

BETWEEN:

MALACHI TULA
Claimant(s)

C/o Public Solicitor's Office,
Luganville, Santo
Counsel

AND:

WILBUR BULE
RUBY BULE
Defendant(s)

C/o Molbaleh & Taiva Ltd, Luganville, Santo
Counsel

Date of hearing: 26.07.24
Before: Magistrate Toaliu
Appearance: Taleo. B of the Public Solicitor's
office for the claimant
Vohor. J for the defendants

DECISION AS TO APPLICATION TO SET ASIDE DEFAULT JUDGMENT

1. This is an application made pursuant to rule 9.5 of the Civil Procedure Rules to set aside a default judgement entered on 17th April 2023 in favour of the claimant.

Background

2. On 7th June 2021, the claimant filed a claim for unpaid labour provided to the defendants for the construction of a family home on Pentecost.
3. On 6th August 2021, Mr. Sakiusa Kalsakau filed a notice of beginning to act for the defendants.
4. Subsequently, the defendants filed a defence on 6th August 2021 and a reply was filed by the claimant on 28th February 2022.
5. The matter was scheduled for trial on April 17, 2023. On this date, the defendants failed to appear, while the claimant and their witnesses were present in court. The court determined that the defendants had been given ample opportunity to prepare and present their defense but had consistently failed to attend multiple court hearings leading up to the trial. As a result, a default judgment was issued against the defendants.

Discussion

6. The starting point is rule 9.5 of the CPR which provides as follows:
 - (1) *A defendant against whom a default 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.*
7. Rule 9.5 (3) of the CPR contains two criteria that the Court is to be satisfied of however as stated by the Court of Appeal in *ANZ Bank (Vanuatu) Ltd v Dinh* [2005] VUCA 3:
If there were a case where an unanswerable defence was demonstrated, but reasonable cause was not demonstrated, the rules would permit the default judgment to be set aside, but not for the reasons advanced by counsel for the Respondent. The purpose of the rules is to further the administration of justice. The rules should not be applied so as to cause or perpetuate injustice. In the extreme case postulated, the answer would lie in the application of rule 18.10 which deals with failure to comply with the rules, applied in light of Overriding Object 1.2(1), namely that the overriding objectives of the rules is to enable the courts to deal with cases justly.
(my emphasis)
8. Justice Harrop applied the approach outlined by the Court of Appeal in *ANZ Bank v Dinh* in *Mandel v Makin* [2015] VUSC 20.
9. Rule 1.2(1) of the CPR provides as follows:

1.2 (1) *The overriding objective of these Rules is to enable the courts to deal with cases justly.*
10. Rule 18.10 of the CPR provides as follows:

18.10 (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 a step taken to be ineffectual; or*
 - (d) *declare a document or a 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.*

(3) If a written application is made for an order under this rule, it must set out details of the failure to comply with these Rules.

11. The defendants attributed their failure to adequately defend the claim to the fact that their counsel did not attend scheduled conferences. Additionally, they claimed ignorance of the matter being transferred to Luganville, Santo for trial and were unaware of the trial date.
12. In my opinion, the defendants' claims of unawareness regarding the trial date and the transfer of the matter to Luganville, Santo, do not constitute a reasonable excuse for their failure to defend the claim. Although Mr. Kalsakau filed a notice of 'Beginning to Act' for them on June 28, 2021, the defendants contend they were unaware of the trial scheduled for April 17, 2023, due to poor network coverage caused by Cyclones Judy and Kevin. They also allege that Mr. Kalsakau failed to attend court conferences during this period, which lasted over a year before the twin cyclones caused the poor network coverage. Having engaged legal counsel, it was the defendants' responsibility to actively follow up with their counsel and stay informed about the progress of their case. If the defendants were genuinely committed to presenting a valid defense, they would have taken appropriate steps to ensure they were aware of all developments and proceedings. They have not provided evidence of any such attempts to stay informed or contact their counsel. Therefore, I am not convinced that the defendants have demonstrated a reasonable cause for failing to properly defend the claim.
13. Mr. Tula's case is that the defendants have failed to compensate him as promised for the work he has carried out for them on Pentecost in 2021.
14. The defendants' defence was that there was no contract between the defendants and the claimant for the construction of the family house on Pentecost. Furthermore, they deny that the cost of labour on the building amounts to VT532,000. It is an arguable defence.
15. Standing back and considering both limbs of Rules 9.5(3), 1.2(1), and 18.10 of the CPR, I find that the interests of justice necessitate the setting aside of the Default Judgment. Although the defendants have not provided a reasonable cause for their failure to advance their defense, they do present an arguable defense. As observed by the Court of Appeal in *ANZ Bank v Dinh*, Rule 18.10 may be applied to address the defendants' failure to defend the claim properly. This rule should be applied in light of the CPR's overriding objective to allow the Court to adjudicate cases justly. I am convinced that the defendants have an arguable defense and that both parties should be afforded their day in court rather than have the matter knocked out on procedural grounds alone. Therefore, I believe that failing to set aside the Default Judgment would result in an injustice.
16. For the reasons given, I am satisfied having regard to all the circumstances of the case that the Default Judgment should be set aside.

Result and decision

17. The Defendant's Application to Set Aside Default Judgment filed on 14 June 2024 is **granted** and it is ordered that the Default Judgment dated 17 April 2023 is **set aside**.
18. I make no order for costs and they are to lie where they have fallen

DATED at Port Vila on this 31st day of July 2024

BY THE COURT

A handwritten signature in black ink, appearing to read "P. Tealin". The signature is written in a cursive style with a small flourish at the end.A decorative handwritten flourish consisting of two curved lines that sweep upwards and then downwards, framing the text below.

MAGISTRATE