

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

Civil Appeal
Case No. 21/3457 COA/CRMA

BETWEEN: POINTY GILBERT
Appellant

AND: POINTY PROSPER
JACOB JONAS
JACOB MICAH
TABUNA JOHNNY
GEORGE STANLEY
Respondents

Date of Hearing: 10 February 2022

Date of Decision: 18 February 2022

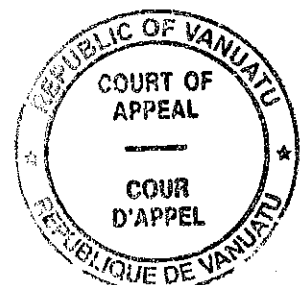
Before: Hon. Chief Justice V. Lunabek
Hon. Justice J. Hansen
Hon. Justice R. White
Hon. Justice D. Aru
Hon. Justice A.G. Andrée Wiltens
Hon. Justice E. Goldsbrough

Counsel: Mr R. Willie of Public Solicitor's Office for the Appellant
Mr J. Malcolm and Ms Motuliki for the Respondents

JUDGMENT OF THE COURT

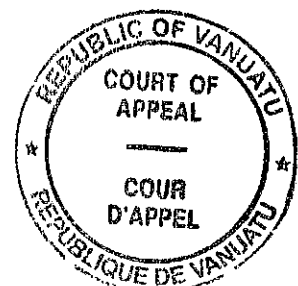
A. Introduction

1. This appeal was filed against orders issued by the Supreme court on 6 October 2021 which dismissed the Appellant's claim and proceeding pursuant to Rule 18.11(1) of the Civil Procedure Rule (CPR).
2. The Appellant sought orders from this Court (a) to set aside the above dismissal orders of 6 October 2021 and (b) to re-direct this case to the Supreme Court for re-hearing.

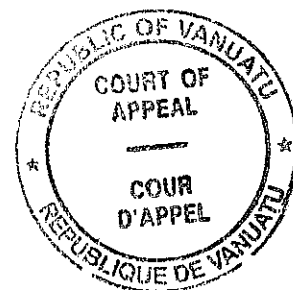


B. Background

3. The Appellant Gilbert Pointy is from Big Bay area and used to live at Pialorai Village with his wife and children on a piece of land he owned there until the incident of August 2018 which led up to the claim in the Supreme Court and this appeal.
4. The Respondents are from the same area of Big Bay, Santo. Four of the Respondents, namely: - Prosper Pointy who is the Appellant's brother, Jonas Jacob, Micah Jacob and Johnny Tabuna live in the same village of Pialorai with the Appellant until the incident of assaults on 14 August 2018. Only the Respondent Stanley George lives in the nearby village of Pialuplup.
5. There has been a history of the Appellant that he caused issues in the village and in particular raiding the cash crops of the Respondent Stanley George. There were seemingly arguments over a lengthy period and at least from 2018 to this incident.
6. There were various meetings held at various nakamals to try to resolve the issues but these meetings recognised the problems and how it was difficult to resolve them because of the remoteness of the area of Pialorai village. There are no roads and airfields.
7. On 14 August 2018, there was an altercation involving the Appellant and the Respondents. The Appellant attacked and chased his brother Prosper Pointy with a bush knife. The Respondents helped Prosper Pointy defend himself from such attack.
8. On 13 December 2018, two of the Respondents: Jonas Jacob and Stanley George were charged, pleaded guilty and were convicted and sentenced by the Magistrate's Court at Luganville, Santo with suspended imprisonment sentences for the assault occurring on 14 August 2018.
9. In 2020, a custom settlement was arranged between the Appellant and the Respondents. The Appellant accepted and was paid approximately VT200,000 which was all the village had. It was made up of:
 - (a) Kava – VT100,000;
 - (b) Cash – VT20,000; and
 - (c) Pig and Crops – VT80,000Total - VT200,000
10. On 07 September 2020, the Appellant filed a Supreme Court claim at Luganville Registry seeking damages in the amount of VT7,000,000 against the Respondents for the injuries he alleged he sustained from the Respondents' assaults on his body on 14 August 2018.



