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

Civil Appeal
Case No. 17/3626 CoA/CIVA

**BETWEEN: LOUIS KALNPEL**
Appellant

**AND: AFRICAN PACIFIC (SINGAPORE) LIMITED**
First Respondent

**AND: AFRICAN PACIFIC PTY LIMITED**
Second Respondent

***Coram:*** ***Hon. Justice John von Doussa***
***Hon. Justice Raynor Asher***
***Hon. Justice Oliver Saksak***
***Hon. Justice Dudley Aru***
***Hon. Justice David Chetwynd***
***Hon. Justice Gus Andrée Wiltens***

***Counsel:*** *Appellant in person*
*Mrs MNF Patterson for the Respondents*

***Date of Hearing:*** *Monday 23rd April, 2018*
***Date of Judgment:*** *Friday 27th April, 2018*

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## JUDGMENT

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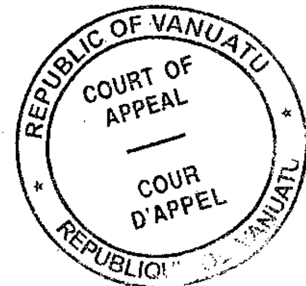
### Introduction

1. This is an appeal against the judgment of the Supreme Court dated 1st December 2017 in which the primary judge entered judgment against the appellant for the following –

   (a) Damages for breach of contract in the sum of VT3,140,375;
   (b) Damages for breach of loan agreement in the sum of VT90,000;
   (c) Interest on the sums awarded at 8% per annum from 27 February 2013 until full settlement;
   (d) Dismissal of three appellant's counterclaim; and
   (e) Costs awarded on the standard basis as agreed or be taxed.



2. Neither the appellant nor his counsel were present when the case came on for trial. The trial judge proceeded nonetheless to go on with the trial which led to the above judgment.

**Background**

3. The appellant was one of three persons trading as NPS Export Services. Begining in 2009 the appellant entered into a business arrangement with the respondents for the purchase of cocoa beans to be supplied by the appellant using the money advanced by the respondents to the appellant. The appellant was obliged to acquire cocoa beans, pay for them, and deliver them to the respondent's local agent in Luganville, Santo. The agent would ultimately export them to the buyers in Europe. Prior to March 2010 the appellant successfully delivered cocoa beans under the arrangement.

4. In May 2010 the respondents advanced the sum of VT2,331,000 to the appellant for the supply of 9 metric tons of cocoa beans. A further advance of VT1,521,625 was made in October 2010 for the supply of 6.25 metric tons of cocoa beans. Under the 9 metric tons invoice only 2.75 metric tons were delivered and under the 6.25 metric tons invoice, no cocoa beans were ever delivered.

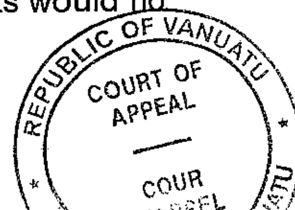
5. The appellant received in addition a personal loan from the respondents in the sum of VT300,000 and has repaid only VT210,000. The balance remaining is VT90,000.

6. The respondents therefore sued the appellant for the refund of VT3,135,758 and VT90,000 with interest and costs.

7. In his defence the appellant admitted trading as NPS Export Service but denied it was a partnership. He also admitted selling cocoa beans to the respondents pursuant to the issued invoices. Finally the appellant said the moneys received from the respondents were paid to cocoa farmers on Malekula who were producers of the cocoa beans.

8. The appellant's defence included a counterclaim which alleged that in October 2010 6 tons of cocoa beans were ready for shipment but they were not shipped to the respondents' agent because he had been told the respondents would no





longer accept them. As a result the appellant alleged that the business arrangement came to an end and the appellant suffered a loss of 6 tons of cocoa beans, loss of future business, and loss of reputation.

## Grounds of Appeal

9. The appellant's grounds of appeal were –

    (a) He was not notified of the trial date;
    (b) His lawyer failed to comply with his obligations;
    (c) He was denied his right to natural justice;
    (d) The trial judge failed to apply Rule 12.9(1) in his judgment;
    (e) He was denied his right to be heard on his counterclaim; and
    (f) The case involved matters of public interest and no equal footing was afforded to all parties to ensure the case was dealt with fairly.

