IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 124 of 2012

BETWEEN: JENNECK SAMUEL PATUNVANU
Claimant

AND: THE REPUBLIC OF VANUATU
Defendant

Hearing: ***15 January 2013***

Before: ***Justice Robert Spear***

Appearances: ***Kiel Loughman for the claimant***
Florence Williams Reur (SLO) for the Defendant

Decision: ***17 January 2013***

JUDGMENT OF THE COURT

Application to set aside Default Judgment

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1. The claimant Jenneck Samuel Patunvanu sued the Republic of Vanuatu for an amount of Vt 6,625,000 for his specialist services incidental to the design, engineering and construction of 2 marine vessels being built for the Republic. The total amount that the claimant invoiced the Republic was Vt 11,620,000 and the claim recognised a payment made by the Republic in December 2010 of Vt 4,995,000.

2. Judgment by default was entered for the claimant on 19 November 2012 in the sum of Vt 6,625,000 together with interest and costs. The Republic now applies to set aside that judgment. The application is opposed.

3. The application to set aside the default judgment was filed on 18 December 2012 which was the date set aside for an enforcement conference.

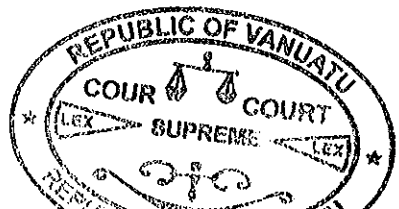
4. The application to set aside the default judgment is supported by a sworn statement from Ms Williams of Counsel who did not appear at that conference on 18 December 2012. Ms Williams appears today principally because Mr Godden (State Counsel who appeared on 18 December 2012) is not apparently available. Mr Loughman indicated that he did not wish to cross examine Ms Williams on her sworn statement and that he had no objection to her appearing as counsel on this matter. While somewhat irregular, I am satisfied that in all the circumstances of this case there can be some relaxation of the usual rule that counsel cannot be both counsel and witness. I notice that the submissions for the Republic dated 11 January 2013 were signed by Ms Williams and it is clear that she has a detailed understanding of this matter. Indeed, Ms Williams stated in her sworn statement that she had been, *"allocated to manage (this) litigation file"*.

5. There is no question but that the default judgment was properly entered. Notice was given on 8 November 2011to the State Law Office of Mr Patunvanu's intention to commence proceedings against the Republic. Correspondence between the claimant's solicitor and the State Law Office then followed over a period of months. When it became apparent that the Republic would not be making the payment, this claim was commenced on 23 July 2012 and served by delivery to the State Law Office on 25 July 2012.

6. The State Law Office did not file a response nor did it file a defence within the time periods required. In short, no steps were taken by or on behalf of the Republic in respect of the claim.

7. I should note that Ms Williams, in her sworn statement (paragraph 4), states that the State Law Office filed a response after it was served with the claim. There is no record of such a response having been filed. Certainly, no response form is on the court file. The filing record kept by the Registrar does not disclose the filing of such a response in either July or August 2012. However, whether or not a response was filed is of no particular significance as a defence was never filed.

8. A sworn statement as to service of the claim was filed on 23 August 2012 and a request for the entry of a default judgment was made on 7 September 2012. In her written submissions, Ms Williams appears to take issue as to whether the request for default judgment was correctly in form 12 and specifically states that *"the claimant failed to file an application"*.



9. However, a request for default judgment in the required form was indeed filed on 7 September 2012 which information would have been available to the State Law Office if it had filed a response or a defence.

10. As the requirments of CPR 9.1 and 9.2 were met, judgment for that fixed amount was duly entered on 19 November 2012.

11. Ms Williams (again in her written submissions) refered to a decision of the Court of Appeal[1] as authority for the following proposition - *"... that all but routine application should be made upon written notice to avoid surprise, adjournment, and delay"*. However, that case involved a proceeding where the defendant had filed a defence and he was accordingly entitled to notice of any step taken in the case.

12. The default judgment provisions of the Civil Procedure Rules are designed to address the situation where a defendant, properly served with a claim, has not taken the steps required to first file a response and then a defence within the respective and specified time periods. As such, there was no obligation on the claimant to give the Repulic notice that it had requested judgment to be entered by default. Be that as it may, the request was dealt with on 19 November 2012 at a conference attended not only by Mr Loughman for the claimant but also by State Counsel who appeared for the defendant. At that time, Mr Obed for the Republic sought time to file a defence but indicated that he was having difficulty obtaining instructions. Mr Obed was unable to assist the Court as to what form the defence would take. Having regard to Ms Williams' evidence, it appears that it was not until default judgment was entered that State Counsel received any assistance from the Government officials and officers.

