

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

**Civil Appeal**  
**Case No. 19/3233SC/CVA**

**BETWEEN: Samuel Iopa**  
Appellant

**AND: Joel Kamil**  
Respondent

*Date of Hearing:* 22 July 2020  
*Before:* Justice V.M. Trief  
*In Attendance:* Appellant – Mr R. Rongo  
Respondent – Mr F.D. Tasso  
*Date of Decision:* 22 July 2020

---

**JUDGMENT**

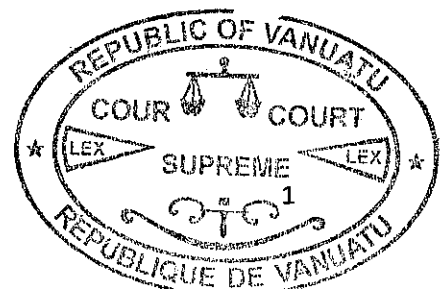
---

A. Introduction

1. This is appeal from the Magistrates' Court decision revoking that Court's earlier oral decision and granting an Application to Set Aside Default Judgment. The Magistrates' Court Claim seeks damages for unjustified dismissal. Default judgment was entered after the Respondent Joel Kamil had not filed a Response or Defence.

B. Background

2. On 6 August 2019, the Appellant Samuel Iopa filed his Magistrates' Court Claim for unjustified dismissal.
3. Proof of service was filed showing that the Claim was served on Mr Kamil on 9 August 2019.
4. Mr Kamil did not file a Response or Defence to the Claim.



5. On 4 September 2019, the Magistrates' Court held the first conference (noted as 'First Hearing' on the Claim) which both parties' counsel attended. At the conference, Mr Iopa's counsel made an oral request for default judgment and the Magistrates' Court entered default judgment.
6. On 9 September 2019, Mr Kamil filed an Application to Set Aside Default Judgment and his sworn statement in support.
7. On 13 November 2019, the Magistrates' Court heard the Application and dismissed it. This decision was not reduced into writing.
8. On 14 November 2019, the Magistrates' Court issued a written decision revoking its oral decision made on 13 November 2020 and granted the Application to Set Aside Default Judgment.
9. Mr Iopa appealed the 14 November 2019 decision in this proceeding.

C. The Law

10. Subsection 56(4) of the *Employment Act* [CAP. 160] provides:

56. (4) *The court shall, where it finds that the termination of the employment of an employee was unjustified, order that he be paid a sum up to 6 times the amount of severance allowance specified in subsection (2).*

11. Ruled 4.5(1) and 4.13(2) of the *Civil Procedure Rules* ('CPR') provide:

4.5 (1) *If the defendant intends to contest the claim, the defendant must file and serve a defence on the claimant within the period required by Rule 4.13.*

...

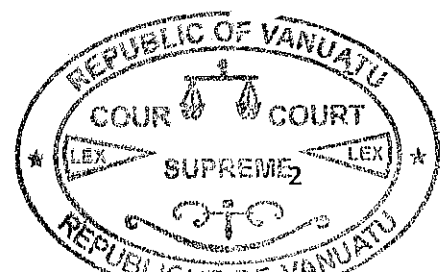
4.13 (2) *The defendant may file a defence although he or she has not filed a response. However, if he or she did not file a response, the defence must be filed within 14 days of service of the claim.*

12. Rule 9.1 of the CPR provides:

9.1 *If a defendant:*

- (a) *does not file and serve a response or a defence within 14 days after service of the claim; or*
- (b) *files a response within that time but does not file a defence within 28 days after the service of the claim:*

*the claimant may file a sworn statement (a "proof of service") that the claim and response form was served on the defendant as required by Part 5.*

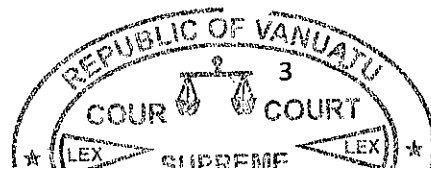


13. Rule 9.3(1)-(4) of the CPR provides:

- 9.3 (1) *This rule applies if the claim was for an amount of damages to be decided by the court.*
- (2) *After the claimant has filed a proof of service, the claimant may file a request for judgment against the defendant for an amount to be determined by the court. The request must be in Form 13.*
- (3) *In the Magistrates Court, the request may be made orally.*
- (4) *The court may:*
- (a) *give judgment for the claimant for an amount to be determined; and*
  - (b) *either:*
    - (i) *determine the amount of damages; or*
    - (ii) *if there is not enough information before the court to do this, fix a date for a conference or hearing to determine the amount of damages.*

14. Rule 9.5 of the CPR provides:

- 9.5 (1) *A defendant against whom a default 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.*



(5) *These Rules apply to the proceeding as if it were a contested proceeding.*

D. The Decision

15. The Magistrates' Court decision dated 14 November 2019 is in the following terms:

*After Court hearing the application and entering a decision in dismissing the application to set aside default judgment against the defendant on 13 November 2019 and the court consideration on dates of proceeding, there is an oversight by the court in allocating the first date of hearing, resulted in the inconsistency of the first date of hearing against the period to allow defense to respond within 28 days as per rule 4.5 CPR, Court hereby revoke its decision in dismissing the application to set aside the default judgment and grant the application to set aside default judgment entered on 4 September 2019 accordingly.*

E. Grounds of Appeal and Submissions in Response

16. Mr Rongo advanced a number of grounds of appeal set out in the Grounds of Appeal filed on 19 December 2019 and the Further Grounds of Appeal filed on 18 February 2020.

