

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

Civil Case No. 131 of 2015

BETWEEN: HUHU GAITUVWA ASSOCIATION COMMITTEE INC

Claimant

AND: NATIONAL BANK OF VANUATU

First Defendant

AND: ROSEMARY LEONA SPRIGGS

Second Defendant

AND: RICHARD LEONA

Third Defendant

AND: DERICK LEONA

Fourth Defendant

Coram: *Justice Saksak*

Counsel: *Mary Grace Nari for the Claimant
Colin B. Leo for the Second, Third & Fourth Defendants
Abel Kalmet for the First Defendant*

Hearing: *20th April 2016*

Decision: *22nd April 2016*

DECISION

1. The application by the Second, Third and Fourth Defendants herein for an order setting aside the default judgment issued by the Court on 11th October 2015 fails in part and succeeds in part.
2. The Order to set aside the default judgment is declined.



3. The Order to remit the matter back to the Annual General Meeting of the Claimant Association (AGM) is granted.
4. There is no order as to costs as costs will follow the event.

REASONS

5.1. The first issue: Whether or not there was service of the claims on the Second, Third and Fourth Defendants?

5.2. Rene Titi's evidence by sworn statement dated 16th September 2015 confirms service of the Supreme Court Claim on Colin Leo Lawyers on 19th August 2015. That was sufficient service on the Second, Third and Fourth Defendants. These Defendants are close relatives and members of the same family. At some point in time the claim was known to them. If it were not, it could not have been possible for Dr. Richard Leona (Third Defendant) to annex it to his sworn statement of 23rd December 2015. The Second Defendant was served personally with the sworn statements of Ben Savina, Esen Benoa, Rene Titi and Joseph Lagoiala on 14th September 2015 by Edwet Solomon. Proof of Service was filed on 14th September 2015. Ms Spriggs is well educated and there can be no excuse for her not knowing what these documents were all about and for her failing or omitting to do anything about them.

5.3. Keithson Liu served copies of the Urgent Application for Default Judgment on Colin Leo Lawyers on 16th September 2015 and filed proof of service on 21st September 2015. Colin Leo Lawyers were counsel representing these three defendants as Huhu Gaituvwa Association Committee Inc (HGA) in Civil Appeal Case 24 of 2015 and the original proceedings in the Supreme Court as Civil Case 31 of 2015. After the appeal decision the positions were reversed. Mr Leo's clients became the defendants in the current proceeding. The parties remain the same and it appears the issues are the same. That being the case, it could hardly be said that Colin Leo Lawyers were not representing those three defendants in this current proceeding at its initial stages of service.



5.4.Those arguments are therefore rejected. This issue is therefore answered in the affirmative.

6.1.The Second issue: Whether or not the tests in Rule 9.5(3) have been made by the Second, Third and Fourth Defendants?

Rule 9.5(3) states

*“The Court may set aside the Default Judgment if it is satisfied that the defendant:
(a) has an arguable defence, either about his or her ability for the claim or about the amount of the claim.”*

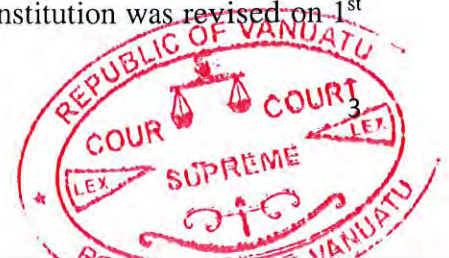
6.2.The three defendants rely on the File Note (“*RL1*”) dated 26th August 2015 and the Minute (“*RL2*”) dated 3rd September 2015 to submit that they had met the test in Rule 9.5(3)(a). Mr Leo of counsel for the three defendants wrote the Note. Counsel had service of the claims from 19th August, 2015. No defences were filed since that date and there is no evidence that any instructions were sought and given in relation to a defence.

6.3.The Minute dated 3rd September 2015 is of no relevance and assistance. Whilst it records the parties agreement to resolve the matter out of Court there is no evidence showing any consent order signed to that effect. Further, the Minute does not record any agreement as to who would arrange for the proposed meeting to eventuate.

6.4.For the foregoing reasons the Court concludes that the three defendants have failed the test in Rule 9.5(2)(a) by not showing any reasonable cause for not defending the claims of the claimant.

