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

Civil Case No. 3 of 2014

BETWEEN: STEFAN MANDEL
Claimant

AND: ROBERT JAMES MAKIN
Defendant

Hearing: ***Thursday 19 February 2015***

Before: ***Justice Stephen Harrop***

Date of Judgment: Wednesday 25 February 2015

Present: ***Nigel Morrison for the Claimant***
Mark Fleming and Edmond Toka for the Defendant; Mr Makin in person

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REASONS JUDGMENT

Introduction

1. On 19 February I heard and granted an application to set aside the default judgment as to liability which had been entered on 25 April 2014 in this defamation case in favour of Mr Mandel against Mr Makin. These are my reasons for coming to that decision.

Nature of Claim and Procedural History

2. Mr Mandel is a Vanuatu businessman. Mr Makin writes and publishes an internet blog called "The Vanuatu Daily Digest". On 6 January 2014 Mr Mandel filed a claim alleging that comments defamatory of him were published by Mr Makin in the blog on 2 November, 5 November and 14 December 2013.

3. The claim sought damages, including exemplary or aggravating damages to be assessed and an injunction to restrain further publication. The latter has not been pursued.

4. The following procedural history ensued:

21 January 2014 The claim is served on Mr Makin together with the information sheet attached setting out the defendant's options. This clearly states that if you tick box 2 or 3 on the response form you must file a defence. It also warns that if this is not done "...then the claimant can sign judgment against you. This means the claimant will win the case. You can then only reopen the case on the Order of a Judge or Magistrate if you have good reason".

6 February 2014 Mr Makin files a response, ticking the third box "I dispute all of the claim". On the bottom of this form immediately above his signature it is stated: "YOU MUST return this form to Court, and serve a copy on the claimant, within 14 days from when you received the claim. If you have ticked the box 2 or 3 you must file a defence and serve a copy on the claimant, in 28 days from when you received the claim....."

8 April 2014 Mr Mandel requests default judgment on the ground that Mr Makin had not filed a defence within 28 days after being served with the claim, or at all. This request was made some three and half months after Mr Makin was served with the claim and therefore some two and half months after the time for filing a defence had expired. This request is in the appropriate form, namely form 13 and asks the Court to list the matter for determination of quantum of damages.

25 April 2014 I issued a judgment in chambers granting the request for default judgment because the claim had been served and was undefended. I observed in paragraph 2 of that judgment: *"As the response document itself confirms and as Rule 4.5 requires, a defendant intending to contest the claim must despite filing a response serve a defence within 28 day of service. Here the defendant has indicated in his response that he disputes all of the claim but has filed no defence....the claimant is clearly entitled to judgment pursuant to Rule 9.3(4) (a) for an amount to be determined and I enter the judgment on that basis.* Pursuant to Rule 9.3 (4)(b) (ii) I fixed a date for conference or hearing to determine the amount of damages for 5 May.

2014 at 9.00 am. Mr Morrison was directed to file proof of service of the judgment, as service of the judgment and of the hearing notice is required under Rule 9.3(6).

5 May 2014 Mr Morrison said he had not been able to arrange for service of default judgment on Mr Makin and requested more time to do so. A further conference was scheduled for 3 June.

3 June 2014 Again Mr Morrison asks for more time to arrange for service on Mr Makin and a further conference 14 July 2014 is arranged. This was later changed to 1 August.

1 August 2014 Mr Makin appeared with a journalist colleague but was unrepresented by counsel. Among other things I recommended to Mr Makin that he obtain legal advice urgently. I pointed out the possibility of his applying to set aside the default judgment provided certain criteria were met. I also commented to Mr Morrison and Mr Makin on the merits of settling this kind of case. A further conference was allocated for 14 August 2014.

14 August 2014 Mr Makin requested further time to obtain legal advice and this was granted without opposition from Mr Morrison. A further conference was allocated for 19 September.

