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

Civil Appeal Case No. 3179 of 2016

BETWEEN: SYLVIE DONNA
First Appellant

AND: BROWNY DONNA
Second Appellant

AND: SOUTH PACIFIC ELECTRICS LTD
First Respondent

AND: ESTER TONNY
Second Respondent

Before: ***Justice Chetwynd***
Counsel: ***Mr Yawha for the Appellants***
Mr Fleming for the Respondents

JUDGMENT

1. This is an appeal from orders made by the Master of The Supreme Court in Civil Case 812 of 2015. In that matter the First Respondent ("South Pacific Electrics") was the Claimant and the Second Respondent ("Ms Tonny") together with the First and Second Appellants were the First, Second and Third Defendants respectively. I take this early opportunity to correct the name of the Second Defendant/Second Appellant. It would appear from a sworn statement that his correct name is Browny Donna. In the circumstances the Appellants will be referred to as Mr & Mrs Donna

2. The Claim in CC812/15 was filed on 1st December 2015. There does not appear to be any formal evidence on file but it seems to be accepted that the First Defendant Ms Tonny was served in December and Mr & Mrs Donna in February. The case was originally on the docket of Justice Aru and on 23rd February 2016 his Lordship made an order the Defendants file defences within 21 days. The matter was adjourned for a further conference to 16th March 2016. Prior to that conference Mr Yawha filed a notice of acting for all three defendants. He appeared on 16th March before Aru J. As the defendants had still not filed a defence His Lordship made a further order for the defendants to file and serve their defence by 23rd March. Supplemental orders were made for the Claimant to file sworn statements in support by 13th April and the defendants to file sworn statements in response by 4th May. A pre-trial conference was fixed for 12th May. The defendants were ordered to pay wasted costs of VT 5,000.

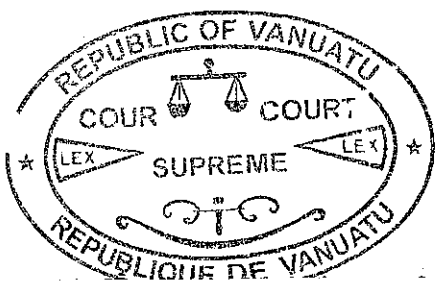
3. The claim concerned the misappropriation of funds by Ms Tonny from South Pacific Electrics. It is said she stole VT 2,045,192 from the company when she was employed by it. The claim asserts that Ms Tonny signed a deed whereby she confessed the theft and stated the money had been used to build a house on the

land owned by Mr & Mrs Donna. A response filed by the defendants on 9th March said the claim was disputed in part. At the 16th March conference Mr Yawha told the court that Mr& Mrs Donna disputed the claim.

4. The defendants did not file any defence by 23rd March and so on 15th April 2016, some three weeks after the Aru J's deadline, South Pacific Electrics filed a request for default judgment against all three defendants. There is no doubt the defendants were well out of time for filing a defence in accordance with Rule 4.13 and well outside the new deadline set by Aru J. The case file was passed to the Master so that she could deal with the default judgment.

5. The procedure to be followed when no defence has been filed is set out in Part 9 of the Civil Procedure Rules. The first requirement is for the Claimant/Applicant to establish service of the claim and response form on the defendant(s) (Rule 9.1). Rule 9.2 then requires a request be made for default judgment which "*...must be in Form 12*". The wording of the Rules seems to envisage a two stage process but there is nothing to prevent proof of service and the request for default judgment being lodged or filed at the same time. There is no requirement in the Civil Procedure Rules for the defendants to be served with the request for default judgment. There is no requirement in the Civil Procedure Rules for a request for default judgment to be heard either in Chambers or in Open Court. If the court has proof of service and is in receipt of a Form 12 request; and if the court is satisfied the claim is for a fixed amount; judgment can be entered. The process is a simple administrative exercise by the court which does not require the attendance of any of the parties and it can be dealt with on the papers. That is the clear effect of Rule 9.2. Once the court has given judgment Rule 9.2(6) requires the claimant to serve a copy of the judgment on the defendant. The Rules do not set any specific timescale for that to occur but if the defendant wants to have the default judgment set aside he must apply within 28 days of service on him of the copy judgment. If the defendant does not do so the claimant can file a sworn statement to that effect and start the enforcement process.

6. In the present case it is my view that there would have been no need for a sworn statement dealing with service of the claim and response form. The reason being the defendants had filed a completed response form on 9th March and at the same time Mr Yawha filed a notice of acting for all three defendants. Proper service had been adequately established by the filing of those documents. It therefore seems to me the court would have been entitled to have entered judgement in default on receipt of the request for default judgment. The request filed on 15th April was in Form 12, the claim was clearly for a fixed amount and so the court could have dealt with the request on the papers. However, at some stage after 15th April the case file was passed to the Master and she chose, as she was perfectly entitled to, to fix a hearing when the request for default judgment would be heard. She may have been influenced in that decision by the comments made by Mr Yawha before Aru J on 16th March. Whether that consideration was in her mind is in any event bye the bye because the salient fact is that the parties were put on notice of a hearing scheduled for 23rd May 2016 when the request for default judgment would be considered.



