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

Civil Appeal
Case No. 18/2092 CoA/CIVA

BETWEEN: MOISE URE PHILIP
Appellant

AND: ANACLET PHILIP
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Oliver A. Saksak***
Counsel:	*E. Molbaleh for the Appellant* *J. T. Aru for the Respondent*
Date of Hearing:	*12th February 2019*
Date of Judgment:	*22nd February 2019*

JUDGMENT

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1. The appellant appeals against a default judgment entered against him in the Supreme Court for a liquidated sum of VT3,202,938.

2. The respondent filed his Supreme Court claim on 27th March 2018. The claim was not immediately served. On 3rd April 2018 the respondent filed an urgent application for an ex-parte restraining order against the appellant, supported by a detailed sworn statement. The application sought the delivery up of a motor vehicle and various orders restraining the appellant and others from interfering with the respondent's possession of the vehicle. The matter was listed before a Supreme Court judge for an ex-parte order, but the judge, after considering the papers, considered that the claim was in reality a straight forward debt collection. He considered there was no urgency, and he directed that the claim should be served. The claim was there upon served on the appellant together with the application for restraining order and the supporting sworn statement on 24th April 2018. On 4th May 2018 a lawyer instructed by the appellant filed a notice that he had commenced to act, but the lawyer did not file a response to the claim within 14 days or a defence within 28 days of service as required by r 9.1 of the Civil Procedure Rules No. 49 of 2002.

3. On 4th July 2018 the respondent filed an application for a default judgment and the same day served it on the appellant's lawyer together with advice that the application was set down for hearing on the 5th of July 2018.

4. When the application came on for hearing on 5th July 2018 the respondent's lawyer did not appear. The court was satisfied that the claim had been duly served, that no step had been taken to defend the matter and that judgment should therefore be entered for the amounts claimed, namely:

- VT2,665,827 in respect of a loan;
- VT454,200 + VT12,760 for the damage to the vehicle;
- VT40,106 for inspection fees;
- Filing fees and costs of VT30,000;
- Total sum VT3,202,938.

5. By this appeal the appellant seeks to have the judgment set aside and the matter returned to the Supreme Court for re-trial on the merits, or alternatively for a re-assessment of the respondent's losses. We shall return to the documents filed by the appellant in support of this appeal, but first we briefly summarize the claim made by the respondent in the statement of claim and his sworn statements.

6. The respondent's pleadings are detailed. He says that in 2002 his brother, the appellant, asked him for a loan to help him purchase a vehicle. The respondent and his sister agreed to contribute money which the appellant supplemented to pay the deposit, and the respondent agreed to borrow additional money from Credit Corporation on the security of the vehicle. The vehicle was to be used by the appellant in a transport business to be conducted by him, and proceeds from the business were to be used to pay installments on the loan. The vehicle was registered in the name of the respondent, as could be expected as he was to be the borrower and the mortgagor of the vehicle under the loan arrangement with Credit Corporation. A new vehicle was acquired from the local motor vehicle dealer, registered in the respondent's name, and then handed over to the appellant for his use.

7. The respondent says that under the agreement with his brother the vehicle was to be handed back to the respondent once the loan was fully paid.

8. The appellant used the vehicle without complaint that it was registered in the name of the respondent until the loan was finally paid in December 2017. At that point the cooperative relationship between the brothers broke down as the appellant refused to hand over the vehicle to the respondent.

9. At the time of purchase the respondent says that he paid many outgoings for inspection fees, taxes, and insurance. Sometime later the appellant was involved in a crash, and the respondent paid the repair costs as the appellant was unable to meet them. Further whilst the vehicle was disabled, and some other times, the respondent also made monthly payments due under the loan from Credit Corporation.

10. When the appellant refused to hand over the vehicle on completion of the loan, the respondent brought the present claim to recover the monies he had paid out on the appellant's behalf to purchase and maintain the vehicle. These monies were precisely itemized in the statement of claim and supported by the respondent's sworn statement, with invoices and a copy of the loan agreement with Credit Corporation.

