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

Civil
Case No. 13/256

BETWEEN: SERGE THEUIL

Applicant/Defendant

AND: KALINDAS TIMOTHY

Respondent/Claimant

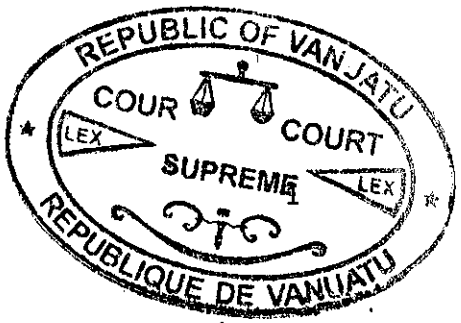
Date of Hearing:	***31st May, 2017***
Delivered:	***28th July, 2017 at 9 a.m.***
Before:	***The Master Cybelle Cenac***
In Attendance:	***Stephen Joel Tari counsel for the Applicant/Defendant, Henzler Vira counsel for the Respondent/Claimant***

JUDGMENT

Application to set aside default judgment – breach of first order to set aside default judgment – Application to set aside a second default judgment – promptness of filing – prejudice – arguable defence – conviction of defence – Application to set aside not granted – personal costs against Attorney

Introduction:

An application filed on the 27th April, 2017 with Sworn Statement in support filed on the 28th April, 2017 to set aside Default Judgment granted by the Master on the 17th October, 2016 came up for hearing on the 31st May, 2017.



Chronology of Events:

The Statement of Claim was filed on the 5th November, 2013 and purportedly served personally on the defendant on the 11th November, 2013. No defence was filed and the claimant consequently filed a request for default judgment on the 3rd February, 2014 which was granted by Justice Harrop on the 3rd June, 2014 following submissions on assessment of general damages.

Following service of the default judgment, an application to set it aside was filed by the defendant on the 16th February, 2015 on the ground that it was irregularly entered for their having been no personal service on him. The court found for the defendant, that he was never personally served and therefore the judgment was irregular under Part 18.10 of the CPR and was bound to be set aside. Accordingly, an order was made on the 29th May, 2015. Personal service was ordered and the defendant was served on the 23rd October, 2015.

As no defence was subsequently filed a request for default judgment was again made on the 8th February, 2016. A hearing was scheduled for the 17th October, 2016 and service of hearing was effected on the defendant through his Attorney on record Mr. Stephen Joel Tari on the 1st September, 2016. At the hearing the defendant was absent and unrepresented and judgment was thereby entered for special and general damages and costs and immediately listed for an enforcement conference for the 3rd November, 2016 at 11 a.m. The court had directed that service of the order of judgment and summons was to be served by claimant counsel. By sworn statement of service the defendant was personally served with the stated documents on the 1st November, 2016 to appear in court for the 3rd November, 2016.

On the day of the conference, both the defendant and his counsel failed to appear. The matter was adjourned and rescheduled to the 9th December, 2016 and counsel for the claimant was again directed to serve a copy of the order of the day and summons on the defendant, which was done. On the 9th December, 2016 there was no appearance of either party or counsel and the court relisted the matter to the 9th March, 2017. By sworn statement of service the defendant was personally served with the summons on the 7th March, 2017 to appear on the 9th March, 2017. The matter was adjourned on the appointed date due to the court's unavailability and the matter was relisted for the 25th April, 2017. By sworn statement of service the defendant was personally served with notice of adjourned hearing on the 31st March, 2017. On the 25th April there was again no appearance of the defendant or his counsel and the court issued an order for bench warrant to issue for the arrest of the defendant which was placed in the pigeon hole of the defendant's counsel on the 28th April, 2017.

On the 27th April, 2017 the defendant filed an application to set aside default judgment through his Attorney Stephen Joel Tari with sworn statement in support filed on the 28th April, 2017 on the following grounds:

(i) That he was of the mistaken belief that Justice Harrop's judgment of the 29th May, 2015 had finally resolved the claim and that he thought there would have been discussions to settle,

(ii) That he had an arguable defence, and

(iii) That the default judgment was irregularly entered for general damages having been unassessed in accordance with CPR 9.4 but nonetheless granted.