7. On 23rd May when the case was called on there was no appearance by Mr Yawha on behalf of the defendants. The Minute published by the Master indicates he was "absent without excuse" presumably meaning he had given no indication that he would not be able to attend the hearing. The Master granted judgment in favour of the claimant. The Master also fixed an enforcement conference on 24th June 2016 at 4 pm.

8. On 24th June Mr Fleming appeared for South Pacific Electrics but Mr Yawha was once again absent. The Masters Minute for 24th June states that Mr Fleming confirmed service of the 23rd May order on Mr Yawha but also indicated there were apparent errors in the order and asked for those errors to be amended under the slip rule. The date of the order was wrong, (the order said 26th May 2016 whereas it was made on 23rd May) and it referred to the First Respondent rather than the Respondents. The Master granted the application and the order was amended. The case was adjourned for an enforcement conference on 21st July.

9. On 21st July counsel for all parties attended before the Master. The published Minute indicates that Mr Yawha told the Master he took exception to the order made by her on 23rd May and amended on 24th June. He said he was going to appeal the orders made so far.

10. A notice of appeal was filed on 21st September 2016. It is an appeal by Mr & Mrs Donna. It purports to be an appeal against *"the entire decisions/orders of the Master granting amended order made on 23 May 2016 and entered on 24 June 2016 and the order made on 21 July 2016 and entered on 5 August".*

11. I will say at this stage that the appeal is misconceived and should fail. If the appellants Mr & Mrs Donna want to challenge the default judgment they should make an application to set it aside. The procedure for doing so is set out in Rule 9.5. I have considered whether it might be possible to treat the notice of appeal as an application to set aside a default judgment under Rule 9.5. However, even given the flexibility generally inherent in the Rules and even having regard to the specific exhortation found in the overriding objective set out in Part 1 (of the Rules), there is so much wrong with the documentation lodged on the appellants' behalf that it would be wrong to do so.

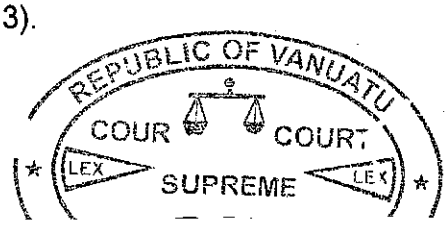
12. The first issue that comes to mind is the question of representation of the parties. Mr Yawha has filed a notice of acting for the appellants Mr & Mrs Donna ***and*** Ms Tonny when they were defendants in Civil Case 812 of 2015. He has not filed any notice of ceasing to act for Ms Tonny yet he names her as Second Respondent in the appeal. Has he taken instructions from Ms Tonny ? Even if he hasn't actually spoken to her and taken detailed instructions there is likely to be a conflict of interests. If he has taken detailed instructions from Ms Tonny then there will be a conflict of interests and he ***must*** consider whether he can continue acting for ***any*** of the parties in the case.

13. Turning now to the notice of appeal, it does not contain any details as to why the defendants did not defend the claim. No doubt the appellants will point to the

"defence" filed on 4th May 2016 and say they did defend the claim. However that document was filed in total disregard of Rule 4.13 and the Orders by Aru J on 23rd February 2016 and 16th March 2016. Whilst Rule 14.4 does allow for late filing that filing should be accompanied by an application pursuant to Rule 18.1 or at the very least a sworn statement setting out the reasons why the document was filed late. If neither an application nor a sworn statement is lodged the court cannot undertake a sensible consideration as required by Rule 4.14(2) and (3). The default position must be the document is not effective unless the court decides otherwise. Absent any explanation at all for the delay the inevitable conclusion must be the defence is not effective.

14. The first, fifth and sixth grounds of appeal do not assist the appellants. To begin with they misrepresent the decisions in the cases of *Esau v Sur* [2006] VUCA 16; CAC 28-05 (6 October 2006) and *Dinh v Samuel* [2010] VUCA 6; Civil Appeal Case 16 of 2009 (30 April 2010). Those cases do not give counsel *carte blanche* to ignore notices and summonses issued by the court and they certainly do not impose a professional obligation on judicial officers to pursue errant counsel by telephone. I bear in mind that since those decisions a system has been put in place whereby weekly lists are sent to all counsel electronically. In addition the lists are published on court notice boards. It is also the case that technology has moved on from the early Alexander Graham Bell days and now we not only have telephones we also have easy access to an efficient and effective internet service and a good mobile telephone network covering the whole of Port Vila and the surrounding countryside. Counsel have, or could (and should) have, easy access to laptop computers, tablets and smart 'phones all of which have computing power well in excess of early IBM mainframes. All of them come with applications or programs designed to allow users to manage their time, in simple terms electronic diaries. If all else fails, or if counsel is unhappy using modern technology, there are many retail outlets in Port Vila which sell paper based diaries. Bearing all this in mind there is no excuse for counsel not being able to diarise upcoming court appointments. And finally in regard to counsel being unaware of hearings, the pigeon-hole system operated at the Registry means that provided counsel check their mail boxes regularly they will receive copies of notices and summonses in time to attend hearings. If legal practitioners choose not to check their pigeon-holes either themselves or by sending their support staff then they only have themselves to blame if court appointments are missed. I also note that the issue of counsel's ill health and the medical certificate covering 26th May was not raised in the hearing in July and only appears to have been put forward in the notice of appeal. There is no evidence, no sworn statement supporting the assertion in the notice.