8 September 2014 Mr Toka files a notice of beginning to act.

19 September 2014 Mr Toka requests a short further period to finalize and file a draft defence and an application to set aside judgment and sworn statement in support, these to be done by 3 October with Mr Morrison filing and serving any opposition and evidence by 24 October. A further conference was arranged for Friday 28 November, which later had to be changed to 2 December.

2 December 2014 Mr Toka had done nothing since the conference on 19 September and Mr Morrison sought wasted costs. I awarded Vt15,000 costs against Mr Makin. Mr Toka was permitted until 5 December to file and serve the application to set aside judgment and sworn statement in support and Mr Morrison would have until 27 January 2015 to file a notice of opposition and any sworn statement. The hearing was allocated for 10 February 2015 with submissions to be filed and served by 6 February.

10 February 2015 Mr Toka had filed the application to set aside and a draft defence but subsequently filed an amended application and amended defence together with Mr Makin's bulky sworn statement in support dated 2 December 2014. Mr. Morrison had not filed a notice of opposition and sworn statement as directed but said that would be remedied promptly. He was directed to do so by 13 February and later complied with.

this deadline. The hearing was arranged for 9.00 am on 19 February. Submissions were to be filed and served by 17 February. Mr Toka complied with that deadline. Mr Morrison did not file submissions but was content to rely on Mr Mandel's notice of opposition together with oral submissions.

The jurisdiction to set aside a default judgment

5. Rule 9.5 of the Civil Procedure Rules provides *"(1) A defendant against whom judgment has been signed under this Part may apply to the court to have the judgment set aside.*

(2) The application:

(a) may be made at any time; and
(b) must set out the reasons why the defendant did not defend the claim; and
(c) must give details of the defendant's defence to the claim; and
(d) must have with it a sworn statement in support of the application; and
(e) must be in Form 14.

(3) The court may set aside the default judgment if it is satisfied that the defendant:

(a) has shown reasonable cause for not defending the claim; and
(b) has an arguable defence, either about his or her liability for the claim or about the amount of the claim.

(4) At the hearing of the application, the court must:

(a) give directions about the filing of the defence and other statements of the case; and
(b) make an order about the payment of the costs incurred to date; and
(c) consider whether an order for security for costs should be made; and
(d) make any other order necessary for the proper progress of the proceeding.

(4) These Rules apply to the proceeding as if it were a contested proceeding."

6. For reasons that will become apparent I also set out here in full Rule 18.10 which provides *"(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 in the proceeding; or
(c) declare a document or a step taken to be ineffectual; or
(d) declare a document or a step taken to be effectual; or
(e) make another order that could be made under these Rules; or
(f) make another order dealing with the proceeding generally that the court considers appropriate.

(3) If a written application is made for an order under this rule, it must set out details of the failure to comply with these Rules."

Submissions

7. Mr. Fleming, who presented the oral argument for Mr Makin supplementing Mr Toka's written submissions, acknowledged that Rule 9.5(3) requires *both* that the defendant show a reasonable cause for not defending a claim *and* that he has an arguable defence (in this case as to liability).

8. Mr Fleming submits that Mr Makin did not file a defence in time because the claim with which he was served was defective in that it did not comply with Rule 4.2(1)(b) of the Rules; I believe this is not the subrule on which Mr Makin in fact relies but rather Rule 4.2(1)(c), namely that the claim fail to identify any statute or principle of law on which the party relies. Mr Fleming says there was a further and more significant breach of the Rules in that the claim did not, as is mandatory, include a statement of the nature and the amount of damages claimed. Mr Fleming contends that the claim should be struck out as an abuse of process as it lacks facts and particulars of damages, allegations of how the written words were false and fails clearly to plead a cause of action. He submits that in consequence Mr Makin was confused as to what defence he could raise and that coupled with delays in the Court process he believed this matter had finished after he filed the response in which he gave notice to disputing all of the claim. Mr Fleming notes that Mr Makin has never admitted the claim, on the contrary he clearly indicated he disputed all of it, and he took what he thought, as a non-lawyer, were reasonable steps.

