

**BETWEEN: BAMBOO FAMILY**  
**Appellant**

**AND: DUNSTAN HILTON**  
**Respondent**

**Coram:** *Hon. Chief Justice Vincent Lunabek*  
*Hon. Justice John Mansfield*  
*Hon. Justice Ronald Young*  
*Hon. Justice Oliver Saksak*  
*Hon. Justice Mary Sey*  
*Hon. Justice Paul Geoghegan*

**Counsel:** *Mr Saling Stephens for appellant*  
*Mr Leon Malantugun for respondent*

**Date of Hearing:** *4<sup>th</sup> April 2017*

**Date of Judgment:** *7<sup>th</sup> April 2017*

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## **JUDGMENT**

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### **Introduction**

1. On 13 October 2016 the Supreme Court sat on Gaua Island, Torba Province for the trial hearing of Civil Case 14/354 between Dunstan Hilton, Claimant now the respondent and Family Bamboo, Defendant now the appellant.
2. On 12 October, 2016 one day before trial Mr Stephens, counsel for Family Bamboo, informed the Judge's associate by telephone that he wanted an adjournment of the trial hearing due to his difficulty

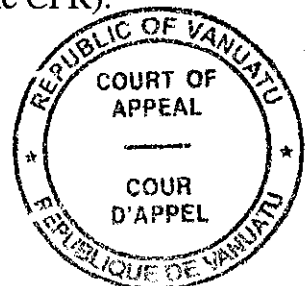


contacting his clients on 10 October, 2016. The request was declined by the judge and the judge's associate replied to Mr Stephens by email. In that email Mr Stephens was advised *"If neither you nor your clients attend then and (sic) order for costs will be made against you personally. The costs will include any airfares incurred by the Claimant and or his witnesses and counsel. That order will be followed by an enforcement notice."*

3. Mr Stephens did not attend the trial hearing and the judge issued a Minute recording the position and awarded substantial costs totalling VT700.000 against Mr Stephens and his clients. The judge arrived at the figure VT700.000 by allowing flight costs in the sum of VT560,000, VT120,000 for accommodation and incidentals, and VT20,000 in legal costs. Mr Stephens was ordered to pay half of the costs in the sum of VT350,000 personally and his clients were to pay the other VT350,000. These were costs thrown away for the trial date.

### **The Appeal and Grounds**

4. Mr Stephens appeals against the Order of the Supreme Court on grounds that the primary Judge –
  - (a) in refusing an adjournment had failed to take account of the fact that there were only three flights per week to Gaua Island.
  - (b) had failed to dispose of the proceeding pursuant to rule 12.9(1) of the Civil Procedure Rules No. 49 of 2002 (the CPR).



(c) had erred in awarding VT700,000 as costs thrown away for an attendance of about 30 minutes and that that sum was extravagantly greater than could reasonably be expected in the circumstances.

(d) had failed to observe and to apply rule 15.26(3) and rule 15.27 of the CPR by awarding VT350,000 against counsel in his absence.

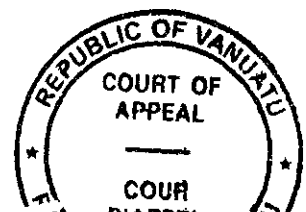
(e) had awarded the costs of VT700,000 without any basis; and

(f) had erred in allowing the proceeding to continue without merit.

### **Consideration**

5. In relation to the Ground (a), it was submitted by Mr Stephens that because of financial difficulties faced by his clients and the limited flights to Gaua the primary Judge should have granted the adjournment. The Minute dated 13 October 2016 records at paragraph 4 that indeed the case was adjourned to 4<sup>th</sup> November 2016. In a further Minute dated 21 November 2016 the case has been adjourned by the primary Judge to 21 April 2017 for a trial preparation conference and provisionally for a trial in Luganville from 31 May 2017. This ground of appeal is therefore misconceived and is dismissed.

6. In relation to the Ground (b), Mr Stephens submitted that the primary Judge should have disposed of the case under the provision of rule 12.9(1) of the CPR. Counsel argued that failure by the Judge to do so constituted a denial of the appellant's right to a fair hearing.