7. The other limb of this second issue is whether the three defendants have an arguable defence?

7.1.The draft defence is annexed as “*RL4*” to the statement of Dr. Leona filed on 12th April 2016. It is not filed. In their defence the defendants raised matters based on the former Constitution (“*RL7*”) dated 9th January 2006. Under the 2006 Constitution HGA was a charitable association but was not registered as such. The Constitution was revised on 1st



April 2015. It has become much shorter than the 2006 document. And it has been registered with the Vanuatu Financial Services Commission. This Constitution is annexed as “RTI” to the sworn evidence of Rene Titi dated 23rd September 2015.

7.2. The defence of the three defendants pleads at paragraph 6 that Derek Leona, Fourth Defendant is still the lawful chairperson of the executive Committee of HGA. However the Court of Appeal in Civil Appeal Case 24 of 2015 recorded at paragraph 2 of its judgment dated 20th November 2015 as follows:

“Derek Leona is the former chairman of the executive council of the Appellant. At a meeting on 14th September 2014, the supreme body of the appellant, the Togotogon Vanua (“TV”) terminated Mr Leona’s application.”

7.3. For the foregoing reasons, the three defendants do not have an arguable defence.

8. The third issue: Whether or not the claimants’ claims were for a fixed amount to entitle the claimants to request a default judgment under Rule 9.2?

8.1. The Supreme Court Claim filed on 18th August 2015 is indeed for a fixed sum of VT113,563,035. However in the reliefs the claimant claims for “*An order for damages to be assessed by the Court.*” The earlier reliefs sought are declaratory in nature. As such Mr Leo argued that the Claimants could not obtain default judgment under Rule 9.2. The Court disagrees with Mr Leo. In Rory v. Westpac Banking Corporation Civil Appeal Case 25 of 2012 the Court of Appeal said this in paragraph 12 of its judgment:

“On a plain reading the claimant is authorized to initiate a proceeding under rule 9.1 but, arguably the Court is authorized to grant relief in 2 specific circumstances covered in Rules 9.2 and 9.3.”

8.2. Where therefore as in this case, the claim was for a fixed amount but with an order that the amount be assessed, the Court is authorized to issue a default judgment under Rule 9.2 and 9.3.

The answer to this issue is therefore in the affirmative.



9. The fourth issue: Whether or not this matter should be remitted to the AGM (Annual General Meeting) for resolution?

9.1.If the File Note (“*RL1*”) and the Minute (“*RL2*”) reflect the true intentions and desires of the parties, then the Court should give them the opportunity to do so, after all the Claimant Association (HGA) is owned by the people and it is the people who should be better-placed to decide, according to its constitution and internal rules or bye-laws.

9.2.It is in that regard that it is appropriate and just to suspend the assessment of the claimant’s claim and remit the matter back to the AGM but subject to the following conditions:

- (a) Both the claimant and the three defendants be required to work together to arrange for an AGM with the current executive Council, the Committee and Togotogon Vanua.
- (b) Both the claimants and the three defendants be required to make themselves available at the AGM at their own costs.
- (c) The AGM shall be held within 3 months from the date hereof.
- (d) Both parties shall file a joint memorandum with the Court informing the Court of the outcome of the AGM.
- (e) The matter be returnable for review on 22nd July 2016 at 0900 hours.

The Bank’s position

10. The Court accepts the submissions by Mr Kalmet that the claimant’s claims do not show any cause of action against the first defendant Bank. As such it is necessary to remove the Bank as the first defendant and party to this proceeding. There will be order as to costs. As between the claimants and the remaining defendants, costs will remain in the cause.



Case Authorities

11. Mr Leo based his submissions and reliance on the following cases: Republic v. Kwang Sing 1 [2013] VUCA 35; LMC v. Garu [1999] VUCA 8; LMC v. Johnny Saksak [2012] VUCA 28 and ANZ Bank (Vanuatu) Ltd v. Dinh [2005] VUCA 3. Those cases are distinguished on their facts and circumstances. While these cases contain clear principles regarding issuance of default judgments, they are not of any assistance to the defendants in this case.

DATED at Port Vila this 22nd day of April, 2016.

BY THE COURT



Judge