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

Civil Case No. 108 of 2011

BETWEEN: GASTON THEOPHILE
Claimant

AND: ALIZÉS ÉNERGIES
Defendant

Coram: ***Justice D. V. Fatiaki***

Counsels: ***Mr. C. Leo for the Claimant***
Mr. M. Hurley for the Defendant

Date of Decision: *21 October 2011*

RULING

1. This is an application to set aside a default judgment entered under the **Civil Procedure Rules 2002** ('CPR') against the defendant company "*... in the amount of VT9,288,429 together with interest at the rate of 5% per annum from 10 June 2011 until the judgment debt is paid in full*".

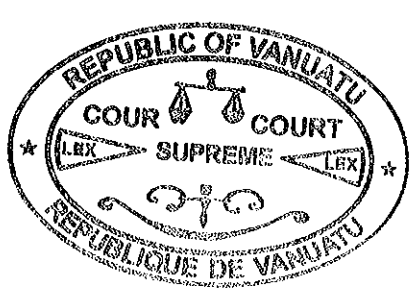
2. The brief chronology of the case is as follows:

- **10 June 2011** – Supreme Court claim filed and served on the defendant "*claiming employment entitlements arising from unjustified dismissal in respect of a written contract of employment between the claimant and the defendant*".

- **14 June 2011** – Proof of service of claim filed;

- **15 June 2011** – Defendant's response filed indicating that all of the claim was disputed. The response was served on the claimant's solicitor;

- **15 July 2011** – Request for default judgment (damages) filed requesting "*the Court to determine the amount of damages*";



- **18 July 2011** – Claimant's counsel wrote to defence counsel enclosing a sealed copy of the claimant's request for default judgment;

- **19 July 2011** – Defence filed and served on the claimant's solicitor under cover of defence counsel's letter dated 18 July 2011;

- **17 August 2011** – Default judgment order for a liquidated amount signed and sealed by the Court;

- **29 August 2011** – Claimant personally served a sealed copy of the default judgment on the defendant company;

- **6 September 2011** – Defendant's application to set aside default judgment with supporting sworn statement filed;

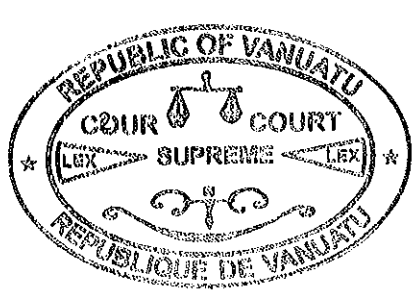
- **16 September 2011** – Claimant filed and served a reply to defence with a response opposing the application to set aside default judgment.

3. In light of the foregoing it is unfortunate that claimant's counsel was unable to consent to the default judgment being set aside. In the result the application had to be heard.

4. I say "*unfortunate*" advisedly because the defence filed and served (albeit out of time but before default judgment was entered) fully addressed the claimant's pleadings and clearly raised a triable issue as to the lawfulness of the termination of the claimant's employment with the defendant company. As the Court of Appeal observed in **Gorden v. Cikay Development Ltd.** [2010] VUCA 17 at paragraph 7 (ii):

> "*The decision as to whether or not a court should grant a default judgment application is discretionary but ... where a defence has been filed raising serious issues that need to go to trial, a default judgment order should not be made*".

5. Furthermore the mere fact that a document has been filed late does **not** necessarily mean that it is ineffective. In this regard **Rule 4.14** of the CPR makes it clear that in the case of a "*late filed document*" the court retains a discretion to determine the effectiveness or otherwise of the document for the purpose of the proceeding.



6. In argument, defence counsel whilst conceding that the defence was **not** filed within the 28 days allowed under **Rule 9.1 (b)** of the CPR, nevertheless, submits that default judgment was irregularly entered and should be set aside for the following reasons:

   (a) The claimant's solicitors failed to give the defendant's solicitors any prior notice of the claimant's intention to request judgment by default; *see:* **Dragon Seafood Co. (Fiji) Ltd. v. Seamach Ltd.** [1996] FJHC 119;

   (b) A defence was filed and served on **19 July 2011** albeit late but before default judgment was served on the defendant;

   (c) The defence is arguable on its face and raises triable issues as to whether or not **section 50** of the **Employment Act** had been fully complied with by the defendant in dismissing the claim; and

   (d) The default judgment wrongly included liquidated amounts for severance allowance and interest which ought properly to be assessed by the Court; *see:* **Municipality of Luganville v. Garu** [1999] VUCA 8 and **Willy Gorden v. Cikay Development Ltd.** [2010] VUCA 17;

