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

Civil Appeal Case No. 36 of 2015

BETWEEN: PACIFIC AUTRONICS LIMITED
Appellant

AND: AMIT LAL
Respondent

Coram:	***Hon. Justice John von Doussa*** ***Hon. Justice Raynor Asher*** ***Hon. Justice Stephen Harrop*** ***Hon. Justice David Chetwynd***
Counsel:	*Mr. J. Kilu for the Appellant* *Mr. J. Malcolm for the Respondent*
Dates of Hearing:	*9 and 18 November 2015*
Date of Judgment:	*20 November 2015*

JUDGMENT

1. The respondent was a former employee of the appellant company. He was employed as the Manager at its Santo branch in Luganville, from May 2004 until 14 May 2013 when he resigned over a pay dispute. On 11 March 2015 the respondent issued a claim in the Supreme Court for unpaid entitlements under the Employment Act including severance, termination notice and unpaid accrued leave as well as common law damages and interest.

2. The claim and a response form was served on the appellant company on 02 April 2015 and in the absence of a defence filed by the appellant company, default judgment was granted on 18 May 2015 in the sum of VT 2,714,455 with interest at 5% per annum calculated from 14th May 2013 and costs to be taxed if not agreed. No penal severance or damages were awarded.

3. On 02 June 2015 the appellant company applied to set aside the default judgment on several grounds and annexed a proposed defence and counterclaim to the managing director's sworn statement in support of the application. The proposed counterclaim was for VT14,606,256 damages said to have been caused by the respondent wrongfully locking up the respondent's rented part of certain garage premises from 16 May 2013 to 2 August 2013.

4. The application to set aside default judgment was vigorously opposed in a cross-application dated 26 June 2015 and orders for security for costs and costs incurred to date were sought in the event that default judgment was set

aside. The cross-application was supported by a sworn statement from the respondent which exhibited the Annual Return of the appellant company made up on 4 April 2013. The Return recorded the total indebtedness of the company in respect of mortgages and charges at VT54,418,523.

5. In a ruling dated 28 August 2015 the primary judge despite rejecting the appellant company's proffered reasons for its delay in filing a defence, nevertheless set aside the default judgment and ordered the appellant company to *"... pay security for costs in the sum of VT1,5 million into the Chief Registrar's Trust Account within 30 days* (**Order 3**) *as well as "... pay the* (respondent's) *costs incurred to date in the sum of VT 270,000"* (**Order 5**). A further conference was fixed for 3 October 2015. In reasons for judgment the judge said "*in considering the level of indebtedness of the company and the amount claimed in the counterclaim, I am of the view that the giving of security for costs in addition to payment of costs already incurred would be justified*".

6. On 1 October 2015 the appellant company filed a notice of appeal against Orders 3 and 5 (above). It also sought leave to appeal from the Court of Appeal.

7. Rules 20 and 21 of the Court of Appeal Rules 1973 relevantly provides:

Time for appealing.

20. *Except where by Ordinance otherwise provided and subject to rule 21, any notice of appeal, whether from an interlocutory or final decision of the High Court, shall be filed with the Registrar of the High Court within thirty days after the decision complained of, calculated from the date on which the judgment or order of the High Court was signed, entered or otherwise perfected.*

Leave to appeal required in interlocutory matters.

21. *(1) No notice of appeal against any interlocutory order of the High Court, whether made at first instance or in exercise of its appellate jurisdiction, in any civil case or matter shall be filed unless leave to appeal has first been obtained from a judge of the High Court, or in the case of Gilbert and Ellice Islands Colony, a judge of the High Court or the Senior Magistrate, or, if such be refused, from the Court of Appeal.*

(2) Every application for leave to appeal under this rule shall be by summons in chambers to be filed with the Registrar of the High Court or with the Registrar of the Court of Appeal, as the case may be, within the period prescribed in rule 20 for the filing of notice of appeal:

Provided that upon the filing of an application for leave to appeal time within which, if leave be granted, the notice of appeal shall be filed shall be extended by such period as a judge of the High Court, the Senior Magistrate, or a Judge of the Court of Appeal, as the case may be, shall consider appropriate having regard to all the circumstances."

8. On its face the Rules require a notice of appeal to be filed *"within 30 days of the decision complained of"* and, in the case of an interlocutory decision, after leave to appeal, *"... has first been obtained from a Judge of the* (Supreme) *Court ... or if such* (leave) *be refused, from the Court of Appeal"*. Plainly the ruling made on 28 August 2015 did not finally dispose of the claim and was therefore an interlocutory decision under r 7.1(1) which required leave to appeal. Equally plainly the proposed notice of appeal was filed well outside the 30 day time limit.

9. An application for leave was filed together with a notice of appeal. It did not comply with the requirements of the above Rules that leave be *"first"* obtained before a notice of appeal may be filed and although the Court of Appeal has a concurrent power to grant leave to appeal, the Rule makes it clear that the power is only exercisable if leave has been refused by the Supreme Court. The Court of Appeal Rules 1973 are there to be complied with. What happened in this case was a serious departure from the Rules for which the appellant's counsel must take responsibility.