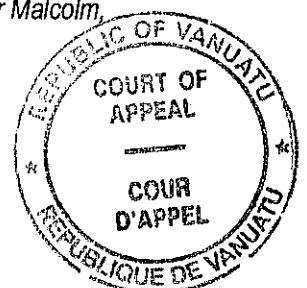
11. It was pleaded at paragraph 5 of the claim that on or about 13th day of December, 2018, two of the Respondents namely, Jonas Jacob and Stanley George admitted the offence and were convicted and sentenced by the Magistrate's Court in Luganville, Santo. The claim referred and relied on the Magistrate's Court Judgment dated 13th December, 2018.
12. As to the particulars of injuries at paragraph 6 of the claim, the claim referred to the medical reports dated 22nd August, 2018 and 12th October, 2018.
13. On 23rd November 2020, a response to the claim was filed disputing part of the claim.
14. On 27 November 2020, Mr Malcolm on behalf of the Respondents wrote to the Public Solicitor after he had obtained instructions from the Respondents and he was hoping of resolving this issue referring, among other matters, to the following that: -
 - This was a matter that occurred back in 2018;
 - The claim for Seven Million Vatu (VT7,000,000) for some bruising damage is over grossly pleaded for such an amount;
 - There are serious concerns with the claim and potential cross claim regardless of the convictions in the matter;
 - The conviction was obtained because none of the Respondents were represented;
 - They have no money;
 - They applied to the Public Solicitor to represent them on the criminal case but that was unavailable because of the obvious conflict;
 - The Respondents were prosecuted by a free legal service with no ability to obtain the same and no funds to pay for a lawyer;
 - This just seemed such a wrongful case to involve the parties in costs and litigation which has an emotive cost which exceeds any legal costs;
 - Subsequent to the criminal case, a custom reconciliation between the appellant and the Respondents occurred. The Appellant accepted and received VT200,000;
 - It is appropriate for this case to be resolved and for the Appellant to discontinue the claim against the Respondents;
 - The Respondents would agree to such Notice of Discontinuance being filed without any costs or any other order which would embarrass or cost the appellant.



15. On 18 January 2020, a defence to the claim was filed denying the claim. On 2nd March 2021, an Amended Defence was filed accepting that there was an altercation involving the Appellant on 14 August 2018 and otherwise denying the claim and in particular that: -
- (a) The Appellant attacked and chased the Respondent Prosper Pointy with a bush knife;
 - (b) Some of the people in the village had helped Prosper Pointy to defend himself from such attack.
16. Paragraph 4 of the defence stated that whilst the Respondents were convicted, they did not have a lawyer because the Public Solicitor could not act for them. The assertions were not defended and the assertions at paragraph 5 of the claim were denied.
17. And by way of further or alternate defence it was said that: -
- (a) There was a custom ceremony to resolve all outstanding issues.
 - (b) The Appellant was paid and received VT200,000 in full and final settlement of the issue.
18. The Supreme Court file records the following conferences were held with directions and or orders made to the Appellant and the Respondents.
19. The first conference was on 04 February 2021. The Appellant's counsel was not present but a lawyer from the Public Solicitor's Office attended. The letter of offer dated 27 November 2020 was put to the Court. The Minutes of the said conference of 4 February 2021 reflected this as follows: -
1. *Mr Malcolm informs the Court he has filed a general defence on behalf of the defendants. He informs also that he wrote a long letter to the public solicitor on 27th November 2020 to which there has been no reply. Counsel proposes two options for an adjournment to be granted so a reply to his letter could be made or to direct the filing of a proper defence with evidence;*
 2. *Mr Vira has no knowledge of the case. He says he would contact Mr Willie after the conference;*
 3. *In the circumstances the Court is of the view there should be an adjournment to allow the Public Solicitor to respond to the letter of 27/11/20;*
 4. *Accordingly, this matter was adjourned for further mention on 26th February 2021 at 8:15am.*
20. The second conference was on 26th February 2021, where a timetable was ordered as follows: -

"Upon hearing Mr Willie through video link from Luganville, and upon hearing Mr Malcolm,

It is Ordered that –



1. *The defendants file and serve their defences within 14 days (by 11th March);*
2. *The Claimant file responses and any application within a further 14 days (by 25th March);*
3. *The Claimant file sworn statements within another 14 days (by 7th April);*
4. *The defendants file responding evidence within 28 days (by 5th May);*
5. *The matter be returnable for pre-trial conference on 31st May 2021 at 8:30am by video link."*

21. In respect to the timetable orders of 26 February 2021:

- (a) The Appellant failed to comply with Orders 2 and 3;
- (b) The Respondents complied with all timetable orders affecting them. Five (5) sworn statements in support of the Amended Defence were filed by the Respondents on 16 March 2021.