9. I note Mr Makin himself says in paragraph 5 in his sworn statement: *"Although I filed a response to the claim within 14 days, I have not been able to file and serve a defence within the time allowed due to various advices for Court attendances which*

always seem to have been cancelled. I felt that the Court action which took 6 months to progress was not seriously intended".

10. I reject entirely the suggestion that Mr Makin had reasonable cause for not filing a defence on this account. He is clearly an intelligent and articulate man and an experienced journalist. The wording of the advice document which he was served, and the response document he later filed, is crystal clear. It emphasises that if either box 2 or 3 is ticked then a defence **must** be filed. There is a clear warning of what may happen if this is not done.

11. As to the points about the alleged defects of the claim, while these are in themselves well-founded submissions, at least so far as the failure to particularise damages is concerned, it is clear on his own evidence that Mr Makin was not aware of this failure and so he does not attempt to explain his failure to file a defence on this basis. This is a matter identified and raised by counsel (very) belatedly but it does not amount to "a reasonable cause for not defending the claim" so far as the defendant himself has concerned.

12. Mr Fleming next submits that there is no evidence that the claimant sought any meaningful information prior to the entry of the default judgment such as whether a defence was forthcoming. Further, no notice was given that should no defence be filed then a request for default judgment would be made. Mr Fleming referred me to *Patunvanu v Republic of Vanuatu* [2014] VUSC 99 where the Court set aside a default judgment in circumstances where the defendant State had filed a response indicating that it was disputing the entire claim but had not followed this up with a defence.

13. The learned Judge said: *"The State Law Office filed at least a Response dated 7th April 2014 on 9th April 2014 indicating that the Defendant was disputing the entire claim. When the claimant filed a request for default judgment on 28 May 2014, a period of 41 days had lapsed. Within that period the claimant has no evidence to show that he or Counsel had made any enquiries from the State Law Office pursuant to their response whether a defence was forthcoming, and of a letter putting them on*

notice that in the event no defence was filed within the specified period, a request a default judgment would be filed."

14. I respectfully disagree that this is a valid reason why a claimant who obtains a default judgment is liable to have it set aside. The scheme of the Civil Procedure Rules is clear: the defendant when served with the claim is given clear notice about his obligations and in effect he is told that he if does not follow up a response with the defence then the claimant may proceed to obtain judgment without further reference to him. He has expressly warned *"if you do not take action as required then a claimant can sign judgment against you."*

15. In my view the claimant therefore needs to do no more than to file and serve the claim together with the notice. A claimant cannot be expected or required to chase a defendant who has filed a response to see whether he is going to follow this up with a defence, as he has already been told he must. A claimant who fails to do so cannot, in my view be criticised, or penalised by having a validly – obtained judgment set aside on that account.

16. As it happens this is a matter on which the Court of Appeal has previously commented, to similar effect. In *ANZ Bank (Vanuatu) Limited v Dinh* [2005] VUCA 3 the Court said *"At points in presentation of this argument, we understood it to be suggested that there was some obligation upon the claimant to do more than just serve a claim, for instance, to also seek out the defendant and encourage his or her participation in the litigation. This argument finds no support in the rules themselves, and indeed is contrary to the scheme envisaged by the Rules in litigation for recovery of a contractual debt."*

17. I accept it is both commonsense and good practice, though not required of a claimant, to contact a defendant who has filed a response signifying dispute of the whole claim to warn that default judgment will be sought unless a defence is filed by a nominated date. This is particularly so where, as in *Patunvanu,* the defendant is the Republic of Vanuatu and there is a substantial claim against it. Indeed I have on several occasions declined immediately to enter default judgment on request by a claimant against the State where a response disputing the entire claim has been filed but no defence has been, because it is almost inevitable that the State will apply to set aside any default

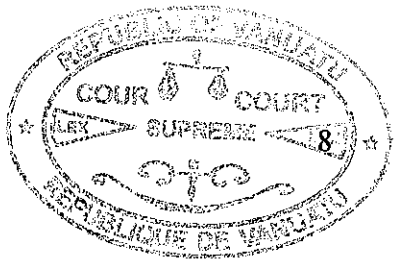
judgment. That is likely to succeed if there is a case which deserves to be heard on its merits and it is in the interests of both parties that time and money is not wasted arguing about whether the judgment should be set aside since this does not advance resolution of the merits at all.