## Discussions

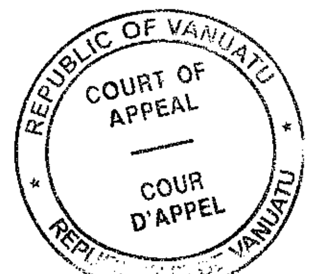
10. At the hearing of the appeal it was pointed out to the appellant that all his documents filed on 12th, 13th and 20th April 2018 were defective because the appellant had not provided his address for service. All the appellant stated in his documents as his address was at Bladinières Estates, Port Vila. In our view this is insufficient for the purposes of effective service under Rule 5.4 of the Civil Procedures Rules. The appellant was unable to explain adequately why he had not done so. The absence of a proper address for service has made it impossible for the Court and the respondents to serve documents on the appellant in the usual way.

11. Turning to the grounds of appeal, first the issue of notice. In the judgment at paragraph 1 the trial judge noted:

    *"This case after several aborted fixtures, was finally set down for trial on 20 and 21 November 2017 by a court notice dated 28 August 2017. When the trial commenced neither defence counsel nor the named individual defendants appeared. ..."*

    At paragraph 13 of the judgment the trial judge recorded:





*"Unfortunately the defence evidence is untested because Louis Kalpnel failed to appear at the trial despite having been advised by counsel for the claimants that he was required for cross-examination. ..."*

12. At the trial hearing on 20 November 2017 the judge was satisfied the appellant and his lawyer were notified by notice dated 28 August 2017. Further the judge was satisfied the appellant had been advised of the requirement for cross-examination by the respondent's lawyer. Despite those clear notices, neither the lawyer not the appellant attended trial. Therefore the first ground of appeal fails.

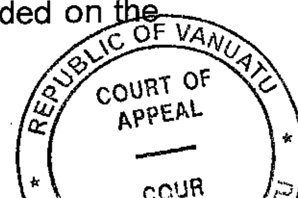
13. As to the second ground, during the hearing of the appeal the court asked the appellant specifically why his lawyer did not attend court for trial, and no adequate answer was given.

14. The ground of failure by the appellant's lawyer to comply or fulfill his obligations is not made out as the appellant has provided no evidence as to the instructions held by his lawyer, or why the lawyer failed to appear. The court at the hearing pointed out to the appellant that this is a matter he could pursue separately with his lawyer if indeed the lawyer failed to carry out his professional responsibilities. This ground of appeal is therefore not made out by the appellant.

15. The third ground is the denial of the appellant's right to natural justice. This ground is considered with the fifth and sixth grounds. The appellant argued that the trial judge had in essence struck out his counterclaim without giving him the opportunity to hear his evidence and the evidence of the cocoa farmers. He placed reliance on the principle laid down in <u>Noel v. Champagne Beach Working Committee</u> [2006] VUCA 18. He placed reliance also on the trial judge's comment at paragraph 13 of the judgment that it was unfortunate that "*the defence evidence is untested because Louis Kalnpel failed to appear ...*" and at paragraph 15 that "*... although the claimant's evidence was not tested in cross-examination ...*".

16. We do not accept the appellant's arguments. The case of <u>Noel v. Champagne Beach Working Committee</u> is distinguished. That case dealt with an application to strike out a claim, this case involved a trial. Although the appellant and his lawyer did not appear without any reasonable cause, the trial proceeded on the





basis that the trial judge was satisfied the appellant and his lawyer had had notice. The trial judge held at paragraph 10 the appellant "*has no defence ...*" to the personal loan aspect of the claim. Further at paragraph 12 through paragraph 14 the trial judge considered the defence evidence deposed by the appellant in his sworn statement of 20 November 2014. Upon that sworn statement being filed it became evidence in the case, and the trial judge was entitled to take it into account. And finally at paragraph 15 the trial judge considered the claimants' (respondents) evidence and made his findings being satisfied on the balance of probabilities.

