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

Civil Appeal
Case No. 22/1329 COA/CIVA

BETWEEN: PACCO SIRI and GLORIA SIRI
Appellants

AND: ANDREW WALTER JOHNNY
Respondent

Date:	***12th May 2023***
Before:	***Hon. Justice J Mansfield*** ***Hon. Justice R Young*** ***Hon. Justice VM Trief***
Counsel:	***Ms T Harrison for the Appellants*** ***Mrs MG Nari for the Respondent***
Date of Judgment:	***19 May 2023***

JUDGMENT OF THE COURT

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1. This appeal is from a decision of the Supreme Court of 24 October 2022 refusing the Appellants' application to set aside a default judgment in favour of his counterclaim in the Supreme Court action. They also sought to re-instate their own claim in the Supreme Court action which had been dismissed in the Supreme Court.

2. The appeal must fail.

3. The Appellants have not even attempted to satisfy the requirements of Civil Procedure Rule 9.5(3)(a):

> *"Setting aside default judgment":*
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> *(3) The court may set aside the default judgment if it is satisfied that the defendant:*
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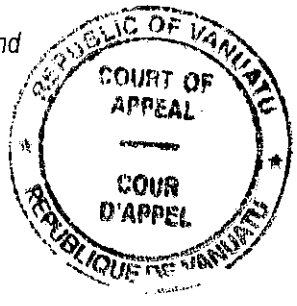
> *(a) has shown reasonable cause for not defending the claim; and*



(b) *has an arguable defence, either about his or her liability for the claim or about the amount of the claim.*

That rule applies because the judgment was on a counterclaim in the Supreme Court action.

4. The Appellants and their counsel wrongly asserted that they were entitled, at any time, to the orders sought, namely setting aside the default judgment against them on the counterclaim and the striking out of their claim, provided they could show an arguable defence to the counterclaim. As the material before the Supreme Court judge and on this appeal shows, the Appellants did not act in a timely manner to file and serve their defence to the counterclaim or to provide the evidence which they now produce in an endeavour to show a genuine dispute or a real prospect of succeeding to resist the counterclaim. They have not explained why they did not do so. The primary evidence they rely upon to show a genuine dispute or a reasonable prospect of defending the claim was obviously available to them at the time of the default judgment.

5. That is sufficient to dispose of the appeal. There is a discretion in the Court then to set aside a default judgment and to take into account all relevant matters in doing so. As discussed in *Wilfred v Westpac Banking Corporation* [2012] VUCA 31 at [paragraph 7] and in *Laho Ltd v QBE Insurance (Vanuatu) Ltd* [2003] VUCA 7, some of those discretionary factors include the reasons for not having presented the material at the appropriate time, the reasons for any delay then in seeking to set aside the default judgment, the prejudice to the other party or parties if the default judgment were set aside, and if there is an arguable case on the merits if the default judgment were to be set aside. There may be other relevant factors in any particular circumstances.

6. Underlying the Civil Procedure Rules, as its overriding objective indicates, is the just, and expeditious resolution of cases. One of the principal factors in the fair and just disposition of cases is to ensure, where appropriate, the finality of judgments properly obtained: see e.g. *Johnson v Gore Wood and Co.* [2002] 2 AC 1; and *D'Orta – Ekeniake v Victoria Legal Aid* [2005] 223 CLR 1; [2005] HCA 12. That principle underlies the emphasis upon the need to act promptly in the case of an application to set aside a default judgment because delay can itself constituted prejudice. More importantly, they illustrate that the proposition of the Appellants and their counsel that they are entitled to have a default judgment set aside at any time, provided they can show an arguable case or a reasonable prospect of a dispute being resolved the other way, is not correct. The finality of a judgment properly obtained is an important element in the just and speedy disposition of cases.

7. It is appropriate to describe the circumstances giving rise to this appeal to demonstrate that the Appellants did not act with due expedition in defending the counterclaim, or indeed in the period of time after they came aware of the judgment on the counterclaim.

