

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

Civil  
Case No. 24/1383 SC/CIVL

**BETWEEN:** Norris Jack Kalmet  
Claimant

**AND:** Republic of Vanuatu  
Defendant

Date: 2 August 2024  
Before: Justice V.M. Trief  
Counsel: Claimant – Mr J. Tari  
Defendant – Mr L. Huri

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**DECISION AS TO APPLICATION TO SET ASIDE DEFAULT JUDGMENT**

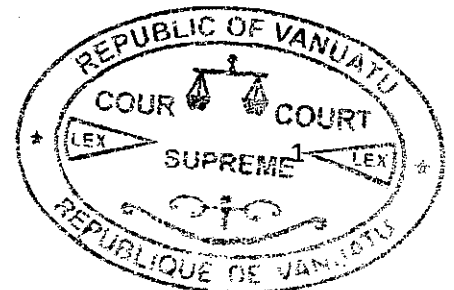
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A. Introduction

1. This was a contested application to set aside the default judgment entered on 2 July 2024. The Claimant Norris Jack Kalmet filed submissions in response. Counsel then requested that the Court determine the application on the papers.
2. This is the decision.

B. Background

3. By the Claim filed on 6 May 2024, Mr Kalmet alleges that he paid 5% lessor's benefit to the Defendant State in respect of the subdivision of lease title 12/0923/1243 however that original lease was created before the coming into force of the *Land Leases (Amendment) Act No. 2 of 2017* (which provided for lessor's benefit to be



paid on rural leases), therefore lessor's benefit was not payable. He is seeking refund of lessor's benefit paid in the sum of VT10,948,250, interest and costs.

4. On 13 May 2024, the Claim was served on the Office of the Attorney General.
5. No response or defence was filed.
6. On 2 July 2024, the Court entered Default Judgment for a fixed amount in favour of Mr Kalmet.
7. On 10 July 2024, the State filed the Defendant's Application to Set Aside Default Judgment pursuant to rule 9.5 of the *Civil Procedure Rules* ('CPR') (the 'Application') and the Sworn statements of Ily Fredy and Gordon Willie in support.
8. On 25 July 2024, the Claimant filed submissions in response and the Sworn statement of Norris Jack Kalmet in support.

C. Discussion

9. The starting point is rule 9.5 of the CPR which provides as follows:

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.*

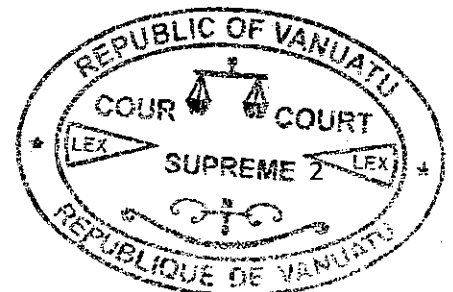
(2) *The application:*

- (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:*

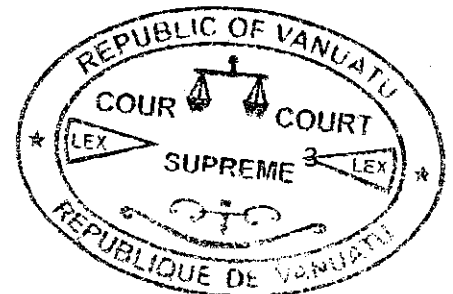
- (a) *has shown reasonable cause for not defending the claim; and*
- (b) *has an arguable defence, either about his or her liability for the claim or about the amount of the claim.*

10. The reasons given by the State for not defending the Claim are that there were 87 derivative leases involved in the subdivision and Department of Lands officers experienced difficulties in locating in a timely manner: (i) the relevant files as those were scattered between the Ministry of Lands' former premises at George Pompidou



area and its current premises adjacent to Thai Viet Hardware Ltd; and (ii) verifying the payments made in respect of each lease.

11. I consider that the State has shown reasonable cause for not defending the Claim.
12. As for arguable defence, the State asserts that Mr Kalmet gave written notice to the Attorney General of impending proceedings but then filed the Claim over 6 months later therefore the proceedings are barred pursuant to s. 6 of the *State Proceedings Act No. 9 of 2007* (as amended):
  6. (1) *No proceeding against the State, other than an urgent proceeding or a Constitutional proceeding, may be instituted under section 3 unless the party intending to do so first gives written notice to the State Law Office of such intention.*
  - (2) *The notice under subsection (1) must:*
    - (a) *include reasonable particulars of the factual circumstances upon which the proposed proceedings will be based; and*
    - (b) *be given not less than 14 days and no more than 6 months prior to the institution of proceedings.*
13. Section 3 of the *State Proceedings Act* makes provision for proceedings by or against the Government. It provides that, subject to the Act itself, a proceeding may be instituted by or against the State.
14. It was submitted that the Court of Appeal held in *Republic of Vanuatu v Napuat* [2023] VUCA 8 that s. 6 of the *State Proceedings Act* provides an absolute bar on proceedings being instituted under s. 3, that is to say against the State, unless notice has been given as required and within the required minimum and maximum periods of 14 days and 6 months respectively.
15. It was also submitted that Lunabek CJ held in his judgment in *Wu Kim Ming v Republic of Vanuatu* [2021] VUSC 29 that s. 48A of the *Land Leases Act* [CAP. 163] (as amended) applies only to leases entered into after 27 February 2015 therefore there is a dispute of law as to whether or not 5% lessor's benefit was payable on the derivative leases. It was submitted that this requires the Court's determination.
16. I deal first with the *State Proceedings Act* point. The Court of Appeal held as follows in its judgment in *Republic of Vanuatu v Napuat* [2023] VUCA 8 at [15]-[16]:
  15. *We... regard the obligation imposed by the statute as absolute, in the same way as this Court arrived at that conclusion in Sing. It provides an absolute bar on proceedings being instituted under section 3, that is to say against the State unless notice has been given as required and within the required minimum and maximum periods of 14 days and 6 months respectively. Counsel are well advised to bear in mind the provisions of the section and may consider filing a copy of the section 6 notice together with the originating claim to demonstrate compliance with the section.*



