

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

Civil Appeal Case No. 25 of 2010

BETWEEN: SONIA LEINKON
Appellant

AND: SUSAN BASTIEN
Respondent

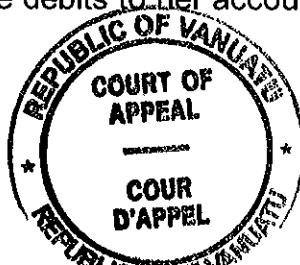
**Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice J. Mansfield
Hon. Justice E. Goldsbrough
Hon. Justice O. Saksak
Hon. Justice N.R. Dawson**

**Counsel: Mr. G. Boar for the Appellant
Mr. C. Leo for the Respondent**

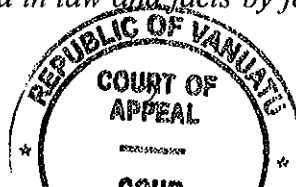
**Date of Hearing: 26th November, 2010
Date of Judgment: 3rd December, 2010**

JUDGMENT

1. The Appellant was the Defendant in proceedings in the Supreme Court. The Claim says that between 12 January 2006 and September 2007, whilst employed by the Respondent/Claimant, she forged the signature of the Respondent/Claimant on a large number of cheques to the total value of VT6,731,500 and so received that amount of money from the Respondent/Claimant.
2. The Appellant/Defendant did not file a Response or Defence within the time prescribed by the Civil Procedure Rules so the Respondent/Claimant applied for default judgment for a fixed amount, supported by her sworn statement verifying the facts alleged in her claim and its amount, including by exhibiting her bank statements showing the debits to her account by the cheques she said had been forged.



3. This is an appeal against Fatiaki J's judgment and orders of 13th July 2010, 29th October 2010 and 12th November 2010 respectively in Civil Case 21 of 2010, which judgment and orders provide that:-
- (a) Order of 13th July 2010 – Default Judgment entered in favour of the Respondent/Claimant in the sum of VT6,731,500 with 5% interest from 19th February 2010.
 - (b) Order of 29th October 2010 – Defendant/Appellant Application to set aside Default Judgment is dismissed with VT5,000 cost payable within 14 days and consequential orders for sale of Defendant's property at Namburu.
 - (c) Order of 12th November 2010 – Appellant/Defendant's Application to suspend the orders of 29th October, 2010 and Defendant/Appellant's verbal Application for leave to appeal to the Court of Appeal are also refused.
4. The Appellant advanced four grounds in support of the appeal. The first ground of appeal submitting that the primary judge erred in law by dismissing the Appellant's Application to Set Aside Default Judgment due to the non-appearance of the Appellant's counsel was withdrawn at the commencement of the appeal hearing.
5. The remaining grounds of appeal are:-
- "2. *That by dismissing the Appellant's further Application for suspension of the order of 29 October 2010 and refusing leave to have the Appellant's appeal to this Honorable Court, the learned trial Judge erred in law in failing to appreciate and to take into consideration the Appellant's proposed defence to the Respondent's claim filed in Supreme Court Civil Case No. 21 of 2010. The Appellant's proposed defence to the claim in Supreme Court Civil Case No. 21 of 2010 is that she does not dispute liability but rather she disputes quantum in the Judgment sum of VT6,731,500.*
 - 3. *That by dismissing the Appellant's Application to set aside the default judgment of 13 July 2010, the learned trial Judge erred in law by failing to appreciate that there was no corroborative and sufficient evidence adduced in court from the Respondent to substantiate the Judgment sum of VT6,731,500.*
 - 4. *That by dismissing the Appellant's Application to set aside the Default Judgment and granting leave to appeal to this Honorable Court, the learned trial Judge erred in law and facts by failing to give any or due consideration*

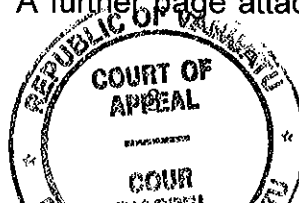


to the Respondent's admission on evidence that the Appellant had worked for six and half months without salaries and that this should be deducted from the judgment sum of VT6,731,500."

6. The Appellant acknowledged that grounds 2 and 4 are effectively the same ground and will be dealt with together. The Appellant does not dispute liability but does dispute the amount that is claimed by the Respondent. Her basis for disputing the amount payable is based solely upon the arrangement she says she had with the Respondent that she worked for no payment for the Respondent for 6 ½ months to reduce the amount of the debt owed. The Appellant has not quantified the amount of the claim in reduction of debt.
7. In the Respondent's Sworn Statement dated 29th October 2010, Exhibit "SB2" is an Agreement as follows:

"AGREEMENT"
*I Sonia Leingkone intend to work 3 hours in the afternoon for 5 days per week.
This is to refund my account towards Suzanne Bastien.
Beginning from the 1st October 2007.
This is done by Suzanne Bastien and me on the 28 September 2007."*
8. In that same Sworn Statement by Exhibit "SB5" is an unsigned and undated Memo saying:

"MEMO"
*Sonia has signed some paper work free on the 28 September 2007. She was arrested/called at Au Bon Marche by the police on account of the stolen cheque or bribery.
On the 17th of April 2008 she was suspended or terminated from her job.
She has worked for 6 ½ months without salary."*
9. Criminal Case 64 of 2008 records that the Appellant was sentenced for forging a cheque of the Respondent on 17th April 2008 at Au Bon Marche to purchase groceries. The figure in the forged cheque was VT28,070.
10. The evidence indicates that at the time of her arrest on 17th April 2008, the Appellant already owed money to the Respondent and they appear to have agreed on the 28th September 2007 that she could work it off. Exhibit "SB3" in the Respondent's Sworn Statement seems to indicate that this would be at the rate of VT150 per hour. A further page attached to the same Sworn Statement



indicates that from October, 2007 to March 2008 that VT105,600 had been repaid to the Respondent by way of the Appellant's unpaid work. The Respondent's counsel accepts that this sum of VT105,600 should be deducted from the Default Judgment entered against the Appellant, and the Appellant is therefore successful on this aspect of her appeal.

11. It does need to be noted that nowhere in the proceedings has the Appellant filed a sworn statement saying why the amount claimed in the Supreme Court Claim and the subsequent Default Judgment was wrong. A draft Defence was attached to the Appellant's Sworn Statement dated 29th September 2010, which makes the bare assertion that "*I dispute the amount claimed*". There was no mention of any arrangement about the Appellant working off the debt and therefore the primary judge cannot be said to have been wrong or to have made a mistake. The person applying to set aside a Default Judgment on the basis that it is the wrong amount has the onus of demonstrating that the amount is wrong and should provide full information to the primary judge.
12. Ground 3 submits that there was insufficient material placed before the primary judge in order for him to enter judgment on 13th July 2010. The Respondent filed a Supreme Court Claim and filed copies of the Respondent's bank statements showing dates and amounts of cheques issued against the Respondent's bank account. The Appellant had not filed a Statement of Defence or response at that time. Nor has the Appellant disputed that she forged cheques from the Respondent's cheque book. The Appellant has at no stage, including during this appeal, made any assertion as to the amount she thinks she should pay.
13. The Civil Procedure Rules, Rule 9.5 enables the Court to set aside a default judgment provided certain conditions are met by the applicant. Rule 9.5 (1) to (3) says:

"Setting aside default judgment

- 9.5 (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 it is satisfied that the defendant:*
- (a) *has shown reasonable cause for not defending the claim; and*
 - (b) *has an arguable defence, either about his or her liability for the claim or about the amount of the claim."*

14. At the time when the primary judge heard the Application to Set Aside Default Judgment on the 29th October 2010, he had before him the Appellant's Sworn Statement dated 29th September 2010 which, as has already been noted in paragraph 11 herein, does not assert why the amount in the Default Judgment was wrong or make any claim for a reduction of the amount due to work done by the Appellant. Her proposed defence asserted that some of her withdrawals from the Respondent/Claimants account were used to pay for staff salaries. She does not, however, give any evidence about that assertion in her Sworn Statement. In terms of Rule 9.5 (2) (c) and (d), she does not explain why that assertion is correct or say how much she accepts that she owed to the Respondent/Claimant. In short, she did not meet the requirements of those Rules. In the absence of such material the primary judge cannot be said to have been wrong in dismissing that Application.
15. The primary judge had before him evidence of amounts taken from the Respondent's bank account due to the forgery of the Respondent. The Appellant has never questioned any of that evidence. The judge was therefore entitled to accept the evidence of the Respondent and to enter Default Judgment.
16. This appeal is allowed in part only. The Order of the Supreme Court dated 13th July 2010 is to be amended by reducing the amount of the Default Judgment to



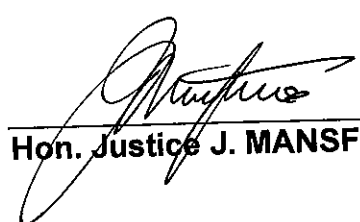
VT6,625,900, a reduction of VT105,600 which the Respondent accepts is the value of what she has received by way of work done by the Appellant. The remainder of that Order stands, as do the Orders dated 29th October 2010 and 12th November 2010 in their entirety.

17. As the Appellant has only been partly successful, each party shall bear their own costs on this appeal.

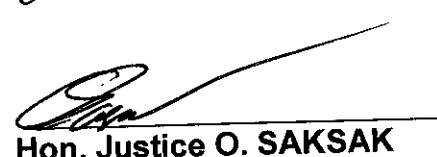
Dated at Port Vila, this 3rd December, 2010

BY THE COURT


Hon. Chief Justice V. LUNABEK


Hon. Justice J. MANSFIELD


Hon Justice E. GOLDSBROUGH


Hon. Justice O. SAKSAK


Hon. Justice N. R. DAWSON