18. It is however different in the case of private litigants. This was a situation where Mr Mandel claimed he had been seriously and more than one occasion defamed by Mr Makin who according to Mr Mandel refused to resile from his comments and to apologise. It would be quite wrong to expect someone in his position, having properly served the claim, to chase Mr Makin to follow up on his response with a defence. It would also be quite wrong to set aside a default judgment later obtained on the basis of the claimant's failure to do that, as it is *the defendant* on whom the focus and onus lies to establish reasonable cause for *his* not defending the claim.

19. I therefore reject the submission that it is in any way supportive of the application that Mr Mandel did not chase up Mr Makin or tell him that he would apply for default judgment if he did not file a defence; he had already been told that once in the information sheet with which he was served and again in the response form itself. As Mr Morrison points out, Mr Makin obviously read that document because he completed the attached response form to which it referred, but self-evidently he did not act as instructed.

20. Mr Fleming submitted that this was irregularly-obtained judgment because among other things the alleged breaches of rules 4.2(1)(b) and 4.10(1) respectively relating to the pleading of relevant facts and particulars of damages mean that the Court should not have entered a default judgment . He says these failures were of substance rather than technicalities entitling the applicant to have it set aside *ex debito justitiae*.

21. As will been seen later, rule 18.10 is of assistance to Mr Makin on this application but in the present context it works against him. To the extent that there were failures of pleading in the claim, I am satisfied these were not such as to make the request for default judgment or the Courts entry of default judgment a nullity and rule 18.10 should if necessary be applied to save them.



22. Further, bearing in mind that the default judgment was as to liability only and that there still needed to be a trial for the assessment of damages with notice of the hearing date to be served on Mr Makin, I do not accept that it is liable to be set aside on that account. The absence of the particulars of damages does not bear on the question of liability. The alleged failure of pleading as to facts is in my view not at the level which prevented the Court entering judgment as to liability where the defendant had not filed a defence taking issue with any of the pleaded facts. I am satisfied the judgment as to liability was properly, or regularly, entered.

23. The question arises whether having an arguable defence may assist on the first limb of the two requirements, namely that the defendant has shown a reasonable cause for not defending a claim.

24. In the *ANZ Bank v Dinh* case the Court of Appeal said *"Counsel for the defendant has developed a complex argument that the requirements of paragraphs (a) and (b) of Rule 9.5(3) are inter-dependent, and the requirement in paragraph (a) may be modified, even to the point of irrelevancy, by the strength of the defence demonstrated for the purpose of paragraph (b). That is, if the Defendant can establish an extremely strong ground of defence, the fact that no reasonable explanation for the delay can be demonstrated would not prevent a default judgment being set aside..... In the present case we think that the appeal must succeed on other grounds, so it is not necessary for us to deal with the appellant's argument on this topic at length. Suffice to say that we think the language of Rule 9.5(3) is plain. There are two requirements each of which must be considered on that application to set aside a default judgment. There may be some scope for taking into account the nature and strength of the defence advanced in paragraph (b) of that rule when considering what would constitute "reasonable cause" under paragraph (a) in the circumstances of a particular case. However that possibility does not lead to the conclusion contended for by the respondent. If there were a case where an unanswerable defence was demonstrated, but reasonable cause was not demonstrated, the rules would permit the default judgment to be set aside, but not for the reasons advanced by counsel for the respondent. The purpose of the rules is to further the administration of justice. The rules should not be applied so as to cause or perpetrate injustice. In the extreme case postulated, the answer would lie in the*

application of rule 18.10 which deals with failure to comply with the rules, apply in the light of Overriding Objective 1.2(1) namely that the overriding objectives (sic) of the rules is to unable the Courts to deal with cases justly.

