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

Civil Appeal
Case No. 23/2069 COA/CIVA

BETWEEN: DON KEN
Appellant

AND: GEORGE BOAR
Respondent

Date of Hearing:	***9 November 2023***
Coram:	***Hon. Acting Chief Justice Oliver A. Saksak*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Richard White*** ***Hon. Justice Mark O'Regan*** ***Hon. Justice Viran M. Trief*** ***Hon. Justice Edwin P. Goldsbrough***
Counsel:	***E Molbaleh for the Appellant*** ***W Kapalu for the Respondent***
Date of Judgment:	***17 November 2023***

JUDGMENT OF THE COURT

Introduction

1. This is an appeal seeking to quash or set aside the whole judgment of the Supreme Court dated 17 July 2023 which was made in favour of the respondent for the amount of VT2,605,833 together with interest at 5%.

Background Facts

2. The respondent is a former legal practitioner, having been struck off from the Roll of Practitioners on 25 November 2019.

3. The appellant and respondent entered into an Agreement on 17 February 2020 which, on its face purported to be a retainer by the appellant of the respondent as his legal practitioner in relation to three pieces of litigation. However, as the primary Judge noted, while the agreement is written in the future tense, it was plain that it is related to work. Performed by the respondent before being struck off. The agreement recorded that the respondent, as a legal practitioner at the time, would assist the appellant in three civil matters namely CC 16/1227 Don Ken v Republic (Supreme); CC 18/1875 Don Ken v Emile Lapenmal & Ors. (Magistrate), and CAC 18/3176 Don Ken v Republic (Appellate).

4. The agreement provided that the respondent would charge VT20,000 per hour for the Supreme Court Case CC 16/1227, VT15,000 per hour for the Magistrates Court Case CC 18/1875 and VT20,000 per hour for the Court of Appeal Case CAC 18/3176. However, the agreement was signed after these cases were completed so the prospective nature of this provision seems anonymous especially since the respondent had been struck off before the agreement was signed.

5. The respondent had already issued to the appellant a total of six invoices totalling the amount of VT3,165,833 for payment but the agreement recorded that VT2,605,833 was the total amount charged for the three specified cases. The difference between these two sums was VT560,000 which the parties agree had been paid by the appellant as a down payment.

6. The respondent filed a claim in the Supreme Court in June 2021. He claims VT2,605,833 together with 10% interest and costs.

7. The appellant claimed in his defence that the only sum he still owes the respondent is the amount of VT355,833.

8. On 8 May 2023 the appellant filed his sworn statement in support of the defence. His wife, Mrs Remon Ken, also filed a sworn statement in support of the appellant's defence on 30 May 2023.

Supreme Court Trial and Judgment

9. The trial Judge found in favour of the respondent and awarded the sum of VT2,605,833 together with interest at 5% per annum from the date of the claim.

10. The Judge held that the respondent had proved his case on the balance of probabilities based on the invoice statements he disclosed in his sworn statement. The Judge said that he gave less weight to the sworn statements of the appellant and his wife because neither of them was cross-examined. Further the Judge said that as the respondent had not been challenged in cross-examination in relation to his claim, that the payments relied on by the appellant had been made in relation to matters not related to the three proceedings. He therefore found that the amount claimed for the work done on the three cases before he was struck off the Roll of Barristers and Solicitors remained unpaid.

The Appeal

11. The appellant appealed against the findings of the trial Judge in particular in paragraph 8 of the judgment which states:

> *"Receipts are issued to a person paying money to signify the payee has received the money from the payer. If the person paying the money wishes to prove they made a payment, they need to obtain a receipt. Without a receipt, the person may be able to prove payment some other way, but it will be more difficult. Here Mr Ken has sought to prove through his sworn statement and that of his wife, that he made the payments. Neither was cross-examined on their sworn statements and as a*

result I give those statements less weight. Mr Boar was not challenged in cross-examination on his statements that the payments Mr Ken made were for matters unrelated to the three cases and that the amount claimed for the work he did on the three cases before he was struck off remains unpaid."

