IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appeal Jurisdiction)

Civil Appeal Case No. 43 of 2012

BETWEEN: LUGANVILLE MUNICIPAL COUNCIL
Appellant

AND: JOHNNY SAKSAK
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice Bruce Robertson
Hon. Justice John Mansfield
Hon. Justice Robert Spear
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru

Counsel: *Mr. Felix Laumae for the Appellant*
Mr. Saling Stephens for the Respondent

Date of Hearing: *23 October 2012*

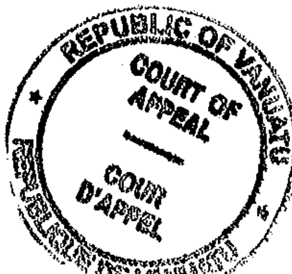
Date of Decision: *25 October 2012*

JUDGMENT

1. This was an appeal against the refusal of Justice Saksak to set aside a default judgment entered in this case. It is necessary to set out a little of the extraordinary background in this matter to provide context.

2. The dispute before the Court has its genesis in an application initially filed in 1986 against the Port Vila Municipal Council, the Luganville Municipal Council and a Mr. Kalsakau. At various stages the Port Vila Council and Mr. Kalsakau have ceased to be involved and they have been removed from the proceeding. The case is about claims for compensation for dismissal from employment.

3. On 17 March 2008 an amended Supreme Court claim was filed. It alleged that the respondent was the representative of former Luganville Municipal workers who were listed in a schedule attached to Mr. Saksak's sworn statement. They had all been employed by the Luganville Municipal Council and it was alleged they were unlawfully dismissed for their involvement in a strike action.



4. The amended claim included a schedule which said that as a consequence of the termination people had suffered loss and damages as enumerated. There was a grid which had 28 names and besides each a sum for lack of notice, another for severance, another for accumulated leave and also a column with the date upon which that person had commenced employment and their daily rate of pay at the time of "*dismissal*".

5. The claim sought a global money order in the sum of VT2,961,023 together with interest and costs.

6. On the file there was clear and unequivocal evidence that the proceeding had been served personally by Mr. Saling Stephens on the 2 April 2008 at 4.00 p.m. by delivering the same to Anna Toara, the secretary of the Luganville Municipal Council at the Municipal Hall in Luganville, Santo.

7. No formal steps were taken by the Luganville Municipal Council but the then Town Clerk Gaspard Moli Palaud on 24 June 2008 asked for an initial conference to be rescheduled and this occurred. That is consistent with the Council knowing of the claim.

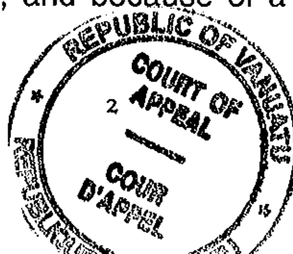
8. There was a series of conferences during 2008 between July and November. Suffice to say nothing happened and no appearance was entered for the Council.

9. The matter trailed on but nothing meaningful occurred and there was no substantive action apart from the Port Vila Municipality being removed from the case and the other defendant ceased to be part of the proceeding.

10. After some inconclusive steps in 2010 and 2011 the respondent eventually asked at a conference on 14 October of that year, for a trial date. That led to the hearing after a specific request for a default judgment.

11. This was granted on 31 January 2012 and it can be said with confidence that although the Council must have known that there were outstanding issues, it had done nothing and taken no steps to involve itself in the matter prior to then. It was accordingly not advised of that hearing. It would have been sensible to have done so but no breach occurred in the failure.

12. When the judgment of 31 January 2012 was drawn to its attention the Council made an urgent application to set aside the default judgment. This was on the ground that there had been no proof of service and so the default judgment was irregular, that this was not the type of claim in respect of which default judgment could be entered, and because of a breach of Part 9 of the Civil Procedure Rules of 2002.



13. Some additional applications were filed about this time but the parties agreed that the judge should determine the application to set aside the default judgment first.