Counsel for the defendant Stephen Joel Tari also filed Notice of Beginning to Act. Bench Warrant was executed on the 4th May, 2017 and the defendant was brought before the court on the same day (his lawyer again being absent without excuse though notified to be in attendance). The defendant was released by the court and the hearing of his application was scheduled for the 22nd May, 2017. The matter was unable to proceed on the 22nd on account of the defendant's counsel being ill as represented by the defendant who requested an adjournment. The matter was then listed for the 30th May, 2017. Counsel for the defendant was again absent without excuse and unable to present the application for the defendant who was present. The matter was adjourned to the 31st May.

Jurisdiction to Set Aside Default Judgement:

Part 9.5 of the Civil Procedure Rules (CPR) provides as follows:

(1) A Defendant against whom judgment has been signed under this Part may apply to the Court to have the judgment set aside.

(2) The application:

a) may be made at any time and;
b) must set out the reasons why the defendant did not defend the claim; and
c) must give details of the defendant's defence to the claim; and
d) must have with it a sworn statement in support of the application; and
e) must be in Form 14.

(3) The court may set aside the default judgment if is satisfied that the defendant:

(a) has shown reasonable cause for not defending the claim;

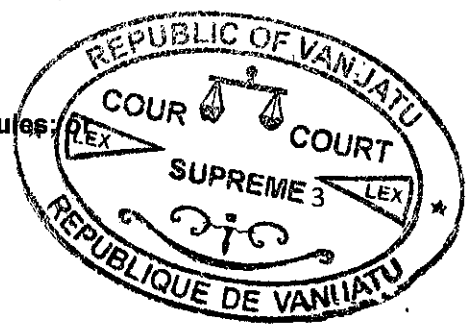
b) has an arguable defence, either about his or her liability for the claim or

or about the amount of the claim.....

Part 9 of the Rules make no specific provision for the setting aside of a default judgment irregularly entered, but 18.10 can be employed to that end:

(1) A failure to comply with these Rules is an irregularity and does not make a proceeding, or a document, step taken or order made in a proceeding a nullity.

(2) If there has been a failure to comply with these Rules, the court may:
(a) Set aside all or part of the proceeding; or
(b) Set aside a step taken in the proceeding; or
(c) Declare a document or step taken to be ineffectual; or
(d) Declare a document or step taken to be effectual; or
(e) Make another order that could be made under these Rules; or



(f) Make another order dealing with the proceeding generally that the court considers appropriate.

In addition, the court may, in its own discretion, and so as to do "substantial justice" invoke Rule 1.7 to address any deficiency in the Rules:

If these Rules do not deal with a proceeding or a step in a proceeding:

(a) The old Rules do not apply; and
(b) The Court is to give whatever directions are necessary to ensure the matter is determined according to substantial justice.

Submission of defendant:

The defendant states, in short, that he delivered to the claimant a working vehicle, fit for purpose, but through the negligence of the claimant and his drivers the vehicle became unusable within a short time of having received delivery of it when it crashed into a bush in North Malekula. The defendant is of the view that it is unfair for the claimant to have asked him to repair a vehicle which was damaged by his drivers and/or to request a full refund of the purchase price.

The defendant goes on to state in his sworn evidence that he had every intention of defending the action but was of the mistaken belief that the oral judgment of Justice Harrop on the 29th May, 2015 had finally resolved the claim and that the Judge's obiter comment to discuss and settle the matter meant there would be some further discussion, and that he only became aware of the need to act when he was served with enforcement proceedings.

Submission of claimant:

The claimant contends that the judgement of Justice Harrop was clear; that the judgement did not resolve the claim but specified that the defendant be personally served with the claim, and that as an aside, the parties should consider settlement. In fact, the claimant goes on to add that the defendant's lawyer was in court when the judgement was delivered and would have adequately explained to the defendant what was expected. Further, in the defendant's sworn statement to set aside the default judgment of the 3rd June, 2014 he had stated that *"had [he] been served [his] lawyer would have been notified and a defence filed."* The claimant states that the defendant was long notified and did not act to defend his position as he swore he would have under his first application to set aside. Therefore, he could not now hold that he was of a mistaken belief as Justice Harrop's Judgment clearly granted him the order he sought, that is, for the judgment to be set aside so he could be personally served with the claim to allow him the opportunity to defend his position.