17. Mr Rongo's principal submission was to the effect that the Magistrate erred in his 14 November 2019 decision in which he revoked his 13 November 2019 decision and granted the Application to Set Aside Default Judgment by not first giving the parties an opportunity to be heard. Ground 3 which was related to the 13 November 2019 oral decision that had not been appealed, and Ground 5 were abandoned.

18. Mr Rongo also submitted that the Magistrate had erred in failing to take into account that the Defendant did not have an arguable defence, and in not awarding costs or ordering security for costs. He submitted that the Magistrate did not give the parties an opportunity to be heard and if he had, counsel would have had the opportunity to seek orders for costs and security for costs.

19. Mr Tasso submitted that the Magistrate did not err as his client has a good defence. He relied on rules 1.4(2)(j) and 1.7(b) of the CPR for his submission that the court has a duty to manage cases including to deal with the case without the parties needing to be at court, and to give whatever directions are necessary to ensure the matter is determined according to substantial justice. He also submitted that the Magistrate did not err in not awarding costs or ordering security for costs as counsel had not applied for those in the Magistrates' Court.

F. Discussion

20. The sole reason given by the Magistrate for his 14 November 2019 decision is that after he had heard counsels and made his oral decision on 13 November 2019, he realised that he had made an oversight in listing the matter for first conference when the period of time for filing a defence pursuant to the CPR had not yet expired.

21. The Magistrate referred to rule 4.5 of the CPR and stated that the Defence was to be filed within 28 days of service of the Claim. However, rule 4.13(2) of the CPR provides that if



a defendant did not file a Response, the Defence must be filed within 14 days of service of the Claim. Mr Kamil did not file a Response therefore his Defence had to be filed within 14 days of service of the Claim. Accordingly, the Magistrate erred in his application of rules 4.5 and 4.13 of the CPR.

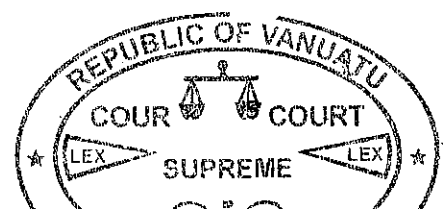
22. However, I consider that the Magistrate made the correct decision to grant the Application to Set Aside Default Judgment, for the following reasons:

- a. The Claim is for unjustified dismissal. Unjustified dismissal is a statutory cause of action pursuant to subs. 56(4) of the *Employment Act*. The remedy for unjustified dismissal is an order that the claimant be paid a sum up to 6 times the amount of severance allowance. Therefore a claim for unjustified dismissal is a claim for damages, and any default judgment for such a claim can only be for "an amount to be determined". Accordingly, the Magistrate erred in signing the default judgment dated 4 September 2019 for a fixed amount. That default judgment cannot stand.
- b. Mr Kamil in his Application to Set Aside Default Judgment set out the reason why he did not defend the Claim and outlined his defence to the Claim, in a sentence each. I pointed out to Mr Tasso that he would serve his client better by setting out in such an Application all the reasons why the defendant did not defend the claim, and full details of his defence to the claim. His submissions went further than the evidential base in Mr Kamil's sworn statement.
- c. In any event, I am satisfied that Mr Kamil has shown reasonable cause for not defending the claim (that he was a lay person with no knowledge or experience of the law and of court processes) and that he outlined his defence to the Claim (that Mr Iopa does not have standing to make the Claim). I am not persuaded that that is an arguable defence but the default judgment cannot stand in any event as it was made for a fixed amount.

23. Given the above result, I need not consider each of the grounds of appeal advanced. It may be that procedural justice required the parties to be given an opportunity to be heard before the Magistrate made his decision, however I am satisfied that in the circumstances of this case, the justice of the case requires that the Magistrate's decision be upheld but for different reasons to the sole reason that he gave, and that the Default judgment dated 4 September 2019 is set aside.

G. Result and Decision

24. The appeal is dismissed. The Magistrates' Court decision dated 14 November 2019 is upheld but for different reasons to the sole reason given by the Magistrate.
25. I confirm that the Default Judgment entered on 4 September 2019 is set aside.
26. The matter is referred back to the Magistrates' Court for hearing of the Claim, not for enforcement.



27. Costs should follow the event. The Appellant is to pay the Respondent's costs of the appeal of VT30,000 by 4pm on 19 August 2020.

DATED at Port Vila this 22<sup>nd</sup> day of July 2020  
BY THE COURT

*VM Trief*

Viran Molisa Trief  
Judge