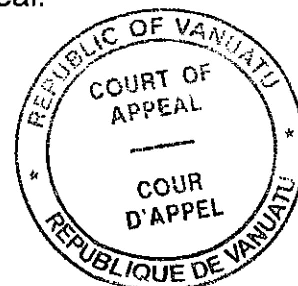
17. In relation to the counterclaim of the appellant the trial judge at paragraph 11 of the judgment said:

> "*In light of the admissions set out at paragraph 7 above, the only common issue that remains in the defence and counterclaim is: 'whether the defendant had available in October/November 2010, 6 tons of cocoa beans ready to supply to the claimants which the claimants refused to accept*".

18. At paragraph 13 of the judgment the trial judge considered the evidence of the defendant that was on the court file, that the 6 tons of cocoa beans had been delivered. He found that it lacked "*crucial credit enhancing details*" because the names of the cocoa farmers who supplied the cocoa beans, the quantity supplied and the payments received were not disclosed. Further the trial judge found there were no additional sworn statements by the farmers to corroborate the appellant's "*bald assertions*".

19. At the hearing of the appeal the court also pointed out to the appellant that he had deposed in a sworn statement on 10 October 2016 at paragraph 9 that he had discontinued the counterclaim against the respondent. He is bound by that statement.

20. For the reasons given, we are not persuaded that the trial judge had erred in his judgment in dealing with the claims and counterclaims of the appellant in his and his lawyer's absence. We do not accept there was a denial to him of his right to natural justice. We therefore reject grounds 3, 5 and 6 of the appeal.



21. The fourth ground of appeal was that the trial judge had failed to apply Rule 12.9(1) of the Civil Procedure Rules. This Rule provides for failure to attend as follows:

> *"**12.9** (1) If a defendant does not attend when the trial starts:*
> *(a) the court may adjourn the proceeding to a date it fixes; or*
> *(b) the court may give judgment for the claimant; or*
> *(c) the claimant, with permission of the court, may call evidence to establish that he or she is entitled to judgment against the defendant."*

22. The trial judge proceeded under Rule 12.9(1)(c). The appellant could not demonstrate that the trial judge had exercised his discretion under this rule unreasonably in the circumstances of the case.

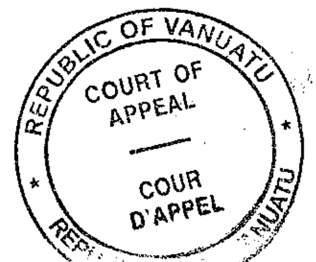
23. The appellant submitted that the court should treat this appeal as an application to set aside a default judgment and to have the judgment set aside under Rule 9.1. The appellant referred to Article 47 of the Constitution to urge the court to consider the application according to substantial justice.

24. We reject those submissions as untenable. In this case it is common ground a claim was filed followed by an amended claim. Then a defence to the amended claim was filed by the appellant. Clearly a default judgment cannot be entered where there is a defence filed. The only appropriate and correct way to have dealt with the claim was under Rule 12.9(1) and we are satisfied the trial judge had exercised his discretion under that rule properly in the circumstances of the case. This ground of appeal also fails.

25. The final ground is in substance another aspect of the allegation that the appellant was denied natural justice. He alleges no equal footing was afforded to both sides of the case. That simply is not correct. He had every right and opportunity to be at the trial and to present his defence. Why he and his lawyer failed to do so has not been explained by him, and without that explanation there is no basis for this ground of appeal.

26. Even if this had been a default judgment, we would have dismissed the appeal, as under Rule 9.5(3) a default judgment will only be set aside if the defendant





has an arguable defence. The appellant has shown no arguable defence for the reasons we have set out above.

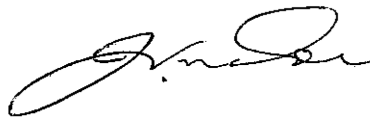
**The Result**

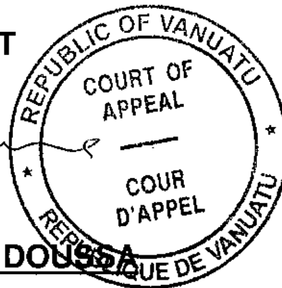
27. The end result is that this appeal is dismissed.

28. The appellant will pay the respondents' costs of the appeal which we fix at VT80,000.

**DATED at Port Vila, this 27th day of April, 2018.**

**BY THE COURT**






**Hon. Justice John von DOUSSA**