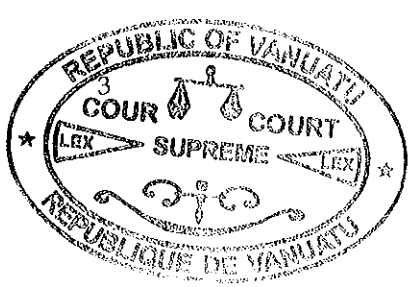
7. Claimant's counsel, for his part, whilst conceding that the request for default judgment incorrectly stated that no response had been filed within the required 14 days, nevertheless, seeks to support the entry of default judgment on the following grounds:

   (a) The failure of the defendant's solicitor to inform claimant's counsel of the delay in filing the defence (whatever that may mean);

   (b) The absence of any obligation under the CPR for claimant's counsel to provide prior notice of the claimant's intention to enter default judgment;

   (c) The amounts for severance and interest reflects the maximum allowable under the Employment Act and are therefore "*liquidated*" amounts properly included in the default judgment entered by the Court;

In brief, counsel submits that default judgment was regularly entered as the defendant simply failed to file a defence within the 28 days period required under **Rule 9.1 (b)** and the filing of a response was not enough. Defence counsel had also received notification that default judgment was



being applied for prior to its issuance by the Court which should have been sufficient notice of the claimant's intentions in that regard.

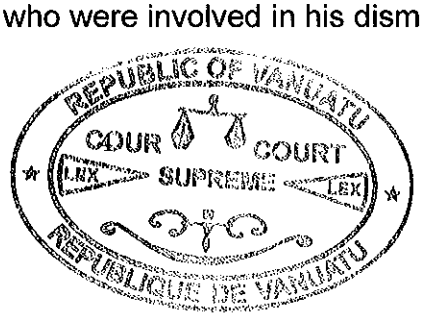
8. **Rule 9.5** of the **Civil Procedure Rules 2002** is the relevant rule. It enables a defendant against whom default judgment has been signed to apply for it to be set aside upon an explanation being given for the failure to file a defence together with details of its proposed defence. The Court may then in terms of **subrule (3)**, set aside the default judgment if it is satisfied that the defendant:

> "*(a) has shown reasonable cause for not defending the claim; and*
>
> *(b) has an arguable defence, either about his or her liability for the claim or about the amount of the claim.*"

9. As to **(a)** above, defence counsel submits that "*it took longer than ... expected to obtain instructions and to settle its defence*". Why that should be so for a company based in Port Vila is not elaborated upon and, on the face of it, appears inadequate given that defence counsel was notified of the request for default judgment a month before it was sealed. I note however, that a defence was filed and served **before** default judgment was actually issued and, after it was issued, default judgment was **not** notified or served on defence counsel (as it should have been), but, in any event, application to set it aside was expeditiously pursued within days of it being served on the defendant company and before any enforcement action had been taken by the claimant.

10. I also note the significant difference in form and substance, between the default judgment requested (for damages to be assessed) **and** the default judgment actually granted (for a liquidated amount). In the former case evidence would have to be called and the defendant would be entitled to have a say in the assessment but not so, in the latter case, which is normally followed by an enforcement order.

11. Be that as it may, I am satisfied that the defence which was filed and served clearly raises an arguable defence about the defendant's liability for the claim, in particular, the defendant denies that the claimant's termination was wrongful **or** unlawful **or** in breach of the provisions of the Employment Act such as to entitle the claimant to any severance allowance and, if sustained, provides a complete defence to the claim. I also note that the defence would have entailed a close examination of the correspondence exchanged between the claimant and the defendant before his dismissal as well as interviews with the claimant's immediate superiors and supervisors who were involved in his dismissal.



12. As the Court of Appeal observed in **ANZ Bank (Vanuatu) Ltd. v. Dinh** [2005] VUCA 3 (at p. 7):

> "*... we think the language of rule 9.5 (3) is plain. There are two requirements each of which must be considered on an application to set aside a default judgment. There may be some scope for taking into account the nature and strength of a defence advanced under paragraph (b) of that rule when considering what would constitute 'reasonable cause' under paragraph (a) in the circumstances of a particular case.*"

13. Likewise in my view, **Rule 9.2 (7)** which effectively gives the defendant a 28 stay of execution grace period within which time the defendant can apply to set aside the default judgment may also influence the court's approach to **paragraph (a)** of **Rule 9.5 (3)**.

