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

Civil Appeal Case No. 24 of 2015

BETWEEN: HUHU GAITUVWA ASSOCIATION COMMITTEE INC
Appellant

AND: RUSSEL NARI
First Respondent

AND: MARY NARI
Second Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Raynor Asher
Hon. Justice Stephen Harrop

Counsel: *Mr Colin Leo for Applicant*
Mrs Mary Grace Nari for the Respondents

Date of Hearing: *Wednesday 18 November 2015*

Date of Delivery: *Friday 20 November 2015*

JUDGMENT

Introduction

1. The Appellant ("HGA") is a charitable association registered with the Vanuatu Financial Services Commission. It operates in North Pentecost.

2. Derek Leona is the former chairman of the executive council of the Appellant. At a meeting on 14 September 2014, the supreme body of the appellant, the Togotogon Vanua ("TV") terminated Mr Leona's position.

3. Mr Leona alleged that the meeting of 14 September and two subsequent meetings on 9 and 16 January 2010 were conducted and arranged by the First Respondent without authority and that the decisions that time were unlawful in terms of the appellant's constitution. He also claimed that the Second Respondent had wrongly claimed to be the Appellant's legal officer and had without authority on its behalf instituted a proceeding against him in the Magistrate's Court in February 2015.

4. Rather than make a personal claim against the TV or the Respondents raising these grievances, Mr Leona filed on 18 February 2015 a Supreme Court claim under number CC 31 of 2015 where the named claimant was the Appellant. In the intituling he refers to himself as being the lawful chairman of its executive council.

5. The Respondents filed a defence on 23 February 2015 denying the essential allegations and asserting that the claim was vexatious and frivolous because Mr Leona was confused whether he was representing the HGA or bringing the proceeding in his own personal capacity against the TV and the Respondents.

6. Soon after, on 4 March 2015, the Respondents filed and served an application to strike out the claim on the grounds that Mr Leona was not authorized by the appellant to bring the proceeding in its name. It was also alleged that the claim was frivolous and vexatious in that no cause of action was disclosed and that the orders sought were misconceived *"as Derel Leona appears to hold himself as the [HGA] disregarding the supreme body [TV] and the executive committee ....who make decisions and execute the decisions. The Association is not the private property of Derek Leona."*

7. Three sworn statements were filed in support of the strike out application. These along with the application were served on the claimant on 4 March 2015.

8. The Appellant (i.e. Mr Leona in effect) did nothing in response to the application. No opposition nor any evidence disputing that of the Respondents was filed.

9. The first case conference took place on 15 May 2015. Mr Leo appeared for the Appellant and Mrs Nari, the Second Respondent, who is a lawyer, appeared for the Respondents.

10. Justice Sey heard from both counsel, considered the papers that had been filed and then made orders including refusal of leave to amend the claim, granting the strike out application and striking out the claim.

11. In July 2015, Mr Leona (interestingly making the application in his own name, rather than in the name of the Appellant) sought an order that he be granted leave to appeal against the orders made by Justice Sey. Leave was necessary both because it was beyond the 30 day period to file an appeal and because it was against an interlocutory order. At the hearing without

opposition from the Respondents we proceeded to explore the merits of the proposed appeal in order to assess the leave application on a fully-informed basis.

12. The grounds of the leave application are :-

"1. It was manifestly unfair for a Judge to strike out a claim at the first conference.

2. The Appellant was taken by surprise by her Lordship (sic) *when her Lordship* (sic) *entertained the Respondent's application without giving the requisite opportunity to the claimant to respond formally as the notice issued by her Lordship* (sic) *was a notice for a conference not a notice for hearing.*

3. There are factual disputes between the parties which warrants (sic) *the Court's careful assessment and deliberation given both parties have organized two different annual general meetings at different times for the [HGA] and have created radical amendments to the [HGA] Constitution which inflated heated dispute between members of the [HGA].*

4. As shown in the sworn statement of Derek Leona filed in support."

13. In the proposed grounds of appeal if leave is granted, the additional point is raised that Sey J erred in refusing the Appellant leave to amend its claim. At the hearing Mr Leo submitted that Sey J ought to have given reasons for her rulings and failed to do so.

14. The Respondents submit Justice Sey was perfectly entitled to determine the unopposed application at the conference on 15 May. They note that although it is not expressly mentioned in the Judge's orders the opportunity for Mr Leona to file a claim in his personal capacity against the Respondents was expressly mentioned by the Judge to counsel.

15. Mrs Nari says that the judge made it clear to counsel that a defecting member of the Appellant, such as Mr Leona, has rights to sue in his own name and may bring a fresh proceeding but purporting as he had done to do so in the name of the Appellant could not be done without its authority.

