IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 18/2268 CoA/CIVA

BETWEEN: VANUAMEDIA DIGITALMEDIA LIMITED
Appellant

AND: VANUATU BROADCASTING AND TELEVISION CORPORATION
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Ronald Young*** ***Hon. Justice Oliver A. Saksak*** ***Hon. Justice Daniel Fatiaki*** ***Hon. Justice Dudley Aru***
Counsel:	*Mr S. Hakwa for the Appellant* *Mr M. J. Hurley for the Respondent*
Date of Hearing:	*Tuesday 6th November 2018*
Date of Judgment:	*Friday 16th November 2018*

JUDGMENT

1. Vanuamedia Digitalmedia Limited (VDL) seeks leave to appeal against an interlocutory decision of the Supreme Court made on 6th August 2018 which refused VDU's application to extend time to file a defence to an application made by Vanuatu Broadcasting and Television (VBTC) to have VDL put into liquidation under s.15(2)(c) of the Companies (Insolvency and Receivership) Act No. 3 of 2014 (the Act). That section relevantly provides that the court may appoint a liquidator if it is satisfied that "*it is just and equitable that the company be put into liquidation*".

Background

2. On 18th August 2015 a contract entitled Cooperation Agreement was entered into between VBTC and Guilin Ceke Communication Equipment Co. Limited (CEKE) to operate a joint venture to set up and manage a digital television broadcasting network throughout Vanuatu. The joint venture involved the incorporation on 2nd

December 2015 a new entity in Vanuatu, namely VDL. CEKE controls 51% of the shares and VBTC the remaining 49%.

The Supreme Court Proceedings

3. On 23rd March 2018 VBTC by application made under s.15(2)(c) of the Act sought to liquidate VDL due to alleged failures to comply with its contractual obligations and as serious unresolvable governance issues then existed. The application, supporting sworn statement by Mr Herman and notice of the hearing of the application before a Master was sent by email to VDL on 11th April 2018. The appointed date for the hearing before the Master was 21st May 2018.

4. VDL instructed lawyers to act for it, and the application was acknowledged by the lawyers as served on 19th April 2018.

5. The Companies (Insolvency and Receivership) Act Regulations 2015 (the Rules) provide in clause 14 that a person on whom a claim is served must file a defence within 14 days after the date on which the claim is served. A defence was not filed within that time by VDL. Clause 17 of the Rules provides that if a person does not file a defence within 14 days that person is not without an order for extension of time or the special leave of the court allowed to appear on the hearing of the proceedings.

6. On 15th May 2018 a "*defence*" was filed by the lawyers then acting for VDL. That occurred 7 days out of time. Lawyers for VBTC pointed out to VDL's lawyers that the defence was out of time both on 8th and then 14th May 2018.

7. On 18th May 2018 the lawyers who had been acting for VDL ceased to act.

8. On 21st May 2018 at the hearing before the Master the late filing of the defence was again raised by VBTC. The Master transferred the case to the Supreme Court on 24th May 2018 with a conference scheduled for 25th June 2018.

9. VDL instructed new lawyers who began to act on 18th June 2018. On 22nd June 2018 the new lawyers filed several applications, including an application for leave to file a defence out of time.

10. At the appointed conference, directions were given that VDL file sworn statements in support of its application by 4pm on 9th July 2018, and that the "*timetable directions are to be strictly complied with*" given the delays evident on the file. On 2nd August 2018 sworn statements were file on behalf of VDL, well outside the timetable directions.

The Challenged Decision

11. All applications came on for hearing before the Supreme Court on 6th August 2018. The court refused to extend time to file a defence. Absent a defence VDL could not be heard on the substantive application to appoint a liquidator. The Supreme Court then proceeded to hear the substantive application without hearing VBTC. Orders were made to appoint a liquidator and to wind up the company.

12. Supreme Court reasons for refusing an extension. The Supreme Court identified the criteria which it should take into account in determining the application to extend time, including the link of delay, the explanation for the delay, the degree of prejudice which could be suffered by either party, and the prospect of success in the underlying proceedings if leave were granted.

13. The court noted that whilst the length of the delay was modest, no satisfactory explanation for the delay had been given. In particular there was no evidence on file from VDL's previous lawyer to draw light on why the delay occurred. On the question of prejudice, as the relationship between the parties to the cooperation agreement had irretrievably broken down there would be no prejudice to anyone if the application for an extension of time was declined and a liquidator appointed.

