

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

Civil Appeal Case No. 192 of 2011

BETWEEN : PACIFIC AUTRONICS LTD

Appellant

AND: JIMMY THOMAS

Respondent

Coram: Justice Aru

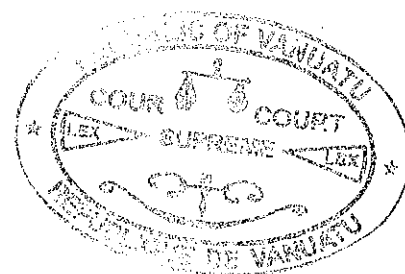
Counsel: Mr. Kilu for the Appellant
Mrs. M. N. Patterson for the Respondent

JUDGMENT

Introduction

1. Pacific Autronics Limited (PAL) appeals the decision of the Magistrate Court issued on 12 August 2011 in favour of Jimmy Thomas in Civil Case No 47 of 2010 , (CC 47 of 2010) and seeks the following orders:-
 - a). That the judgment of the Magistrate Court dated 12 August 2011 be called up and quashed in its entirety;
 - b). All consequential applications upon the judgment be set aside and be of no effect;
 - c). The Magistrate Court conduct a fresh trial of the matter; and
 - d). Other orders the Court deems proper.

2. Several grounds were advanced in support of the appeal. In summary, PAL says that:-
 - a) the court erred in fact and in law in proceeding to conduct the trial in the absence of the appellant and his counsel ;

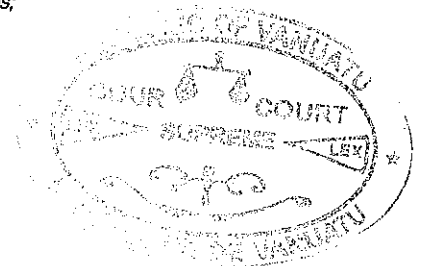


- b) the court erred in fact when it stated that both counsels had agreed to the trial date of 12 May 2011 when defence counsel did not agree;
- c) the court erred in law when it said that by not attending the trial , the defendant had denied itself the right to a defence;
- d) the court erred in law in relying on rule 18.11
- e) the court erred in fact when it said the defendant did not provide any reasonable excuse for not attending trial on 12 May 2011 ;
- f) the court erred in fact when it said counsel for the defendant had wasted the court's time;
- g) the court erred in fact when it said that the defendant and its counsel's absence at trial seemed to be a repetition of absences without informing the court ;
- h) the court erred in law in proceeding with the trial in the absence of the defendant ;
- i) the court erred in fact in stating that PAL's manager , Mr. Lal confirmed that he gave the claimant a part from a bongo truck and not from a hyundai;
- j) the court erred in law and in fact when it kept confusing Mr. Lal's reference to bongo truck;
- k) the court erred in law and in fact when it said that the defendant's statements were not relevant and did not corroborate each other .

CC 47 of 2010

3. By way of background, Jimmy Thomas filed the claim as a result of a dispute with PAL over the purchase of a vehicle spare part. Jimmy Thomas alleged that he ordered a spare part for his hyundai bus from PAL and purchased the part believing it to be a hyundai part. He alleges that upon discovering that PAL sold him a bongo spare part instead of a hyundai spare part , he sought a refund of the total purchase price paid being VT 65, 000 . In the end PAL refunded part of the money being VT32, 862 but refused to refund the balance.
4. The claim is for the balance owing being VT 32,138 and damages in the sum of VT 90,000. The damages pleaded is for loss suffered as a result of the bus lying idle over a period of five days .The average daily income lost for that period was VT 18,000 per day.
5. On 12 August 2011 , the Magistrate Court issued the following orders:-

- "1. That the judgment is hereby entered against the defendant in the sum of Vatu 122,138 as claimed in the Magistrate Court claim. This being:*
- 2. Vatu 32,138 being the balance of the funds been advanced, vatu 90,000 being for damages;*



3. The defendant is further ordered to pay costs of 300,000 Vatu calculated as follows:

Court attendances 7 times 5000	Vatu 35,000
Court attendances and obtaining judgment	Vatu 10,000
Disbursements	Vatu 45,195
Legal fees	<u>Vatu 209,805</u>
	<u>Vatu 300,000</u>

Making a total of Vatu 422,138."