16. The Respondents point out that a claim was later lodged under CC 131/2015 by HGA against several defendants including Mr Leona. In that proceeding, a default judgment was entered by Justice Saksak on 28 September 2015 in which among other orders Mr Leona was restrained from assuming and exercising the role of executive member of HGA. Mr Leo said an application to set aside that judgment was made on 1 October and has not yet been determined.

Discussion and Decision

17. In our view the proposed appeal is entirely without merit. Justice Sey was perfectly justified in making the orders she did on the information before her on 15 May 2015.

18. Even if there were merit in the procedural complaints raised about the way Sey J dealt with matters at the conference, which in our view there is not, there is nothing of substance that the Court could have dealt with if the Appellant had had more time to put further evidence before the Court.

19. Rule 6.4 of the Civil Procedure Rules provides:-

> *"**6.4** (1) The purpose of Conference 1 is, as far as practicable, to enable the court to actively manage the proceeding by covering the matters mentioned in rule 1.4.*
>
> *(2) At Conference 1, the judge may:*
>
> *(a) **deal with any interlocutory applications** (see Part 7), or fix a date for hearing them; and*
>
> *(b) make orders:*
>
> *(i) adding or removing parties (see Part 3); and*
> *(ii) about whether it is necessary to employ experts (see Part 11 dealing with evidence); and*
> *(iii) for the medical examination of a party; and*
> *(iv) about disclosure of information and documents (see Part 8); and*
> *(v) that a party give security for costs (see Part 15); and*
> *(vi) that statements of the case be amended or that further statements of the case be filed; and*
> *(vii) about any other matter necessary for the proper management of the case."* (emphasis added)

20. As is clearly stated in rule 6.4 (2) (a) a Judge may deal with any interlocutory applications at a first conference; there is no need to issue a notice of hearing. She had three such applications before her including, ironically, two from Mr Leo (one he withdrew, the other Sey J dismissed). There was no suggestion from Mr Leo that *his* applications should not have been dealt with in the absence of a notice of hearing. The Appellant was represented by Mr Leo and he needed to be prepared to deal with all interlocutory applications before the Court in case the judge decided to deal with them at that conference, rather than fix a date for later hearing.

21. The third application was the unopposed strike out application in respect of which the Appellant had done nothing in the 2 ½ months since it was served. There was clear sworn evidence before the court that Mr Leona was not authorized to take any claim on behalf of HGA. In striking out the claim he had lodged without authority on behalf of HGA, all the court

did was to confirm that he had no such authority. However, at the same time his right personally to take a claim challenging the way he had been treated by TV and/or by the respondents (or others in the faction opposing him and his supporters) was acknowledged. That was entirely unaffected by what the judge did, as she told counsel. The Court was merely confirming that Mr Leona had used an inappropriate vehicle to air his concerns, but was not commenting on the validity of those concerns. He should have filed the claim in his own name at the outset against those of whose conduct he complained. Such a claim would have been *about* the affairs of HGA but HGA, if a party at all, would not have been actively involved. All the court did was to address Mr Leona's fundamental error in purporting to launch a claim on behalf of HGA in circumstances where he knew very well that there were two factions disputing the right to make decisions on its behalf, including the right to sue.

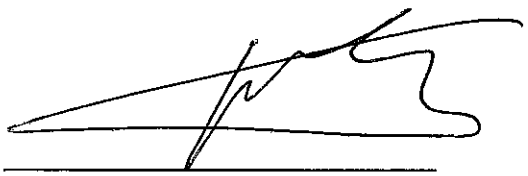
22. The first case conference envisaged by rule 6.4 is exactly the right occasion for the court to sort out this kind of fundamental error. Allowing the case to continue when it was clearly misconceived would have been futile and would have caused unnecessary costs to accrue to all parties, including Mr Leona. There was no point in allowing Mr Leo's application to amend the claim because the amendment sought was not going to solve the fatal and fundamental problem. While Sey J might ideally have given reasons for her orders, the reasons are obvious on consideration of the documents she had before her.

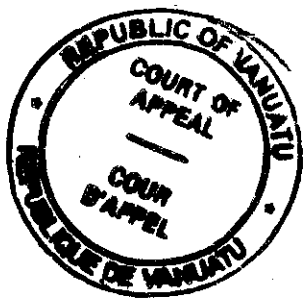
23. Even if we took a different view of the merits of Justice Sey's decision, there is in any event no justification for allowing the appeal and resurrecting the struck out proceeding because as matters stand the injunctive order which Justice Saksak made on 28 September restrains Mr Leona from purporting to act on behalf of HGA. Accordingly, even if Civil Case 31 of 2015 remained alive a court order in the other proceeding prevents him pursuing it on behalf of HGA.

24. For these reasons the application for leave to appeal is dismissed with standard costs awarded to the respondents which are to be taxed if they cannot be agreed.

DATED at Port Vila this 20th day of November 2015

BY THE COURT





Vincent LUNABEK
Chief Justice.