13. The hearing of this application to set aside the default judgment proceeded with the benefit of the following evidence:-

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[1] *Duduni v Vatu [2003] VUCA 15; Civil Appeal Case 28 of 2003 (30 October 2003)*

a) The sworn statement of the claimant of 23 August 2012 (filed before the entry of default judgment);

b) The sworn statement of Ms Williams of 18 December 2012;

c) The further sworn statement of the claimant of 9 January 2013.

14. There was no cross-examination of the witnesses.

15. An application to set aside the default judgment is to be considered under CPR 9.5

9.5 Setting aside default judgment

(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.

(4) At the hearing of the application, the court must:

a. give directions about the filing of the defence and other statements of the case; and

b. make an order about the payment of the costs incurred to date; and

c. consider whether an order for security for costs should be made; and

d. make any other order necessary for the proper progress of the proceeding.

(5) *These Rules apply to the proceeding as if it were a contested proceeding. (emphasis added)*

16. The Republic complied with the requirements under CPR 9.5(2) and the issue now is whether the Court is satisfied both that the Republic has shown reasonable course for not defending the claim (CPR 9.5 (3)(a)) and that the Republic has an arguable defence (CPR 9.5 (3)(b)).

17. The written submissions presented by Ms Williams mis-state rule 9.5 (3). The extract of the rules found in the submissions is that, *"the Court must set aside the default judgment if it is satisfied...."* Whereas the rules actually read *"the Court may set aside the default judgment if it is satisfied...."(underlineation added).* Accordingly, the relief is within the discretion of the court.

Reasonable cause for not defending

18. The first consideration is whether the Republic (in the case) has shown reasonable course for not defending the claim; that is, whether the Republic has satisfied the Court that its explanation as to why it did not file a response within 14 days of service and/or a defence within 28 days of service is reasonable in all the circumstances.

19. The short position that emerges from both Ms Williams' submissions and from her sworn statement is that the Attorney General was unable to obtain assistance from the relevant Government officials involved in this case. It appears, accoridingly, that this is why no steps were taken by the Republic in respect of the claim served on 25 July 2012. Ms Williams acknowledged in her evidence that State Law received the claim on 25 July 2012, that *"the State Law Office wrote to its clients seeking instructions and also filed a response" but received no response to that letter."* Indeed, Ms Williams' states further in her evidence that most of the information about the claim emerge from the claimant's sworn statement filed on 23 August 2012.

20. While an explanation has been provided as to why no defence was filed, I am far from satisfied that that explanation is reasonable. It appears that State Law received assistance

about this matter from Government officials only after the default judgment had been entered.

21. There appears to be a fundumental misunderstanding of the role of the State Law Office and necessarily the Attorney General particularly when reference is made by State Counsel to their, "clients". Regrettably, this misunderstanding has emerged time and time again in proceedings involving the Republic including one occasion when the Attorney General gave notice that he had ceased to act for the Republic.

22. The *State Law Office Act* No 4 of 1998 provides for the establishment of the State Law Office as well as the appointment of an Attorney General as the principal legal officer of the Republic who is also the head of the State law Office. The Act makes it clear that the Attorney General and the State law Office can act only for the Republic in its various divisions and indeed that is one of its two its principal function.

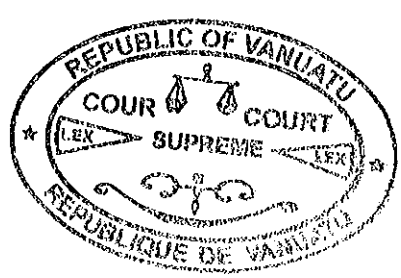
23. The Attorney General (and by extension, the State Law Office) is required to act independently in relation to the representation of the Government as emphasised by s. 21 of the Act

INTERFERENCE WITH ATTORNEY-GENERAL AND OFFICE PROHIBITED

21. The President, Government and all other persons whether in the Public Service or otherwise must not interfere or attempt to interfere in the performance and independence of the Attorney-General and the Office.

24. The State Law Office Act provides a quite conventional approach to the establishment of an independent principal law officer and a state law office broadly replicated in similar legislation in other countries.

25. What Ms Williams is really saying is that the work of the Attorney General (and thus the State Law Office) in this case was frustrated by the failure on the part of Governement to provide any proper response to the Attorney General's requests for information about this matter. That failure should never have been permitted to occur by the Attorney General as it exposed the Republic to risk.



