

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

Civil
Case No. 17/2451 SC/CIVL
17/2145 SC/ CIVL

BETWEEN: ACN 052 469 PTY Limited (IN LIQUIDATION)
Formerly known as Custom Security Services
PTY Limited

Claimant

AND: Robert James Newham

First Defendant

AND: B& P Investments Limited

Second Defendant

AND: Paul Newham

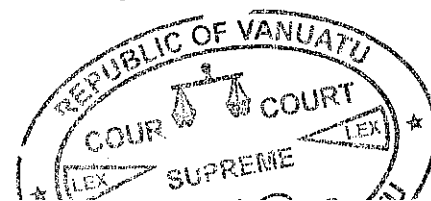
Third Defendant

Date of Hearing : 10th December 2020
Date of Decision: 17th December 2020
Before: Justice Oliver.A.Saksak
In Attendance: Mr Robert Sugden for Third Defendant as Applicant
Mr Nigel Morrison for First and Second Defendants
Mr Matt Karam and Mr Mark Hurley for the Claimant/ Respondent

DECISION

Introduction

1. I heard two applications filed by the Third Defendant on 10th December. The first application was filed on 13th March 2020 seeking an order for the claimant to show cause why their claim should not be struck out for non-compliance with Court orders. This is the Rule 18.11 application.
2. The second application was filed on 16th September 2020 seeking an order to amend the original application in paragraph 1 by adding "its" between " why" and "claim" in its second line and seeking the costs of the application and of CC 2145 of 2017 on an indemnity basis instead of simply "costs".
3. At the hearing Mr Karam objected to the second application and therefore Mr Sugden did not pursue it further. The application is deemed to have been withdrawn.



4. That leaves only the first application to be determined.

Background Facts

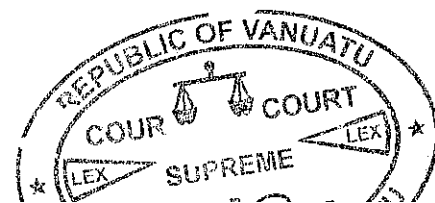
5. The claimant is an Australian company that carried on business as a security company between 1991 and 2013. The company's former director was Robert Newham (First Defendant). The claimant alleges Mr Newham acted in breach of his director's and fiduciary duty, amongst others.
6. Mr Newham is now the director of the Second Defendant Company. It is alleged he breached his duties in transactions allowing the flow of funds from the claimant to the defendants.
7. Those allegations are the basis of the claimant's current proceeding which they filed on 17th August 2017.
8. Subsequent to filing the proceeding the applicant filed an application on 15th May 2018 seeking for better particulars.
9. The Court having granted leave, the claimant on 17th August 2018 file its amended claim but without any particulars.
10. On 30th August 2018 the applicant filed an application for particulars of the amended claim.
11. On 6th February 2020 the Court ordered the claimant to provide its particulars by 11th March 2020.
12. On 11th March 2020 the clamant did not provide the particulars and did not seek any extension of time within which to do so.

Claim by Applicant

13. The applicant clams the particulars sought are an essential part of the claimant's claim to show how it claims its money was used in the purchase of the assets of the second defendant, so as to entitle it to a share in the sale proceeds of those assets.
14. The applicant claims also that it has now been nearly 2 years since the particulars were first sought and despite the claimant having obtained third party disclosures from certain commercial banks, it has remained silent in spite of having failed to provide them as ordered.

Rule 18.11

15. The applicant now seeks to invoke Rule 18.11 of the Civil Procedure Rules No. 49 of 2002 (the Rules) for an order striking out the claimant's claim and proceeding for failure to comply with the Court orders of 6th February 2020.



16. Rule 18.11 of the Rule states:

" Failure to comply with an order

18.11 (1) *This rule applies if a party fails to comply with an order made in a proceeding dealing with the progress of the proceeding or steps to be taken in the proceeding.*

(2) A party who is entitled to the benefit of the order may require the non-complying party to show cause why an order should not be made against him or her.

(3) The application:

(a) must set out details of the failure to comply with the order; and

(b) must have with it a sworn statement in support of the application; and

(c) must be filed and served, with the sworn statement, on the non-complying party at least 3 business days before the hearing date for the application.

(4) The court may:

(a) give judgment against the non-complying party; or

(b) extend the time for complying with the order; or

(c) give directions; or

(d) make another order.

