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

Civil
Case No. 14/221

BETWEEN: GEORGE SUALO

Applicant/Defendant

AND: MARCELLINO PIPITE

Respondent/Claimant

Hearing:	***11th June, 2018***
Delivered:	***22nd June, 2018***
Before:	***The Master Cybelle Cenac***
In Attendance:	***Jack Kilu counsel for the Applicant/Defendant, Wilson Iauma counsel for the Responent/Claimant absent without excuse***
Present:	***Rosa Pipite wife to the Respondent***

JUDGMENT

Headnote

Setting aside of default judgment - tests to set aside - delay - more than merely arguable but a real prospect of success - defence carrying a degree of conviction - prejudice - merits of defence primary consideration

Jurisdiction to set aside Default Judgments

This is succinctly set out at Part 9.5 of the Civil Procedure Rules (CPR) as follows:

(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 is satisfied that the defendant:

(a) has shown reasonable cause for not defending the claim;

b) has an arguable defence, either about his or her liability for the claim or

or about the amount of the claim.....

and should be read in tandem with the "Judicially recognized Tests":[1]

(a) Whether the defendant has a substantial ground of defence to the claim.
(b) Whether the defendant has a satisfactory explanation for the default judgment.
(c) The promptness with which the application is made.
(d) Whether the setting aside would cause prejudice to the plaintiff.

Was the Application filed promptly and was the explanation for the delay in filing defence reasonable?

The claim was filed on the 25th June, 2014 and served on the 26th June, 2014. Default Judgment was obtained on the 15th September, 2014 and served on the debtor on the 19th September, 2014.

Very oddly, a sworn statement, with no application in support to set aside default judgment was filed on the 24th March, 2015, approximately 9 months after service of the claim and almost 6 months after service of the default judgment. The application to set aside was filed on the 24th August, 2015, approximately 14 months after service of the claim and almost 11 months after service of the default judgment.

In this first application filed by Pacific Lawyers, the applicant states that the reason for the delay was because of the delay of his lawyers, first an Arthur Faerua, then Mary Grace Nari, and then an unknown, unnamed lawyer with VFSC. By the applicant's account, it would appear that since receiving the claim he has had no knowledge of the steps taken by these lawyers and in fact appears to have had little connection with them by way of instructing them on his behalf. His application filed nearly 5 months later than his sworn statement adds an additional ground for the delay, which is, that he was pursuing reconciliation with the expectation that the matter would be resolved.

[1] Naicker V Land Transport Authority [2015] FJHC 770 and Fiji National Provident Fund v Sari-Datt [1988] SPLR 138

This first application and sworn statement were sparse in its establishment of a defence of merit which could allow the court to make a suitable assessment as to its arguability.

The court notes that after service of the default judgment and issuance on the 16th February, 2015 of a notice of hearing for enforcement conference, it took the applicant almost 2 months to file an application to suspend the enforcement proceedings.

At the enforcement conference of the 17th April, 2015, in decision of Saksak J, the court was not minded to grant the suspension but for the applicant's offer to pay wasted costs. At the said hearing the court granted leave for the applicant to file his application to set aside default judgment within 7 days. The order was breached and the application was not filed till the 24th August, 2015, approximately 4 months after the court appointed time, with no application made for an extension to file beyond the allotted time.

The hearing of the application to set aside was listed for the 24th September, 2015 but was adjourned by the court to the following day, and by the court's record all counsel were duly informed. Neither counsel for the applicant nor the applicant were present on the day of hearing and the submissions of counsel for the respondent, that there had been substantial delay and that the debtor himself was not a litigant unfamiliar with the processes of the court were accepted by Saksak J and the application was dismissed.

No action was taken by the applicant following this decision for 10 months until an application filed on the 19th July, 2016 to suspend enforcement warrant granted by Saksak J, which was due to expire on the 18th July, 2016, 1 day prior to the filing of the applicant's application for suspension.

The applicant by then had retained new counsel, Jack Kilu, about July/August 2016. New counsel's retention was followed by 2 letters dated the 20th July, 2016 and the 6th January, 2017 requesting documents off the court file.