16. Counsel for the Appellants acknowledged that the appeal did not take the original claim any closer to finality but sought a decision from this Court in clear and authoritative terms for future guidance...

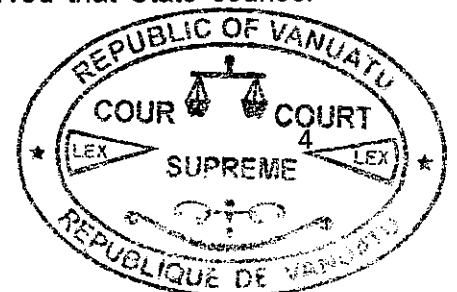
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17. The earlier decision of the Court of Appeal referred to was *Republic of Vanuatu v Sing* [2013] VUCA 35.
18. It is clear from the Court of Appeal judgment in *Republic of Vanuatu v Napuat* that s. 6 of the *State Proceedings Act* provides an absolute bar on proceedings against the State unless notice has been given within the required minimum and maximum periods of 14 days and 6 months respectively.
19. In the present proceedings, a copy of Mr Kalmet's notice by letter dated 14 June 2023 was attached to the Sworn statement of Ily Fredy [Attachment "IF1"]. That letter carries a stamp belonging to the Office of the Attorney General showing that the letter was received on 5 September 2023. Accordingly, proceedings had to be instituted within 6 months from that date, that is, by 5 March 2024.
20. However, the Claim in the present proceedings was filed on 6 May 2024 – well after the expiry of the mandatory maximum period.
21. Accordingly, the institution of the present proceedings are barred by s. 6 of the *State Proceedings Act*. That ground of the Application is made out and the Claim must therefore be struck out.
22. I must add, however, that the Court of Appeal addressed in its judgment in *Republic of Vanuatu v Napuat* [2023] VUCA 8 at [12] the question of whether or not a party (claimant) having once failed to give the required notice, may thereafter file the same claim again after ensuring the proper notice has been given:

12. What section 6 does not provide is an answer to the question of whether, having once failed to give the required notice, a party may thereafter file the same claim again after ensuring the proper notice has been given. Counsel for the Appellant conceded that, subject to compliance with the *Limitation Act*, such a claim may be instituted in those circumstances and will not be met with a claim of *res judicata*. We accept this to be a correct concession given that the bar goes to the institution of process. If nothing has been properly instituted, there can be no bar to the subsequent but proper institution of the same.

(my underlining)

12. It is clear therefore that the bar under s. 6 of the *State Proceedings Act* goes only to the institution of process therefore if the claimant having once failed to give the required notice, he or she may thereafter file the same claim again after ensuring the proper notice has been given. The Court of Appeal observed that State counsel



correctly conceded that the filing of the same claim would not be met with a claim of *res judicata* as the bar goes only to the institution of process therefore there can be no bar to the subsequent but proper institution of proceedings by filing the same claim a second time.

13. For the reasons given, I must strike out the Claim in the present proceedings however it is open to Mr Kalmet to give fresh notice under s. 6 of the *State Proceedings Act* and to then file the same Claim in new proceedings within the required minimum and maximum periods of 14 days and 6 months respectively.
14. For completeness, I record that I agree that there is a disputed question of law raised by the State as to whether or not 5% lessor's benefit was payable on the derivative leases. That is a dispute of law going to the State's liability for the claim and on that basis, I would have set aside the default judgment and managed this matter towards trial. However, as set out above, the Claim in the present proceedings must be struck out. It follows that the default judgment must also be set aside.

D. Result and Decision

15. The Defendant's Application to Set Aside Default Judgment filed on 10 July 2024 is **granted** and it is ordered that the Default Judgment dated 2 July 2024 is **set aside** and the Claim is **struck out**.

**DATED at Port Vila this 2<sup>nd</sup> day of August 2024  
BY THE COURT**

  
Justice Viran Molisa Trief

