appeal shall be filed shall be extended by such period as a judge of the Supreme Court, or a judge of the Court of Appeal, as the case may be, shall consider appropriate having regard to all the circumstances." [Emphasis added]

Counsel for the Applicant provides no case authorities in support of the application to assist the Court. On the contrary, Counsel for the First and Second Respondents refer the Court to the following case authorities to which I am grateful for that assistance:

- **Vanuatu Maritime Authority v. Athy**, Director General of Finance [2006] VUCA 12; CAC 27 of 2006 (27 September 2006);

- **Wing Luck Foods v. Lay Choo LIM WAR** [1989].

Leave is required to appeal against interlocutory decision. The Court must be satisfied that the decision below is attended with sufficient doubt to justify the grant of leave and that a substantial injustice would be done if it remains un-reversed. The Court cannot grant leave to appeal an interlocutory decision if there is no material before it on which it should be granted.

In the present case, given the nature of the appeal, it is necessary for Mr Yawha to address the matters set out in the notice of appeal. In particular Mr Yawha needs to address his appearance on 18 December 2008. The sworn statement of Mr Yawha does not address why he did not attend Court on 3 February 2009. This is a failure by counsel on behalf of the client which is not a good ground for appeal. The application must fail. Accordingly, the following Orders are made:

ORDER

1. The application for leave to appeal the interlocutory Order of 3 February 2009 is hereby refused.
2. The First and Second Respondents to the Application are entitled to their costs or the application against the Applicant.
3. The costs of the First and Second Respondents are assessed and determined at Vatu 30,000.
4. The Applicant shall pay the costs of VT30,000 to the First and Second Respondents by 7 May 2009.

DATED at Port-Vila this 16th day of April 2009

BY THE COURT

Vincent LUNABEK
Chief Justice