(5) This rule does not limit the court's powers to punish for contempt of court."

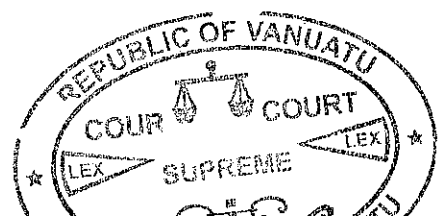
Evidence

17. The applicant relies on the sworn statement of Counsel Robert Sugden in support of the application.

18. The claimant as respondent resisted the application for reasons stated in the sworn statements of John Hill dated 26th April and 2nd June 2020 and the affirmed statements of Serah Frances Hendry dated 24th June, 27th August and 26th October 2020.

Submissions

19. The applicant submitted the claimant had committed a breach of Rule 18.11 which was a continuous and a serious breach warranting that their claim be struck out. It was submitted further that, the application for particulars made on 6th February 2020 was not opposed but despite that, the claimant had failed to provide them for 19 months prior to the making of the orders. Further, it was submitted that on 11th March 2020 the claimant was not apologetic about

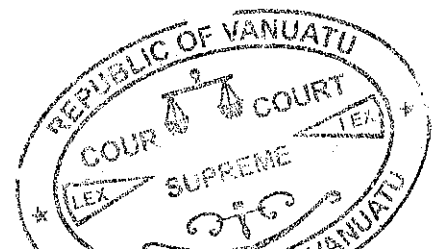


their failure and gave no reason for non-compliance which amounted to a complete disregard for the Court's order.

20. Mr Morrison made short submissions supporting the application by the applicant for a strike out.
21. The claimant through Mr Karam made very lengthy submissions. In short the claimant submitted they had complied with the Court's order. The claimant submitted it had taken reasonable steps available to comply with the Court's orders and that therefore there was no basis for the Court to exercise its jurisdiction under Rule 18.11.

Discussion

22. The issues for determination is first whether the claimant has not complied with the orders of 6th February 2020.
23. From the evidence by 11th March 2020, the claimant had not complied. The Court can appreciate the active and reasonable steps the evidence of Mr Hill and Ms Hendry deposed to taking but the fact remains the claimant has not fully complied with the Court's orders.
24. The claimant filed their claim on 17th August 2017. 9 months later on 15th May 2018 the applicant filed the first application seeking for particulars. Then 3 months later on 17th August 2018 the claimant filed an Amended claim but still with no particulars resulting in the second application by the applicant for particulars to the amended claim on 30th August 2018. No particulars were provided. Then 1 year and 6 months later on 6th February 2020, the Court issued the order requiring the claimant to provide the particulars by 11th March 2020. The claimant did not do so.
25. From 17th August 2017 to 6th February 2020, it could hardly be true the claimant had taken active and reasonable steps to assist or support their case and claim by providing the particulars required to put the claimant and the defendants on equal footing so that the overriding objective in Rule 1.2 could be achieved.
The claimant's submissions at paragraphs 26, 27, 28 and 29 are therefore untenable and are rejected.
26. The second issue is whether the claimant's claim and proceeding should be struck out under Rule 18.11? The answer is in the affirmative.
27. Rule 18.11 must be read in conjunction with Rule 9.10 of the Rules. Whereas Rule 18.11 provides for failures to comply with Court orders, it is Rule 9.10 that gives the Court discretionary power to strike out a proceeding if a claimant does not:
" (a) take the steps in a proceeding that are required by these Rules to ensure the proceeding continues, or
(b) comply with an order of the Court made during a proceeding."



28. The letter of the claimant dated 27th August 2020 is indicative of the claimant's attitude toward the Court's order of 6th February 2020. It has always been open for them to have applied to have them vacated or appealed. They have not done so but have simply chosen not to comply with it. That makes their breach contemptuous. I accept Mr Sugden's submissions on this point.

The Result

- 29. The application by the Third Defendant as supported by the First and Second Defendants is allowed.
- 30. The claim and proceeding of the claimant are hereby struck out.
- 31. The claimant shall pay the Defendants' costs of the proceeding on the standard basis as agreed or taxed.

DATED at Port Vila this 17th day of December 2020

BY THE COURT


OLIVER.A.SAKSAK

Judge

