

4. The appeal has been listed for hearing on 13 August 2008 at 8.00AM o'clock. No parties appeared on the said date and time. The appeal was re-listed for hearing on 22 August 2008 at 9.00AM o'clock. The Appellant nor his counsel attend the hearing today 22 August 2008 at 9.00AM o'clock. There is no information provided by the Appellant nor his counsel as to the progress of the appeal.

5. The appeal is made on two (2) following grounds:
 - (1) The learned Magistrate failed to exercise any discretion to adjourn the hearing given the request for the adjournment by the Appellant's solicitors.
 - (2) In entertaining the hearing to proceed when counsel for the Respondent had no right of audience in court to litigate the matter given that he was not admitted to appear in court.

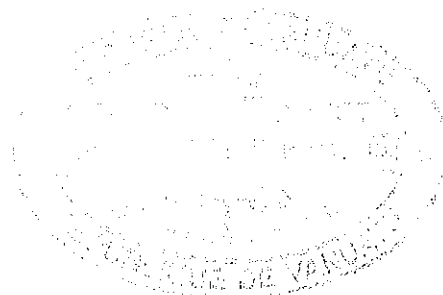
6. The Court proceeds with the hearing of this appeal on the record of the Magistrate's Court pursuant to Section 30(2)(a) of the Judicial Services and Courts Act [CAP.270].

7. The following transpired from the record of the Magistrate's Court file in Magistrate's Court Civil Case No.160 of 2006 in which the decision made is under challenge:
 - On 6 July 2006, the Respondent filed a Magistrate's Court claim in CC No.160 of 2006 against the Appellants.
 - The Claimant claimed for:
 - (1) An order for loss of business at Vatu 340,000;
 - (2) Damages for Palms and Plants at Vatu 100,000.
 - On 6 July 2006, the Respondents also filed an Urgent Application seeking for restraining orders against the Appellants, among other matters, from

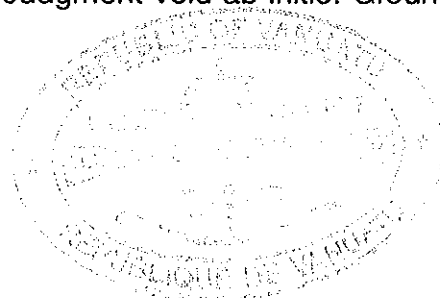


threatening and assaulting the Respondent and the staff of Leneai Palms Resort.

- The Magistrate's Court heard the Urgent Application and issued restraining Orders in the terms sought on 6 July 2006.
 - On 22 January 2007, the Appellants filed an Urgent Application seeking an order to set aside the Magistrate's Court Orders of 6 July 2006.
 - On 20 February 2007, the Magistrate's Court issued Direction Orders directing the Appellants to continue observing the restraining Orders of 6 July 2006 and keep peace until the Court dealt with the substantive claim and adjourned the matter to 2nd April 2007 at 9.00AM o'clock.
 - On 2nd April 2007, the Magistrate's Court struck out the Urgent Application of the Appellants seeking to set aside Orders of 6 July 2006.
8. It is noted in the notes of the Presiding learned Magistrate that Mr Ronald Warsal, counsel for the Appellant was not attending the hearing. Only Appellant Sam Natonga was present and others were not.
9. Mr Sam Natonga informed the Magistrate's Court that his lawyer sent him a facsimile note advising that he will not attend the Court although the Appellants and their lawyer were aware of the date and time of the hearing of their Urgent Application to set aside the Orders of 6 July 2006 as noted in the Magistrate's Court file record.
10. On 2nd April 2007, the Magistrate's Court, upon submissions made by Mr Kapalu on behalf of the Respondent, on the basis of the Respondent's request for default judgment on the Respondent's claim filed and served on the Appellants on 5 February 2007 as evidenced by the sworn statement of service of one Savi Jeffery of Pacific Lawyers filed to this effect, the Magistrate's Court issued a Default Judgment in favour of the Respondent which is now under appeal.



11. I have perused the Magistrate's Court file record of this case, I do not find any basis in law in which the learned Magistrate erred in law in the exercise of her discretion when she refused to adjourn the hearing of the Urgent Application of the Appellants filed 22 January 2007. The failure of a lawyer to represent his client in Court on the date and time set for hearing, is not a ground of appeal in itself. The First ground of appeal is dismissed.
12. As to the second ground of the appeal, it is advanced on the basis that Mr Kapalu has no right of audience before the Court when Mr Kapalu appeared before the Magistrate's Court on behalf of the Respondent (then Claimant) and had successfully obtained the Default Judgment on 2nd April 2007 which is now under challenge. The Magistrate's Court file record confirmed that on 2 April 2007, Mr Kapalu appeared for the Respondent and that the Respondent attended also the hearing before the Magistrate's Court. The complaint in the second ground of appeal, cannot be an appeal ground per se. Even if it is substantiated, it is difficult to apprehend how it could lead to an allowance of the appeal. The basis of the default judgment is that the Appellants (as then Defendants in the Magistrate's Court claim) failed to file a response or a defence within the period allowed by the Civil Procedure Rules 2002. The perusal of the file record of the Magistrate's Court claim in Civil Case No.160 of 2006, shows that there is no response or defence filed within 14 days or 28 days respectively in accordance with Rules 4.13 of the Civil Procedure Rules 2002. The Learned Magistrate had properly and correctly exercised her discretion when she issued the Default Judgment dated 2 April 2007. The complaint raised in the second ground, if substantiated, has to be raised before the appropriate forum. This is so because whatever remedy sought against a person who is not admitted to practice law is a remedy against that person and so has nothing to do with the failure of the Appellants to comply with the provisions of the Civil Procedure Rules in their defence to the Magistrate's Court claim in CC No.160 of 2006. The complaint, if substantiated, cannot render the Default Judgment void ab initio. Ground 2 of the appeal is also dismissed.



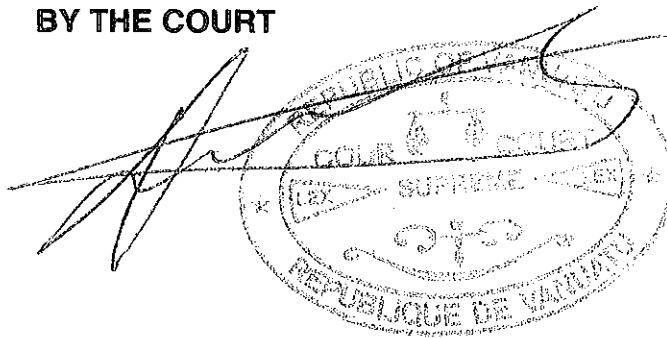
13. It follows then that the appeal must be dismissed.

ORDER

1. The appeal is dismissed.
2. The decision of the Magistrate's Court dated 2 April 2007 is hereby upheld.
3. There is no Order as to costs.

DATED at Port-Vila this 22nd day of August 2008

BY THE COURT



**Vincent LUNABEK
Chief Justice**