11. The relief claimed was for the specific sums paid out by the respondent as itemized in the pleadings together with a further VT50,000 for emotional relief. The default judgment was in respect of the specific sums outlaid, and upon judgment being entered for those amounts the claim for emotional damages was abandoned.

The appeal

12. The appellant filed a notice of intention to appeal saying that grounds will be filed later. On the eve of the appeal being heard the document entitled "*grounds of appeal*" was filed but that document does no more than recite many assertions of fact made by the appellant directed at showing that the respondent's claim was fabricated. That document does not identify any appealable error of substantive or procedural law, nor does it identify any appeal ground which could justify this court setting aside the judgment.

13. In addition the appellant filed five sworn statements said to be in support of the appeal. These statements challenge allegations of fact made by the respondent both in the pleadings and in the respondent's sworn statement.

14. When the appeal was called, this court was simply invited to consider the sworn statements and on the strength of them set aside the default judgment.

Discussion

15. As the appeal documents failed to identify meaningful grounds of appeal this court in discussion with the appellant's counsel identified the following matters which the court should consider:

    (1) Was the default judgment regularly entered?
    (2) How are the sworn statements filed in the Court of Appeal relevant, and on what basis can they be used in support of the appeal?
    (3) How should an application be made to set aside a default judgment and what are the principles that apply when deciding such an application?

16. On the first of these matters counsel for the appellant conceded that the default judgment was regularly entered and cannot be challenged on procedural grounds. We consider this concession was properly made.

17. The appellant had failed to file a response or defence in the times allowed. Such a failure entitled the claimant to proceed under Rules 9.2. or 9.3 for a default judgment if the subject matter of the claim falls within one or other of these rules.

18. Rules 9.2 and 9.3 do not require that a claimant again serve papers on the defaulting defendant. The claimant is not required to give notice of intention to seek a default judgment. This situation is quite unlike a situation covered by r 18.11 where three business days notice of an application is required.

19. In this case, on 4th July 2018 the application for a default judgment was regularly made, and notice of the application to the appellant was not required. As a matter of courtesy notice was given in this case, but that fact does not render the otherwise regular course taken by the respondent to become irregular. Had the lawyer for the appellant appeared on the hearing, the judge may have entertained an application for an adjournment to allow the appellant belatedly to seek leave to file a defence, but this did not happen. We consider the judge was correct to grant a default judgment on the application before him.

20. The application for the default judgment was entitled "*Request for Default Judgment (Damages) Rule 9.2*". This is a bemusing description as Rule 9.2 concerns a claim for a liquidated amount. Perhaps the title was intended to acknowledge that the claim pleaded included both liquidated and unliquidated claims, but that the application was being made only in respect of the liquidated claim. Whatever the explanation, we do not think anything turns on this heading. Whilst the claim included both liquidated and unliquidated amounts, the judgment was confined to the liquidated claim only.

21. Whilst the pleading mixes up both the claim for damages for the appellant's refusal to honor the agreement to hand over the vehicle, and the claim for repayment of monies, we think the proper interpretation of the pleadings is that the appellant repudiated the agreement, that the repudiation was accepted, and that the respondent's claim then became one for the repayment of monies paid for and on behalf of the appellant.

22. The second matter we have identified for discussion concerns the five sworn statements filed in this court. Normally an appeal court does not receive additional evidence, but it can do if the additional evidence is new or fresh evidence in the sense that it was not known to the party at the time of trial, and could not have been discovered by reasonable inquiry. In that sense none of the five sworn statements meet this requirement. All the matters deposed to in them were either known to the appellant, or were readily available to him at all stages.

In short, the sworn statements are not properly admissible on this appeal and on this strict approach, should be rejected. However as the appellant's presentation of this appeal is so confused and directionless, for reasons given below we shall give them attention when discussing the third issue we have identified.