His lawyer was aware of the proceedings, having represented him in the first Application to set aside and then receiving the judgment of the court. The defendant was served per the instructions of the court with the claim and the judgement had handed down specific instructions that a defence was to be filed within 28 days from service. The defendant did nothing.

As to the strength of the defence put forward, the claimant asserts that the defence lacks tangible evidence of the existence of a traffic accident with consequent damages to prove that the damage to the vehicle was caused by the negligence of the claimant and not the shoddy repair work or lack thereof of the defendant.

Delay:

This case is a peculiar one, in that the defendant is yet again before the court on an Application to set aside the default judgment of the claimant. Albeit that the entry of the first judgment was found to be irregular and set aside as a matter of course, it is clear evidence, that at the point of the Application, and certainly following the judgment of the court the defendant was more than apprised of the state of affairs in which he found himself as it related to the vehicle which he sold to the claimant. While he could have held in the first application that he was improperly served and the sworn statement of service of John Sam was a clear perjured statement, he could not adduce the same set of circumstances in the current application. There was no dispute as to the adequacy of service. The defendant's sole defence to his lack of a filed defence was that he had made a mistake, seeking refuge beneath his mistaken belief.

It is difficult for the court to understand how such a mistake can be justified, considering that the defendant has been represented by the same counsel, Stephen Joel Tari as early as 16th February, 2015 when the issue of setting aside the first default judgment had arisen and which lawyer was also present at the delivery of the judgment to set aside on the 29th May, 2015.

Having successfully argued a first application to set aside, with counsel, the court is constrained to understand how the defendant could expect it to accept such a far-fetched excuse. The defendant being then aware that a claim had been filed, steps taken to enter a default judgment and he being subsequently served pursuant to the directions of the judgment, how then could he, represented by counsel, have reasonably concluded that he was not required to have done anything except to wait on the defendant to contact him to discuss settlement - the defendant himself making no effort to attempt to resolve the issues.

If, as he states, he relied more on the obiter statements of the Judge to settle rather than the substantive part of the judgment requiring him to act following service then he should have moved himself or instructed his lawyer to convene a settlement meeting with the claimant and his Attorney. He followed neither of the directives under the judgement of the court but now wishes to impress upon the same court that he had been mistaken. Further, if there was, as he says, an expectation of settlement, how could he, in the same breathe hold that he had thought the matter finally resolved.

I do not believe the defendant ever intended to properly defend the action, having had every opportunity to have done so over the last two (2) years and only making the effort when confronted with enforcement proceedings and an Arrest Warrant compelling him to take action.

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I note that in his first application to set aside the default judgment irregularly entered, the defendant, according to his account, was served with the order for default judgment on the 3rd July, 2014 but waited almost seven (7) months before filing his application to set aside and only when he was served with an application for enforcement order on the 13th February, 2015, filing his application to set aside 3 days later. His behaviour has not much differed in the present application, seemingly exhibiting a consistent pattern of delay until the umpteenth hour.

The defendant was served with the claim on the 23rd October, 2015, and up till a request for default judgment was made 3 ½ months later the defendant had done nothing. In fact, at the point when he was served with the order of default judgment on the 1st November, 2016 and summons to attend court, it had been over one (1) year and the defendant had filed no proceeding with the court. Even when served with the summons to appear in court for the 3rd November, 2016 neither he nor his counsel made an appearance. Two additional hearings were scheduled for the 9th April and 25th April, 2017 wherein the defendant was served both personally and through his counsel and still no action was taken. It was not until the hearing of the 25th April, 2017 when an order to arrest the defendant was made and said order served on his lawyer that the defendant was moved to file the application currently before the court to set aside the default judgment.

I pause here to point out that there appears to be a one (1) day delay between the grant of the arrest warrant and its service on defendant counsel when the application to set aside was filed. I believe that the defendant must have somehow received word of the order for arrest as it was entirely too curious that the speed with which he acted to file his application came on the heels of an order for arrest.

In fact, from the date of service of the claim on the 23rd October, 2015 to the date of the order for arrest of the 25th April, 2017 it was by then a year and a half before the defendant had taken any step to defend his position.

