

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

Civil Appeal
Case No. 19/1453 CVA

BETWEEN: Christopher Emelee
Appellant

AND: Tony Toursesrew
Respondent

Date: 19 November 2019
Before: Justice G.A. Andrée Wiltens
Counsel: Ms J. Kaukare and Mr D. Yahwa for the Appellant

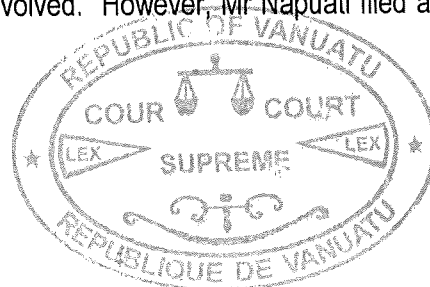
JUDGMENT

A. Introduction

1. This is an appeal from a Magistrate's decision to not set aside a default judgment.

B. Background

2. The Claim was filed on 14 March 2018. It related to an alleged debt owed for the transportation of politicians during the January 2016 General Election.
3. The Claim was served on Mr Emelee on 26 March 2018.
4. The Magistrate's Court scheduled a first hearing for 7 May 2018. That notice was served on Mr Emelee on 26 April 2018. There was no appearance by Mr Emelee or anyone representing him.
5. Due to the failure by Mr Emelee to file a Response or a Defence, an application for Judgment by Default was filed on 12 June 2018. That was served on Mr Napuati the same day – the file does not indicate how it was that Mr Napuati was now involved. However, Mr Napuati filed a Notice of Beginning to Act on 25 June 2018.



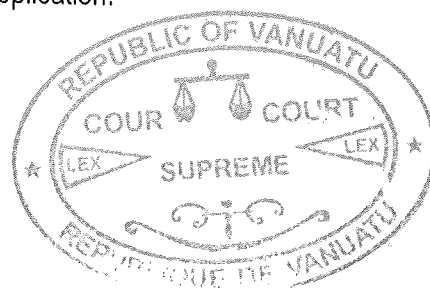
6. At no stage up until then was a Defence filed, to the Claim or to the application for Judgment by Default. Accordingly, on 8 August 2018 Judgment was entered by Default.
7. On 29 October 2018 an application for Enforcement Order was made, which was granted on 15 November 2018. That Order, together with an Enforcement Conference Notice, was served on Mr Emelee on 19 November 2018.
8. On 22 November 2018 Mr Napuati filed a Notice of Ceasing to Act.
9. On 17 December 2018 Mr Yahwa filed a Notice of Beginning to Act.
10. On 11 March 2019 Mr Yahwa filed a Defence to the Claim together with an application to Set Aside the Judgment by Default. The sworn statements by Mr Emelee in support of both matters were filed on 10 April 2019.
11. The application was heard on 11 April 2019, and the decision of 15 May 2019 was to the effect that the application failed as there had been no satisfactory explanation for the delay, nor had there been an arguable defence disclosed. This is the decision appealed against.

C. Law

12. The learned Magistrate rightly held that Rule 9.5(3) of the Civil Procedure Rules had application. In order to succeed to set aside the default judgment Mr Emelee needed to:
 - Show reasonable cause for not defending the claim; and
 - Demonstrate an arguable defence regarding liability or quantum.

D. Discussion

13. Mr Toursesrew is a bus driver. The amount of this Claim (VT 438,500) is indisputably a large sum for him. He has had to wait to be paid for his services for almost 4 years.
14. Mr Emelee has demonstrated a desire to delay these proceedings. He has belatedly come forward and submitted that the delay is the fault of Mr Napuati. That may be so, but Mr Emelee did not demonstrate that to the learned Magistrate's satisfaction.
15. In order to be able to blame Mr Napuati, Mr Emelee should have provided a waiver of privilege so that Mr Napuati could disclose his instructions. Without that, all the Court had was a protestation by a judgment debtor attempting to avoid having to pay.
16. Further, even if Mr Napuati was responsible wholly or partly, his involvement appears to have commenced only after the time for filing a Response and/or a Defence had well and truly passed – and Mr Emelee had provided no explanation at all in relation to that.
17. I accept the learned Magistrate's finding as to that aspect of the application.

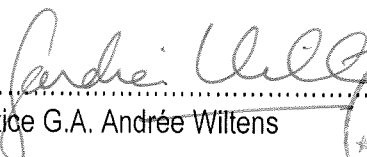


18. Mr Emelee maintains he was not at Malekula when the debt was created. He seems to suggest it might a debt of his political party, but he maintains it is not a personal debt as he had no agreement with Mr Toursesrew.
19. There is no evidence before the Court to confirm that statement. Had Mr Emelee filed a Defence in time, there would have been a trial and the relevant evidence would have been examined.
20. I am concerned about the fairness of the situation to both parties. It would be easy to simply agree with the learned Magistrate and find that there is no arguable defence raised. To do would deny Mr Emelee his opportunity to challenge the debt. However, to give Mr Emelee the opportunity, somewhat against my better judgment given the delays he alone is responsible for, means Mr Toursesrew has to wait further for his payment. A half-way house accordingly has an attraction.

E. Result

21. I am prepared to give Mr Emelee the opportunity to advance this defence, but only on condition he first pay into the Chief Registrar of the Supreme Court's trust account the sum of VT 438,500 within 10 days from today. If that occurs, I will remit the case back to the Magistrate's Court for an urgent trial. If that does not occur, I will simply dismiss the present appeal.
22. Mr Toursesrew is unrepresented and has not appeared at any stage in relation to this appeal. There will accordingly be no award of costs.

Dated at Port Vila this 19th day of November 2019
BY THE COURT


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Justice G.A. Andrée Wiltens

