

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

Civil Appeal Case No. 16/3745 CoA/CIVA

BETWEEN: ISAACH TARILIU
Appellant

AND: PLANTATION LIMITED
First Respondent

AND: THE REPUBLIC OF VANUATU
Second Respondent

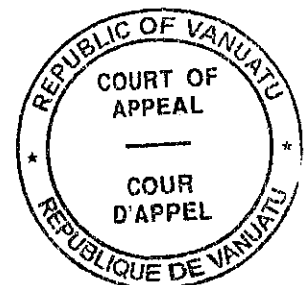
Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Ronald Young
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan

Counsel: *Mr Felix Launae for the Appellant*
Mr John Malcolm and Ms Stephanie Mahuk for the First Respondent
Mr Sammy Aaron (SLO) for the Second Respondent

Date of Hearing: *Wednesday 29th March 2017 at 9:00 am*
Date of Judgment: *Friday 7th April 2017 at 4:00 pm*

JUDGMENT

1. This is an appeal from orders made in these proceedings in the Supreme Court on October 19th 2016. The orders were made consequent upon the filing by Plantations Ltd of an application pursuant to rule 18.11 of the Civil Procedure Rules. That rule



entitles an applicant to seek judgment against a party in circumstances where that party has failed to comply with an order made in the proceeding.

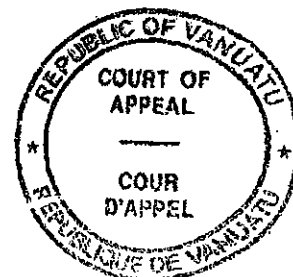
2. There was no appearance by or on behalf of Mr Tariliu when the matter was called before the Supreme Court Judge. The application under rule 18.11 had been served upon Mr Toka, counsel for Mr Tariliu, on October 13th 2016.

3. Upon being satisfied that the grounds for the making of an order had been made out the Judge made orders that:-

- a) Judgment be entered in favour of Plantations Ltd against Mr Tariliu.
- b) Judgment be entered against Mr Tarililiu in favour of the State which had been joined to the proceeding as a third party.
- c) There would be no order for damages.
- d) Costs were fixed at Vt 500,000 each for Plantations Ltd and the State.

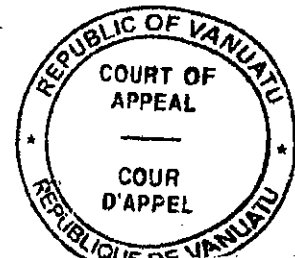
4. Mr Tarililiu appeals against that judgment on the following grounds:-

- a) The Judge was wrong in law and fact in granting the judgment because Mr Tarililiu had filed an amended defence and counter claim in June 2015 and had also filed a third party notice as directed by the Court. Mr Tarililiu's lawyer had also provided reasons for his non-attendance at the conference.
- b) The trial Judge erred in granting judgment in favour of Plantation Ltd when the claim, defence and counter claim had raised contentious issues in respect of the proceedings.



- c) That the trial Judge erred in law in granting judgment when the proceedings involved a challenge to the validity of the registration of a lease title.
- d) That the Judge should have extended time for compliance with orders which had not been complied with.
- e) That the case involved land "*which is fundamental to the people of this country like many other societies as well as the integrity of the registration of leases in Vanuatu*".

- 5. It is contended by Mr Tariliu that the case required fair and just trial of issues raised in the claim and counter claim.
- 6. The substantive claim involves a claim by Plantation Ltd that Mr Tariliu has trespassed on its land including an allegation that Mr Tariliu has unlawfully constructed buildings on the land. Mr Tariliu denies this and alleges a number of things in turn, including that Plantation Ltd's lease title was not properly surveyed prior to registration.
- 7. The Rule 18.11 hearing had been preceded by a number of conferences and resulting Minutes.
- 8. A Minute issued by the trial Judge on October 11th 2016, records that the defendant had failed to comply with all Court orders issued on March 3rd 2015, April 14th 2015, June 2nd 2015, June 29th 2015, August 21st 2015, November 27th 2015, May 10th 2016 and August 8th 2016. The Minute recorded that the claimant and third party were to bring an application "*for the defendant to show cause why an order should not be made against*



him for his non-compliance" and recorded that the application would be heard in chambers on Wednesday October 19th at 8:30 am. Mr Toka did not appear at that conference.

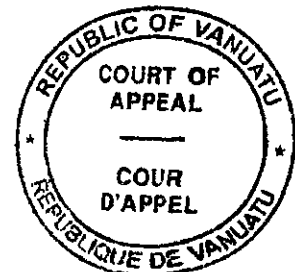
9. Counsel in this appeal were unable to provide us with any orders made on June 2nd 2015, November 27th 2015, May 10th 2016 and August 8th 2016.

10. The application pursuant to rule 18.11 was accompanied by a sworn statement of the receptionist employed by the claimant's lawyers. That sworn statement annexed orders made by the Judge on May 30th 2016 and then stated that the deponent had perused the file and that the defendant had not filed or served an amended defence and cross claim within seven days and that the claimant had not received a memorandum stipulating how the Republic of Vanuatu had come to be joined as a third defendant, both of those things having been directed in the Minute of May 30th.

11. The sworn statement also asserted that the claimant's lawyers had not received the cross claim against the third defendant or third party "*asserting fraud on (sic) negligence, or anything at all*".

