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

Civil Case No. 256 of 2013

BETWEEN: KALINDAS TIMOTHY
Claimant

AND: SERGE THEUIL
Defendant

Hearing: ***Friday 29 May 2015 at 10:30 am***
Before: ***Justice SM Harrop***
Appearances: ***No appearance for the Claimant (Henzler Vira (PSO))***
Stephen Joel for the Defendant

ORAL JUDGMENT OF JUSTICE SM HARROP AS TO APPLICATION TO SET ASIDE DEFAULT JUDGMENT

---

1. Mr Vira has not appeared at the hearing of this application to set aside the default judgment entered on 3 June 2014. I have had no explanation as to why that is so. He has however on 27 May filed a response which in paragraph 6 says:

> *"To assist the Court in its determination:*
>
> *a) That the default judgment be set aside,*
>
> *b) That the claim, sworn statements and response of the claimant be re-served on the defendant;*
>
> *c) That the defendant's counsel file a notice of beginning to act;*
>
> *d) Costs be in the cause."*

2. I take this to be an acknowledgement by the claimant that the judgment must be set aside in the circumstances of this case and that the three consequential directions ought to be made.

3. Regardless of whether or not the claimant agrees that the judgment be set aside, I am satisfied on the evidence before me that it must be.

No personal service on the defendant

4. On 11 November 2013, John Sam of the Public Solicitor's Office swore an unqualified statement deposing that he did on 8 November 2013 at 4.33pm at Black Sands Area he personally served the defendant with the claim and supporting documents. It is now evident that this is simply not correct. What he apparently did do was to serve the claim on someone called Bela David who had it seems asked for the documents so that she could give them to the defendant. She signed an informal acknowledgment of receipt which was attached to Mr Sam's sworn statement, although it is not referred to in it and does not record her promise to pass the documents on to the defendant.

5. Self-evidently – I would have thought – this does not amount to personal service on the defendant. It may be, being as charitable as I can to Mr Sam, that he was lulled into a false sense of security by the assurance apparently given by Ms David, but in no way can that excuse his filing of a sworn statement which unequivocally states that he served the defendant personally with the document, because plainly he did not. His statement is a false statement and if anyone were inclined to pursue the matter he could be prosecuted for perjury or attempting to pervert the course of justice. His statement led the Court to conclude that the defendant was properly served and deliberately did nothing to oppose the claim. The Court then relied on that evidence and entered a default judgment.

6. I have to say that in the 18 months or so in which I have been a Justice of the Supreme Court in Vanuatu I have seen numerous examples of purported service on a defendant being by means of handing of documents to someone who is or appears to be associated with or related to the defendant. That is simply not proper service. The correct response where there is difficulty in serving a defendant personally is to apply to the Court for an order for substituted service on another person or on the defendant in some other manner. Even if an assurance is given by a family member that the document will be given to the defendant that can never be sufficient unless there is subsequent confirmation that the defendant has indeed received the document. At the very least Mr Sam should have explained in his sworn statement exactly what he had done rather than claiming in an unqualified manner that he had personally served the defendant.

7. When I dealt with the application for default judgment I understandably relied on Mr Sam's sworn statement being true. Clearly now that it is exposed as a false statement the judgment I entered must be, and is, set aside.

8. In terms of Rule 9.5 (3) the defendant obviously has shown reasonable cause for not defending the claim because he was not served with it and did not know what is alleged against him. It is strictly, in terms of Rule 9.5 (3) (b), necessary for a defendant also to show that he has an arguable defence. Without going into detail, the defendant has in his sworn statement of 16 February 2015, albeit handicapped by (still) not seeing the claim, outlined his position which may found an arguable defence. However, even if he could not establish an arguable defence at this stage, I do not consider that an impediment to the setting aside of a judgment where it has been obtained irregularly in the sense that it was never properly served. A defendant cannot be deprived of his day in Court by a false statement as to service. In any event, Rule 18.10 permits the Court to do justice in the face of a failure to comply with other rules in accordance with the overriding objective in Rule 1.2(1) : *"to enable the courts to deal with cases justly"*. There is authority for this approach: see the observations of the Court of Appeal in *ANZ Bank (Vanuatu) Limited v Dinh* [2005] VUCA 3.

9. Under Rule 9.5 (4) having set aside the default judgment I am required to give directions about the future course of the case.

10. I direct that the claim and sworn statement of the claimant be served on the defendant personally within 28 days.

11. On receipt of those documents, a defence is to be filed within a further 28 days ; no doubt Mr Joel will be instructed and notice of beginning to act filed.

12. Mr Vira has suggested that costs be in the cause but Mr Joel opposes such an order saying that his client has been put to significant cost in having to apply to set aside a judgment which should never have been entered. I agree with Mr Joel. None of the numerous documents and attendances which have been required of the defendant and his counsel would

have been necessary if the claimant had carried out the fundamental step of serving the defendant in accordance with the Rules.

13. The defendant is therefore, regardless of the outcome of this proceeding, entitled to costs on a standard basis relating to his application to set aside judgment. These may be taxed if they cannot be agreed between the parties.

Settlement?

14. This claim, as clarified at the time when judgment was entered is for Vt 1,820,000 inclusive of costs. If the matter is fully defended and proceeds to trial no doubt a significant further sum will be incurred by way of costs in resolving it. Mr Timothy I understand lives in Luganville and Mr Theuil on Malekula. The need to travel to Port Vila for a hearing will add to those costs. In the circumstances, once the pleadings are filed as directed above, I urge the parties through counsel to discuss the possibility of settling the matter in some way so as to avoid those costs.

15. At this stage I will not allocate a further conference. If Mr Timothy wishes to pursue the claim following the lack of success of such discussions he may of course through counsel request a further conference to advance the matter.

BY THE COURT

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU