

BETWEEN: DONALD RESTUETUNE

Petitioner

AND: GEORGE WELLS

First Respondent

AND: ELECTORAL COMMISSION

Second Respondent

Coram: *Mr. Justice Oliver Saksak*

Counsels: *Ms. Christina Thyna for the Petitioner/Applicant*
First Respondent in person
Mr. Frederick Gilu for the Second Respondent

Date of Hearing and Decision: 9th September 2013

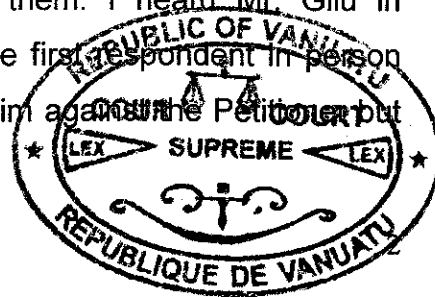
DECISION

1. On 12th August 2013, the Court issued its decision recording among others that –
 - "(a) Election Petition No. 2 of 2012 is wholly discontinued against the First and Second Defendants and accordingly it is hereby dismissed; and
 - (d) The Second Respondent be entitled to their costs of and incidental to the proceedings on the standard basis allowed and fixed at VT650,000."
2. On 14th August 2013, the Petitioner filed his application to set aside the judgment. He filed a sworn statement in support on the same date.
3. The matter had progressed to a stage where final directions were issued on 9th April 2013 fixing the trial date for two days from 4 June 2013. The trial did not proceed on these dates. And the Court issued a notice of adjournment on



17th July 2013 fixing the trial hearing for one week from Monday 12th August 2013 to Friday 16th August 2013.

4. Ms Thyna however filed a notice of ceasing to act on 5th August 2013. On the same date Counsel wrote a letter to the Court to advise that among others, she had ceased to act in the matter and that the Petitioner had intention to discontinue the matter and that trial may not proceed as fixed. Further she advised that she would not attend the hearing but would appear only for other matters listed that day. The letter was not copied to Mr. Bani or the State Law Office.
5. On 8th August 2013, the Petitioner filed a Notice of discontinuance.
6. On Monday 12th August 2013, Ms Thyna and Mr. Gilu attended in Chambers for another matter. She mentioned in passing that she would not be present for the hearing of the Petitioner's petition but that the Petitioner would be present in person.
7. When the matter was called at or about 0930 hours on 12th August, the First and Second Respondents were present. The Petitioner was not present.
8. Mr. Gilu acknowledged the Petitioners notice of discontinuance, nevertheless he sought costs under Rules 2.13 and 9.9 (4) (c) of the Rules. It was on that basis the Court exercised its discretion.
9. The First Respondent was present in person. He acknowledged the notice of discontinuance but indicated his lawyer, Mr. Bani would pursue costs on his behalf at a later time.
10. Now returning to the application to set aside the judgment of 12th August 2013, Ms Thyna filed written submissions at 0915 hours on 9th September 2013. I heard Counsel verbally in relation to them. I heard Mr. Gilu in response objecting to the application. I heard the first Respondent in person who indicated he will be pursuing a damages claim against the Petitioner but that was not relevant to the issue of costs.




11. I consider that the submissions by Ms Thyna are irrelevant in relation to an application to set aside a judgment. The decision of 12th August 2013 is a final judgment. This Court is functus officio. Only a higher Court can set aside that decision and through an appeal. What the Petitioner has filed is not an appeal. It is an application to set aside a judgment. There is no legal basis for this Court to set aside its own decision except if it were a default judgment. But the judgment of 12th August 2013 was not and is not a default judgment.

12. For the reasons given I find the application by the Petitioner to be misconceived. Accordingly, I dismiss it in its entirety.

13. Mr. Gilu seeks costs at VT10,000. The First Respondent does not seek any costs. I allow costs of VT10,000 in favour of the Second Respondent.

DATED at Luganville this 9th day of September 2013.

BY THE COURT


OLIVER A. SAKSAK
Judge

