

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

CIVIL APPEAL CASE NO. 16/726 COA/CIVA

BETWEEN: FELIX LAUMAE
Appellant

AND: CLAIRE DORNIC
Respondent

Coram:
*Hon. Chief Justice Vincent Lunabek
Hon Justice John von Doussa
Hon Justice Ronald Young
Hon Justice Oliver Saksak
Hon Justice Daniel Fatiaki
Hon Justice Dudley Aru
Hon Justice Mary Sey
Hon Justice David Chetwynd
Hon Justice Paul Geoghegan*

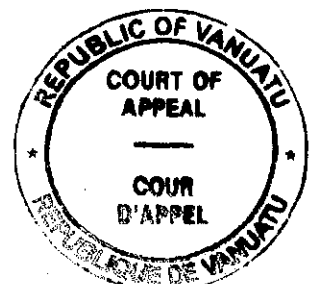
Counsel:
*Mr. Colin B. Leo for the Appellant
Mr. Silas C. Hakwa for the Respondent*

Date of Hearing: 5th April 2016 at 11.00 am

Date of Judgment: 15th April 2016 at 4.00 pm

JUDGMENT

1. Mr. Laumae seeks leave to appeal out of time against an order of Harrop J. which was made on 11 February 2016 in Supreme Court Case No. 167 of 2011 (Dornic v Laumae) that *“the defendant’s defence and counterclaim are each struck out and that he is debarred from defending the claim.”*
2. The order was made because of non-payment by Mr. Laumae of costs of VT175,000 awarded to Mrs. Dornic by Harrop J. in his Reserved Judgment of 1 October 2015 as follows:

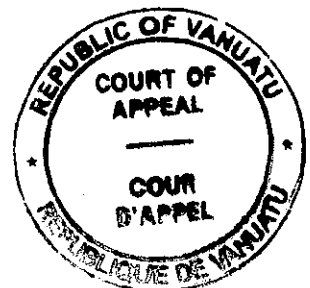


“22. All of that said, in the exercise of my discretion I have decided to award increased, rather than indemnity, costs. I award the claimant costs against the defendant in the sum of VT 175.000 including disbursements and VAT.

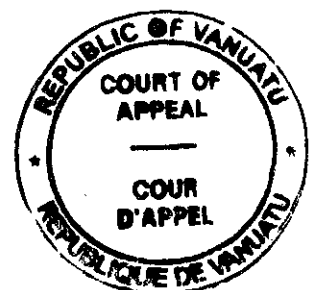
23. This sum is to be paid in full to the claimant, through payment to Mrs Patterson's office, by 15 November 2015. If that is not done, then without further notice or application from the claimant, the defence and counterclaim will be liable to be struck out and the defendant debarred from defending the claim.”

Background

3. The following chronology highlights how events unfolded in Supreme Court Case No. 167 of 2011 leading up to the reserved judgment of Harrop J. dated 1st October 2015 and subsequent directions and orders made on 27th November 2015 and 11th February 2016 respectively.
4. On **15 September 2014**, the defendant was ordered to, within 7 days of receiving notification of the claimant's expenses of attending for trial on 15 September 2014, either pay those expenses or to file a memorandum setting out his objections to the expenses.
5. This led to an order made on **14 October 2014**, that Mr. Laumae was to pay to Mrs. Dornic the sum of VT104,930 by 28 October 2014. The order went on to state that if this was not done Mrs. Dornic may proceed under rule 18.11 to apply for Mr. Laumae to be debarred from defending the case.
6. On **10 November 2014**, the claimant sought pursuant to rule 18.11 of the Civil Procedure Rules an order striking out the defendant's defence and counterclaim and debarring him from defending the case, together with costs in relation to that application because the costs order for October 2014 had not been paid



7. Mr. Laumae was in attendance (in person as the defendant) at a conference before Harrop J. on **3 December 2014**. He said he was willing to assure the Court and Mrs. Dornic that those costs will be paid by Friday 12 December 2014 either in cash or by bank cheque rather than personal cheque. Harrop J. issued a direction that if payment was not made as required then, on an urgent application from Mrs. Dornic, he would strike out the Defence and Counterclaim in the week following 12 December 2014.
8. Mr. Laumae did not pay the costs by 12 December 2014.
9. On **16 December 2014**, the claimant lodged an Urgent Application pursuant to Rule 18.11 of the Civil Procedure Rules for the defendant to show cause why a Judgment should not be entered against him. The application was supported by Ms. Viska Muluane's statement confirming that no costs had been paid by 16 December 2014 in breach of the Directions of 3 December 2014.
10. Mrs. Patterson, on behalf of Mrs. Dornic, filed a memorandum on **5 January 2015** requesting that Harrop J. strike out the defence and counterclaim as he had said he would do in absence of payment.
11. On **23 January 2015**, Mr. Laumae filed a response to the strike out application. He opposed the application and he explained to the Court that he is in financial difficulty. He stated that:
 1. *"After he returned from contesting the Solomon Islands National Election, he has faced financial difficulties. He was expecting payments from one of his clients in week ending 12 December 2014 but however, the payment was delayed until today. Because of the delay he emailed His Lordship's secretary if he could be given further time for him to have the VT 104,930 wasted cost and the additional VT20,000 to pay. This has not happened as expected either.*
 2. *As the result of his financial situation, the Defendant did not travel with his family for Christmas holidays in the Solomon Islands.*

