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

Civil Appeal
Case No 18/2595

BETWEEN	ROSE DONALD DONALD RESTUETUNE Appellants
AND	ROBERT EDGAR SUGDEN Respondent
DATE OF DECISION:	
CORAM:	Hon Chief Justice V Lunabek Hon Justice J Hansen Hon Justice D Fatiaki Hon Justice O Saksak Hon Justice D Aru Hon Justice S Felix
COUNSEL:	J Taiva — Counsel for Appellant Respondent in person
DATE OF HEARING:	8TH July 2019
DATE OF JUDGMENT:	19th July 2019

JUDGMENT OF THE COURT

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[1] This is an appeal against the decision of Justice Andrée Wiltens dated 19 October 2018, where he refused leave to appeal out of time.

Background

[2] This matter has a long history. The respondent is a solicitor and has been acting for the appellants for many years. He was involved in two particular pieces of litigation that he explained to us were far from the bar. One involved admiralty proceedings and the second mortgage proceedings. He said they were both complex and complicated, leading to boxes of

files. There is no evidence before us to question that. Both were before the Courts for a number of years. The mortgage matter was unduly complicated as it related to a loan from the National Bank of Vanuatu made to the father of Rose Donald. It appears that the manager of the National Bank of Vanuatu at that time was related to the Donald's. There was an allegation that some of the money advanced to the Donald's for the construction of a house was diverted into the construction of a house for the manager of the National Bank. As Mr Sugden explained it, it involved accounting for almost every single piece of material that went into the two houses.

[3] Mr Sugden acknowledged that the appellants could not afford costs, and so he agreed to a reduced rate at three quarters of his normal fee. Various arrangements for payment were made, including regular deductions from Mrs Donald's bank account. However, many promises were not met and eventually Mr Sugden issued proceedings on 9 December 2016 in Civil Case 3948 of 2016. This claimed in total the sum of VT 7, 894,155, and sought interest on this at 5 per cent.

[4] No steps were taken by the appellants, and on 8 April 2017 default judgment was entered. This led to the appellants filing an application to set aside this default judgment on 19 May 2017. The matter was called before Justice Chetwynd on 15 June 2017, when the appellants were represented by Mr Justin Ngwele. The Judge made an order that unless the defendants paid into Court the amount of the judgment debt, or secured it to the satisfaction of the claimants by close of business on 13 July 2017, the application to set aside was to be dismissed. On 20 July 2017 the application was dismissed for failure to comply with the conditions so the default judgment stood.

[5] Various promises to pay by instalment were made, and there was a suggestion of taking security over a property to satisfy the debt. It culminated, on 27 July 2018, the day before a stay on the enforcement warrant was due to expire when the appellant, Donald Restuetune, attended on Mr Sugden accompanied by Mr Ericson. That appellant informed Mr Sugden he had contracting work with the Public Works Department (PWD), and he handed him a letter which confirms that an entity associated with Mr Restuetune had been awarded contracts with the PWD worth VT3 to VT4 million, which would be paid monthly. The letter also states he would be awarded more contracts before the end of the year. The appellant Restuetune asked if he could pay the judgment debt in instalments of VT2.5 million by 8

August 2018, VT2.5m by 3 September 2018 and the balance by 15 October 2018. When Mr Sugden said this would be satisfactory, Mr Restuetune produced a large wad of cash, stated he would make an initial payment of VT1 million, and began counting out notes. However, at that stage Mr Ericson stopped him and said to Mr Restuetune and Mr Sugden, "No. We will appeal." The money was put back in the pocket of Mr Restuetune and they left the office. Mr Sugden had no further communication until he received the appeal book on 2 July 2019.

[6] Various negotiations that took place can be seen in a series of minutes from the Master that are annexed to Mr Sugden's submissions but had not been placed before the Court by the appellants.

[7] We also note that Mr Justin Ngwele (who appeared for the appellants on the application to strike out the default judgment) filed a sworn statement on 2 July 2019. In it he states:

> 5. I told them we needed to provide an arguable defence, hence I queried with them if they had been properly served with all Court documents. Mr Restuetune seemed to suggest that he was not properly served with a copy of the Supreme Court claim and supporting sworn statements.
>
> 6. To that end I filed the application to set aside default judgment on the premise that the appellants were not properly served and the amount claimed was massively over exaggerated.

[8] Those instructions to Mr Ngwele were incorrect. Proof of service is on the file. If they so instructed Mr Ngwele, the appellants chose to mislead him.