14. As to the merits of the substantive application to appoint a liquidator the court can canvassed to the evidence which ultimately led to a winding up order being made. The court held that the prospect of VDL successfully defending the substantive claim were poor.

15. Taking those considerations into account and notwithstanding that the delay was moderate, the court refused to grant an extension.

Discussion on the Application for Leave to Extend Time

16. The proposed appeal in this case is against the interlocutory decision to refuse leave to extend time. The application for leave to appeal is made under rule 21 of the Court of Appeal Rules. Is well established that in the absence of any important issue of law that requires the consideration of the Court of Appeal, to obtain a grant of leave the applicant must at the least show that there is a reasonable prospect that the appeal would succeed if leave were granted: for example see: Ebbage v Ebbage [2001] VUCA 7 at [33].

17. The decision in the Supreme Court involved the exercise of a discretion. To overturn the exercise of the discretion in this case VDL needs to show that the court erred in law in its approach, or either failed to take into account some

relevant consideration or took into account some irrelevant consideration: Haus v The King [1936] HCA 40.

18. It is not the suggested by counsel for VDL that the judge made any error in law in the way he approached the application to extend time or his identification of the considerations which he took into account.

19. Counsel did not identified any irrelevant matter which the court considered, or any relevant matter that was not taken into account. Rather, counsel submitted that the court had wrongly evaluated the evidence before it, and should have held that VDL had reasonable prospects of successfully opposing the appointment of a liquidator.

20. We do not accept this submission. The evidence from Mr Herman supported the conclusions that the purpose to which VDL had been set up was now unattainable because of the breakdown in the relationships between the parties, and because of governance issues. The sworn statements filed on behalf of VDL from Mr Zheng Weu Wi challenged many of these factual assertions made by Mr Herman. Whilst Mr Zheng's evidence was no doubt intended to answer specific allegations made by Mr Herman, it raised other complaints relevant to the management of the project, and overall serve to demonstrate how fractured the relationship between the parties had become. We consider Mr Zheng sworn statements actually lend weight to the conclusions reached in the Supreme Court that it was just an equitable to appoint a liquidator whose functions would be to preserve the assets of the company, get them in, and return their value to the shareholders. We agree with the conclusion of the Supreme Court that the appointment of a liquidator would not prejudice either party but would have the benefit of giving protection to the shareholders whilst the exercise of dismantling the failed project occurred.

21. VDL has failed to identify any error in the reasoning of the Supreme Court. In our opinion there is no prospect that an appeal against the refusal to extend time would succeed. VDL's application for leave to appeal should therefore be refused.

Other Matters

22. The Supreme Court held that once the application to extend time was refused, there was no merit in other applications which VDL had filed which sought to join CEKE and a related company Hong Kong Media Investment Manage Co. Limited as parties to the Supreme Court claim. Those applications were therefore dismissed, and there is no appeal against those dismissals.

23. Counsel for VDL sought to bring to the attention of this court so called "*new evidence*" being the fact that on 4th August 2018 VDL had been removed the register of companies at the Vanuatu Financial Services Commission. This fact was not new evidence as it was known to VDL at the time of the application heard by the Supreme Court. The information before this court is that VDL was notionally removed from the register by administrative error, and it was formally restored on 7th August 2018. It remains on the register and the process of winding the company up is well underway. The so-called new evidence is not relevant to the outcome of the present application before this court.

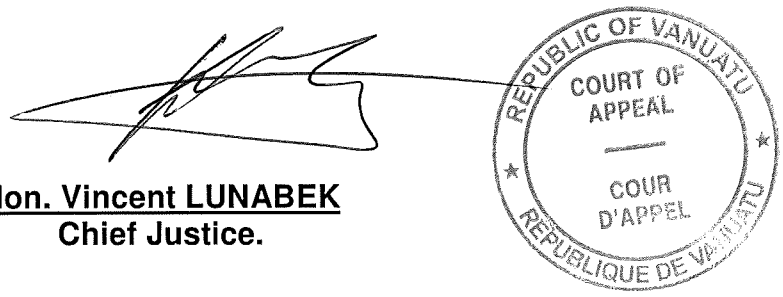
24. For the above reasons the application for leave to appeal is refused. The formal orders of the court are:

    (a) Application for leave to appeal from the decision of the Supreme Court made on 6th August 2018 which refused leave to extend time to file a defence is refused;

    (b) The appellant shall pay the respondent's costs in this court to be assessed on the standard basis.

DATED at Port Vila, this 16th day of November, 2018.

BY THE COURT



Hon. Vincent LUNABEK
Chief Justice.