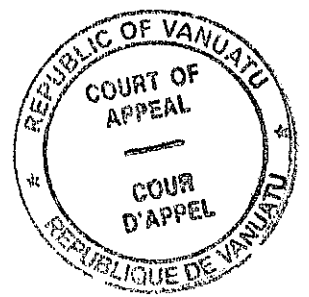
22. The next conference was on 20th July 2021. In that conference the directions were made as follows:

"Having heard Counsel in relation to the amended defence and sworn statements filed by the defendant, it is ordered that –

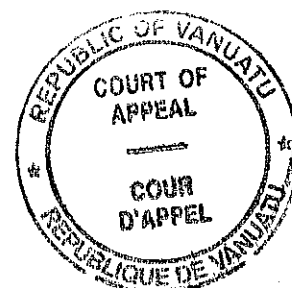
1. *Within 21 days from today's date (by 9/08/21) the claimant is to file and serve sworn statements in response to the defendant's sworn statements and to disclose medical reports relating to his injuries and hospitalization following assaults he sustained a week prior to the current complaints, including a medical report on the incidents the subject of his current claims;*
2. *Within 21 days thereafter (by 1/09/21) the defendants will file and serve replies;*
3. *There be a pre-trial conference at 9:30am on 30th September 2021 via video-link."*

23. Again, the Appellant failed to comply with the orders of the Court of 20 July 2021.

24. The Pre-Trial Conference was listed for 31 May 2021, but it was heard on 30 September 2021. Counsel for the Appellant was absent. The Court was informed by Mr Malcolm on behalf of the Respondents that he had filed an application under Rule 18.11(1) of the CPR. The Pre-Trial Conference was adjourned to 6 October 2021 at 8.30am for proof of service of the Rule 18 Application and because of the Appellant's counsel's absence. The Minute of the Pre-Trial Conference of 30 September is as follows: -



1. *By orders issued on 20 July 2021 this case was returnable today. However, I am told by Mrs Vira that Mr Rollanson Willie is on sick leave;*
 2. *There is however no medical document confirming same;*
 3. *Mr Malcolm tells me he has filed an application under Rule 18.11 together with a sworn statement. Counsel advises also the documents have been served but despite proof of service has been filed; Mr Malcolm did not have a copy to furnish the Court with. He seeks an adjournment;*
 4. *Accordingly, the case is adjourned to Wednesday 6th October 2021 at 8.30 am.*
25. On 6th October 2021, counsel for the Respondents appeared and provided the statement of service of the Rule 18 Application. The Rule 18 Application was served on 30 September 2021 and within the 3 days' time required by Rule 18.11.
26. The Court advised the Public Solicitor's Office was called by the Court but could not reach Mr Willie.
27. The Court reviewed Rule 18.11 and was satisfied that: -
- (i) *The Appellant had not filed a Response to the Rule 18 Application;*
 - (ii) *The Appellant had not responded to the lengthy settlement proposal;*
 - (iii) *The Appellant did not respond to the issue of settlement by way of the custom payment;*
 - (iv) *The Appellant did not file and serve any statements of facts and still has not; and*
 - (v) *The Appellant has not paid or agreed to any thrown away costs as ordered.*
28. The learned Judge dismissed the claim and proceeding and ordered the Appellant to pay the Respondents' costs on the standard basis as agreed or taxed.
29. The decision of 6 October 2021 is reproduced below: -
1. *The defendants filed an application for show cause pursuant to Rule 18.11 on 29/09/21. It was listed for hearing on 30/09/21. However, it was adjourned on that date because (a) Mr Willie was not available and (b) there was no proof of service. The application was adjourned to today (6/10/21);*
 2. *When the case was called at 8:40am this morning, Mr Willie again was not available. He had been contacted by my associate, Ms Donald but he could not be reached.*
 3. *Mr Malcolm filed proof of service on 4/10/21 by Kupa Turrus showing service on 30/09/21;*
 4. *I am satisfied there has been sufficient service on the claimant's counsel;*