23. That third matter concerns the proper way to go about setting aside a default judgment. Such an application should be made to the court which entered the default judgment, not by way of an appeal to a higher court. Rule 9.5 so provides, and sets out both the procedure to be followed, and the matters which the court on such an application should consider.

24. The appellant has not followed this course. Had he done so, it would have been appropriate to file the five sworn statements in support of the application in the Supreme Court. Rather than let this acrimonious family dispute go any longer than necessary, we propose to consider the five statements against the issues which Rule 9.5 would have required the Supreme Court to consider had a proper application being made to it.

25. Rule 9.5(2)(b) requires the court to consider why the claim was not defended in a timely way. The excuse offered here is in a sworn statement from the father of the parties. He says "*we*" – presumably including the appellant – delayed the work in the Supreme Court because he thought the respondent would discontinue the case, but the respondent would not listen. This is a weak explanation for the delay. The appellant had consulted a lawyer, and he should have taken steps to hold the position by filing a defence if further time was required to discuss an out of court resolution.

26. The more important issue arises under Rule 9.5(2)(c) which requires details of the defendant's defence. Further sworn statements related to the payment of the deposit. In one statement the appellant identifies one of his bank statements showing a withdrawal made about the time the vehicle was purchased of VT1,120,000 which presumably is for the deposit. In another of the statements the appellant implies that he paid the dealer the deposit. That he did so is not inconsistent with the respondent's evidence that the money contributed by him and his sister for the deposit was given to the appellant to be added to the other monies the appellant had for that purpose. The bank's statement also shows a deposit the same day as the withdrawal was made of VT1,134,823. No explanation for this deposit is given. The inference however is that the money gathered within the family for the deposit was placed in the bank to enable the deposit to be paid. If anything, this tends to support the respondent's case.

27. The same sworn statement from the appellant goes on to say, with emphasis, that the respondent "*NEVER HELP FINANCIALLY to purchase the truck in question*". This assertion flies in the face of all the documentary evidence produced by the appellant, and cannot be accepted. In another of the statements

the appellant says he never authorized the respondent to register the vehicle in the respondent's name. Again, this assertion cannot be accepted as correct as the loan contract of necessity required the vehicle to be registered in the respondent's name, and the appellant was well aware that this had happened but made no complaint until December 2017.

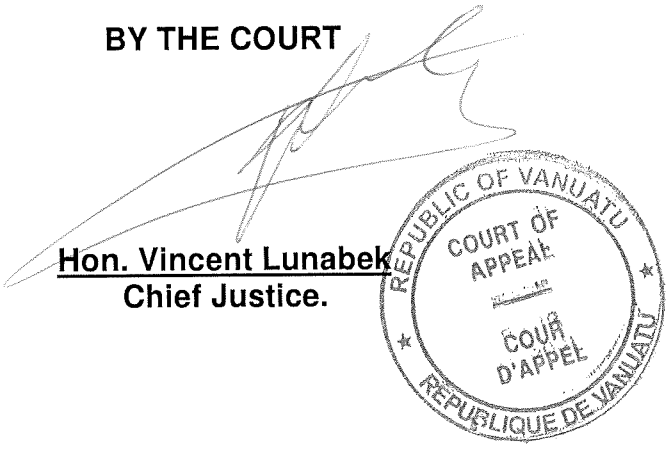
28. We do not consider that the statements filed by the appellant, when considered with the respondent's documentary evidence, established that the appellant has an arguable defence to the claim that would justify setting aside the default judgment. Even if the procedural irregularities in the presentation of the appeal are put to one side, the appellant has not established any ground on which the default judgment should be set aside and the appeal must therefore be dismissed.

29. Counsel informed the court that there had been attempts to have the parties reach a settlement. This is to be encouraged. It is always open for them to do so even after judgment. It would plainly be in the interest of the parties if this could happen.

30. The formal orders of this court are that the appeal is dismissed and the appellant is ordered to pay the respondent's costs of the appeal fixed at VT40,000.

DATED at Port Vila, this 22nd February, 2019.

BY THE COURT



Hon. Vincent Lunabek
Chief Justice.