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

Civil Appeal
Case No. 22/2748 CoA/CIVA

BETWEEN: **Republic of Vanuatu**
First Appellant

AND: **VAN2017 Pacific Mini Games Organizing Committee**
Second Appellant

AND: **Moses Napuat T/A Watch Dog Security Services**
Respondent

Before:	***Hon. Justice J Hansen*** ***Hon. Justice R White*** ***Hon. Justice E Goldsbrough***
Appearances:	*F Samuel and N Robert for the Appellant* *J Ngwele for the Respondent*
Date of Hearing:	*13 February 2023*
Date of Judgment:	*17 February 2023*

JUDGMENT OF THE COURT

1. Moses Naupat, trading as Watch Dog Security Services sought payment for security services provided during the VAN2017 Pacific Mini Games from the Games Organising Committee and now seeks to recover that debt from the Republic of Vanuatu, the present Appellant.

2. In an earlier action in Civil Case 2321 of 2020 entitled *Moses Naupat v VAN2017 Pacific Mini Games Organising Committee*, he was successful. An order was made for the payment of VT 6,997,286 to him by the Second Appellant. As the Second Appellant had ceased to operate and had transferred VT 37 million surplus funds to the First Appellant and another – the Vanuatu Amateur Sports & National Olympic Committee (VASANOC), in this action he sought to recover the judgment debt from the First Appellant.

3. In the Court below the First Appellant raised in its defence the requirement of the service of a notice under section 6 of the State Proceedings Act as amended. The trial judge rejected that defence.

4. Pursuant to an order granting leave, the Appellants appeal the interlocutory decision made by the trial judge when he dismissed their application that the claim be struck out. The sole basis of the application to strike out was non-compliance with section 6 of the State Proceedings Act No 9 of 2007, as amended.

The Appeal

5. The present claim was filed on 12th July 2022 and the application to strike out on 12th August 2022. The Appellants did not file either a response or defence to the claim, only the application itself. That application was heard, and a decision was given, on 24th August 2022. Thus, the Appellants can show that the issue was raised at the earliest opportunity and before substantial costs had arisen in pursuing the claim.

6. The decision of the Court below was to dismiss the application.

Discussion

7. Section 3 of the State Proceedings Act makes provision for proceedings by or against the government. It provides that, subject to the Act itself, a proceeding may be instituted by or against the State.

8. Section 6 of the State Proceedings Act as amended then provides that: -

> *(1) No proceeding against the State, other than an urgent proceeding or a Constitutional proceeding, may be instituted under section 3 unless the party intending to do so first gives written notice to the State Law Office of such intention.*
>
> *(2) The notice under subsection (1) must:*
>
> *(a) include reasonable particulars of the factual circumstances upon which the proposed proceedings will be based; and*
>
> *(b) be given not less than 14 days and no more than 6 months prior to the institution of proceedings.*

9. It is admitted that notice was given to the Chambers of the Attorney General on 21st November 2021 and the claim was filed on 12 July 2022. That amounts to eight months after the notice of intention to commence proceedings and in contravention of the provisions of the amended section 6. Counsel for the Respondent concedes this but explained the late filing.

10. The explanation is submitted to be the general closure of many government offices during what can be described as the COVID-19 lockdown. Whilst one may have some sympathy with such a submission, the Supreme Court Registry did remain open to accept the filing of documents, albeit in a restricted way during COVID-19. Accordingly, there was no reason to fail to comply with the section 6 requirements.

11. Counsel conceded that there is no leeway given to either the Supreme Court or indeed this Court to extend time. He submits that this case may be distinguished from *Republic of Vanuatu v Sing* [2013] VUCA 35 wherein this Court said (*obiter)* at [19] that it appeared that the failure to give notice will operate as a complete prohibition to the commencement of proceedings against the State. Two things were different in *Sing:* no notice of intention to commence proceedings had been filed at all, unlike here, and the section 6 point was not taken at any time during the proceedings or, it appears, on appeal.

12. What section 6 does not provide is an answer to the question of whether, having once failed to give the required notice, a party may thereafter file the same claim again after ensuring the proper notice has been given. Counsel for the Appellant conceded that, subject to compliance with the Limitation Act, such a claim may be instituted in those circumstances and will not be met with a claim of *res judicata.* We accept this to be a correct concession given that the bar goes to the institution of process. If nothing has been properly instituted, there can be no bar to the subsequent but proper institution of the same.

13. In the circumstances of this case, the provision may achieve very little. That is not, however, a reason to dispense with compliance. The judge at first instance found that non-compliance was not fatal, comparing the situation to non-compliance with a rule of procedure. With respect, that is to compare two quite different provisions. Whilst it is generally accepted that rules of procedure should not be interpreted in a way which is obstructive to the attainment of justice in any particular case, a statutory prohibition must be observed.

14. Thus *Fujitsu (NZ) v International Business Solutions Limited & Ors* [1998] VUCA 13 as relied upon in the lower court should itself be distinguished. That appeal considered the application of procedural rules. It was not concerned with the application of a statutory requirement. Procedural rules, we agree, are aimed at advancing the speedy just and proper determination of a real dispute (*Michel v Public Service Commission* [1998] VUCA 15). Yet this is not a case where consideration of rules of procedure is required.

15. To the extent that the trial judge found the requirement an obstacle to dealing with the substance of the claimant's claim, we do not disagree. We do, however, regard the obligation imposed by the statute as absolute, in the same way as this Court arrived at that conclusion in *Sing.* It provides an absolute bar on proceedings being instituted under section 3, that is to say against the State unless notice has been given as required and within the required minimum and maximum periods of 14 days and 6 months

respectively. Counsel are well advised to bear in mind the provisions of the section and may consider filing a copy of the section 6 notice together with the originating claim to demonstrate compliance with the section.

16. Counsel for the Appellants acknowledged that the appeal did not take the original claim any closer to finality but sought a decision from this Court in clear and authoritative terms for future guidance. For that reason, counsel did not seek costs on the appeal.

Decision

17. The appeal is allowed and the decision to dismiss the application for strike out is set aside, as is the primary Judge's order for costs. The application for strike out is upheld and the claim filed on 12th July 2022 is hereby struck out. We make no order as to costs at first instance and no order for costs on the appeal.

DATED at Port Vila this 17th day of February, 2023

BY THE COURT

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Hon Justice Hansen J

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