5. *It is clear the claimant has failed to comply with the clear orders of 20th July 2021 which required him to file and serve sworn statements by 9/08/21;*
6. *The defendants seek an order that the proceeding be dismissed with costs on the standard basis as agreed or taxed.*
7. *Accordingly, the claim and proceeding are dismissed.*
8. *I order the claimant to pay the defendants costs on the standard basis as agreed or taxed.*
9. *The case is to be removed from the register and the file be closed."*

C. Consideration

30. The grounds in support of the appeal are: First that the Learned Judge erred in law and fact to discuss the claim and proceeding on the basis that the Appellant's Counsel failed to attend a hearing listed on the 6th October 2021. Secondly, that the learned Judge erred in law and fact to dismiss the claim and proceeding when his Lordship stated that the Appellant failed to comply with Court Orders dated 10th July 2021.
31. We deal with both grounds together. In respect of the conference hearing on 6th October 2021, Counsel for the Appellant informed the Court that he and his client (the Appellant) were in Court in Luganville waiting to be connected through video conference at 8:30am in respect to Civil Case no.20/2410. During the hearing, the Appellant's Counsel was asked as to while he was waiting in Court with his client and noted that there was no video connection, what steps he took to contact the Court in Port Vila to enquire about the conference on the Appellant's case listed on that day (6 October 2021) at 8.30 am? He was unable to answer.
32. He was further asked whether he could give reasons or justifications as to why the Court orders of 26th February 2021, 20th July 2021 and 30th September 2021 were not complied with by the Appellant or even the show cause notice under rule18 application to dismiss the claim and proceeding was not responded to by the Appellant? He was unable to answer.
33. Further, even if the Appellant's Counsel attended the hearing of 6th October 2022, whether it would make any difference to the position of the Appellant, when the Respondents filed five (5) sworn statements in support of their defence raising new matters including custom reconciliation ceremony with the payment of VT 200,000 which was accepted and received by the Appellant in full and final settlement of the issue while Counsel for the Appellant decided not to comply with these court orders. Again counsel struggled to respond. It is hard to say that the Judge was in error in dismissing the claim and proceeding in such circumstances.
34. We observe also that despite the claim of damage of VT 7,000,000 there was no evidence of the particulars of injuries sustained by the Appellant including medical evidence to support that amount



of damages claimed. We agree with the assertions of the Respondents' Counsel that the claim for damages in the amount sought was over pleaded. The Appellant Gilbert Pointy's Medical Report dated 12 October 2018 that we have now the benefit of reading shows that the Appellant complained about pain in his right knee when it is cold. It started after he sustained blunt trauma to the right knee (he was reportedly stoned). The function and range of motion of the right knee joint is fully intact. There is otherwise no permanent disability. This is in support of the fact the nature of the Appellant's claim is a small claim for damages. The Appellant had the benefit of the custom reconciliation ceremony with an amount of VT200,000. We bear in mind also that the respondents are represented by their Counsel on a pro-bono basis which has an effect on the public as a result of using up resources.

35. We are of the view that the Learned Judge was right in dismissing the Appellant's claim as per in his decision of 6th October 2021. The judgment of this Court in *Government and the Republic of Vanuatu v. Carlot* [2003] VUCA 23 supported the learned Judge when the Court of Appeal held that: "*Rule 18.11 (1) is clear and unambiguous. That rule will apply whenever a party fails to comply with an order in a proceeding unless there is a patent abrogation of that position, e.g. 18.14 (1) (a).*"
36. This is the factual situation of this case and this appeal.

D. Disposition

1. We accordingly dismiss this appeal.
2. The Respondents are entitled to their costs in this appeal we set at VT50,000 to be paid within 21 days.

Dated at Port Vila, this 18th day of February 2022.

BY THE COURT

Vincent Lunabek
Chief Justice

