Mr. Kalwat

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

Civil Case No. 136 of 2003

BETWEEN: **MAXWELL JOEL**
Claimant

AND: **LINDA KALPOI**
First Defendant

AND: **ALICKSON FRANK VIRA**
Second Defendant

DECISION IN RESPECT OF APPLICATION TO SET ASIDE DEFAULT JUDGMENT

1. On 11 March 2003 there was a collision between two vehicles, one of which was being driven by the Claimant's authorized agent and the other by the First Defendant's authorized agent.

2. Arising out of this incident, the Claimant, alleging negligence, sued by statement of claim dated 27 August 2003 for:-

(i) repair expenses	VT887,000
(ii) towage fees	VT8,000
(iii) assessors fees	VT71,100
(iv) loss of income for 3 months @ VT8,492 per day	VT774,888
	VT1,741,068

3. The Claimant also claimed interest and costs.

4. The Claimant's overall claim is a mixture of fixed amounts and damages. The claim for lost income arises out of the fact that the Claimant's vehicle was a minibus used in business operations.

5. On 28 January 2004, the Claimant obtained judgment by default for VT1,874,255 against both Defendants on a joint and several basis on the grounds that the Defendants had taken no steps.

6. In February 2004 the First Defendant made application to set aside that judgment.

7. One of the two issues to be decided on such an application is whether the First Defendant had reasonable cause for not filing a response to the claim within the permitted period. In this case the issue is whether the First Defendant was ever personally served with the proceedings.

8. Rule 5.2 required personal service on the First Defendant.

9. The Claimant has filed a statement of service under which the deponent says he served the First Defendant with the proceedings at 4pm on 11 September 2003 "*by delivering to and leaving same the First Defendant inside her house.*"

10. Careful analysis of this leads me to the view that the deponent is not saying he served the First Defendant herself but rather that he left the papers inside her house.

11. For her part, the First Defendant says she has never personally been served with the documents. She swears that she first knew of them during the third week of September 2003 when she saw them on top of a kitchen cupboard in her house.

12. The First Defendant's husband has also sworn that early in September 2003 he was approached by someone he knew to be employed by the Claimant's solicitors and handed copies of the proceedings which he then left in the house. He says he forgot to tell the First Defendant about these.

He also says that he told the Claimant's process server that he should serve the First Defendant personally.

13. From the wording of the statement of service, and the combined effect of the sworn statements of the First Defendant and her husband, I find that personal service of the documents was never effected on the First Defendant.

14. Mr. Kalmet for the Claimant refers me to ANZ Bank (Vanuatu) Ltd. v. Dinh [2005] VUCA3. He argues on the authority of that case, that the fact that personal service on the First Defendant may not have been effected is of no importance. He says that, in any event, by the end of September 2003 the First Defendant was aware of the proceedings she having herself discovered the documents in her house.

15. The Court of Appeal in the ANZ Bank case dealt with an apparent irregularity in service as being "*a mere technicality of no substance*". In my opinion, however, there is one matter which substantially distinguishes the facts of that case from this. In the ANZ Bank case the Respondent had already, and in writing, acknowledged his liability to the Claimant. That has not happened in this case.

16. I find in favour of the First Defendant on the first issue.

17. The second issue then, is whether the First Defendant has an arguable defence either about her liability or about the amount of the claim. In my opinion she does have an arguable defence about the amount of the claim.

18. At conference on 29 April 2009, the Claimant's counsel advised that the initial claim for loss of income was miscalculated so that there was, now, a significant reduction in the overall claim.

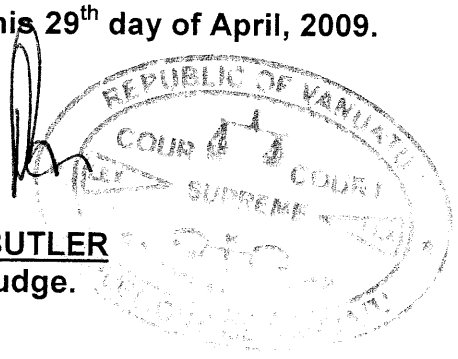
19. Quite apart from that, the claim for loss of income should have been made in accordance with rule 9.3 whereby the Court is asked to determine the amount of damages.

20. I am satisfied for these reasons that the default judgment of 28 January 2004 should be set aside.

21. Costs will lie in the event.

22. The parties are requested to attend a further conference on 19 May 2009 at 8.30 a.m.

DATED at Port Vila, this 29th day of April, 2009.



P. BUTLER
Judge.