Authoritative texts on the question of the length of delay that might justify a court not setting aside a default judgment state that a court may refuse to act in favour of the defendant if he deliberately chooses not to defend the action, applying to set aside the default judgment only when he realized the claimant was in a position to enforce the proceedings against him and that a defendant may very well lose his right to defend if his action is seen as an irrevocable waiver of those rights.[1]

In the case of **Regency Rolls**[2] the Appeal court found that 30 days was too long of a delay in making the application to set aside, *"having regard to the long, and generally unsatisfactory history of the proceedings to that point, the application plainly could and should have been issued well before it was."* In that particular case the court found that one Mr. Carnall was aware at all times of the need to act promptly.

In the present case, having already obtained an order to set aside a first default judgment the defendant and his lawyer found themselves in similar circumstances as

[1] Zucherman A.; "Zucherman on Civil Procedure, Principles of Practice" p. 277

[2] Regency Rolls Ltd. v Carnall [2000] AER 1417

Mr. Carnall, that is, with an awareness that it was necessary in all the circumstances, particularly bearing in mind the likely prejudice to be suffered by all parties on account of the deteriorating subject-matter - the bus, that it was vital that all celerity be employed to bring a speedy resolution to the case.

In the case of **Standard Bank**[3] the court made the point that the question of promptness of filing was now a condition precedent to any application to set aside a default judgment since the advent of the new Civil Procedure Rules, which, together with its overriding objective recognized the importance of alacrity in the filing and pursuit of cases so as to promote efficiency and avoid delay, and that while it was not the overwhelming criterion it was a criterion that carried with it much greater weight than before the passage of the new rules, going on to add, that *"if there has been a marked failure to make the application promptly, the court may well be justified in refusing relief, notwithstanding the possibility that the defendant might succeed at trial."*

In the present case, the defendant delayed by approximately 1 ½ years before taking any step in the proceedings following service of the claim, and approximately 6 months from service of the first Summons following default judgment to make application to set aside. As in the case of **Standard Bank** when the court found that the defendant was *"quite capable of taking prompt and effective steps to protect his position, with or without the benefit of legal representation"* when default judgment was entered, so to do I find that the defendant in this case showed himself quite capable of taking prompt and effective steps once becoming aware of a warrant for arrest issued against him in the enforcement proceedings, filing his application on the 27th April, 2017 on the heels of the court's order of the 25th April, 2017.

In fact, my observation of the defendant was that he was intellectually capable of both understanding what was expected of him and representing his interests even without legal representation.

Finding that the explanation of the defendant was not just unconvincing but spectacularly unconvincing, I will now turn to the second tier of the test to ascertain whether the defendant has a case which has the capability of withstanding scrutiny to establish a real prospect of success at trial. But before I do this I will speak to the question of prejudice.

Prejudice:

While this is not a limb referenced in the Rule, it is one often considered by the court, in its discretion, to ascertain whether the delay has been so prejudicial as to warrant the upholding of the default judgment in spite of the possibility of an arguable defence.

According to the courts, a person with a default judgment has something of value and should not therefore be deprived of it without good reason.[4] The defendant

[3] Standard Bank Plc & Anor v Agrinvest International Inc & Ors [2010] EWCA Civ 1400
[4] ED&F Man Liquid Products Ltd. v Patel & Anor [2003] EWCA Civ 472

being fully aware of the assertions of the claimant and the subject-matter involved, that is, a bus of depreciating value, it was incumbent on him to have acted with due diligence to expedite the matter. On account of the inordinate delay, this bus will no longer be able to yield credible evidence regarding the cause of its breakdown to allow the court to come to any reasonably safe conclusion as to the party responsible, and in the absence of such conclusive evidence the court will be left to draw inferences, which in this case are likely to be adverse to the defendant, his having admitted the initial defects with the bus and the fact that shortly after delivery the bus encountered a tragic end.