Appeal

6. Section 30 1) and 2) of the Judicial Services and Courts Act [CAP 270] provides:

30. Appeals from Magistrates' Court

(1) Subject to the provisions of any other Act, the Supreme Court has jurisdiction to hear and determine appeals from judgements of the Magistrates' Court on all or any of the following:

- (a) a question of law;
- (b) a question of fact;
- (c) a question of mixed law and fact.

(2) The Supreme Court in hearing an appeal:

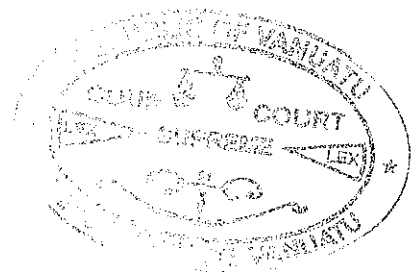
- (a) is to proceed on the face of the record of the Magistrates' Court; and
- (b) may exercise such powers as may be prescribed by or under this Act or any other law; and
- (c) has the powers and jurisdiction of the Magistrates' Court; and
- (d) may review the procedures and the findings (whether of fact or law) of the Magistrates' Court; and
- (e) may substitute its own judgement for the judgement of the Magistrates' Court; and
- (f) may receive evidence.

7. Rule 16.32 of the Civil Procedure Rules provide that the Supreme Court after hearing an appeal can:

- a) confirm or quash all or part of the decision appealed from;
- b) by order, refer part or all of the proceeding back to the Magistrates' Court for rehearing;
- c) make any order the Magistrates' Court can make."

Discussion

8. Grounds a) to h) relate to PAL's main argument that the Senior Magistrate erred when she proceeded with the trial hearing in their absence. In her decision the Senior Magistrate said:-

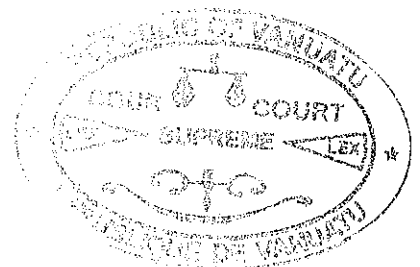


"This matter came before the court by way of a magistrate court claim in 2010. The first hearing date was on 15 April 2010. According to the court's file there has been 9 adjournments altogether and most of those adjournments were because one or the other party has not attended court.

On the 12th of May 2011, the date which the court has put aside for the trial and both parties counsel agreed to that date. On that date the defendant no his counsel attended court. The court continued to hear the claimant's case on the request of the claimant on the following reasons;

- *By not attending the court the defendant has denied himself the right to a defence;*
- *Rule 18.1.1 of the Civil Procedure Rules No 49 of 2002;*
- *The defendant did not provide any reasonable excuse for not attending the court and already wasted time for the court the other parties when the trial was schedule for the 17 March 2011 at 8.30am and appeared after the due time of the trial to inform the court he could attend because of conflicting commitments in court known to him for a significant time;*
- *The defendant's counsel was aware of the trial date , yet did not attend;*
- *Also the listing of cases issued by the registry was distributed to all lawyers which shows the dates and times of all cases;*
- *The absence of the defendant and lawyer seemed to be a repetition of absence of attendances and this particular date the counsel has not even informed the court or the plaintiff's counsel of his absence ;*
- *On the 17 March 2011 the claimant had summoned 5 witnesses to attend court and all witnesses present and had to go back home. On the 12 May 2011 all claimant's witnesses were present again even a sick witness who attended court....."*

9. Mr. Kilu submits on behalf of PAL that there is no basis for the damages claim and secondly Orders 1 and 3 were not part of the claim. He submits that the appeal should be allowed and the matter returned to the Magistrate Court for retrial.
10. It was submitted that under rule 12.3, the court has the discretion to adjourn a trial of its own motion (**Carlot v Santhy [2009] VUCA 5**). Secondly Mr. Kilu submits that he was double booked (**Coconut Oil Production (Vanuatu) Ltd v Tavoia [2005] VUCA 24**) and the matter should have been adjourned because he had made an earlier request for adjournment (**Maltape v Aki [2007] VUCA 5**).
11. Mr. Kilu advances the same argument in relation to rule 12.9 that the court has the discretion to adjourn the proceedings in the absence of the defendant and it should have enquired into the reasons for his non-attendance (**Dinh v Samuel [2010] VUCA 6**) to call his office and mobile phone. He submits that had they done so they would have found that he was engaged in another matter in the Supreme Court and had written a letter in advance to inform the court of his unavailability (**Dinh v Polar Holdings [2006] VUCA 24**; **Fujitsu NZ v International Business Solutions Ltd & Or [1998] VUCA 13**; **Michel v**



Public Service Commission & Or [1998] VUCA 10). Mr. Kilu finally submits that under rule 1.7, the court is empowered to ensure that a matter is dealt with according to substantial justice.