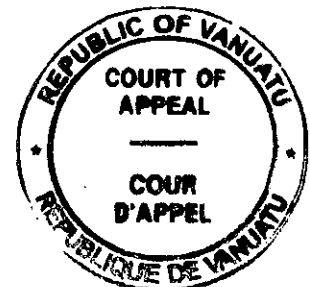


3. *Considering the Defendant's circumstance, he humbly prays to Court to invoke its power under Rule 18.11 (4) (b) to extend time whereby he could comply with the order for payment of wasted costs."*

13. In his Minute of **5 February 2015**, Harrop J. extended the time of payment of the VT124,930 to 4 pm on Wednesday 18 February 2015. Alternatively, if Mr. Laumae could not do that, he was to file a sworn statement setting out the particulars of his financial position by 4 pm on Friday 20 February 2015.
14. Mr. Laumae did not comply with either of the Court's directions.
15. On **23 February 2015**, Mr. Yawha informed the Court that Mr. Laumae had promised to make payment of the costs by 4.00 pm the next day. In those circumstances Harrop J. allocated a conference at 4.00 pm on 24 February 2015, and His Lordship indicated that if payment has not been made prior to the conference then orders will be made in light of the information.
16. The defendant and his counsel were in attendance in Harrop J.'s chambers on **24 February 2015** at 4.00 pm for conference but there was no appearance for the claimant. Paragraph 2 of the Minute reads:

"Mr. Yawha has with him a personal cheque from Mr. Laumae for VT124,930 and he was intending simply to hand this to Mrs. Patterson at the conference but in the circumstances he will travel to her office immediately after the conference and hand over the cheque to her or to her office staff, the cheque being made out in favour of Hudson & Co."

17. On **11 March 2015**, the claimant filed a Further Urgent Memorandum together with a sworn statement of Viska Muluane in support of that memorandum, and the sworn statement of Mark Stafford filed on 1 April 2015. There was an application by Mrs Patterson for a further conference as soon as possible after 13 May. The Court issued a Minute stating that the application under Rule 18.11, which required Mr. Laumae to show why his defence should not be struck out, would be heard in Chambers on Wednesday 27 May 2015 at 9.30 am.



18. However, before that scheduled conference date, the claimant filed an application on 1 April 2015 for the Court to schedule a further conference in order to consider the claimant's application pursuant to rule 18.11 on the basis that the personal cheque handed over by the defendant's lawyer on 24 February 2015 was dishonored by the NBV Bank. The hearing of Mrs. Dornic's application to strike out Mr. Laumae's defence and counterclaim was scheduled for 27 May 2015 but Mrs. Patterson advised the Court that the VT124,930 was paid by Mr. Laumae in cash on 26 May 2015.
19. After the costs of VT124,930 had been paid in cash, on 27 May 2015 Mrs. Patterson filed an application for costs on an indemnity basis seeking a payment of VT253,485 for all the numerous attendances which had followed Mr. Laumae's failure to pay the costs ordered against him on 14 October 2014.
20. Harrop J. allocated a conference/hearing on 30 September 2015 during which both the claimant's Rule 18.11 and Indemnity Costs Applications were heard. Both applications were opposed. Mr. Yawha had filed written submissions on the defendant's behalf contending that there was no longer any basis on which the Court could entertain the rule 18.11 application because those costs had been paid in full (albeit not until 26th May 2015.)
21. On 1 October 2015, Harrop J. delivered his Reserved Judgment as to Claimant's Rule 18.11 and Indemnity Costs Applications. He said (at paragraphs 7 to 10 of the judgment):

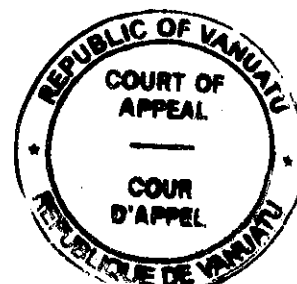
"7. Mr. Yawha's submission is misconceived. The order contained two requirements:

(a) To pay the sum of VT104,930 and;

(b) To do so by 4:00pm on 20th October 2014.

8. The order was not complied with by meeting one of the requirements but not the other. Paying the sum in full at some later time did not comply with the order any more than it would have been complied with by paying VT10 by 20 October.

9. There is no doubt that the defendant not only failed to make the payment when required but that it took him approximately seven months to make payment of what is relevantly a small sum. It is also clear that even that was only done after various efforts to extract payment were made by the claimant. These are detailed



in the various minutes on this file notably those dated 5th February, 23rd February, 24th February, 8th April and 27th May 2015.