14. This was done at a hearing on 3 October 2012. The application to set aside was dismissed by Saksak J. who said that the supporting evidence from the town clerk, Mr. Sakita was not persuasive because never before had anyone raised the issue of non-service and that accordingly there was no reason why the judgment should not exist.

15. The question of leave was considered but again it was considered that the decision finally disposed of the proceeding and so there should be an immediate appeal to this Court.

16. Before us a number of issues were raised.

17. We are satisfied that the appeal must be allowed and it must be remitted for further hearing.

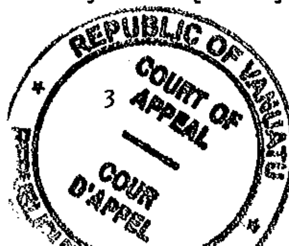
18. Mr. Stephens argued that the claimed absence of proof of service could not succeed and on that we agree with him and the Judge in the Supreme Court. However there are other fundamental issues which are of importance in this case.

19. First, we are not persuaded that this is a case in which the respondent can advance the claim on a representative basis. For that to occur there must be a combination of common interest, common grievance and the relief must be beneficial to all the parties.

20. In essence the matter does not fall within the provisions of Rule 3.12 of the Civil Procedure Rules and is not in conformity with our previous decision in Gidley v. Mele [1997] VUCA 17.

21. We are further persuaded that this is not a case which can be dealt with by way of a default judgment. The claim, as pleaded in the amended claim dated 14 March 2008, is not a liquidated demand but is a claim in which it was necessary for a Court to make a judicial assessment of the circumstances of each individual claimant. Particularly the claim for severance is the maximum permitted and this may not be appropriate in some or all cases.

22. We agree with Mr. Laumae that the circumstances are very similar to those in Municipality of Luganville v. Wendy Garu [1999] VUCA 8 where we said:-



"However, we are equally satisfied that it was never competent for the Court to enter judgment by default in respect of the claims for severance. They were not debts or liquidated demands. The Court was required to make an assessment of the circumstances and a hearing was essential."

23. Accordingly in the total circumstances of the case:-

    (a) the appeal must be allowed;
    (b) The decision of the Supreme Court of 3 October refusing the application to set aside the default judgment of 31 January 2012 is quashed;
    (c) The default judgment of 31 January 2012 is set aside;
    (d) The matter is remitted back to be tried by another judge of the Supreme Court. Major attention will be required to the pleadings if it is to proceed.

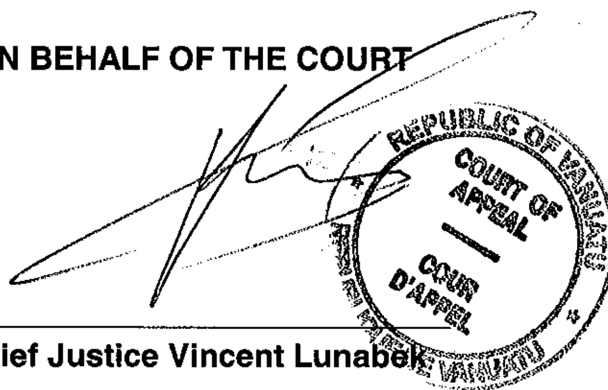
24. In all the circumstances it is not appropriate to make any orders as to costs. Although the Council has been successful, the problems can be laid at its door in the first instance. The Council cannot feel aggrieved now that they have been put to time and expense in having to be involved in more litigation.

25. We would say again to everybody involved in this case that it cries out for a settlement. We note that an ex-gratia offer was made a long time ago and of course the claim involving the Port Vila Municipal Council had been disposed off.

26. It is in the interest of no one that this matter which is now more than 26 years old should drag on unresolved.

DATED at Port Vila, this 25th day of October, 2012.

ON BEHALF OF THE COURT



Chief Justice Vincent Lunabek