[9] Further Mr Ngwele goes on to say:

> 9. I contacted Mr Restuetune by phone and informed him about the missing order. He informed me that his roadworks company had a few contracts with the public works department and if his contract was completed, he would settle the judgment debt.
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> 10. That said, I considered that to be the end of the matter.
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> 11. Truth be told, the appellant's quick response to settle the judgment precluded any opportunity for me to advise him on the possibility of filing an appeal against the dismissal orders.
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> 12. The appellant, Donald Restuetune, is also a businessman, he has been involved in Court litigation in several other cases. He is well familiar with the appeal process. If he had sought my advice on the possibility of an appeal, I would have given him advice that it was unlikely for them to succeed in an appeal because they do not have an arguable defence to the claim.

> 13. If given the opportunity I would also advise that an appeal would only lead to additional costs for them and if they were successful, they would be a litigation cost for the unsuccessful party.

We well understand why that was the position of Mr Ngwele.

[10] That is the background to the order of 9 October 2018 refusing leave. In it the Judge stated:

> 2. The application for leave is **declined**. No good grounds have been articulated for the delay — this is really just an attempt to further delay enforcement.

The appeal

[11] Essentially two matters are argued on behalf of the appellants. The first is there are good grounds for them being out of time. The second is they have an arguable defence.

[12] The argument of being out of time and the reasons advanced for that cannot succeed. The appellants were served with the Supreme Court proceedings and simply took no steps. As a result the default judgment was entered. Their application to have that set aside failed. Again, for a considerable period they took no steps. The only reasons they can advance is that they are lay people and do not understand the appeal processes, and that they were undergoing a marital breakup which made things difficult for them.

[13] These two people have apparently been involved in litigation for a number of years. Mrs Rose Donald is a customs officer who has been involved in prosecutions. Mr Restuetune is an experienced businessman and familiar with litigation. We have no doubt they both would have been aware that the right to appeal is not time unlimited. Indeed, we concur in the comments of Andrée Wiltens J that this is only yet another attempt to delay the inevitable payment.

[14] Furthermore, there is nothing put forward by way of an arguable defence. They maintain that the fee charged by Mr Sugden is exaggerated and that various payments have been made. Yet they, through their then lawyer Mr Malcolm, were given details of both the accounts as requested by Mr Malcolm, and bundles of receipts.

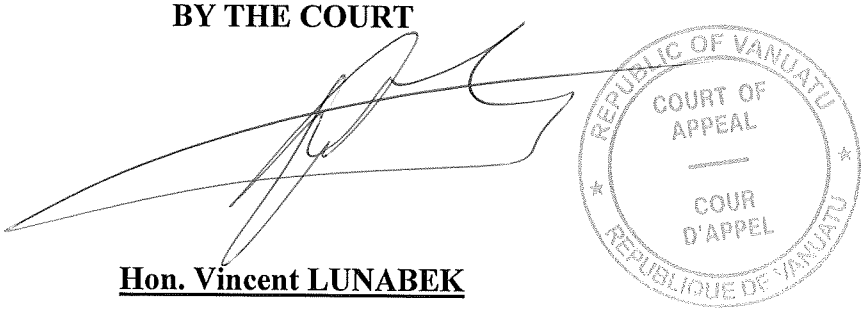
[15] Mr Taiva submitted that after the litigation was over deductions were still made from Mrs Rose Donald's bank account. No bank statements have been placed before the Court to justify that position. In a case such as this, it is not enough to simply say a solicitor's bill is too much. The proper course of action was, at the time of the original Supreme Court proceedings being served, to request detailed bills that supplied specificity and particulars. Mr Taiva conceded, in answer to a question from the Chief Justice, that it was not defendable until that had been done. And in any event, as already noted, the necessary information had been given to Mr Malcolm the appellants' then lawyer.

[16] It follows that this appeal against the refusal to grant leave is totally misconceived. It is dismissed. We note that that means the enforcement warrant is still in effect. There will be costs on the appeal to the respondent to be taxed if not agreed.

[17] For the sake of completeness we note that if a lay person is dissatisfied with a solicitor's account they can apply for a detailed bill. They can then apply to have that taxed by the Master. If significant deductions are made by the Master, it may amount to circumstances that could warrant a complaint to the Disciplinary Council of the Law Council. All of these are steps that could have been taken, rather than the torturous process that has been adopted by the appellants here.

Dated at Port Vila the 19th July 2019.

BY THE COURT



Hon. Vincent LUNABEK

Chief Justice.