

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No. 64 of 2009

BETWEEN: DANIEL YAWHA
First Claimant

AND: PETER BONG
Second Claimant

AND: PORT VILA MUNICIPAL COUNCIL
Defendant

Coram: Justice D. V. Fatiaki

Counsels: Mr. F. Laumae for the Claimants
Mr. R. Warsal for the Defendant

Date of Ruling: 15 April 2011

RULING

1. This case concerns an agreement entered into between the Claimants and the Port Vila Municipal Council (*the Council*) in August 2007 for the purchase of 14 hectares of the Claimant's land for the purposes of establishing a new cemetery for the Council. The agreement did not have a completion date instead it had a payment clause which required the purchase price of **VT170 million** to be paid by way of a deposit of 0.001% of the purchase price on execution of the contract and a second payment of 50% of the balance purchase price "*within the period of 3 months prior to registration of the transfer of lease*" (whatever that means) and finally, quarterly installment payments of VT5 million "*after registration of transfer until final settlement*".
2. For present purposes however, it is only necessary to record that after a period of 22 months of inactivity largely on the Council's part, the Claimants issued a claim seeking specific performance of the agreement, interest, and costs on 4 June 2009. The claim was served on 8 June 2009 and on 16 July 2009 the Claimant filed and served a request for Default Judgment (fixed amount). At a conference hearing on 21 September 2009 the Court expressed a preliminary view that default judgment might not be available in a claim for specific performance and written submissions were ordered from the Claimants to address that preliminary issue. Submissions were filed and served on the then Commissioner appointed by the Minister to administer the Council which had been dissolved by ministerial order.



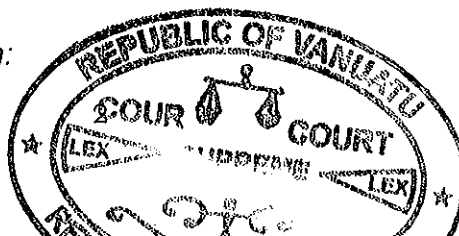
3. At no time between 8 June 2009 and 28 September 2009 did the Council file a response or defence nor did it appear by counsel at any of the conference hearings that were fixed by the Court during those 4 months.
4. On 12 October 2009 the Council finally appeared by counsel and filed a defence and counterclaim. The Claimants' application for default judgment was accordingly dismissed with costs of VT10,000 ordered against the Defendant Council for the wasted costs incurred by the Claimants for its default application and appearances during several adjourned conference hearings.
5. For completeness, I record that the Court, in dismissing the Claimant's application for default judgment, confirmed its earlier expressed preliminary view that default judgment is not available on a claim for specific performance. In this regard, the Court of Appeal in **Gorden v. Cikay Development Ltd.** [2010] VUCA 17 in quashing a default judgment entered in that case said (at **para 7**):

"(iii) The default judgment process in the Civil Procedure Rules cannot be used to obtain the equitable relief of specific performance. In a claim for equitable relief, if a defendant has not filed a defence, then to obtain judgment the claimant would need to proceed according to Rule 12 of the Civil Procedure Rules, and in particular, Rule 12.9. To obtain a judgment for equitable relief, pursuant to Rule 12.9 the Claimant would need to call evidence to establish the claim. Equitable relief cannot be granted pursuant to Rules 9.1 and 9.3 as stated in the Default Judgment."

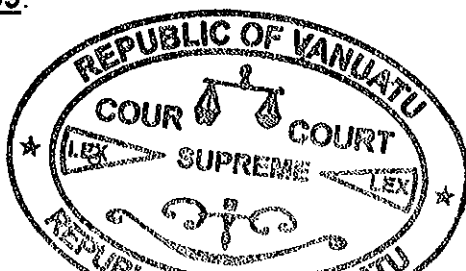
So much then for the default judgment application.

