

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

Civil Appeal Case No.02 of 2012

BETWEEN: BILL and LINDA KALPOI
Appellants

AND: AVOCK MAEL
Respondent

Coram: Justice D. V. Fatiaki

Counsels: Mr. G. Nakou for the Appellants
Mrs. M. G. Nari for the Respondent

Date of Decision: 25 May 2012

JUDGMENT

1. This is an appeal against a default judgment entered in the Magistrate's Court on **23 May 2011** against the appellants (who are named as defendants in the judgment) in the following terms:

"DEFAULT JUDGMENT

Having heard an application for default judgment from the counsel representing the claimant, the court is satisfied that a claim was filed against the defendant on 8 April 2011 at 8.30 a.m. o'clock, and the first hearing date was set for 6 May 2011 at 9 am. The defendant had been served with the claim on 13th of April 2011 at 9.05 am, but failed to file his response or defence within the period provided under Rule 9.1 (a). In the pretrial conference of 6 May 2011, Mr. Timakata instructs the court, he just received the claim. A further 17 days were given for the defence counsel to file his response and defence. In the conference for 23 May 2011, Mr. Timakata failed to appear and file response and defence as directed by the court, therefore he has again failed to comply with Rule 9.1 (a). Therefore, the Court hereby enters judgment in favour of the Claimant and orders as follows:

1. That the Defendant shall pay to the Claimant, a judgment sum of VT998,000;
2. That the Defendant shall pay a filing and served fee of VT10,000;
3. That the Defendant shall pay to the Claimant a total sum of VT998,000;



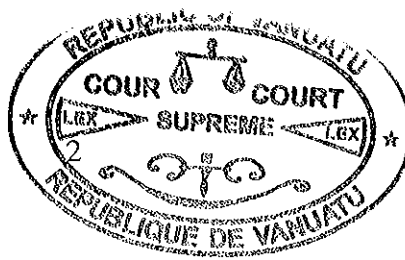
4. That the amount of VT448,000 for the repair of the Defendant's bus must be paid within 28 days after the date of issuance of this default judgment to stop the Claimant from experiencing further losses;
5. That the Claimant shall apply to the court for an enforcement order after 28 days, if the Defendant does not apply to set aside this judgment."

2. The grounds advanced in support of the appeal are as follows:

- "1. The Magistrate's Court erred in fact and in law by entering default judgment in a negligent case when the pleading (no cause of action) in respect of negligent driving is not contained in the Magistrate's Court claim filed in the Magistrate's Court;
2. The Magistrate's Court erred in fact and in law by entering default judgment in a negligent case where clearly there is no law that provides for magistrate court to enter default judgment without determining the issue of whether the defendants were negligent;
3. The Magistrate's Court erred in fact and in law by awarding judgment in default in respect to a matter where the court is clearly required to assess (subject to evidence of the claimant) the amount of claim in accordance with the evidence in order to arrive at an amount that is assessed by the court;
4. The Magistrate's Court erred in fact and in law in maintaining the default judgment when in fact default judgment is irregular judgment and irregular judgments are bad judgments and cannot be in the records of the court's judgments;
5. The Magistrate's Court erred in fact and in law in fixing the default judgment before enforcement of the default judgment."

3. After default judgment was entered and served on the appellants enforcement proceedings were commenced and were the subject matter of an unsuccessful stay application. The appellants also filed a number of applications in the Magistrate's Court seeking various orders including, an order directing the respondent to amend his claim and add a second claimant and an order setting aside the default judgment for irregularity.
4. I propose to deal with the applications, as necessary, in disposing of the grounds of appeal.

Ground 1: No cause of action



5. The appellants' submission on this ground is two-fold. That the original claim as filed disclosed no cause of action and it should have included the driver of the respondent's vehicle as a second claimant.
6. The claim in the Magistrate's Court is one seeking "*damages for negligence*" arising out of an accident involving a bus belonging to the respondent (**B7607**) and a bus driven by the first named appellant (**B9273**). The damages sought are also in two-parts:
- (a) for the cost of repairs for the damage caused to the respondent's bus quantified at **VT448,000**;
 - (b) loss of profit at a daily rate of **VT10,000** from the date of the accident to the date of the claim estimated at **VT540,000**; and
 - (c) court fees of **VT10,000**;
7. The details of the accident are described in **paras 4 and 5** of the claim as follows:
- "4. On 10 February 2011 at about 6 am, the claimant's driver was driving the grey Hyundai Grace bus from Colardeau towards the USP round-about turning right towards the USP area. The defendant Bill Kalpoi drove their bus from Tassiriki towards the USP round-about at the same time.*
- 5. The claimant's driver gave a right signal and turned right towards USP but the defendant Bill Kalpoi failed to take note of the signal and ran into the claimant's bus. The claimant's bus was damaged on the doors on the right side of the bus. The traffic police arrived at the scene to investigate the matter and prepared a report. As a road user, Mr. Kalpoi owed a duty of care to other road users, he failed to exercise care at that time."*
8. From the foregoing it cannot be said that the claim, as pleaded, disclosed no cause of action, and, whilst it is common ground that the respondent's vehicle was being driven by an unnamed driver at the time of the accident, that is not a sufficient reason to include the driver, as a claimant, if he has suffered no personal injury or damage and claims no relief. I accept however that had the case gone to trial the respondents' driver would have had to give evidence but that is not the present situation.
9. The inclusion of the respondent's driver as a claimant would undoubtedly assist the appellants, as defendants, in the event that they wish to plead contributory negligence but, again, that omission does not render the claim defective as disclosing no reasonable cause of action nor does it constitute an abuse of process.