A notice of hearing was issued on the 12th May, 2017 for status update of the matter scheduled before the Master on the 5th June, 2017. The notice was duly placed in the pigeon hole of counsel for the applicant on the same day. At the said hearing both the applicant and his attorney were absent without excuse and the enforcement warrant was renewed.

Counsel for the applicant wrote to the Master by letter of the 23rd June, 2017 that he had received the order of the 5th June, 2017 but he had never received any notice of hearing.

The matter was set down for hearing for the 17th August, 2017 to hear the applicant's application to suspend enforcement warrant. Based on representations the court found no valid reasons to suspend the warrant, save to conclude that there were some minor irregularities with the warrant, which once regularized could be reissued.

At the said hearing, at which the applicant was in attendance, counsel for the applicant indicated an intention to file an application to set aside default judgment.

The court noted counsel's intent, but having little confidence, based on past behaviour that any application would be filed, proceeded to issue a summons on the 9th March, 2018 for enforcement conference for hearing on the 20th March, 2018. The application to set aside default judgment was filed one day before the enforcement conference, that is, on the 19th March, 2018. The said application was filed nearly 7 months after the expression of intent by counsel for the applicant in the presence of the applicant.

The matter came up for hearing on the 3rd April, 2018. Counsel for the applicant and the applicant were both absent without excuse. The matter was adjourned to the 12th April, 2018 at which time counsel for the applicant was again absent, asserting illness. The applicant was also absent but without excuse. The matter was adjourned to the 24th May, 2018 wherein counsel for the applicant and the applicant were again both absent without excuse. The matter was adjourned again to the 18th June, 2018 and rescheduled to the 11th June, 2018. All orders stemming out of these adjourned hearings were duly placed in the pigeon hole of counsel for the applicant and the court deemed counsel to have been adequately informed of each and every appointed hearing. If counsel failed to retrieve the said orders at all, or in time, or failed to enquire of the status of the matter, then all responsibility for this neglect rested with him, and any loss suffered by the applicant would therefore have been at the hands of his attorney(s), and any recourse for compensation would be against his attorney(s) and not the court.

This detailed layout of the events which have transpired since the filing of the claim shows a defendant who has not been proactive in the pursuit of this matter. The applicant has laid blame at the door of his numerous attorneys, accepting none of the responsibility for himself, and has tended to act only when served with proceedings by the Respondent to execute against himself or his property. By his very action, and the inordinate delay on his part, the applicant has not demonstrated that he is a litigant with a genuine interest in defending the allegations against him, and it might appear, has no conviction in the belief of his own defence; for a man convicted in his innocence would most assuredly pursue it with vigour. The defendant cannot credibly say that he has done so.

While an application to set aside a default judgment can be made at any time during the proceedings, the application must be shown to have been made at the earliest opportunity, explaining any delay that might have mitigated against its prompt filing, and further, he must offer reasonable explanation as to why he did not file a defence within the stipulated time.

The applicant's reason for the substantial delay in filing his defence and application late is that he has had three separate lawyers and that the last lawyer died and he was unable to obtain his file. He does not explain why concerted efforts by way of letters and/or an application to the court was not made to secure a copy of the court's file if he is to be believed that he was not in possession of any documents. In fact, the court takes judicial notice of the death of his last attorney, with clients of that attorney having appeared before this very court to make requests for copies of their court file to continue to actively pursue their matter.

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From the time the applicant filed his first application to set aside on the 24th August, 2015, it was nearly 1 year and 5 months before a letter was penned to the Registrar requesting copies of the court file, and in spite of the court's efforts through conferences to facilitate the applicant, neither he nor his counsel made themselves available for court hearings save for the 17th April, 2015 and 17th August, 2017. And by the court's own order of the 25th September, 2015 it accepted that the applicant was a person familiar with court processes. In other words, he was a litigant with knowledge of court proceedings and engaging lawyers and could not therefore be placed in the same category as a naif litigant, heavily reliant on directions of counsel.

In any event, even if he were a new litigant, the onus is always on the parties to actively pursue their matter by following up with their counsel and the court, and if their counsel is not conducting himself as he should, for the litigant to obtain more suitable counsel. Further, having stated his misfortune with a number of attorneys the court would expect that upon retaining new counsel he would prove more diligent and watchful over his matter to ensure that there were no further substantial delays.