6. On 15 March 2010 after several fruitless conference hearings, the present application was filed by the Claimants pursuant to **Rule 18.11** of the **Civil Procedure Rules** "for judgment against the defendant in terms as sought in the claim filed in this proceeding dated 4 June 2009 (sic)."
7. **Rule 18.11** provides:
"Failure to comply with an order

- (1) *This rule applies if a party fails to comply with an order made in a proceeding dealing with the progress of the proceeding or steps to be taken in the proceeding.*
- (2) *A party who is entitled to the benefit of the order may require the non-complying party to show cause why an order should not be made against him or her.*
- (3) *The application:*



- (a) *must set out details of the failure to comply with the order; and*
 - (b) *must have with it a sworn statement in support of the application; and*
 - (c) *must be filed and served, with the sworn statement, on the non-complying party at least 3 business days before the hearing date for the application.*
 - (4) *The court may:*
 - (a) *give judgment against the non-complying party; or*
 - (b) *extend the time for complying with the order; or*
 - (c) *give directions; or*
 - (d) *make another order.*
 - (5) *This rule does not limit the court's powers to punish for contempt of court."*
- 8. The present application is supported by a sworn statement of Claimants' counsel which outlines the following failings by the Council:
 - "3. *On 23 December 2009, upon request by the Defendant's lawyer, the Court make direction order for the Defendant to file reply to defence to Counterclaim.*
 - 4. *The Defendant has failed to file the reply to defence to Counterclaim since 23 December 2009.*
 - 5. *On 15 February 2010, the Defendant's lawyer request the Court for further 14 days to allow him to take instruction to file reply to defence to counterclaim. The Court ordered him accordingly to file the reply by 12 March 2010.*
 - 6. *I annexed herewith marked "FL1" is true copies of the orders of 12 October 2009 and 23 December 2009.*
 - 7. *The Defendant again failed to file the reply by 12 March 2010."*
- 9. In summary, the application seeks judgment for the "... *continuous failure of the Defendant to comply with direction orders of the Court*", in particular, its order of **12 October 2009**:



- “1. Claimant’s application for default judgment is dismissed with costs of VT10,000 ordered against the Defendant to be paid within 14 days.
2. Claimant to file reply and defence to counterclaim on or before 26th October 2009.
3. Defendant to reply to defence to counterclaim on or before 2nd November 2009 on condition the costs have been paid.
4. Matter adjourned to 10th November 2009 at 10.00 a.m. for conference.”

and its order of **3 December 2009**:

1. “Claimant to file and serve a reply and defence to counter claim on or before 17th December 2009;
2. Adjourned to 18th December 2009 at 9h30 am.”

10. Both orders clearly required the Council to file and serve a reply to the Claimants’ defence of the Council’s counterclaim which was filed on 12 October 2009. The Claimants’ defence of the counterclaim was eventually filed on 17 December 2009 the same day that the Claimants filed a sworn statement in support of its substantive claim.

11. There is not the slightest doubt in the Court’s mind that up till 17 December 2009 the Council had failed to comply with “*an order made in a proceeding dealing with the progress of the proceeding or steps to be taken in the proceeding*” and the Claimants were prima facie entitled in terms of **Rule 18.11(2)** of the Civil Procedure Rules “... (to) require the non-complying party (the defendant Council) to show cause why an order should not be made against ...(it)...”

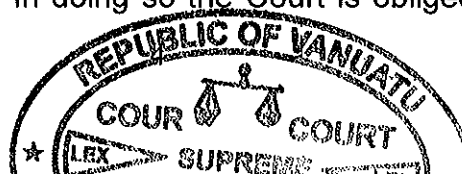
(my insertions in brackets)

12. **Rule 18.11(4)** also sets out what the Court may do on such an application, as follows:

“The court may:

- (a) give judgment against the non-complying party; or
- (b) extend the time for complying with the order; or
- (c) give directions; or
- (d) make another order.”

13. Plainly the Court is given a wide unfettered discretion in dealing with the Claimant’s application. In doing so the Court is obliged to have regard to



the over-riding objective of the **Civil Procedure Rules** including “*dealing with the case in ways that are proportionate*”:

- (i) *to the importance of the case; ...*
- (ii) *...*
- (iii) **to the amount of money involved; and**
- (iv) **to the financial position of each party”.**

14. In this latter regard the sworn statements of the incumbent Chief Executive Officer (CEO) of the Council is instructive in his assertion that the sale and purchase agreement “... *was subject to Government giving funds for the project due to the enormosity (sic) of the funds involved.*” (as confirmed by an unsworn statement of the relevant minister of state) and in a further sworn statement of the Council CEO dated 26 March 2010 “... *that the Defendant has no financial capacity to pay VT170,000,000*”.
15. **Rule 4.6** of the Civil Procedure Rules is the relevant Rule dealing with the filing of a reply to a defence. It states:

4.6 (1) *If a claimant does not file and serve a reply, the claimant is taken to deny all the facts alleged in the defence.*

(2) *If a claimant wishes to allege further relevant facts after the defence has been filed and served, the claimant must file and serve a reply.*

(3) *The claimant's reply must:*

- (a) *contain a statement of the case; and*
- (b) *state what the claimant alleges happened.*

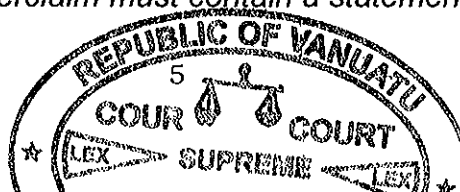
(4) *If the claimant's reply does not deal with a particular fact, the claimant is taken to deny it.*

(5) *The reply must be in Form 9.*

16. For completeness, **Rule 4.8** which deals with counterclaims relevantly provides:

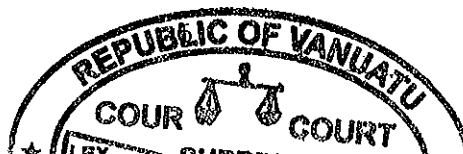
“4.8 (1) *If a defendant in a proceeding wants to make a claim against the claimant (a “counterclaim”) instead of bringing a separate proceeding, the defendant must include details of it in the defence.*

(2) *A counterclaim must contain a statement of the case.*



- (3) *That part of the defence dealing with the counterclaim must:*
- (a) *be shown clearly as the counterclaim; and*
 - (b) *set out details of the counterclaim as if it were a claim.*
- (4) *If the defendant has counterclaimed:*
- (a) *the claimant may include a defence to the counterclaim in the claimant's reply; and*
 - (b) *rule 4.5 applies to that part of the claimant's reply that deals with the counterclaim as if the reply were a defence.*
- (5) ***If the claimant defends the counterclaim:***
- (a) ***the defendant may file a reply (headed "defence to counterclaim") dealing with that part of the claimant's reply that relates to the counterclaim; and***
 - (b) ***rule 4.6 applies to the defendant's reply.***
- (6) *This rule applies to the conduct of a counterclaim (whether the counterclaim is against a person who was a party before the counterclaim was made or not) as if:*
- (a) *the counterclaim is a claim, and the person making it a claimant in an original proceeding; and*
 - (b) *the party against whom the counterclaim is made is a defendant to an original proceeding."*


17. From the foregoing Rules it is sufficiently clear that a defendant who files a counterclaim as part of its defence will be treated as a claimant for the purpose of the Rules with a right (**not** a duty) to file a reply to any defence filed by the original claimant in response to the Defendant's counterclaim. This is apparent from the wording of **Rule 4.6(2)** above, and the use of the word "**if**" in **Rule 4.8(5)** and "**may**" in **Rule 4.8(5)(a)**. The Court's orders of 12 October 2009 and 3 December 2009 cannot be taken to have altered or ignored the Council's discretion whether or not file a reply and must be viewed in that relevant regulatory and discretionary context.



18. In other words, the Court's orders were conditional upon the Council exercising its right to file a reply and **not** (as claimants' counsel infers), as imposing a positive or mandatory duty on the Council which, if breached, entitles the Claimants to file an application for judgment under **Rule 18.11**.
19. The result of the Council's failures to comply with the Court's orders is clearly provided for in **Rule 4.6** which states:
- “(1) **If a claimant** (ie. the defendant Council in its counterclaim) **does not file and serve a reply** (pursuant to Rule 4.8(5)), **the claimant** (ie. the defendant Council) **is taken to deny all the facts alleged in the defence** (of the original claimant to the Defendant Council's counterclaim).”
- (insertions in brackets for clarity)*
20. Given the above result and the clear discretion of the Council (as a counter-claimant) to file and serve a reply “... *if a claimant wishes*”, it is clear to the Court that the Claimants belated application for judgment under **Rule 18.11** is based on a misappreciation of the relevant applicable Rules and must be refused.
21. Accordingly the application is dismissed with costs to be taxed if not agreed.
22. By way of further directions this matter is listed for conference hearing on **28th April, 2011 at 8.30 a.m.**

DATED at Port Vila, this 15th day of April, 2011.

BY THE COURT


D. V. FATIAKI
Judge.