14. Additionally counsel submits that a severance allowance pursuant to Section 56 (4) **and** interest under the Employment are wrongly included in the default judgment as **both** sums are plainly discretionary and therefore must be assessed by the Court.

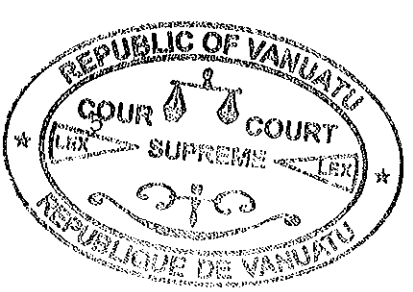
15. In this latter regard **Section 56 (4)** clearly provides that if the Court is satisfied that the claimant's dismissal was unjustified then it:

> "*... shall, ... order that he be paid a sum up to 6 times the amount of severance allowance specified in subsection (2)*".

Similarly, **Section 56 (6)** provides that:

> "*the Court may, ..., order an employer to pay interest at a rate not exceeding 12% per annum from the date of the termination of the employment to the date of payment*"
>
> (my underlinings for emphasis)

16. Plainly **both** the multiplier under 56 (4) and the interest rate under 56 (6) are discretionary figures subject to the Court's assessment and determination and therefore, cannot be properly included as liquidated sums in a default judgment, much less, can it be assumed that the claimant is entitled to the maximum amount which the law allows for an unjustified dismissal as occurred in this instance. As the Court of Appeal trenchantly observed in **Municipality of Luganville v. Garu** (op. cit) at p.5:



> *"... 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."*

17. In light of the foregoing, I am satisfied that defence counsel's submissions about the severance allowance under Section 56 (4) and about the interest claimed under Section 56 (6) of the Employment Act are correct.

18. Furthermore, inconsistently with the default judgment entered, the claimant filed and served a **reply** to the defendant's defence thereby accepting and acknowledging the substance of its contents as well as advancing "*further relevant facts*" in an attempt to explain and avoid the impact of the facts averred in the defence which sought to justify the claimant's summary dismissal for serious misconduct in accordance with **Section 50** of the **Employment Act**.

19. Finally and in deference to counsel's submissions, I propose to make some general comments about the desirability or otherwise of adopting, in Vanuatu, the established practice amongst legal practitioners in other neighbouring jurisdictions, of advising or warning defence counsel before default judgment is entered against his client.

20. Defence counsel submits that this Court should sanction the adoption of a similar practice in Vanuatu. Claimant's counsel equally forcefully, submits that the adoption of such a practice is **not** required by the CPR and "*would open a further avenue for slackness and promote a lack of vigilance*" within the profession.

21. I preface my comments by noting that in this case, defence counsel was notified by letter, of the claimant's request for default judgment. Such a request whilst required to be filed in terms of **Rules 9.2 (2)** and **9.3 (2)** of the CPR, is **not** required to be notified or served on the defendant or his counsel. This is an unfortunate omission or lacuna in the Rules dealing with the entry of default judgments.

22. In my view the removal or filling in of this "*omission*" would go some way towards avoiding the type of complaints made by defence counsel. This could be readily achieved by requiring the request for default judgment to be served on the defendant or defence counsel as occurred un this instance. Such a requirement would be consistent with and promote the "*overriding objective*" of the CPR which is: "*... to enable the court to deal with cases justly*" and in a proportionate, speedy and fair manner. Needless to say service of the request would serve to notify the defendant

of the need to act expeditiously in the matter either by seeking further time from the claimant **or** by filing a defence at the risk of default judgment being entered without further notice.

23. Additionally, the adoption of such a practice would place an unwarranted burden on claimants especially unrepresented claimants, and introduce an additional unsanctioned step into the proceedings inconsistent with **Rule 1.7** which empowers the Court to act "*... according to substantial justice*" where the Rules are silent.

24. For the foregoing reasons the application succeeds, the default judgment is set aside and the late filed defence is ruled "*effective for the proceeding*" in terms of **Rule 4.14 (2)**. Although the defendant succeeded in this application in all the circumstances I am satisfied that each party should bear their own costs and accordingly make no order as to costs.

25. By way of further directions:

(a) The defendant is ordered to file and serve sworn statements in support of its defence by **4 November 2011**;

(b) The claimant is ordered to file and serve sworn statements in response by **18 November 2011**;

(c) The parties are ordered to undertake and complete mutual discovery and inspection of documents by **25 November 2011**; and

(d) The case is adjourned for further conference on **9 December 2011 at 9.30 a.m.**

DATED at Port Vila, this 21st day of October, 2011.

BY THE COURT

D. V. FATIAKI.
Judge.