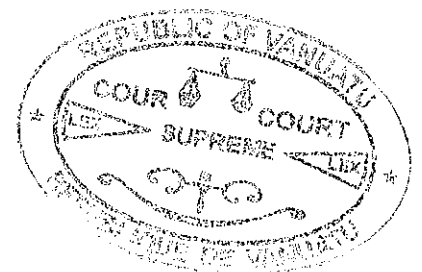
12. Mrs. Patterson on the other hand submits that the court pursuant to rule 12.9 1) c) exercised its discretion and accepted to hear the claimant in the defendant's absence. Referring to the above cases, she submits that the defendants in these cases were proactive whereas in this matter it is clear that the Senior Magistrate proceeded to hear the claimant because no reasons were given for the defendant's absence. She submits that Mr. Kilu simply did not turn up in court for the trial and had not requested an adjournment at any time before the trial hearing.

18 April 2011 letter

13. Mr. Kilu relies on this letter to say that he had requested an adjournment of the trial date in good time. The letter is addressed to the Magistrate court clerk and copied to Mrs. Patterson informing the court that the trial date of 12 May 2011 was not suitable to him due to his commitments before Spear J on that date and requested that the trial be rescheduled.
14. This letter was written a month before the trial hearing. There is no evidence that any follow ups were made by Mr. Kilu on his request to adjourn. Likewise there is no proof of service filed or evidence that this letter was served on Mrs. Patterson or the court before the trial hearing on 12 May 2011. Rose Bangga who is Mrs. Patterson's legal secretary deposes in her sworn statement of 16 May 2011 that she was in court With Mrs. Patterson on 12 May 2011 ready for the trial but Mr. Kilu was not there at 8.30am. She states that:-

"Manu Jacky from the Magistrate Court checked on about 8.35am the whereabouts of Mr. Kilu by calling him but the phone was on answering machine and no one answered at the office."

15. In a further sworn statement dated 3 October 2011, Rose Bangga states that she did not receive the letter of 18 April 2011 from Mr. Kilu in the month of April 2011 but that the letter was received on 23 May 2011 as an attachment to another letter sent by Mr. Kilu to the Magistrate Court which was dated 20 May 2011. The evidence of Rose Bangga was not challenged by Mr. Kilu.
16. In her judgment, the Senior Magistrate made it quite clear that the trial had been adjourned several times in the past. It was therefore well within her discretion pursuant to rule 12.9 1) c) to allow the



claimant in the absence of the defendant to call his evidence and establish that he was entitled to judgment.

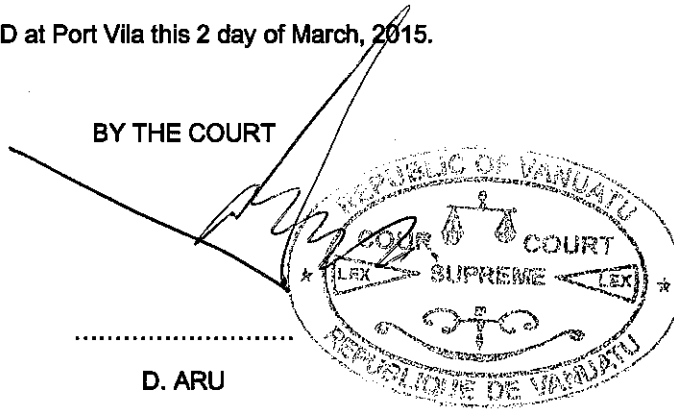
17. Having heard the submissions, I am of the view that there is no basis for costs in the sum of VT 300,000 and therefore order as follows:

Order

1. The appeal is allowed only in part and order 3 of the Senior Magistrate's orders is quashed.
2. The claimant is only entitled to costs in the sum of VT 55,195.
3. As to costs of the appeal, considering the initial amount claimed and costs incurred to date, each party shall bear their own costs.

DATED at Port Vila this 2 day of March, 2015.

BY THE COURT



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D. ARU
Judge