The explanation of the applicant regarding delays occasioned by his attorneys seem weak and unsubstantiated and the court sees it as merely his attempt to deflect his lack of care and concern in attending to his own affairs. The applicant has offered no substantial explanation as to why there was a long delay between the granting of leave to file his application to set aside on the 17th April, 2015 and the filing of the application on the 24th August, 2015. One would have thought, with all the previous delays that great haste would have been employed to ensure that that application was filed within the time stipulated by the court of 7 days.

The applicant has shown an utter disregard and contempt for a matter which he claims to maintain a solid defence of merit by breaching the rules and court orders. He acts only when it appears that finality is being brought to the matter by way of execution. This is not a litigant who believes in the strength of his defence.

The court finds that the application was not made promptly and that the explanation for failing to file a defence is unacceptable for all the reasons aforementioned.

Would the setting aide of the default judgment cause prejudice to the respondent?

Neither party addressed the court on this point.

Other than an obvious further delay to the matter, the court does not find any substantial prejudice that would be caused to the respondent that could not be compensated in damages should the default judgment be set aside.

Does the defendant have a substantial ground of defence to the claim?

The leading case of **Evans V Bartlam**[2] has well established the primary principle upon which a court may exercise its discretion to set aside a default judgment regularly entered:

> The primary consideration is whether he has merits to which the court should pay heed; if merits are shown the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication.....

The principle in this case has been widely adopted throughout commonwealth jurisdictions including Vanuatu, and I dare say, appears to be the singular ground upon which all counsel relies in an effort to set aside a default judgment, no matter the apparent delay. These types of applications in this jurisdiction appear to have enjoyed the broad discretion of the court in that they have so often been set aside that counsel have adopted the posture of making very little effort at convincing the court of the merit of the defence they intend to put forward, and that failure is what will prove fatal to any application. Fatal, because the applicant is required to demonstrate, not merely that he has an arguable defence but a substantial ground of defence, a defence with a *"real prospect of success"* and which *"carries some degree of conviction"* in order that the court may *"form a provisional view of the probable outcome of the action."*[3]

Counsel in this jurisdiction have so significantly diluted this part of the test that the court is left with little detail of the defence upon which to exercise its discretion.

Rule 9.5 directs an applicant in his application to give details of his defence to the claimant and these details must be supported by sworn evidence.

The practice in Vanuatu appears to be that an application is filed merely alluding to an arguable defence and sparse detail given as to the defence to be filed.

The courts have consistently maintained that a person who holds a regular default judgment has something of value and should not be deprived of it save for good reason, and therefore, more than a mere arguable defence needs to be shown in order to tip the scales of justice in favour of the applicant.[4]

In the 2 ½ years that I have been sitting in this jurisdiction no attorney has yet properly addressed his or her mind to exactly what is needed to prove arguability and/or, more than arguability of the defence. For the purposes of elucidation I will do so now.

While Rule 9.5 speaks of an arguable defence, there have been copious judgments since the initiation of the CPR discussing the judicially recognized tests which run 4 tiered, rather than the only 2 under the rule. The discussion on arguability has expanded to encompass the concepts of demonstrating a *"substantial ground of defence"* that is, not a paltry defence, *"a real prospect of success"* that is, a realistic

[2] [1937] 2 ALL ER 646

[3] Pankaj Bamola & Amor V Moran Ali, Fiji Court of Appeal, Civil Appeal 50/90 and Weaspar Textiles Ltd V General machinery Hire & Amor, Civil Appeal No. ABU0030/97S

[4] Moore-Bicke J in International Finance Corporation [2001] CLC 1361

prospect and not fanciful and *"carrying a degree of conviction"* that is, a strong belief in the success of the defence. The case law goes on to assert that the defence must not be speculative and that if none of the above can be shown then relief must be refused.[5]

How then is this to be demonstrated by counsel?

