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

Civil Appeal Case No.07 of 2003

BETWEEN: COMMISSIONER OF POLICE
Appellant

AND: PHILLIPPE LUANKON
Respondent

Coram: **Hon. Justice Robertson**
Hon. Justice von Doussa
Hon. Justice Fatiaki

Counsels: Mr. Michael Edwards for the Appellant
Mr. Saling Stephens for the Respondent

Hearing Date: 5th May 2003.
Judgment Date: 9th May 2003.

JUDGMENT

The short point in this appeal is whether an order for costs of VT10,000 made on the adjournment of an interlocutory application against the appellant in the absence of his counsel was properly made. The appellant contends that the order should be set aside as it was made in breach of the rules of procedural fairness as he was not heard before the order was made.

In the ordinary course, the amount involved would not justify the expenditure of public money by a statutory office holder on an appeal against a procedural order which had no effect on the ultimate outcome of the case. However the appellant, who is represented before this Court by the State Law Office, contends that what happened on the hearing of the interlocutory application, including the making of the order for costs, raises important issues about the intent and operation of the new Civil Procedure Rules No. 49 of 2002 which came into force on 31st January 2003.

The background facts as disclosed by an uncontested affidavit filed by the State Law Office may be shortly stated. The appellant

was the respondent in a Constitutional Petition commenced in the Santo Registry of the Supreme Court. The appellant filed an application to strike out the Petition on the ground that it was without foundation and was frivolous and vexatious. The application was set down for hearing at 2 p.m. on 18th February 2003 in Santo.

By letter dated 12th February 2003 to the Registrar of the Court, the State Law Office requested that the respondent appear on the hearing of the application by telephone from Port Vila under Rule 6.10 of the Civil Procedure Rules. The State Law Office received no reply to that letter, so at 8.30 a.m. on 18th February 2003 the legal officer handling the matter telephoned the Registrar of the Court at Santo who informed her that the teleconference was approved and she should ring the Court at 2 p.m.

The legal officer telephoned the Court at 2 p.m. and spoke again to the Registrar who asked that she ring back in five minutes. The legal officer rang back in five minutes but could not get a connection. She kept ringing, but did not get connected to the Registrar until 2.30 p.m. at which time she was informed that someone had kicked the telephone cord out of its socket. The Registrar said the matter would be adjourned, and a new time would be advised.

It seems that there was a breakdown in communication between the registrar and the judge. The judge's note records that at 1.30 p.m., thirty minutes before the appointed time for the hearing of the application, a solicitor for the respondent appeared before the judge. The solicitor for the respondent submitted to the judge that the State Law Office by the letter of 12th February 2003 was attempting to delay the matter. The solicitor contended that the appropriate procedure to strike out a Constitutional Petition had not been followed, and asked that the respondent's application be dismissed.

The judge's note then records:

> *"Ref: to summons of 10/7/02. Not clear from letter if respondent wishes to pursue this application. In any event I will not accept Court by telephone if matter exceeds 5 minutes. This is a matter that requires personal attendance of counsels.*

I will adjourn the petition to be heard on Wednesday 19th March at 9 a.m. Respondent will pay petitioner's costs which is (sic) fixed at VT10,000."

When the matter was relisted and heard on 19th March 2003 the application to strike out the petition was argued and dismissed. An order was made that costs follow the event. After a short adjournment, the appellant advised the judge that no appeal would be lodged against that ruling, and directions were given for the future conduct trial of the Petition.

The appellant's contentions are straightforward. It is argued that to make an order for costs against a party before hearing that party is a breach of the procedural fairness rule that a party must be given the opportunity to make answer to a claim against it. Then it is contended that under the Civil Procedure Rules, the overriding objective is to enable Courts to deal with cases justly, and that includes, among other things, so far as is practicable the saving of expense and ensuring that the case is dealt speedily and fairly: see Part 1 of the Rules. It is contended that in a country where parties and the counsels are often widely dispersed, attendance by telephone is a modern, sensible means of saving money and ensuring speedy resolution of issues in a case. Part 6 of the Civil Procedure Rules deals with conferences, the purpose of which is to enable a judge to actively manage a proceeding. Rule 6.10 provides that a conference may be held by telephone if the judge and all the parties are able to participate. It is contended that even if the judge was minded to think in this case that the application was not suitable to be heard by telephone, the respondent should have been given the opportunity to be heard on that matter as well as on the question of costs.

The appellant contends that it is important that this Court take the opportunity to stress the importance of the overriding objectives of the new Civil Procedure Rules, and indicate that the use of the telephone should be generally accepted as a means of attendance. To this end it is submitted that the appeal should be allowed and the order for costs set aside.

With the benefit of hindsight it is unfortunate that there was a breakdown in communications within the Santo registry of the Court on the day in question. It is also surprising that the application was dealt with before the appointed time. However, the case which the respondent has chosen as the vehicle for this

Court to expound on the purpose and application of the overriding objectives in the new Rules is a poor one. Rule 1.6 (2) provides that the Rules do not apply to a constitutional petition brought under s. 218 of the Criminal Procedure Code. The proceedings before the Court on 18th February 2003 were not, therefore, governed by the new Rules.

As a general proposition, which we are confident would be widely accepted by judges and legal practitioners in 2003, the use of the telephone provides a convenient and often cheap and sensible way of dealing with many of the issues which arise in Court proceedings. However a telephone attendance is not a convenient vehicle for hearing complex, difficult or long applications. We sympathise with the view of the primary judge in this case that an application to strike out a constitutional petition on the ground that it is without foundation, frivolous and vexatious, is not one which could conveniently be heard where one party was represented by telephone. To apply an arbitrary rule that a telephone attendance should not be permitted if it would exceed five minutes is not one we would encourage. However, in this case we do not consider that it has been demonstrated that the primary judge fell into error in refusing attendance by telephone.

As a matter of principle, we agree with the submission of the appellant that an order for costs should not be made against a party who does not appear on an application without first giving the party an opportunity to be heard. In that situation costs should be reserved, and dealt with at a subsequent hearing. However, the mere demonstration of a failure to provide an opportunity to be heard does not automatically mean that an appeal against an order made in the absence of a party will succeed. Where a breach of procedural fairness of this kind is alleged, an appellate court will not interfere unless the party complaining demonstrates by evidence or otherwise that had the opportunity to make answer been given, material would have been put before the Court which could have led to a different result. In this case no such material has been proffered. On the contrary, had the legal officer been heard on 18th February 2003 the application would nevertheless have been adjourned for the reasons given by the judge. On the question of costs, the most favorable outcome from the appellant's viewpoint would have been an order reserving the question of costs. As it then transpired the strike out application ultimately failed with an order for costs in favour of the respondent. In short,

the appellant has failed to demonstrate that the result could have been different had the respondent been heard. No injustice from the making of the order under appeal has been shown. The appeal must be dismissed. The respondent does not seek costs against the appellant.

Accordingly the appeal is dismissed with no order as to costs.

Dated at Port Vila, this 9th day of May 2003.

BY ORDER OF THE COURT

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Hon. Justice Robertson

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Hon. Justice von Doussa

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Hon. Justice Fatiaki

REPUBLIC OF VANUATU COUR D'APPEL COURT OF APPEAL REPUBLIQUE DE VANUATU