12. There is no dispute that when the application was dealt with on October 19th Mr Toka did not appear.

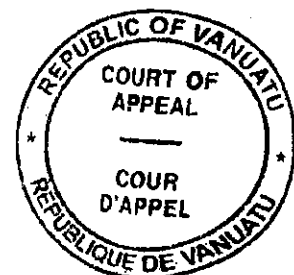
13. It is clear that the sworn statement in support of the application did not present an entirely accurate picture of the situation at that time. An amended statement of defence and counter claim together with a third party notice issued against the State had been



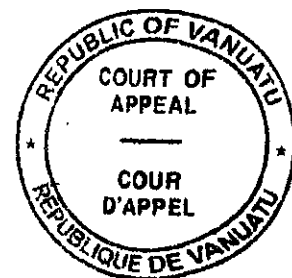
filed by Mr Tariliu's counsel on June 12th 2015 some 14 months prior to the rule 18.11 application and almost 12 months prior to the Minute of May 30th 2016. Accordingly Mr Tariliu had complied with the previous orders made by the Court. While a memorandum had not been filed stipulating how the Republic had been joined as a third defendant, it is unclear why such a memorandum was required in circumstances

where not only had a third party notice been filed but a sworn statement on behalf of the third party had also been filed in response on September 17th 2015. Accordingly while it is possible that the claimant may not have been served with these documents (and that position is unclear) the pleadings had been filed.

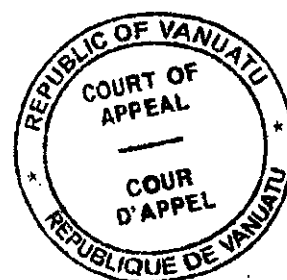
14. In addition, while the application referred to the fact that Mr Toka had failed to attend various conferences, the sworn statement in support did not refer to that issue at all.
15. Accordingly, the only non-compliance on the part of Mr Tariliu was a failure to file a memorandum. The requirement for such a memorandum was unnecessary.
16. In all other respects, the defendant's pleadings were complete and Mr Tariliu had also filed a number of sworn statements setting out his position, those four statements having been filed on July 21st 2015 and October 30th 2015.
17. What is also clear is that at the time of the conference the claimant had not filed a reply to the defendant's counter claim. Pursuant to rules 4.5 and 4.13, if the claimant wished to defend the defendant's counter claim a defence to the counter claim should have been filed within 28 days after the date of service of the claim. Accordingly the claimant was also in default at the time the Rule 18.11 hearing was held.



18. We are satisfied that during the hearing of the rule 18.11 application there was insufficient focus on whether or not Mr Tariliu had actually failed to comply with the orders of the Court. In fact, he had complied and there were insufficient grounds to justify granting judgment against the defendant.
19. In making the decision to grant the application the Judge was not aware of the fact that the defendant had in fact complied with previous directions and had done so nearly 12 months prior to the application. We are satisfied that had the Judge known the correct circumstances the discretion would have been exercised differently.
20. None of what has been said excuses the conduct of Mr Tariliu's previous counsel. Mr Toka provided a sworn statement in support of the appeal. No leave for the filing of that statement was sought and we refer to it only for the purpose of making observations as to the duties of counsel to the court.
21. In his statement Mr Toka accepted having not attended all Supreme Court conferences and stated that he was either in Malekula attending Magistrates Court or "*busy elsewhere*". He accepted also that he had not made any arrangements with other lawyers to act as agent in his absence as it was difficult to contact his client who lived in Epi in order to secure funds to pay another lawyer for their attendance. Mr Toka's explanation is unsatisfactory. Supreme Court matters must always take priority over Magistrates Court matters and if counsel cannot obtain funds from their client to fund the appearance of another lawyer then they should meet those costs themselves and sort that issue out with their client at a later date.



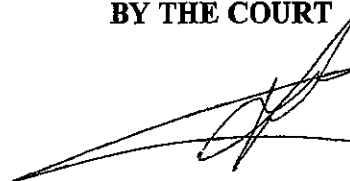
22. Mr Toka referred to the fact that he is not on the Registrar's weekly email list for Court conferences and collected all Court notices from his pigeon hole at the Court's front desk but did not do so when he was "busy travelling". Again this provides no valid reason for his non-appearance. As an officer of the Court Mr Toka has clear obligations as counsel and he was in clear breach of those obligations.
23. While Mr Toka deposed that he made "genuine attempts" to attend conferences on October 11th and October 19th, the only important fact is that he did not appear. Sending an email to the Court registry at 10:34 am in respect of a conference that has been scheduled for 9 am that morning, as he did for the conference on October 11th, is unacceptable.
24. Notwithstanding that, the appropriate step to take in these proceedings might have been to have made a wasted costs order against counsel personally rather than to bring Mr Tailiu's defence and counter-claim to an end. We are satisfied for the reasons we have referred to that judgment should not have been granted in favour of Plantation Ltd and the State.
25. The appeal is allowed.
26. The orders made by the Supreme Court judge on October 19th, 2016 are set aside.



27. Both Plantation Ltd and the State should receive an award of costs in respect of both the rule 18.11 conference appearance and this appeal and accordingly while being successful, Mr Tariliu is ordered to pay costs to Plantation Ltd of Vt 50,000 and to the State of Vt 30,000 in respect of both matters.

DATED at Port Vila this 7th day of April, 2017

BY THE COURT



Vincent LUNABEK
Chief Justice