Arguable Defence:

The defendant's defence is that he admits that at the time when the consideration of VT1.8 million was transferred to him, the vehicle was not in a proper working condition, needing repairs, but that he was able to carry out those repairs once he was in receipt of the purchase price in less than a week. He states further that he did not use second hand parts as the claimant contends, resulting in the vehicle being grounded but it was as a result of the *"negligent and careless driving and conduct of the claimant and his several drivers which resulted in an accident on Tuesday 6th August, 2013 at North East Malekula where the vehicle veered off the road and headed into a grove of 'Kasis' trees elevating it from the ground and making it difficult to reverse or drive back on to the road."*

He went on to add, at paragraph 12 of his sworn statement of the 28th April, 2017 that *"damage to the vehicle was occasioned by* ***the defendant's*** [my emphasis] *chosen drivers who were drunk at the time."* I assume that he meant to say **'claimant's drivers'** were drunk and not *drivers provided by him* for the claimant's vehicle.

He admits in his sworn statement of the 28th April, 2017 at paragraph 11 that the balance of the monies after the repairs were paid to the bank to meet arrears on his loan.

The above being the substance of the defendant's defence, I find his defence to be most underwhelming. Even upon development I cannot see how the defendant would hope to prove the facts he asserts. He refers to the vehicle as having been involved in an accident where the drivers were drunk. His pleadings make no reference to conclusive evidence by way of a police report of the accident and state of condition of the drivers. He admits that the vehicle was defective prior to purchase (albeit with the knowledge of the claimant) and that he used part of the purchase price to repair it but made no reference to the quality of the parts used to bring the vehicle to a standard fit for use and purpose.

He referenced no receipts for purchase of first hand parts or good quality second hand parts, having admitted, at paragraph 3 of his draft defence that he was aware that the claimant intended to use the vehicle for transport purposes. The implication is that the vehicle would need to be of a standard to allow it to run continuously on the road, over long periods, carrying heavy loads, that is, people and their cargo.

Therefore, the vehicle would have had to have been repaired to a standard that would accommodate its use and purpose. The defendant admitted that he was in arrears of his loan and used the balance of the monies to repay those arrears which would easily lead to an inevitable conclusion that the defendant would have wanted to ensure that much of the purchase price was applied to the loan and therefore would have been unlikely to have purchased first hand parts to service and repair a second hand bus. No expert evidence has been produced to speak to the repairs undertaken or the cause of the breakdown of the vehicle. The defendant has referenced no evidence in his draft defence that he intends to submit to prove his assertions of negligence on the part of the claimant and/or his drivers, his pleadings reading more as conjecture than provable fact.

To borrow the words of Justice Field in **Standard Bank Plc.**, I find the defence *"far from overwhelming"* and impossible to see how the defendant would hope to adequately defend those facts to cause a court to make a decision in his favour. It seems quite apparent that his factual assertions lack real substance and my principal ground for concluding that the defendant has no real prospect of success is the patent lack of evidence adduced in his pleading to lend any degree of credibility to his defence.

Irregularity of Default Judgement entered:

The defendant's follow-up argument was, that the entry of the judgment was irregular in that the court had included in its order an assessment of the general damages amounting to VT1 million when no proper assessment had been undertaken as required under CPR 9.4.

While I readily accept that the court erred in granting this part of the order, I am also guided by Part 18.10 of the CPR which allows the court to set aside a part of the proceeding without nullifying the proceeding in its entirety.

Unlike the first application to set aside for improper service for which the court was bound to rectify and could only do so by a full recant of the default judgment this is not the position at is relates to the present application to set aside. The court granted default judgment under two specific heads, specific and general damages when it could have granted only the former in the absence of specific evidence to grant the latter. That having not been provided the court would have had to deny the award for general damages.

Conclusion:

I find that the explanation for the cause of the delay was spurious and lacking any substance to be believed, particularly in light of the preceding events, wherein a similar application had been filed and granted and which would, in all the circumstances of the case called on the defendant to act with all promptness which

he failed to do after numerous opportunities accorded him until he was faced with the inevitability of enforcement.

The defendant was unable to show that he had an arguable defence, that is, a defence that was not fanciful and which carried with it a degree of conviction to persuade the court to its merits.

Costs:

As costs always follow the unsuccessful party, the defendant would, expectantly be required to meet the costs of the claimant. In this instance, I am minded, under Part 15.25 and 15.26 to order that the costs be met equally between the defendant and his lawyer Mr. Stephen Joel Tari.