25. In the circumstances of that case the Court of Appeal concluded "*....we are inclined to the view that the information placed before the primary Judge does not establish a reasonable cause for not defending the claim within the prescribed time. However, we prefer to decide this appeal on the matters that arise in relation to whether an arguable defence about liability and quantum is demonstrated.*"

26. In the end, the Court of Appeal decided there was no arguable defence so the default judgment, which had been set aside in the Supreme Court, was reinstated. It is obvious however that if the Court had concluded there was an arguable defence it would have upheld the setting aside of the default judgment on the application of rule 18.10 even though it did not consider reasonable cause had been established by the defendant for not defending the claim.

27. While the Court of Appeal obligations are not strictly binding as they were obiter, I respectfully accept and adopt its approach. That said, I do find difficulty in understanding the way in which "some scope" may be given to take into account the nature and strength of the defence when considering the "reasonable cause" limb. Consideration of whether there is a reasonable cause for not defending a claim inevitably focusses on procedural steps taken or not taken by the defendant whereas the question of whether there is an arguable defence is one relating to substance and merit, not procedure.

28. I have to come to the view that it is doubtful, to say the least, that Mr Makin had reasonable cause for not filing a defence. He is an articulate and intelligent journalist capable of understanding much more complex documents than the advice sheet which he clearly received and read. His explanation that later delays and confusion about advice as to Court attendances meant the claim was not seriously intended thereby excusing his failure to file a defence at any stage is frankly spurious. He knew from the start that he had to follow up his response for the defence and that judgment could be entered against him without reference to him if he did not do so.

29. That said, I take into account that he is not a lawyer and that it is obvious from his response and from a letter he apparently wrote to Mr Mandel's lawyers soon after service of the claim that he genuinely and substantively disputes that there is any basis for legal action arising from his articles. He wrote to the claimant's solicitors on 5 February 2014 and although I have not seen that letter, I have no doubt it was sent because it is referred to in Mr Morrison's notice of opposition. Accordingly, and even though Mr Makin does not say this in his sworn statement, I am satisfied that on some level he thought that by filing a response and corresponding with the claimant's solicitors his position was made clear and that his rights to defend the claim, if he could not persuade Mr Mandel to drop it, were protected.

30. Whether this amounts to *reasonable* cause for not filing a defence to ensure such protection is, as I have said, doubtful.

An arguable defence?

31. Mr Makin filed a draft amended defence on 8 January 2015 setting out his essential response to the claim. As an aside I note this clearly indicates that he was perfectly able to file such a defence in February 2014; the alleged shortcomings in the claim to which Mr Fleming adverts were no impediment to that.

32. Mr Makin indicates his intention to plead a number of defences namely that the words published were true and/or fair comment and/or justified and/or privileged and/or such as to entitle him to statutory defences under various sections in the UK Defamation Act 1952.

33. Mr Fleming submits that the proposed defence is one with real or substance and with the number of limbs to it. Mr Makin's sworn statement also annexes a number of documents which he claims as a support for his position that his articles were justified.

34. Mr Morrison made submissions in support of the validity of the claim and challenging the merit of these proposed defences. Ultimately though he accepted that

while Mr Mandel does not agree that any of these defences will succeed, it is difficult at this stage to say that they are not at least arguable.

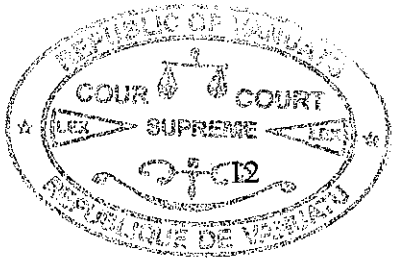
Result

35. Standing back and considering both limbs of Rule 9.5(3), and Rule 18.10, I have come to the view that the interests of justice require the setting aside of the judgment. Even if there is no reasonable cause for Mr Makin for not having filed a defence, this is not a situation where he did nothing at all and it is clear he strongly and genuinely disputes his liability in defamation. This is case where, as Court of Appeal observed in the *ANZ Bank v Dinh* case, rule 18.10 can be properly be applied to excuse Mr Makin's failure to file a defence, having regard to the overriding objective of the rules namely to enable the Court to deal with the case justly. I am satisfied there is a both a serious claim and a serious proposed defence to it and that both parties deserve to have their "day in Court" rather than to have the matter determined on a procedural knock-out. There is a clear risk of injustice if the judgment is not set aside.