15. The second, third and fourth grounds of appeal have been dealt with above (see paragraphs 5, 6, 11 and 13 above). Until such time as an application to set aside the default judgment is made there is no requirement for the court to consider the merits of any defence. The claim is clearly a liquidated claim and if there is a failure to file a defence in time the court can deal with a request for default judgment administratively. Somehow the appellants seek to superimpose the procedure for setting aside a default judgment over the process of obtaining one where there is a liquidated claim. I have dealt with the procedure for the two different circumstances earlier (see paragraphs 5 and 6 above) and I have found there is no application to set aside the judgment before the court (see paragraphs 11 and 13).



16. The seventh ground is a repetition of grounds put forward earlier. The introduction of Rule 18.11 is totally misconceived. The Master in her Minute published following the 21st July hearing states quite plainly that the default judgment was entered because there was no properly filed or effective defence before the court. The hearing in July was not a show cause hearing it was set down as an enforcement conference. The Minute describes how the appellants' counsel asked why judgment had been entered. The Master explained why. She showed more patience than I would have done when dealing with counsel who had failed to appear previously. The plain facts are on 23rd May the Master had, following a request dated 15th April, given judgment. The hearing, when a request for default judgment was considered, was on notice so the defendants in Civil Case 812 of 2015 had been given an opportunity to appear and make representations. No one appeared for them either on 23rd May or at the next hearing on 24th June. None of the judgment debtors filed an application to set aside the default judgment despite having been served, through their legal representative, with a copy of the judgment. In those circumstances the Master was not required to give any explanation about the judgment at a later enforcement conference. However she did so and with counsel having failed to appear on at least two previous occasions, in doing so she showed more tolerance than I might have done in the same situation.

17. I have found that there was no requirement for the master to consider the merits of the purported defence. Similarly there is no requirement that as an appellate court I consider the merits of any defence. Having said that, what has been put forward by Mr & Mrs Donna is not to my mind a defence to the claim. What they say is they acknowledge the stolen money was used to pay for materials which were incorporated into the house built on their land. They seemingly go on to say they are entitled to keep what was incorporated into the house and that only Ms Tonny is liable. That must be wrong in law. It may be correct that ultimately Ms Tonny is liable but that does not prevent South Pacific Electrics recovering the loss from them initially and they can then seek a contribution or indemnity from her. If I had to consider the merits of the defence I would have had to say it is unmeritorious. So far as a contribution is concerned they can still make that application even though judgment has been entered against them.

18. Finally, so far as the purported grounds of appeal are concerned, it is said that the Master took judicial notice of Mr Fleming's admission to the Bar "without proper evidence" being put before her. This ground shows how wrong headed counsel for the appellants is in regard to this case. First, it is sad to see this issue raised before the Master on 21st July and as a ground of appeal when it concerns an issue raised and dealt with by Aru J very early on in this case. Secondly, it is very basic law known to most first year law students that judicial notice is a rule of evidence or a concept which allows a judge to accept as certain a fact without the need for evidence establishing that fact. Usually the rule is invoked when dealing with matters which are of common knowledge from sources which guarantee accuracy or are a matter of official record.

19. The appeal must fail. It is dismissed and the First Respondent, South Pacific Electrics, is entitled to its costs. I have considered the making of an indemnity costs

order. I have decided not to do so as that would be penalising the appellants for the actions of their counsel. There is no doubt that counsel (for the appellant) in this case has fallen woefully short of the standard expected of legal representatives. However there have been no submissions made by Mr Yawha in respect of the application for costs to be awarded against him personally. The "application" for costs against counsel was made in the Respondent's submissions and even though there has been plenty of time for a response to what was said none has been forthcoming. However, in the absence of submissions and in an abundance of caution I will not make any order that Mr Yawha personally pays any costs. The appellants Mr & Mrs Donna shall pay the costs of this appeal to the First Respondent. The costs of the appeal shall be taxed by the Master of the Supreme Court on a standard basis if not agreed.

DATED at Port Vila this 30th day of January 2017.

BY THE COURT

D. CHETWYND
Judge

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