10. **Rule 3.7** of the **Civil Procedure Rules (CPR)** enables a defendant to join a "third party" to a proceeding if he claims a "contribution, indemnity or other remedy against the third party". Furthermore **Rules 4.8** and **4.9** enables a defendant to make a counterclaim against a claimant and even "against a person other than the claimant" if certain pre-conditions are fulfilled.
11. There is no merit in this first ground of appeal which is dismissed along with the application seeking an order to amend the claim and to add the driver of the respondent's bus as a claimant.

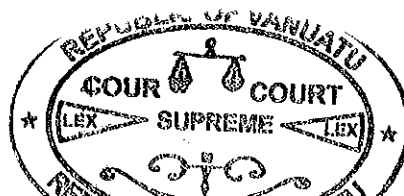
Grounds 2 & 3: Irregularity of Default Judgment

12. The appellants' submission is that there is no legal basis for entering a default judgment in this claim without a finding of negligence, and, the default judgment, as entered, for liquidated amounts without any assessment hearing was irregular.
13. In this regard **Rule 9.2** of the **CPR** which applies to a claim for a fixed amount, empowers a Magistrate's Court to give judgment for (a) the amount claimed and (b) interest from the date of the claim at a rate fixed by the Court and costs. Similarly **Rule 9.3** which deals with claims for damages to be decided by the court provides in **subrule (4)**:

"The court may:

- (a) *give judgment for the claimant for an amount to be determined; and*
- (b) *either:*
- (i) *determine the amount of damages; or*
- (ii) *if there is not enough information before the court to do this, fix a date for a conference or hearing to determine the amount of damages."*

14. I am satisfied that the above **Rules** gives a Magistrate's Court the necessary power to enter default judgments for liquidated claims as well as claims for damages to be determined.
15. I accept that in the case of claims for damages **subrule (4)** envisages a 2 step process; (a) the entry of a judgment for an amount to be determined and (b) determining the amount of damages. But, the **subrule** also infers in the second step that if there is enough information before the Court, then the Court may proceed to "determine the amount" (of damages) at the time of giving default judgment.



16. In the present case, at the time of entering default judgment, the Magistrate had before him the following relevant "information":

(1) A Statement of Claim which complied with the requirements of **Rule 4.10** of the **CPR** which provides:

"(1) If damages are claimed in a claim or counterclaim, the claim or counterclaim must also state the nature and amount of the damages claimed, including special and exemplary damages.

(2) *If general damages are claimed, the following particulars must be included:*

(a) *the nature of the loss or damage suffered; and*

(b) *the exact circumstances in which the loss or damage was suffered; and*

(c) *the basis on which the amount claimed has been worked out or estimated.*

(3) *In addition, the statement of the case must include any matter about the assessment of damages that, if not included, may take the other party by surprise."*

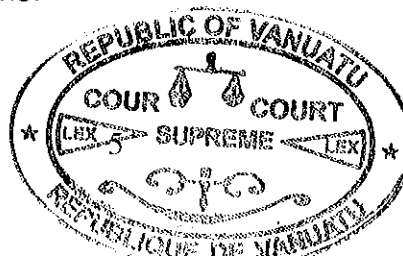
(my underlining)

(2) A Request for Default Judgment which claimed a total liquidated sum of **VT998,000** including an amount of **VT448,000** for the cost of repairs to the respondent's bus;

(3) A sworn statement of **David Joseph** the proprietor of **DJ Auto Repairs** annexing a detailed quotation to repair the respondent's bus for the sum of **VT448,000**. Interestingly, the quotation is addressed to the first named appellant because: "... he admitted that he was responsible for causing the accident and he would pay for the quotation for the repair";

(4) A sworn statement of the respondent annexing their **Business Licence** to conduct a "land transport business" using bus registration No. **7607** (which was damaged in the accident) and which the respondent deposed "*mi imekem abaot VT10,000 evri dei ...*";

(5) A copy of a Police Abstract Report which described the accident in the following terms:




"The actual incident occurred when vehicle B7607 (the respondent's bus) apply its right signal and turned right while vehicle B9273 (the appellants' bus) coming from Tassiriki failed to comply with Give Way sign causing to crash its front into the front right side of vehicle B7607".

17. In light of the foregoing, the trial magistrate determined the amount of damages without a hearing or trial of the matter on the basis of the available "*information*" as he was entitled to do. In this regard I note that **Rule 11.2 (2)** permits a Magistrate to order evidence "*be given by sworn statement*".
18. I am not unmindful that **Rule 9.4** of the **CPR** requires a determination of the amount of damages "*to be conducted as nearly as possible in the same way as a trial*", but, on closer consideration of the disjunctive nature of the Rule and the overriding objectives of the **CPR**, I am firmly of the view that the above Rule applies only to the second limb of **Rule 9.3(4)(b)** where "*there is not enough information before the court to enable it (to determine the amount of damages)*". In other words **Rule 9.4** has no application to the first limb where, as in the present case, the trial magistrate was satisfied that he had enough information "*to determine the amount of damages*"
19. I also note in the proposed counterclaim (for the loss of use of their bus as a result of the accident) the appellants' claim damages for "*loss of business*" at a rate of "*VT5,000 per day*".
20. There are no merits in **grounds 2 and 3** or in the application to set aside the default judgment for irregularity which are accordingly dismissed.
21. **Ground 4 and 5** are also dismissed on the basis that they are unintelligible as framed, and otherwise have already been adequately dealt with under the preceding grounds of appeal.
22. The appeal is accordingly dismissed with costs in favour of the respondent to be taxed if not agreed.

DATED at Port Vila, at 25th day of May, 2012.

BY THE COURT


D. V. FATIAKI
Judge.