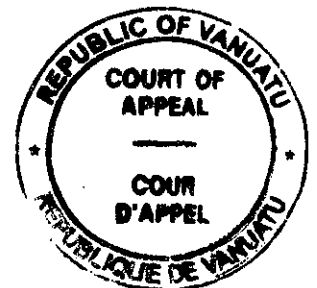
10. *I therefore uphold the claimant's application pursuant to rule 18.11."*

22. Harrop J. awarded the claimant VT175,000 costs. He then scheduled a pre-trial conference at **2pm on Friday 27th November 2015** for appropriate directions to be made. During that conference the Judge issued the following directions:

- “1. *Mr. Laumae has not paid the VT175,000 costs which I awarded against him in my reserved judgement of 1 October 2015. I gave him a lengthy period, six weeks or so, to make that payment and directed that it be done by 15 November. I said that if it was not done then without further notice or application from the claimant Mr. Laumae's defence and counterclaim would be liable to be struck out and he would be debarred from defending the claim.*
2. *The costs have still not been paid some two weeks after that dateline and Mr. Yawha is unable to tell me anything as to why not or as when they might be paid. In these circumstances and against the background that is set out in the various Minutes as well as my judgement of 1 October, I am going to make an “unless” Order i.e. if those costs are not paid in full in cash by noon next Friday 4 December 2015 the Defence and counterclaim will be struck out and Mr.Laumae will be debarred from defending the claim.*
3. *In that event, the case would proceed on a formal proof basis so far as the claim is concerned and Mr. Laumae would not be permitted to be heard in opposition to it. Those consequences were clearly set out in paragraph 23 of my judgment and it is frankly yet another indulgence being granted to Mr. Laumae to give him the further time I have.”*

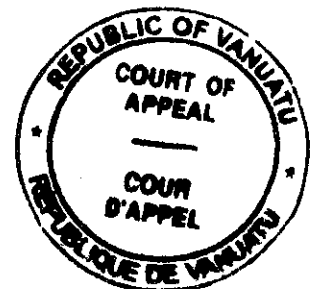
23. On **11 February 2016**, Harrop J. confirmed the primary “unless” order previously made. He ordered that the defendant's defence and counterclaim are each struck out and that he was debarred from defending the claim. The Judge said:

“There is no reason not to do so. There has been no request by the defendant for more time to pay or any application to vary the terms of those orders, coming as they did against an appalling, indeed contemptuous, history of non-compliance by the defendant with court orders over a very lengthy period.”



This Appeal

24. The grounds in support of the Notice of Application for Leave to Appeal are: First, that the making of the order of 1 October 2015 was wrong in law because the Court had no jurisdiction to make the order. Secondly, that there was no proper basis or Civil Procedure Rule upon which the learned trial judge awarded costs of VT175,000 against the Appellant. Thirdly, that the making of the order of 11 February 2016 was in breach of natural justice to the Appellant as the application referred to in the order was not served on the Appellant or his lawyer.
25. We are satisfied that the Judge was quite within his power to deal with the costs as he did. As to the claim there was no jurisdiction to make such a costs award, we refer to Rule 15.1 and Rule 15.2 (1) and (2) of the Code of Civil Procedure. That gives the Court wide power to award costs at any stage of the proceedings as it thinks fit. Here, as we have described, Mr Laumae consistently failed to comply with Court orders as to costs. His failure meant Ms Dornic was put to significant further costs. The Judge was correct to order Mr Laumae to pay some of these further costs. As to the second ground of appeal the Judge was entitled to award indemnity costs. Here he ordered indemnity costs of VT175,000 which was somewhat less than Ms Dornic was claiming. Rule 15.5 (4) of the Civil Procedure Rules provides that the Court may order indemnity costs if those costs are:
- a)
 - b) The costs of a proceeding brought for non-compliance with an order of the court.
- Here indemnity costs were awarded because Mr Laumae failed to comply with Court orders as to previous costs awards. It is significant that the Court did not strike out the defence and counterclaim at the onset but kept giving Mr. Laumae an opportunity to pay. In fact, the matter dragged on for a long time until 15 months later.
26. The issue of non-service before the making of the order of 11 February 2016 does not arise because the Appellant and his counsel had been warned about the automatic operation of the “unless” order as a consequence of non-payment of the VT175,000 costs awarded against him by Harrop J. in the reserved judgement of 1 October 2015.



27. The Appellant also submits that the original costs order of VT124,930 should not have been awarded against him as he had requested and made at least three (3) attendances before the Judge to adjourn the trial but his applications were declined. We are of the view that we need not consider this argument because the Appellant did not appeal the costs award of VT124,930 made in October 2014.
28. In the circumstances, we refuse leave to appeal as we find no merit in the proposed appeal.
29. The Respondent is entitled to costs on a standard basis for an appeal.

DATED at Port Vila this 15th day of April 2016.

FOR THE COURT



**Hon. Vincent Lunabek
Chief Justice.**