10. The above matters were drawn to appellant Counsel's attention and the hearing of the appeal was adjourned to allow Counsel to regularise the position. Subsequently, on 10th November 2015 the primary judge issued consent orders in the following terms:

> *"1. that leave is hereby granted to the defendant to file its Appeal out of time, and*
>
> *2. Leave is hereby granted to the Defendant to file its Appeal against the interlocutory judgment of the Court dated 28 August 2015".*

11. The appellant now seeks to appeal against the security for costs and incurred costs orders on the single ground that the Court *"did not exercise its discretionary powers in accordance with proper reasons and the law"*. In its submissions in support of this ground the appellant also argued that the amounts awarded for incurred costs, and for future security for costs were each too high.

12. Rule 9.5 (4) of the Civil Procedure Rules ("*CPR*") relevantly provides that at the hearing of the application to set aside default judgment "... *the Court must*:

> *(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, ..."*

Plainly the primary judge had a duty (*"must"*) to make an order about the costs incurred by the clamant in obtaining a default judgment and in opposing the application to set it aside. He also had a duty *"to consider"* the possibility of an order for security for costs.

13. Further, Rules 15.19 and 15.20 of the CPR provide that the Court may order security for costs against a corporate claimant if there is reason to believe from a consideration of the corporation's finances that it will not be able to pay the defendant's costs if ordered to pay them.

14. With the setting aside of the default judgment the appellant company was given unconditional leave to defend the respondent's claim for Employment Act benefits and the parties resumed their original_capacities as claimant and defendant. In respect of the counterclaim those capacities are reversed in that the appellant company became (counter) claimant and the respondent was the (counter) defendant. It is only in this latter capacity that the respondent could apply for an order for security for costs under Rules 15.19 and 15.20. ie. as a *"defendant"*.

15. The trial judge in his reasons for judgment has not indicated whether the order for security for costs was made under Rule 9.5 or Rules 15.19 and 15.20, or both. The judge's reference to the counterclaim indicates that the latter rules were being invoked. The reference to the company's level of indebtedness would be justification for making the order under both provisions. In the circumstances of this case there plainly was jurisdiction to make the order. The issues for decision on both aspects of the appeal are therefore whether the discretion of the judge has miscarried either because the amounts awarded are too high or for some other reason.

16. On the order for costs thrown away the appellant argues that the default judgment was entered irregularly and therefore no costs or only low costs should have been awarded. We consider this argument is without substance. The fact is that the appellant had failed to respond to service of the claim and in consequence became liable to have judgment in default entered, and this happened. In any event, the default judgment was regularly entered because there is no doubt the claim was properly served. The setting aside of that judgment meant that the respondent had been put to unnecessary expense, and the appellant must compensate him for it.

17. At the hearing of the appeal the parties and the Court discussed the quantification of the costs thrown away. Counsel for the respondent acknowledged that the sum awarded was high, and invited the Court to fix a lower sum. Taking into account the matters raised by both parties we think an overall figure for costs and disbursements of VT160,000 would be fair. The order under appeal will be adjusted accordingly.

18. The appellant argues that as the appellant is a local company actively carrying on business in Vanuatu no order for security for future costs should have been made. The submission overlooks the level of indebtedness of the company. We

think it also overlooks the nature of the claim being made in the counterclaim, one for damages where there is reason to question whether the pleaded particulars will fully support the amounts claimed, and in any event it will require extensive evidence. We are not persuaded that any error in the exercise of the trial judge's discretion has occurred. The appeal against the order for security for future costs is dismissed.

19. The appeal will be allowed only to the extent of adjusting the amount awarded for incurred costs. The time for compliance with the orders will be extended so as to run from the delivery of this judgment.

20. The main purpose of this appeal was to challenge the order for security of future costs, and on this the appellant has failed. We consider that the appellant should suffer an award of costs against it on this appeal, but reduced somewhat in amount to reflect the appellant's partial success about the order for incurred costs.

21. The formal orders of this Court are:

    1. Appeal allowed in part;

    2. In lieu of paragraphs 3 and 5 of the Orders in the Supreme Court, the following orders are substituted:

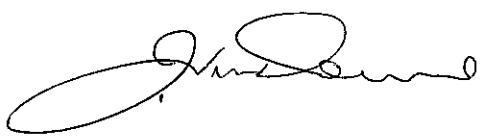
        "3. *The defendant shall pay security for costs in the sum of VT1,5 million into the Chief Registrar's Trust Account within 30 days commencing from 20 November 2015*";

        "5. *The defendant shall pay the claimant's costs incurred to date in the sum of VT160,000*".

    3. The appellant shall pay the respondent's costs of this appeal fixed at VT40,000.

DATED at Port Vila, this 20th day of November, 2015

BY THE COURT



Hon. Justice John von DOUSSA