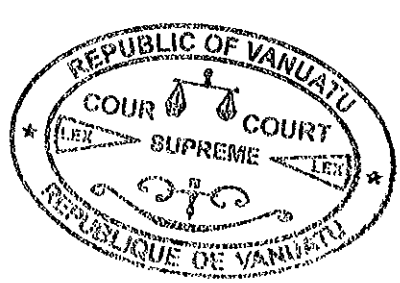
26. Given the matters that Ms Williams now wishes to advance by way of a defence, it appears that there have been decisions made by Ministers, including the Prime Minister, in respect of this matter including Ministers entering into two separate deed of release. That notwithstanding, Ms Williams would have me accept (as did Mr Obed previously) that the Attorney General felt that he/she had no ability to ascertain the background to those decisions and the claim in general so that the position of the Republic could be safeguarded. If that is so, it identifies a serious disconnection within the governmental structure of this country bordering on dysfunction.

27. I do not consider that the Republic had reasonable cause for not filing a defence. Certainly, the evidence filed in support of the application to set aside default judgment does nothing more than identify at least a "communication/relationship difficulty" between the Attorney General / State Law Office and other Government officers and officials. How can such an extraordinary state of affairs form the basis of a reasonable excuse by the Republic for not taking the steps required by its own rules of civil procedure?

Arguable defence

28. The second consideration is whether the Court is satisfied that the defendant has an arguable defence. Ms Williams' evidence is that on 17 December 2012, the Director of Finance and the Director General of Finance attended the State Law Office and provided information which the Republic now wishes to apply as the basis of a defence.

29. Ms Williams had earlier applied for the hearing to be adjourned so that further evidence could be filed. Ms Williams indicated at the hearing that a sworn statement had been prepared for Mr Natapei who was a Minister involved in this particular matter at an earlier stage. I declined to adjourn the hearing essentially because it was to provide evidence that should have been filed with the application. Additionally, if there was to be further evidence filed in support of the application then the Court should have been informed of this before it set the hearing for today. The fixture for today was fixed in consultation with counsel appearing at the conference on 18 December 2012 and to recognise that this date provided an opportunity for the prompt hearing of the application.



30. Ms Williams outlined the basis of the defence which is essentially that the Republic does not accept that the claimant carried out the work he states he did and on which his invoice is based. There appears to have been some public clamour by one Api Toara to the effect that he carried out all the design and consultation work in respect of the 2 ships. That does not however contradict the abundent evidence adduced by the claimant that he was actively involved in this process at the request of Government officials and of course there is supporting evidence produced by him confirming that he was engaged by the Government in that respect on more than one occasion. Whether the claimant's work was eventually seen as of assistance to the design and construction of the 2 ships is another matter and likely immaterial.

31. What the claimant states in detail is that he carried out work in respect of the proposed ships at the request of the Government and that this involved 2 trips to China with Government officials.

32. THe claimant's evidence is not inconsistent with the indicated defence. There is the distinct possibility that the Government eventually decided to accept the design work and recommendations of Mr Toara rather than the claimant but of course that does not lessen the liability of the Government/Republic to pay a reasonable charge for the claimant's services.

33. Even more curious is the fact that the claim was supported by a deed of release executed by the relevant Minister. It appears that it was only after the Prime Minister (of the time) intervened to stop the payment of the balance of Vt 6,625,000 that this dispute arose.

34. One further matter raised by Ms Williams in her evidence is a letter sent by the claimant to the Minister of Finance on 22 December 2010 which appears to compromise his claim to an amount of Vt 4,995,000. As an answer to that, the claimant states *"that document dated 22 December 2010 was addressed to the Minister of Finance .... The Minister of Finance and the Ministry of Finance were aware of it but agreed to settle my claim"*.

35. The only basis for the intended defence (as explained) could be that the claimant has lied about his involvement in respect of the 2 ships and thus there is no factual basis for his charges. If so, then his sworn evidence should be referred to the police for consideration of a charge of perjury.

36. However, dealing with the evidence before me today, there is nothing to suggest that the claimant has lied or overstated his involvement with the planning for the design and construction of the ships. In respect of the letter of 22 December 2010, that is presented for the Republic as an indication of a compromise of claim. The claimant has provided a somewhat brief explanation to the effect that it was agreed with the Minister of Finance and officials at the Ministry of Finance that this should not be treated as a compromise of claim. Again, if the claimant has attempted to mislead the Court in that respect then that is a matter that should also be investigated further by the prper authorities.

Conclusion

37. The Court is required to consider this application to set aside the default judgment on the basis of the evidence that has been filed. It must do so recognising that the overriding interests of justice are directed towards ensuring that disputes between parties should be determined at a substantive hearing if not settled.

38. The default judgment procedures are, however, necessary to ensure that cases which are not defended or defendable are able to be dealt with swiftly. CPR 9.5 (3) establishes the test that the Court is required to apply when considering whether to set aside a default judgment. In this case, the Court is not satisfied that the Republic has shown either reasonable cause for not defending the claim and the Court is furthermore not satisfied that the Republic has shown that it has an arguable defence. In those circumstances, the application is declined.

39. The judgment sum is required to be paid within 14 days.

BY THE COURT

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