12. Further the appeal is in relation to the judge's finding in paragraph 9 of the judgment which states:

> *"It is for the claimant to prove his case on the balance of probabilities. I am left with a claim supported by evidence of invoice statements that show amounts owed and paid, a signed agreement, and no defence evidence beyond two vague and untested sworn statements to the effect that Mr Ken made 15 payments to Mr Boar without obtaining receipts in various places for unspecified work. I have heard no evidence in support of fraud or duress pleaded in the statement of defence that might vitiate the contract Mr Ken admits he signed. On the evidence before me, Mr Boar has therefore proved his claim on the balance of probabilities." (Emphasis added)*

Submissions

13. It was submitted by the appellant that the judge had erred in both fact and law in his findings and judgment.

14. In relation to the 7 Grounds of appeal advanced, Mr Molbaleh submitted that the reason the appellant and his wife were not cross-examined was that the respondent had failed or omitted to give any notice to cross-examine them as required by Rule 11.7 (4) of the Civil Procedure Rules and had not sought at the trial any abridgement of the time in which notice could be given. As such the respondent had accepted that the statements of the appellant and his wife that payments were indeed made could be received by the Court without them being cross-examined.

15. It was further submitted that the respondent had failed or omitted to refer to the three cases in any of his sworn statements in support of his claim and in answer to the appellant's defence which had alleged the making of the payments. Further it was submitted that because the respondent had failed to provide receipts of payments, he shifted the blame to his secretary when, as a legal practitioner, he had the primary responsibility to ensure receipts were issued.

16. Mr Kapalu submitted first that it was the appellant who elected not to be cross examined and as such the only evidence that the Judge was bound to accept was that of the respondent. Further, that as there was no evidence by the appellant to show that the Costs Agreement between him and the respondent was entered into by fraud or duress to vitiate the agreement, the appellant could not escape his responsibility and liability for the costs claimed as outstanding.

Discussion

17. At the hearing of the appeal, we questioned both Mr Molbaleh and Mr Kapalu whether the appellant and his wife were present at the trial hearing on 13 July 2023. Both counsel confirmed that the appellant and his wife were available in Court at trial. The issue is not whether they refused or elected to be cross-examined as submitted by Mr Kapalu, rather it is whether the respondent required them to be cross-examined in relation to their sworn statements made in

support of the appellant's defence. Mr Kapalu admitted that neither he nor Mr Boar had asked the Judge for the opportunity to cross-examine the appellant and his wife in relation to their sworn statements. In these circumstances, the Judge was, with respect, in error in giving the statements of the appellant and his wife less weight because they had not been cross-examined. The respondent was not entitled to benefit from his own omission to challenge the defence evidence.

18. However, the Judge said in paragraph 8 of his judgment that he gave less weight to those statements not only because they were not the subject of cross-examination, but also because of Mr Boar's evidence that the payments made by the appellant and his wife were unrelated to the three cases.

19. Mr Boar relied on two sworn statements; the first was filed on 8 June 2021 in support of his claim filed on 7 June 2021. This statement consisted of 7 paragraphs. Mr Boar confirmed the three cases and the 6 invoices he had issued in respect of his costs therein. There was no reference to any other cases in which he had asked for the appellant as to payments which the appellant had made in relation to those cases.

20. The second sworn statement was only filed on 23 May 2023, which contained 8 paragraphs. It is basically the same evidence Mr Boar gave in his paragraphs 1 – 7 in his earlier statement of June 2021. Paragraph 8 is the only new paragraph but it does not refer to any case or cases other than the 3 cases for which Mr Boar and Mr Ken executed a Costs Agreement in February 2020.

21. The sworn statement of Mr Boar dated 23 May 2023 was filed after the appellant had filed his defence on 19 April 2023 in which Mr Ken claims he and his wife made payments from May 2015 through 24 February 2020.