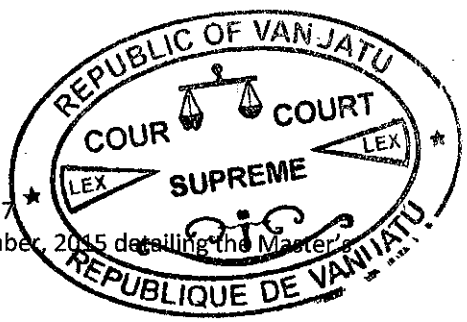
Counsel must recognize that the test to prove a defence on substantial grounds is the same as that laid down for obtaining a summary judgment. The only difference is that the onus for obtaining summary judgment is on the claimant to show that the defendant has no real prospect of success, while, in an application to set aside a default judgment it is the defendant upon whom the onus rests to prove that he has a real prospect of success.[6]

In so doing, an application to set aside default judgment must be supported by evidence, and while a draft defence is often attached to the sworn statement in support, it is considered of lesser importance to the sworn statement proving merit.[7]

In the present case, the applicant stated in his application that his brief line of defence was provided without the benefit of viewing the claim. The court is baffled by this statement, as at no point in presenting this application or previous applications did the defendant ever state that he had not been served or properly served with the claim. A regularly issued sworn statement of service of the claim on the defendant on the court's file, and the applicant's non contest of the regularity of service, together suggests that he was properly served and had a copy of the claim at all material times when he attended his numerous attorneys to act for him. But if, as he says, he had not had the benefit of viewing the claim prior to filing his application the court is not willing to accept this as true and correct as even the sparseness of his defence shows a specific knowledge of the content of the claim.

Further, the applicant always had at his disposal the means and wherewithal to request a copy of the claim from counsel for the respondent and to attend the Master's court from 16th December, 2015[8] to request or make a suitable application to retrieve any documents including the claim off the court file in pursuance of his application to set aside default judgment. Rather than these proactive steps, the defendant sat back, allowed time to run away with him and then proceeded to lay the blame at all doors including that of the court and to finally advert to the fact that his insubstantial defence was on account of not having had an opportunity to view the claim.

While the applicant makes sparse reference to an "arguable" defence his sworn statement makes no reference at all, and the sum total of his defence is that he does not owe any money to the claimant.



[5] Allen V Taylor [1992] PLQR 255
[6] Swain V Hilman [2001] ALL ER 91
[7] The Fiji Sugar Corporation Ltd V Mohammed, Civil Appeal No. 28/87
[8] Practice Direction No. 1 of 2015, para. 2(i) &(ii) effective 16th December, 2015 detailing the Master's Jurisdiction to hear applications to set aside default judgments.

In the court's opinion, this cannot stand as a defence capable of a real prospect of success or even a defence carrying any degree of conviction.

I can therefore say, beyond a peradventure, that the application and sworn statement of the applicant has failed to demonstrate a defence capable of success and there is no justification to cause the court to exercise its discretion in favour of the applicant and against the respondent for a default judgment regularly obtained.

My order is as follows:

1. That application is dismissed.

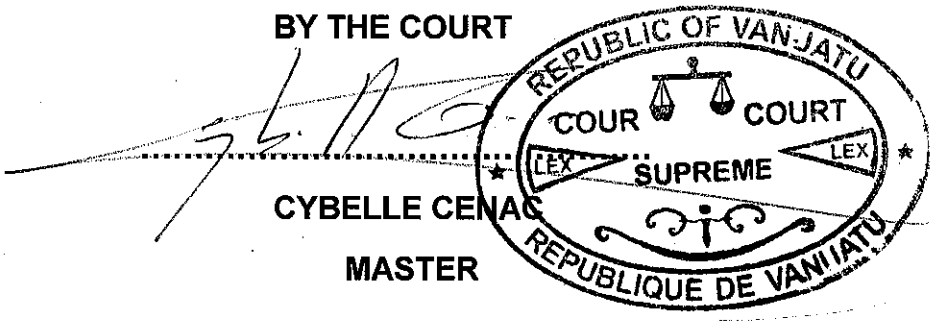
2. This costs to the Respondent in the amount of VT20, 000 to be paid within 14 days.

3. That matter scheduled for enforcement conference on the 12th July, 2018 at 10 a.m.

4. That counsel for the Respondent to prepare summons and deliver to the court for signature and counsel to serve summons on the Applicant.

DATED at Port Vila, this 22nd day of June, 2018

BY THE COURT



CYBELLE CENAC

MASTER