My reason for including counsel for the claimant in this order is because of what the court views as gross negligence on the part of counsel in conducting and representing his client in these proceedings from the moment he took conduct of the matter.

Mr. Tari was the one who filed the application on behalf of his client to set aside the first judgment in default. He was present to argue the application and to take delivery of the judgment. While I did not accept the explanation of the defendant that he was mistaken in his belief as to the final resolution of the matter, I do believe that his lawyer failed to adequately advise him as to the urgency with which he was to act to have his defence filed. As far as the file reflects, Mr. Tari continued to act as counsel for the defendant and in spite of being served with every proceeding of the court he made no appearances, having failed to appear on no less than six (6) occasions, nor attempted to contact the court through any means to apprise the court of his client's circumstance until he was served with the order of the court to have his client arrested. It was only in that, that counsel clearly showed himself capable of acting with haste, by filing, in less than two (2) days a full application to set aside with sworn statement and a draft defence. To further compound his negligence he failed to appear in court at every juncture since filing the application, save for the final date of hearing when the court ordered that it would proceed with the hearing of the application with or without the presence of counsel.

While a defendant has the ultimate responsibility to pursue his defence, and the defendant seemed more than capable of doing so, a defendant does expect, having retained counsel he will be adequately advised as to the steps to be taken and when to defend himself and full and proper pleadings presented to the court. Based on all that I have read and seen of counsel in this matter I believe that he conspicuously failed in his duty to his client resulting in today's outcome.

I have become accustomed to severely defective pleadings being filed with the court. Counsel in this instance did not disappoint in failing to properly plead his client's case.

I am giving defendant's counsel an opportunity now to tell me why, at the delivery of this judgment I should not make an order against him for personal costs.

At the delivery of this judgment Counsel for the defendant represented to the court that as the eldest son of his parents he has the obligation to care for them. That his mother had fallen gravely ill between September to October, 2016, wherein she died in November of that year. He indicated that he was out of the island till February, 2017 and was unaware of the matter. He stated that he was only notified of the pending action upon his return, going on to add that following proper service of the claim on the defendant, the defendant was free to retain any other lawyer and he did not consider himself then acting for the claimant until he filed his Notice of Acting on the 28th April, 2017.

While the court is willing to make some allowance on compassionate grounds, the court indicated to counsel, that in spite of his personal circumstances he was bound to make provision for the continuation of representation for his client and further, that following the judgment of Justice Harrop, which did not conclude the matter resulting in a fresh claim but was simply a continuation of the existing case which had encountered a glitch based on improper service, he remained counsel on record until he filed a notice of ceasing to act, which he never did and was therefore considered by the court to be counsel in the matter.

Moreover, his own client never represented to the court that he had any other lawyer save for Mr. Tari. The court emphasized the point that prior to the ill-health of his mother he appeared to have taken no decisive action for his client and in particular, even were the court to ignore all of the above, the pleading alone spoke to a deficiency of representation.

Obiter Statement:

Having said this, the pleading of the claimant are admittedly just as deficient and this is the first case which has come before me that I can honestly say neither party had a successful chance of winning on account of the conduct of each and his counsel.

This is very likely what my brother Judge, Justice Harrop may have seen hence his statement following his judgment that the parties attempt to settle this matter. That would be my recommendation now. In spite of the default judgment I would hope that the claimant might see his way to considering a reduction in the damages.

Damages:

In the matter of general damages defendant counsel has indicated that his client is willing to waive said damages and this will not be made part of the court's order for default judgment.

My Order is as follows:

1. **That Application to set aside default judgement is dismissed.**

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2. That default judgment of the 17th October, 2016 is allowed under Part 18.10 of the CPR only in so far as it relates to specific damages.

3. That Counsel being unable at the delivery of this judgment to provide sound reason why the court should not make an order for costs against him, I hereby order that costs are awarded in favour of the claimant in the amount of VT10, 000 to be paid between the defendant and his lawyer Stephen Joel Tari within 21 days from today in the amount of VT7, 000 by the defendant and VT3, 000 by defendant counsel.

4. That this matter is listed for conference on enforcement proceedings on the 24th August, 2017 at 1:30 p.m. where the matter of enforcement or agreed settlement will be discussed and civil case 1275 of 2017 addressed.

By The Court

MASTER

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