36. It is also relevant to my decision to set aside the default judgment that it was only a judgment as to liability. That meant there was always going to be a substantial trial on the question of damages. In assessing the appropriate damages, the Court would inevitably have had to consider in a back-handed way the extent to which there was any liability. In the absence of an earlier considered (rather than default) judgment as to liability, the interests of justice in a defamation case which is both seriously advanced and seriously defended require that all issues are dealt with at once. The current judgment being one as to liability only is, in and of itself, of no value to Mr Mandel until it is followed up with an award of damages.

37. For these reasons I was satisfied having regard to all of the circumstances of the case that the default judgment should be set aside. I accordingly confirm the order I made at the end of the hearing.

Costs



38. Having succeeded with the application to set aside the default judgment Mr Fleming applied for indemnity costs. He referred me to a letter which Mr Toka had written to Mr Mandel's solicitors on 14 January pointing out the likelihood of the success of the application and requesting that consent orders be agreed to, with the costs to be in the cause. Mr Morrison's submission was that standard costs should be awarded to Mr Mandel in accordance with the usual practice on applications of this kind and he submitted that Mr Mandel was entitled to leave it to the Court to decide.

39. In this case the judgment was regularly obtained and I have found that Mr Makin arguably had no reasonable cause for allowing that to occur. While costs normally follow any event, this is not usually so in these circumstances. The usual, though of course not invariable, practice where the applicant is seeking the indulgence of the Court for his procedural failure is to award costs to the claimant, not the defendant. After all the claimant, in this case Mr Mandel, has followed the rules by filing and serving his claim with the appropriate notice but the defendant has not followed them, necessitating an application to the Court with which the claimant has to deal after a judgment has properly been entered. While I acknowledge that some weight must be given to Toka's letter, it does not in my view change the position from costs being awarded to the claimant to their being awarded in favour of the defendant in the circumstances of this case, let alone on an indemnity basis.

40. That said, I consider that the combination of Mr Makin's detailed sworn statement, the submissions in support of the application, the letter of 14 January and the observations about likely outcome which I made at the conference on 10 February mean that Mr Mandel should be deprived of the costs which would otherwise have been awarded.

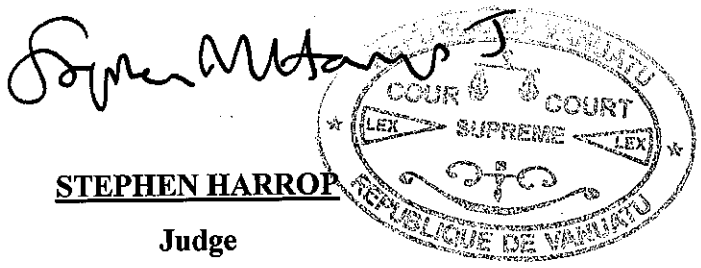
41. In light of those matters, the prudent course for Mr Mandel would have been to accede to the judgment being set aside, but to ask for standard costs. However, he chose, as was his right of course, to oppose the application at the hearing and to require the Court to make a decision. That decision, fairly predictably, went against him.

42. In conclusion I make no order for costs and they are to lie where they have fallen.

Future directions

43. Pursuant to rule 9.4, at the end of the conference I dictated a Minute as to the immediate future course of this proceeding. This has been issued separately but I record here that the next conference will be at 10.00 am on Monday 27 April 2015.

BY THE COURT



STEPHEN HARROP

Judge