8. The Respondent sold his Toyota truck to Pacco Siri (or the Appellants) and the uncle of Mr Siri on 20 October 2020. Mr Siri arranged a loan facility of VT2,300,000 and paid VT2,300,000 to the

Respondent. The Respondent delivered the truck but said he expected a further payment of VT700,000 by a final instalment.

9. There was a dispute about whether the price was VT3,000,000 or VT2,300,000, and therefore whether the additional VT700,000 was payable.

10. The Respondent subsequently repossessed the truck because he had not received the additional VT700,000. The Appellants then claimed in the Supreme Court for an order for the return of the truck, and as the result of an interlocutory application, it was returned to them in the custody of their uncle.

11. In the Supreme Court proceedings the Respondent, by counterclaim, then sought payment of the outstanding purchase price which was said to be VT700,000 plus interest and costs.

12. After the Appellants had failed to file any defence to the counterclaim despite case conferences on 2 July 2021 and 4 August 2021, the Respondent applied for summary judgment on his liquidated claim. The application was supported by his sworn statement of 20 July 2021. It came on for hearing on 28 August 2021, but was refused at that time. It was stood over to 20 September 2021 for further hearing.

13. On 20 September 2021, the Respondent obtained default judgment for VT700,000 and interest at 5% from the date of the contract, namely 22 October 2020, and costs of VT50,000. The Appellants had not filed any defence to the counterclaim, and they had not filed any sworn statements to show that it was resisted.

14. By that time the Appellants were clearly persistently in default of the Court directions and the Supreme Court rules. There was no explanation for that given then or at any subsequent time.

15. The Appellants then on 29 September 2021 applied to set aside the default judgment. They did not file any supporting sworn statements. They did not provide any proposed defence to the counterclaim. Their application came on for hearing on 12 October 2021. Not surprisingly, it was dismissed.

16. The Court notes, incidentally, that the Index to Appeal Book A is misleading. It says that the Appellants filed sworn statements in support of that application [see Index documents numbered 4 and 5] when those sworn statements were made well after the application to set aside was made, on 11 March 2022 and 27 May 2022.

17. The Appellants' next step was not for some months. On 22 March 2022 they applied again to set aside the default judgment. That was then supported by the sworn statements of Mr Siri just referred to. Those sworn statements related to establishing that the agreed purchase price was VT2,300,000. They did not explain why that evidentiary material was not presented at the proper time, namely

when the defence to the counterclaim was first due and they do not explain why there was no material filed in support of their application to set aside default judgment of 29 September 2021.

18. Their application was listed for hearing on 9 September 2022, and was adjourned to 24 October 2022. Before that hearing the Appellants also applied for leave to reinstate their claim by application of 16 September 2022, supported by a further sworn statement of Mr Siri of that date. That sworn statement acknowledges that their previous lawyer was not present when their claim was first struck out and judgment was given on the counterclaim. It does not follow to say (as Mr Siri does) that the Appellants had no chance to file a defence to the counterclaim. The Respondent's defence and counterclaim had been served on the Appellants and their lawyer had been present at the first directions hearing on 28 August 2021. They do not say that they were not aware of the counterclaim or of the several conferences before the default judgment, or explain why their defence to it was not filed.

19. This detail shows that the default judgment on the counterclaim was regularly obtained. The material could not have satisfied the judge hearing their application on 24 October 2022 that the Appellants had done all that was reasonable to provide a defence to the counterclaim and the evidentiary material in support of it. There is no significant explanation for why the application to set aside the default judgment made in September 2021 was not supported by relevant material. The evidentiary material to show a genuine dispute, or even a reasonable prospect of success if the matter were litigated, was clearly material available to the Appellants at all times.

20. In the circumstances, we are not persuaded that the judge who refused the applications the subject of the present appeal by the orders made on 24 October 2022 made an error. Indeed, in our view, those orders were correctly made.

ORDERS

1. The appeal is dismissed.

2. The Appellants are to pay to the Respondent costs of the appeal fixed at VT40,000.

DATED at Port Vila, this 19th day of May 2023

BY THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

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Hon. Justice J Mansfield