Rule 12.9(1) provides for a circumstance where a defendant fails to attend trial. It states:

“(1) If a defendant does not attend when the trial starts:

(a) the court may adjourn the proceeding to a date it fixes;

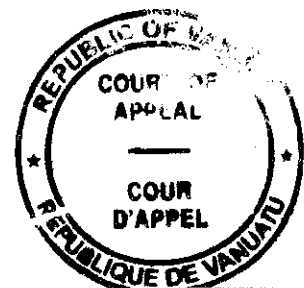
or

(b) the court may give judgment for the claimant; or

(c) the claimant, with the permission of the Court, may call evidence to establish that he or she is entitled to judgment against the defendant.”

7. The Minutes issued by the Court on 13 October and 21 November 2016 respectively indicate the Judge had adjourned the case. We are satisfied the judge had exercised his discretion correctly under rule 12.9(1)(a). We reject counsel’s submission there was any denial of the appellant’s right to a fair trial and this ground of appeal therefore fails.

8. In relation to the Ground (c), Mr Stephens submitted the award of costs thrown away at VT700.000 for a 30 minutes conference hearing was extravagantly greater than is reasonably expected. Counsel argued that only the respondent was present on that date as a witness. Mr Malangtugun conceded there were no documents provided to the judge to assist him to assess and fix the costs. Under the circumstance we agree the judge was wrong to simply order costs of VT700,000 without knowing actual costs. The appropriate order which we make is that the respondent is entitled to wasted



costs on the adjournment, however, those claimed costs are to be taxed. Therefore the appeal succeeds on this ground.

9. In relation to the Ground (d), Mr Stephens relied on rule 15.26(3) of the CPR that states:

*“The Court must not make an order for costs against a lawyer personally without an opportunity to be heard.”*

10. At the outset of the appeal hearing the Court indicated to Mr Stephens that we agreed and accepted his submissions on this ground and that the Court did not need to hear him further. We accept that in the circumstances the Judge did not give Mr Stephens a chance to be heard on the question of whether the Judge should award costs against him. The appeal succeeds on this ground. We therefore quash the order that Mr Stephens pays personally any costs. If after the costs amount is settled under [7] the judge considers that rule 15.26 could be invoked against Mr Stephens then given the background of this case the judge may feel it is appropriate for another judge to consider whether any portion of the costs should be paid by counsel after a rule 15.26(3) inquiry.

11. In relation to the Ground (e), it is a repetition of the third ground in (c). In circumstances where as here, the lawyer did not appear and the case had to be adjourned, it is normally the case to award costs thrown away on the standard basis to be agreed or taxed. It did not happen in this case. The Court invited Mr Malantugun to say whether he would accept the Court's proposition to have the costs of the adjournment on 13 October 2016 taxed and Counsel agreed.



The appeal succeeds on this ground.

12. In relation to the Ground (e), Mr Stephens abandoned this ground.

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**The Result**

13. The appeal is allowed. The cost orders at paragraph 5 of the Minute dated 13 October 2016 are quashed. We make the following orders:

(a) the respondent is entitled to wasted costs on the adjournment of 13 October 2016;

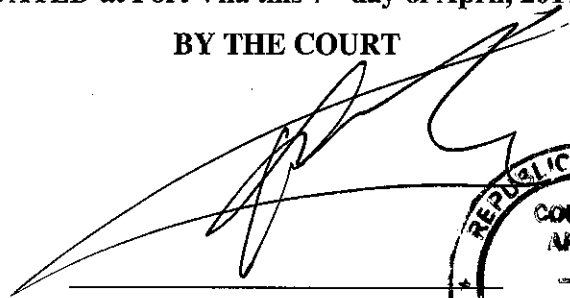
(b) any costs sought by the respondent will be taxed; and

(c) should the Supreme Court consider all or part of these costs might be paid by counsel Mr Stephens then the procedure under rule 15.26(3) of the CPR should be followed.

14. In the circumstances there will be no order as to costs in this appeal.

**DATED at Port Vila this 7<sup>th</sup> day of April, 2017.**

**BY THE COURT**



**Vincent LUNABEK**

**Chief Justice**