22. In the usual course of practice as a lawyer by profession Mr Boar should have responded directly in that statement to the allegations in the filed defence but he did not.

23. The issue of payments was heavily contested in the defence of the appellant. In that circumstance, it was incumbent on Mr Boar as a former lawyer to have responded adequately to the defence, both by sworn statement and to seek leave of the Court to have the opportunity of cross-examining the appellant and his wife at trial, if he wished to challenge that evidence.

24. It seems that there may have been some cross-examination of the respondent in relation to the payments claimed by the appellant and his wife as there was some evidence on the topic in re-examination. That could have been a proper subject of re-examination only if the topic had been raised in cross-examination.

25. Rule 11.7 of the Civil Procedure Rules permit the use of sworn statements in legal proceedings. Subrule (1) states:

> *"A sworn statement that is filed and served becomes evidence in the proceeding unless the Court has ruled [it] inadmissible."*

26. Subrule (3) states:

> *"A witness may be cross-examined and re-examined on the contents of the witness's sworn statement."*

27. Subrule 4 states:

> *"A party who wishes to cross-examine a witness must give the other party notice of this:*
>
> *(a) at least 14 days before the trial; or*
>
> *(b) within another period ordered by the Court."*

28. Mr Boar, the respondent, failed to comply with Rule 11.7 (4) (a) but the opportunity to cross-examine was still available under subrule (4) (b) by seeking an abridgement of the time in which to give notice. Neither Mr Boar nor Mr Kapalu took that step. Instead, Mr Boar, by his counsel, consented to the sworn statements of the appellant and his wife becoming evidence in the trial. In that circumstance, the respondent's submission that the appellant had elected not to be cross-examined is untenable.

29. The basis of the respondent's claim is unclear and that lack of clarity was not resolved before us. One interpretation is that the claim is a debt claim for the amounts invoiced in the invoices specified in the claim. Another is that it is a contract claim, based on the Costs Agreement. If it is the latter, it is unclear what the respondent says the appellant agreed to in the contract. The respondent appears that the appellant acknowledged a debt of VT2,605,833 by signing the Costs Agreement. But the Costs Agreement does not say that in clear terms: it may be that it simply asserts the amount charged by the respondent, but is silent as to any payments received.

30. The position this Court now confronts is that there is a lack of clarity as to the legal basis for the respondent's claim and gaps in the evidence caused by the way the Supreme Court hearing was conducted. We are left in the position that we do not consider we can fairly resolve the respondent's claim on the evidence before us. In those circumstances, we consider the appropriate step is to allow the appeal and remit the matter to the Supreme Court for rehearing.

31. At the rehearing, a number of issues need to be attended to, so the Judge conducting the hearing is not left in the difficult position the primary Judge was. In particular:

(a) the respondent should replead his claim, clarifying whether it is a contract claim, based on the Costs Agreement or a debt claim based on the invoices;

(b) the respondent should provide details of the invoices for other matters on which he says he acted for the appellant and to which he says the appellant's payments related; and

(c) if their evidence is to be challenged, the appellant and his wife should be cross-examined.

32. We would normally resist ordering a rehearing in circumstances that permit a party to improve a case that was inadequately presented at the first hearing. But, as we see it, both parties would benefit from the opportunity to present their cases in a manner that gives the presiding Judge a proper basis for a fully informed decision.

The Result

33. The appeal is allowed. The judgment of the Court below is quashed and the matter is remitted to the Supreme Court for rehearing.

34. In the circumstances, we do not consider any award of costs is appropriate because, as we see it counsel for both parties have had a role in the problem we have highlighted coming about. We therefore order that costs should lie where they fall.

DATED at Port Vila, this 17th day of November, 2023.

FOR THE COURT

.....

Hon. Acting Chief Justice Oliver A. Saksak